

Forensic Science Regulator

Guidance

**Legal Issues in Forensic Pathology and Tissue
Retention**

FSR-G-203

Issue 4

© Crown Copyright 2020

The text in this document (excluding the Forensic Science Regulator's logo, any other logo, and material quoted from other sources) may be reproduced free of charge in any format or medium providing it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown Copyright and its title specified. This document is not subject to the Open Government Licence.

1. Preamble

- 1.1.1 The first issue of this document was prepared to reflect discussions between the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO) ¹ and the Coroners' Society of England and Wales. It was prepared in consultation with the Human Tissue Authority; the Coroners Unit of the Department for Constitutional Affairs ² and the Forensic Science and Pathology Unit of the Home Office.
- 1.1.2 The review of the document, which led to the second issue, was commissioned by the Forensic Pathology Specialist Group established by the Forensic Science Regulator. The process involved consultation with ACPO, the Coroners' Society, the Ministry of Justice, the Human Tissue Authority, the Home Office and the National Policing Improvement Agency (NPIA). ³
- 1.1.3 The second issue was completed after the Coroners and Justice Act 2009 had received Royal Assent but before the relevant provisions had been brought into force and before any related secondary legislation had been prepared. The third issue of the document was prepared after the implementation of the Act and the relevant secondary legislation. ⁴ **The fourth issue was prepared to address issues raised in cases.**
- 1.1.4 The purpose of the document is to set out a framework for the co-operation between those involved in the investigation of violent or suspicious death to ensure compliance with the various legal requirements relevant to such enquiries.
- 1.1.5 It must be stressed that the activities under discussion are performed on the authority of the coroner or police. It follows that the responsibility for these activities also rests with the coroner and police and whilst others may assist it is for those with the responsibility to ensure compliance with the legal requirements.

¹ ACPO has been replaced by the National Police Chiefs' Council (NPCC).

² This is now the Ministry of Justice.

³ The forensic pathology responsibilities of the NPIA are now performed by the Forensic Pathology Unit within the Home Office.

⁴ Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013 and Coroners (Inquests) Rules 2013 S.I. 1616 of 2013.

- 1.1.6 It is anticipated that the content of this document will be reflected in the relevant procedures or protocols. This document will not be used directly but will act as source material. As a consequence, it has been drafted to include a significant amount of background information to allow, if necessary, determination of the reasoning behind the guidance.

2. Introduction

- 2.1.1 The consideration of suspicious death involves two separate but concurrent investigations. One, by the coroner, seeks to identify the deceased and establish the cause of death and surrounding circumstances.⁵ The other, by the police, is to determine whether a criminal offence has occurred and, if it has, to bring to justice those responsible.
- 2.1.2 The inter-relation of these two investigations can be complicated. This became more complex as a result of (a) the introduction of the Human Tissue Act 2004, (b) the amendment of the Coroners Rules 1984⁶ and (c) the expanding interpretations of obligations under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷
- 2.1.3 This document sets out a framework which should ensure all involved in the investigation can comply with the legal obligations placed on them.
- 2.1.4 In drafting this document it has been assumed that the consent of the family of the deceased will not be sought for the post mortem examination.

3. Reservation

- 3.1.1 The first issue of this document was drafted before the provisions of the Human Tissue Act 2004 under discussion came into force. In the period between the first issue and the subsequent reviews no cases were decided in relation to relevant points. The analysis of the legal position is therefore not supported by decided cases. It follows that the document is based on the interpretation of the

⁵ s5 Coroners and Justice Act 2009.

⁶ The provisions are set out in Home Office Circular 25/2005.

⁷ Specific reference is made at s5(2) Coroners and Justice Act 2009.

law by those drafting the document. This interpretation may not be adopted by the courts.

4. Scope

4.1.1 This guidance is based on the law in England and Wales and therefore applies only to that jurisdiction.

5. Implementation

5.1.1 This issue of the guidance became effective on 31 August 2020.

6. Modification

6.1.1 This is the third issue of this document by the Forensic Science Regulator.

6.1.2 Significant changes to the text have been highlighted in grey.

6.1.3 The modifications made to create Issue 4 of this document were, in part, to ensure compliance with The Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018.⁸

6.1.4 The Regulator uses an identification system for all documents. In the normal sequence of documents this identifier is of the form 'FSR-#-###' where (a) the '#' indicates a letter to describe the type or document and (b) '###' indicates a numerical, or alphanumeric, code to identify the document. For example, the Codes are FSR-C-100. Combined with the issue number this ensures each document is uniquely identified.

6.1.5 In some cases, it may be necessary to publish a modified version of a document (e.g. a version in a different language). In such cases the modified version will have an additional letter at the end of the unique identifier. The identifier thus becoming FSR-#-####.

⁸ To facilitate compliance with the Regulations changes to the document are noted here. The following sections of the document have been changed – 1.1.3, 5.1.1, 6.1.2, 6.1.3, 6.4.4, 6.1.5, 6.1.6, 7.1, 7.2, 7.3.5, 7.5.6.d, 7.5.52, 7.7.1, 8.2.1, 8.3.8, 8.4.4.e, 9.4.1, 12, 16.1.4, 16.1.7.c, 16.1.8, 16.1.9 and 16.1.14. The following footnotes have been altered – 8, 18, 21, 26, 31, 43, 49, 54, 57, 61, 62, 63, 71, 81, 86, 87, 94, 95, 106, 120, 123, 138, 147, 148, 149, 150, 154, 166, 173, 181, 182, 183, 184, 185, 186, 187, 190, 191, 192 and 193..

6.1.6 In all cases the normal document, bearing the identifier FSR-#####, is to be taken as the definitive version of the document. In the event of any discrepancy between the normal version and a modified version the text of the normal version shall prevail.

7. Guidance

7.1 Examination of a Foetus or Still Born Child

7.1.1 The main body of this guidance discusses the “routine” position in forensic pathology where there is dead body. The legal status of a foetus or still born child is such that neither is, in law, considered to be a dead body.

7.1.2 The situation with regard to such cases is discussed in Annex 1.

7.2 Police Powers

7.2.1 This guidance makes many references to police powers. As a general rule these powers can be employed only where the police are investigating a potential criminal offence.

7.3 Location of Body

Legal Issues

7.3.1 The Human Tissue Act 2004 introduced a number of provisions with regard to the performance of a post mortem examination. These include requirements that:

- a. The examination takes place on licensed premises⁹;
- b. Any person performing a post mortem examination does so under the authority of a Human Tissue Authority¹⁰ licence; and
- c. The Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority are complied with.¹¹

⁹ s16 Human Tissue Act 2004.

¹⁰ s16 Human Tissue Act 2004.

¹¹ s15 Human Tissue Act 2004.

7.3.2 The Human Tissue Act 2004 also imposes requirements in respect of obtaining consent before certain activities, such as post mortem examinations, are undertaken. However, consent is not required for anything done pursuant to the functions of a coroner or under the authority of a coroner.¹²

7.3.3 A licence is not required to enable a person acting on behalf of a constable¹³ or the coroner to remove “relevant material” (which is defined as material other than gametes which consists of or includes human cells¹⁴) from the body/part of the body of a deceased person at the first place where the body/body part is situated to be attended by a constable.^{15 16} However, a licence is required to subsequently carry out a post mortem examination on the instruction of a coroner.¹⁷

Guidance

7.3.4 The pathologist may take samples of relevant material (for the purpose of determining the cause of death) at the scene of discovery of the body if he is confident the coroner has approved (see 7.1.2 above).

¹² s11 Human Tissue Act 2004.

¹³ References to a constable or the police should be taken to include any other person who can exercise police powers.

¹⁴ s53 Human Tissue Act 2004.

¹⁵ Whilst the Human Tissue Act 2004 does not require the removal to be on behalf of a constable/coroner [see s39(3)] there may be a number of legal issues with persons, others than those acting on behalf of the police/coroner, interfering with the scene/evidence.

¹⁶ A literal interpretation of s39(3) Human Tissue Act 2004 would suggest that in a case where the first place a constable attended the body was at the mortuary then this subsection would override s39(2) and that the s39(1) exemption would apply to the taking of relevant material from the body. This interpretation would lead to the illogical position that the application of the controls set out in the Act would depend on the history of when a constable first attended the body. This does not appear to be the intention of the section. Importantly this interpretation, if correct, would only exempt the taking of relevant material – not the post mortem examination itself.

¹⁷ The main provisions of the Human Tissue Act 2004 (e.g. s11) refer to things done for “purposes of functions of a coroner or under the authority of a coroner” but s39 refers to “post mortem examination for purposes of functions of a coroner”. It could be suggested that a post mortem examination in a suspicious death case is performed under the authority of the coroner but, applying the primary purpose approach, is done for the purposes of the police (and the investigation of crime) rather than the coroners’ purpose. It would follow that s39(2) would not apply and, as a result, the s39(1) exemption would apply to the post mortem. Given the structure of the s39 such an interpretation would raise the question – what would the purpose of s39(2) be. It does not appear to be the intention in the section. In this paper it has been assumed that, in such circumstances, s39(2) does apply and that a licence is required.

7.3.5 If the circumstances demand urgent action to preserve ¹⁸ evidence, then material should be protected even if there is no evidence of approval from the coroner. This should be done under the authority of the police.

7.3.6 Section 39 of Part 2 of the Human Tissue Act 2004 excludes the licensing requirements of the Act and regulation by the Human Tissue Authority for acts done for Criminal Justice System purposes, with the exception of coroners' post mortem examinations, which must always take place on licensed premises. Section 39 does not exclude the consent requirements of Part 1. ¹⁹ It follows that the consent requirement applies. However, the taking of samples for the purpose of determining the cause of death must be under the coroner's authority and is therefore subject to the s11 exemption to the consent requirements. ²⁰

7.3.7 Material taken for the purpose of preventing or detecting crime under the authority of the police is not subject to the consent requirements of the Human Tissue Act. ²¹

7.4 Transport to Mortuary

Legal Issues

Coroners and Justice Act 2009

7.4.1 The Act provides the coroner with the authority ²² to remove the body to a suitable place for the post mortem examination.

Human Tissue Act 2004

¹⁸ In this context 'preserve' means taking measures to prevent the loss, destruction, contamination or degradation of material which may be evidence in any criminal investigation.

¹⁹ The s39 exclusion of the provisions of s14 means that even though the consent requirements still apply the Human Tissue Authority has no authority over the cases.

²⁰ s11 Human Tissue Act 2004 does not impose any requirements with regard to the seizure/retention of the relevant material. It follows that the provisions of s11 can apply to samples seized under the authority of the police – so long as the coroner also has an interest in the samples.

²¹ The main provisions of the Human Tissue Act 2004 apply to acts done for purposes set out in Schedule 1 of the Act. In this context the relevant purpose is determination of the cause of death. Acts done for a purpose not set out within the Schedule are, in general, out with most requirements of the Act. See, for example, paragraphs 29 and 77 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017 and paragraphs 56-69 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

²² s15 Coroners and Justice Act 2009.

