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?

> We are pleased to see that a single self-contained set of rules has been created. The chronological layout and the use of separate schedules for more detailed procedural matters helps make the rules easy to follow.

Part 2 – Overview

The inquiry principles

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

> We are satisfied with the proposed inquiry principles.

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?

> Given the desire for greater case management of inquiries by the presiding sheriff, we agree that judicial continuity during the course of the inquiry is important. Given pressures on judicial resources, we are not sure that it is necessary for such continuity to commence with the issuing of the notice of the inquiry by the fiscal/issuing of the first order by the sheriff. However, we do consider that the same sheriff should, wherever possible, preside over proceedings from the initial preliminary hearing onwards.
>
> There is emphasis in the rules on ensuring that parties comply with deadlines set down in the timetable. Our experience in other forms of court procedure suggests that consistency of approach in enforcement of such deadlines is best achieved through judicial continuity.
>
> There will undoubtedly be difficulties in scheduling hearings to allow for judicial continuity and care will be required to avoid delay in the progress of an inquiry due to unavailability of a presiding sheriff. The purpose of some hearings during the course of an inquiry may not justify insistence on continuity. Avoidance of delay may be a greater priority but care will be needed to ensure that a proper balance is struck.

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?

We are generally content that the sheriff should have the broadest possible inquiry management powers. Our only comment would be that there is at least a possibility that the use of illustrative examples in the rules may in practice tend to restrict the kind of orders sought/granted during the progress of an inquiry. It might be useful to make it even clearer in the rule itself that they are merely illustrative examples and do not limit the general power.

Rule 2.5(d) sets out examples of orders that might be made where there has been non-compliance with deadlines set down in the rules or by the court. The focus of the examples seems to be on relief from non-compliance (subject to conditions, if appropriate) or on a financial penalty where a participant has behaved in a vexatious manner. They are, however, intended merely as illustrative examples and sheriffs will be entitled to decide that some other form of order is appropriate.

The concept of sanctions for non-compliance is a difficult one in the context of inquisitorial proceedings designed to establish the circumstances of death, and steps that might be taken to prevent further deaths in similar circumstances. We wonder whether, given the potential impact on a participant of the imposition of a sanction for non-compliance – of whatever kind – it would be better for the rules to set out clearly the range of sanctions open to a sheriff for failure to comply. As presently framed the rules give a participant no indication of the kind of orders that are likely to be made by a sheriff in the event of non-compliance and as presently drafted tend to suggest that orders for payment (in civil litigation terms an award of expenses) will be restricted to situations involving vexatious participants. That may be the intention but it would be helpful if the rules were more explicit.

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?

This question is really one for the Scottish Courts and Tribunals Service, which will have a better feel for the resources available.

We would have no difficulty with the period being extended to 21 days.

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?

We consider that a timeframe for holding any preliminary hearing after making the first order should be provided. However, the 28 days proposed seems too short a period given that rule 3.3 requires notice of the inquiry to be given at least 21 days prior to any preliminary hearing.

We consider that a minimum of 28 days' notice of any preliminary hearing should be provided for in rule 3.3 and the first preliminary hearing should take place within 56 days but not less than 42 days from the date of the first order. That would help ensure that in most cases participants would receive more than merely the minimum period of notice.

In those rare cases where a preliminary hearing is not to be held then the inquiry should take place within 56 days of the first order.

These timescales will ensure that participants have the opportunity to prepare their rule 3.7 notes which, as the rules are presently drafted, are required no later than 7 days prior to the first preliminary hearing.

Preliminary hearings

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

Although we generally welcome the proposals we consider that the timeframes set out elsewhere in the rules as currently drafted do not allow participants sufficient time to prepare their rule 3.7 note. It is likely that a participant will have only a period of 14 days from receipt of the rule 3.3 notice to consider the likely disputed issues, prepare lists of productions and witnesses and frame matters for the sheriff to address in the determination.

Our concern is that the relatively short timeframes involved may reduce the usefulness of the content of the rule 3.7 note.

That difficulty may be avoided by increasing the length of notice of the holding of the preliminary hearing as mention in our response to the previous question.

Rule 3.7 notes will require to be intimated to other participants in terms of Sch 2 2(1). It might be helpful for participants to be required to intimate and lodge their rule 3.7 note more than 7 days prior to the preliminary hearing in order to give other participants a reasonable amount of time to consider the content.

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

We have no difficulty with the list of matters to be dealt with at the preliminary hearing detailed in rule 3.8.

However, the way the rule is currently worded suggests that the sheriff must address those matters at each of the preliminary hearings held during the course of the inquiry, although that is presumably not the intention?

There is no suggestion that a preliminary hearing can be continued – the only alternatives open to the sheriff in terms of rule 3.8(3) seem to be to fix a further separate preliminary hearing or to fix a date for the inquiry. It might be more appropriate for the rules to provide that the list of matters in rule 3.8 must all have been addressed by the conclusion of the final preliminary hearing rather than at each individual hearing.

Part 4 – evidence

Agreeing evidence

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

The broad duty on participants set out in rule 4.9 is to identify facts or documents that they would normally seek to prove at the inquiry but which the participant considers are unlikely to be disputed by other participants. Once those facts and documents are identified by one of the participants, all the participants must take all reasonable steps to agree them. We are content with that approach and with the guidance provided in the rule as to specific matter that the court will ordinarily expect to be agreed.

