ANNEX C

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?

No. The Faculty considers that the structure and layout provide a concise and logical set of rules.

Part 2 – Overview

The inquiry principles

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

No.

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?

The Faculty agrees that judicial continuity should be an aim in every inquiry. Case management works best where there is judicial continuity. We do, however, accept that a degree of continuity may be easier to achieve in some sheriffdoms than others.

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?

Rule 2.5(1)(a)(ii) permits an order requiring participants to lead particular witnesses. The Faculty is unclear why this power is required and how it would apply in practice. While we recognise that the inquiry is inquisitorial rather than adversarial, this is a power which is unusual in a Scottish legal context where parties determine what witnesses to lead. We are not aware of situations in which problems have arisen at an FAI because participants have chosen not to lead a particular witness. Presumably, this power would need to operate along with the sheriff directing the participant to lead the witness in relation to certain specified matters. The possibility of cross examination relating to further or different matters could not be ruled out. It is recognised that the witness may decline to answer a question, by reference to s.20(6) of the 2016 Act.

Rule 2.5(d)(iii) permits an order for a vexatious participant to be required to "make a payment" to another participant to reflect the consequences of non-compliance with a rule or order. We question whether this provision falls within the powers conferred by the 2016 Act. Section 25 of the 2016 Act precludes the court awarding expenses in relation to inquiry proceedings. A payment to reflect the consequences of non-compliance with a rule or order looks very much like an award in relation to wasted expenses incurred by the other party. Even if this "payment" was distinguishable from "an award of expenses", we question what *vires* there is to have a rule requiring such a payment.

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?

Form 3.1 in schedule 3 does not currently include a section reflecting rule 3.1(2)(h) which requires the notice to identify any person who the PF considers might have an interest in the inquiry.

Form 3.1 does include a section which reflects rule 3.1(2)(d) requiring the notice to indicate if the PF considers a preliminary hearing is necessary or not. Consideration might be given to also requiring the notice to indicate if the PF considers that an inquiry date should be fixed at this stage. Section 15(3) of the 2016 Act envisages the initial order from the sheriff fixing both a preliminary hearing and a start date for the inquiry. Section 15(4) permits the sheriff not to fix an inquiry date if it is not thought appropriate. As the PF is likely to be best informed on whether an inquiry date should be set at this stage or not, Form 3.1 might usefully require the PF to indicate whether he considers it appropriate to fix a start date of the inquiry when the first order is issued and the reasons for his view.

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?

Yes

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?

The Faculty considers that the timeframes in rule 3.2 may prove challenging in some cases. We do not suggest that a different timescale is necessarily more appropriate. We recognise that strict timescales which are tempered by sensible use of some judicial discretion provide the best balance. Our concern is that many participants will be unrepresented and may only have around 21 days to prepare for a preliminary hearing or inquiry. If participants seek to secure funding for legal representation, either through SLAB or a trade union or insurers, these timescales will prove difficult to comply with. We recognise, of course, that the participants may have been forewarned well before the first notice triggers the start of proceedings, enabling them to organise their representation in good time.

Preliminary hearings

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

The Faculty has a number of comments in relation to Rule 3.7

As a preliminary observation, the Faculty notes that there is no procedure specified in the rules, or on the forms, to generate an indication that a particular individual intends to be an active participant in the inquiry. Many individuals listed in section 11(1) of the 2016 Act will be served with a Form 3.3 notice but there is no specific procedure that they must then follow to indicate that they will be active participants. Section 36(2)(d) of the 2016 Act gives power to have a rule specifying "the process by which a person becomes a participant in an inquiry". We consider that there is merit in having some form of intimation required by persons served with the Form 3.3 notice whereby they indicate an intention to participate in the inquiry. Not only would this assist the court and the PF to identify the number of likely active participants at the earliest stage but it would also assist in the operation of other rules which confer rights or duties on "participants". For example, as soon as the first order is made, a "participant" may recover evidence using the schedule 5 processes. Does this refer to someone simply served with a Form 3.3 notice or does it only apply to someone who has taken the step of indicating an intention to take part in the inquiry? If our suggestion of intimation of participation is adopted, we would suggest that a participant is defined as someone served with the Form 3.3 and who has intimated an intention to participate.

