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The Attorney General's proposed amendment to the Justice Bill

The information contained in this briefing note should not be relied upon as legal advice, or as a substitute for it.

Key Points

- Power to direct an inquest - in Northern Ireland and currently in the Republic of Ireland, the Attorney General has a statutory power to direct inquests if there are circumstances which in his opinion would make the holding of an inquest advisable.
- A Bill in the Republic of Ireland proposes to maintain the power of the Attorney General to hold an inquest, however there is a proposed consultative role for the Chief Coroner.
- In England and Wales, the Attorney General applies to the High Court to order an inquest.

- In Scotland, applications for Fatal Accident Inquiries, including those which are discretionary but it appears to the Lord Advocate expedient in the public interest that one is held, are made to the Sheriff's Court by the Procurator Fiscal,.
- Power to obtain papers.-The research could not identify a statutory power in any of the jurisdictions examined to obtain papers that would be relevant to the exercise of the Attorney General's statutory power to direct an inquest.

1 Introduction

This paper has been produced in response to a research request by the Committee for Justice on whether the Attorney General in other jurisdictions (England and Wales, Scotland and the Republic of Ireland) have an equivalent power to that of the AGNI under the Coroners Act 1959 and whether they have a statutory power to obtain papers.

2 Northern Ireland

2.1 Role and Functions of the Attorney General for Northern Ireland in relation to inquests

Section 14 of the Coroners Act (Northern Ireland) 1959 provides the AGNI with a power to direct an inquest where it is advisable to do so. Section 14 (1) states:

Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death.

At the time the provision was introduced, it was intended that it would enable a coroner where there was an inquest or a partial inquest, under the direction of the Attorney-General, to hold a further complete inquiry.¹ The debate of the Northern Ireland Senate

¹ Senate Debate (Northern Ireland) 3 November 1959, col 667

in November 1959 indicated that the power would be used sparingly. Mr Topping, the Minister of Home Affairs stated the intention of the provision as follows:

This is a power which obviously would be used most sparingly and only in the most exceptional cases. I would suggest that in cases and they would be most unusual- where something comes to light a good while after an inquest, the sort of thing that leads to the exhumation of a body, it would be proper that an inquest should be held in public and that this power could be well entrusted to the Attorney-General as being the person who is custodian of the public liberty. I suggest that it would be quite right that he should have that power and that it would be in the public interest to have such as power to direct an inquest.²

2.2 Proposed amendment by the Attorney General for Northern Ireland to the Justice Bill

The Attorney General has asked the Justice Committee to consider a proposal in the context of the Justice Bill 2014 which would amend section 14 of the 1959 Act by inserting additional provisions to enable him to obtain papers that may be relevant to the exercise of his power. The focus of the Attorney General's concern is primarily in relation to deaths that occur in hospital or where there is a suggestion that a medical error has occurred.³ The Justice Committee is currently considering this in the context of the Justice Bill 2014. The proposed amendment is as follows:⁴

14A (1)- The Attorney General may, by notice in writing to any person who has provided health or social care to a deceased person, require that person to produce any document or give any other information which in the opinion of the Attorney General may be relevant to the question of whether a direction should be given by the Attorney General under section 14.

(2) A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings to the High Court.

(3) In this section

“document” includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in legible form;

(4) A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”

² Senate Debate (Northern Ireland) 3 November 1959, col 667

³ Correspondence from the Attorney General to the Committee for Justice dated 5 March 2014

⁴ Correspondence from the Attorney General to the Committee for Justice dated 30 April 2014

Section 7 of the 1959 Act currently provides for a duty to give information to a coroner. It provides that a medical practitioner, registrar of deaths, funeral undertaker and every occupier of a house or mobile dwelling and every person in charge of an institution in which a deceased person was residing who has a reason to believe that the person died as a result of violence or misadventure, unfair means, negligence or misconduct or malpractice on the part of others shall notify the coroner of the facts and circumstances of the death. Every person who contravenes this section shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 2 on the standard scale.⁵

2.3 Case Law in Northern Ireland

There have been a number of cases in Northern Ireland relevant to the Attorney General's power to direct an inquest. In the case of *Forde v Attorney General* in 2009, the Court of Appeal held the Attorney General cannot direct the Coroner to conduct an inquest into a death outside Northern Ireland. The court held that the judge at first instance was correct in concluding that section 14 cannot be interpreted as investing the Attorney General with a power to effectively confer a jurisdiction on the Coroner that he does not have under section 13.⁶

In the case of *McLuckie v Coroner for Northern Ireland* in 2011, the Court of Appeal noted that in 2007 the Attorney General exercised her powers under section 14 of the Coroners Act (Northern Ireland) 1959 and ordered an inquest to be conducted into the death of the deceased. The Court of Appeal noted that no reason was given for this decision and nor had one emerged since her decision.⁷

In the case of the *Attorney General for Northern Ireland and another v Senior Coroner for Northern Ireland* in 2013, the Court of Appeal held that the coroner had jurisdiction to hold an inquest in the case of a stillborn child. The appeal was against a previous decision dismissing a judicial review challenge by the Attorney General to a decision of the Senior Coroner for Northern Ireland declining to comply with a direction given by the Attorney General under section 14 of the 1959 Act.⁸

