

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill introduced in the Scottish Parliament on 21 May 2020. It has 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);
- Explanatory Notes (SP Bill 73–EN).

Policy objectives of the Bill

3. Guidance issued by the Crown Office and Procurator Fiscal Service (COPFS)¹ states that a post mortem examination (PME) will always be required where a death has occurred in suspicious circumstances. This allows for all available evidence to be gathered to assist with any criminal

¹Crown Office and Procurator Fiscal Information for bereaved families, <https://www.copfs.gov.uk/images/Documents/Publications/Information%20following%20a%20death/October%202017%20Information%20for%20near%20relatives.pdf>, accessed on 17 March 2020.

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

investigation, including identifying those persons responsible for the death. It is normal practice for these PME's to take place as soon as possible after the report of a death to the Procurator Fiscal and they will often take place within a few days of the date of death.

4. The guidance also states that a further PME may be subsequently required. This is often referred to as a defence PME as it is requested on behalf of an individual accused of the crime.² There is no timescale by which a defence PME should be instructed.

5. The purpose of the Bill is, in cases where the accused has been charged with causing or contributing to a death³, to make the right of the defence to instruct a further PME subject to a 14-day time limit, while giving the defence the right to apply (an unlimited number of times) to the courts for an extension of the time limit if it is deemed necessary, so as not to impact upon the accused's right to a fair trial. In practice, this means the Bill is likely to be limited to cases of murder and culpable homicide and won't cover every situation where the defence in criminal proceedings would have the right to instruct a PME (e.g. some road traffic offences).

6. The member was prompted to pursue this legislation following the high-profile murder in his constituency of 15-year-old Paige Doherty in March 2016⁴. Despite an arrest being made within a week of Paige's murder, a delay in the defence PME meant her family had to wait over a month to hold a funeral service and were unable to have an open-casket

² In some cases, a defence team may instruct an expert to review the Crown pathologist's findings, as an alternative to carrying out a separate defence post-mortem. In this document, a defence PME refers only to a further, separate, PME carried out on behalf of the defence.

³ In practice, this means the Bill is likely to be limited to cases of murder and culpable homicide and won't cover every situation where the defence in criminal proceedings would have the right to instruct a PME (e.g. some road traffic offences).

⁴ Scottish Sun article dated 9 January 2019. Available at: <https://www.thescottishsun.co.uk/news/scottish-news/3727312/paige-doherty-clydebank-mum-pamela-murder/> Accessed on 17 March 2020.

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

funeral as was their cultural tradition. There have also been similar cases in Edinburgh,⁵ Renfrew and Coatbridge.⁶

7. The member hopes that creating an extendable time limit for defence PME's will encourage the defence to act more quickly, leading to a general reduction in delay. It will also increase transparency in the system, helping families to understand what is happening, reducing distress and giving them more advance certainty about the timescales within which funeral arrangements can be made.

8. It should be noted however, that the Bill does not seek to prevent a further PME being conducted on behalf of the defence, nor does it force every case to meet a single, pre-determined timescale (which might not be sufficient, in some complex or difficult cases). Extensions will always be possible so long as good reasons can be given. Whilst the needs and interests of victims' families are at the heart of the Bill, it also recognises the important role of the courts in determining the necessary timescales required in order to ensure a fair trial.

Background

Homicide rates in Scotland

9. Cases of homicide are relatively rare in Scotland. Scottish Government statistics⁷ show 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.

Post-mortem examinations

10. There are two main types of PME: hospital PME's, which are conducted when someone dies in hospital, and medico-legal PME's, which

⁵ BBC news article dated 22 November 2018. Available at: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-46304590>

⁶ <https://www.dailyrecord.co.uk/news/scottish-news/let-bury-boy-mothers-heartache-9674968>. Accessed on 17 March 2020.

⁷ Homicide in Scotland 2018-19: Statistics. Available at: <https://www.gov.scot/publications/homicide-scotland-2018-19/> Accessed on 17 March 2020.

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

are usually conducted following a suspicious or unexplained death, directed by COPFS. This Bill is concerned with the latter of the two.

11. Figures from COPFS⁸ show that between December 2018 and December 2019, it instructed 182 PME's 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 PME's were requested.⁹

12. Of the two defence PME's carried out over that period, in one instance, 44 days passed between the Crown PME taking place and the defence PME being completed. In the other case, 20 days elapsed between the Crown PME and the defence PME.

