



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 29 September 2020

Session 5



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JUSTICE COMMITTEE

23rd Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Andrew Mylne (Scottish Parliament)
Gil Paterson (Clydebank and Milngavie) (SNP)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 29 September 2020

[The Convener opened the meeting at 10:00]

Post-mortem Examinations (Defence Time Limit) (Scotland) Bill: Stage 1

The Convener (Adam Tomkins): Good morning and welcome to the 23rd meeting in 2020 of the Justice Committee.

Our first item of business is stage 1 consideration of the Post-mortem Examinations (Defence Time Limit) (Scotland) Bill. I welcome our witnesses, who are all attending online. We are joined by Gil Paterson MSP, the member in charge of the bill, and the Scottish Parliament officials who are supporting him: Andrew Mylne, Liz Anderson and Claudia Bennett. I welcome you all to the meeting.

I invite Mr Paterson to make some short opening remarks in respect of his bill, after which we will move to questions.

Gil Paterson (Clydebank and Milngavie) (SNP): Convener, thank you for inviting me to say a few words about my bill.

When a person dies in suspicious circumstances, a post-mortem examination usually takes place within a few days of the death. There is also scope for a further post-mortem examination, which is known as a defence PME, to be carried out on behalf of the accused. There is no timeframe within which that must take place or be instructed.

In recent years, there have been high-profile cases where, because of delays in defence post-mortem examinations, relatives of murder victims who have been bereaved in the most distressing of circumstances have waited far too long for the remains of their loved one to be returned to them.

One such case, and my motivation for proposing the bill, is that of Paige Doherty, the daughter of one of my constituents, who was murdered on 19 March 2016. Despite the suspect being charged within a week of her death, a defence post-mortem examination was not held until 15 April, and her body was released to her family on 18 April, 30 days after her murder. There was no transparency in the procedure, which caused a great deal of distress to her family.

My bill aims to lessen the suffering experienced by other families in similar situations by introducing an extendable 14-day time limit during which a defence post-mortem examination may be instructed. I hope that that will reduce delays in the release of the body by encouraging the defence to act more quickly. 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.

Although 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 timescales that are required to ensure a fair trial. That is why the accused will be able to apply to the court for an extension to the time limit on an unlimited number of occasions and, provided an acceptable reason is given, an extension may always be granted.

I thank the committee for its time today and urge it to give further consideration to my bill so that this important issue can be addressed fully.

The Convener: Thank you, Mr Paterson. That was a helpful introduction. Does Andrew Mylne or either of the other officials accompanying Mr Paterson wish to make any opening remarks?

Andrew Mylne (Scottish Parliament): No, thank you, convener. We are happy to go to questions.

The Convener: In that case, that is what we will do.

My first question is directed to Mr Paterson, but he can bring in officials if he wants to. Aside from the Paige Doherty case, which you spoke about in your opening remarks, what general evidence is there of unacceptable delays in releasing the bodies of victims when homicide is suspected? How widespread is the problem?

Gil Paterson: I think that it is fairly common. There have been other high-profile cases after that of Paige Doherty. When we consider the low number of homicides in Scotland, the fact that, only a short time later, there was another incident that was as bad as the Paige Doherty one tells me that it is quite common. In any case, even if it happened only occasionally, preventing it would be a good thing to do.

The Convener: I certainly hear the force of that argument. I do not want to talk about numbers, because we are dealing not with numbers but with people—families who are grieving in the most difficult of circumstances. However, it would be good to be clear about the scale of the problem. How many such cases are we talking about on an annual basis?

Gil Paterson: I do not have that figure to hand. I would need to hazard a guess at it. I started this process in 2016 and, from talking to all the folks who are involved in post-mortem examinations, I would say that around 10 per cent of cases cause concern. That is a fair number. However, that is based only on my experience—it could be more than that.

The reason why we do not know the numbers is that there is no transparency. It is only when families go over and above what other families have done that we find out about what has happened. Some families may—I stress “may”—just put up with it. The death of Paige Doherty was pretty horrific in itself, but the fact that the process dragged on in the way that it did, and the fact that the family was denied the opportunity to have an open-casket ceremony, meant that the family became vocal. Shaun Woodburn’s family became vocal in similar circumstances. Those were two extremely high-profile cases.

