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?

The Scottish Government is generally content with the structure and layout of the rules and agrees that technical, lengthy or complex provision, or provision of an over-arching nature with no logical place in the chronological structure, is more appropriately placed at the end of the main body of the rules.
We wonder, however, if the forms might be in the final schedule, particularly because schedule 3 includes forms introduced in further schedules.

Part 2 – Overview

The inquiry principles

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

The Scottish Government very much supports the inquiry principles and particularly the statement that an inquiry is inquisitorial rather than adversarial. This is because it is essential that participants at FAIs are aware that the public interest purpose of the inquiry is to establish the circumstances of the death(s) and any precautions which may be taken in the future in order to avoid deaths in similar circumstances in the future, as set out in section 1(3) of the 2016 Act. While all participants must be able to participate effectively, this should only be in relation to furthering the purpose of the inquiry as set out in section 1(3) and this ability should not be used to further attempts to adduce evidence which may be useful at subsequent civil proceedings or indeed attempted private prosecutions.
In rule 2.2(6), lay supporters should also be required to respect the inquiry principles.

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?

In an ideal world, there would be clear advantages in having the same sheriff presiding over the preliminary hearing or hearings and the inquiry itself, since the sheriff will become familiar with the issues related to the death. This may not, however, be possible due to pressure of other business in sheriff court districts where there is more than one sheriff.

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?

The Scottish Government is generally content with the approach to the sheriff's management powers, and the illustrative list, but with one exception. This is the proposal under rule 2.5(1)(d)(iii) that a participant may be ordered to make a payment to another participant to reflect the consequences of not complying with a rule or order. Section 25 of the Act prohibits the awarding of expenses yet this draft rule would appear to allow the equivalent of an award of punitive expenses. Such awards are appropriate in adversarial proceedings, but rule 2.2(1) makes clear that FAIs are not adversarial proceedings. The sheriff's inherent powers to control proceedings under section 19 should be sufficient.

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?

The Scottish Government is content with the proposed content of the first notice, except that, under section 16 of the 2016 Act, the decision on whether a preliminary hearing is held is primarily for the sheriff.

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 is assumed that the procurator fiscal will not give the sheriff notice of the FAI under section 15 until the death investigation is concluded and the fiscal is ready to proceed to lead evidence at the inquiry. It is also likely that the fiscal will have had discussions with SCTS about court availability for a preliminary hearing and in the light of an estimate of the likely duration of the inquiry. In these circumstances, it does not seem unreasonable for the sheriff to be obliged to make the first order within 14 days of receipt of the first notice.

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?

As it is assumed that the procurator fiscal will not give first notice of the FAI until s/he is ready to lead evidence at the inquiry and that discussions will already have taken place with SCTS about the likely need for a preliminary inquiry and the likely duration of the inquiry itself, it does not seem unreasonable for the these to begin within 28 days of the first order being made. There remains the possibility that the sheriff may adjust the deadline using the power in rule 2.5(1)(b)(ii). In the vast majority of cases, only possibly the first of a number of preliminary hearing need be held within 28 days. This is in itself intended to identify the issues and volume of evidence which will have to be considered at the inquiry.

Preliminary hearings

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

The Scottish Government submits that only the procurator fiscal should be expected to lodge the note covering the material set out in rule 3.7 before the preliminary hearing, since s/he is likely to be the only person in possession of, and familiar with, all of these facts following the death investigation which the fiscal has conducted.

All of the participants may not be known before the preliminary hearing and they may only seek participant status under rule 3.5 at the preliminary hearing or indeed at the inquiry itself. How and why then could they be expected to produce all of this material 7 days before the preliminary hearing? See also rule 3.8(2)(a).

The consultation document states that "persons whom the procurator fiscal has identified as having an interest will have been provided with relevant material well in advance of this stage in proceedings and should therefore be in a position to comply with the duties in rule 3.7 in a constructive manner". This is arguable, but the critical person in the identification of evidence and issues at this stage is clearly the fiscal, following the death investigation, who will lead evidence at the inquiry.

Once **the fiscal** has lodged all of the material in rule 3.7, surely it is the purpose of the preliminary hearing to establish whether other participants have identified **other, additional** matters likely to be in dispute at the inquiry and on which they might invite the sheriff to address in the determination? They may still, however, not be in a position to lodge a list of productions or possible witnesses at least at the stage of the first preliminary hearing particularly in the timescales envisaged. Such lists should be expected at later preliminary hearings (see rule 3.8(2)(e)(ii)).

Quite apart from the practicalities of the assembly of this material by participants (which may, as the consultation document suggests, delay the preliminary hearing and one of the inquiry principles is to avoid delay), such a participant may not have, or may be in the process of obtaining, legal representation and/or may be waiting for an application for legal aid to be processed. Will unrepresented participants be expected to produce this material?

In summary, the Scottish Government doubts that rule 3.7 can focus the issues for the court **before** the preliminary hearing, as suggested in the consultation paper – that is surely the purpose of the preliminary hearing itself as under rule 3.8(2)(b) and (c).

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

The Scottish Government is content with the list of matters to be considered at the preliminary hearing under rule 3.8(2), except that it is suggested that it might be made clearer that the sheriff should at this point order that a witness statement by an expert witness must be lodged by a particular date as under rules 4.12(4) and 4.13.

