

Compass Chambers



Fatal Accident Inquiries: How not to make fatal mistakes.

Elaine Russell, Advocate and Elaine Smith, Advocate



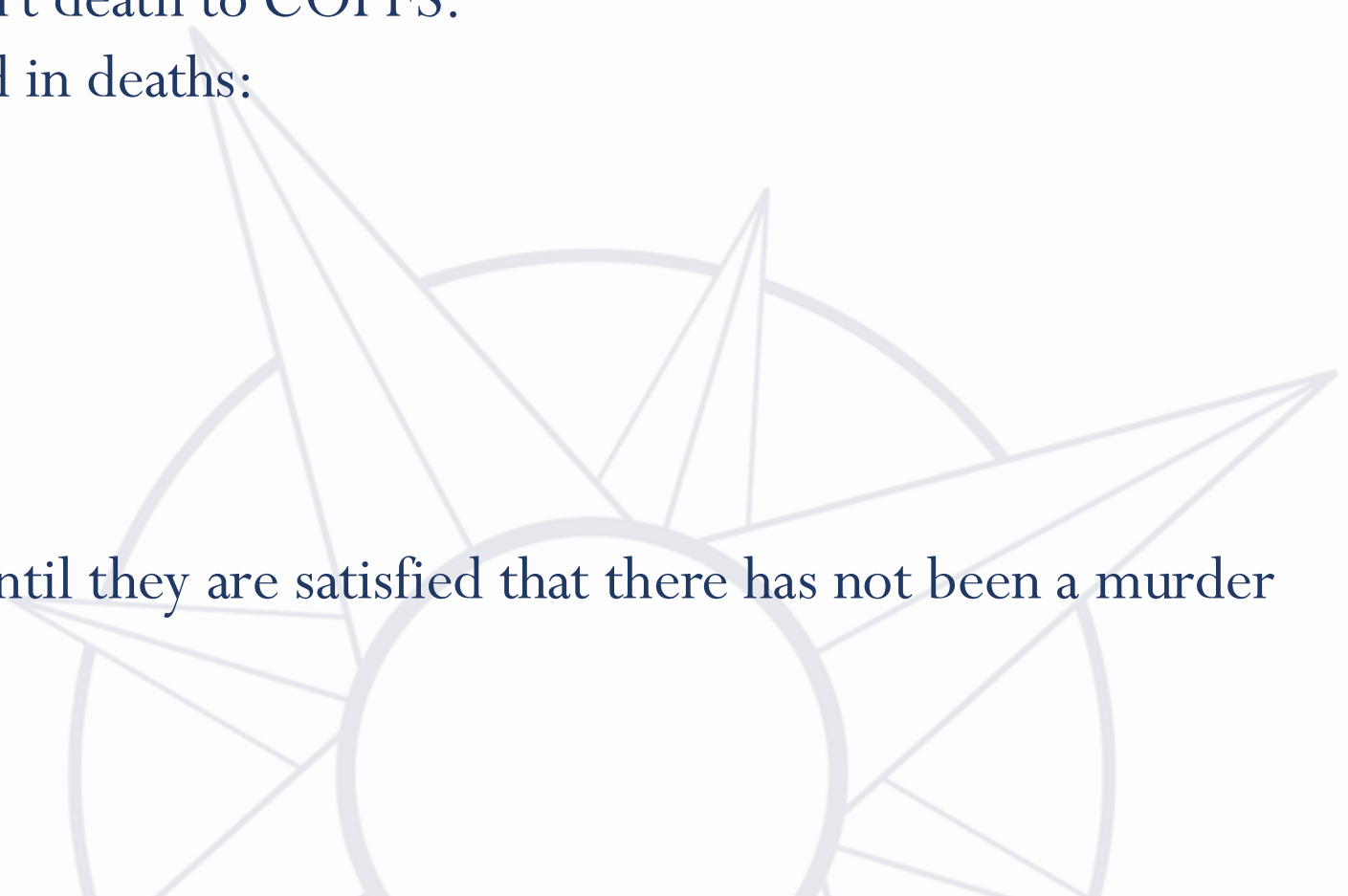
Introduction

- Death reporting and investigation
- Decisions – when are FAIs held?
- Family liaison charter
- Procedure
- Determination
- Judicial Reviews and recent news





