



**Scottish  
Civil Justice  
Council**

# **Consultation on the draft Fatal Accident Inquiry Rules**

**NOVEMBER 2016**

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## RESPONDING TO THIS CONSULTATION PAPER

Written responses to this consultation paper are invited by **23 January 2017**.

Please send your response with the completed Respondent Information Form (see "How your response will be treated" below) to:

scjc@scotcourts.gov.uk  
or  
Karen Stewart  
Scottish Civil Justice Council  
Parliament House  
Edinburgh  
EH1 1RQ

If you have any queries please contact on Karen Stewart 0131 240 6879.

Please use the consultation questionnaire to make your comments or clearly indicate in your response which questions or parts of the consultation paper you are commenting on to ensure that we know which of the rules you are commenting on.

This consultation, and all other Scottish Civil Justice Council (SCJC) consultation exercises, can be found on the consultation web pages of the SCJC website at:

<http://www.scottishciviljusticecouncil.gov.uk/consultations>

### How your response will be treated

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. **Please complete the Respondent Information Form (Annex B) to make sure that we treat your response as you wish.** Your response will not be published on the SCJC website if you have asked us not to make it public.

However, all respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002. This means that, if the SCJC receives a Freedom of Information request about the responses to this consultation exercise, any of the responses, including those not published, may have to be made available under the request.

Where respondents have given permission for their response to be made public (and as long as they contain no potentially defamatory material) responses will be made available to the public on the SCJC website.

### What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on the Fatal Accident Inquiry Rules. It is intended to publish a consultation report on the SCJC website, following the meeting of the SCJC on **20 March 2017**.

## **Feedback**

If you have any comments about how this consultation exercise has been conducted, please send them to:

Karen Stewart  
Scottish Civil Justice Council  
Parliament House  
Edinburgh  
EH1 1RQ  
0131 240 6879

**Or by email to:**  
[scjc@scotcourts.gov.uk](mailto:scjc@scotcourts.gov.uk)

## **SECTION 1: INTRODUCTION AND BACKGROUND**

### **Introduction**

1. This consultation seeks views on draft rules setting out the procedure which applies at fatal accident inquiries. The underlying law and policy has been consulted upon twice; first in relation to Lord Cullen's Review of Fatal Accident Inquiries and second, in relation to the Scottish Government Bill which implemented many of Lord Cullen's recommendations. Consultee's views are therefore sought on the practical aspects of the conduct of an inquiry and the way these are dealt with in the rules; the underlying law and overarching policy having been settled during the passage of the Bill.
2. The rules are designed to encourage the expeditious progress of fatal accident inquiries and make the most efficient use of time spent in court.
3. Much greater emphasis is placed on active shrieval inquiry management and the rules provide a broad power to allow sheriffs to tailor the procedure in response to the nature and complexity of the inquiry.
4. When designing this new procedure the intention has been to produce straight forward rules that can be easily understood, and which will create an efficient, flexible and accessible system for carrying out fatal accident inquiries.

### **Background**

#### ***The Cullen Review***

5. In 2008, Lord Cullen, a former Lord President of the Court of Session, was asked to undertake a review of the fatal accident inquiry legislation and his review team undertook a comprehensive and thorough review, reporting in November 2009. Lord Cullen made 36 recommendations for reform of the system. Some of the recommendations were addressed to the Crown Office and Procurator Fiscal Service and were implemented administratively, principally by the establishment in 2010 of the Scottish Fatalities Investigation Unit ("SFIU"), which now oversees death investigations in Scotland.
6. Investigations into deaths are conducted locally by the SFIU North, West and East divisions, which liaise with Crown counsel on complex death investigations and with bereaved families. Investigations are overseen by the SFIU National. Approximately 11,000 deaths are reported to the Crown Office each year. This past year the SFIU conducted investigations into around 7,000 deaths and an average of between 50 and 60 inquiries are held per year. Thus, the overwhelming majority of deaths that are investigated do not result in a fatal accident inquiry.
7. Lord Cullen's aim was to set out practical measures for an effective, efficient and fair system for inquiry. The Scottish Government took on board the majority of his recommendations which are implemented by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 ("the Act").

8. The Act ensures that inquiries remain inquisitorial fact-finding hearings. Inquiries do not apportion blame or guilt in the civil or criminal sense; that is for civil or criminal proceedings. They are inquisitorial judicial inquiries that are held in the public interest to establish the circumstances of sudden, suspicious or unexplained death or deaths that have caused serious public concern. The sheriff will consider what steps, if any, might be taken to prevent other deaths in similar circumstances.