7.4.2 The Human Tissue Act introduced a number of provisions which are of relevance. These include:

- a. The storage of the body of a deceased person for the purpose of determining the cause of death must be on premises licensed for that activity by the Human Tissue Authority ²³ unless the storage is incidental to transportation ²⁴; and
- b. The performance of a post mortem examination may only take place on premises licensed for that activity by the Human Tissue Authority. ²⁵

Guidance

7.4.3 The coroner should ensure that, in exercising his/her power to remove the body to a suitable place for a post mortem examination, he/she orders the removal to premises which are licensed for that activity.

7.4.4 The Human Tissue Authority has a list of all licensed premises on its Internet site at URL www.hta.gov.uk. ²⁶

7.4.5 Coroners can thus establish the status of any premises.

7.5 Post Mortem Examination

Post Mortem Examination

7.5.1 The term “post mortem examination” does not have a single legal definition. Traditionally coroners and police viewed it as the dissection/evisceration of the body. Other tests, such as X-ray or other imaging techniques were not considered to be part of the examination. Similarly tests/analysis on material taken at the dissection/evisceration were not considered part of the examination.

7.5.2 The Human Tissue Authority, in relation to interpretation of the Human Tissue Act 2004, adopted the same definition.

²³ s16 Human Tissue Act 2004.

²⁴ s16(7)(a) Human Tissue Act 2004.

²⁵ s16 Human Tissue Act 2004.

²⁶ This site was accessed on 20 June 2020.

7.5.3 The explanatory memorandum to the bill which became the Coroners and Justice Act 2009 made clear that, in relation to that bill, the term was intended to have a wider meaning. For example it was to cover non-invasive examinations such as Computerised Tomography and Magnetic Resonance Imaging.

7.5.4 In this guidance the term is used to refer to the dissection/evisceration of the body by the forensic pathologist.

Legal Issues

7.5.5 There are a number of legal provisions which affect the performance of the post mortem examination.

Coroners and Justice Act 2009

7.5.6 The Act and the Regulations created under the Act impose a number of provisions.

- a. A post mortem examination can be authorised by the coroner.²⁷
- b. The choice of pathologist is to be made by the coroner²⁸ but, in cases of suspected homicide, he/she must consult the police.²⁹
- c. The Chief Coroner has the power to set the description of a suitable person for particular types of examination.³⁰
- d. The Coroners Rules 1984 (now repealed) contained clearly stated powers for the pathologist to retain material at the post mortem examination.³¹ The Coroners (Investigations) Regulations 2013 do not contain similar provisions. Rule 14 of the Regulations infers that such a power exists by creating requirements to notify the coroner when material is retained. If such a power exists it appears restricted to material which relates to the cause of death or the identity of the deceased.³²

²⁷ s14 Coroners and Justice Act 2009.

²⁸ s14 Coroners and Justice Act 2009.

²⁹ r12 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

³⁰ s14 Coroners and Justice Act 2009.

³¹ See r9, 9A, 12 and 12A of the Coroners Rules 1984 S.I. 552 of 1984 (as amended).

³² r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

- e. The pathologist must notify the coroner of the material being retained and the reason for the retention. ³³
- f. The coroner must notify the pathologist of the period for which the material may be retained. ³⁴
- g. The pathologist can seek an extension of the period for retention. ³⁵
- h. The coroner must notify the next-of-kin ³⁶ of the retention of material and seek their views as to the appropriate treatment for the material when it is no longer required for his purposes. ³⁷

Human Tissue Act 2004

7.5.7 The Act imposes a number of provisions with regard to the performance of a post mortem examination and the taking of samples during such an examination.

- a. The post mortem examination must take place on premises covered by a licence (for the performance of post mortem examinations) from the Human Tissue Authority. ^{38 39 40}
- b. A licence in relation to post mortem examination also covers the removal of relevant material for the purposes of the examination; removal for other purposes (e.g. research) would require a separate licence. ⁴¹

³³ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

³⁴ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

³⁵ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

³⁶ This term was defined as the parent, spouse, child or personal representative in r20(2)(a) Coroners Rules 1984 S.I. 552 of 1984 (as amended). The current secondary legislation does not define the term

³⁷ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

³⁸ s16 Human Tissue Act 2004.

³⁹ It could be argued that where the primary purpose of a post mortem examination ordered by the coroner is a Criminal Justice System purpose then the s39(1) exemption is engaged but the s39(2) limit on the exemption is not. This would lead to the conclusion that the post mortem examination could take place on unlicensed premises. This does not appear to have been the intention behind the legislation and it is recommended such examinations should take place on licensed premises.

⁴⁰ If a post mortem examination was performed for Criminal Justice System purposes but not for the purposes or functions of a coroner then the s39(1) exemption would be engaged but the s39(2) limit on the exemption would not be. It would follow that the post mortem examination could take place on unlicensed premises. However such circumstances are likely to be extremely rare - if they occur at all.

⁴¹ s16(2)(c) Human Tissue Act 2004 makes clear that removal of relevant material from a dead body requires a licence but only if the activity is not within a licence granted under s16(a) or s16(b). The latter of these relates to post mortem examination.

- c. The pathologist undertaking the post mortem examination must act under the authority of a licence from the Human Tissue Authority ⁴² authorising post mortem examinations on those premises.
- d. Samples may only be taken for the purpose of determining the cause of death if the post mortem has been authorised by the coroner. ⁴³
- e. The performance of the post mortem examination must be in accordance with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority. ⁴⁴

7.5.8 The Act also creates a number of criminal offences.

- a. It is an offence, subject to a reasonable belief defence, to perform an act requiring consent (or authorisation from the coroner) without such consent or authorisation. ⁴⁵
- b. It is an offence, subject to a reasonable belief defence, to falsely represent that consent (or authorisation) has been given or that no such consent/authorisation is required. ⁴⁶
- c. It is an offence, subject to a reasonable belief defence, to perform an act requiring a licence without such licence or, by implication, in violation of any condition on a licence. ⁴⁷

Guidance

Premises

7.5.9 The pathologist must ensure the premises at which the post mortem examination will take place are licensed for that activity by the Human Tissue Authority.

7.5.10 If the pathologist is not confident that the premises are licensed he/she must not perform the post mortem examination.

⁴² s16 Human Tissue Act 2004.

⁴³ s11 Human Tissue Act 2004 read in conjunction with s1 of the Act. See also paragraphs 29 and 77 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

⁴⁴ s15 Human Tissue Act 2004 read in conjunction with s14 and s39 of the Act.

⁴⁵ s5 Human Tissue Act 2004.

⁴⁶ s5 Human Tissue Act 2004.

⁴⁷ s25 Human Tissue Act 2004.

7.5.11 The Human Tissue Authority has a list of licensed premises on its Internet site at URL www.hta.gov.uk.⁴⁸ There may be circumstances where a temporary mortuary is established. Such mortuaries require a licence but this may not appear on the Internet site.

7.5.12 All licensed premises are required to display the licence.

7.5.13 Pathologists should therefore be able to establish the status of the premises.

Pathologist

7.5.14 The pathologist must ensure that he/she is acting under the authority of a licence issued by the Human Tissue Authority for the performance of post mortem examinations at the premises.

7.5.15 The Human Tissue Act 2004 states that a licence authorising an activity on premises applies to a person who is:

- a. The Designated Individual for the premises⁴⁹;
- b. Designated in a notice given to the Human Tissue Authority by the Designated Individual as a person to whom the licence applies “Person Designated”⁵⁰; or
- c. Acting under the direction of the Designated Individual or a person notified to the Human Tissue Authority (under s17(b)) as person to whom the licence applies.⁵¹

7.5.16 The Designated Individual means the person under whose supervision the licensed activity is authorised to be carried on. The role of the Designated Individual is central to the Human Tissue Authority’s licensing framework. In particular, it is the duty of the Designated Individual to secure that the conditions of the licence are complied with and the Human Tissue Authority has the power to revoke a licence if it is satisfied that the Designated Individual has failed to discharge or is unable to discharge his/her duties.⁵²

⁴⁸ This site was accessed on 20 June 2020.

⁴⁹ s17(a) Human Tissue Act 2004

⁵⁰ s17(b) Human Tissue Act 2004.

⁵¹ s17(c) Human Tissue Act 2004.

⁵² s18 Human Tissue Act 2004.

- 7.5.17 The Persons Designated in the notice given by the Designated Individual have a role in “directing” others in relation to the Human Tissue Act 2004 so that other persons working under the direction of the Person Designated are advised about how and why they need to follow procedures and systems agreed by the Designated Individual to comply with the Human Tissue Act 2004.
- 7.5.18 Any person who acts under the direction of the Designated Individual or Person Designated will be classified as a “person to whom the licence applies” and will therefore be acting under the authority of the licence.
- 7.5.19 A pathologist based at a mortuary may be the Designated Individual but it is just as likely that he/she will be a Person Designated or acting under the direction of the Designated Individual or Person Designated.
- 7.5.20 It follows that there is no requirement for complex authorisation procedures before a pathologist can act under the authority of a licence.
- 7.5.21 Forensic pathology practices should enter into discussions with local mortuaries to ensure their pathologists have authority to act under the licence.
- 7.5.22 If the pathologist is not assured that the establishment where the post mortem examination is to take place holds a Human Tissue Authority licence, and that he/she can act under the authority of that licence, he/she must not perform the post mortem examination.

Coroners Approval

- 7.5.23 Each coroner must establish a process whereby a pathologist⁵³ can be confident that the coroners’ authority has been given for the post mortem examination.
- 7.5.24 The Human Tissue Authority has issued guidance stressing the need for the mortuary to have processes in place to be assured that the coroner’s authorisation has been given.

⁵³ Throughout this document it is assumed the relevant examinations are undertaken by a pathologist who may instruct others. Should the coroner instruct a person other than a pathologist then the provisions of this framework related to the pathologist should also be applied to that person.

7.5.25 The pathologist must ensure, by the process established by the coroner with jurisdiction, that authority has been given. The pathologist should record this.

7.5.26 If the pathologist is not confident that the coroners' authority has been given he must not perform the post mortem examination.

Communication with Next of Kin

7.5.27 The coroner and police must establish a process for communication with the next-of kin of the deceased. This communication should cover, but need not be limited to, the following matters.⁵⁴

- a. The nature of the post mortem examination and the need for retention.
- b. The fact that retention would be authorised either under the coroner's authority or police powers.
- c. That samples held under the coroner's authority would be held, subject to the power of the police to seize them, for the period of the coroner's authority.
- d. That samples taken on police authority would be held according to the rules applicable to evidence in criminal investigations. The samples may also then be held for a period to be determined by the coroner.
- e. Seeking views as to the treatment of material after the coroner's authority has expired.
- f. Explain that the views expressed in relation to coroners samples do not cover samples taken by the police.
- g. Explain the approach set out in Annex 2 may be adopted as a default position by the police and seek views.

7.5.28 The involvement of the coroner's officer and the family liaison officer may be invaluable in this process.

7.5.29 It is essential that this process is done at an early stage and comprehensively to avoid the next of kin being asked to address these issues on a number of occasions.

⁵⁴ Paragraphs 97-105 and 30 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 provides Authority guidance with regard to consultation with the family.

7.5.30 Coroners and police may wish to establish local procedures to ensure this process is handled effectively.

Post Mortem Examination

7.5.31 The post mortem examination must be performed in accordance with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority.

