

This document relates to the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill (SP Bill 73) as introduced in the Scottish Parliament on 21 May 2020

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

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill, introduced in the Scottish Parliament on 21 May 2020. They have been prepared by the Parliament's Non-Government Bills Unit on behalf of Gil Paterson MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 73–LC);
- a Financial Memorandum (SP Bill 73–FM);
- a Policy Memorandum (SP Bill 73–PM).

3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

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The Bill

4. The purpose of the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill is to make the existing right of the defence to instruct a post-mortem examination for the purposes of the person's defence (in addition to the post-mortem examination carried out at the instruction of the procurator fiscal), where a person has been charged with an offence in connection with causing or contributing to a death, subject to an extendable time limit.

5. The Bill is made up of five sections. Section 1 inserts a sequence of three new sections into the Criminal Procedure (Scotland) Act 1995, whilst the remaining sections of the Bill deal with consequential amendments, ancillary provision, commencement and the Bill's short title.

Commentary on sections

Section 1 – Time limit for post-mortem examinations

6. Section 1 inserts three new sections (291A-291C) into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") in order to impose an extendable time-limit on the period in which a further post-mortem examination for the purposes of the defence can be instructed and to set out details relating to the release of the victim's body.

New section 291A – Time limit for defence post-mortem examinations

7. Section 291A(1) sets out the criteria that determine when the rest of section 291A and sections 291B and 291C apply.

8. The first is that a post-mortem examination (PME), instructed by the Crown Office and Procurator Fiscal Service (referred to as "the prosecutor" in the Bill in line with the 1995 Act), must already have been carried out. The Crown will always instruct a PME following a suspicious death, usually within a couple of days of the death occurring or the body being found. A death is considered to be suspicious where circumstances around it

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“suggest that criminal conduct may have caused or contributed towards the death.”¹

9. The second criterion is that someone (referred to as “the accused” in the Bill in line with the 1995 Act) must have been charged in connection with causing or contributing to the death (meaning, in practice, that the accused has been charged with murder or culpable homicide). In some cases, there will be more than one accused person.

10. The third criterion is that the dead person’s body must not yet have been released by the Crown Office. Releasing a body means handing it over to the dead person’s relatives for burial or cremation once it is no longer required for evidential purposes.

11. Sections 291A-C only apply when all three criteria are satisfied (at the same time). Depending on when the accused person is charged (or, if there is more than one accused person, when the first one is charged), the second criterion may be satisfied before or after the first.

12. Section 291A(2) states that, within the ‘defence post-mortem period’, as defined in 291A(3), the accused must either instruct a further (defence) PME or notify the Crown that they will not exercise their right to do so. In practice, such actions would be taken by the defence solicitor, acting on behalf of the accused. The right of the defence solicitor to instruct a defence PME (in addition to the Crown PME) is an existing non-statutory right; it is not a right created by the Bill. The Bill, however, regulates that right by making its exercise subject to an extendable time limit.

13. Section 291A(3) defines the ‘defence post-mortem period’ as being, initially, 14 days from the point at which the cause of death has been notified in writing to the accused. The ‘defence post-mortem period’ will also encompass any extension period which is granted by the court. Established practice is for the forensic pathologists who carry out the Crown PME to provide their initial findings (including as to cause of death)

¹ Guidance by the Crown Office and Procurator Fiscal Service, <https://www.copfs.gov.uk/investigating-deaths/our-role-in-investigating-deaths> accessed 21 April 2020.

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to the Crown, as soon as possible after the PME has been carried out, and for the Crown then to share the main findings with the defence solicitor.

New section 291B – Extension of time limit

14. Section 291B sets out the process for extending the time limit within which a defence PME can be instructed.

15. Section 291B(1) states that an application for extension can only be made where the defence post-mortem period, as defined in section 291A(3), has begun. In addition, an application for extension cannot be made if the accused has informed the Crown that they will not instruct a defence PME.

16. Section 291B(2) deals with the situation where the application for an extension is made prior to the initial 14-day period expiring, or prior to the expiry of any subsequent extension which has previously been granted (an “in-time” application). In that situation, the court may extend the defence post-mortem period “on cause shown” – meaning that an extension will be granted if the court is satisfied by the reasons given. It is expected that the reasons will normally be set out in the application, but may be added to by further written or oral submissions if those are requested by the court.

17. Section 291B(3) provides that an application for an extension may also be made after the defence post-mortem period has ended. However, such a “late” application could only be granted if the court considered that special circumstances justified it. In addition, such an extension could not be granted if the body of the deceased had already been released by the Crown Office.

18. Section 291B(4) provides that any extension may be for a period of up to 14 days. The extension period begins either on the date on which the defence post-mortem period would otherwise expire (if the extension is granted on or before that day) or from the date on which the extension is granted (if the period has, by then, already expired).

19. Section 291B(4)(b) provides that there is no limit on the number of extensions which can be granted and hence no limit on the overall duration of the defence post-mortem period.

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New section 291C – Release of body

20. Section 291C sets out three scenarios in which the Crown should make arrangements for the body of the deceased to be released.

21. The first is that a defence PME has already been carried out (since the right of the defence to instruct a PME may only be exercised once). The second is that the accused has informed the Crown that they will not instruct a defence PME (which therefore signifies the accused permanently waiving the right to do so).

22. The third scenario is that the defence post-mortem period has expired and any application for an extension that has been made has been refused. This might involve an application being made and refused and the time limit then expiring; an application being made before the time limit expires, but only being refused after it has expired, or the time limit expiring and a (late) application then being made and refused. If no application has been made when the time limit expires, the prosecutor becomes entitled to release the body, but it remains open to the defence (under section 291B(3)) to make a late application for an extension. If that application is made before the body has actually been released, the prosecutor must then wait until the application has been determined; once the body has been released, then an application can no longer validly be made.

23. Once section 291C(2) is satisfied, the Crown must either release the body of the deceased or, if it deems it inappropriate to release the body at that time, apply to the court for an order permitting the Crown to retain the body. Any such order must specify the period during which the body may be retained. There is no upper limit to how long this period may be, but an order may be granted only “on cause shown”, so the Crown would need to give reasons to the court justifying any particular length of period applied for.

24. Section 291C(3) makes provision for circumstances in which more than one person has been charged with causing or contributing to a death. In such instances, the body may not be released until one of the conditions as set out in 291C(1) has been satisfied for each accused person. The condition need not be the same for each accused – for example, one may have instructed a PME while another has applied for an extension to the time-limit and had the application refused.

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Section 2 – Consequential amendments

25. The Bill uses the terminology ‘post-mortem examination’ throughout. Section 2 amends section 281 of the 1995 Act (routine evidence: autopsy and forensic science reports) to change existing references to ‘an autopsy’ in that section to ‘a post-mortem examination’. This ensures that the terminology in that Act is consistent throughout.

Section 3 – Ancillary provision

26. Section 3(1) and (2) allow the Scottish Ministers, by regulations, to make ancillary provision in order to give full effect to this Bill, including by amending other enactments (that is, Acts of the UK or Scottish Parliament, Orders in Council or subordinate legislation made by UK or Scottish Ministers).

27. Section 3(3) provides that any regulations made under this section are normally subject to negative procedure – meaning the regulations are subject to annulment by resolution of the Parliament for 40 days after they are laid. However, if the regulations add to, replace or omit the text of an Act (of the UK or Scottish Parliament), they are subject to the affirmative procedure – meaning they require approval by resolution of the Parliament before they can be made.

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