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Justice Committee Comataidh a' Cheartais

Stage 1 Report on the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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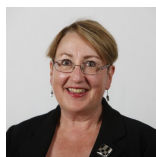
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Introduction

1. The Post-mortem Examinations (Defence Time Limit) (Scotland) Bill ("the Bill") is a Member's Bill and was introduced in the Parliament by Gill Paterson MSP ("the Member in Charge"), on 21 May 2020. The Parliament designated the Justice Committee as the lead committee for Stage 1 consideration of the Bill.
2. Under the Parliament's Standing Orders Rule 9.6.3(a), it is for the lead committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other committee. The lead committee is also required to report on the Financial Memorandum and Policy Memorandum, which accompany the Bill.
3. The Presiding Officer has decided under Rule 9.12 of Standing Orders that a financial resolution is not required for the Bill.

About the Bill

4. The Bill deals with situations where a person has been charged with an offence in connection with causing or contributing to a death (e.g. murder or culpable homicide). In such cases, it seeks to impose a 14-day time limit on the period during which the defence can instruct its own post-mortem examination (PME), rather than simply relying on the one which the Crown Office & Procurator Fiscal Service (COPFS) will have instructed. It allows for the extension of the time limit on application to the court.
5. As things stand, there is no fixed period during which the defence must decide whether to exercise the right to instruct a second post-mortem examination. By imposing a time limit on the defence, the Bill aims to reduce the time taken to release bodies for funeral.
6. The Member in Charge hopes that creating an extendable time limit for defence PMEs will reduce delays in the release of bodies. He also believes the Bill will reduce the distress experienced by families of the deceased. It will give them more certainty about the process and when funeral arrangements can be made.
7. According to the Member in Charge, cases of homicide are relatively rare in Scotland, with Scottish Government statistics showing that in 2018-19, 60 homicide cases were recorded. The number of homicide cases in Scotland has remained relatively stable with between 59 and 63 recorded each year during 2012- 13 to 2018-19.¹
8. The Member in Charge also provided figures from COPFS showing that between December 2018 and December 2019, it instructed 182 PMEs in cases where a suspect was being prosecuted for homicide. However, only 59 criminal homicide cases subsequently took place. Further to this, in that year-long period, two defence PMEs were requested.
9. Further information is available on the [Bill web page](#) and on the relevant [member's bill proposal page](#) (including a consultation summary).

Consideration by the Justice Committee and other committees

10. The Bill and the views of the Member in Charge were considered at the Justice Committee's meeting of [29 September 2020](#). Evidence was taken from Gill Paterson MSP and officials from the Scottish Parliament's Non-Governmental Bills Unit (NGBU) who have supported the Member in Charge during the development of his proposal and Member's bill.
11. At its meeting on 22 September 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provision in the the Bill at Stage 1.
12. The Member in Charge has provided the Parliament with a [memorandum on the delegated powers provisions](#) (DPM) in the Bill. The Bill confers one power to make subordinate legislation on the Scottish Ministers.
13. Section 3 of the Bill makes standard ancillary provision, giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Act flowing from this Bill, or any provision made under it.
14. By virtue of subsection (2), regulations made under section 3 may modify any other enactment but may not modify the Bill itself. Section 3(3) provides that the affirmative procedure will apply where regulations made under section 3 amend primary legislation and that otherwise the negative procedure will apply.
15. The DPM states that the power is necessary to ensure the successful implementation of the Bill. The DPM sets out that although this is standard with all new legislation, it is particularly necessary for this Bill which puts into statute for the first time one specific element of a process that is currently governed by convention and guidance. As such it has been difficult to identify all the possible consequences of the Bill. This regulation making power provides the Scottish Ministers with a mechanism to deal with technical, operational or other matters which would be within the scope of this Bill without the need for further primary legislation, which would not be an efficient use of Parliamentary time.
16. **The Delegated Powers and Law Reform Committee found the power to make ancillary provision in section 3 acceptable in principle. It was also content that it is subject to the affirmative procedure if amending primary legislation, and otherwise subject to the negative procedure.**

Key issues

Problem which the Bill seeks to address

17. During the Committee's consideration, Members sought to better understand the particular problem which the Bill seeks to address and the evidence collated by the Member in Charge underpinning his case for the Bill to proceed.
18. In his evidence, Mr Gill Paterson MSP argued that unacceptable delays in releasing the bodies of a victim was "fairly common" and that "even if it happened only occasionally, preventing it would be a good thing to do".² He thought that around 10 per cent of cases were of concern.³
19. Presented with figures from his Policy Memorandum which cite two defence PME requests in the period December 2018 to December 2019, Mr Paterson said—
 - ” Two is a low number. In an average year, the number is somewhere between two and 10, but I recognise that that is still low compared with the number of post mortems. If that is the case with regard to the numbers that go to a second post mortem, there is, equally, a higher number where the time that is taken is just too long. The bill seeks to sort that out.⁴
20. Mr Paterson accepted that one of the reasons why there may be delays in the release of a body could be the limitations on the number of forensic pathologists available to conduct PMEs. He said that he was not sure whether it is the Crown Office or the Government that is responsible for that but, "somebody needs to get their finger out" and that "if that is one of the problems, it is a problem that can be sorted".⁵
21. He also accepted that the [forensic pathologist consultation protocol](#) published by the Crown Office in 2018 had been helpful in addressing some of the issues he perceives exist. Nevertheless, Mr Paterson argued that—
 - ” ... the problem with the protocol is that it still relies on due diligence on the part of the defence. There is no sanction of any kind if the defence has a slack day. My bill makes the protocol work properly and makes it complete. It provides the conclusion that is required: a successful outcome. The protocol is very good if everyone obeys it, but what it sets out should have been happening in the first place.