### **Key changes**

9. The Act does not radically change the law, rather it modernises and expands it. The key changes brought about by the Act are as follows:
10. Mandatory inquiries: the Act rationalises and extends the categories of death in which it is mandatory to hold a fatal accident inquiry to include deaths of children in secure accommodation and deaths under police arrest, irrespective of location.
11. Discretionary inquiries: the Act enables discretionary inquiries to be held where a Scottish resident dies outside the UK. There is no requirement that the body must be repatriated before such an inquiry might take place, as there might be occasions when a body has been lost or is otherwise not available for examination or post mortem.
12. Written reasons: the Act requires the Lord Advocate to give written reasons for a decision not to hold an inquiry where requested by certain persons. It is intended that this will make the basis of the decision clearer to the deceased's family.
13. Preliminary hearings: in an effort to speed up the inquiry process, the Act introduced a requirement to hold a preliminary hearing and encourages the sharing and agreeing of evidence in advance of an inquiry.
14. Sheriffs' recommendations: parties to whom a sheriff has made a recommendation to undertake a course of action are required to explain what steps they have taken to address the recommendation. If this has not been possible, they will have to explain why. However, the sheriff's recommended action is not compulsory.
15. Jurisdiction: an inquiry no longer requires to be held in the same sheriff court district or even the same sheriffdom where the death occurred.
16. Reopening: the Act allows an inquiry to be reopened if new evidence is provided. In cases where the evidence is considered to be significant then a completely new inquiry could be held.

### **The need for rules**

17. The Act provides a framework but much of the detail has been left to the rules that will set out how the inquiry is to work in practice.
18. Currently the inquiry rules are to be found in three places – the Sudden Deaths Inquiry (Scotland) Act 1976, the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 and the Sheriff Court Ordinary Cause Rules 1993 also apply. This mix of sources is not ideal for a number of reasons and Lord Cullen

recommended a self-contained set of rules setting out the procedure to apply at an inquiry.

### **The Scottish Civil Justice Council**

19. The Scottish Civil Justice Council (SCJC) was established on 28 May 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (“the 2013 Act”). As well as developing rules for the civil courts, the SCJC has responsibility for keeping the civil justice system under review and making recommendations for its improvement.
20. Section 36(6) of the Act confers responsibility upon the SCJC for the review of the practice and procedure followed in inquiry proceedings and this includes the drafting of inquiry procedure rules.
21. The SCJC is now overseeing the preparation draft of rules of court required to implement the Act and will hold a care and maintenance function (under the 2013 Act) for the inquiry procedure rules when these are enacted.

### **The SCJC Working Group**

22. The SCJC set up a Working Group to develop the rules required to implement the Act.
23. The Working Group remit is: *To consider the secondary legislation required to facilitate implementation of The Inquires into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 and to make proposals for draft inquiry procedure rules for consideration by the Scottish Civil Justice Council.*
24. The SCJC sought nominations from the legal profession for membership of the Working Group. The members nominated were required to have a broad spectrum of experience of fatal accident inquiry work and to bring a high level of objectivity and impartiality to policy development.
25. Sheriff Principal Abercrombie, who is a member of the SCJC<sup>1</sup>, was appointed to chair the Working Group. Given their respective interests in the implementation of the Act, representatives of the Scottish Courts and Tribunals Service, the Scottish Legal Aid Board and the Scottish Government were appointed to the Working Group. Two sheriffs with expertise in fatal accident inquiries were also appointed, together with a representative from COPFS, an advocate, a solicitor and a representative of Victim Support Scotland.

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<sup>1</sup> The Council's standing orders require that each committee must have at least one SCJC member appointed to it.

26. The membership of the Working Group is as follows:

Sheriff Principal Abercrombie (Chairman and SCJC member)  
Sheriff Hughes (SCJC member)  
Sheriff G Liddle  
Elizabeth Ross (COPFS)  
Jillian Martin-Brown, Advocate  
Rona Jamieson, Solicitor  
Hamish Goodall (Scottish Government)  
Jane MacDonald (SCTS)  
Marie-Louise Fox (SLAB)  
Alan McCloskey (Victim Support Scotland)

Jackie Powell (SCTS, ICMS Project Leader) was later appointed as an observer.