7.5.32 Where the post mortem examination is performed by a forensic pathologist registered with the Home Office it must comply with the Code of Practice and Performance Standards for Forensic Pathology issued by the Home Office, Royal College of Pathologists, the Forensic Science Regulator and Department of Justice. The nature of the Code has been reviewed and, as part of that process, its scope altered. Instead of applying to a group of pathologists its application is determined by the nature of the case.

7.5.33 In all cases where there is a possible prosecution for homicide it is expected that these standards will be met – regardless of whether the pathologist is registered with the Home Office.

Samples - General

7.5.34 Samples of relevant material may be taken for three reasons. These are:

- a. Identification of the deceased;
- b. Determination of the cause and circumstances of death; and
- c. Determination of information required for the investigation and prosecution of possible criminal offences.

7.5.35 The first two are within the remit of the coroner and have, traditionally, been retained on the authority of the coroner. The last is outside the remit of the coroner and has, traditionally, been retained on the authority of the police.⁵⁵ However, all of these classes are relevant to police inquiries and could be seized/retained under police authority.

⁵⁵ The police have power to seize evidence under s19 Police and Criminal Evidence Act 1984. They also have powers under the common law (see for example *Commissioner of Police for the Metropolis, Ex P Rottman, R v.* [2002] UKHL 20 (16th May, 2002)) but these are not as well defined as those under statute.

- 7.5.36 It is important to note that, of all of these purposes, only the determination of the cause of death is a scheduled purpose under the Human Tissue Act 2004.⁵⁶ It follows that the consent requirements of the Act (or, alternatively, the authority of the coroner) only applies to samples taken to determine the cause of death.
⁵⁷ ⁵⁸
- 7.5.37 The differences in requirements attaching to samples retained on the different authorities, the complexities arising from two separate systems for decision making about relevant material and recognised problems with control of such samples led to a debate on the approach to seizure/retention. The possibility of seizing/retaining all relevant material (indeed all samples taken at the post mortem examination) under the authority of the police has been considered. It is feasible, does not prevent the coroner meeting his/her obligations⁵⁹, is not likely to lead to relevant material being retained for longer periods and does simplify the decision making process.
- 7.5.38 This approach is therefore recommended. The College of Policing document 'Practice advice: The medical investigation of homicide' has been updated to contain this recommendation. However, it is a matter for the police and coroner to agree the approach to be adopted.
- 7.5.39 The seizure of material under police powers does not eliminate the coroners' law provisions application to those materials. The nature of the police and coroner's investigations and the timing of these investigations means that once seized by the police it should be for the police to make decisions about the material. Once the Criminal Justice System no longer requires retention of the material it will be disposed of or transferred to the control of the coroner.

⁵⁶ See Schedule 1 Human Tissue Act 2004.

⁵⁷ See paragraphs 29 and 77 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

⁵⁸ Although not all samples taken on the authority of the coroner are subject to the provisions of the Human Tissue Act 2004 it limits complications if all are treated equivalently.

⁵⁹ This is dependant on the coroner knowing what material has been taken at the post mortem examination. It is therefore important that the coroner is informed of all material taken at the examination – unless the coroner has given clear instructions to the contrary.

- 7.5.40 Given that retention, separately, under both authorities ⁶⁰ may still continue this document shall discuss this, more complex, model. Where police powers are employed to seize/retain all materials the approach set out can be simplified.
- 7.5.41 Samples taken on the authority of the police are taken for the investigation of crime and are not subject to either the consent or licensing provisions of the Human Tissue Act 2004. ⁶¹
- 7.5.42 It is most important to recognise that every sample, no matter under whose authority is has been taken, must be properly identified, adequately labelled, and its presence recorded in the appropriate document. The basic rules of the continuity of evidence must apply at all times. This is true whether it appears likely the material will be employed as evidence or not. The requirements for continuity are discussed at Annex 3.

Samples - Blood

- 7.5.43 Relevant material includes blood samples taken at post mortem examination. Samples of blood which are taken and stored, on behalf of the coroner, to determine the cause of death, are therefore subject to the consent (or coroner's authority) and licensing requirements of the Human Tissue Act 2004.
- 7.5.44 It is an inevitable consequence of a post mortem examination that blood will be liberated from the body and lost through the drains. This blood is not taken at post mortem and thus not subject to the Human Tissue Act 2004.

Samples - Records

- 7.5.45 All samples taken must be recorded by the police exhibits officer (or other police representative charged with supervision of exhibits) and given a unique identifier. This record must make clear those samples taken for the coroner and

⁶⁰ That is some samples being retained on the authority only of the coroner whilst others are retained only on the authority of the police.

⁶¹ The investigation of crime is not listed in Schedule 1 Human Tissue Act 2004 and, as a consequence, does not fall within the consent requirement set out in s1 of the Act. The requirements for licensing and Human Tissue Authority regulation do not apply (a) to acts done for criminal justice purposes by virtue of s39 of the Act and (b) because the acts are not done for a scheduled purpose. This position is reflected in paragraph 57 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

those taken for the police. Any samples taken at the location where the body was found should be incorporated into this list.

- 7.5.46 This list provides a definitive list of what has been taken and must be provided to the pathologist, the coroner and the Senior Investigating Officer.⁶² It should also be included as an annex to the post mortem report. This can act as the basis for sample tracking.⁶³
- 7.5.47 The record of samples should be used by the pathologist to notify the coroner of samples taken. It may also be useful for the coroner, and perhaps the police, when explaining the retention of material to the family.
- 7.5.48 For each item listed on the record as being retained under the coroner's authority the coroner must inform the pathologist of the period for which it may be retained.⁶⁴ It would be helpful if a particular date is specified.⁶⁵
- 7.5.49 The record may also be used by the coroner, and perhaps the police, to inform the pathologist of the wishes of the next of kin with regard to disposal of retained material after his requirement for retention has ended.

Samples – Temporary Storage

- 7.5.50 Samples of relevant material removed during a post mortem examination may be stored at the mortuary for a short period awaiting collection and transportation without a licence being required.⁶⁶
- 7.5.51 Similarly, a pathologist may store relevant material for a short period in unlicensed premises (e.g. his home) if this is reasonably necessary as part of the transport to licensed premises.

⁶² Paragraph 39 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 notes the need to provide the coroner with a list of material retained.

⁶³ This also provides a basis for compliance with the Human Tissue Authority guidance in relation to maintenance of documentation (paragraphs 167-168 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 and paragraphs 150 and 157 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017).

⁶⁴ This is a requirement r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

⁶⁵ It is unhelpful for the coroner to indicate materials should be held to the end of the inquest as the pathologist is unlikely to know when this is. Similarly, periods set by reference to the end of the coroner's authority are unhelpful as the point at which authority ends is a matter of debate.

⁶⁶ s16(7) Human Tissue Act 2004 (the HTA specifies that this should usually be for no more than a week).

Samples – Mortuary Records

- 7.5.52 The Human Tissue Authority has a power to inspect premises licensed under the Human Tissue Act 2004. In doing so it will trace selected samples that have been taken during a post mortem examination.
- 7.5.53 The list generated in the manner discussed above may offer a suitable way for traceability to be achieved.
- 7.5.54 Under normal circumstances the list discussed above should be provided to the mortuary to ensure samples taken at post mortem examination can be traced. However, it is recognised that there may be concerns about such disclosure of material taken as part of a police investigation.
- 7.5.55 Where concerns prevent the mortuary being provided with the list sufficient information should be provided to ensure the Designated Individual can meet his/her legal obligations. As a minimum there must be a record that the post mortem examination was undertaken and the pathologist involved identified. Where material has been retained which has to be returned to the body before it is released the mortuary must be informed. There should be a contact address provided so that the Human Tissue Authority can link the post mortem examination to the pathologist and thereby gain access to the list of material taken.
- 7.5.56 It is essential that the mortuary has proper records of any material the pathologist leaves for storage at the mortuary.

7.6 Storage

Legal Issues

Human Tissue Act 2004

- 7.6.1 The Act contains provisions with regard to storage of relevant material. These include:

- a. The storage of the body of a deceased person or relevant material therefrom for the purpose of the determination of cause of death requires appropriate consent ⁶⁷ or the approval of the coroner ⁶⁸;
- b. The storage of the body of a deceased person or relevant material therefrom for the purpose of determining the cause of death must be undertaken in compliance with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority ⁶⁹; and
- c. The storage of the body of a deceased person or relevant material therefrom for the purpose of determining the cause of death must be undertaken under the authority of a licence issued by the Human Tissue Authority. ⁷⁰

Guidance

7.6.2 Once taken at the post mortem examination, samples of relevant material must be stored for further analysis or retention for the period specified by the coroner or police.

Coroner's Samples

7.6.3 Samples held under the authority of the coroner must be held under a licence issued by the Human Tissue Authority and in compliance with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority. Where samples are held whilst awaiting disposal instructions from the coroner, or while arranging disposal, they are not held for a scheduled purpose and need not be held on licensed premises. This should not be considered an authorisation for long term storage of samples on unlicensed premises.

7.6.4 The pathologist is responsible for ensuring all samples in his/her possession, or under his/her control, are stored in accordance with the Codes of Practice. The pathologist should also ensure any third party to whom he/she sends

⁶⁷ s1 Human Tissue Act 2004.
⁶⁸ s11 Human Tissue Act 2004.
⁶⁹ s14 Human Tissue Act 2004.
⁷⁰ s16 Human Tissue Act 2004.

samples for analysis is aware of and seeking to comply with these requirements.

7.6.5 The storage must allow for tracking of samples. ⁷¹

7.6.6 Where samples are held simultaneously on the authority of the coroner and the police ⁷² the provisions of s39 Human Tissue Act 2004 apply and, consequently, the requirement for a licence and compliance with Human Tissue Authority guidance do not apply.

Police Samples

7.6.7 Samples held on the authority of the police only do not fall within the consent requirements of the Human Tissue Act 2004. ⁷³

7.6.8 Samples held on the authority of the police only do not fall within the licensing requirements of the Human Tissue Act 2004. ⁷⁴ However, samples held by the pathologist on behalf of the police should, as far as practical, comply with the guidance issued by the Human Tissue Authority. It is also advisable for the police to comply with the guidance. ⁷⁵

7.7 Analysis

General

7.7.1 The discussion in this section relates to the analysis of material taken at post mortem examination for the purposes of determining the cause of death. Where samples are taken for other purposes, e.g. the furtherance of police investigations, certain exemptions can apply. See the discussion in section 7.8 below.

⁷¹ See paragraphs 167-168 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 and paragraphs 150-151 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

⁷² In this regard authority of the police means that the samples must have been seized as evidence by the police.

⁷³ s1 Human Tissue Act 2004 – samples are not held for a scheduled purpose.

⁷⁴ s39 Human Tissue Act 2004.

⁷⁵ Whilst there is no legal requirement to do so it is reasonable to seek a level of consistency of approach.