In my view, a protocol was not needed in the past. My bill does not do anything to change the protocol. It enhances it and gets it to where it should be, by including a timeframe, which is the only thing missing from it. If the protocol had a timeframe, I would not have introduced the bill.⁵
22. In its response to the Member in Charge's [consultation](#) on his proposal for a bill, the Faculty of Advocates stated that—

- ” The view of Faculty, based on experience, is that delayed instruction of defence post mortems is a direct result of a dearth of forensic pathologists available and willing to accept instructions to carry them out and prepare reports. Solicitors and Counsel are sensitive to the fact that the body of the deceased cannot be released until a defence post-mortem has been carried out, however, they are impotent in addressing this issue due to the lack of availability of suitable qualified Forensic Pathologists.⁶
23. The Faculty also argued that a second possible reason for delays was when no suspect has been identified and therefore, no defence solicitor instructed. The Faculty suggested that a "solution may lie in a system where, upon completion of the Crown post-mortem, a defence post-mortem is instructed from a panel of Forensic Pathologists overseen by their professional body the Royal College of Forensic Pathologists, (RCFP) irrespective of whether a suspect has been identified or not."⁶
24. The Law Society of Scotland said that 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". In its view, "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, it also said that "the circumstances in which solicitors instruct defence post-mortems cannot be viewed in a straightforward manner."⁷ The Law Society suggested 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".
25. Police Scotland's submission stated that in its experience there is an evident drive to return bodies to families as soon as possible. However, Police Scotland acknowledged that there will always be cases where bodies of deceased persons cannot be returned to families and this will always be difficult for grieving families. In its view, homicide investigations are complex and even after PM, further investigations are often needed.⁸

Provisions in the Bill

26. According to the Member in Charge, one of the advantages of his Bill is to introduce openness and transparency into the process of PME. He said—
- ” With something such as post mortems, 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. They want to be able to bury their child— their loved one—and the bill would allow them to understand why there is a delay, which is a very good thing.⁹
27. He argued that there should be key timeframes in the PME process, so that a family would have an expectation of what would happen after 14 days. If that was slipping for a good reason, the family would get to know that reason by the 14th day.⁹

28. Mr Paterson was also asked about the provision in the Bill whereby the period for a PME is extendable if the defence applies and an acceptable reason is given. He was asked for examples of what might constitute an acceptable reason or what cause would justify such an extension. He stated that—
- ” If more than one person was accused, there could be a reason to get forensic evidence on who was in the location at the time. An extension would be legitimate if there was a shortage of forensic pathologists to do the examination. [...] An extension would be legitimate if more than one person was accused or if something was challenged—for example, if someone said that they were not there and it was necessary to go back to look for genetic evidence. That could possibly be a reason for extension. The good thing is that a judge would know what was missing from the first post mortem, and they might say that it was not sufficient. ¹⁰
29. He did not agree, however, that repeated requests for extensions were likely to be granted by a court without exceptionally good reasons. ¹⁰

Views on the Financial and Policy Memorandums

30. The **Financial** and **Policy** Memoranda which accompany the Bill set out indicative costs and savings the Member in Charge estimates will be delivered by the policy set out in the Bill.
31. The Member in Charge has stated that other than introducing a 14-day extendable time limit for the defence to instruct a PME, the Bill does not alter the existing processes relating to the instruction and carrying out of Crown and defence PMEs. In his view, the majority of potential additional costs generated by the Bill will be those which relate to the ability of the defence team to apply for an extension or extensions.
32. He notes that should an application for a time limit extension be made, some costs will be incurred by the Scottish Courts and Tribunal Service (SCTS), as the body responsible for providing administrative support to the Scottish Courts. In his view, the precise costs involved in this process are difficult to ascertain as the Bill does not specify what should be involved in the process of applying for an extension, leaving this to be determined either by rules of court or left to judicial discretion (based on established practice in similar circumstances).
33. He also states that any costs to COPFS are also likely to be minimal as the processes which are carried out in the case of a death taking place under suspicious circumstances will remain the same, regardless of whether a defence PME is requested, or an extension is applied for.
34. The process of applying for an extension would also generate costs for the defence. In most cases, the accused could be expected to be in receipt of legal aid, meaning costs would at least partially be met by the Scottish Legal Aid Board (SLAB). In its response to the Member's consultation, SLAB estimated that a court hearing on an extension before a judge or sheriff would cost £175.68 based on a 2-hour hearing with a solicitor.¹¹
35. The Committee has no particular concerns it wishes to bring to the attention of the Parliament in relation to the Financial or Policy Memoranda produced for this Bill.

