

Appendix 1

Consultation Questionnaire

Structure and chronology

Consultation Question 1: Do you have any comments about the approach taken to the structure and layout of the rules?

Our view is that the structure and layout of the rules are logical, accessible and easy to understand.

Part 2 – Overview

The inquiry principles

Consultation Question 2: do you have any comment on the content of the inquiry principles?

SLAB supports the introduction of inquiry principles and welcomes the consistency of approach with those introduced for the Simple Procedure Rules. The principles clearly set the context for the rules, which is useful for all participants, whether they are familiar with the procedure or whether they are having reference to the rules for the first time.

Representation and judicial continuity

Consultation question 3: Do you agree that wherever possible the same sheriff should deal with the inquiry from the point that the procurator fiscal gives notice that an inquiry is to take place, until final determination?

Do you foresee any practical difficulties with this?

SLAB's general view is that judicial continuity is important to build knowledge of the case from the outset and for consistency of approach in how the case is managed. We are not in a position to offer comments on the practical difficulties such a proposal may cause.

The inquiry management powers

Consultation question 4: are you content with the approach to the sheriff's inquiry management powers? Are there specific illustrative powers which you think should be included in addition to those already listed?

In general, the sheriff's inquiry management powers appear to be comprehensive and appropriate. We support this approach to facilitate shrieval management of inquiries to ensure they progress efficiently and effectively.

We note the inclusion of rule 2.5(1)(d)(iii) where the sheriff may make an order where a participant has behaved in a vexatious manner, requiring that participant to make a payment to another participant to reflect the consequences of not complying with a rule or order. We believe this rule may be contrary to the intention of the legislation. Section 25 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 states that a sheriff may not make an award of expenses in relation to inquiry proceedings. The Policy Memorandum and Explanatory Notes to the Bill explained that the sheriff would have robust case management powers to deal with vexatious participants. It is also not clear whether this provision would apply to all participants in the inquiry.

It is unclear from the rule whether, for those participants who are represented by a solicitor or counsel, the payment is to be made to the individual, to their solicitor or to counsel. If it is to reflect the *consequences* of not complying with a rule or order, this implies that something has had to be done or a cost incurred which need not have been done or incurred other than for the vexatious behaviour of a participant. Such a payment has the appearance of expenses.

If the payment is to be paid to the solicitor or counsel, this could not be done in situations where they represented the participant under legal aid. Section 32(a) of the Legal Aid (Scotland) Act 1986 places a restriction on payment that a solicitor/counsel can receive. They cannot accept another payment whilst legal aid is in place, except for those made under the 1986 Act. Therefore, they couldn't personally receive a payment under Rule 2.5(d)(iii). The question would therefore be whether the payment could be made to the Legal Aid Fund, which would incur the cost of the additional work done as a result of the vexatious participant, or to the assisted person as a participant. If the former, the Scottish Government may wish to consider whether primary legislation would be required.

In addition, if the participant who is to make the payment has been granted legal aid for representation, the Legal Aid (Scotland) Act 1986 currently gives protection and discretion to the court to modify an award of expenses if satisfied that the assisted person would suffer financial hardship. No such provision exists for the payment under Rule 2.5(1)(d)(iii).

Part 3 – pre-inquiry procedure

The first order and notices

Consultation question 5: Is there any further information which you think would be useful to include in the form of first notice?

We have no comment to make regarding the formal notifications required in the first notice. However, we do believe that it would be helpful to highlight for participants that they may wish to seek legal advice and that legal assistance may be available and should be applied for timeously.

Consultation question 6: Do you think that imposing a deadline of 14 days within which the sheriff must make the first order is reasonable and practical?

No comment.

Consultation question 7: should we provide a timeframe within which the preliminary hearing and inquiry must start after the first order? If so, what should those timescales be? Do you think that the 28 day timescales provided for in the draft are achievable?

In order to set expectations and maintain momentum in the preparation of the inquiry, we believe it is important to set a timeframe within which the preliminary hearing should be held. We would support the timeframe of 28 days as we believe it is advisable to have early discussions with the participants to establish early dialogue about the issues to be considered by the inquiry.

To facilitate the operation of the new rules and the timescales, we will prioritise applications for legal aid for representation by participant(s) at an inquiry. We will issue revised guidance prior to the introduction of the new rules. In cases where a participant is legally represented before the first notice and first order, the solicitor will have a level of knowledge about the case. Therefore, we would strongly encourage solicitors and applicants to prepare the application for civil legal aid so that it is ready to be submitted as soon as possible after the first notice. Where a solicitor is instructed after receipt of the first notice or the first order, we would encourage the legal aid application to be submitted as soon as possible. We support the provision in the rules that the legal aid application is one of the issues considered by the sheriff with participants at the preliminary hearing. We will make information available to the court regarding the status of legal aid applications, where appropriate.

Preliminary hearings

Consultation question 8 – do you have any comments on the duty and timeframe set out in Rule 3.7?

No comment.

Consultation question 9 – are there any other matters you consider should be dealt with at the preliminary hearing?

No comment.

Part 4 – evidence

Agreeing evidence

Consultation question 10: are you content with the provisions on agreement of evidence?

We believe that it is in the interests of all participants that the inquiry is focussed on its purpose:

- to establish the circumstances of the death, and
- consider what steps (if any) might be taken to prevent other deaths in similar circumstances.

The agreement of evidence ensures that all participants use their time and resources effectively and that the inquiry does not take longer than is necessary, for the benefit of all involved.

Consideration should also be given to witnesses and minimising their involvement to giving evidence about the key issues.

Consultation question 11: with regard to the lodging of witness statements, what do you think the default position should be? Should the default position be that a witnesses statement should be lodged for every witness who is to give evidence at an inquiry, or should the converse presumption apply?

We would support the suggestion that the lodging of witness statements should be the default position, unless it is shown that it is not appropriate in the circumstances.

Expert evidence

Consultation question 12: are you content with the provisions on expert witnesses?

We note Rule 4.15 provides that the sheriff may make an order about the payment of the expert witness. We would like the rules to make specific provision about equal sharing of the cost to avoid the risk that the Legal Aid Fund or the assisted person becomes liable for the whole costs. The recently introduced Rule 33.21(7) of the Ordinary Cause Rules could be used as a model for this, where the cost of Child Welfare Reporters is shared equally between the parties in the action.

Consultation question 13: do you have any comments on how the provisions on single joint experts would work in practice?

No comment.

Consultation question 14: do you have any comments on how the provisions on concurrent expert evidence would work in practice?

No comment.

Part 5 – the inquiry

Consultation question 15: do you agree with the approach to Part 5? If not, please provide comments.

We agree with the approach.

Part 6 – the sheriff's determination

Consultation question 16: do you have any comments or suggestions regarding the sheriff's style determination, Form 6.1?

No comment.

Schedule 3 – forms

Consultation question 17: do you have any comments on the content of any of the forms?

No comment.

Schedules 1, 2, 4, 5, 6

Consultation question 18: do you have any comments on the technical provisions contained in schedules 1, 2, 4, 5 or 6?

No comment.