Part 4 – evidence

Agreeing evidence

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

We are not familiar with the current arrangements for liability for witnesses' fees and expenses and were unaware that a citing solicitor had personal liability. Is there not a danger that an unscrupulous witness might seek to take advantage of this liability? Perhaps the word "reasonable" might be added before "fees and expenses"?

The concept of caution in rule 4.1(6) and (7) should be explained in the Explanatory Note as it is very unlikely that an unrepresented participant will understand the ramifications.

The Scottish Government is content with the provisions on agreement of evidence but has the following comments.

If the clerk referred to in rule 4.8(2) is the sheriff clerk, would it not be easier to specify that?

The requirement in rule 4.9(4) should also be applied to rule 4.8. Rules 4.8 and 4.9 should both make it clear that these procedures are for use before the start of the inquiry.

In rule 4.10, the "first participant" is almost invariably likely to be the procurator fiscal, but keeping "first participant" would allow for the unusual situation where another participant may take the initiative in preparing a notice of uncontroversial evidence.

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 Scottish Government understands that there would be significant practical and resource implications, particularly for the Crown Office and Procurator Fiscal Service and Police Scotland, if the rule were to state that witness statements should be lodged for each witness, unless the sheriff orders otherwise. The first iteration of draft rule 4.11(1) should therefore be the default position: that rule 4.11 should apply where the sheriff orders that the witness statement of a particular witness must be lodged by a particular date.

Expert evidence

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

The Scottish Government welcomes the provisions on expert witnesses and notes that they are based on similar provisions in the Civil Procedure Rules (CPR) south of the Border. It particularly approves the clear duty of expert witnesses to the inquiry and not the person who instructed or paid the expert witness. We wonder if rule 4.13(2) might include a requirement that the expert witness should also set out the nature of their expertise and their qualification to express an expert view.
It is noted that the origin of rule 4.14 is CPR 35.6 which allows **any party** to put questions to **another party's expert**. The draft rule only provides for questions to be put to the procurator fiscal's expert witness. It is appreciated that rule 4.14 might reduce the unnecessary instruction of alternative experts, but if other expert witnesses are instructed, it seems right that other participants should have the opportunity to lodge questions to be put to that other expert.

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

Single joint expert witnesses may not be used much in practice, but the Scottish Government believes that it may occasionally be helpful to particular inquiries that the rules should provide for the possibility.

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

It is also possible that the provision for concurrent evidence may also be rarely used, but again it is right that the option should be available to sheriffs and participants.

Part 5 – the inquiry

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

Rule 5.1 should end with the words "having regard to the purposes of the inquiry and the inquiry principles".

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 Scottish Government welcomes the suggested style of determination of sheriffs' determinations at the conclusion of inquiries and agrees that the skeleton form is not overly prescriptive. It is now particularly important that any recommendations made by the sheriff should be clearly set out in order that those participants to whom the sheriff may have directed a recommendation are made aware of that fact (when a copy of the determination is sent to them by SCTS).

It would be helpful if Form 6.1 referred to Form 6.2 (which should accompany the determination) and the obligations on participants to respond to SCTS in relation to any recommendation directed to them by the sheriff.

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

We wonder if, in Form 3.1 and similar forms, it is necessary to have a special paragraph 2 for mandatory military service deaths yet the discretionary paragraph 2 does not have variant text for section 6 or 7 deaths. It might be easier to have just two alternatives, one for mandatory and one for discretionary, with an explanation added by the fiscal as to which legislative provisions are relevant and why.

Paragraph 3 should be removed – the fiscal's opinion on whether there should be a preliminary inquiry is irrelevant as this is a matter for the sheriff.

Form 6.1 might conclude with a statement making it clear that the determination is not admissible as evidence in other proceedings which would emphasise the inquisitorial principle of FAIs.

As above, Form 6.2 should accompany each determination which contains recommendations directed to participants. Form 6.2 should also make it clear that if participants do not respond to a recommendation directed to them by the sheriff, then that fact will be noted on the SCTS website.

The statement in Form 6.2 that any response to a sheriff's recommendation is not admissible in other proceedings should be highlighted **in order to encourage full and frank responses to recommendations so that any remedial action taken as a result of the FAI is made public**.

In Form 6.3, the publication of the response should include the statement that it is not admissible in evidence in other proceedings.

Forms S1.7 and S2.7 appear identical and their purpose is not clear.

Form S4.21 contains a number of typos of "representative".

Form S5.11B: The form is obviously based on the original model form for Letters of Request under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which is not now used much as most States use the revamped version available on the Hague Convention website (or a variation thereof) – see link here. The model form used for taking evidence under Council Regulation (EC) 1206/2001 might also be considered. It may be better to base the form on the more recent versions, which are more user-friendly.

We also wonder if the "central authority" and the "competent authority" should be defined?

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

Schedule 2, paragraph 6 and subsequent equivalent provisions: there is reference to fax yet not to email or other digital technologies. We think that the rule should give email or online communication parity with paper posting, but allowing fax as a backup.

Schedule 2, paragraph 1 defines “first class post” yet paragraph 8 defines “postal service”. Should the rules on postal service throughout the UK not be the same given that it is the same postal service?

Schedule 2, paragraph 15(3): is the convention not to say “Secretary of State” but no more as per rule 3.3?

Schedule 4, paragraph 1: same points about fax and email.

Schedule 4, paragraph 10: CEHR and SCHR are defined terms in rule 1.2 so do not require to be named in full?

Schedule 5, paragraph 2(4): need first class post be specified?

Schedule 5, paragraph 7(2)(d): why would the taking of blood be relevant?