## **SECTION 2: KEY AIMS AND ASPECTS OF THE DRAFT FATAL ACCIDENT INQUIRY RULES**

### ***Overarching aims***

27. Although the substantive law has not changed radically, the intention is that the way inquiries are prepared for and conducted will be improved. In particular, the rules have been designed with the following key aims in mind:

- (i) to achieve greater efficiency. This means a process that runs as smoothly as possible, reduces delays and makes the most of time spent in court.
- (ii) to encourage consistency in the conduct of inquiries across Scotland. The experience of the Working Group suggests that there is significant divergence in practice across sheriff courts. It is hoped that the inclusion of a set of guiding principles within the rules will encourage a more consistent approach to the conduct of inquiries.
- (iii) to reinforce and re-emphasise the inquisitorial nature of an inquiry.

### ***Front loading and the preliminary hearing***

28. If the process is to be efficient, that means making the most productive use of the available time in court and controlling the evidence and questioning. In order to achieve that efficiency there will require to be greater front loading of the process and the preliminary hearing will be key to that.

29. At the moment these hearings are held in some sheriff courts but not others. Going forward the default position is that a preliminary hearing should be held unless the sheriff dispenses with it. In practice that will only happen in the most simple and straightforward of inquiries.

30. The objective of the preliminary hearing is to ensure that the inquiry is effective in achieving its purpose and doing so in a manner that is expeditious and efficient. The preliminary hearing will be used to settle the scope of the inquiry, identify the matters likely to arise and establish a framework within which the evidence is to be given at the inquiry.

31. It should be stressed that multiple preliminary hearings will not be uncommon. The idea is that the sheriff is to continue the preliminary hearing until the issues have been honed as far as possible. That may take a few hearings even in relatively straightforward cases.

32. In consequence, all of the participants at an inquiry will require to spend a greater amount of time on preparation. The rules make provision for early disclosure of documents and witnesses. The participants are also placed under a duty to agree evidence where possible.

### ***Shrieval inquiry management***

33. The general thrust of civil justice reform is in the direction of sheriffs and judges taking a much more active role in managing cases that come before them. This applies equally to inquiries where there will be far more emphasis on shrieval inquiry management. As part of this, the sheriff at an inquiry will be expected to:

- front load the process – the preliminary hearing will be key;
- keep a tight rein over the evidence and the participants;
- be flexible in responding to the unexpected and tailor the process to reflect the nature of the inquiry.

### ***Inquiry management powers & the inquiry principles***

34. In order to assist the sheriff in managing the inquiry, the rules give the sheriff a very wide power. That power is limited only by what is necessary to “*further the purpose of the inquiry*”. The sheriff is therefore afforded a great deal of flexibility and freedom in the management of an inquiry. Conferring maximum flexibility can sometimes give rise to inconsistent application. Given that consistency is one of the Working Group’s overarching aims, a set of inquiry principles has been included in the rules. This legislative technique is considered to aid effective case management and support the exercise of judicial discretion. It is hoped that with the principles acting as a guiding compass the right balance can be struck

## SECTION 3: OVERVIEW OF THE RULES

### Structure and chronology

35. The rules have been structured with two principal aims: to provide for a broadly chronological structure within the rules and to keep the body of the rules as short and focused on procedure as possible.
36. Parts of the rules which contain solely technical provision, provision of such an overarching nature that it has no logical place in a chronological structure, or provision so lengthy and complex that it would distract from that structure, have all been separated out into schedules at the end of the rules.
37. The approach taken to splitting off the technical parts of the rules from the core of the procedure means that the body of the rules, setting out inquiry procedure from beginning to end, fills only 14 pages.

### ***Consultation question 1: Do you have any comments about the approach taken to the structure and layout of the rules?***

#### **Part 2 – overview**

38. In order to allow parts 3 to 7 to follow the clearest possible chronological order, a group of important provisions which set the tone for, and apply across, the rest of the rules has been set out together at the outset, under the heading ‘overview’.
39. Rule 2.1 sets out the structure of an inquiry and the structure of the rules to come. It should mean that the reader who is only interested in the basics gets an accurate idea of them and can, if interested, find the detail more easily.

