

IN THE MATTER OF:

**THE PROPER LAWFUL AUTHORITY
FOR TAKING AND RETAINING
HUMAN TISSUE MATERIAL IN A
POST MORTEM EXAMINATION**

**ADVICE (No.1; of 19 March 2011;
revised 17 June 2011)**

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Introduction

1. The central question which I am asked to address is: under what legal authority should human tissue samples be seized in a post mortem and thereafter retained?
2. The present practice adopted by police forces varies but the most common model adopted is a ‘mixed model’ whereby human tissue samples are taken and retained either under the authority of the coroner or the police in the

exercise of statutory and/or common law powers; and the decision as to which authority is exercised is based on an analysis of whether the purpose thus served is a coroner's purpose or a police purpose. In various papers (which I describe and refer to below) it has been proposed that a better model is to seize and thereafter retain all human tissue samples in connection with criminal investigations under sections 19 and 22 of the Police and Criminal Evidence Act 1984 ("PACE"). Those instructing me wish to ascertain whether that is the correct approach.

3. Ancillary issues arise as to:

- 3.1. The correct approach following the exhaustion of the criminal investigation at the time that it is determined that the death is not suspicious or at the end of criminal proceedings. At that stage,
 - a. Is the retention of human tissue material in breach of The Human Tissue Act 2004 ("HTA 2004")?
 - b. Does the human tissue material revert to being 'coronial material' in so far as it is retained for coronial purposes?
 - c. Should any human tissue material not retained for coronial purposes be disposed of in accordance with the wishes of the next of kin or is there a residual power to retain it?
 - d. Is there a power in pathologists to retain material after the conclusion of a criminal investigation or criminal proceedings in order to guard against future miscarriages of justice?
- 3.2. How does the disclosure regime applicable to criminal proceedings apply to coronial samples? In particular, what, if any, rights of access are afforded to the defence in criminal proceedings with respect to material retained as coronial samples?

Summary of Conclusions

4. I summarise my essential conclusions as follows:

- 4.1. The coroner does not have power to authorise the taking at a post mortem examination or thereafter the retaining of human tissue samples as evidence in relation to the investigation and prosecution of crime.
- 4.2. The coroner's power to authorise the taking at a post mortem examination and thereafter the retention of human tissue samples for other purposes (the identification of the deceased or the determination of the cause and circumstances of death) do not afford powers of equivalent effect.

- 4.3. Lawful authority is required for the retention of human tissue samples for evidential purposes in relation to the investigation and prosecution of crime in order to override the rights of others with respect to such material.
- 4.4. The most appropriate police powers for achieving those objectives are sections 19 and 22 of PACE. It is arguable that equivalent common law powers exist but they are not well established and, in most contexts, they offer no advantages to the clearly defined powers in sections 19 and 22 of PACE.
- 4.5. The one exception is human material seized in a place other than premises. Sections 19 and 22 of PACE only apply to material seized in “*premises*” and that will not include open spaces. In that limited context, the common law offers a power which fills a lacuna in the armoury of police statutory powers.
- 4.6. The recommendation made in documents provided to me that all human tissue samples taken in the course of a suspicious death post mortem examination should be seized and retained under police authority using sections 19 and 22 of PACE offers substantial advantages over the currently prevalent mixed model of seizure and retention in that:
 - a. It eliminates the complexities arising from the simultaneous application of two separate systems for seizure and retention decision-making.
 - b. Unlike coronial samples, samples seized and retained under police authority are free of the restrictions in the HTA 2004 in relation to their retention, storage and disposal (the licensing requirements and the Codes of Practice and guidance of the HTA).
 - c. Although the consent requirements in the HTA 2004 do not apply to samples seized and retained for coronial purposes, nor do they apply to samples seized and retained for criminal justice purposes.
 - d. Section 22 PACE permits the samples to be retained for the length of time required for criminal justice purposes, which would not necessarily be the case under coronial powers of retention.
 - e. Seizure and retention under police authority is necessary for the proper discharge of police duties in relation to maintenance of continuity and disclosure, including duties under the Criminal Procedure and Investigations Act 1996 (“CPIA”).

