



Law Society  
of Scotland



# Consultation Response

## Proposed Post-Mortem Examinations (Defence Time- Limit) (Scotland) Bill

9 April 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the proposal for a Bill to make the right of defence counsel for a person accused of homicide to instruct a post mortem examination of the alleged victim subject to an extendable time-limit in order to minimise delays and uncertainty for victims' families' consultation (the Bill)<sup>1</sup>.

We have responded previously to two Public Petitions which related to similar topics. It may be helpful to refer our responses at:

- Petition PE1712 dated 8 January 2019<sup>2</sup> which related to the review of the use of soul and conscience letters in criminal proceedings and
- Petition PE01699 dated 16 October 2019<sup>3</sup> which related to the release of murder victim bodies for funeral arrangements.

## About You

1. Are you responding as:

As an organisation – The Law Society of Scotland. (Go to Question 2B)

2B. We are a representative organisation as indicated above. Details of what the Society's remit is included above. Our Criminal Law Committee is made up of a number of members that include members of academia as well as representatives of the defence and Crown Office and Procurator Fiscal Service

<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/110533.aspx>

<sup>2</sup> [http://www.parliament.scot/S5\\_PublicPetitionsCommittee/Submissions%202019/PPC\\_PE1712\\_C.pdf](http://www.parliament.scot/S5_PublicPetitionsCommittee/Submissions%202019/PPC_PE1712_C.pdf)

<sup>3</sup> [http://www.parliament.scot/S5\\_PublicPetitionsCommittee/PE1699\\_E.pdf](http://www.parliament.scot/S5_PublicPetitionsCommittee/PE1699_E.pdf)

(COPFS). Both COPFS and the defence are involved when post mortems are carried out into suspicious deaths. Their experience is therefore relevant to the background to the Bill which is proposing the introduction of time limits in relation to the carrying out of defence post-mortems.

3. We are content for this response to be published and attributed to us.

4. This response should be published under The Law Society of Scotland's name. It is provided by the Criminal Law Committee.

5. We confirm that we have read and understood the privacy notice attached to this consultation which explains how the personal data will be used.

## Your views on the Proposal

### Aim and approach

**Question 1: The proposed Bill would set a time-limit for the instruction of a second post-mortem examination, by the defence, in relation to a suspicious death. Which of the following best expresses your view of this proposal?**

- Fully supportive
- Partially supportive**
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

At the outset, the circumstances for the relatives in relation to the death of Paige Doherty which provide the background to the Bill are tragic. We would wish to express our sympathy to her family and indeed to all the families who may find themselves in similar circumstances such as the 64 homicide victims' families in 2016-17 mentioned in the Bill's consultation. The circumstances of these deaths all require to be investigated which includes the necessity for carrying out a post-mortem examination to ascertain the cause of death. The families are left trying to grieve when the circumstances of the victim's death are being played out in a high-profile manner through press reporting.

By way of background, it may be helpful to set out the context in which such investigations are carried out as these are supported by Article 2 of the European Convention on Human Rights<sup>4</sup> which states:

- Everyone's right to life shall be protected by law.

That includes the State's interest in investigations into sudden, suspicious, unexpected or unexplained deaths In Scotland. In Scotland, that duty is undertaken by COPFS.

Where such a suspicious death occurs, COPFS are fully responsible for instructing a post mortem. In suspicious deaths, the post mortem will be carried out by two pathologists. The body remains under COPFS's authority until such time as a decision is taken for its release. Information regarding the handling of suspicious deaths is included on COPFS's website.<sup>5</sup>

Though the Bill does mention the need for a final report following the post-mortem being produced for the COPFS, in practical terms, once the post mortem has been completed and the relevant evidence gathered, the body may be released to allow relatives to undertake the necessary funeral arrangements. There is not necessarily a requirement to await the final written report for that decision to be taken by COPFS. Having said that, the question of the carrying out a defence post mortem may complicate matters. This is the issue with which the Bill is primarily concerned. There is a need to understand that the evidential requirements need to be respected to ensure that in the event of any future criminal proceedings taking place that the best evidence is secured and can and will be available for all to use, as required, in court.

The Bill outlines just how difficult it is for the families to understand the process. The Foreword to the Bill does set out that there was no "transparency in the procedure and this caused a great deal of distress to her family."<sup>6</sup> The family concerned should be made fully aware of the processes involved to promote their understanding of the system in which they will not have bene previously involved. This should include the reasons for any delay and the necessity for the process of carrying out post mortems.