Conclusions and recommendations

Constraints on scrutiny

36. The Justice Committee's ability to scrutinise this Member's Bill in depth has been constrained by two factors.
37. Firstly, the impact of COVID-19 and the imposition of lockdown restrictions in March 2020 has meant a delay in all aspects of the work programme of the Justice Committee. The critical period of March to June 2020 was taken up with re-establishing the Committee and how it would be able to operate during the pandemic and also with vital scrutiny of the impact of the virus on our justice and policing systems. It was the Committee's view that this scrutiny took priority during that period, resulting in delays to the consideration of other work streams such as the consideration of Scottish Government and Member's bills.
38. Secondly, the Scottish Government's programmes for government of September 2019 and September 2020 have resulted in a substantial legislative workload for the Justice Committee, consideration of which has been delayed by the pandemic.
39. The Committee is currently considering the following Scottish Government bills during the same time period as its consideration of this and one other Member's bill:
 - Defamation and Malicious Publication (Scotland) Bill;
 - Hate Crime and Public Order (Scotland) Bill; and
 - Domestic Abuse (Protection) (Scotland) Bill
40. The Scottish Government has made it clear to the Committee that it places a high priority on the consideration of these bills during the time available in the remainder of this parliamentary session.
41. Additionally, at least one of these bills - on hate crime - is already proving to be contentious and will require a significant amount of evidence to be taken and considered if the tight timetable for the bill's passage is to be adhered to.
42. Nevertheless, the Justice Committee believes that Member's bills are an important feature of the Scottish Parliament and appreciates the amount of effort that is required for any Member to bring forward a proposal and then a bill.
43. We are also aware that, for this particular Bill, there are a number of families for whom this Bill's provisions are very important given the tragic circumstances behind the murder of a loved one and the subsequent delays in the release of their body to the family.
44. It is for these reasons that the Committee chose to take evidence from the Member in Charge of the Bill and to also consider the issues raised in the Member's consultation before producing this Report.

45. It is also the case that the Committee's ability to scrutinise this Bill in any further depth has been constrained for the reasons cited above and the Committee has now completed its stage 1 scrutiny with this Report.

Our views

46. The Committee believes that it is important that the bodies of a relative are released to their family after their death through criminal homicide in a timely fashion, keeping delays to a minimum.
47. The Committee notes that the numbers of times that significant delays have been introduced are, according to figures from the Member in Charge, few and far between (perhaps 2 or 3 times per year compared to the 60+ criminal homicide cases in Scotland each year). Nevertheless, each delay will have caused considerable pain and distress to the family concerned.
48. The Committee has some sympathy with the policy intentions underpinning this Bill. The Committee notes, however, that some issues with the Bill have been raised in the questioning of the Member in Charge and in his consultation.

49. **On the basis of the above, the Committee makes no recommendation to the Scottish Parliament on the general principles of the Bill and invites it to consider whether there is merit in the Bill proceeding to Stage 2 given the limited time available for further consideration of the Bill in the remainder of this session.**
50. **Of particular relevance to consideration of whether the Bill should proceed will be the views of the Scottish Government on the general principles of the Bill. The Committee recommends that the Cabinet Secretary for Justice makes clear whether the Scottish Government supports the general principles of this Bill in his formal written response to this Report which we request in advance of the Stage 1 debate.**

- [1] Gill Paterson MSP. (2020). Policy Memorandum. Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/post-mortem-examinations-defence-time-limit-scotland-bill/introduced/policy-memorandum-post-mortem-examinations-defence-time-limit-scotland-bill.pdf>
- [2] Justice Committee. (2020, September 29). Official Report, col 2.
- [3] Justice Committee. (2020, September 29). Official Report, col 3.
- [4] Justice Committee. (2020, September 29). Official Report, col 4.
- [5] Justice Committee. (2020, September 29). Official Report, col 6.
- [6] Faculty of Advocates. (2020). Written submission provided to Gill Paterson MSP.
- [7] Law Society of Scotland. (2020). Written submission to Gil Paterson MSP.
- [8] Police Scotland. (2020). Written submission to Gill Paterson MSP.
- [9] Justice Committee. (2020, September 29). Official Report, col 7.
- [10] Justice Committee. (2020, September 29). Official Report, col 9.
- [11] Gill Paterson MSP. (2020). Financial Memorandum. Retrieved from <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/post-mortem-examinations-defence-time-limit-scotland-bill/introduced/financial-memorandum-post-mortem-examinations-defence-time-limit-scotland-bill.pdf>