Legal Issues

Coroners and Justice Act 2009

7.7.2 The Act and Regulations introduced a number of provisions of relevance. These include:

- a. The coroner must set the period (for material retained under his/her authority) for which material may be retained ⁷⁶;
- b. The coroner must, in certain cases, inform the police of the material retained and the period authorised ⁷⁷; and
- c. The need for persons who retain material under the coroner's authority to record the disposal etc. of the material. ⁷⁸

Human Tissue Act 2004

7.7.3 The Act introduced a number of provisions relevant to the examination and analysis of samples taken at a post mortem. These include:

- a. That the storage for use ⁷⁹ of relevant material in relation to determination of the cause of death must be on premises licensed for that purpose ⁸⁰;
- b. The requirement for a licence is subject to exemptions – see below;
- c. That the storage and use of relevant material in relation to the determination of the cause of death must comply with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority ⁸¹; and
- d. That the storage and use of relevant material in relation to determination of the cause of death must be done with the coroner's authority. ⁸²

⁷⁶ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

⁷⁷ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

⁷⁸ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

⁷⁹ The use itself does not require a licence. s16(2)(f) Human Tissue Act 2004 is clear that a licence is only required for public display and anatomical examination. Should the use be part of a post mortem examination this would require a licence (s16(b)) but the Human Tissue Authority's position is that subsequent analysis is not part of the post mortem examination.

⁸⁰ s16 Human Tissue Act 2004.

⁸¹ Sections 14 and 15 Human Tissue Act 2004.

⁸² s1 Human Tissue Act 2004 taken in conjunction with s11 of the Act.

Human Tissue Act - Exemptions

- 7.7.4 The Secretary of State for Health has introduced exceptions to the licensing requirements under the Human Tissue Act 2004.⁸³
- 7.7.5 The storage of relevant material for determination of the cause of death does not require a licence where⁸⁴:
- a. The relevant material has come from premises which are licensed by the Human Tissue Authority;
 - b. It is stored for the purpose of analysis for a scheduled purpose⁸⁵ (other than research); and
 - c. It will be returned to premises licensed under s16(2) when the analysis is completed.
- 7.7.6 This provision should not be construed as an authorisation for long term storage without an appropriate licence.

Guidance

Tracking Samples

- 7.7.7 The legal provisions discussed above can only be effectively complied with if the samples are uniquely identified and tracked by all persons holding them. This ensures appropriate continuity for Criminal Justice System purposes and complies with Human Tissue Authority's Codes of Practice on post mortem examinations.^{86 87}
- 7.7.8 All samples taken at the post mortem examination should be given a unique identifier by, depending on the circumstances, the exhibits officer (or other police representative charged with this responsibility) or the pathologist. This identification must be related to the sample at all times. Should the sample be

⁸³ Human Tissue Act 2004 (Ethical Approval, Exceptions from Licensing and Supply of Information about Transplantation) Regulations 2006. S.I. 1260 of 2006.

⁸⁴ s3(4) Human Tissue Act 2004 (Ethical Approval, Exceptions from Licensing and Supply of Information about Transplantation) Regulations 2006. S.I. 1260 of 2006.

⁸⁵ As set out in Schedule 1 of the Human Tissue Act 2004

⁸⁶ Paragraphs 167-168 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

⁸⁷ Paragraphs 150 and 157 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

subdivided the parts must be referred to by the existing unique identifier and a division number. Again this identifier must always be linked to the samples.

Premises

- 7.7.9 The storage of samples for the purpose of determination of the cause of death must be on premises licensed by the Human Tissue Authority for that activity.⁸⁸ Relevant material may be taken from licensed premises to unlicensed premises (such as the pathologist's home address) for the purpose of analysis provided it is subsequently returned to the licensed premises or disposed of.⁸⁹ However, should any of the material be retained, following the analysis, this exception may not apply.⁹⁰
- 7.7.10 The storage of samples held on police authority does not require a licence.⁹¹

Pathologist

- 7.7.11 The examination of post mortem samples to determine the cause of death must comply with the Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority.
- 7.7.12 Examinations of post mortem samples carried out for the investigation of possible criminal offences are not required to comply with the Codes of Practice and other Guidance, information and advice issued by the Human Tissue Authority.⁹² It is, however, good practice to comply.

Third Party Analysis or Examination

- 7.7.13 The legal requirements noted above also apply to third parties or organisations to which the pathologist provides samples for analysis or examination if the purpose is to determine the cause of death.

⁸⁸ The Human Tissue Authority views the post mortem examination to be the dissection and evisceration of the body only. It follows that subsequent analysis is not considered to be a post mortem examination and, therefore, a licence under s16(2)(b) of the Human Tissue Act 2004 (for the making of a post mortem examination) is not required.

⁸⁹ The relevant provisions do not explicitly state that it is acceptable to dispose of material and not return it to licensed premises but the Human Tissue Authority has determined that this course of action is acceptable. It would be disproportionate to demand material to licensed premises only for it to be disposed of.

⁹⁰ Destruction of material as part of the analysis process may not prevent the exception applying.

⁹¹ Section 39 Human Tissue Act 2004.

⁹² Section 39 Human Tissue Act 2004.

7.7.14 In order to ensure he/she can comply with his obligations⁹³ the pathologist should, where relevant:

- a. Take reasonable steps to ensure the organisation has the appropriate licences for all activities it will be undertaking (if not subject to the exception noted above);
- b. Notify the recipient that the samples being sent are subject to the requirements of the Coroners and Justice Act 2009 and Human Tissue Act 2004;
- c. Ensure the organisation has suitable record keeping facilities⁹⁴;
- d. Record the transfer of material to the organisation⁹⁵;
- e. Upon receipt of notification from the coroner of the period for which material may be retained forward that information to the sample recipients;
- f. Inform all recipients of any instructions he receives to dispose of material; and
- g. Ensure that arrangements are in place to facilitate the return of the samples for repatriation with the body where necessary.

Transportation

7.7.15 The Human Tissue Act 2004 does not impose any requirements with regard to transportation of relevant material. Storage incidental to transportation is excluded from the licensing requirements of the Human Tissue Act 2004.⁹⁶ However, such storage (whether of a body or relevant material) must not be for a period greater than seven days before the body and/or material is taken to licensed premises.

⁹³ The offences related to consent and licensing created by the Human Tissue Act 2004 may be committed by third party laboratories. The pathologist who provided material to a laboratory which commits an offence would not be guilty of the offence unless he was aware of the breach at the time he provided material.

⁹⁴ This is required to comply with the Human Tissue Authority guidance – see paragraphs 167-168 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 and paragraphs 150 and 157 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

⁹⁵ This is required to comply with the Human Tissue Authority guidance – see paragraphs 167-168 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 and paragraphs 150 and 157 of the Human Tissue Authority; Code A: Guiding principles and the fundamental principle of consent; April 2017.

⁹⁶ s16(7)(a) Human Tissue Act 2004.

7.7.16 The transportation method must however be safe and secure.

Export

7.7.17 The export of relevant material does not fall within the consent requirements of Part 1 of the Human Tissue Act 2004 ⁹⁷, nor does it fall within the scope of activities requiring a licence. ⁹⁸

7.7.18 Export does, however, fall within the general remit of the Human Tissue Authority. ⁹⁹

7.7.19 Pathologists exporting relevant material must act in accordance with any guidance issued by the Authority. ¹⁰⁰

7.7.20 In this regard export means the transportation of samples outside of England, Wales and Northern Ireland. ¹⁰¹

7.7.21 The export of evidence can give rise to particular problems.

- a. The material will be outside the control of the police or coroner on whose authority it is held.
- b. The material is no longer under the control of the courts in this jurisdiction.
- c. It will be difficult to supervise the actions of those in possession of the material.
- d. The risk of the material being lost is increased.
- e. The maintenance of continuity will be more difficult.
- f. The material will be subject to the laws of the country to which it is exported and this creates a risk of satellite litigation.

7.7.22 Tissue should only be exported where this has been specifically authorised by the party on whose authority the tissue is held.

⁹⁷ s1 Human Tissue Act 2004.

⁹⁸ s16 Human Tissue Act 2004.

⁹⁹ s14(1)(e)(ii) Human Tissue Act 2004.

¹⁰⁰ This is not required when material is being dealt with for Criminal Justice System purposes – see s39 Human Tissue Act 2004.

¹⁰¹ s41 Human Tissue Act 2004.

7.8 Police Enquiries

Legal Issues

Coroners and Justice Act 2009

7.8.1 The Act, Rules and Regulations introduced under it have a number of points of relevance. These include:

- a. Where a coroner is informed that a person has been charged in relation to the death he shall normally adjourn the inquest ¹⁰²;
- b. Upon conclusion of any criminal prosecution which has led to the adjournment of the inquest the coroner may resume the inquest ¹⁰³ but in many cases will not do so;
- c. The police have a right to be consulted over the person instructed to undertake the post mortem examination if they have notified the coroner of the probability of a person being charged with an offence ¹⁰⁴;
- d. The police have a right to be present at a post mortem examination ^{105 106};
- e. The coroner must inform the police of the period of retention he/she has set for material retained after the post mortem examination ¹⁰⁷; and
- f. The coroner must seek the views of the next-of-kin on the appropriate means of disposal of material taken under his/her authority. ¹⁰⁸

Human Tissue Act 2004

7.8.2 The Act includes a number of points of relevance. These include:

- a. The police do not normally ¹⁰⁹ retain material for a purpose set out in the Schedule to the Act and are therefore not subject to the requirement for consent to store or use relevant material ¹¹⁰;

¹⁰² Part 1 Schedule 1 Coroners and Justice Act 2009 and r25 Coroners (Inquests) Rules 2013 S.I. 1616 of 2013.

¹⁰³ Part 2 Schedule 1 Coroners and Justice Act 2009.

¹⁰⁴ r12 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁰⁵ r13 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁰⁶ r13(4) Coroners (Investigations) Regulations 2013 allows the police to be represented at the post mortem by a medical practitioner. r13(5) allows the police to attend the post mortem examination.

¹⁰⁷ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁰⁸ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁰⁹ If the police retain material with the intention of using it to determine the cause of death then the consent requirements would be engaged.

¹¹⁰ s1 Human Tissue Act 2004.

- b. The licence requirements of the Act ¹¹¹ do not (other than those relating to post mortem examinations ¹¹²) apply to acts done for criminal justice purposes, which are defined as purposes related to the prevention or detection of crime or the conduct of a prosecution ¹¹³; and
- c. Whilst a post mortem examination is not excepted from the licensing requirement, the carrying on of a post mortem examination does not include the removal of relevant material from the body of a deceased person, or from part of such a body, at the first place where the body is situated, to be attended by a constable. ¹¹⁴

Police and Criminal Evidence Act 1984

7.8.3 The Act includes a number of points of relevance. ¹¹⁵ These include:

- a. Where an officer is lawfully on premises he/she has the power ¹¹⁶ to seize material he/she believes to be evidence in a criminal investigation ¹¹⁷; and
- b. Where material is seized by the police as evidence it may be retained by the police for as long as is necessary in all the circumstances. ¹¹⁸

Criminal Procedure and Investigations Act 1996

7.8.4 The Act includes a number of points of relevance. These include:

- a. The Act requires ¹¹⁹ the Secretary of State to issue guidelines on a number of matters relevant to criminal investigations, including the retention of material; and
- b. A code of practice ¹²⁰ has been issued and this contains detailed provisions with regard to retention of material obtained during criminal investigations. ¹²¹

¹¹¹ s16 Human Tissue Act 2004.

¹¹² s39(2) Human Tissue Act 2004.

¹¹³ s39 Human Tissue Act 2004.

¹¹⁴ s39(3) Human Tissue Act 2004.

¹¹⁵ The police also have powers under the common law.

¹¹⁶ s19 Police and Criminal Evidence Act 1984.