3 England and Wales

3.1 Role and functions of the Attorney General for England and Wales in relation to inquests

Under the Coroners and Justice Act 2009 (Consequential Provisions) Order 2013, the Attorney General has a public interest function, independent of government, to decide

⁵ Section 10 of the Coroners Act (Northern Ireland) 1959

⁶ *Forde v Attorney General* [2009] NICA 66

⁷ *McLuckie v Coroner for Northern Ireland* [2011] NICA 34

⁸ *Attorney General for Northern Ireland and another v Senior Coroner for Northern Ireland* [2013] NICA 68

whether to apply to the High Court for an inquest.⁹ The Attorney General can apply to the High Court to order an inquest in circumstances where:

either a Coroner had previously refused or neglected to hold an inquest where it ought to have been held, or, where an inquest has been held, and it is in the interests of justice that another inquest should be held. (Examples include the Attorney's decision to request a new inquest for the victims that were killed at the Hillsborough Football Stadium in 1989; and, the decision not to apply for a new inquest into the 2003 death of Dr David Kelly, a government scientist.)¹⁰

The website of the Attorney General's office further states that:

If somebody connected to the dead person thinks the inquest did not come to the correct conclusion, for example if new evidence emerges, they can ask the Attorney to consider asking the High Court to look at the evidence again. He will do this if he thinks a new inquest is necessary. He cannot order a new inquest himself.

The Attorney General has no power to order a new coronial inquest; they can only be ordered by the High Court on application made either by the Attorney General or by a third party with consent of the Attorney General.¹¹

The Coroners and Justice Act 2009 (Consequential Provisions) Order 2013 amends section 4A(8) (coroners districts in Wales) and section 13 of the Coroners Act 1988 (order to hold inquests). These amendments were to ensure that provisions are consistent with Part 1 of the Coroners and Justice Act 2009. There does not appear to be a statutory power for the Attorney General to obtain documents in these pieces of legislation. Schedule 5 of the Coroners and Justice Act 2009 makes provision for the powers of coroners to require evidence to be given or produced. Paragraphs 1 (b) and 2 (b) provide that a senior coroner may by notice require a person produce any documents in the custody or under the control of the person which relate to a matter which is relevant to the inquest.

4 Republic of Ireland

4.1 Role and Functions of the Attorney General of Ireland in relation to inquests

Section 24 of the Coroners Act 1962 in the Republic of Ireland contains an almost identical provision to section 14 of the Coroners Act (Northern Ireland) 1959. Section 24 (1) of the 1962 Act provides:

Where the Attorney General has reason to believe that a person has died in circumstances which in his opinion make the holding of an inquest advisable, he may direct any coroner (whether or not he is the coroner who would ordinarily hold the

⁹ http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

¹⁰ Crown Prosecution Service, Legal Guidance, Coroners: http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

¹¹ http://www.cps.gov.uk/legal/a_to_c/coroners/#a14

inquest) to hold an inquest in relation to the death of that person, and that coroner shall proceed to hold an inquest in accordance with the provisions of this Act (and as if, not being the coroner who would ordinarily hold the inquest, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry, held any inquest in relation to or done any act in connection with the death.

During the Second Stage debate of the Bill in 1961, the Minister for Justice Mr Haughey stated:¹²

The Attorney General stands in a special relationship to the general public and has a statutory duty of asserting and protecting public rights. For this reason it is in the public interest that he should have the power conferred on him by this section.

The Coroners Act 1962 does not contain a statutory power to enable the Attorney General to obtain papers that would assist in the exercise of this function.

The Coroners Bill 2007 was published in 2007 to provide for coroners reform and is currently on the Order Paper of the Seanad.¹³ Clause 37 of the Bill provides for a coroner or a coroner's officer to enter premises where there are reasonable grounds for believing that there are documents or information in any form relating to the investigation. The provision also provides coroners with powers to inspect any documents or information in any form on the premises and secure documents for later inspection. The coroner may also take copies of or extracts from documents or any electronic information on the premises and remove documents for later examination or copying.¹⁴

Clause 64(1) (c) empowers the coroner to direct the production by any person of any document, article, substance or thing in their possession or under their power or control.

Clause 45 (1) of the Coroners Bill 2007 proposes to maintain the current power of the Attorney General to direct an inquest but provides a consultative role for the Chief Coroner. The provision states:

Where the Attorney General has reason to believe that a person has died in circumstances which in his or her opinion make the holding of an inquest advisable, he or she may, for stated reasons following consultation with the Chief Coroner, direct that coroner to be nominated by the Chief Coroner (whether or not he or she is the coroner who would ordinarily hold the inquest) hold an inquest into the death of that person.