Documents provided to me

- 5. I have been provided with the following documents:

- a. Various emails clarifying the issues upon which I am asked to advise and commenting on the earlier draft of this Advice.
- b. A letter dated 5/7/10 from Assistant Chief Constable Debbie Simpson of the Devon and Cornwall Constabulary, in her capacity as ACPO Lead on Forensic Pathology, to all Chief Constables in England, Wales, Scotland and the Police Service of Northern Ireland. The letter was sent jointly on behalf of ACPO and the NPIA. It sets out the background to the decision, in August 2009, of the Human Tissue Authority (“HTA”) to suspend mortuary licences for the Cardiff and Vale Hospital mortuary. It proposed a coordinated audit of human tissue holdings by police forces in the United Kingdom.
- c. Enclosed with the letter, a restricted Guidance Document to Police Forces, issued jointly by ACPO and NPIA, on “*the Management of Human Tissue Audits*”, “version 15.18 05/7/10” which, in turn, contained as Appendices, the following 4 documents.
- d. Appendix A – HTA Code of Practice 3 – ‘post-mortem examination’.
- e. Appendix B – HTA Code of Practice 5 – ‘disposal of human tissue’.
- f. Appendix B – Redfern Report (Alder Hey).
- g. Appendix D – Home Office document ‘*Legal issues relating to forensic pathology and tissue retention [Police and coroners approach to forensic pathology]*’ draft 1.05. (I shall refer to this as the “**Framework Document**”). It is not protectively marked and is available, at least in the form of an earlier draft, in the public domain¹. It is undated but, from its contents, post-dates the giving of Royal Assent to the Coroners and Justice Act 2009 (“CJA 2009”) which occurred on 12/11/09. It is the product of very wide consultation. The first issue was prepared in consultation with the HTA, the Coroners Unit of the Department of Constitutional Affairs (now the Ministry of Justice), ACPO, The Coroners’ Society of England and Wales and the Forensic Science and Pathology Unit of the Home Office. The second draft was completed after the CJA 2009 had received Royal Assent and involved consultation with ACPO, the Coroners Society, the Ministry of Justice, the HTA and the National Police Improvement Agency.

- h. In addition, I have been provided with a document entitled *“Seizure of Tissue at “Forensic” Post-Mortem Examinations – A Discussion Paper”* produced by the Forensic Science Regulator Forensic Pathology Specialist Group, Draft 0.27. (I shall refer to this as the **“Discussion Paper”**.) I understand that it was finalised in March 2010.

Under what legal authority should human tissue samples be seized in a post mortem and thereafter retained?

The proposal that all human material should be seized and retained under police powers

- 6. The Framework Document and Discussion Paper set out a comprehensive analysis of the relevant legislative and regulatory framework. I summarise (in my own words) below the key conclusions and recommendations, material to this discussion, which appear within those documents.
 - 6.1. There is an incomplete overlap in the purposes for which human material samples may be taken in a post mortem examination and thereafter retained for the purposes, on the one hand, of the coroner and, on the other hand, for the purposes of criminal justice investigations. This causes tension, in particular, in relation to the period for which the material may be retained.
 - a. Criminal justice investigations require human material² samples for three principal reasons: the identification of the deceased; the determination of the cause and circumstances of death; and the determination of information required for the investigation of possible offences. The first two are, broadly speaking, within the scope of the coroner’s functions whereas the last is outside of the scope of the coroner’s functions³.
 - b. Human material samples may be preserved and retained under the authority of the coroner where it bears upon the first two areas of inquiry (cause of death or the identification of the accused) but only for so long as they need to be preserved for the purpose of

¹ It can be downloaded as:

http://www.hta.gov.uk/db/documents/Police_and_Coroners_Approach_to_Pathology.pdf

² The phrase “human material” is used in this Advice in the sense in which it is used in the HTA 2004 and its Explanatory Notes, i.e. organs, tissues and cells taken from the bodies of deceased persons.

³ Framework Document, para 4.3.33 to 4.3.39. See also the discussion in Jervis on Coroners, 2nd Ed, at para 1-08.

fulfilling his functions⁴. That period may well be insufficient for criminal justice purposes.

6.2. There are three principal requirements which flow from the HTA 2004 relevant to the conduct of post mortem examinations and the seizure and storage of human material:

- a. the consent requirements which require the obtaining of consent from specified persons in order to make certain activities for specified purposes, such as post mortem examinations for the purpose of determining the cause of death, lawful (Part 1 and Schedule 1 of the Act);
- b. the licensing requirements which require specified activities to be done under the authority of a licence granted under the Act and include, in certain circumstances, the making of a post mortem examination and the storage of human material removed from the body of the deceased (s.16 in Part 2 of the Act);
- c. guidance and codes of practice (the breach of which is relevant to licensing decisions) issued by the HTA which apply to activities within its remit (ss.14, 15 & 28 in Part 2 of the Act).