As I said, the problem is that we do not know the number, because there is no transparency in the system. My bill would change that and ensure that we all knew what was happening all the time.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning and welcome to the committee, Gil. I know that you are passionate about the issue, and I commend you for the work that you have done on it, motivated by the tragic and awful circumstances that you have described.

Is there any evidence that the time that is taken for defence lawyers to decide on instructing a second post-mortem examination is a contributor to any delays? Have you and your team found any evidence for that?

Gil Paterson: I have my own views about what happens, but I just get the feeling that, in some circumstances, no priority is given to the issue because it is an open-ended procedure. In no way, shape or form are the delays deliberate—it would be impossible to think that. However, it might be that because other, perhaps very important, things are involved in the defence, the post mortem is somewhat left aside and time elapses. That is the only answer that I can give to your question.

Fulton MacGregor: Thank you for that. Are there any facts or figures on the number of times that the defence instructing a post mortem has led to significant delays?

Gil Paterson: No, because, as I said to the convener, we cannot get our hands on those details unless family members decide to publicise them. That is not an easy job to do because, in their circumstances, they have very important things to deal with. There is no way for us to go in and see how long the defence in a particular case

has taken to come to the conclusion that it needs a second post mortem.

Because getting a second post mortem is on demand, there is nothing in law that says that it must happen in a certain time. Some jurisdictions say that there is a period within which people can apply for a second post mortem. I have looked very carefully, but I cannot find another jurisdiction in the world that automatically grants a second post mortem. In every other jurisdiction, people have to apply, normally to the court or judge; Scotland is unique in it being automatic and a given that the defence will get one.

In my bill, I am careful not to take that right away, because that would cause a lot of barriers for the legal fraternity. The right would remain, but the bill requires the second post mortem to be requested within 14 days. After that time, the defence would need to apply to the court with good reason and it would decide whether a second post mortem would be granted.

Fulton MacGregor: Thank you. It is helpful that you have set out that context.

The Convener: On the question of numbers, if I read correctly the policy memorandum that accompanies your bill, it says that there are in the region of 60 homicides a year in Scotland and that, between December 2018 and December 2019, 182 post-mortem examinations were carried out, only two of which were requested by the defence. I do not know whether that year is representative, but that snapshot suggests that only two of the 182 post mortems that were carried out in that 12-month period were requested by the defence. Do you have any reflections on those numbers?

Gil Paterson: I agree that, often, the defence will utilise the Crown post mortem. That approach is a good thing and it is common elsewhere.

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.

The Convener: I understand. Thank you.

Liam McArthur (Orkney Islands) (LD): I commend Gil Paterson for his commitment to the issue and his efforts in taking forward a member’s bill, which are not to be underestimated.

I will pick up the point about delays, which the convener touched on. You set out the case in relation to the defence instructing its own post mortem but, from looking through the papers that the committee has received, it appears that other

factors are potentially at play in delays, such as identifying suspects and finding pathologists to undertake the examinations. What assessment have you made of the impact of those factors on delays in the system?

10:15

Gil Paterson: My constituent and I recognise that, because of the nature of murder, there is a prospect that there might not even be an accused. The 14-day period in the bill would start to take effect when an accused has been charged and the defence has been appointed and has had sight of the Crown post mortem. We in no way criticise the system for taking too long to charge people—that is not where we are going with the bill. We recognise fully that there might be lots of good reasons why no one is charged and so a second post mortem cannot take place.

The bill will kick in after someone has been charged and the defence has been appointed and has had sight of the Crown post mortem. The convener alluded to the point that, hopefully, once the defence has had sight of that post mortem, it will decide that it does not need a second one, and that is a good thing. The bill relates to cases in which a post mortem takes place. We are trying to tighten up that procedure, because that is what causes the problem. It is when the defence has been appointed that the problem starts.