#### *The inquiry principles*

40. Rule 2.2 sets out the inquiry principles, which reflect the following four key ideas:
- that, standing the important role of the procurator fiscal, the sheriff is in charge once the inquiry begins and should have the power to steer and focus proceedings,
  - that speed and efficiency are of the essence if the purpose of the inquiry is to be effectively met,
  - that the manner in which evidence is given should not be restricted to the traditional forms of chief and cross-examination if an approach more suited to the inquiry is possible, and
  - that participants should be recognised as an important part of the process.
41. The sheriff is required to take these into account when exercising powers, limited only by a requirement that orders should be focused on the achievement of “*the purpose of the inquiry*”.

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

*Representation and judicial continuity*

42. The rules include a provision on judicial continuity. This is inspired by the Practice Notes on Preliminary Hearings which apply in Edinburgh and Glasgow Sheriff Courts, which provide that the same sheriff should preside over both the preliminary hearing and the inquiry.

**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?**

*The inquiry management powers*

43. The sheriff's power to manage the inquiry is set out in rule 2.5(1) which provides that *"the sheriff may, taking into account the inquiry principles, make any order necessary for the purpose of the inquiry"*. The sheriff's power is limited only by what is necessary to *"further the purpose of an inquiry"*, that is move either the sheriff or the parties closer to the point at which the sheriff can make a determination which meets the ambition of section 1(3) and (4) of the Act.

44. The specific powers set out in rule 2.5 are only illustrative examples of how this wider power may be exercised. They have been selected and framed with this in mind. Their purpose is twofold:

(i) to illustrate to readers the breadth which it is intended the sheriff's powers should have, and

(ii) to encourage sheriffs applying the rules to feel that they have legislative support for any innovative orders they may feel are necessary in the context of a particular inquiry.

45. As well as the overall power in rule 2.5(1), the rule has been sub-divided into medium-level purposes. Rule 2.5(1)(a) gives examples of orders that might be made to narrow the issues in dispute. This is intended to assist with the principles that inquiries are inquisitorial and should be progressed expeditiously and efficiently.

46. The examples in rule 2.5(1)(b) are more directly focused on efficiency. They include important provision which, in appropriate circumstances, allows the sheriff to vary the effect of a deadline or time limit set out in a rule.

47. The examples in rule 2.5(1)(c) address the creative ways that the sheriff can adapt the manner of presenting evidence at the inquiry. This is in line with the third inquiry principle.

48. Rule 2.5(1)(d) contains an adaptation of the standard court rule concerning relief from failure to comply with a rule or order.

**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?**

**Part 3 – pre-inquiry procedure**

*The first order and notices*

49. The Act sets out a system of notices in sections 15 and 17. The first notice initiating the inquiry is given under section 15. This used to be called an “application” under the 1976 Act.

50. In order to prevent confusion, and to reflect the particular importance of this notice, we have decided to provide for a distinct label for the section 15 notice in the rules: the “first notice”.

51. Rule 3.1 makes provision about this first notice and sets out the particular information which we consider should be included in the first notice. The form (Form 3.1) prescribed for this purpose is found in schedule 3. The Act gives the SCJC the power to require any information to be included in this form.

**Consultation question 5: Is there any further information which you think would be useful to include in the form of first notice?**

52. The order which the sheriff makes in response to this notice has been labelled the “first order”, in rule 3.2(1). This is the order that will either arrange the first preliminary hearing or dispense with preliminary hearings.

53. Other rules in which expedition is a guiding principle (for example, the new judicial review rules in chapter 58 of the Rules of the Court of Session) have imposed deadlines on the court as well as parties. This is in recognition of their shared responsibility for progress.

54. It is suggested that the fatal accident inquiry rules should incorporate a requirement on the sheriff to start proceedings within a certain period after the section 15 notice is sent to the sheriff: 14 days is provided for in the draft rules. This deadline would be capable of adjustment by the sheriff where appropriate, using the power in rule 2.5(1)(b)(ii).

55. Rule 3.2(1) provides that if a preliminary hearing is to be held then it should take place within 28 days after the date of the first order. Rule 3.2(3) provides that if the sheriff orders that a preliminary hearing is not to be held then the inquiry must be ordered to take place within 28 days. The effect of these rules taken together is that if the sheriff considers that the inquiry will not be able to start within 28 days, a preliminary hearing must be arranged (subject to the power of the sheriff to adjust the timeframe). It follows that in all but the simplest inquiries it is likely that a preliminary hearing will require to be set, as few inquiries will be able to commence within 28 days of the first order.