6.3. There are important exceptions to the application of those requirements.

- a. Section 11 HTA 2004 which disapplies⁵ the consent requirements to *“anything done for purposes of functions of a coroner or under the authority of a coroner”*;
- b. Section 39 HTA 2004 which disapplies the licensing requirements and the remit of the HTA (and hence the application of its guidance and codes) to acts done for criminal justice purposes;
- c. There is another exception to the licensing requirements and the remit of the HSA built in to s.39 HTA 2004: although it provides that a post mortem examination *“for purposes of functions of a coroner”* does not fall within the s.39 exception, it also provides that the removal of human material from the deceased *“at the first place where the body or part is situated to be attended by a constable”* is not part of a post mortem examination (s.39(2) and (3)). The overall effect of these subsections is that a post mortem for the purposes both of the coroner’s functions and for criminal justice purposes, typically in a coroner’s post mortem in licensed

⁴ Framework Document, para 4.7.1. See, in particular, the Coroners Rules 1984 (as amended), rules 9 to 12A.

⁵ I use this word in the sense that the provision states that the requirement ‘does not apply’ in those circumstances.

premises, is subject to the licensing requirements and the remit of the HTA; but where samples are taken for both of those purposes on the occasion of the first police contact, typically the crime scene, the licensing requirements and the remit of the HTA do not apply⁶.

- 6.4. The taking of human material samples in a post mortem examination for the purpose of determining the cause of death (a scheduled purpose under the HTA 2004⁷) must either comply with the consent requirements in the Act or, in order to come within the s.11 HTA 2004 exemption from those requirements, must be under the coroner's authority. Conversely, the taking of samples in a post mortem examination for other purposes which are not scheduled under the Act, such as the purpose of obtaining evidence required for the investigation of criminal offences, does not engage the consent requirements⁸.
- 6.5. The same principles apply to the storage of human material seized in a post mortem examination. Storage for the purpose of determining the cause of death (a scheduled purpose under the HTA 2004) must either comply with the consent requirements in the Act or, in order to come within the s.11 HTA 2004 exemption from those requirements, must be under the coroner's authority. Conversely, storage of samples in a post mortem examination for other purposes which are not scheduled under the Act, such as storage of material seized under police authority as evidence of criminal offences, does not engage the consent requirements⁹.
- 6.6. The relevant police powers for the seizure and retention of material are sections 19 and 22 PACE which materially provide that:
 - 6.6.1. an officer lawfully on premises may seize material which he has reasonable grounds for believing is evidence of an offence and that it is necessary to seize it in order to prevent it being lost, altered or destroyed (s.19);
 - 6.6.2. anything so seized "*may be retained so long as is necessary in all the circumstances*" (s.22).
- 6.7. Human material stored simultaneously for a dual purpose (i.e. under the authority of both the coroner and the police) is exempted from the licensing requirements by s.39 HTA 2004¹⁰.

⁶ There may be a wider interpretation of s.39(3) which I consider in greater detail below.

⁷ i.e. specified in Sched 1.

⁸ Framework Document, para 4.1.5 and 4.3.33 to 4.3.35 in particular.

⁹ Framework Document, para 4.4.

¹⁰ Framework Document, para 4.4.

- 6.8. The Framework document recommends the seizing and retaining under police authority of all human material taken in a post mortem examination on the basis that (a) it facilitates the criminal justice investigation in that such samples would not be subject to either the consent or licensing provisions of the HTA 2004; (b) it does not prevent the coroner meeting his obligations; and (c) it eliminates the complexities arising from the simultaneous application of two separate systems for seizure and retention decision-making¹¹. The Discussion Paper makes the same recommendation¹² adopting a similar analysis¹³.
- 6.9. The Framework document suggests that defence post mortem examinations are different. The consent requirements in the HTA 2004 for the taking and storage of human material do not apply because the review of evidence and reports in a criminal case is not a scheduled purpose. However, the licensing requirements in the HTA 2004 do apply because the examination is for the purposes of functions of a coroner (s.39(2) HTA 2004)¹⁴.
7. In broad terms, subject to the particular observations set out below, I agree with both the analysis and the recommendation.
- 7.1. It addresses the considerable practical difficulties which have been identified in the mixed model approach.
- 7.2. In my view, it is within the spirit of the HTA 2004 in that the Act is intended to exempt from the reach of the consent and licensing requirements activities whose dominant purpose relates to the investigation, detection and prosecution of crime.

The scope of the HTA 2004 consent requirements

8. The consent requirements in the HTA 2004 are engaged by the carrying out of specified activities for a scheduled purpose. Those activities must either comply with the consent requirements in the Act or, in order to come within the s.11 HTA 2004 exemption from those requirements, must be under the coroner's authority. Notably, in the context of this discussion, the consent requirements apply to the taking and the storing of samples from a body when done for the scheduled purpose of "*determining the cause of death*" (s.1 and Sched 1, Part 1, para 2):
9. This begs the question whether the taking of samples in a post mortem carried out for criminal justice purposes can ever escape being, at least in part, for the purpose of determining the cause of death.