Liam McArthur: That is helpful. On your point about a reduction in demand for a second intrusive post mortem because of the willingness of the Crown to co-operate with the defence on the issue, that seems to be in everybody's interests, where it is appropriate.

I suppose that nothing can be done about delays in identifying suspects, as those delays will reflect the nature of the case. However, from your work in the area, do you know whether there is a dearth of pathologists who can carry out such work? Do we need more people who are expert in the field and can carry out that work?

Gil Paterson: You will see from the correspondence from people who raise that legitimate question that there is a shortage of forensic examiners. If there is at any time a shortage of people who are available to carry out a second post mortem, that would be a legitimate reason to apply to the court for an extension. That might happen, and we recognise that.

We know that there is a shortage of examiners. In 2016, when I had my first meeting on the subject with the Crown Office, it raised the prospect of there being such a shortage. My answer to that then, which is also the answer that I will give now, is that, if we all know that there is a shortage, we need to fix that. In my view, it is not a

good reason to delay cases, if we can deal with that particular problem. If the bill is enacted and the first post mortem after that is delayed because of a shortage of examiners, that issue will be highlighted.

I am not sure whether it is the Crown Office or the Government that is responsible for that but, honestly, somebody needs to get their finger out. If that is one of the problems, it is a problem that can be sorted. We need more forensic examiners to take care of the issue.

Liam McArthur: I suspect that that is probably a Crown Office responsibility, but with resources that are provided by the Scottish Government. That is very helpful.

John Finnie (Highlands and Islands) (Green): At the outset, I make a declaration that I am a signatory of Mr Paterson's bill and that I have given my support to get it to this point. Like others, I commend Mr Paterson for his diligence.

I am aware of the length of time that it takes to get to this point. To ask a blunt question, has the purpose of the bill been overtaken by events? If not, has the forensic pathologist consultation protocol published by the Crown Office in 2018 had an impact on the bill?

Gil Paterson: I welcomed that. At every step of the way, I interviewed everyone who was involved in the case, from the police to the Crown Office and the person who carried out the post mortem. They were all sympathetic to my ask, and there is general sympathy about the issue.

To be quite honest, the protocol is in place on the basis of the work that I was doing. Every time that I had an interview or a meeting, I passed the information on to the Cabinet Secretary for Justice, who liaised with the Crown Office. One of the people whom I spoke to raised the prospect of a protocol, which I then flagged up. I welcome the protocol; it is a good thing and it will help the situation.

However, 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.

John Finnie: That is very helpful and clear.

The Convener: So far, the thrust of the committee's questions has been about the problem that the bill seeks to address. We now turn to the detailed proposals in the bill. Shona Robison has the first questions on those.

Shona Robison (Dundee City East) (SNP): I join everyone in recognising your efforts, Gil. I know that it is not easy to get a member's bill to this stage, so well done.

You have touched on this already, but it would be helpful to hear a bit more about the relative advantages and approach of your bill and the other ways that the issue could have been taken forward. You have just been talking about the protocol, so what are the advantages of the approach in your bill?

Gil Paterson: The bill has one straightforward advantage. It is hard to imagine the circumstances that victims' families are in. In many cases, they are left in the dark. No one can tell them anything about the post mortem, including where it takes place. There is no transparency, you can find no numbers, the defence does not let anything out of its sphere of influence, and the police cannot tell anyone anything—nobody can. The one thing that the bill does is introduce transparency. It is just as important to the public that they know what the systems are.

We should be an open and transparent society. With something such as a post mortem, 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.

Shona Robison: I want to be sure that I understand: does the bill place a requirement on the Crown Office to publish that information or to provide that information directly to the family? How will that work in practice?

Gil Paterson: The family will know that there is a timeframe of 14 days and that, if there is a delay, there will be a good reason for that. If that good reason is passed by the court, it will be published and people will know why the timeframe is being extended for up to another 14 days. That information is the bit that is missing.

I am not saying that a family should be informed at every step of the way, every day. That would not be practical. However, there should be key timeframes, 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.

Shona Robison: Thanks, Gil. That is really helpful.