We do think it would be helpful to provide further clarification in the rules of the relationship between the duties set out in 4.9 and the “Notice of uncontroversial evidence” procedure provided in 4.10. The latter rule seems generally to reflect the Notice to Admit procedure open to parties in civil proceedings but in those proceedings parties do not require an order by the sheriff authorising use of the procedure. Is there any reason why an order by the sheriff is a necessary prerequisite of the notice procedure being used? There is no indication as to when or why a sheriff might make an order under 4.10. Is it intended that orders be made routinely or only where a sheriff or participants are not satisfied with voluntary efforts?

We would suggest that the power to order the lodging of notices of uncontroversial evidence might usefully be listed amongst the illustrative examples of inquiry management powers in rule 2.5

Rule 4.10(2) suggests that even where a sheriff makes an order for notices of uncontroversial evidence to be lodged by a particular date parties are not obliged to do so – see use of the word “may”. What is the effect of a participant opting not to prepare and intimate a notice following the making of an order?

Rules 4.10(6) and (8) refer to a “minute of uncontroversial evidence”. We presume the intention was to refer to a “notice of uncontroversial evidence” as provided for in rule 4.10

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 of the view that witness statements should be lodged for every witness unless the witness declines to co-operate with the party citing them.

Expert evidence

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

In rule 4.12(4), obligations are imposed on participants who are "considering" instructing an expert witness. This suggests the obligations arise even prior to a decision being taken to instruct an expert.

If the intention is to require permission of the court prior to instructing an expert witness then this should be stated explicitly in the rules and a procedure for obtaining permission should be provided.

If this rule is not intended to prevent the instruction of, or leading of evidence from, an expert without permission but is instead intended merely to provide other participants with fair notice of the instruction of an expert then imposing requirements at the stage of "considering" use of an expert seems premature. Parties might instead be required to provide the information set out in 4.12(4) within 7 days of a letter of instruction being sent to the expert. That would also avoid the need for interpretation of the rather broad "as early as possible" requirement set out in the rule.

The rule as drafted does not explicitly deal with the situation where a participant has already instructed and obtained a report from an expert.

Although there is a requirement to lodge witness statements by an expert witness there seems to be no absolute requirement on experts to provide a written expert report. Is it intended that such reports form an annexe to written statements and be adopted as the expert's evidence in chief?

In rules 4.15 and 4.16 the sheriff "must" order the use of single/joint experts and concurrent presentation of expert witness if to do so would further the purpose of the inquiry. We are of the view that a sheriff should be allowed a greater degree of discretion as to whether such orders should be made – use of the permissive "may" rather than "must" might be more appropriate particularly since the Scottish courts and practitioners currently have little experience of these two approaches to expert evidence. Once the new system has bedded in and sheriffs and practitioners have greater experience of the use of single experts and concurrent evidence, then consideration may be given to re-instating the current wording.

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

The instruction of single joint experts in a Scottish context is very rare.

Although we appreciate the reasoning behind the proposal to provide sheriffs with the power to order expert evidence on particular matters to be provided to the court by a single [joint] expert witness, we do have some reservations. The rules will be introducing this new practice for the first time in Scotland in the context of what will often be highly publicised and sensitive inquiries. Our preference would be to delay the compulsory use of single experts until after their introduction in civil proceedings generally.

There should however be nothing to stop participants in an inquiry choosing to instruct a single expert by agreement should they wish to do so.

It is interesting to compare the single ground for a sheriff deciding to order the use of a single expert (where "to do so would further the purposes of the inquiry") with the rather more nuanced approach adopted in Part 35/PD35 of the English CPR.

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

The only Scottish example of concurrent expert evidence that we are aware of is the recent decision of Lord Woolman in SSE Generation Ltd v Hochtieff Solutions AG & Anr [2016] CSOH 177 where he suggests he found it "a valuable way of focussing on the main issues and assessing the quality of their contributions". This was in relation to liability issues, however "the exercise was less successful in respect of quantum, however, where there was little common ground and the level of detail was too great".

Overall, our view is that the use of concurrent evidence, particularly in inquisitorial as opposed to adversarial proceedings, should not present undue difficulties although sheriffs may require some guidance and training as to the circumstances in which concurrent evidence can be most effective.

Part 5 – the inquiry

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

We do not see any difficulty with having such a minimalist approach to procedure at the inquiry although our feeling is that most sheriffs will expect to have some discussion or debate with parties about the merits of the approach.

It might be helpful to participants if sheriffs were obliged to set out or summarise the procedure to be followed in writing in advance of the inquiry rather than merely rely on participants' understanding of what is discussed, agreed or said at the preliminary hearing stage.

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?

On the basis that this is merely a skeleton style which can be adapted by a sheriff as appropriate we do not have any comments or suggestions to make.

Schedule 3 – forms

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

Forms 3.3 & 3.4 – do not appear to include any guidance for those persons who receive the notice of inquiry or who become aware of the public notice. As a minimum, it should perhaps point them to online resources where the inquiry system is explained.

Form 4.1A - It might be helpful if the witness citation could include an explanation of the rules regarding witness statements so that the witness is aware that the citing party may be in touch to obtain a signed statement.

Form 4.10A – the introductory wording "Apart from rule 4.10" is unnecessarily confusing.

Form 6.1 – typographical error under legal Framework heading "civil of criminal"

Form 6.2 – alternative wording for corporate participants should be provided.

Forms S1.7 certificate of intimation is for applications only but refers to documents.

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?

Schedule 1 & 2 – it would be preferable to allow intimation of applications by email where the receiving participant is the fiscal or is otherwise represented by a solicitor.

Sch 2 2(2) – our experience of other sheriff court procedures is that it is more helpful if the terms of all orders, including those made in open court in the presence of parties, are intimated as a matter of routine to participants by the sheriff clerk