¹¹ See para 4.3.36 and 4.6.5 and 4.6.7 in particular.

¹² Discussion Paper, para 3.1.4.

¹³ See in particular Discussion Paper, para 3.3.11 to 3.3.13 and 3.3.18 to 3.3.22.

¹⁴ Framework Document, para 5.2.

10. An answer, albeit in the different context of the retention of material, is suggested in guidance given in para 79 of the HTA '*Code of Practice 3, Post-mortem examination*' (issued under the HTA 2004) which states "[C]onsent is not required to retain material for a criminal investigation". The same difficulty would seem to arise in that context: the retention of any human material in a criminal investigation ordinarily would be in part for (or at least not to the exclusion of) the purpose of determining cause of death and the storage of such material is a specified activity under s.1 of the Act.
11. Accordingly, the guidance in the Code of Practice suggests that, in answering the question, one should focus on the overriding or dominant purpose and the fact that it may, in part, embrace or correspond to a scheduled purpose is not enough to engage the consent requirements.
12. As I understand it, the Framework Document and Discussion Paper analyse the position on the basis that the assessment of purpose under the HTA 2004 should be made on a sample by sample basis. In other words, one does not assess whether the post mortem examination as a whole has the scheduled purpose of determining the cause of death but rather whether the particular sample taken has that purpose. I understand that this approach corresponds to the approach in practice presently taken by some forces at suspicious death post mortems. It has the advantage that it provides a rationale for asserting that samples taken in a post mortem examination conducted under the authority of the coroner can be categorised as being taken for a purpose which is different to that of the coroner (which is bound to include the scheduled purpose). The disadvantage is that where all the samples taken are taken under police authority on the basis that the coroner's purposes are also thereby served (as is proposed in the Framework Document and Discussion Paper), it is difficult to escape the conclusion that they are also being taken for the scheduled purpose of determining the cause of death.
13. The wording of s.39(1) to (3) of the HTA 2004 (considered below) lends some support to the view that the correct approach is to ask what is the global purpose of the post-mortem rather than the purpose of the taking of individual samples: s.39(2) speaks of the "*carrying-out of a post-mortem for purposes of functions of a coroner*"; and the wording of s.39(3)¹⁵ implies that ordinarily the phrase post-mortem examination will connote a process involving the taking of samples.
14. However, in my view, the focus on the overriding or dominant purpose of the activity, whether it is applied globally to the post mortem examination or whether it is applied to the individual samples, permits the position to be

¹⁵ "(3) The reference in subsection (2) to the carrying-out of a post-mortem examination does not include the removal of relevant material from the body of a deceased person, or from a part of the body of a deceased person, at the first place where the body or part is situated to be attended by a constable."

analysed as not engaging the consent requirements where the dominant purpose can be said to be a criminal justice one.

The scope of the s.39 exemption from the HTA 2004 licensing requirements

15. The Explanatory Notes appended to the Act, produced by the Department of Health, give an idea of what the promoter of the Act intended to achieve¹⁶:

“Section 39: Criminal Justice purposes

54. This section deals with excluding activities done for criminal justice purposes from the relevant provisions of Part 2 of the Act. The intention is for all coroners' *post mortem* examinations carried out in premises to be subject to regulation, so even where these are carried out also for criminal justice purposes, they will not be excluded from Part 2 of the Act. Subsection (2) of the section achieves this. Subsection (1) excludes from the regulatory regime of Part 2 of the Act other activities done for criminal justice purposes. Examples of activities excluded from regulation by this section might be *post mortem* examinations authorised by a coroner in a criminal case to take place at the place where the police first attend a body (which would not need a licence) and disposal of material which has been removed from a body during a *post mortem* examination in a criminal case (which would not be within the HTA's remit and not subject to any code of practice on this subject).”