The Convener: Rona Mackay wants to pick up a similar line of questioning.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Gil, I remember the tragic case of Paige Doherty very well, and I know how hard you have worked on it and your utter commitment to the family, which is really commendable.

The bill seems straightforward in its ask. However, were any concerns expressed during the consultation process? If there were, how does the bill seek to address them?

Gil Paterson: The only legitimate concern that I could determine was the one that I raised with the committee myself, which is the shortage, at times, of forensic pathologists. That has created a difficulty, and it is the one issue that has been raised that is of any substance. In the course of my deliberations, everyone has been wonderful with me and has understood what I am trying to do. I have had a lot of help from all involved.

That is the only substantial roadblock to the bill that I can see, but, for the reasons that I gave earlier, I do not agree that it is a good reason to oppose the bill. It could be easily sorted, and, whether or not the bill fails, we should sort out that problem. We know that it has been going on since 2016.

Rona Mackay: You have clearly highlighted an issue. Was the legal profession generally supportive of what you are trying to do?

Gil Paterson: I would not say that it was supportive—it was very sympathetic. People understood the torment that the situation causes. There is no question about that; that came across loud and clear. However, the shortage of forensic pathologists was raised right at the start, and any legal objections are about the shortage and not about anything else. Nobody has said that the bill denies the accused the right to a fair trial or anything like that. No one has come back at all on anything in the legal sense. You will not find that, because I have not found that. The shortage is the one element that has been raised. Would I say that that is a legitimate concern? Yes, if people are concerned about that, it is legitimate, and the issue should be addressed, one way or another.

10:30

Rona Mackay: Thank you. That is interesting.

Liam Kerr (North East Scotland) (Con): Good morning, Gil. I would like to look at the 14-day time limit, which is, I understand, extendable if the defence applies and, as you said in your opening remarks, an acceptable reason is given—the bill

says “on cause shown”. Can you give the committee any examples of what might constitute an acceptable reason or what cause would justify such an extension?

Gil Paterson: I think so. 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. If I were a judge and I was asked to grant that—members can see how passionate I am about the issue—I would. There are legitimate reasons. 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. I think that the reasons that I have given are legitimate ones to extend.

Liam Kerr: So those would be acceptable reasons. In your opening remarks, you said that an application could be made any number of times, but after the initial 14-day period has passed, special circumstances are required to get a further extension. Are an acceptable reason and special circumstances the same thing, or are they different?

Gil Paterson: They are the same thing. A good reason would be sufficient. The last thing that the family that I am dealing with—I am sure that the same applies to every family—would want would be for the wrong person to be charged because the defence was not able to present all the evidence. The guiding factor is the idea that someone who committed a murder would still be at large. A family would want the opportunity for the defence to conduct its business properly. So do I.

Liam Kerr: That makes sense, but the question that plays in my mind is whether, if an extension can be granted on any number of occasions, as you said at the start, and with a relatively low threshold—as you have just said, justice still has to be done—there is a risk that no greater certainty about the time limit will be achieved because, in theory, someone could come back any number of times and make further extension applications. If I may put words into your mouth, the interests of justice would require that extensions be given. Is that lack of certainty a risk?

Gil Paterson: I do not think so. If we look at all the other jurisdictions, we see that some extensions are granted and some are not. Case studies tell us that they will not always be granted.

I suspect that the same thing would happen in the Scottish situation—a judge or court could say no and they would give a good reason as to why they would not grant the extension. One thing that everyone else has is certainty—everybody else knows what is happening—but we do not. That is the main thing that we would get out of the bill.

Annabelle Ewing (Cowdenbeath) (SNP): I also declare an interest, because I was happy to be a signatory to the proposal when it was initially put forward. We have had a very interesting discussion, and I think that each of us has enormous sympathy with the reasons why Gil has introduced the bill.

I seek clarification as to what discussions Gil has had with the cabinet secretary and across the parties to ascertain the likely level of support for the bill.