¹¹⁷ This power is subject to conditions and restrictions – a discussion of these is beyond this text.

¹¹⁸ s22 Police and Criminal Evidence Act 1984.

¹¹⁹ s23 Criminal Procedure and Investigations Act 1996.

¹²⁰ The Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2015.

¹²¹ The code sets out the period for which evidence must be retained in criminal investigations.

Guidance

Seizure of Evidence

- 7.8.5 The police have the power to seize material including “relevant material” as evidence. It is also clear that they have the power to seize material held under the authority of the coroner.
- 7.8.6 The provisions of the Coroners and Justice Act 2009 with regard to retention of material; adjournment of inquests and notification of police of retention periods means it is not essential for the police to seize material required for the coroners purposes of identifying the deceased and establishing the cause of death.
- 7.8.7 However, as noted above, the simultaneous use of two different systems for retaining relevant material (and other evidence) complicates the process of controlling the material and it is therefore recommended practice that material is seized under police powers. This is a matter for the discussion/ agreement of the police and coroner.

End of Enquiries

- 7.8.8 The police investigation into a death can end in a number of different ways. It is therefore a matter for the police to determine, in line with relevant guidance, what must happen to samples seized as evidence.
- 7.8.9 In particular they must, for every sample held on their authority, determine whether it is to be retained, the period of retention and what should happen to the sample when retention is no longer required.
- 7.8.10 The police must also consider whether sub-samples used for additional analysis must also be retained.
- 7.8.11 In making this decision it may be essential to seek the advice of the pathologist who undertook the post mortem examination.
- 7.8.12 Given the possibly significant period between the post mortem examination and the end of the enquiry it may be useful to have made an initial assessment of the need to retain soon after the examination.

7.8.13 In relation to samples taken on the authority of the coroner the views of the next-of-kin should have been taken with regard to what should happen to retained material when it is no longer required. These views are not binding on the police but, unless there are good reasons not to follow these views, the police may wish to act in compliance with them. They should also take account of any views expressed to the family liaison officer with regard to this matter. Consent must be sought from a person in a qualifying relationship¹²² with the deceased for the continued retention of any material which falls outside the authority of the police or the coroner for use for scheduled purposes set out in the Human Tissue Act 2004.

7.8.14 One particular problem may be where retention is required for a long period. In such cases it may be inadvisable to return material to the family even if this was the view expressed to the coroner.

Notification of Coroner

7.8.15 The police must notify the coroner of any material which has been identified for immediate disposal. This will ensure no samples which may prove helpful to the coroner's inquiries are destroyed.

7.8.16 It would also be useful to inform the coroner of any samples held on his authority which the police would wish to retain.

7.8.17 In some cases samples will have been taken by the police for further analysis (for example toxicology). The results of this analysis may be of interest to the coroner. Should the end of police enquiries mean that this analysis shall not be undertaken it may be helpful to inform the coroner.

7.8.18 Should the coroner take control of samples previously held on the authority of the police these samples, which were not subject to the controls of the Human Tissue Act 2004, may (depending on the coroner's purpose) become subject to the controls of the Act.¹²³

¹²² Section 27 of the Human Tissue Act 2004 sets out a list of defined relationships between the deceased and other individuals. These are qualifying relationships and are in a ranked order starting with spouse/partner and ending with friend. The ability to give consent depends on being in a qualifying relationship with the deceased and the "rank" of that relationship in s27.

¹²³ See paragraph 59 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

Notification of the Forensic Pathologist

- 7.8.19 The police must notify the forensic pathologist ¹²⁴ of their determination with regard to the period of retention and means of disposal of all material held on their authority.
- 7.8.20 Where material is to be retained the police and forensic pathologist should determine the appropriate means of storage according to their agreed policy. ¹²⁵
In response to this agreement:
- a. The forensic pathologist must ensure that all samples in his/her possession are transferred into this store; and
 - b. The forensic pathologist must notify all persons to whom he/she provided samples for further analysis of the material that it is to be transferred to the storage facility.
- 7.8.21 Where material is to be disposed of the police must inform the forensic pathologist of the requirement to dispose and the manner of disposal. In response to this notification:
- a. The forensic pathologist must ensure that all samples in his/her possession are disposed of in the stated manner; and
 - b. The forensic pathologist must notify all persons to whom he/she provided samples for further analysis of the material that it is to be disposed of in the manner stated.
- 7.8.22 Where material is retained by the forensic pathologist under police authority he/she shall retain it for the period required and dispose of it in the manner set out by the police at the end of the period of retention.
- 7.8.23 If the forensic pathologist, or mortuary, wishes to determine the retention periods for any tissue he/it should contact the force in writing to seek advice. If suitable advice is not then received the pathologist/mortuary should write to the

¹²⁴ If tissue samples were retained by the police or persons acting directly for the police then the police should also notify them.

¹²⁵ The requirements of the Human Tissue Act 2004 do not apply to this storage because it is not done for a purpose set out in Schedule 1 of the Act (and thus no consent requirement). Furthermore, the material is not being stored for a scheduled purpose and thus the s14 and s16 requirements do not apply and the s39 exemption excludes storage for criminal justice purposes from the licensing requirements and supervision of the Human Tissue Authority.

Chief Officer. Where this process does not achieve suitable advice the matter can be raised with the Home Office Forensic Pathology Unit.

Material held by the Police

- 7.8.24 Where material is held by the police it is their responsibility to ensure appropriate retention and/or disposal.
- 7.8.25 Returning the material to the mortuary is not a suitable means of disposal unless the force has an agreement with the mortuary that the mortuary will dispose of material on behalf of the police.

7.9 Coroners Enquiries

Legal Issues

Coroners and Justice Act 2009

- 7.9.1 The Act, Rules and Regulations introduced under it have a number of points of relevance. These include:
- a. Where a coroner is informed that a person has been charged in relation to the death he shall normally adjourn the inquest ¹²⁶;
 - b. Upon conclusion of any criminal prosecution which has led to the adjournment of the inquest the coroner may resume the inquest ¹²⁷ but in many cases will not do so;
 - c. The police have a right to be consulted over the person instructed to undertake the post mortem examination if they have notified the probability of a person being charged with an offence ¹²⁸;
 - d. The coroner must inform the police of the period of retention he/she has set for material retained after the post mortem examination ¹²⁹;
 - e. The coroner must seek the views on the appropriate means of disposal of material taken under his/her authority ¹³⁰; and

¹²⁶ Part 1 Schedule 1 Coroners and Justice Act 2009 and r25 Coroners (Inquests) Rules 2013 S.I. 1616 of 2013.

¹²⁷ Part 2 Schedule 1 Coroners and Justice Act 2009.

¹²⁸ r12 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹²⁹ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹³⁰ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

- f. The forensic pathologist must record the disposal of material held under the coroner’s authority.¹³¹

Human Rights

- 7.9.2 Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹³² sets out the “right to life”. This has been held to require an effective public investigation by an independent official body into any death occurring in certain circumstances.¹³³
- 7.9.3 There has been an increasing awareness of the requirements imposed by Article 2 and, as a consequence, it is accepted that there may be cases where a coroner’s inquest must be re-opened after a prosecution.¹³⁴
- 7.9.4 In cases where Article 2 is engaged but there does not appear to have been the commission of a criminal offence the powers for seizure of evidence may be limited.

Guidance

Notification of the Police

- 7.9.5 In the majority of cases the coroner’s enquiry into a death will conclude after any police investigation and/or prosecution. However, even if this is true there may be material held on the coroner’s authority that the police would wish to retain.¹³⁵
- 7.9.6 The coroner should therefore notify the police of the end of his/her inquest and of the fact that samples held on his/her authority (other than those he/she has already been notified of police interest in) shall be disposed of.
- 7.9.7 In making this decision it may be essential to seek the advice of the pathologist who undertook the post mortem examination.

¹³¹ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹³² Incorporated into domestic law by the Human Rights Act 1998.

¹³³ *Middleton, R (on the application of) v. Coroner for the Western District of Somerset* [2004] UKHL 10 (11 March 2004) – at paragraph 3.

¹³⁴ *Middleton, R (on the application of) v. Coroner for the Western District of Somerset* [2004] UKHL 10 (11 March 2004) – at paragraph 30.

¹³⁵ Such retention may be required under the provisions of the Code of Practice issued under s23 Criminal Procedure and Investigations Act 1996; be needed for an ongoing enquiry or perhaps to allow a subsequent prosecution under s76 Criminal Justice Act 2003.

7.9.8 Given the possibly significant period between the post mortem examination and the end of the enquiry it may be useful to have made an initial assessment of the need to retain soon after the examination.

7.9.9 If the police seize material previously held on the authority of the coroner the retention of that material by the police will be exempt from the licensing requirements of the Human Tissue Act provided that the material is being retained for the purpose of conducting a prosecution or preventing or detecting crime.

Notification of the Pathologist

7.9.10 Following notification of the police and any request from them with regard to samples the coroner must notify the forensic pathologist¹³⁶ of the end of his inquest and the samples which are (a) to be held on the authority of the police and (b) samples to be disposed of. In the case of samples to be disposed of the coroner must inform the pathologist of the means of disposal.

7.9.11 In response to this notification:

- a. The forensic pathologist must ensure that all samples in his/her possession are disposed of in the stated manner;
- b. The forensic pathologist must notify all persons to whom he/she provided samples for further analysis of the material that it is to be disposed of in the manner stated; and
- c. Record the disposal of material.

Lack of Notification

7.9.12 If the above processes are followed the pathologist should receive clear instructions over what should be done with every sample of retained material.

7.9.13 However, there may be cases where the period specified, by the coroner, for retention of the material has expired but no instructions received. In such circumstances the pathologist would be expected to take reasonable steps to

¹³⁶ If tissue samples were retained by another person acting directly for the coroner the coroner should also notify them.

contact the coroner and determine if there is an extension of the period of retention or instructions for disposal.¹³⁷

7.9.14 If this process does not lead to an extension or instructions the pathologist should (in cases where it may occur) ascertain whether the police have an interest in retaining the samples.

7.9.15 If the police do not wish to retain the samples the pathologist should arrange their disposal in accordance with Human Tissue Authority guidance.¹³⁸

7.10 Disposal of Material

Legal Issues

Coroners and Justice Act 2009

7.10.1 The Act and Regulations introduced under it have a number of points of relevance. These include:

- a. The coroner must seek the views on the appropriate means of disposal of material taken under his/her authority¹³⁹; and
- b. The forensic pathologist must record the disposal of material held under the coroner's authority.¹⁴⁰

Human Tissue Act 2004

7.10.2 The Act has a number of points of relevance. These include the following.

- a. The remit of the Human Tissue Authority includes:
 - i. The disposal of a body of a deceased person which has been imported for use, stored for use or used for a scheduled purpose;¹⁴¹

¹³⁷ The Human Tissue Authority has published a communications flowchart for coroner's cases.

¹³⁸ The need for a policy to dispose of tissue in cases where no notification is received is noted at paragraph 51 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

¹³⁹ r14 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁴⁰ r15 Coroners (Investigations) Regulations 2013 S.I. 1629 of 2013.

¹⁴¹ s14(1)(f) Human Tissue Act 2004.