**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?**

**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?**

56. Rule 3.3 contains provision about notice to interested parties and rule 3.4 contains provision about public notice. Rule 3.5 provides for third parties to seek to become participants by application.

#### *Preliminary hearings*

57. The preliminary hearing phase of the procedure is designed to take participants and the courts from where they are when the inquiry is begun with the first notice to the date on which the inquiry can start. If done properly, it should mean that once the inquiry begins, it is: properly focused with participants sharing a common understanding of its scope; the sheriff will have given orders to ensure it will be conducted efficiently; and, evidence is ready to be presented to the inquiry in the manner ordered by the sheriff. This purpose is therefore set out at rule 3.6. These purposes are tied back to both the inquiry principles and to the examples of the sheriff's powers given.

58. Rule 3.7 places a duty on all participants to lodge a brief note, 7 days before the preliminary hearing, setting out various information. After that, the function and scope of individual preliminary hearings and any steps which participants must take will be a matter for the sheriff's orders.

59. The tension expressed by rule 3.7 is:

- that on one hand participants should be providing information which assists the sheriff in discharging the purpose of a preliminary hearing under rule 3.6, but
- on the other hand we don't want to impose burdens on the participants which will be difficult for them (and in particular for the procurator fiscal) to discharge.

To impose this duty upon participants may have the inadvertent side effect of delaying the point at which the procurator fiscal prepares the section 15 notice and begins proceedings.

60. For that reason, the list at rule 3.7 is framed in a reasonably circumspect manner – “*persons whom it is considered might be led as witnesses*”, etc – to reflect the reality that, particularly in a complex inquiry, participants' preparation might not be further advanced than that. It should be stressed at rule 3.7 is not a disclosure rule; it does not compel the participants to exchange evidence. Rather, it is concerned with making sure the issues are focussed for the court before the first preliminary hearing takes place. It is designed to assist the sheriff to focus the issues and make informed decisions about how to exercise the inquiry management powers to move the process forward. This rule must be understood in the wider context of the Crown's general disclosure obligations: 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.

61. Rule 3.8 sets out the matters which a sheriff must consider at a preliminary hearing, with a view to achieving the purpose set out at rule 3.6. Again, there is a direct read-through from the inquiry principles, to the sheriff's powers and to these provisions. In particular the rules, at 3.8(2)(e)(i) to (vii), refer to the 'toolbox' of evidence-related powers given to the sheriff by part 4 of the rules. This indicates that the preliminary hearings give the sheriff an essentially authorial role in crafting a timetable and evidential approach for the inquiry.

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

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

#### **Part 4 – evidence**

62. This part is positioned before part 5 ('the inquiry') since it is intended that most of the evidential matters covered by part 4 – the agreement of matters, the sheriff's orders about expert evidence, any vulnerable witness applications – ought properly to have been completed before the inquiry starts.

#### *Witnesses and productions*

63. Rules 4.1 and 4.3 are standard provisions in any set of rules requiring witnesses to be compelled to appear and be put on oath or affirmation.

64. Rule 4.2 introduces schedule 5, which contains the 'mini-code' for the recovery of evidence.

65. Rule 4.7 introduces schedule 6, which contains the standard provisions required in all sets of court rules to implement the Vulnerable Witnesses (Scotland) Act 2004.

66. Rules 4.4 and 4.5 concern the lodging of productions and lists of witnesses. Both must be done "*by a date ordered by the sheriff*". This links back to the requirement in rule 3.8(2)(e)(ii) on the sheriff to set out a timetable.

67. Rule 4.6(1) contains a general order-making power concerning the recording of evidence.

#### *Agreeing evidence*

68. The application and operation of rules 4.8, 4.9 and 4.10 are inquiry-tailored adaptations of sections 256 to 258 of the Criminal Procedure (Scotland) Act 1995.

69. Rule 4.8 contains a mechanism which participants may use, at any point, to agree evidence in advance of an inquiry starting. It does not require the sheriff to make any

order to bring it into effect. Similarly rule 4.9 applies to all participants in the entire period leading up to the start of the inquiry, without the sheriff making any order. It imposes a strong duty on the parties to agree evidence which is unlikely to be disputed. Given that one of the purposes of the preliminary hearings is to “*identify issues which are in dispute*”, the sheriff is required to monitor participants’ progress with this at preliminary hearings by rule 3.8(2)(e)(iv).

70. Rule 4.9(4) contains a list of matters particularly relevant to the circumstances of an inquiry, which participants are put under a special duty to try to agree.