The Bill makes out a compelling case for the imposition of time-limits in relation to the instruction of any second post-mortem examinations by the defence. There is no doubt that a delay in the release of the body to the deceased's family can cause significant distress to family members. However, the circumstances in which solicitors instruct defence post-mortems cannot be viewed in a straightforward manner. There are the circumstances where:

- An accused person is not identified after the suspicious death so there is no solicitor instructed or involved in acting for the defence. The question of the release of the body lies entirely within the COPFS's discretion as to if and when the body may be released. There may be more than one accused person to be identified in any case involving a suspicious death. Each defence solicitor will

<sup>4</sup> [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>5</sup> (<http://www.copfs.gov.uk/about-us/contact-us/freedom-of-information/11-deaths>)

<sup>6</sup> [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

then need to act in the best interests of their client<sup>7</sup> where the interests of their clients may well not coincide. That may require separate post mortems to be carried out.

- An accused person is detected as was the case with Paige Doherty's death. Defence solicitors frequently experience difficulty in instructing pathologists, particularly away from the central belt. This can compound matters when the deaths take place in more remote areas or where specialist pathologists may be required where the expertise lies in England and Wales. The pool of forensic pathologists in Scotland who are available to undertake defence post mortem work is extremely limited. There can then be a supply issue.

All this means if there was an imposition of a strict time limit to be introduced that could pose significant difficulties.

The Criminal Law Committee is aware of the recently introduced protocol formulated by the Lord Advocate<sup>8</sup> where it was discussed in advance with the Society. One of the objectives of this protocol is to ensure that defence pathologists are in contact with the Crown pathologists and are aware of the particular issues that arise from their post mortem. We support the Lord Advocate's protocol as it formalises what represents good practice. Going further to encourage a more collaborative approach to allow for the early release of the Crown draft post mortem report would also be helpful. Could this be framed as a legal requirement?

We would suggest that a reasonable period of time should be allowed to ascertain how the protocol is working out in practice before the proposed Bill is set before the Scottish Parliament.

## **Question 2: Which of the following best expresses your view of when any time-limit should begin?**

- On the day after the Crown PME is completed, or when defence counsel is appointed for an accused person, whichever is the later
- On the day after the results of the Crown PME are provided to defence counsel, or when defence counsel is appointed for an accused person, whichever is the later

<sup>7</sup> Law Society of Scotland Code of Criminal Conduct Rule B1.4 <https://www.lawsco.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/rules/b1-4-the-interests-of-the-client/>

<sup>8</sup> <http://www.copfs.gov.uk/media-site/media-releases/1806-bid-to-reduce-impact-of-murder-post-mortems>. This refers to the protocol but does not include a link to its terms.

Other (please specify)

Unsure

Please explain the reasons for your response.

This question refers to defence counsel. In a strict legal sense, counsel are members of the Faculty of Advocates or Solicitor Advocates instructed by defence solicitors to represent an accused person in trial at the High Court of Justiciary. They will not necessarily have been instructed when the accused person first appears in court. It is assumed that the reference to defence counsel in this question is a reference to the defence solicitor instructed in connection with an accused person's first appearance in court. The defence solicitor will be involved at the outset. They will be the person in practical terms that will be involved and responsible for instructing a defence post-mortem.

What can be said is that when a defence solicitor is instructed, the identity of any accused person will be known. There may well be cases involving multiple accused persons. The interests of multiple accused persons may well differ.

We would suggest that it would be appropriate to set a time period that has regard to the date of the accused person's first appearance in court rather than taking the date of the Crown's post-mortem examination as the starting point for the calculation of time limits. That would be on the basis that the Crown post mortem report had been undertaken by that time. At the time of the Crown's post mortem examination the identity of the accused person may well not be known and may be unknown for some indefinite period thereafter. No time period would therefore be triggered.

### **Question 3: How long a time-period do you think should be available to the defence in which to instruct a second PME?**

- 7 days (1 week)
- 14 days (2 weeks)
- 21 days (3 weeks)**
- 28 days (4 weeks)
- Other (please specify)

Please explain the reasons for your response.

A 21-day period running from the date of the accused person's first appearance in court would possibly be a good starting point as this would allow for the situation in which a defence solicitor has difficulties in securing the services of a defence pathologist.

**Question 4: The proposed Bill would allow the defence to apply to the courts for the time limit to be extended by up to the same amount as originally allowed, and on more than one occasion. Which of the following best expresses your view of this element of the proposal?**

- There should be no scope for extension of the time-limit
- There should be scope for only a single extension (shorter than the original period – please specify)
- There should be scope for only a single extension (no longer than the original period)**
- There should be scope for repeated extensions (each shorter than the original period – please specify)
- There should be scope for repeated extensions (each no longer than the original period)**
- There should be no time-limit (and so no need for any extension)
- Other (please specify)

Please explain the reasons for your response.