- ii. The disposal of relevant material which has been removed from the body of a deceased person for the purposes of a post mortem examination ¹⁴²,
 - iii. The disposal of relevant material which has come from the body of a deceased person (otherwise than as a result of an anatomical or post mortem examination) for use for a scheduled purpose ¹⁴³; and
 - iv. The disposal of relevant material which has come from a human body and been imported for use for a scheduled purpose, or has come from the body of a deceased person which has been imported for use for a scheduled purpose. ¹⁴⁴
- b. The Human Tissue Authority's general functions include:
- i. Maintaining a statement of the general principles which it considers should be followed in the carrying on of activities within its remit or in the carrying on of its functions in relation to such activities; and
 - ii. Providing in relation to activities within its remit such general oversight and guidance as it considers appropriate. ¹⁴⁵
- c. These general functions do not apply to material held for criminal justice purposes ¹⁴⁶; but
- d. Do apply to material which has been held on the authority of the coroner.

Guidance

Material held on Authority of the Coroner

- 7.10.3 Where the forensic pathologist is notified by the coroner that material must be disposed of he/she must ¹⁴⁷:

¹⁴² s14(1)(g)(ii) Human Tissue Act 2004.

¹⁴³ s14(1)(g)(iii) Human Tissue Act 2004.

¹⁴⁴ s14(1)(g)(iv) and (v) Human Tissue Act 2004.

¹⁴⁵ s15 Human Tissue Act 2004.

¹⁴⁶ The remit of the Human Tissue Authority set out in s14 Human Tissue Act 2004 with regard to disposal covers the body of the deceased (s 14(1)(f)), relevant material taken as part of a post mortem examination (s14(1)(g)) and removed for a scheduled purpose (s14(1)(g)). It may therefore not cover all samples held by the police. To the extent, if any, that it does cover such material s39 Human Tissue Act 2004 excludes the Human Tissue Authority remit.

¹⁴⁷ See paragraph 47 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

- a. Dispose of the material in his/her custody in line with the coroner's instructions as to the means of disposal and the guidance issued by the Human Tissue Authority;
- b. Record the disposal of the material; and
- c. Notify all laboratories which he/she supplied material to that the material must be disposed of according to the coroner's requirements.¹⁴⁸

7.10.4 The disposal of material held on the authority of the coroner should be in accordance with guidance issued by the Human Tissue Authority.

Material held on Authority of the Police

7.10.5 Where a forensic pathologist is notified by the police that material must be disposed of (or the period determined for retention has expired) the pathologist must:

- a. Dispose of the material in his/her possession or control in line with the method specified by the police;
- b. As far as practical within the methods specified by the police comply with the guidance issued by the Human Tissue Authority¹⁴⁹;
- c. Record the disposal of the material; and
- d. Notify all laboratories which he/she supplied materials to that it must be disposed of according to the method set out by the police.

7.10.6 The police should dispose of material in their possession, as far as reasonably practical, in accordance with the guidance set out by the Human Tissue Authority. An outline approach is provided at Annex 2. It is perhaps appropriate that the model in Annex 2 is used as a default position which is discussed with the family of the deceased.

¹⁴⁸ See paragraph 49 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

¹⁴⁹ This position is reflected in paragraph 58 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017.

8. Additional Matters

8.1 Coroners Second Post Mortem

8.1.1 Coroners have, for some time, authorised the performance of second post mortem examinations. In many cases this is authorised to facilitate the release of the body to the family.¹⁵⁰

8.1.2 From the discussion above the following conclusions can be drawn.

- a. The purpose of the second post mortem examination is the determination of the cause of death – a scheduled purpose under the Human Tissue Act 2004.
- b. The post mortem is undertaken on the instruction of the coroner and the coroners regulations apply.
- c. The post mortem examination is undertaken on the authority of the coroner and the consent requirements of the Human Tissue Act 2004 do not apply.¹⁵¹
- d. The post mortem examination must be conducted on premises licensed for that activity by the Human Tissue Authority¹⁵² by a pathologist who is authorised to act under the licence.¹⁵³
- e. The post mortem examination must be undertaken in accordance with the conditions of the licence and Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority.

8.1.3 These points indicate the second post mortem examination should be subject to, essentially, the same provisions discussed above with regard to the first examination.

8.1.4 The coroner may wish to adopt a policy whereby samples taken at the second post mortem examination are provided to the pathologist who undertook the first

¹⁵⁰ See discussion in Home Office Circular 30/1999. This Circular has been superseded by the Chief Coroner's Guidance No. 32 Post-Mortem Examinations Including Second Post-Mortem Examinations. s11 Human Tissue Act 2004.

¹⁵¹ s16 Human Tissue Act 2004 read in conjunction with s39 of the Act.

¹⁵² s16 s17 Human Tissue Act 2004 confirms that the authority conferred by a licence extends to the (a) the designated individual, (b) a person designated as a person to whom the licence applies by a notice given to the Human Tissue Authority and (c) a person acting under the direction of (a) or (b) read in conjunction with s39 of the Act.

post mortem and incorporated within the control methods applied to samples taken at the first examination.

8.2 Defence Post Mortem Examination

8.2.1 There is no statutory authority for a person charged in connection with a death to order a post mortem examination of the deceased. The performance of such an examination has however been recognised by the courts.¹⁵⁴ This examination appears to be undertaken on the authority of the coroner.¹⁵⁵ **As the examination is under the authority of the coroner there is no requirement for consent.**

8.2.2 From the discussion above the following conclusions can be drawn.

- a. Assuming that the post mortem examination is undertaken on the authority of, or for the purposes of, the coroner then the consent requirements of the Human Tissue Act 2004 do not apply.¹⁵⁶
- b. Whilst the post mortem examination is under the authority of, or for the purpose of, the coroner it is not under the instruction of the coroner and, as a consequence, the coroners regulations do not apply.
- c. The post mortem examination must be conducted on premises licensed for that purpose¹⁵⁷ by the Human Tissue Authority¹⁵⁸ by a pathologist who is authorised by that licence.^{159 160}

¹⁵⁴ See *R v. HM Coroner for Greater London ex parte Ridley* [1985] 1 WLR 1347 and discussion in Home Office Circular 30/1999. This Circular has been superseded by the Chief Coroner's Guidance No. 32 **Post-Mortem Examinations Including Second Post-Mortem Examinations.**

¹⁵⁵ If the position were adopted that the examination was not authorised by the coroner then the provisions of s11 Human Tissue Act 2004 would not apply. If the assumption, made later, that the purpose of the defence post mortem examination is not determination of the cause of death is not accepted then the consent requirements of the Act would apply. This could prevent the defence undertaking a post mortem examination without the consent of the appropriate person. This could pose serious difficulties for the Criminal Justice System.

¹⁵⁶ s11 Human Tissue Act 2004.

¹⁵⁷ s16 Human Tissue Act 2004 read in conjunction with s39 of the Act.

¹⁵⁸ s16 Human Tissue Act 2004.

¹⁵⁹ s17 Human Tissue Act 2004 confirms that the authority conferred by a licence extends to the (a) the designated individual, (b) a person designated as a person to whom the licence applies by a notice given to the Human Tissue Authority and (c) a person acting under the direction of (a) or (b)

¹⁶⁰ The main provisions of the Human Tissue Act 2004 (e.g. s11) refer to things done for "purposes of functions of a coroner or under the authority of a coroner" but s39 refers to "post mortem examination for purposes of functions of a coroner". It could be argued that a defence post mortem examination is not done for the purpose of functions of a coroner. It would follow that s39(2) would not apply and, as a result, the s39(1) exemption would apply to the post mortem. It is not clear why a coroner would have the authority to authorise a post mortem examination if it was not done for one of his

- d. The post mortem examination must be undertaken in accordance with the conditions of the licence and Codes of Practice and other guidance, information and advice issued by the Human Tissue Authority.^{161 162}
- e. The purpose of the examination is not the determination of the cause of death but to offer a review of reports already prepared a for criminal justice purposes.¹⁶³ It follows:
 - i. The requirements of the Act with regard to consent for taking of samples by the appropriate person do not apply;
 - ii. The requirements of the Act with regard to consent for storage and use do not apply; and
 - iii. The requirements of the Act with regard to licensing¹⁶⁴ apply to the post mortem examination but not to further activities.¹⁶⁵

8.2.3 On this interpretation, the Human Tissue Act 2004 does not prohibit the taking of samples during a defence post mortem examination. However, there is no clear statutory or common law provision which authorises the taking of samples or which governs the management of these samples.

8.2.4 The taking/retention of tissue samples by those instructed by the defence may give rise to a number of issues – including the following.

- a. Those instructed by the defence are in a position of uncertainty as to:
 - i. The legality of the taking/retention;
 - ii. The retention and disposal provisions that apply; and
 - iii. The requirements for licences under the Human Tissue Act 2004.
- b. The implementation of the appropriate retention and disposal policies (whether those of the police or coroner) becomes more complex.

functions/purposes but, as noted in the paper, this area is not clear. This interpretation does not appear to be what was intended in the Act and it is assumed that the examination must be subject to the controls of the Act.

¹⁶¹ s14 Human Tissue Act 2004 read in conjunction with s39 of the Act.

¹⁶² The argument discussed in relation to paragraph 8.2.2c could also be made in relation to the application of the Codes.

¹⁶³ This position is asserted as a common sense assessment of the purpose of the examination. However, there is no legal authority to support this position. It follows that the courts may not accept it as correct.

¹⁶⁴ s16 Human Tissue Act 2004.

¹⁶⁵ The exemption of s39 Human Tissue Act 2004 read in conjunction with s39(2) of the Act.

- c. Full traceability of the material may be compromised

8.3 Provision of Relevant Material to the Defence

- 8.3.1 The provisions of the Human Tissue Act 2004 apply to those acting for the defence in a criminal prosecution. The provisions of the Coroners and Justice Act 2009, Coroners (Inquests) Rules 2013 and Coroner (Investigations) Regulations 2013 still apply to the samples retained under the authority of the coroner.
- 8.3.2 Pathologists should not provide material held on the authority of the coroner to those acting for the defence without clear authority from the coroner. Similarly, they should not provide police exhibits without clear authority from the police or the Crown Prosecution Service.
- 8.3.3 Where a request is made for relevant material to be provided to the defence the pathologist may not know the purpose for which it is required.
- 8.3.4 The pathologist should therefore seek confirmation (in writing) from the person seeking possession of the material that, where relevant:
 - a. He/she is aware the provisions of the Coroners and Justice Act and Human Tissue Act apply to the materials and that he/she holds the relevant licences;
 - b. He/she is aware the provisions of the Coroners and Justice Act and Human Tissue Act apply to the materials and that he/she is taking possession solely for the purpose of providing the material to an appropriately licensed facility; or
 - c. The material is being taken for purposes which do not require a licence from the Human Tissue Authority (setting out why this is the case) but acknowledging the provisions of the Coroners and Justice Act still apply.
- 8.3.5 The pathologist can check the Human Tissue Authority Internet site and with the Authority itself if there are any concerns over the status of the site to which material is to be transported.
- 8.3.6 The pathologist acting for the defence should not, normally, produce new sub-samples (e.g. blocks or slides) from the material provided to them. Instead they should seek to have material supplied in the form required. If new sub-samples

are created the pathologist acting for the defence should notify the pathologist instructed by the coroner of the existence of, and detailed information on, the sub-samples. This ensures the tracking of material can always be maintained.