Rule 3.7 requires participants to lodge a brief note at least 7 days before the first preliminary hearing. Effectively, the participant will have between 14-21 days to prepare that note which may prove to be too little time in many cases. We consider that there is a risk that lay persons will be unlikely to be aware of this requirement, as the Form 3.3 makes no mention of the need to produce a Note in advance of the procedural hearing. While it need not be in the Form itself, we consider that some information requires to be served along with the Form 3.3 alerting the individual that if they are to participate, they require to produce a note in relation to these issues within the timescale.

We would suggest that rule 3.7 could also include a general cross reference to rule 3.8 such that participants are also invited to address, in the note, any matters which the sheriff is directed to consider under rule 3.8(2)(a)-(h). The Faculty accepts that, especially at the first preliminary hearing, the participants may not need to address in their note matters going beyond rule 3.7(a)-(d), but all participants are likely to be assisted if specific concerns on, for example, vulnerable witnesses or witness statements, are flagged up for discussion in the note prior to any hearing.

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

Yes. We consider that rule 3.8 is a very helpful and clear rule to guide the sheriff through the main issues at the preliminary hearing. The Faculty considers that in rule 3.8(2)(e), a further sub-sub-paragraph might direct the sheriff to consider the use of technology, including live link, for the taking of evidence. The use of technology is specifically referred to in section 36(2)(b) of the 2016 Act, which is the statutory power under which these rules are made. We are envisaging that there will be some cases in which technology may be used by way of reconstructions or document management, and where the early discussion of the systems to be used in the inquiry may save time and expense.

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

The Faculty considers that the wording of rule 4.10(3) and Form 4.10A is potentially unclear. Our understanding is that the rule seeks to have participants identify facts or documents that they consider are relevant to the inquiry and which are unlikely to be disputed. The current wording which splits this into two sub-paragraphs seems to us to be potentially confusing. It would be far clearer to provide something such as "That notice must set out such facts or documents which the first participant considers are relevant to the issues before the inquiry and are unlikely to be disputed by other participants."

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?

The Faculty favours the first form of wording whereby oral evidence is the norm. We do so because we consider that FAIs perform a valuable function in which investigation of the death of a member of the public takes place in a public forum. Oral evidence serves that function in a way that adopted written statements may not.

The Faculty's understanding of rule 4.11 is that the written statement will still need to be adopted on oath by the witness such that the main saving in time relates to examination in chief. The witness will still be cross-examined.

We accept that written statements should be used in FAIs but we do wish to underline that written statements work best where there is a clear understanding of how they are to be prepared; when they can be disclosed to other potential witnesses; and whether supplementary witness statements are to be permitted. Some guidelines or protocol could usefully be produced for written statements in FAIs.

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

The Faculty considers that rule 4.12(4) should also require the participant to specify what qualifies the expert in terms of their professional qualifications or experience to assist on the issues before the inquiry. Ideally, the participant would produce a copy of the witness's CV or a summary, by the witness, of their relevant qualifications and experience.

Rules 4.13 and 4.14 both refer to written statements by expert witnesses. We are unclear whether "statements" is to be taken as including a report by the expert. We would expect that in most cases, the expert will produce a report which will be lodged. There will be no need for a written statement. The report should refer to the expert's duties under rule 4.12(1). These rules might be clarified in relation to this.

Rule 4.14 – we do not understand why a participant is, subject to the sheriff ordering otherwise, limited to asking the expert instructed for the PF to clarify the contents of his statement/report. We consider that the participant should be able to lodge questions going beyond simple clarification of the existing contents. For example, a blatant omission from the report should be open to questioning.

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

The Faculty considers that rule 4.15(3) should provide for the sheriff approving the terms of the joint instruction if agreement cannot be reached. Our concern is that to allow participants to send separate instructions on matters that cannot be agreed could potentially result in a confused and contradictory instruction to the single expert. This single expert is reporting to the Court and so the Court should be the ultimate arbiter of the terms of the instruction where there is a dispute.

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

No

Part 5 – the inquiry

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

Yes

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?

The Faculty considers that the style determination is extremely helpful.

Schedule 3 – forms

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

No – comments have been made in the answers above in relation to Forms 3.1, 3.3 and 4.10A.

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