13. The Bill seeks to discourage such long intervals between PME's from occurring.

Current law and practice

14. Whilst hospital PME's are governed by the Human Tissue (Scotland) Act 2006, there is no legal framework for medico-legal PME's. However, COPFS has issued guidance on the role of the Procurator Fiscal on the investigation of deaths, including information on the PME process.¹⁰

The instruction of a post-mortem examination following a suspicious death

15. The COPFS guidance states (page 5) that a PME will always be required where a death has occurred in suspicious circumstances “to ensure all available evidence is gathered to assist with any criminal investigation, including identifying those persons responsible for the death”. The guidance goes on to state (page 6) that a PME should take place as soon as possible after the report of a death to the Procurator Fiscal and will

⁸ Source: information provided to NGBU by COPFS

⁹ The examination may not have taken place in the same month it was requested.

¹⁰ Crown Office and Procurator Fiscal Information for bereaved families, <https://www.copfs.gov.uk/images/Documents/Publications/Information%20following%20a%20death/October%202017%20Information%20for%20near%20relatives.pdf>, accessed on 17 March 2020.

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

often take place within a few days of the date of death. The examination is carried out by two pathologists (a “double doctor PME”) to ensure evidence is corroborated. Once the PME has been conducted, a final report must be made to the Procurator Fiscal. The Procurator Fiscal is then obliged to share the results with defence solicitors acting on behalf of any accused person.

16. The guidance also states (page 5) that, if someone is charged with a crime in connection with a suspicious death, a further PME may be subsequently required. This is often referred to as a “defence PME” as it is requested on behalf of an individual (or individuals) accused of the crime.

17. A submission by COPFS to the Scottish Parliament’s Public Petitions Committee¹¹ sets out more detail of how the process of sharing information with the defence and the instruction of a defence PME works in practice. The submission explains—

“Current practice is that the defence are provided with a letter at the earliest opportunity, usually when their client first appears in court, which sets out the results of the Crown post mortem and refers them to the terms of the protocol. The defence are then asked to contact the National Homicide Team to advise if a defence post mortem will be required and the draft Post Mortem report and photographs taken at the Crown Post Mortem are provided to the defence, as soon as they are available, to allow them to consult a pathologist. Proactive efforts are then made to encourage the defence to make a decision, on whether there requires to be a defence post mortem, as soon as possible.”

18. Therefore, although a final Crown PME report may not be available until several weeks after the homicide has taken place, information setting out the initial findings including the cause of death is provided to the defence team much earlier, usually within a few days of an arrest being

¹¹ Crown Office and Procurator Fiscal Service Submission to Scottish Parliament Public Petitions Committee
PE1699/H:
http://external.parliament.scot/S5_PublicPetitionsCommittee/Submissions%202019/PE1699_H.pdf. Accessed 2 April 2020.

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

made. By sharing this information early, the Crown seeks to ensure that all information is consistently shared with legal teams. As a result of having early access to this information, the defence team may determine that it does not need to carry out its own PME or may be in the position to promptly reach a decision on whether to carry out a separate PME.

19. However, it remains that there are no fixed timescales for defence PMEs – specifically, there is no deadline for a decision to be taken as to whether a further PME should be instructed, nor is there a deadline for carrying out such a PME. Where no-one has been charged in connection with the suspicious death, there is no time limit for deciding when the body can be released to the family.

20. As a result, bereaved families can find themselves left in limbo, not knowing how long they may have to wait for the body of their loved one to be returned. The length of the wait, combined with the uncertainty, can create considerable additional distress to people who are already grieving. The member hopes that imposing a statutory timescale for the release of the body and requiring the defence to make the case for any extension, will both reduce the length of time that families must typically wait, and reduce the uncertainty that can currently make that waiting so difficult to endure.

Defence review of Crown Pathologists findings

21. In some cases, a defence team may instruct an expert to review the Crown pathologist's findings, as an alternative to carrying out a separate defence post-mortem examination.

22. A submission by the Scottish Legal Aid Board (SLAB) to the member's consultation on a draft bill included data on requests for legal aid for defence PMEs¹². SLAB noted that—

“In the 9 requests received since this new protocol has been put in place, (from 1 December 2018 to 28 February 2019), 8 involved the defence pathologist reviewing the Crown PM report and photographs only, and only 1 sought approval for a separate examination of the

¹²Scottish Legal Aid Board response to Member's consultation on proposed Bill. Available at: https://b0dd9303-7bd8-42bf-917c-cf559717b4cc.filesusr.com/ugd/1a660c_4aa8b6b2ea0248259498026618ab3aec.pdf. Accessed on 17 March 2020.