We refer to our comments in Question 1. The Criminal Law Committee had mixed views on this question. There was support for a single extension or there was also support for repeated extensions if a time limit were to be introduced as proposed.

We stress that what needs to be considered is to provide enough time for the defence solicitor to decide that a defence post mortem is required and can arrange for it to be undertaken. Setting a single extension may be problematic as there should be no fettering of the required investigations if a defence post mortem needs to be carried out.

The preferred outcome would be for any defence post mortem to be carried out within the 21-day period. That does however depend on factors out with the control of the defence solicitor in that there needs to be a pathologist available, legal aid in place and the practical arrangements for the post mortem examinations to be carried out.

## Financial implications

**Question 5: Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:**

(a) prosecuting authorities (COPFS)

- Significant increase in cost
- Some increase in cost

- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure**

We do not have access to this information.

(b) the courts (SCTS)

- Significant increase in cost
- Some increase in cost**
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

Information with regard to court costs would lie with the Scottish Courts and Tribunals Service. We would anticipate some increase in costs due to the need to hold court hearings though these may be substantially procedural in nature.

(c) victims' families

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure**

We are unsure of these costs because much would depend if it is envisaged to be a need for the families to be represented at such court hearings. If so, would this be a case for legal aid to be made available to families to assist them in being represented?

(d) the accused/defence

- Significant increase in cost
- Some increase in cost**
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

These costs would presumably include legal aid in connection with the accused's representation.

Please explain the reasons for your response.

The increase in cost both to the courts and to the accused/defence stems from the fact that an application for an extension would involve an appearance in court before a Sheriff. There would be the time in preparing such an application and the need to hear parties at the hearing. There would be a question as to whether the family would be present or represented as this would affect where the hearing was to be held i.e. whether in open court or in private.

### **Question 6: Are there ways in which the Bill could achieve its aim more?**

Yes. We refer to the petitions above where we raised some issues that may be helpful by way of considering in relation to the Bill. These include:

- In recognising that highly emotive issues arise in relation to any question of post-mortems being carried out, there would seem merit in better public information being made available in an independent forum in addition to that already available on COPFS (and the support provided by them to families) and the Police Scotland websites. We have located *Information for Bereaved Family and Friends Following Murder or Culpable Homicide*<sup>9</sup> which might well be the best place for additional information to be posted. This may also provide a better route too for the sharing of any cultural wishes that the bereaved family may have in relation to funeral arrangements.
- There would be the possibility of exploring the role and use of new technology in relation to the holding of post mortems in the future. There is inevitable upset to any family by the fact of holding a post mortem. By using digital procedures which are less invasive, this may speed up the process, obtain the relevant evidence and improve the position in relation to post mortems for families. For instance, we understand that the concept of a ‘virtual autopsy’ has been developed abroad. Forensic pathologist Guy Ruttly has called for cross-sectional autopsy imaging to be available, as he indicated that ‘there are important religious cultural and humanitarian benefits offered non-invasive autopsies.’<sup>10</sup>

Considering these proposals may encourage the implementation of some practical measures to assure the public that all those involved are committed to considering how to improve the current system.

## **Equalities**

<sup>9</sup> <https://www.gov.scot/Publications/2014/08/1338/1>

<sup>10</sup> <https://www.theguardian.com/science/2013/feb/23/virtual-autopsy-virtopsy-forensic-science>

**Question 7: What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, race, religion and belief, sex, sexual orientation?**

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure**

Please explain the reasons for your response.

We recognise that there are implications for the timescales for holding post-mortem reports where cultural observance issues are relevant. There is a need to ensure that effective communication is made as it is not always possible to adhere to these requirements when there is a requirement for a post mortem to be carried out. By effective communication, we do mean that there is a need for families to be able to communicate their preferred observance and where possible, for these to be observed.

**8. In what ways could any negative impact of the Bill on equality be minimised or avoided?**

We have no comment to make.

## **Sustainability**

**Question 9: Do you consider that the proposed bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?**

- Yes
- No
- Unsure**

Please explain the reasons for your response.

We have no comment to make.

## General

### 10. Do you have any other comments or suggestions on the proposal?

We have already mentioned the need for the defence solicitors to act in the best interests of their clients. That means taking their clients' instructions to ensure that they fully investigate the accused's defence. Failure to do so could potentially lead to an appeal. Thereafter, there may be professional consequences such as an *Anderson*<sup>11</sup> appeal for defective representation.

**For further information, please contact:**

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<sup>11</sup> *Anderson v HMA* 1996 SCCR 114