Death reporting and investigation

- Lord Advocate has overall responsibility of investigating deaths in Scotland.
 - Medical professionals will report death to COPFS.
 - COPFS specialist units involved in deaths:
 - HSIU
 - RTFIU
 - CAAPD
 - CDU
 - Homicide
 - SFIU
 - CDIT
 - Police Scotland have primacy until they are satisfied that there has not been a murder / corporate homicide.
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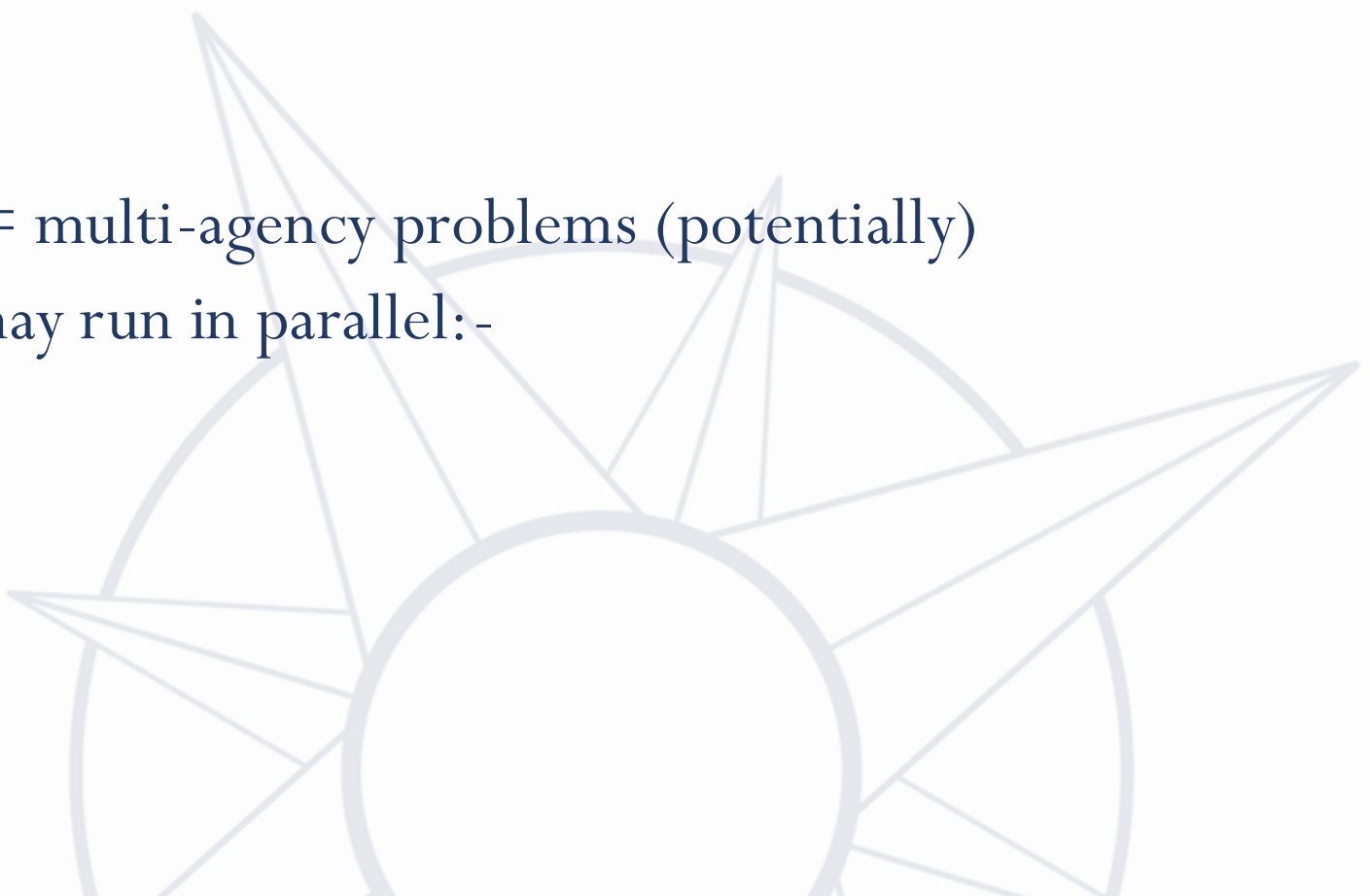
Death reporting and investigation

- Investigating agencies – Signatories to work-related deaths protocol:
 - PSoS
 - BTP
 - ORR
 - HSE
 - ONR
 - SFRS
 - MCA