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

body by the defence pathologist. For the same period the year before, we received 7 requests for defence pathologists, 2 were for reviewing the Crown reports, and 5 were for a further examination.”

23. Although the data provided by SLAB is limited to a 3-month period, it is worth noting that the defence will sometimes rely on commissioning its own examination of the results of the Crown PME and only sometimes commission its own, separate PME of the body.

Review of post-mortem examination procedure

24. Although there is no current statutory framework for medico-legal PMEs, a new protocol was introduced by COPFS in 2018 which sought to speed up the release of the remains of homicide victims retained for the purposes of PMEs. This protocol followed press coverage of the three high profile cases that prompted the member’s proposal and subsequent political campaigns.¹³

25. One of the main aims of the protocol is to reduce the instances where a further PME is necessary by ensuring information is consistently shared with defence solicitors.

26. In response to a parliamentary question, the Lord Advocate explained that this protocol was the result of a review of the current system, and was formulated in consultation with the Law Society of Scotland, the Faculty of Advocates, and forensic pathologists—

“The review recognised the right of accused persons to examine and test the evidence against them, including pathology evidence, and the resultant right to instruct a defence post mortem examination. The review recognised the professional obligation on the defence to ensure that an accused’s defence is properly investigated and conducted and that any failure to meet this professional obligation may result in a successful appeal against conviction.

¹³ Crown Office and Procurator Fiscal Service Article: ‘Bid to reduce impact of murder post-mortems’ Available at: <http://www.copfs.gov.uk/media-site/media-releases/1806-bid-to-reduce-impact-of-murder-post-mortems>. Accessed on: 17 March 2020.

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

“However, the review also recognised that in all but exceptional cases, a second invasive post mortem examination of the deceased’s body may be of limited evidential value. The review noted that, in all but exceptional cases, the evidence of the Crown post mortem examination could be properly tested and challenged by the defence through a defence pathologist’s expert examination of the post mortem findings, including samples where relevant, and opinion as opposed to a second invasive post mortem examination.

“The review concluded that a Consultation Protocol, supporting effective consultation between pathologists instructed by the Crown and defence may deliver improvements. Effective consultation would support an informed defence decision as to whether a second invasive post mortem examination was required and may reduce not only the number of required defence examinations but also delays in the return of deceased persons to their families, reflecting the views of families.”¹⁴

27. Following this review, the Forensic Pathologist Consultation Protocol was agreed and was supplemented by the following consultation commitments on the part of forensic pathologists:

- Pathologists instructed by the Crown should be available, if required, to consult with the pathologist instructed by the defence to ensure that the latter is content that all appropriate examination has been undertaken by the Crown.
- That, if available, the Crown pathology report should be made available to the pathologist instructed by the defence to inform this consultation. A draft report may similarly be made available provided it contains all significant facts.
- That the Crown examination photographs should be made available to the pathologist instructed by the defence to similarly inform the consultation.

¹⁴ Response from Lord Advocate to written question lodged by Gordon Lindhurst MSP, 22 November 2018. Available at: <https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5W-20155&ResultsPerPage=10>. Accessed on: 17 March 2020.

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

- That the pathologist instructed by the defence should consider whether or not a further physical post mortem examination is required or whether, following consultation with the Crown pathologist, a physical examination is of limited value and the pathologist instructed by the defence can provide an expert opinion based upon the available records and samples from the first post mortem examination.”¹⁵

Law and practice in England and Wales

28. PME in England are conducted by a Home Office registered forensic pathologist. Following a suspicious death, the police and coroner will work closely together to ensure the initial post-mortem examination is undertaken straight away. The pathologist’s report and the results of any additional forensic examinations or tests are then made available at the earliest opportunity, with the report itself completed within 14 days.

29. The 14-day time limit is intended to allow any defendant (and their solicitor) the opportunity to consider whether there is a need for a further, independent, PME. If the defence is granted a request for a further PME, they will be expected to make the arrangements without delay. The current guidance however limits the opportunity for defendants to request a further PME to 28 days.

30. Where no offender has been identified or charged, a further, independent PME can be conducted within 28 days of the first, in anticipation of any future defence requirements. If the police have reason to believe that a person will be charged with a homicide offence within 28 days of the discovery of the offence, the coroner will be so advised and will retain the body until a person has been charged, or until the expiry of the 28 days.

