

REPORT

To: CORPORATE SERVICES COMMITTEE	Subject: RESPONSE TO CONSULTATION PAPER ON INQUIRIES (SCOTLAND) RULES 2007
From: EXECUTIVE DIRECTOR OF CORPORATE SERVICES	
Date: 24 July 2007	Ref: ES

1. INTRODUCTION

- 1.1. The purpose of this report is to seek homologation by Committee for the Council's response to the Scottish Executive Consultation Paper on the Inquiries (Scotland) Rules 2007.
- 1.2. The introduction of Inquiry Rules is welcomed by local authorities as it has the potential to assist in the delivery of quality conclusions and recommendations quickly and at reasonable cost.

2. BACKGROUND

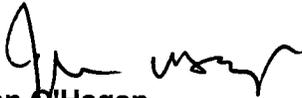
- 2.1. The Consultation on Inquiries (Scotland) Rules set out draft rules of procedure to be adopted at Inquiries held in Scotland which are wholly or primarily concerned with a Scottish matter and which are held under the Inquiries Act 2005.
- 2.2. The Inquiries Act 2005 which came into force on 7 June 2007 was intended to modernise the law on statutory inquiries and create a comprehensive new statutory framework for Inquiries set up by Ministers to look into matters of public concern.
- 2.3. The Act codifies best practice from past Inquiries. For the first time, all the stages of the Inquiry process are laid down in statute. However the Act does not stipulate when an Inquiry might be set up. Each decision will depend on the particular circumstances and what sort of other investigation procedures are available. The Act is intended to ensure that when Inquiries are needed they can be conducted effectively.
- 2.4. The Act will be used only for Inquiries that need to have statutory powers and there will still be a place for non statutory Inquiries.
- 2.5. The application of the procedural rules is subject to the provisions of the Inquiries Act 2005 and is subject to a requirement for the Chairman to act with fairness and with regard to the need to avoid unnecessary costs.
- 2.6. The consultation on the Inquiries (Scotland) Rules is part of the process of implementation of the Inquiries Act 2005. The closing date for consultation was 15 June 2007.

3. **COUNCIL RESPONSE**

- 3.1. Attached is Appendix 1 which contains the response issued on behalf of the Council. It reflects experience in dealing with such issues on the Council's behalf and offers comment to assist in the final version of the Rules which will be made by the Scottish Ministers.

4. **RECOMMENDATION**

- 4.1. That the Committee homologate the response made as part of the consultation process.



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For further information on this report please contact Elizabeth Smith, Principal Solicitor, on (01698) 302290.

APPENDIX 1

Proposals and North Lanarkshire Council's Responses

Rule 2: Interpretation

Rule 2 sets out the definitions of various terms used throughout the Draft Rules. It is envisaged that all inquiries will have a secretary and a solicitor, but it is possible that some smaller inquiries will not need Counsel and members of the inquiry panel will undertake the questioning of witnesses (instead of simply asking questions which are additional to those of Counsel).

Council's Response to Rule 2

This is in line with the moves generally within the Scottish Executive to limit formality, speed up the process and reduce costs. The definitions are fairly straight forward. The secretary to the inquiry is an administrative appointment. The Counsel to the inquiry and the solicitor to the inquiry would be appointed by the Chairman to act for the inquiry.

Rule 3: Documents

Rule 3 makes provision for documents being given or sent either to the inquiry or to any person involved in any way with the inquiry.

Council's Response

No comment other than there is provision for electronic service of documents, subject to criteria.

Rule 4: Core Participants

It has become the practice of inquiries in recent years to identify key participants who are recognised as having a central interest or involvement with the subject matter of the inquiry. These participants, sometimes known as "interested parties", have been afforded an elevated status within the inquiry that may include being afforded legal representation throughout the proceedings or having the right for their legal representatives to question witnesses.

Rule 4 outlines the criteria for the Chairman to consider when awarding "core participant" status. The term "core participant" is used in the Draft Rules since it both reflects the status more accurately and ensures that any confusion with the definition of "interested party" in the Act is avoided.

