

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.

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?

Question 1: Yes.

Question 2: No, assuming that inquiry work is allocated to sheriffs whose availability is such at the particular sheriff court to allow for efficient and timeous progress of such work. In our experience, judicial continuity has worked well to date at Edinburgh and Glasgow Sheriff Courts, where Practice Notes apply. Allocating inquiry work to “visiting” sheriffs in other courts may, though, lead to delay on account of shrieval availability.

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?

Question 1: Yes.

Question 2: No.

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?

Yes. The first notice could usefully include an indication or undertaking in respect of Crown disclosure, in terms of information to be disclosed and reasonably anticipated disclosure timescale.

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 first order should, in our view, provide for a preliminary hearing to be held within 28 days of the date of the first order. We consider, though, that ordering that an inquiry must start within 28 days of the first order is potentially too prescriptive and restrictive. A provisional inquiry date should be set by the first order, subject to review at the preliminary hearing in terms of disclosure and preparations.

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

No.

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

Yes. The present position on disclosure should be dealt with and orders made in that regard if need be.

Part 4 – evidence

Agreeing evidence

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

Yes.

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 are not in favour of witness statements being lodged for every witness who is to give evidence at an inquiry. The preparation of such statements would increase the cost of inquiry work and could lead to delay. We are also not in favour of witness statements standing as evidence-in-chief since we consider that unduly prescriptive and restrictive in the context of an FAI. Further, certain witnesses at FAIs require to be issued with a warning by the Sheriff against self-incrimination. That requirement would not work for a witness in that position if his / her statement, potentially containing self-incriminating evidence, was lodged before the inquiry and treated as his / her evidence-in-chief.

Expert evidence

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

We are content with proposed provisions on expert witnesses as drafted. Contrary to para. 77 of the Consultation Paper, Rule 4.13 does not presently provide for a presumption that the evidence-in-chief of an expert witness will be given by witness statement nor that such a statement will incorporate the expert report. We would not be in favour of either presumption nor required incorporation. Evidence heard during the course of an FAI may have a bearing on expert input such that their evidence-in-chief may depart from their statement. Expert evidence should also be allowed without a report having been lodged.

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

No.

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

We consider that concurrent expert evidence may be useful. Proposed Rule 4.16 (2) provides for a note setting out areas of agreement and disagreement between the expert witnesses. Any such note should, in our view, be subject to the caveat that other evidence heard during the inquiry might alter any such agreement / disagreement.

Part 5 – the inquiry

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

Part 5, as presently drafted, is one sentence: “the procedure at an inquiry is to be as ordered by the sheriff”. We agree with that though observe that disparity in approach between different sheriffdoms would not be welcome.

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.

Schedule 3 – forms

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

No.

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.