16. The wording of s.39(2) and (3) is an odd way of attempting to achieve this objective. It qualifies a provision formulated with reference to functions (s.39(2) concerned with the functions of a coroner) with a provision formulated with reference to location (s.39(3), concerned with the “*place*” attended by a constable). On the face of s.39(3), it is capable of applying to the attendance of a constable at a licensed mortuary unless a special meaning is given to the phrase “*the first place where the body or part is situated to be attended by a constable*” so as to limit it to a crime scene scenario. The fact that the word “*place*” is used rather than the narrower word “*premises*” indicates that the subsection, at the very least, extends to examinations conducted in places other than premises. However, it does not, in my view, exclude premises.
17. At first blush, it appears significant that s.39(2) uses the phrase “*the carrying out of a post-mortem examination for purposes of functions of a coroner*” whereas s.11 uses the phrase “*for purposes of functions of a coroner or under the authority of a coroner*”. That might be read as indicating that s.39(2) only brings a post mortem examination within Part 2 of the Act where it is done

¹⁶ It should always be recalled that Explanatory Notes are a legitimate aid to the construction of an enactment in only a limited sense. An enactment may achieve, on its proper construction, an effect which is quite different to that intended by its promoter. The value of Explanatory Notes as an aid to construction is that they illuminate the contextual scene in which the Act is set (although not the will of Parliament); and they may be turned to by the Courts even in the absence of ambiguity in the statute: see *Tarlochan Singh Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103 at [15]-[17], per Brooke LJ (citing Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, paras [2]—[6] and referring to *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39); Bennion on Statutory Interpretation (5th Ed.), section 219.

“for purposes of functions of a coroner” but not where it is done *“under the authority of a coroner”*. However, para 29 of the Explanatory Notes, in describing the effect of s.11 of the Act, states: *“[T]his includes both his statutory functions and his common law authority”*. Accordingly, the phrase *“or under the authority of a coroner”* in s.11 appears to have been intended to denote a coroner’s common law authority. Its omission from s.39(2) is best explained on the basis that post mortem examinations are so squarely within the statutory functions of a coroner that it was unnecessary to refer to common law authority in this particular limited context¹⁷.

18. It is important to note that the retention of samples taken for criminal justice purposes is much more straightforward than the taking of samples. The complicating factor of subsection 39(2) is concerned only with the *“carrying-out of a post-mortem examination”*, not with the retention or storage of samples taken. This distinction is reflected in guidance given in paras 79 to 81 of the HTA *‘Code of Practice 3, Post-mortem examination’* (issued under the HTA 2004) which makes it clear (a) that the s.39 exemptions apply to material held under the authority of a coroner and the police simultaneously; and (b) that material retained solely under police authority is not subject to the HTA 2004 with regard to disposal (although it is the subject-matter of relevant Home Office guidance).
19. Accordingly, the intended effect of s.39 was:
 - 19.1. First, it was intended to make all coroners’ post mortem examinations, including those for the dual purpose of serving both the coroner’s statutory purposes and the purposes of the criminal justice system, subject to the licensing requirements in the HTA 2004 and under the remit of the HTA.
 - 19.2. However, importantly, the wording of s.39(2) is limited to the *“carrying-out of a post-mortem examination”*. It does not apply to retention or disposal of human material taken in the post mortem examination. The Explanatory Note is therefore right to draw a distinction with respect to disposal for criminal justice purposes which is outside the reach of Part 2 of the Act.
 - 19.3. Secondly, it was intended to provide for a special exception (in s.39(3)) with respect to criminal justice purpose examinations carried out under the authority of the coroner otherwise than at a coroner’s post mortem.
20. Does it achieve those objectives?
 - 20.1. In my view, the s.39(3) exception is wider in its effect. It seems to me at least arguably to be capable of disapplying Part 2 of the Act (the licensing requirements and the remit of the HTA) to the taking of human material

¹⁷ See ss.19 & 20 Coroners Act 1988.

samples in the course of a coroner's post mortem where there is (wholly or in part) a criminal justice purpose to the examination and the place of the examination is the first place at which a constable attends the body or body part.

- 20.2. Section 39(1) and (2), in my view, do achieve the first objective. A dual purpose (for the purpose of the coroner's statutory functions and for the purpose of the criminal justice system) post mortem examination is subject to Part 2 the Act (the licensing requirements and the remit of the HTA). However, that, in turn, is subject to the wide interpretation of s.39(3) which is capable of ousting Part 2 in the circumstances I have described.
- 21. Does that interpretation of s.39 HTA 2004 stand in the way of the proposal to use police powers for the seizure of human material in order to avoid the complications of the mixed model?
 - 21.1. It does mean that where there is a dual coroner's/ police purpose to the post mortem examination, the licensing requirements and the remit of the HTA prima facie apply.
 - 21.2. There are a number of potential ways of avoiding that result:
 - a. If the wide interpretation of s.39(3) described above is correct and the facts are such as to satisfy its requirements.
 - b. If the taking of samples can properly be analysed on a sample by sample basis and the individual samples in question can be said to have been taken otherwise than for purposes of functions of a coroner. As stated above, in my view, the wording of s.39 and the Explanatory Notes on s.39 militate against that construction.
 - c. If, as a matter of fact, the post mortem is not done for any of the statutory functions of a coroner. That would be so where the post mortem examination occurs otherwise than under the authority of the coroner. Where it occurs with the coroner's consent with respect to a body under his control, in my view, it is arguable that the mere giving of consent does not transform a post mortem conducted by others into one which is carried out for the coroner's statutory functions. (I consider the position in greater detail in relation to defence post mortems below.) In reality, however, the first suspicious death post mortem is likely to be one in which the coroner is interested as helping him to discharge his statutory functions. In those circumstances, in my view, it would be possible to argue that the dominant or overriding purpose analysis discussed above applies. On that basis, the mere cooperation of the coroner or the use of his resources or facilities would not, necessarily lead to