The key difference between a core participant and an individual witness is that a witness, and the witness's legal representative (if the witness has one), will only be involved for matters relating to that witness's evidence. Core participants and their legal representatives are entitled, subject to directions by the Chairman, to be involved throughout an inquiry. A core participant may be permitted to be "active" throughout all or for an extended part of the inquiry. The recognised legal representative of a core participant may apply to the Chairman to put questions to witnesses (rule 9(4)) and make opening and closing statements at oral hearings (rule 10) and may see reports ahead of full publication (rule 15).

It will be possible for a core participant to lose that status on a date to be specified by the Chairman in writing if, for example, it transpires that a party has less involvement or interest than originally envisaged (rule 4(3)).

Council's Response

This mirrors the Planning Inquiry practices. It would afford such parties full participation, with concomitant responsibilities.

Rules 5, 6 and 7: Recognised Legal Representative

Inquiries are not adversarial processes. Legal representation can, however, play an important part in helping the inquiry to establish the facts and to ensure that witnesses and core participants are treated fairly.

- Rule 5(1) *allows* core participants and witnesses to have a recognised legal representative for the purposes of the inquiry. The role which a legal representative can play will be at the discretion of the Chairman and, in the case of oral hearings, will also be subject to the procedures set out in rule 9. Recognition of a legal representative by the inquiry does not mean that the cost of the legal representation will be paid for out of public funds.
- Rule 6 *requires* the Chairman to direct joint representation by a single recognised legal representative where he/she considers the interests of the core participants are closely aligned and he/she may designate a qualified lawyer for that purpose. If core participants do not agree on the identity of the appointee, the Chairman may designate a representative who in his/her opinion has sufficient knowledge and experience to act for the core participants in question (rule 6(4)). This would be the case, for example, for members of an action or victims' group. Joint representation enables an inquiry to proceed more swiftly, particularly in relation to oral proceedings where a single counsel can put questions on behalf of several core participants. It also reduces costs.

Council's Response

This is in line with evolving practice in Planning Inquiries.

- Rule 7 makes it clear that a legal team may be appointed to assist the recognised legal representative in the discharge of his/her functions. Members of the legal team will be permitted to attend the inquiry hearings and will be allowed to act in place of the "principal" recognised legal representative.

Rule 8: Requests for Evidence

Rule 8 requires any request for written statements or documents to be sent in writing to the person who will give evidence. The aim is to ensure that anyone giving oral evidence at an inquiry will have already made a written statement. The process is intended to provide background information for the inquiry panel and to assist in identifying the main points of contention which the panel may wish to explore further.

Council's Response

The Consultation paper specifically states that rule 8 does not prevent the inquiry from providing assistance in the making of a written statement and this might, for example, include employing teams of solicitors to take statements. Neither however does rule 8 suggest that such assistance be given. There would be likely to be a cost issue for the inquiry.

Rule 9: Oral Evidence

The inquiry panel will decide, based on the written statements and other evidence, who will be called to provide further evidence at an oral hearing. This rule sets out the procedure to be followed in respect of questioning.

Usually only Counsel to the inquiry and a member of the inquiry panel will examine a witness (rule 9(1)). If, however, a witness is legally represented, the Chairman may direct the witness's own legal representative to examine that witness (rule 9(2)). This also applies to core participants.

There are two other situations in which further questioning may be permitted. First, if witness A's evidence directly relates to evidence being given by witness B, then the legal representative of witness B may apply to the Chairman for permission to examine witness A where neither are core participants (rule 9(3)). This is intended to address the situation where the evidence of witness A may conflict with that of witness B and, as a matter of fairness, the legal representatives of both witnesses should have the opportunity to cross-examine to test the evidence.

Second, the recognised legal representative of a core participant may apply to the Chairman for permission to examine a witness (rule 9(4)).