Death reporting and investigation

- But there are more:-
 - Local authorities
 - SEPA
 - PIRC
 - Multi-agency investigations = multi-agency problems (potentially)
 - Other investigations which may run in parallel:-
 - HMICS
 - HMIPS
 - MAIB
 - AAIB
 - RAIB
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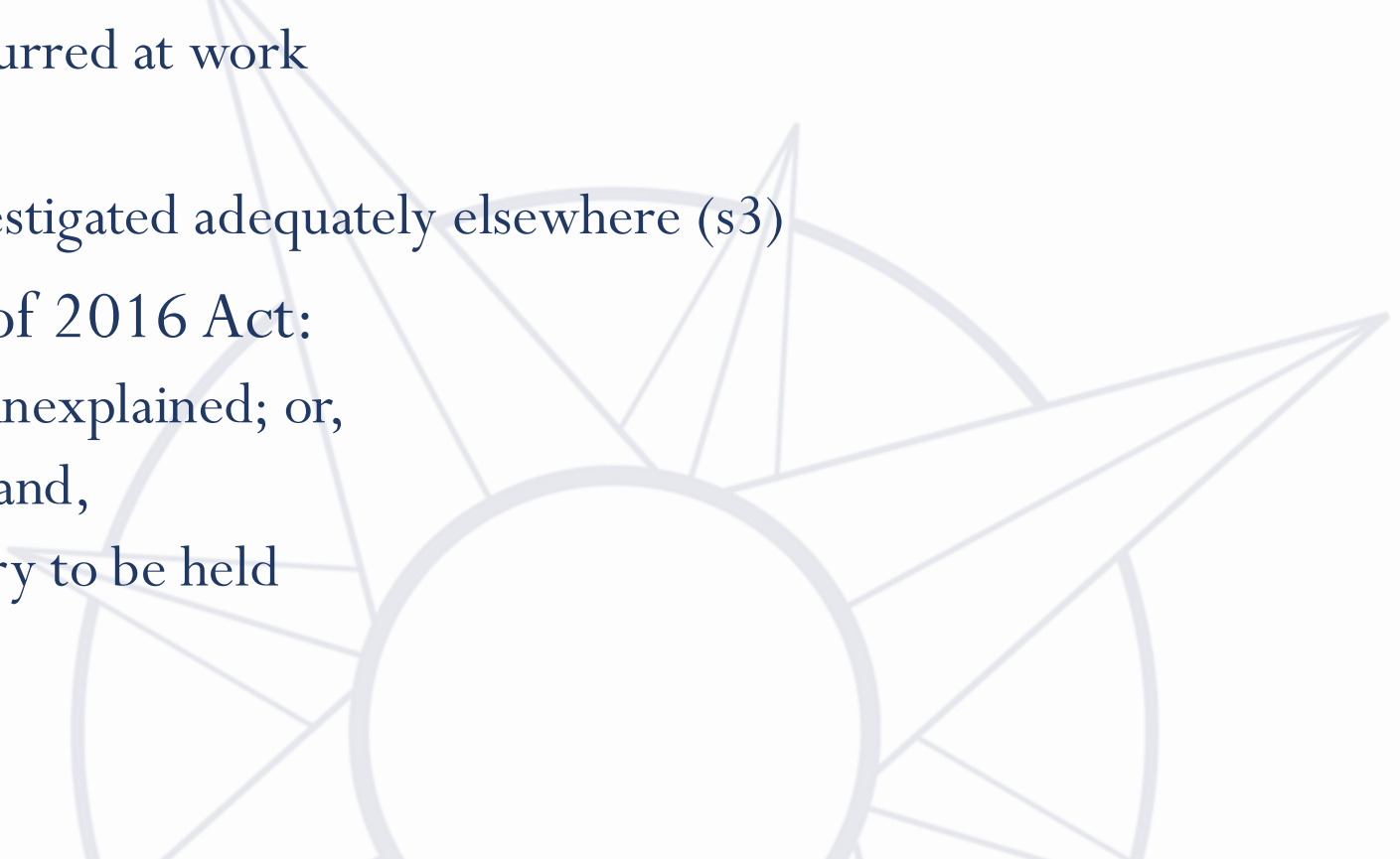
Death reporting and investigation – don't forget the experts

- Forensic pathologist for PM (potentially double doctor if ? over death)
 - Forensic Toxicology
 - Forensic Neuropathology
- Various scientists at SPA
- Independent experts





Decisions – when are FAIs held?

- Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016
 - Mandatory inquiries – s2 of 2016 Act:
 - Deaths in Scotland which occurred at work
 - Deaths in custody
 - Exception – where death investigated adequately elsewhere (s3)
 - Discretionary inquiries – s4 of 2016 Act:
 - Death sudden, suspicious or unexplained; or,
 - Gives rise to public concern; and,
 - In public interest for an inquiry to be held
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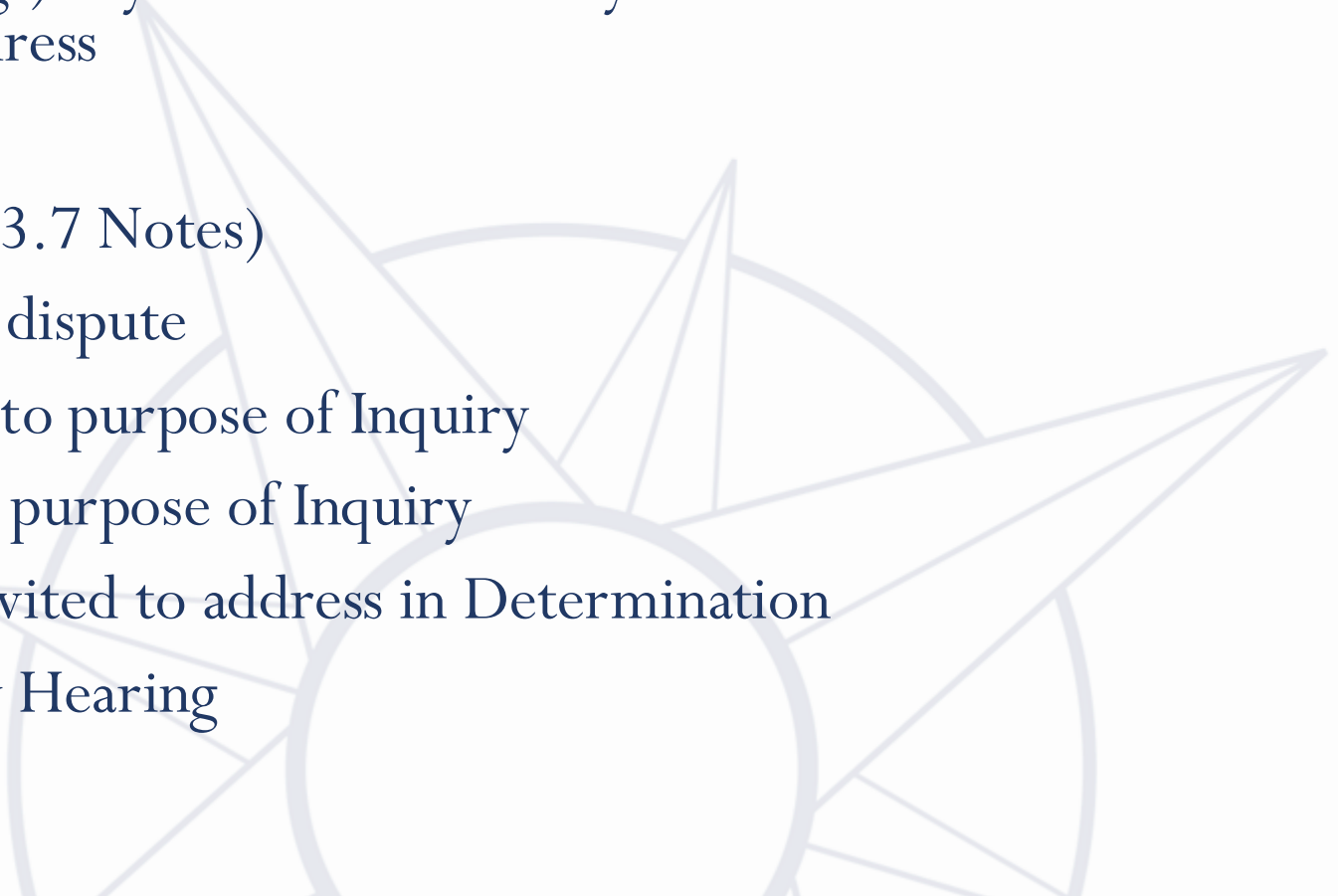


Family liaison charter

- Decisions taken by COPFS / ADs
- But, views of family should be taken into account where appropriate
- Communication and expectations set out in family liaison charter – applies to deaths post Sept 2016
- Makes commitments regarding communication – can be a useful tool to prompt response
- Decision not to prosecute – VRR
- Decision not to inquiry – no VRR
 - But, see para 6.8 of Family Liaison Charter for review process.
 - Also remember – decisions made by Crown can be judicially reviewed.
- At this point, ready to start the formal process...