8.3.7 The pathologist acting for the defence should not retain material (whether supplied to, or created by, him) after his examination is completed. All material should be returned to the pathologist acting for the coroner.

8.3.8 This area has been addressed in guidance issued by the Regulator.¹⁶⁶

8.4 DNA Sampling and Analysis

Legal Issues

Coroners and Justice Act 2009

8.4.1 The Act and the Rules and Regulations made under the Act make clear the responsibility of the coroner to determine the identity of the deceased.¹⁶⁷

Police and Criminal Evidence Act 1984

8.4.2 The Act includes a number of points of relevance. These include:

- a. Where an officer is lawfully on premises he/she has the power¹⁶⁸ to seize material he believes to be evidence in a criminal investigation¹⁶⁹;
- b. Where material is seized by the police as evidence it may be retained by the police for as long as is necessary in all the circumstances¹⁷⁰;
- c. The provisions of ss62- 63A of the Act, with regard to taking of samples for DNA profiling, do not apply to deceased persons¹⁷¹;
- d. The provisions of s19 of the Act, the general power to seize evidence, can be used to seize material from the deceased (including for the purpose of DNA profiling); and

¹⁶⁶ Provision of Human Tissue to the Defence (England and Wales); FSR-G-215, Forensic Science Regulator.

¹⁶⁷ s5 Coroners and Justice Act 2009 and r34 Coroners (Inquests) Rules 2013 S.I. 1616 of 2013.

¹⁶⁸ s19 Police and Criminal Evidence Act 1984.

¹⁶⁹ This power is subject to conditions and restrictions – a discussion of these is beyond this text.

¹⁷⁰ s22 Police and Criminal Evidence Act 1984.

¹⁷¹ s62, s63 and s63A Police and Criminal Evidence Act 1984 can not apply as they require lawful detention.

- e. The Act, as amended, allows the use of the National DNA Database¹⁷² for the investigation and prosecution of criminal offences and for identification purposes.¹⁷³

Human Tissue Act 2004

8.4.3 The Act introduced provisions with regard to DNA profiling. These include:

- a. A person commits an offence if he/she possesses any bodily material with the intent that any human DNA in the material be analysed without qualifying consent and that the results of the analysis be used otherwise than for an excepted purpose¹⁷⁴; and
- b. The excepted purposes¹⁷⁵ include the purposes or functions of a coroner, the prevention or detection of crime, the conduct of a prosecution and implementation an order of a court or tribunal.

Guidance

8.4.4 The various legal provisions suggest the following.

- a. The coroner has the right to take samples for DNA profiling to identify the deceased.
- b. The police have the right to take samples for DNA profiling if it is required as part of the investigation of a crime. This includes the use of the results for identifying the deceased where this is relevant to the investigation.
- c. The police do not have the right to take samples for DNA profiling if it is only required for the purpose of identifying the deceased and this is not relevant to a criminal investigation.
- d. The police may assist the coroner in his role by taking samples obtained under his authority and obtaining the DNA profile.
- e. The National DNA Database, and the associated missing and vulnerable persons databases, may be used to assist the identification of the deceased.

¹⁷² National DNA Database is a registered trademark owned by the Secretary of State for the Home Department.

¹⁷³ Part V Police and Criminal Evidence Act 1984 – see Home Office Circulars 28/2005 and 1/2006.

¹⁷⁴ s45 Human Tissue Act 2004.

¹⁷⁵ Set out in s5 Part 2 of Schedule 4 Human Tissue Act 2004.

8.5 Importation

- 8.5.1 It is unlikely that, as part of a coroner’s or police enquiry, samples of relevant material will have to be imported. However, it may occur and it is therefore appropriate to make some comment.
- 8.5.2 The importation of relevant material does not fall within the consent requirements of Part 1 of the Human Tissue Act 2004.¹⁷⁶ Nor does it fall within the scope of activities requiring a licence.¹⁷⁷
- 8.5.3 Importation does fall within the remit of the Human Tissue Authority¹⁷⁸ and, as a consequence, the Human Tissue Authority’s general functions apply, including:
- a. Maintaining a statement of the general principles which it considers should be followed in the carrying on of activities within its remit or in the carrying on of its functions in relation to such activities; and
 - b. Providing in relation to activities within its remit such general oversight and guidance as it considers.¹⁷⁹
- 8.5.4 Pathologists importing relevant material must act in accordance with such guidance subject to the s39 exemption with regard to Criminal Justice System purposes.
- 8.5.5 In this regard import means the import into England, Wales and Northern Ireland from a place outside England, Wales and Northern Ireland.¹⁸⁰
- 8.5.6 Once relevant material has been imported into England and Wales it is subject, if not exempt, to the provisions of the Human Tissue Act 2004.

¹⁷⁶ s1 Human Tissue Act 2004.
¹⁷⁷ s16 Human Tissue Act 2004
¹⁷⁸ s14(1)(e)(ii) Human Tissue Act 2004.
¹⁷⁹ s15 Human Tissue Act 2004.
¹⁸⁰ s41 Human Tissue Act 2004.

9. Contacts

9.1 Human Tissue Authority

- 9.1.1 Advice on the application of the Human Tissue Act 2004 can be obtained from the Human Tissue Authority.

Human Tissue Authority
151 Buckingham Palace Road
London
SW1W 9SZ

9.2 Coroners Legislation

- 9.2.1 Coroner's legislation is the responsibility of the Ministry of Justice.

Head of Coroners, Burials, Cremation and Inquiries Policy Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

9.3 Chief Coroner

- 9.3.1 The Chief Coroner has oversight of the coroners system.

The Chief Coroner
11th Floor - Thomas More Building
Royal Courts of Justice
London
WC2A 2LL

9.4 Forensic Pathology Services

- 9.4.1 The provision of forensic pathology services in England and Wales is the responsibility of the Pathology Delivery Board. This can be contacted via pathology@homeoffice.gov.uk.

9.5 Forensic Pathology Quality Standards

9.5.1 Quality standards in forensic pathology are the responsibility, in conjunction with others, of the Forensic Science Regulator.

5 St Philip's Place
Colmore Row
Birmingham
B3 2PW

10. Review

10.1.1 This document is subject to review at regular intervals.

10.1.2 If you have any comments please send them to the address or e-mail set out on the Internet at URL: www.gov.uk/government/organisations/forensic-science-regulator

11. Abbreviations and Acronyms

Text	Meaning
ACPO	Association of Chief Police Officers of England, Wales and Northern Ireland
DNA	Deoxyribonucleic Acid
EWCA Civ	England and Wales Court of Appeal Civil Division
NICA	Northern Ireland Court of Appeal
NPCC	National Police Chiefs' Council
NPIA	National Policing Improvement Agency
SI	Statutory Instrument
UKHL	United Kingdom House of Lords
URL	Uniform Resource Locator

Annex 1: Examination of a Foetus or Still Born Child

12. Legal Position

12.1 General

12.1.1 The discussion that follows describes the position in law only; there is no intent to minimise the importance of the unborn child.

12.2 The Foetus

12.2.1 The legal position of the foetus has been considered by the courts, in the Criminal Justice System, on a number of occasions.^{181 182 183 184} These cases suggest the following position.

12.2.2 The foetus:

- a. Is not, in law, a person;
- b. Is not, in law, part of the mother;
- c. Has, in law, no life separate from the mother and cannot be considered a living being or person; and
- d. The foetus gains independent existence and could be described as a person on being born alive.

12.2.3 A foetus which does not survive to be born alive has, in law, never lived and, as a consequence, has not died. It is, therefore, not a dead person.

12.2.4 The above discussion describes the position of the foetus in relation to criminal cases. In respect of the Human Tissue Act 2004, the Human Tissue Authority in relation to the provisions of the Act, considers the foetus to be part of the mother. As the relevant provisions of the Act do not apply to samples taken under police powers, this does not alter the discussion in this section. Should samples be taken other than under police powers, for a scheduled purpose

¹⁸¹ *Attorney General's Reference No 3 of 1994* [1997] UKHL 31.

¹⁸² *CP (A Child) v First-Tier Tribunal (Criminal Injuries Compensation) & Ors* [2014] EWCA Civ 1554.

¹⁸³ *The Attorney General for Northern Ireland & Anor v The Senior Coroner for Northern Ireland* [2013] NICA 68.

¹⁸⁴ *R (on the application of T) v. HM Senior Coroner for the County of West Yorkshire (Western Area)* [2017] EWCA Civ 318.

under the Human Tissue Act, then the Authority’s Code of Practice should be followed.

12.3 Coroners’ Powers

12.3.1 In England and Wales a coroners jurisdiction is triggered by the presence “the body of a deceased person” within his area – see s1 Coroners and Justice Act 2009. As the foetus, or stillborn child, has never lived it cannot be dead. As a result, the coroner will have no jurisdiction.

12.3.2 The position in Northern Ireland appears to be different.

12.4 Police Powers

12.4.1 The police have power to seize and examine evidence. There are some restrictions on these powers (see for example the provisions with regard to excluded or special procedure material in the Police and Criminal Evidence Act 1984). The foetus (once separated from the mother), or still born child, does not fall within the definition of excluded ¹⁸⁵ or special procedure material.

13. Guidance

13.1 Seizure and Examination

13.1.1 The foetus (once separated from the mother), or still born child, is not dead and the coroner has no jurisdiction. The police powers to seize and order the examination of evidence can be employed. If there is any doubt as to whether the child was born alive the matter must be referred to the coroner.

13.1.2 The examination cannot be a post mortem examination as the foetus, or still born child, has not died.

¹⁸⁵ s11(1)(b) Police and Criminal Evidence Act 1984 deals with human tissue but the conditions are not met for the foetus or still born child to fall within its provisions.

13.2 Human Tissue Act 2004 Issues

Consent

13.2.1 The consent requirements only apply to things done for a scheduled purpose. As the foetus (once separated from the mother), or still born child, is not considered to be a dead person the purposes in Part 2 of Schedule 1 Human Tissue Act 2004 are not relevant.

13.2.2 None of the purposes in Part 1 of Schedule 1 of the Act apply to the examination of a foetus carried out under police powers.^{186 187}

13.2.3 The result is that the examination does not require consent.

Licensing and Supervision

13.2.4 The provisions of s39(1) of the Act, which exempt things done for criminal justice purposes from the licensing and supervision requirements, apply to the examination of a foetus. The provisions of s39(2), which state that the s39(1) exemption does not apply to post mortem examinations, do not apply as the examination is not a post mortem. It follows that the licensing and supervision requirements of the Act do not apply to this type of examination.

13.2.5 As a result, there is no legal requirement for the examination to take place on licensed premises or in compliance with the guidance issues by the Human Tissue Authority. It is, however, strongly recommended, that the examination is performed on licensed premises and to the standards which would normally apply to a post mortem examination.

13.3 The Foetus in Utero

13.3.1 The discussion above considers the position of a foetus when separated from the mother. What is the position with regard to a foetus when it is still in the mother's womb (i.e. it is "in utero")?

¹⁸⁶ The scheduled purpose relating to the determination of the cause of death can not apply as the foetus has not died.

¹⁸⁷ The examination of the foetus cannot amount to an anatomical examination as a result of s54 Human Tissue Act 2004.