31. If no-one has been charged in connection with a homicide offence, and the police do not expect to make an arrest within 28 days, the coroner will arrange for a second PME by an independent pathologist. The body will then be released, and the report of the second PME retained for use by the defence if an arrest is made and charges brought.

¹⁵ Text of protocol provided to the member by the Lord Advocate.

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

32. A defendant or prosecuting authority has the right to appeal to the Chief Coroner for further 20-day extensions to release of the body, but a compelling reason must be provided for the Chief Coroner to grant such a request. The coroner's decision is subject to judicial review.

33. Coroners have the authority to retain a body in cases of suspicious violent death (murder, manslaughter, infanticide, and causing death by dangerous driving) for a period of up to 40 days from the death, with an option to apply to the Chief Coroner for a one-off extension of a further 20 days should circumstances demand (e.g. following representations by the prosecuting authorities or the defence representative, or should additional suspects be charged with the offence).

Law and practice in other European countries

34. In Germany, it is generally assumed that only one PME should take place, with the defence able to call their own experts to analyse the results. In some cases, a request for a further PME can be made to a judge.

35. Both France and Belgium allow for a further PME; however, this request must be put before a judge who will set a time limit for its instruction and completion.

Policy in detail

36. The Bill imposes a 14-day time limit for a defence solicitor to instruct a further post-mortem examination in cases where a person has been charged with an offence in connection with causing or contributing to a death.

37. The Bill also establishes the right of the defence to apply (an unlimited number of times) to the courts for an extension of the 14-day time limit, giving reasons for why the extension is considered necessary. Each extension can be for up to a further 14 days. This ensures that there is no absolute time limit that could compromise the accused's right to a fair trial.

Scope of time limit

38. The time limit should apply in any case where a person has died, and someone has been charged with an offence in connection with causing or

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

contributing to the death and where the accused has legal representation in place. In practice, this primarily means homicide cases.¹⁶

39. In cases where the defence indicates that it does not wish to instruct a PME, the Crown can make arrangements for the body to be released where appropriate.

Calculating the time limit

40. The 14-day period begins on the day on which the accused person (in practice, that person's solicitor) is informed in writing of the post mortem examination finding as to the cause of death, as determined by the Crown's PME.

41. In situations where someone has already been charged by the time the Crown PME is carried out (e.g. if the person was arrested at the scene), the prosecutor is likely to share this information with the defence solicitor immediately after receiving it from the forensic pathologists, and prior to the accused first appearing in court.

42. In situations where the Crown PME is completed first, the prosecutor would hold onto the information until a suspect has been charged and a defence solicitor has been appointed; again, the information would need to be shared (starting the 14-day clock) prior to the accused first appearing in court.

43. Where a number of people are charged in connection with the death (and separately have defence solicitors appointed), a separate 14-day time limit will apply to each one. The 14-day periods may start on different days (and some may subsequently be extended while others are not).

¹⁶ Homicide is understood to cover the offences of murder or culpable homicide. National Records of Scotland's index of legal terms defines murder as the "(u)nlawful killing of another with intent to kill, or with wicked recklessness to life." whilst culpable homicide is defined as the: "(i)ntentional/ reckless act with some diminishing factor / death caused unintentionally by criminal act or culpable negligence."

<https://www.nrscotland.gov.uk/research/research-guides/research-guides-a-z/court-and-legal-records/index-of-legal-terms> Accessed 31 March 2020

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

44. It is not the defence PME itself that must take place within the 14 days; rather, what the defence solicitor must do within 14 days is to instruct a pathologist to carry out a further PME and confirm to the Procurator Fiscal that this has been done. (Alternatively, if no defence PME is needed, the solicitor should confirm this to the Procurator Fiscal, also within the 14 days.)

Extending the time limit

45. At any time before the time limit is reached, it is open to the defence solicitor to apply to the court for an extension, providing that the solicitor has not already either instructed a PME or confirmed to the Procurator Fiscal that a PME won't be instructed. The extension sought can be for any period of up to 14 days. It is expected that the form in which an application is to be made, and the means by which it is decided will either be determined by rules of court or left to judicial discretion (based on established practice in similar circumstances).