71. Rule 4.10 contains a mechanism for a participant to require other participants to admit or dispute a particular fact or document, considered to be unlikely to be disputed at an inquiry. This rule and this mechanism, only apply where the sheriff orders that “*notices of uncontroversial evidence must be lodged by a particular date*”. This is considered to be an appropriate way of making provision which may not be required in every inquiry, but which would have an important place in many, particularly the most complex. It effectively gives the sheriff a tool to use, backed up by a considered set of rules. The sheriff does not need to set out anything particularly complex in an order to use this mechanism in an inquiry – the order simply has to identify the date by which such notices must be lodged, and the whole rule comes into effect for that particular inquiry.

72. Rule 4.11 contains the mechanism for requiring witnesses to give their evidence-in-chief by way of witness statement. We have provided two drafts of rule 4.11(1) which differ in emphasis. The question is whether witness statements should be a default, which the sheriff can order not to apply, or whether the converse presumption should apply.

73. It is a question of whether participants should have to argue in favour of witness statements in circumstances where they are particularly appropriate, or whether participants should be identifying witnesses whose evidence is not, for whatever reason, appropriately given by witness statement.

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

*Expert evidence*

74. Rules 4.12 to 4.16 contain an innovative code governing the evidence of expert witnesses, with most provisions being the first of their type in the Scottish courts. Many have their origins in similar provisions of the English and Welsh Civil Procedure Rules, or the Practice Directions which underpin them.

75. Rule 4.12(1), (2) and (3) set out what an expert witness is and must do for the purposes of these rules. Their duty to the inquiry (rather than the person instructing them) is set out, and the scope of their evidence is limited to “*matters which are*



*reasonably required to further the purpose of the inquiry*". This is in accordance with the inquisitorial nature of an inquiry.

76. Rule 4.12(4) is an important rule which facilitates the effective operation of the other rules in this part. It requires early notification of an intention to instruct an expert witness by any participant. This is required if participants are to be able to meaningfully use the provisions in rule 4.14 (to ask questions of a procurator fiscal's expert) or if the sheriff is to meaningfully exercise the powers in rules 4.13 (expert witnesses' statements), 4.15 (single joint witnesses) or 4.16 (concurrent evidence). It is also needed to allow the sheriff to exercise the power to limit a witness's evidence.
77. Rule 4.13 provides for a presumption that the evidence-in-chief of an expert witness will be given by witness statement. The witness statement will incorporate the expert report.
78. Rule 4.14 is a special provision that applies when the procurator fiscal lodges the witness statement of an expert witness. It enables other participants to ask questions of that witness for clarification purposes and requires the procurator fiscal to lodge the expert's answers to those questions. It is hoped that this mechanism, combined with the procurator fiscal having given early notice of the broad terms of the instruction under rule 4.12(4), might reduce the unnecessary instruction of alternative experts. This would assist in focusing the issues at an inquiry or promoting the agreement of evidence. It has its origins in a similar provision in English and Welsh procedure under Civil Procedure Rule 35.6, which allows any party to put questions to another party's expert.
79. Rules 4.15 and 4.16 use a similar mechanism to rule 4.10 (notices of uncontroversial evidence): they only come into effect where the sheriff orders their application by setting dates in terms of each rule. They are both tools which allow the sheriff to direct that evidence should be given in a particular way. Rule 4.15 contains provision about single joint experts, and rule 4.16 contains provision about concurrent evidence, or 'hot-tubbing'.

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

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

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

## **Part 5 – the inquiry**

80. Part 5 is short. The thinking behind such direct, sparse provision is that, if the sheriff has properly conducted the preliminary hearings to focus the issues and make orders about the evidence, then the sheriff's understanding of the inquiry will be such that the sheriff alone is in a position to make orders about, for example, the order in which evidence should be presented. This, combined with the breadth of the sheriff's powers in rule 2.5, make any detailed provision about inquiry procedure unnecessary.

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

#### **Part 6 – the sheriff’s determination**

81. It was a recommendation of the Cullen Report (at paragraph 8.7) that there should be a standard form for the sheriff’s determination. In their response to the Bill, the Sheriffs Principal expressed some reservations about this; they stated, *“The circumstances in which an inquiry may be held are many and varied, and we do not see an additional benefit in being prescriptive in requiring a standard form of determination as suggested.”* However, we do not think that the skeleton structure proposed is overly prescriptive and, in any event, the rules provide that where a form is prescribed it can be varied, we therefore think this provision should remain. Form 6.1, prescribed for this purpose can be found in schedule 3.