13.3.2 This raises issues with regard to the post mortem examination where the subject is a woman who was pregnant at the time of death and the foetus is still in utero. The power of a coroner to request the examination of the foetus could be a matter of some debate. The police power, as long as such examination is necessary as part of the investigation of crime, applies.

13.4 The Future

In 2019 the Ministry of Justice started consultation on whether the jurisdiction of coroners should be extended to cover certain stillbirths. If that proposal is progressed the position set out above will change in relation to any stillbirths where the coroner has jurisdiction.

Annex 2: Disposal of Material Held on the Authority of the Police

14. General

- 14.1.1 Samples of relevant material taken and/or retained under the authority of the police are not subject to the provisions, with regard to disposal, of the Human Tissue Act 2004.¹⁸⁸ It follows that the police are not obliged to follow the guidance on disposal set down by the Human Tissue Authority.
- 14.1.2 The police are subject to requirements with regard to the retention of evidence¹⁸⁹ which result in material being held for far longer periods than would be the case in medical or coroner's retention. An approach must therefore be adopted that:
- a. Allows an effective means of dealing with retained evidence;
 - b. Does not place an undue burden on police resources; and
 - c. Respects the wishes of the family of the deceased.
- 14.1.3 It is also necessary to realise the material may be held for a considerable period and it may be inappropriate to return material to the family after such a period.

15. Categorisation

- 15.1.1 Material held by the police may be divided into three categories.
- a. Category 1 - Material taken at the post mortem examination which would not generally be considered part of the body (e.g. scrapings, fingernails, hair, stomach contents).
 - b. Category 2 – Small samples of human tissue which are not a significant part of the body (e.g. small tissue samples, blocks slides etc).¹⁹⁰
 - c. Category 3 - Samples of human tissue that incorporate a significant part of the body (e.g. organs, limbs etc.).

¹⁸⁸ Such samples are not held for a scheduled purpose and the provisions of s39 Human Tissue Act 2004 ensure the provisions of s14 and s16 of the Act do not apply.

¹⁸⁹ Criminal Procedure and Investigations Act 1996 (Code of Practice) 2015 S.I. 861 of 2015.

¹⁹⁰ A large piece of tissue or organ does not fall within this class just because it is contained within a block.

15.1.2 The appropriate course of action when the material is no longer retained would depend on the materials category.

15.1.3 Blood samples should not, normally, be returned to the family but should be incinerated.

16. Disposal Method

Category 1

16.1.1 In all cases this material would be disposed of by incineration.

Category 2

16.1.2 Where the family have expressed the view they would like material to be returned the following approach should be adopted.

- a. If disposal is within 5 years of the post mortem examination and the family are still contactable they should be contacted and an offer of return made.
- b. If the disposal is more than five years from the post mortem examination the material should be disposed of sensitively subject to issues raised below.

16.1.3 In the event that material is to be returned to the family it would be sensible to advise the family of any risks involved and suggest that the return be handled through an undertaker.¹⁹¹

16.1.4 Where the family have made it known they want the material to be disposed of or retained/used for research it should normally be disposed of sensitively. The use of such material for research may give rise to inappropriate media interest and may, therefore, not be considered appropriate. However, use by forensic pathologists may be justified.

16.1.5 Where the family has not previously expressed a view about disposal of material the SIO should decide whether seeking their views would cause them disproportionate distress.

¹⁹¹ The discussion in paragraphs 151-152 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 is relevant.

16.1.6 If the family is not contactable or it is not appropriate to return the material, or a decision has been made that contact would cause disproportionate distress, the material should be disposed of by incineration.

Category 3

16.1.7 Where the family have expressed the view they would like material to be returned the following approach should be adopted.

- a. If disposal is within 5 years of the post mortem examination and the family are still contactable they should be contacted and an offer of return made.
- b. After 5 years a balance must be struck between the significance of the material and the time from the post mortem examination. The more significant the material the longer the period it would be appropriate to contact the family.
- c. If the material is to be disposed of arrangements should be made for **sensitive disposal** in suitable circumstances.

16.1.8 In the event that material is to be returned to the family it would be sensible to advise the family of any risks involved and suggest that the return be handled through an undertaker. ¹⁹² **Consideration should be given to any health and safety issues which may arise if the material is to be returned. It may be necessary to provide warnings or, in some exceptional cases, decline to return material.**

16.1.9 Where the family have made it known they want the material to be disposed of or retained/used for research it should be disposed of **sensitively**. It may not be considered appropriate to allow police exhibits to be used for research etc in light of possible interest. However use by forensic pathologists may be justified.

16.1.10 Where the family has not previously expressed a view about disposal of material, the SIO should decide whether seeking their views would cause them disproportionate distress.

¹⁹² The discussion in paragraphs 151-152 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017 is relevant.

- 16.1.11 If the family is not contactable or it is not appropriate to return the material, or a decision has been made that contact would cause disproportionate distress, the material should be sensitively disposed of.

General

- 16.1.12 The term 'sensitive disposal' should be taken to mean cremation or incineration depending on the circumstances.
- 16.1.13 In the above discussion the term "incineration" is used to cover the manner by which, for example, a hospital would dispose of tissue but done in a suitably respectful manner and not mixed with clinical waste. However, it is not necessary to deal with each exhibit separately.¹⁹³
- 16.1.14 The term cremation suggests cremation through an undertaker. Where the police arrange the cremation, it is not envisaged a religious ceremony should occur as it is unlikely that the religion would be known for certain and an inappropriate ceremony would cause more offence than none. As the police are unlikely to have a purpose for taking the ashes the ashes should be spread in the garden of remembrance at the crematorium.

¹⁹³ See the discussion at paragraph 135 of the Human Tissue Authority; Code B: Post-mortem examination; Code of practice and standards; April 2017. The Human Tissue Authority has indicated that this requires the material to be in a separate container from other medical waste to be incinerated. It does not however prevent the material being incinerated in a facility which also incinerates medical waste even if such waste is dealt with in the same run.

Annex 3: The Principles of Continuity

17. Maintaining the Chain of Evidence

- 17.1.1 The provenance must be proved and the integrity assured for every item produced as evidence or seized for further analysis or processing to produce, or potentially produce, evidence in a court of law. This means that each individual through whose hands the item has passed must take responsibility for that item and be able to prove that they have done so. This applies from the moment of its acquisition until the completion of all subsequent proceedings. Any break in continuity – in the ‘chain of evidence’ – has the potential to undermine a case because absolute reliance cannot then be placed on the integrity of the evidence adduced in relation to that item. In criminal proceedings this may allow a defendant to argue that the particular piece of evidence be discounted.
- 17.1.2 In practice the assurance of continuity requires the chronological logging of the following.
- a. The origin of the item – what the item is, how and from where it was obtained.
 - b. The name of the individual acquiring or originating the item.
 - c. The names of every person(s) through whose hands the item passes.
 - d. The location and security status of the place of storage.
- 17.1.3 Every individual who handles the item, even if simply to transport it from one location to another, must sign the record to confirm their involvement and to show that they have taken personal responsibility for the item at that time. They must be able to prove that it has not been contaminated, adulterated or tampered with in any way. If the item has been changed, for example by subjecting it to tests, that fact must be recorded. Every record must be dated, and there must be no gaps.
- 17.1.4 In practice continuity will be proved through the use of labels attached to the item itself, and the item then becomes an ‘exhibit’. This label should bear an adequate description of the item together with a unique (usually alpha-numeric) exhibit number; typically the initials of the individual from whom the item originated, plus a number indicating the position of the item within the series

created by that particular individual. A log will be created containing the description and reference of each exhibit together with details of every individual who may have handled it, all in chronological order. Responsibility for logging evidence is usually assigned to a single individual, the exhibits officer. It will normally be important for information to be retained in a single log; this will, for instance, ensure there is no duplication of exhibit numbers.

- 17.1.5 Within the Criminal Justice System the handling of exhibits and the proof of continuity will usually lie with the police, and pathologists may thus consider themselves absolved from responsibility for such issues. This, however, is not the whole picture. During the course of the post mortem examination the pathologist will take samples of blood and other tissues for further examination. All such samples must be given a unique identifier and this identification must be related to the sample at all times. Depending on the circumstances, responsibility for ensuring that every sample is adequately labelled and properly logged will lie with either the exhibits officer or the pathologist. Should a sample be subdivided the parts must be referred to by the existing unique identifier and a division number. Again this identifier must always be linked to the subdivided samples.
- 17.1.6 Adherence to a strict protocol is vital even when a tissue sample is to remain in the pathologist's own laboratory for processing and further examination. The location of every sample and the identity of the responsible individual must be clearly and continuously recorded with no breaks in the chronological record; this maintenance of continuity is standard practice in every analytical laboratory. Unique and effective identification is vital in order to ensure that the correct sample is processed and the relevant results assigned to it. In the context of a criminal prosecution, any failure in positive identification could have the potential to allow a defendant to argue the results obtained are not related to his case. Similarly, any break in the continuity of responsibility may enable a defendant to suggest contamination could have occurred if at any time a sample cannot be proved to be directly in the custody of a named person.
- 17.1.7 A particular problem can occur when a pathologist passes on a sample, for example a brain, to a specialist for further examination. The transfer must take place person to person or by using some reliable and traceable secure method

such as recorded delivery. The receiving expert must confirm receipt of the sample. It is important that the same protocol be employed when the material is returned to the original practitioner. This will also apply when a sample is 'split' in order that an expert retained by the defence can conduct his own examination, although retaining adequate control of the material may sometimes prove more difficult.

17.1.8 It is customary for the exhibit label to be attached to the item itself. This ensures reliable identification. However, it is physically impossible to attach a label to many items, for example blood or tissue. In these circumstances the label will, of course, have to be attached to the container in which the sample is stored. Pathologists and their technical staff must then be especially careful to ensure reliability in identification of the material as distinct from its container. Again, such a situation is not unique to the Criminal Justice System but applies to most samples investigated in the laboratory. The effective maintenance of continuity thus demands little more than good scientific practice.

17.1.9 Proper continuity is of primary importance in evidence forming the case for the prosecution. However, the police disclosure officer and in turn the prosecuting authority must be provided with details of every item or sample taken even if it does not eventually prove relevant to the prosecution. This 'unused material' may assume importance at some later date and accordingly maintaining continuity is vital for every item involved in an investigation even if initially it appears irrelevant. Pathologists must not ignore this possibility when taking and storing samples; the microscope slide considered unimportant may later assume relevance in the light of emerging evidence and intelligence in the case, or be relevant to another practitioner retained by the defence. The vital importance of adhering to this protocol is described in section 4.2.2 of the Crown Prosecution Service 'Guidance booklet for experts'.

17.1.10 Although organs and even small samples of tissue are likely to be returned to the body for ultimate disposal it may be that slides bearing tissue sections will be retained and stored by the pathologist (subject to the relevant human tissue legislation and/or the provisions of Section 22 of Police and Criminal Evidence Act 1984). Such materials have proved vital in a number of instances in 'cold case' reviews where old cases have been re-investigated. It is therefore

important that where samples are to be retained for long, and sometimes indefinite, periods the continuity record is kept up to date.

Published by:

The Forensic Science Regulator
5 St Philip's Place
Colmore Row
Birmingham
B3 2PW

www.gov.uk/government/organisations/forensic-science-regulator