¹² <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1961111600009?opendocument>

¹³ Confirmed by a colleague in the Oireachtas via email on 02/02/15, see also [http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/\(indexlookupdail\)/20141210~WRE?opendocument#WRE00200](http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupdail)/20141210~WRE?opendocument#WRE00200)

¹⁴ <http://www.oireachtas.ie/documents/bills28/bills/2007/3307/b3307s.pdf>

The 2007 Bill does not make provision for a statutory power for the Attorney General to obtain documents relevant to the exercise of the power to direct an inquest.

5 Scotland

5.1 Role and Functions of the Lord Advocate and the Procurator Fiscal in relation to the investigations of deaths

The system in Scotland is very different to other jurisdictions in the UK and the Republic of Ireland. In Scotland, the Lord Advocate has responsibility for investigating any death which requires further explanation.¹⁵ In other parts of the United Kingdom, the coroner may investigate such deaths.¹⁶ The Lord Advocate is the Ministerial Head of the Crown Office and Procurator Fiscal Service (COPFS). He is a Minister of the Scottish Government and acts as a principal legal adviser. Decisions taken by him in relation criminal prosecutions are taken independently of any other person.¹⁷

Procurator Fiscals are qualified lawyers who are employed by the COPFS and act on the instructions of the Lord Advocate. The Procurator Fiscal's role is comparable to the Coroner as investigator, in the public interest, of certain deaths.¹⁸ The Procurator Fiscal does not preside over the court hearings, those are conducted by the Sheriff in the district the death took place.¹⁹

The relevant legislation regulating an inquiry into fatal accidents and sudden deaths is the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977.

Section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 provides where:

- (a) *It appears that the sudden death resulted from an accident during the course of employment or occupation; or the person died while in legal custody; or*
- (b) *It appears to the Lord Advocate to be expedient in the public interest in the case of death that an inquiry under the Act should be held into the circumstances of the death on the ground that it was suspicious, sudden or has occurred in unexplained circumstances to give rise to public concern.*

¹⁵ <http://www.crownoffice.gov.uk/about-us/who-we-are>

¹⁶ <http://www.copfs.gov.uk/investigating-deaths/our-role-in-investigating-deaths>

¹⁸ Working Group Review of the Coroners Service, available at <http://www.justice.ie/en/JELR/ReviewCoronerService.pdf/Files/ReviewCoronerService.pdf>

¹⁹ Sheriff courts deal with the majority of civil and criminal cases in Scotland, see <http://www.scotland-judiciary.org.uk/36/0/Sheriffs>

the procurator fiscal for the district with which the circumstances of the death appear to be most closely connected shall investigate those circumstances and apply to the sheriff for the holding of an inquiry under the act in these circumstances.

A report by the Rt Hon Lord Cullen on the Fatal Accident Inquiries (FAI) legislation in 2009, outlined the procedure to be followed in relation to an FAI as follows:

If an FAI appears to be mandatory the procurator fiscal will normally proceed to arrange for one without reference to Crown Office. The wide discretion given to the Lord Advocate permits the holding of an FAI in a wide variety of situations, such as an unexplained death in hospital or a death in circumstances suggesting a risk to public health or safety or a road accident on a bad stretch of road. Where there is a question of a discretionary FAI, the procurator fiscal has to report to the deaths unit which is part of the Crown Office, with the views of relatives of the deceased and his or her recommendations. It is for Crown Counsel, in consultation with the law officers where appropriate, to decide whether a discretionary FAI should be held and for the procurator fiscal to apply for one if so instructed. A decision of the Lord Advocate to decline to apply for the holding of a discretionary FAI is open to challenge by judicial review.²⁰

The Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 makes provision for the procedure to be followed in relation to inquiries held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. Rule 5 makes provision for possession and inspection of documents:

The Sheriff may at the time of making an order for the holding of an inquiry at any time thereafter, upon application of the procurator fiscal, or of any other person entitled to appear at the enquiry or at his own instance, grant warrant to officers of the law to take possession of anything connected with the death which is the subject of the inquiry and which it may be considered necessary to produce at the inquiry and to hold any such thing in safe custody, subject to inspection by any persons interested.²¹

However there is nothing explicit in either the 1977 rules or the 1976 Act which provides a power for the Lord Advocate to obtain papers. Officers of the law in the 1977 rules are interpreted to include:²²

- Any macer, messenger-at-arms, sheriff or other person having the authority to execute a warrant of the court;
- Any constable ;
- An officer of revenue and customs;

²⁰ Lord Cullen "Review of Fatal Inquiry Legislation: The Report", pg 9

²¹ http://www.legislation.gov.uk/ukxi/1977/191/pdfs/ukxi_19770191_en.pdf

²² The Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 amended by the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Amendment Rules 2007, no 478, see

- A person employed under the Police (Scotland) Act 1967 for the assistance of constables of the police force;
- Where a person upon whom service is executed is in prison, any prison officer;
- Any person authorised for the time being by the Lord Advocate or by the Secretary of State.

The reference to the rules for ordinary civil causes enables the Sheriff to order the recovery of documents and the examination of witnesses and to request for the taking of the evidence of witnesses abroad.²³

²³ Lord Cullen "Review of Fatal Inquiry Legislation: The Report", pg 14