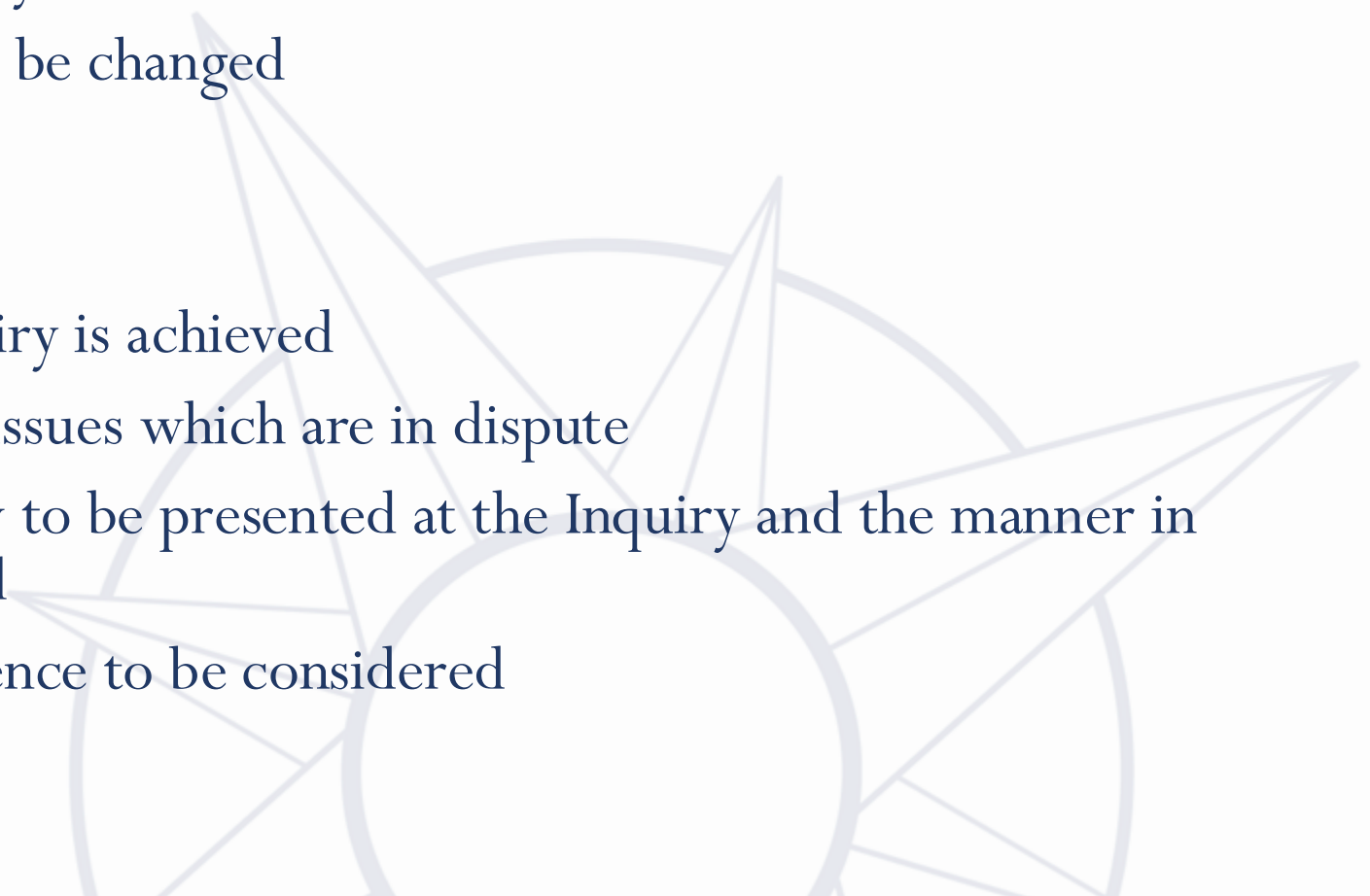


PROCEDURE: FAI Rules 2017

- Rule 3.1 First Notice (Form 3.1)
 - Must set out (amongst other things) any issues identified by the Crown which it is anticipated the Inquiry should address
 - Rules 3.7: Note to identify (Rule 3.7 Notes)
 - Matters considered likely to be in dispute
 - List of Productions and relevance to purpose of Inquiry
 - List of Witnesses and relevance to purpose of Inquiry
 - Matters which Sheriff might be invited to address in Determination
 - Lodge 7 days prior to Preliminary Hearing
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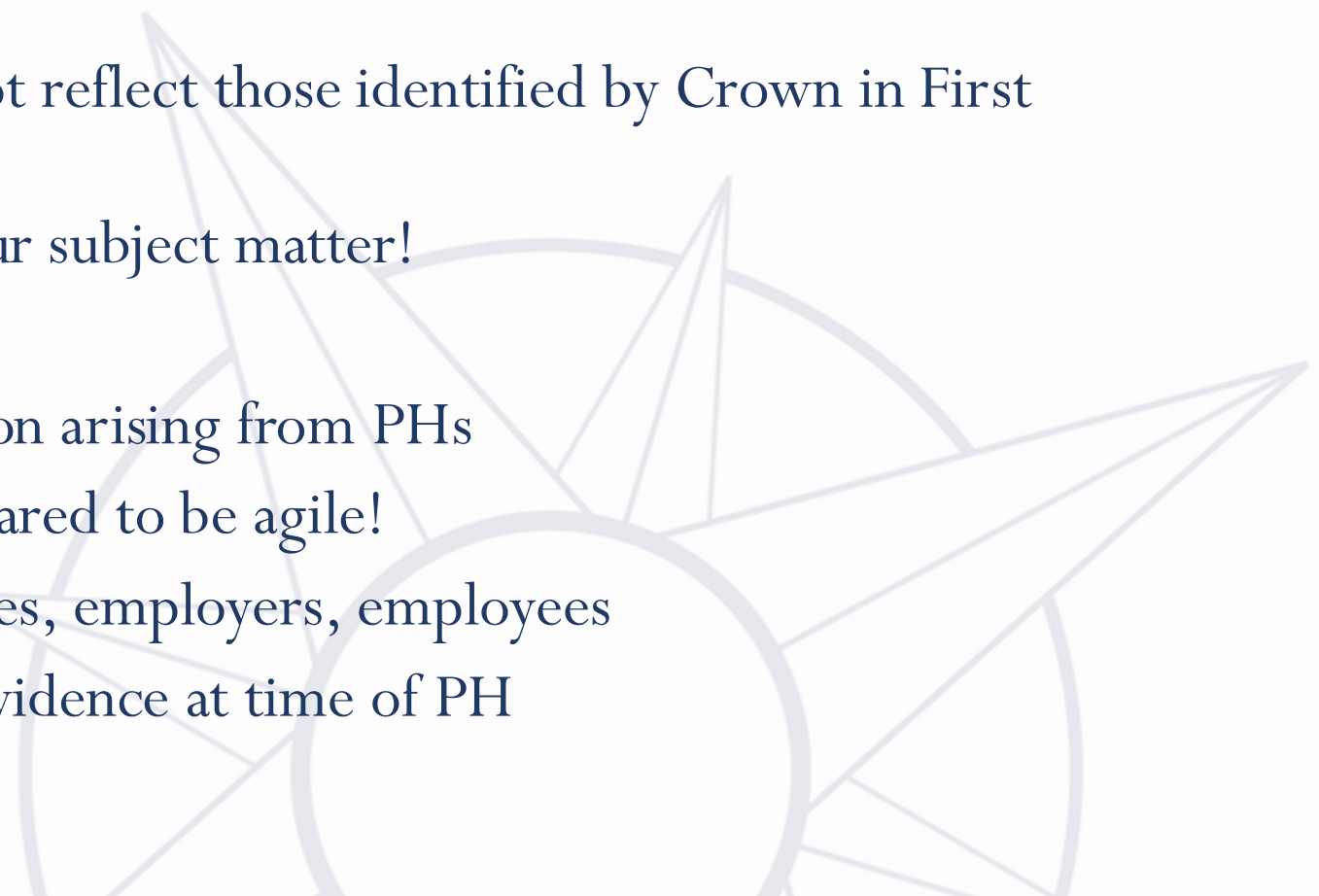


PRELIMINARY HEARING (PH)

- 2016 Act, s. 16(1): At least one PH to be held before the start of the Inquiry, unless dispensed with by the Sheriff.
 - Place of PH/Inquiry: court can be changed
 - Remote or in-person
 - Purpose of PH- Rule 3.6
 - Ensure the purpose of the Inquiry is achieved
 - Consider scope of Inquiry and issues which are in dispute
 - Consider the information likely to be presented at the Inquiry and the manner in which they should be presented
 - Affidavits/expert witness evidence to be considered
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ERROR ALERT! Preliminary Hearing(s)