Gil Paterson: I am unsure about the Government’s support. I have been at this game too long—that is what my family tells me. I have felt no pressure from the Government, and there has been no chat from it that it thinks that the bill is a bad idea and it cannot support me—I have had only encouragement. I am unsure of exactly what it thinks about the bill. However, we are in politics, so there is also the fact that no one has tapped me on the shoulder and told me that they do not support it.

During most of the time that I was engaged in gathering my own extensive evidence prior to launching the bill, the co-operation from and dialogue with Michael Matheson was excellent. He was a very good listening ear, and was very helpful to me. Therefore, maybe “neutral” would be the word that I would use to describe the Government’s view. Perhaps it is a bit better than neutral, but neutral is a fair description.

Annabelle Ewing: Has there been any feedback from the Opposition parties on the likely position that they will adopt?

Gil Paterson: No, nothing. Again, some individual colleagues from different parties have been very supportive of the bill and have spoken highly of its intention. It is a simple bill—it is not too complicated and does not challenge the system.

Talking to parties in a group is not how I normally do business. I normally talk to folk I know and whose word I trust. They will tell me if they think that something is a good idea and will give me their good, honest advice and consideration. That is how I am, I am afraid. Therefore, I do not know about the parties—I have no idea.

The Convener: I thank all members for their questions. Special thanks go to Gil Paterson and the officials who have joined us this morning. No

member has indicated that they have further questions on the bill.

Next week, we will take evidence from Claire Baker MSP about her member's bill. We intend to discuss our approach to both bills after that. We will be in touch in due course to discuss our plans, after we have heard from Claire Baker and had time to reflect on her bill as well as Mr Paterson's.

Gil Paterson: If you will indulge me, convener, I would like to make an ask of the committee. I know that the committee is extremely busy as a result of Covid and that it is under enormous pressure, but would the committee consider asking the Government and the Crown Office and Procurator Fiscal Service what they think of the bill?

I am now going to be really cheeky. If the Parliament decided that the election was to be delayed—the chance of that happening might be very small—and the committee thought that my bill was a worthy one, would it consider holding it on the shelf, just in case the parliamentary session is extended? That is a simple, straightforward request, which I invite the committee to consider in my absence. I realise that I am being very cheeky, but my age allows me to be.

The Convener: With great respect, Mr Paterson, I do not think that it has anything to do with age. You refer to matters that are a long way above my pay grade. The delaying of parliamentary elections is not a question for the Justice Committee or its convener. However, I assure you that we will take all of what you have said on board and will consider what we can do with regard to the bill after we have heard from Claire Baker next week.

Thank you very much indeed for the evidence that you have shared with us this morning.

Sentencing Bill

10:41

The Convener: The next item on our agenda is consideration of a legislative consent memorandum in relation to the United Kingdom Government's Sentencing Bill, which I have not read, as I understand that it is 600 pages long. We have a paper from our clerks, which summarises the relevant provisions of the bill, and the Scottish Government's legislative consent memorandum. Do members have any comments on the LCM?

No member has indicated that they have any comments to make on the LCM. That being the case, does the committee agree that the Scottish Parliament should give its consent to the relevant provisions in the Sentencing Bill?

That is agreed.

Are members content to delegate to me the publication of a very short factual report on the outcome of our deliberations on the LCM?

That is agreed.

Subordinate Legislation

Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No 2) Rules 2020 (SSI 2020/264)

10:42

The Convener: The next item on our agenda is consideration of a Scottish statutory instrument that is subject to the negative procedure. We have a paper from the clerks that summarises the instrument's purpose. Do members have any comments to make on the instrument?

No member has indicated that they have any comments to make. That being the case, are members content formally not to make any comments to the Parliament on the instrument?

That is agreed.

That concludes the public part of the meeting. Our next meeting will be on Tuesday 6 October, when we will hear from Claire Baker in relation to her Culpable Homicide (Scotland) Bill and will consider our approach to the Hate Crime and Public Order (Scotland) Bill. We will also consider a draft report on the Defamation and Malicious Publication (Scotland) Bill.

We now move into private session for the final item on our agenda.

10:44

Meeting continued in private until 11:20.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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