In both these cases the legal representative must state the issues of fact in respect of which a witness is to be examined and whether the examination will raise new issues or, if not, why the examination should be allowed (rule 9(5)). The purpose of requiring legal representatives to outline the areas they intend to raise is to assist the Chairman in managing the time spent on questioning.

Council's Response

The issues of fairness covered by Rule 9 give the Chairman considerable discretion.

Rule 10: Opening and Closing Statements

Recognised legal representatives of core participants (or the core participant themselves, where not represented, though this will probably be rare) are permitted to make opening and closing statements at the beginning and end of any oral hearings. The form or length of any statement will be at the discretion of the Chairman.

Council's Response

No comment.

Rule 11: Disclosure of Potentially Restricted Evidence

Rule 11 sets out the procedure to be followed in the event the inquiry panel wish to consult people from outside the inquiry team in order to come to a decision about whether evidence before the inquiry should potentially be subject to a restriction notice or order under section 19(2) of the Act or as a result of a public interest immunity application.

Council's Response

The Chairman has considerable discretion, but must afford the person providing the evidence or the person making the application to restrict, (where they are not the same person), the opportunity of making representations prior to making his decision. There is an actionable duty of confidentiality where potential evidence has been disclosed.

Rules 12, 13 and 14: Warning Letters

Inquiry practice where an individual was to be criticised by an inquiry, has been to give notification of the allegations to be made and the evidence purportedly supporting the allegations. These warning letters became commonly known as "Salmon letters". Some Chairmen have in the past provided advance warning of emerging conclusions by sending letters to individuals. Other inquiries have adopted a process (known as "Maxwellisation") which involves showing specific extracts from the final report of the inquiry to relevant witnesses.

These practices were designed to safeguard the interests of witnesses and parties to the inquiry. However they have been criticised for causing inquiries to become too adversarial. Some commentators have argued that too many warning letters have been sent, sometimes unnecessarily where the level of criticism was low.

Rules 12 to 14 aim to preserve the underlying objective of ensuring fairness, but to avoid a costly, adversarial process.

Rule 12 leaves it the judgement and discretion of the Chairman as to what he/she considers constitutes criticism or merits a warning letter. here, however, criticism of a person is significant and explicit, and will be contained in an interim or final report, the Chairman **must** have sent a warning to that person before the report is issued and given them an opportunity to respond (rule 12(7)).

Rule 13 makes it clear that the contents of a warning letter are to be treated as subject to an obligation of confidence with reference to section 19 of the Act, section 23 (risk of damage to the economy), or resulting from a determination of public interest.

Rule 14 makes it clear that the fact that a warning letter has, or has not, been sent to any party before a determination of the weight to be accorded to any evidence is to be disregarded by the inquiry panel.

Council's Response

No comment.

Rule 15: Reports

Rule 15(1) provides that after delivery of the report to the Scottish Ministers, but before publication, the Chairman must provide copies to core participants and their legal representatives. It has become recent practice for core participants to be given advanced notice of the final report. This may be of no more than a matter of hours, but it affords those with the closest interest in the outcome of the inquiry the opportunity to prepare for any public reaction to the findings of the report. It is left to the discretion of the Chairman how much advance notice is given.

Rule 15(2) and (3) contain safeguards to prevent the leaking of contents of the report and any breach of the obligation of confidence to the Chairman is actionable at the instance of the Chairman (rule 15(4)).

Council's Response

No comment.

Rule 16: Records Management

Rule 16 places a duty on the Chairman to ensure that there is a comprehensive and well-ordered record of the inquiry.

Council's Response

The rule is as stated above, but the consultation paper expands this to state, "the record will consist of original documents given to the inquiry, copies of any original documents that the inquiry has returned to their owners, as well as records generated by the inquiry (such as the transcript). A comprehensive record does not mean that every document must be retained. For example, some housekeeping or administrative records would probably not be kept, since they would be of minimal use or interest. The inquiry must assess which records should be selected for permanent preservation or for review after a stated period.

At the end of the inquiry, the Chairman must transfer the record of the inquiry to the Keeper of the Records of Scotland for preservation in the National Archives of Scotland (rule 16(2)).

