



Law Society
of Scotland

Stage 1 Briefing

Post-mortem Examinations (Defence Time Limit) (Scotland) Bill

25 January 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 previously responded to the consultation on the Proposed Post-mortem Examinations (Defence Time Limit) Bill¹ which provided the background to the introduction of Post-mortem Examinations (Defence Time Limit) (Scotland) Bill² (the Bill) as a private member's bill by Gill Paterson MSP.

The Justice Committee has published its Stage 1 Report on the Bill³ on 29 September 2020. The Stage 1 debate which is scheduled to take place on Tuesday 26 January 2021. We have had sight of the letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 7 January 2021.⁴

We conclude that the Bill even if passed may not achieve its aims of transparency. However, we would not suggest complacency with the current process and its working. There seems merit in reviewing, scrutinising and overhauling the investigation into deaths process in Scotland of which this Bill forms part which is not restricted to homicide.

We suggest that there is a need to raise public awareness of what information is available to the families. It needs to address complaints from the families as to any lack of understanding or information on what is going on. They need that information to understand the roles of all parties involved, including the defence, as well as the purpose of the post- mortem and its evidential relationship to the upsetting intrusion into what understandably should be a time of private grief.

¹ <https://www.lawscot.org.uk/media/362461/9-04-2019-crim-proposed-post-mortem-examinations-defence-time-limit-scotland-bill.pdf>

² <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/post-mortem-examinations-defence-time-limit-scotland-bill/introduced/bill-as-introduced-post-mortem-examinations-defence-time-limit-scotland-bill.pdf>

³ <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12860>

⁴ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210107_CSJtoAT_PM_Bill.pdf

This could be combined into exploring the possibility for post-mortem reports to be videoed, evaluation of the working of the forensic pathologist consultation protocol and further investigation into the COPFS process for release of bodies.

General

The Bill seeks to deal with situations where a person has been charged with an offence in connection with causing or contributing to a death such as murder or culpable homicide. It imposes a 14-day time limit on the period during which the defence can instruct its own post-mortem examination (PME), rather than relying on the Crown Office & Procurator Fiscal Service (COPFS) PME. It allows for a process to extend the time limit on making an application to the court.

The justification for the Bill lies in providing transparency to the families of the victims about what is happening as stated by Mr Paterson MSP during his evidence section that:

“surely to goodness we should be able to tell a bereaved family what is happening, where things are at and the reasons. The main advantage of the bill is to provide information for people who are in real distress.”

Transparency for families is the crux of the matter.

Article 2 of the European Convention of Human Rights refers to the right to life under which the State (and in Scotland's case COPFS) investigates the cause of sudden, unexpected, unexplained and suspicious deaths.

Deaths such as Paige Doherty which provided the impetus for the Bill are tragic. Investigations in murders are played out in the public arena when families are trying to understand and grapple with unfamiliar processes and with organisations such as Police Scotland and COPFS. Tensions for all are inevitably heightened- the police to conduct a successful investigation and the families to be allowed to grieve.

First and foremost, we must express our sympathy to the relatives finding themselves in that unfortunate position of loss and for all families who may find themselves in that similar position such as those of the 59 homicides mentioned in Mr Paterson's evidence. The circumstances of these homicides require to be investigated which includes the necessity for carrying out a PME to ascertain the cause of death. Families are left in limbo, grieving in these most challenging of circumstances.

We note the Cabinet Secretary for Justice has indicated no final position with regard to the Bill. We understand that view and seek to highlight views on why the Bill in its current form may not best achieve the laudable transparency of process which is being sought.

Observations

The Bill has a narrow focus where we consider that it would not achieve its goals for the following reasons:

Lack of numbers affected: The Bill quotes that between December 2018 and December 2019, COPFS instructed 182 post-mortems in homicide cases with 59 criminal homicide cases subsequently taking place. Only two defence post-mortems were requested. Since then, from October 2018 to the beginning of June 2020, 92 homicides were reported, and 3 defence post-mortems had taken place.

On that evidence, the number of defence post-mortems carried out would be too small to make a real impact.

That may be the result of the introduction of the forensic pathologist consultation protocol published by COPFS in 2018. We suggest that evaluating the success or otherwise of the Protocol would be a step to take before any Bill is passed. That would establish if there is any absence of “due diligence” in relation to the application of the Protocol by the defence. The Protocol needs a “reasonable period to ascertain how the protocol is working out in practice”⁵ and based on only 3 defence post-mortems to date seems too small.

Best evidence: This would include exploring whether the Crown post-mortem can be video recorded. We understand that this is a practice existing in other jurisdictions. It could, if considered appropriate as a practice, reduce the possible need for defence post-mortems to be held, especially where any accused is unknown and in effect, no defence is able to be instructed. The Bill does not assist in that situation.

What is needed in court ultimately is the best evidence which would be the video.

Release of the body: The release of the body, post forensic investigation, is entirely a matter for the Crown who can if they choose, release a body where there is no accused and no defence post-mortem has been carried out. For the Crown as indicated to require to go to court seems intrusive, interfering with their discretion. They may be restricted in what they can say publicly about a death (consider the evidential role of special knowledge where facts of the death would be known only to the accused).

We note the reference to “COPFS has instituted procedures for regular review of retention of a body, with a view to ensuring that this is justified in the interests of the proper investigation and prosecution of crime or investigation of deaths.”⁶ However, a review into suspected homicides where no accused has been identified and the timing by the Crown of the release of the body may provide further information as to how best to address this transparency aspect. That aspect merits fuller transparency of process.

⁵ Paragraph 24 of the Bill's Stage 1 Report

⁶ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210107_CSJtoAT_PM_Bill.pdf

Background to a post-mortem: It is necessary to keep in mind too, the background to why a post-mortem is being carried out. It is to establish a cause of death and at that point, the families may feel that is the end of the matter and the body should be discharged.

But considerations of public interest go much further in prosecuting for any such death as evidence must be led not only of the cause of death, but other relevant forensic findings may exist pertinent to the case. These could include the presence of defence wounds, expert evidence as to the depth or position of the knife wound or to exclude a death from natural causes. The forensic pathologist's evidence is vital to underpin the prosecution or indeed, on occasion, to establish a defence. That is why the post-mortem examination is so important and its purpose needs to be much clearly understood by the public.

Delays in release of the body: These should be avoided with the PME taking place as soon as possible. A further PME may be required which as highlighted above should be the exception rather than the rule. To impose an artificial timeframe does not seem realistic, especially where there are issues with "deploying forensic pathologists in Scotland." Conflict of interest with a small pool of pathologists and also the need for increasing specialisation in investigations are factors which cannot be ignored. the 14-day limit in the Bill is unlikely to be sufficient for the defence, as recognised in acting in "perfectly good faith."

Professional responsibilities: In instructing a defence post-mortem, the defence are acting in the best interests of their clients in undertaking their professional legal responsibilities in terms of adequate representation of clients. That includes time for scrutinising any post-mortem report and taking instructions from any accused.

What must be ensured that justice is served and the right to a fair trial preserved. If the Bill were to pass, it would result in a number of applications inevitably which would be burdensome on the courts with the time and also the cost as well as the Crown and court costs, legal aid as access to justice would be needed to support the application process.

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