the conclusion that the post mortem examination was done for the purpose of any of his statutory functions. It must be a question of fact in each case as to the purpose for which the post mortem examination was carried out.

Defence post mortem examinations

22. I agree, subject to one qualification, with the conclusions in the Framework Document¹⁸ that a second defence post-mortem examination does not engage the consent requirements of the HTA 2004 (or, if conducted under authority of the coroner, is excepted from those requirements) and that the licensing requirements apply. In my view, the application of the licensing requirements is not inevitable.

22.1. Section 39(1) applies so as to provide, subject to s.39(2), the criminal justice purposes exception to the licensing requirements. Whether one analyses the position from the perspective of the individual samples or the perspective of the post mortem globally, in my view, things done in a defence post mortem are for criminal justice purposes as defined in s.39. In particular, s.39(1)(a) and s.39(4)(a), read together, have the effect that anything done for purposes relating to the detection of crime are exempt from the licensing requirements which include “*establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed*”. Accordingly, the licensing requirements do not apply by virtue of s.39(1). That, of course, is not the end of the matter.

22.2. The more difficult question is whether the exception is displaced by s.39(2). As a matter of practice, coroners do agree to second post mortem examinations where the body is under their control. There is some debate as to whether, strictly speaking, they have power to do so. The authors of Jervis on Coroners argue that they do have such power on the basis that the authorisation of a second post mortem falls within a coroner’s statutory powers¹⁹. However, in my view, the case cited, ***R v H.M. Coroner for Greater London (Southern District) Ex p. Ridley*** [1985] 1 W.L.R. 1347 (QB) (considered in detail below under the heading “Powers and rights with respect post mortem examinations”) establishes that a coroner in possession of the body can consent to a second post mortem and does not enjoy an exclusive power to authorise a post mortem. Whether the giving of consent amounts to the exercise of a statutory power seems to me to be debatable. If it is a common law power or, alternatively, a power which is not “*for purposes of functions of a coroner*” it would not fall within s.39(2) so as to re-engage the licensing requirements. In the event that the

¹⁸ Framework Document, para 5.2.2.

¹⁹ Jervis on Coroners, 2nd Ed, para 6-23 in main work and 3rd Cumulative Supplement.

licensing requirements do not apply, no doubt a coroner would be entitled to impose reasonable conditions upon the giving of consent.

- 22.3. In so far as the taking of individual samples or the carrying out of a post mortem is done under the authority of the coroner (including common law authority) the s.11 HTA 2004 exception to the consent requirements applies even if it is done for a scheduled purpose. However, just as with a suspicious death first post mortem examination for criminal justice purposes, it is strongly arguable that the dominant or overriding purpose of a defence second post mortem is not a scheduled purpose in the first place and hence the consent requirements are not engaged.

Police powers of seizure and detention in ss.19 & 22 PACE

23. I do not dissent from the view that has been expressed in the Framework Document and the Discussion Paper: these provisions are apt to be employed both to seize human material in a post mortem examination and to retain it *“for so long as is necessary in all the circumstances”*.
24. Some features of these provisions and the decided cases should be noted.
25. The power is confined to things lawfully seized on premises by a constable who both subjectively believes and objectively has reasonable grounds for believing that it is evidence of an offence and that it is necessary to seize it in order to prevent it being, amongst other things, lost, altered or destroyed (s.19). The latter conditions will be readily met with respect to human material in a post mortem.
26. *“Premises”* has an extended definition in s.23 PACE and includes *“any place”* and, *“in particular”* vehicles etc, tents and movable structures. However, it would probably be stretching the definition too far to extend it to open places which have none of the characteristics of a structure or thing of finite dimensions. It follows that any sample taken from an open space would need, albeit somewhat artificially, to be subsequently seized in premises to come within s.22 PACE.
27. In ***Scopelight Ltd and others v Chief Constable of Northumbria Police Force and another*** [2009] EWCA Civ 1156, the Court of Appeal considered the proper construction of s.22 PACE. The question in the instant case was whether the police could lawfully retain property seized under ss.19 and 20 PACE for the purpose of facilitating a private prosecution by the Federation Against Copyright Theft Ltd but after the CPS had decided not to prosecute. Allowing the appeal, the court held that they could. Leveson LJ, giving the only reasoned judgement of the court, made observations which are pertinent to this discussion.