Costs of Inquiries

Rules 17 to 28 relate to the assessment of costs. It should be borne in mind that, under section 17(3) of the Act, the Chairman is under a duty, in making any decision as to the procedure or conduct of an inquiry, to act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

Rule 17: Application for an Award under Section 40(1) of the Act

Section 40(1) of the Act enables the Chairman to make awards to participants for expenses (including the cost of legal representation) or compensation for loss of time. Rule 17 provides for applications for an award to be made in writing to the Chairman. There are three sorts of applications for awards:

1. Applications for expenses to be incurred (for example, a request that the costs of legal representation will be met);
2. Applications where expenses have already been incurred (for example, travel or legal expenses); and
3. Applications for compensation for loss of time (for example, where someone seeks compensation for lost wages for the time they spent attending the inquiry).

Rule 17(2) sets out the information that must be provided where an application relates to legal representation.

Council's Response

These are fairly standard.

Rule 18: Criteria for Determination of Applications

All awards are considered by the Chairman in the context of general assessment criteria, which focus on the financial resources of the applicant and the public interest in the expenses being paid (rule 18(2)). The power to make an award is, however, subject to such conditions or qualifications as may be determined by the Minister under section 40(4) of the Act.

Council's Response

The consultation paper states that the above assessment criteria "reflect the basis on which the UK Government currently decides whether to fund legal representation. This was originally set out in an answer to a Parliamentary Question given by the then Attorney General on 29 January 1990:

"In general, the Government accept the need to pay out of public funds the reasonable costs of any necessary party to the inquiry who would be prejudiced in seeking representation were he in any doubt about funds becoming available. The Government do not accept that the costs of substantial bodies should be met from public funds unless there are special circumstances."

So, for example, the legal costs of bereaved families whose loved ones were killed in an incident which was the cause of the inquiry are always likely to be paid from public funds, as they were in the case of the Dunblane inquiry. But it would not be in the public interest to fund an organisation such as a large commercial concern if that participant had substantial funds available to meet those costs or perhaps had its own legal advisers. Equally, it would not be in the public interest to fund legal representation for a witness who would not be criticised during an inquiry or in the final report and who was merely providing background evidence, though such a witness may be entitled to compensation for loss of time or other expenses.

Whereas the Attorney General's advice applied only in respect of awards for legal representation, the general assessment criteria must be applied when determining all awards."

The section quoted above would appear to be the basis of guidance for Chairmen.

Rule 19: Determination Conditions for Awards

The Chairman must first decide that the initial application for an award meets the general criteria. If he/she decides that an award should be made, his/her initial determination will set conditions for subsequent applications. There may be a number of different applications for different types of award and rule 19 sets out conditions that the Chairman must set when determining that an award should be made. These conditions help the inquiry control costs and make sure that it is clear at the outset what costs will be awarded.

Council's Response

These are fairly standard. Subject to that, the Chairman has considerable discretion.

Rule 20: Notification or Referral following Determination

Rule 20 sets out the steps to be taken after the Chairman has determined that an award should be made. Where the application relates to amounts which are to be incurred, the Chairman must send the determination (with the relevant conditions included as under rule 19) to the applicant and his/her legal representative, if any.

Where the application is in respect of amounts which have already been incurred, he/she must refer the application to the solicitor to the inquiry for an assessment of the amount of the award as soon as is practicable.

Council's Response

No comment.

Rule 21: Assessment of Award by the Solicitor to the Inquiry

It is the responsibility of the solicitor to the inquiry to make an initial assessment of an award within 21 days of the referral of the application by the Chairman (rule 21(1)). Any initial or final assessment made by the solicitor to the inquiry must be in writing and must be sent to the applicant and his/her lawyer, if he/she has one (rule 21(5)). Where the solicitor to the inquiry determines that the full amount applied for by the applicant should be paid, then the initial assessment becomes the final assessment (rule 21(2)). Rule 28 sets out the arrangements for making an award.