***Consultation question 16 do you have any comments or suggestions regarding the sheriff’s style determination, Form 6.1?***

#### **Part 7 – further inquiry proceedings**

82. The Act contains, for the first time, provisions allowing a completed inquiry to be re-opened or restarted (see section 32 of the Act). This part contains the rule required to support this.

#### **Schedule 1 – applications**

83. This schedule provides for a motion procedure in inquiries and is modelled on the procedure in the Sheriff Appeal Court and in Bankruptcy proceedings. It is required to facilitate the many other parts of the rules where participants (and non-participants) must ask the court for something in terms of the rules.

#### **Schedule 2 – intimation**

84. This schedule contains a detailed code for the intimation of documents on other parties. It sets out when intimation has to take place and how. These rules, and in particular the complex provision on international service which is largely now governed by EU law and international agreements, take a broadly standard form across rules of court.

#### **Schedule 3 – forms**

85. Each form is numbered and set out in schedule 3.

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

#### **Schedule 4 – miscellaneous and general matters**

86. This schedule contains some miscellaneous matters with no obvious home in the chronological parts of the rules – parts 3 to 7.

87. Paragraph 1 concerns lodging and requires, wherever the rules require something to be lodged, it to be sent to the sheriff clerk. Para 2(1) of schedule 2 requires intimation when something is lodged.
88. Paragraph 2 is the standard provision on live links in the courtroom.
89. Paragraphs 3 to 7 are the standard provisions on reporting restrictions in the courts.
90. Paragraphs 8 and 9 prescribe the standard forms of oath and affirmation.
91. Paragraphs 10 to 14 are the standard provisions on interventions by the Scottish Commission on Human Rights and the Commission on Equality and Human Rights.
92. Paragraphs 15 to 18 make detailed provision for the appointment of lay representatives and supporters.

#### **Schedule 5 – recovery of evidence**

93. This schedule contains an adaptation, tailored to inquiry procedure, of the recovery of evidence provisions familiar from chapter 28 of the Ordinary Cause Rules.

#### **Schedule 6 – vulnerable witnesses**

94. This schedule contains a code for applications and orders made under the Vulnerable Witnesses (Scotland) Act 2004. These provisions are now standard across the different sets of court rules.

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

## **SECTION 4 NEXT STEPS**

### **Implementation timetable**

Following the consultation period, responses will be analysed and a revised set of rules will be considered at the 20 March 2017 meeting of the SCJC, taking account of the responses received.

All responses received will be published on the SCJC website unless the respondent has asked their response to be treated as confidential. The SCJC will publish a report on this consultation along with approved rules in due course.

## **ANNEX A - List of Consultees**

### **Organisations**

Summary Sheriffs

Judicial Hub

SLAB

Scottish Ambulance Service

Perth and Kinross Council

East Lothian Council

Police Investigations and Review Commissioner

Forum of Scottish Claims Managers

STUC

Glasgow City Community Health Partnership

Health and Safety Executive

Scotland's Campaign against irresponsible Drivers (SCID)

Aviva

Scottish Prison Service

Zurich

NHS National Services Scotland

Care Inspectorate

Forum of Insurance Lawyers (Scotland)

BLM LLP

West Lothian Council

Equality and Human Rights Commission

The Scottish Human Rights Commission

RMT

Victim Support Scotland

Association of Personal Injury Lawyers

The Medical and Dental Defence Union of Scotland

Argyll and Bute Council

Scottish Public Services Ombudsman

SCOLAG

Action against Medical Accidents (AvMA)

NFU Mutual

Pinsent Masons

UNITE

Mental Welfare Commission for Scotland

Faculty of Advocates

South Lanarkshire Council

DAC Beachcroft Scotland

Morton Fraser

Network Rail

The Law Society

The Sheriffs Principal

Royal College of Psychiatrists

Scottish Courts and Tribunals Service

Glasgow City Council

Society of Solicitor Advocates

NHS Grampian

Peacock Johnston

Deaths Abroad-You are not alone (DAYNA)

The Sheriffs' Association

Office of the Advocate General

**Individuals**

Lord Cullen

Sheriff Crowe

Hugh Cowan

Donald Morris

Julie Love

Bob Doris MSP

James Jones