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 agree with the general approach taken to the structure and layout of the rules. We are concerned, however, that in the quest for flexibility to ensure speed and efficiency, many of the rules may be too imprecise, which may have the opposite effect of slowing the process and creating confusion. For example, forms are to be used except "where the circumstances require it". The guiding principles may help the sheriff in interpretation, but are likely to do little to help a lay participant. We can foresee difficulties and delays in interpreting some such provisions and in ensuring consistency in application.

Part 2 – Overview

The inquiry principles

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

Our concerns in relation to this question are as set out above. We appreciate the aim of the principles but wonder if that is actually achieved, given the wording used. The inquiry principles allow for great latitude in interpretation and application and so could lead to confusion and inconsistency (particularly if the matter is before a sheriff with little Inquiry experience) - the very things they seek to avoid. Moreover, the sheriff is only to "take account of" them (a phrase again open to differing interpretations) and participants to "respect" them. In the circumstances, we are concerned that as currently worded the principles do not achieve their aim. The ultimate aim of a fatal accident inquiry should not be lost sight of in the quest for speed and efficiency. Perhaps this should be repeated here as an overarching purpose/principle. Moreover, we consider that the statement that the sheriff is 'in charge, with the power to steer and focus the proceedings', should be included alongside a commitment to agree a defined scope in advance of the start of the Inquiry as is the practice in Coroner's Inquests. The Procurator Fiscal ("PF") is best placed to guide the evidence, given their intimate knowledge of the witness evidence and productions.

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, we agree that there should be judicial continuity wherever possible. Of equal if not more importance to participants, however, will be that the matter is heard by someone experienced in such inquiries. There is no doubt that if discussions regarding the scope of the Inquiry are to form part of the Preliminary Hearings, continuity would be key.

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?

There may be some merit in making it clear the sheriff can also order the submission of witness or expert statements/reports.

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?

Rule 3.1 states that the first notice must set out, amongst other things, the identity of any person the PF considers may have an interest in the inquiry. This should be included in the form.

There is no Form 3.2. It is not apparent why and its omission may lead to confusion.

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?

One of the overall aims is to improve the speed and efficiency of the Inquiry process. Whilst we agree with the timescales set out in the draft rules, they still do little to reassure the public that such matters will be dealt with expeditiously. As we have said before, we understand that there is often a need for extensive investigative steps to be taken before a decision on whether an Inquiry should be conducted can be made. However it does not always appear that the delay is connected to the conduct of investigation. We remain of the view that to move matters forward in a timely manner, an Inquiry should open (or at least a decision be made on whether to hold an Inquiry in principle) within a certain amount of time from the date of death with judicial oversight from an early point in the process.

To be clear, we are not suggesting that the sheriff should assume responsibility for the investigation, that should properly remain with the Crown. However, providing the sheriff with Case Management responsibilities would allow a degree of intervention and enquiry that could give the public comfort that an independent member of the Judiciary is able to question whether the investigation is proceeding as expeditiously as possible and not only behind closed doors.

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?

A 28 day timeframe should be achievable if all interested parties are fully instructed by the time the first notice is issued. However, as parties may require their own experts and to cite their own witnesses, parties who are informed of their potential interest at the time of the first notice may be left relatively little time to secure representation, funding, disclosure and any opinions his/her legal representatives deem necessary. This could be remedied if there is provision for adjournment if a party shows sufficient cause.

Preliminary hearings

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

We can see how this would be helpful, but is perhaps more in line with civil cases, where all the initial documents exchanged are intended to draw out the matters in dispute. In solemn criminal cases, too, there is a requirement to set out the defence in advance of the preliminary hearings in a defence statement. An Inquiry, however, is an inquisitorial not adversarial process and care must be taken to ensure this is not lost sight of with parties' ultimate submissions limited by such notes.

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

Rule 3.8 sets out a thorough agenda for the Preliminary Hearing, however, in addition, the Crown should advise the presiding sheriff if any interested persons have failed to respond to their notice and what steps have been made to ensure that person is aware of the Inquiry. Equally they should advise if an interested party has actively chosen not to be a part of the Inquiry to ensure the sheriff is satisfied all interested parties who want to participate are included in the process.

Part 4 – evidence

Agreeing evidence

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

If parties are unable to agree the matters set out in Rule 4.9 (3) it might be useful if they were obliged to outline the reasons for this. A similar rule for notices of uncontroversial evidence may also aid speed and efficiency – at present participants are simply obliged to notify the objection on Form 4.10B

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 consider that the default position should be to lodge statements. Although against the grain for criminal matters in Scotland, we can see that this would be helpful and could lead to more evidence being agreed under Rule 4.9. It should be made clear that the statement would be intended to form that witness's evidence in chief, unless other evidence comes to light during the Inquiry process. In Inquests, parties have an opportunity to review the statements of potential witnesses and indicate a preference for the evidence of each witness to be read or called, with a presumption towards reading the statements if possible. Such a rule could potentially cut the length of Inquiries here by eliminating uncontroversial witnesses, whose evidence could easily be agreed.

Expert evidence

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

If parties all adhere to the rules as written, this could avoid each party instructing their own experts to come to similar conclusions. However, it is important that parties retain the right to instruct their own expert should there be a fundamental disagreement in approach, conclusion or interpretation of evidence, if to do so would be in the interests of the client.

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

See our answer to Q12. We are concerned that in appropriate circumstances parties should retain the right to appoint their own expert. The rule as presently worded does not provide for this.

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

The use of concurrent expert evidence can be extremely useful in the right circumstances. Lord Woolman recently commented on the use of concurrent expert evidence in the SSE v Hochtief case, where, in particular he chaired the meeting and put time limits on each expert's individual contribution:-
"Instead of hearing complex testimony weeks apart, I was able to hear the different opinions at one and the same time. They were also able to challenge one another's position. This brought the topics into sharp focus. Each expert had to crystallise his position. I should add that they rose to the challenge by (in general) providing crisp answers. The exercise was less successful in respect of quantum, however, where there was little common ground and the level of detail was too great."

Part 5 – the inquiry

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

We agree that it is not necessary to go into great detail about the procedure, but *some* detail or guidance should be given on the order of evidence to be led, for example:-

- the Crown will lead such evidence as it sees fit, including; witness evidence in person and by read statement; and any joint minute of agreement.
- interested parties and the presiding sheriff will have adequate opportunity to cross examine witnesses and otherwise test evidence as appropriate.
- following the close of the Crown case, each interested party will be given an opportunity to lead evidence in an order to be agreed amongst parties in advance of the Inquiry.
- upon the conclusion of evidence, each party will deliver oral/written submissions for the sheriff to consider.
- the sheriff will give an indication of whether he or she will provide the Determination orally or in writing.

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 style looks to be in order but should not be overly prescriptive; sheriffs must be allowed to exercise a degree of discretion to include more personal comments of condolence that seem to offer families comfort when reading a very formal legal document. We also believe consideration should be given to imposing a time limit on the issuing of the Determination post conclusion of the Inquiry.

Schedule 3 – forms

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

See above. In addition, we have already stated that we see some difficulty with requiring participants to whom a recommendation relates to respond to a sheriff's determination; the Inquiry may have looked at a narrow issue and imposing a potentially expensive obligation on recipients (who may have played no part in the process) may be unduly onerous. Moreover, the general ethos is to reduce red tape. Seeking to impose such an obligation, where there is no sanction for failure to comply, seems overly bureaucratic.

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?

All these provisions seem standard and uncontroversial.