27.1. Section 22(2) provided examples in relation to a criminal investigation which come within s.22(1) (para 23 judgment).

27.2. However, the wider power in s.22(1) must be construed with reference to the purposes for which the material was seized under ss.19 and 20 PACE which includes the purpose of investigating and prosecuting crime.

a. Leveson LJ endorsed the view of Sir Christopher Slade in *Marcel v Comr of Police of the Metropolis* [1992] Ch 225 (CA) that, “... *the phrase [in s.22(1)] “so long as is necessary” means necessary for carrying out the purposes for which the powers given by sections 19 and 20 have been conferred*”. Sir Christopher Slade in *Marcel* said of ss.19 and 20 that they “*clearly include, inter alia, the primary purpose of investigating and prosecuting crime ...*”

b. Leveson LJ went on to say:

“... the phrase “so long as is necessary” means necessary for carrying out the purposes for which the powers given by sections 19 and 20 have been conferred. Reference back to sections 19 and 20 only serves to underline the power of the police to seize material evidence in relation to any offence (not limited to the offence the police are investigating) and without limitation as to whether such an offence would necessarily fall to the CPS to prosecute. On the face of it, that suggests that the limiting feature within the examples set out in section 22(2) of the principle described in section 22(1) is the investigation of any criminal offence and the use of the material in any criminal trial.”

(Para 30 judgment; emphasis added.)

27.3. In the court’s view, s.22 required a fact-specific judgement as to what was necessary in terms of the retention of material in order to carry out the purposes of the powers in ss. 19 and 20 and one which balanced all the factors relevant to those purposes.

“... the phrase “anything which has been seized by a constable ... may be retained so long as is necessary in all the circumstances” requires the police to consider each case on its own individual facts, at each stage in the process of investigation and prosecution. If the CPS is prosecuting the case, whatever is required for forensic investigation or the prosecution will obviously be retained but, even then, consideration will have to be given to ensuring that no more than is necessary for the case (either to pursue it or to rebut a potential defence) is kept. If a prosecution is not to be pursued by the CPS but some other public or private body wishes to pursue a private prosecution, the relevant circumstances include (but are not limited to): the identity and motive of the potential prosecutor; the gravity of the allegation along with the reasoning behind the negative decision of the CPS and thus the extent to which, in this case, the public have a legitimate interest in the criminal prosecution of this conduct; the police view of the significance of what has been retained; and any material fact concerning the proposed defendant. All this falls to be considered so that a balanced decision can be reached upon whether retention is necessary “in all

the circumstances”. Such a decision would be capable of challenge on traditional public law grounds.”

(Para 53 judgment; emphasis added.)

- 27.4. This balanced approach is not materially different to that required by Article 1 (right to peaceful enjoyment of possessions) of the European Convention, taking into account, inter alia, the proportionality exercise required in its application (paras 55-57 of judgment).
28. Applying the analysis in *Scopelight* to the very different context of the retention of human material samples taken in post mortems under s.19 PACE, in my view:
- 28.1. It is important to note that the analysis of the necessity of retention focuses on both the *extent of the material* required to meet the purposes of the sections (i.e what and how much is retained) and *the duration of retention* of that material required to meet the purposes of the sections (i.e. how long it is retained). Both need to be justified on necessity grounds.
- 28.2. One should not read too much into the reference in para 30 of the judgment to “*the investigation of any criminal offence and the use of the material in any criminal trial*” as being the limiting feature in s.22(2): first, because the focus in that passage appears to be primarily on *what* may be retained; and, secondly, because the wider power in s.22(1) is free of the more specific limiting features of s.22(2).
- 28.3. Human material samples taken in post mortems under s.19 PACE may be retained under s.22 PACE to the extent to which it is necessary and proportionate to do so taking into account both the quantity of material and the length of time for which it is retained.
- 28.4. That is capable of outlasting the conclusion of the criminal trial because:
- a. In the case of human material samples, the phrase in s.22(2)(ii) “*for forensic examination or for investigation in connection with an offence*” should be read as contemplating retention for the period required for the proper prosecution of crime which will necessarily go beyond the conclusion of the criminal trial and include any appeal proceedings. (It is not limited by the phrase “*at a trial for an offence*” in s.22(2)(i).)
- b. In any event, the phrase “*so long as is necessary in all the circumstances*” in s.22(1) is not limited by anything in s.22(2) and it contemplates retention for the period required, inter alia, for the proper prosecution of crime which, in the case of human material

samples, will necessarily go beyond the conclusion of the criminal trial and include any appeal proceedings.