Where the applicant disagrees with the initial assessment of the award, or any part of it, then he/she must notify the solicitor to the inquiry in writing within 21 days of the date of service of the initial assessment (rule 21(3)). If the applicant does not do so within 21 days of the date of service of the initial assessment of the award, the solicitor to the inquiry must issue the final assessment (rule 21(4)).

Council's Response

No comment.

Rule 22: Matters to be Taken into Account for the Initial Assessment

Rule 22 sets out matters which the solicitor to the inquiry must have regard to in assessing applications for compensation for loss of time and in respect of other expenses.

Amounts claimed which do not comply with conditions notified under rule 19 will be excluded from the assessment (rule 22(3)).

Council's Response

No comment.

Rule 23: Procedure where Initial Assessment is not agreed to in Relation to an Award other than for Legal Representation

Under rule 23, where the applicant is contesting the initial assessment of the amount of the award and has notified the solicitor to the inquiry under rule 21(3), but the application does not relate to legal representation, the solicitor must reconsider the initial assessment of the amount of the award and then issue his/her final assessment within a reasonable time.

Council's Response to Rule 2

No comment.

Rule 24: Dispute Procedure in Respect of Initial Assessment in Relation to an Award for Legal Representation

Where the applicant is contesting the initial assessment of the amount of the award for legal representation and has notified the solicitor to the inquiry under rule 21(3), the solicitor must set out the details of the points of dispute in writing within 21 days of receipt of the notification of disagreement (rule 24(2)). These details must identify the items which the solicitor objects to, state the nature of the objection in each case, and propose an alternative amount to be allowed for each (rule 24(3)).

The applicant must then in turn provide a response to the points of dispute within 21 days of them being served on him/her (rule 24(4) and (5)). The timescales referred to in this rule may be extended by agreement between the solicitor to the inquiry and the applicant.

Council's Response

No comment.

Rules 25 and 26: Review by the Auditor of the Court of Session of the Amount of an Award for Legal Representation

Rule 25 makes provision for review of the solicitor to the inquiry's assessment of the amount of an award in respect of legal representation. This review procedure is only available in relation to awards for legal representation. Rule 25 requires the Chairman of the inquiry to either refer the assessment to the costs assessor, who is the Auditor of the Court of Session, along with all relevant evidence and documentation or, alternatively, if he/she considers that the continued objections are without foundation, to direct the solicitor to the inquiry to issue the final assessment of the award. In that latter case, a dissatisfied applicant will still have the option of judicial review.

Where the assessment of the award is referred to the Auditor, he/she must hold a review hearing within a reasonable time following referral and inform the solicitor to the inquiry and the applicant of the date and location of the hearing in writing at least 14 days before the date of the hearing (rule 25(2) and (3)). The applicant, and his/her qualified lawyer (if any), and the solicitor to the inquiry will be entitled to be heard at the review hearing - any other party may only be heard with the permission of the Auditor (rule 25(4)).

After the review hearing, the Auditor must, under rule 26, send the applicant and the Chairman of the inquiry his/her assessment of the amount of the award as soon as practicable. This then becomes the final assessment of the amount of the award.

Council's Response

No comment.

Rule 27: Agreement prior to a Review Hearing

Rule 27 provides for the withdrawal of a referral of an assessment to the Auditor of the Court of Session where the solicitor to the inquiry and the applicant have agreed on the amount of the assessment. In a case where the referral is withdrawn, the solicitor to the inquiry must issue the final assessment as soon as practicable following the agreement with the applicant.

Council's Response

No comment.

Rule 28: Making an Award

The Chairman is responsible for making the award and for arranging for payment of the final assessment. If an award is not being reviewed by the Auditor of the Court of Session, the Chairman must arrange for payment of the award within 28 days of the final assessment being sent to the applicant (rule 28(2)). If the amount of the award has been reviewed, then, under rule 28(3), the Chairman must arrange for payment of the amount of the Auditor's final assessment within 28 days of service of the assessment under rule 26.

Council's Response

No comment.