46. Any application may either be granted (either for the duration requested or a different duration, up to a maximum of 14 days) or refused. If the application is granted, the defence solicitor may apply for a second extension before the final day of the extended period; and this process of further extending the period may be done on repeated occasions, meaning there is no limit on the total amount of time that may be allowed by the court (so long as it continues to be satisfied by the reasons that are given).

End of time limit and release of body

47. Once a defence PME has taken place, or if the defence solicitor confirms that no such PME is to be instructed, the Crown should make arrangements for the body of the deceased to be released if it considers it to be appropriate. If the time limit expires (whether or not it is the original 14 days, or an extension) without either of those things happening, and without an application for an extension (or a further extension) being made, then the Crown must arrange for the body of the deceased to be released if it is satisfied that it is appropriate to do so. This is also the case if the time limit has expired, an application for an extension has been made, and the court has refused it.

48. In cases where the Crown is not satisfied that it is appropriate to release the body, for example if it expects to soon arrest another suspect, it

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

may apply to the court for an order permitting the retention of the body for a longer period. It will be for the court to decide, taking account of the reasons given, whether to grant such an order and, if so, for how long. (In this context, there is no 14-day maximum.)

49. Where more than one time limit was running (i.e. where there are two or more accused persons), then the duty to release the body applies only when all the time limits have expired.

50. The Bill does not specify to whom the body must be released. In practice, this is likely to mean releasing it to the family of the deceased (or the undertaker appointed by the family) for burial or cremation; in cases where there are no relatives, it may mean release to a Crown-appointed undertaker.

Late applications

51. It is possible that a time limit will expire in error, for example because a solicitor forgets to apply for an extension or is unable to lodge an application for some practical reason (e.g. illness, transport disruption). Strict application of a statutory requirement to release the body in such cases could compromise the interests of justice. The Bill therefore includes provision for late applications – that is, applications for an extension made after the original time limit (or the time limit as most recently extended) has expired (but before the body has actually been released).

52. However, the court may only grant such applications if the body of the victim has not already been released and if it deems that there are special circumstances to justify such an extension. It will be for the courts to establish, over time, what might constitute special circumstances.

Alternative approaches

Removal of right to defence PME

53. There are several alternative approaches which the member could have chosen to take. For example, he could have legislated for the complete removal of the right of the defence to instruct a separate PME. Given, the protocol introduced by COPFS in 2018, which aims to ensure information is consistently shared with defence solicitors, it could be argued that there is no requirement for a further PME to take place. In addition, it is

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

the member's understanding that defence teams are frequently content to instruct another pathologist to review the material provided from the Crown PME, without any further need to carry out a further PME (physical examination of the body).

54. The member was not minded to legislate for such a removal, taking the view that the right of the defence to carry out a further PME is an important factor in ensuring that all parties have full access to all relevant information and that a fair trial takes place.

Further restrictions on time limits

55. Having ruled out an outright ban on defence PMEs, the member could have chosen to place more specific limitations on the amount of time in which a defence PME could be requested and carried out. For example, the Bill could set an absolute time limit on the instructing of defence PMEs by requiring all defence PMEs to be instructed within 28 days of the initial Crown PME taking place. This would to some extent reflect the system in England and Wales in which guidance places a limit of 28-days for the defence to request a further PME.¹⁷ Alternatively, the Bill could have capped the number of extensions which a defence team could apply for.

56. Creating such restrictions may have helped to achieve the member's policy aim of encouraging the defence to act more quickly in the instruction of PMEs, leading to a general reduction in delay. However, the member is of the view that the option to extend a deadline should always be available so long as an appropriate reason is provided, explaining why such an extension is necessary.

No legislative action

57. The member could have determined that current guidelines were sufficient to ensure that his policy aims are met, particularly in light of the COPFS protocol introduced in 2018 which aims to reduce the number of instances where a further PME is necessary, by ensuring information is consistently shared with defence solicitors. It is also hoped that the

¹⁷ An appeal for further 20-day extension can be made if a 'compelling reason' is provided to the Coroner in order to grant such a request.

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

protocol will result in the bodies of homicide victims that have been retained for the purposes of PME's being released more quickly.

58. While the member welcomes the protocol, he does not think it goes far enough, as it doesn't set any time limits and doesn't put the onus on the defence to justify the time taken to reach decisions. He also feels that a protocol could easily be changed in future and so doesn't offer the same longer-term certainty that legislation can provide. He therefore considered it necessary to introduce legislation in order to ensure that his policy aims are achieved and retained in the long term.

