

## Briefing for the Public Petitions Committee

**Petition Number:** [PE 1699](#)

**Main Petitioner:** Amanda Digby

**Subject:** Release of murder victims' bodies for funeral

Calls on the Parliament to urge the Scottish Government to change post-mortem examination protocols to allow for the deceased to be released as early as possible to enable families to make funeral arrangements for their loved ones.

### Background

#### Investigating homicides

When someone is killed, the circumstances of the death need to be thoroughly investigated in order to provide evidence for a criminal prosecution. Investigation is carried out by the police, in conjunction with the Crown Office and Procurator Fiscal Service (COPFS).

COPFS is responsible for the prosecution of crime in Scotland. Legally qualified Crown Office staff – procurators fiscal and advocate deputes – carry out this work.

Homicide is a legal term which covers murder and the lesser charge of culpable homicide.

#### Post-mortem examinations

To collect evidence about the death, it will be necessary to conduct a post-mortem examination. This may uncover information useful to the homicide investigation. Its findings may be used as evidence during any prosecution.

Where someone is charged with a homicide they are also entitled to instruct a post-mortem examination. This is to provide them with independent evidence, which may be necessary to defend the charge (or to mitigate a guilty plea).

[“Information for Bereaved Families and Friends Following Murder or Culpable Homicide”](#) (Scottish Government 2013) explains what to expect when a family member has been murdered. In relation to defence post-mortems, it notes (page 20):

## **“Possible delay in making funeral arrangements**

“More than one post mortem examination may take place if more than one person is charged with an offence to do with the death. You may find this distressing and you should be prepared for a delay while this is being organised.

“Where no one is arrested quickly, the Procurator Fiscal may have to delay releasing the body for the funeral. This is to preserve evidence until a suspect is arrested and charged.”

### Adversarial criminal justice system

Scotland has an adversarial system of criminal justice. In this system, it is the responsibility of each of the parties to investigate and present their own case.

In Scotland, the prosecution is under an obligation to preserve evidence and to share information which may be relevant to the defence. However, there is no obligation to actively investigate issues which may help the defence case.

It can therefore be argued that, in order to do a thorough job of investigating and presenting a case, a defence lawyer should be able to instruct their own post-mortem. This may uncover things that were not the focus of the post-mortem examination carried out by the prosecution.

However, the resulting delays can clearly be distressing for family members, as the petitioner has highlighted.

### Procedures in England and Wales

England and Wales also have an adversarial criminal justice system. However, [information from the Crown Prosecution Service states](#):

#### **“Will the Coroner arrange a second post mortem?”**

“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 post mortem examination by a pathologist independent of the first, (Home Office Circular No 30 / 1999 and paragraph 10 of accompanying Memorandum of Good Practice re early release of bodies in cases of suspicious deaths).

“The second post mortem examination will allow the coroner to release the body and retain the report for use by the defence if, in due course, an arrest is made and charges brought.”

The petitioner makes reference to proposals in England and Wales to make the instruction of a second (defence) post-mortem subject to the authority of the court. These proposals were originally discussed in the Hutton [Review of Forensic Pathology in England and Wales](#)” (2015) – see chapter 3.4.

Essentially, a detailed and well-documented first post-mortem examination would be carried out to agreed national standards. A defence solicitor would have access to this, and would be able to arrange for expert review of the findings. But a second physical examination could only be ordered where a judge was persuaded that this was necessary.

These proposals are in the process of being developed by the Office of the Chief Coroner in England and Wales.

### **Scottish Government action**

In answer to [Parliamentary Questions from Kezia Dugdale](#)<sup>1</sup>, the then Secretary for Justice Michael Matheson announced that COPFS is working on a new protocol. This is intended to promote more effective consultation between Crown and defence pathologists.

The Lord Advocate, James Wolffe QC, explained (S5W-14316 – 26 February 2018):

“Post Mortem examination is a necessary step in the investigation of suspicious deaths. In law, the Defence have a right to instruct a defence post mortem examination to properly test the evidence against an accused person. Failure to recognise this right would potentially jeopardise any subsequent criminal proceedings against an accused person in relation to the death.

“In consultation with the Law Society of Scotland, the Faculty of Advocates, and Forensic Pathologists, the Crown Office and Procurator Fiscal Service is reviewing post mortem examination protocols to enable more effective consultation between pathologists instructed by the Crown and Defence. Effective consultation would support an informed defence decision as to whether a second physical 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.”

There is no timescale for publication of the new protocol.

### **Scottish Parliament action**

The Scottish Parliament has considered legislation which touches on post-mortem examinations where the body is under the control of the procurator fiscal. Examples include the Human Tissue (Scotland) Act 2006 and the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2015.

However, SPICe is not aware of any detailed Scottish Parliament consideration of the issues raised by the petitioner.

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<sup>1</sup> See [S5W-14044](#); [S5W-14316](#); [S5W-14954](#); [S5W-15125](#); [S5W-15126](#) and [S5W-15127](#), asked between January and March 2018.

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16 July 2018

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