- Procedure: Rule 3.8
 - Lack of preparation/information
 - Issues explored in Inquiry may not reflect those identified by Crown in First Notice/Rule 3.7 Notes
 - FAIs are unpredictable- know your subject matter!
 - Advise clients with caution
 - Potential alternative representation arising from PHs
 - It is the Sheriff's Inquiry- be prepared to be agile!
 - Conflicting interests- public bodies, employers, employees
 - Unsure whether to lead expert evidence at time of PH
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Productions, Reports and Statements for FAI

- Not enough just to lodge statement: Inquiry must make an order which gives it evidential status (Rule 4.6: 7 days before FAI or as per interlocutor)
- Make sure statement conforms to formalities required by Rules- JMA can record that statement forms part of evidence that Sheriff has regard to in Determination- must be signed- available for inspection by public- draft carefully!
- Consider use of affidavit evidence- cuts down time/stress for witnesses
- Even when affidavit evidence agreed, Sheriff can ask witnesses to give oral evidence
- Affidavits- input from Crown, other participants and interested parties
- Use affidavit as evidence in chief, then cross on affidavit (Rule 4.13)
- Witnesses must know their statement/affidavit content- coaching not allowed!
- Remember! Rule 4.15. NB! for instruction of expert witness: identity, why, for what, estimated date for completion of report