Increase the number of forensic pathologists

59. Some responses to the member's consultation on his proposed Bill suggested that there is a shortage of forensic pathologists in Scotland, and that this is the primary reason for delays in defence PME's taking place and bodies subsequently being released. It could therefore be argued that by increasing the number of forensic pathologists, any requested defence PME's could be carried out earlier, thus leading to a quicker release of the bodies of the deceased.

60. While an increase in the number of forensic pathologists would be welcomed by the member, he acknowledges that this is not the sort of outcome that can be achieved through legislation. If it is achieved, it is likely to be through the Scottish Government working with universities and professional bodies to identify and address the obstacles which appear to be deterring people from becoming forensic pathologists. Such action could usefully complement the Bill but is not, in the member's view, a substitute for it.

Consultation

61. The member ran a consultation exercise between 8 January and 9 April 2019¹⁸. He received 247 responses in total, six of which were from organisations. Most respondents, 97%, were supportive of the member's proposal, with only 1% opposed. The main reasons given by those who were supportive were:

¹⁸ Gil Paterson MSP's consultation on his proposed bill, available at: [https://www.parliament.scot/S5MembersBills/20190108_Gil_Paterson_Consultation_document_\(2\).pdf](https://www.parliament.scot/S5MembersBills/20190108_Gil_Paterson_Consultation_document_(2).pdf), accessed 5 May 2020

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

- dignity for the victim and their family;
- the impact that delays have on family members; and
- to allow family members to choose between an open and closed casket.

62. Some of the organisations that responded to the consultation (the Faculty of Advocates, the Law Society of Scotland, and Berrymans Luce Mawer) argued that the proposal did not tackle one of the root causes of the current delays, namely the shortage of forensic pathologists in Scotland, and suggested alternative solutions to those proposed by the member to attempt to address this problem.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

63. The Bill is not expected to have any specific impact on the protected characteristics of age, gender, disability, sexual orientation or marriage and civil partnerships.

Religion and belief

64. Many faiths have particular views or traditions around the timing of funeral services and the manner in which the body is treated/prepared. For example, some Catholics favour an “open-casket” funeral which may only be possible if the funeral can happen within a short space of time after death. Within Christianity, many traditions (e.g. Baptists, Methodists, and some Anglicans) expect burial to take place within a few days of death. Most strands of Jewish belief require burial to take place within a very short time and prohibit embalming – although exceptions are made for homicide to allow the cause of death to be investigated. In many Muslim traditions, there is also a strong expectation of rapid burial. In the Hindu religion, the normal expectation is for burial to happen the day after death if possible.

65. The Bill seeks to reduce the level of uncertainty around when a defence PME will take place and allow families to make funeral arrangements sooner, and where extensions are necessary, provide them with a realistic timescale for when arrangements can take place. It is also

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

intended that the Bill will reduce unnecessary delays in the release of bodies, making it more likely that burial or cremation can take place quickly. Although delays are, in some cases, unavoidable, the Bill should limit these and provide greater certainty for family members.

Ethnicity and race

66. The issues identified above around religion and belief are likely also to apply in relation to ethnicity and race, given the correlation that exists between some religions and particular ethnic communities. Cultural attitudes to death and funerals, which often have a basis in a religious tradition, are likely to be widely shared in an ethnic community, including among those who do not subscribe to or practice that religion.

Human rights

67. The Bill seeks to create restrictions on the time that can be taken for a defendant to request a further post-mortem. The member considers that the way it does so is fully compatible with the European Convention on Human Rights. In particular, care has been taken to ensure that it meets the requirements of Article 6 of the European Convention of Human Rights (right to a fair trial). This is achieved in particular by allowing the defendant to apply, on course shown, for an unlimited number of extensions to the period in which a further post-mortem examination can be instructed. It further allows for the possibility of a late application for an extension to this period.

Island communities

68. The Bill should have no significant impacts specific to island communities.

Local government

69. The Bill should have no significant impacts specific to local government.

Sustainable development

70. The Bill may impact on sustainable development in the context of an equitable and just society. In particular, the Bill is intended to be fairer to the victim's family by reducing delay and increasing certainty in the process

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

for instructing a further PME and then releasing the body, whilst still protecting the defendant's right to a fair trial.

71. It is not anticipated the Bill would have any impact on sustainable development in the context of the environment, economy and governance.

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

Policy Memorandum

□ Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
www.parliament.scot/documents