

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

A 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

RESPONSE BY THE FACULTY OF ADVOCATES TO

Consultation by

Gil Paterson, MSP for Clydebank and Milngavie

19 February 2019

INTRODUCTION

It is noted that the Faculty of Advocates was asked to respond to an on-line questionnaire. Whilst the Faculty of Advocates is sympathetic to the issue that the proposed bill seeks to redress, we consider that the proposed bill does not address the real issues which cause delay in the conduct of defence post-mortem examinations (“post-mortems”). In consequence, the response by the Faculty will focus on the concerns that the Bill seeks to address and explore the background issues that give rise to delay in defence post-mortems being carried out timeously.

THE CAUSE OF DELAY IN DEFENCE POST MORTEM EXAMINATIONS

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.

Faculty note that, anecdotally, the reasons for the lack of availability include:

- The contractual duties that Forensic pathologists have to the Crown and the Police takes priority over their availability to perform defence post-mortems;
- They are generally over-worked and this causes delays in their performance of post-mortems with priority being given to those they are contractually obliged to perform;
- The rates of pay available for the conduct of defence post-mortems (paid at standard rates by the Scottish Legal Aid Board) are not sufficiently attractive

to entice Forensic Pathologists to travel to other jurisdictions within Scotland to carry them out;

- The situation is such that defence agents (the solicitors who actually instruct defence post-mortems, rather than “defence counsel” which is a term referring to members of the Faculty of Advocates who are in due course instructed by solicitors to act for those charged) regularly have to contact and instruct Forensic Pathologists nationally (i.e., across the UK) in an effort to secure attendance;
- The problem is particularly acute in the West of Scotland where the retirement of Professor Anthony Busuttil has exacerbated the issue. Since his retirement from University work he was predominantly instructed to conduct defence post-mortems however, he has now retired from all employment and no-one has filled the substantial gap left by him.

POSSIBLE SOLUTIONS TO THE PROBLEM

Faculty have identified that the two main problems arising in the timeous conduct of defence PM are first, the unavailability of pathologists and second, delay that is encountered in consequence of there being no suspect identified and therefore, no defence solicitor instructed. The delay in the conduct of defence post mortem examinations cannot be significantly reduced without the assistance of the Royal College of Forensic Pathologists. Faculty recommend that input should be sought from them before proceeding further with the draft proposed bill.

Faculty observe that the 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.

This suggestion would require liaison with the Fellows of the RCFP in order that they can indicate whether a panel of the type suggested is feasible.

Questions arising from this observed solution relate to who is responsible for instructing a defence PM and who bears the cost of that instruction. The instruction could emanate from the Court if there is no suspect, or, if a suspect has been identified, from the defence solicitor representing that person. Such an approach has the advantage of avoiding delay as a result of the lack of an identified suspect or, where there is a suspect, defence solicitors being unable to secure a pathologist to accept their instructions. The question of funding is, however, more complex. Where a suspect has been identified the post-mortem will be funded by SLAB. However where there is not yet a suspect, the question of whether the court or SLAB bears the funding would require to be resolved.

Faculty are of the view that should the foregoing model be introduced, it should be accompanied by time limits. Faculty suggest in the event that a suspect has been identified by the time of the Crown post-mortem, a defence post-mortem should take place within 21 days thereof. Where no suspect has been identified the Court should appoint a 2nd post-mortem to take place within 28 days of the Crown post-mortem and the body could be released thereafter, avoiding the prolonged detention of bodies when no suspect had been identified and thus no 2nd post-mortem can be instructed.

It should be noted that discussion between Crown Pathologist and defence pathologist can avoid the need for a second PM taking place, however, this does not resolve the fundamental problems identified above.