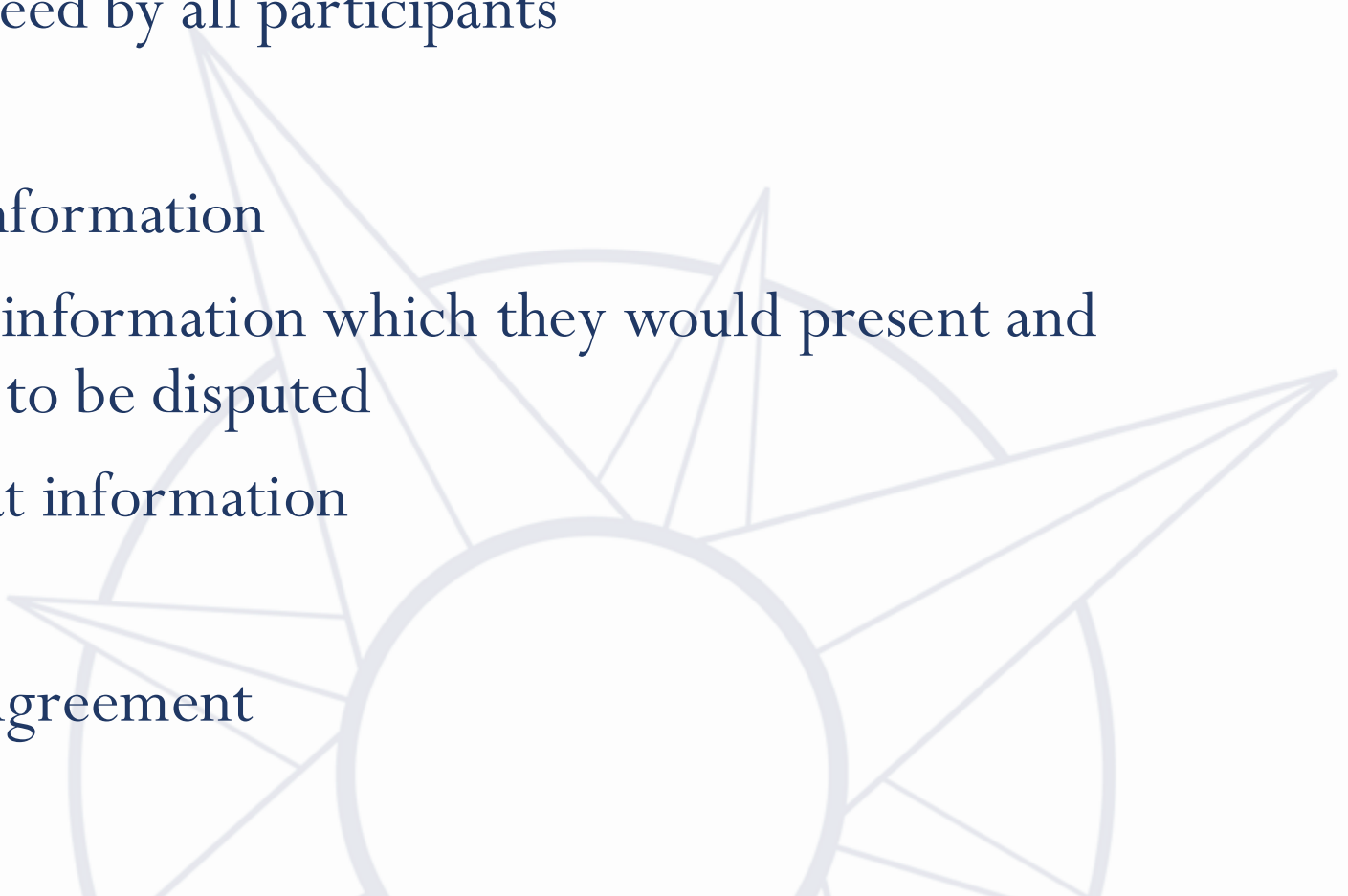
Notices to Admit

- Rule 4.12: Notice to Admit Information
- *Arthur & Ors* ("Clutha") FAI [2019] 46
- 3 significant Notices to Admit from BALPA and CAA
- Can be unchallenged and accepted by Sheriff





Agreement of Information

- Rule 4.10- not necessary to present information concerning facts or productions which are agreed by all participants
 - Rule 4.11: DUTY to agree information
 - Participant must identify the information which they would present and which they consider unlikely to be disputed
 - Reasonable steps to agree that information
 - *Yuill & Bell* FAI [2024] FAI 18
 - M9 FAI- 5 Joint Minutes of Agreement
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Watch out! Agreement of Information

- Sheriff is not obliged to accept agreement of information among participants, by JMA or unchallenged Notices to Admit, as binding
- *Darren Smith* FAI [2018] FAI 40 at [5]- [6], Sheriff Foulis
- The role of the Sheriff an Inquiry is different from that played in adversarial proceedings
- Joint Minute of Agreement does not constrain Sheriff from seeking information to ensure there are not matters upon which evidence should be presented
- The court's role in an Inquiry is inquisitorial; when understandable emphasis is placed on agreement of matters and attempts to avoid unnecessary use of court resources, there may be a danger that the requirements of an inquisitorial role are overlooked



Agreement of Information

- *Mark Allan FAI* [2020] FAI 8 (Sheriff Wade QC)
- Custody death; indication from participants that would proceed by joint minute of agreement only
- Sheriff not content with joint minute which simply sought to agree certain SPS policies and protocols but not how they had been implemented
- JM contained “bland assertions” (ie. not facts)
- Sheriff was “not satisfied in relation to the evidence which the inquiry was being invited to accept”
- Parties had not properly applied their minds to the evidence which was required to address the issues identified in the First Notice and were treating the proceedings as something of a formality— this is not a practice which can be allowed to develop
- Parties reminded of their duty to the court and in terms of the 2016 Act to ensure that adequate evidence is furnished to support any findings which the Inquiry might be asked to make



Inquiry itself

- Relief when it starts?!? Reading of JM(s)?
- Next of kin- sharing of information before FAI, during FAI and Sheriff brings in as participants
- Press reporting
- Witness protection!
- Restriction on reporting- when to ask for this
- Can go off on a tangent
- More evidence to lodge. And yet more evidence sought...
- Submissions (time for written submissions), oral submissions- help with questions for Sheriff
- Spirit of Inquiry- collegiality, adversarial, tone...



Determination

- Avizandum then Determination issued as soon as possible after conclusion of evidence and submissions
- More questions from participants despite avizandum- before Determination issued
- Fact-finding, not fault-finding
- Determination to address
 - Where and when death took place, cause of death/accident, reasonable precautions which could have been taken and avoided death, defect(s) in system of work
 - Sheriff can make own recommendations- published (can be press embargo prior to that)
 - Timescales and advising clients/press coverage
 - Evidence to be submitted post-Determination- 8 weeks- positive and proactive



Recent FAI news

- *Jean MacLellan* [2024] FAI 1
- Proper construction and application of s26(2)(e) of 2016 Act- precautions which could reasonably have been taken- Lady Haldane - any place for *Hunter v Hanley*?
- From 7 April 25: Non-means tested Legal Aid available for family members of death in custody Inquiries





Discussion

- Differing experience in room
- Time to share experiences and discuss.....



Compass Chambers



Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com