

INQUIRY GUIDANCE QUESTIONING OF WITNESSES

INTRODUCTION

The approach taken by Sheku Bayoh Inquiry (“the Inquiry”) to the calling of witnesses, the leading of evidence and the questioning of witnesses will be informed by two overarching principles. First, the Inquiry is inquisitorial in nature, requiring an approach that differs from the conventional adversarial approach that is employed in the civil and criminal courts. Second, the test for receiving evidence and allowing lines of questioning will be whether doing so will assist the Inquiry to fulfil its terms of reference.

CALLING WITNESSES

Decisions as to whether an individual might be a potential witness from whom a statement should be taken, and which witnesses should be called to give evidence will be for the Inquiry; responsibility for those decisions will lie with senior counsel to the Inquiry. Senior counsel is willing to receive suggestions but the ultimate decisions in respect of these matters will be for senior counsel to the Inquiry.

LEADING EVIDENCE

Decisions as to what evidence should be led will be for counsel to the Inquiry.

QUESTIONING OF WITNESSES

General approach

The conduct and procedure of the Inquiry is provided for in section 17 of the Inquiries Act 2005, which allows a wide discretion to the chair. That discretion is subject to rule 9 of the Inquiry (Scotland) Rules 2007 (“the Rules”), which makes specific provision in relation to examining witnesses. Pursuant to rule 9, the Inquiry’s approach will be as follows.

1. **Witnesses will be examined by counsel to the Inquiry.** This reflects the statutory scheme; it is consistent with the approach of an inquisitorial inquiry; it makes for the efficient and fair running of evidence hearings; and it minimises the risk of undermining any restriction orders.

2. **The examination of the witnesses by counsel to the Inquiry will be guided by material provided to the core participants in the form of a chronology and list of issues.** Core participants have been afforded the opportunity to consider the chronology and list of issues and to suggest lines of inquiry. They may assume that the material in the chronology and list of issues will be covered in questions asked by counsel to the Inquiry; ordinarily, therefore, it should not be necessary for the legal representatives of core participants to propose lines of questioning in relation to that material.

3. **Core participants should submit proposed lines of questioning in writing via their legal representatives.**

PROPOSED LINES OF QUESTIONING

Such proposals, which will be considered by counsel to the Inquiry, must:

- a. be e-mailed to the Inquiry legal mailbox (legal@shekubayohinquiry.scot) using the subject line “Rule 9 Application – [NAME OF WITNESS PROPOSED TO BE QUESTIONED] – [NAME OF CORE PARTICIPANT].”

- b. have regard to the requirements of rule 9(5) of the Rules. The application should state:-
 - (i) the matters or issues in respect of which the witness is to be examined;
 - (ii) whether the examination will raise new matters or issues; or,
 - (iii) where no new matters or issues are likely to be raised, reasons why the examination should be permitted); and
- c. be submitted no later than **five working days** before the witness concerned is due to give evidence using the template to be found at Appendix A to this guidance. Proposals for each witness should be a maximum of 2 pages of A4.

In the event that agreement cannot be reached with counsel to the Inquiry on the proposed line of questioning and the relevant core participant insists on it, the core participant may ask for the proposal to be considered by the chair as an application under rule 9(4) of the Rules. Such requests should be submitted no later than **three working days** before the witness concerned is due to give evidence. The Inquiry will treat the proposal sent to counsel as the application to the Chair. Core participants will not be invited to submit a further application. As such, sufficient detail must be included to enable counsel to the Inquiry, or, when applicable, the Chair, to make their decision.

MATTERS ARISING DURING THE HEARINGS

There are certain exceptions to the requirement for prior notice:-

- i. where a witness, including a core participant, is being examined the Chair may direct that their recognised legal representative can examine the witness (rule 9(2);
- ii. Where a witness has been examined by counsel and their evidence relates directly to that of another witness, the witness to whom the evidence relates or their recognised legal representative can apply to the Chair to examine the witness (rule 9(3).
- iii. A core participant or their recognised legal representative may apply to the Chair for permission to examine any witness giving oral evidence (rule 9(4).

i. Applications under rule 9(2)

Where a witness, including a core participant, is being examined, after the witness has been questioned by counsel to the Inquiry and any legal representative of a core participant given permission to question the witness, the Chair will give an opportunity to the legal representative of the witness to apply in terms of rule 9(2) of the Rules to examine the witness. Such examination should be limited to issues such as:

- (i) clarification of evidence;
- (ii) addressing any perceived unfairness;
- (iii) addressing a matter which could not reasonably have been anticipated; or
- (iv) addressing particular matters in respect of which the legal representative considers that the witness has not given the best evidence they are able to give to assist the inquiry.

Any proposed examination on behalf of the legal representative should not go over all the ground covered in questioning by counsel to the Inquiry, nor should it be used to introduce new matters without permission. The legal representative should be in a position to explain to the chair the parameters of any proposed examination.

ii. Applications under rule 9(3)

Where a witness has been examined by counsel to the Inquiry or the Chair and the evidence of that witness relates directly to the evidence of another witness, the witness to whom the evidence relates or their recognised legal representative may apply to the chair for permission to examine that witness. In terms of rule 9(5) the application must state:-

- (a) the matters or issues in respect of which a witness is to be examined;
- (b) whether the examination will raise new matters or issues; or

(c) where no new matters or issues are likely to be raised, reasons why the examination should be permitted.

iii. Applications under rule 9(4)

Ordinarily rule 9(4) applications will be made in advance of the witness being called by the core participant or their recognised legal representative. There may be occasions, during the leading of evidence, when a matter arises that could not have been anticipated. In these circumstances core participants can apply to the Chair to ask for permission to examine the witness. In terms of rule 9(5) the application must state:-

(a) the matters or issues in respect of which a witness is to be examined;

(b) whether the examination will raise new matters or issues; or

(c) where no new matters or issues are likely to be raised, reasons why the examination should be permitted.

Should an application be required during the hearings the procedure is as follows:-

- after counsel to the Inquiry has finished examination of a witness, the Chair will ask the legal representatives of the core participants whether any of them consider that anything has arisen in the evidence of the witness that could not reasonably have been anticipated.
- If anyone indicates that they do, the Chair will ask counsel for that core participant, under reference to the transcript, to identify the material and to indicate what line of questioning they propose.
- The Chair will decide, based on what counsel identify, whether or not to allow the line of questioning. A short adjournment may be required in some instances.

Appendix A

Rule 9 Witness Question Application Form

Witness Name:

Name of Core Participant:

Date of Request:

Date of calling of witness:

1. Issues to be explored: *(please specify if these are new issues)*

2. Reason why questioning is appropriate and justified: **please provide sufficient detail**

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3. Please state any Inquiry Document IDs to be relied upon in support of your application.

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