

## 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?

None.

#### Part 2 – Overview

##### *The inquiry principles*

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

None.

##### *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?

Yes.

I foresee no practical difficulties other than those which are attendant in any judicial proceedings.

### *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?

Yes.

None further.

### **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?

No.

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?

It seems that the Sheriff has no discretion in the making of a First Order but does over whether a Preliminary Hearing ("PH") should be held. Could the Sheriff's refusal of a PH be challenged by the Crown?

Looked at in the round I do have some concerns over timetabling as envisaged by the Rules. My concern would be that as envisaged, the timetabling may prove rather tight for participants to organise representation and I do wonder how the Crown process of antecedent Disclosure fits into all of this.

I wonder that more flexibility might be built into timetabling : perhaps on the fixing of the PH in 3.2 (2) and that the Sheriff is afforded discretion/some latitude in the timing of the making of the First Order.

My concern is added to when one considers the requirements of Rule 3.7.

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?

See my comments on timeframe, above.

### *Preliminary hearings*

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

I do have some concern on the duty and timeframe set out in Rule 3.7 when taken together and that this may be rather tight. See my comments on timeframe, above. I do wonder how 3.7 fits in with the process of Crown Disclosure and what is provided for by way of the **Other participation** process at 3.5?

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

None.

## Part 4 – evidence

### *Agreeing evidence*

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

#### **The duty to agree evidence**

4.9 (1) and (2)

I did wonder that this might be more reflective of the *process* of agreement *between* the Parties rather than each of them identifying their individual views on what can be agreed? In current draft how does one move from 4.9 (1) to (2)?

4.9 (3)

I did wonder whether it was really necessary to be this prescriptive.

#### **Notices of uncontroversial evidence**

4.10

How is it envisaged that objections to Notices will be resolved? Will a hearing be fixed?

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?

My view would be that the converse presumption should apply. It seems fundamental to me that the present approach within our jurisprudence in support of the primacy of oral evidence should be maintained and jealously guarded. I would think this to be particularly so in the context of an FAI where transparency to the Family and to the Public is paramount and for faith to be posited and maintained in the FAI process.

## *Expert evidence*

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

### **Expert witnesses**

4.12 (4)

To what end is the note to be lodged? Should inclusion of the expert on a List of Witnesses not suffice? Experts may be required as the evidence unfolds (the draft Rule refers to “as early as possible”).

### **Witness statements by expert witnesses**

4.13

This appears to tend towards the constraint of an expert’s evidence/report to a witness statement? Generally, there is no obligation to lodge an expert’s report in Process but one can still call him and lead his evidence when he can be examined in cross and in chief on the basis of his instructions, oral and written.

4.14

### **Expert witnesses instructed by the procurator fiscal**

This seems unnecessarily cumbersome and to create unnecessary hurdles for participants.

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

The Sheriff can currently resort to an assessor to assist him/ the Inquiry ex proprio motu or on application of a participant or of the Crown. This is rarely done but available nevertheless. When considering the somewhat complex nature of the draft Rule here I do wonder why we might not leave it there. I would have concerns about the efficacy of this draft Rule particularly in a large FAI with multiple participants.

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

I have some difficulty in seeing how and where this would fit into the procedural timetable. How would participants necessarily know to be in a position to lodge the note required in terms of 4.16 (2) (b) ? As it stands the draft Rule here seems cumbersome and potentially problematic.

### **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?

None.

### **Schedule 3 – forms**

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

Aside from the effect on some of any comments above, no.

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

No.