- 28.5. Accordingly, in my view, the approach adopted in various parts of the Framework Document and Discussion Paper in recommending best practice is correct in two important respects: consideration should always be given to whether the retention of a lesser quantity of human material will suffice for the proper prosecution of crime; and the retention of small quantities of human material (e.g. slides) is easier to justify on proportionality grounds.

Powers and rights with respect to possession of the body of the deceased; property rights in the body or body parts

29. The principle that there is no property in a corpse is well established in the common law but it is subject to important exceptions.

29.1. In ***R v Kelly*** [1999] Q.B. 621, C.A., an appeal by K against his conviction of theft of body parts from the Royal College of Surgeons, the Court of Appeal held (at p.631A-B) that, as an exception to the general principle that there is no property in a corpse, parts of a corpse are capable of being property (within section 4 of the Theft Act 1968) if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques for exhibition or teaching purposes. Rose LJ, giving the judgment of the Court, expressed the view (at p.631D) that the common law may develop, in a future case in which the issue arose, to extend the principle to body parts which have “*a use or significance beyond their mere existence*” even where they could not be said to have acquired different attributes. An example he gave was where “*they are intended for use ... as an exhibit in a trial*”.

29.2. In ***In re Organ Retention Group Litigation*** (QBD) [2004] EWHC 644 (QB), a case concerning a group action arising from the Bristol Inquiry by parents of deceased children on whom post mortems had been conducted, Gage J concluded (at paras 145-148 and 160) that the decision in *Kelly* was not confined to the context of s.4 of the Theft Act 1968 but established the general “*principle that part of a body may acquire the character of property which can be the subject of rights of possession and ownership is now part of our law*”; in particular, it applied to cases “*where part of the body has been the subject of the application of skill such as dissection or preservation techniques*” which included, on the evidence in that case, the

skilled dissection and fixing of an organ from a child's body and the subsequent production of blocks and slides²⁰.

- 29.3. Gage J went on to consider the competing legal rights in issue with respect to human material taken in a (coronial) post mortem (paras 155- 162) and concluded: that organs removed under statutory authority, or with express consent or under the coroner's authority were in the lawful authority of the pathologist or others subsequently conducting histological examination; that material subject to the *Kelly* exception vested the pathologist (or person processing the material) with a right to possession until a better right is asserted; that consent to the post mortem by the persons with right to possession of the body based on a duty to bury necessarily involved consent to the removal of organs; that, although it did not arise on the facts, it was possible that the right to possession of the body based on a duty to bury gave rise to an action in conversion with respect to retained human tissue samples where consent was limited so as to require the return of such samples.
30. The personal representatives of the deceased (the executors or administrators) have a right to possession of the body of the deceased but that right is overridden by the coroner's right to possession of the body for the purposes of his enquiry (which overrides all others²¹) and, in certain circumstances, rights to the possession of the body for the purposes of anatomical examination²².
31. Applying those principles to the factual scenario of human material taken in a suspicious death post mortem examination, in my view:
 - 31.1. The rights of personal representatives to possession of the body are capable of giving rise to an action in conversion against those in possession of human material.
 - 31.2. Although a right to possession of the samples is vested in those processing the samples (the pathologist or those working under him), it is capable of being overridden by the rights of personal representatives to possession of the body in the absence of (a) the coroner's authority; or (b) other statutory authority; or (c) consent by the personal representatives expressly or impliedly extending to the retention of such samples.

²⁰ The principle has found its way into the HTA 2004 in s.32 which exempts from the prohibition on commercial dealings in human material for transplantation "material which has become property by reason of the application of human skill".

²¹ *Regina v Bristol Coroner, Ex parte Kerr* [1974] Q.B. 652

²² *Jervis on Coroners*, 2nd Ed, Chap 7.

Powers and rights with respect post mortem examinations

32. The term “post mortem examination” is not defined in any of the enactments in which it is used. The courts have accepted that, in the absence of a statutory definition, the term denotes a scale of procedures of varying degrees of invasiveness and does not exclude the use of non-invasive procedures²³.
33. The coroner’s power to require a post mortem examination for the purposes of his functions overrides that of any other person. However, there is no legal impediment to post mortem examinations being conducted otherwise than with the authority of the coroner even in suspicious death post mortem examinations. Where that occurs, the licensing and consent requirements of the HTA 2004 are likely to be engaged in all cases other than those for a criminal justice purpose.
- 33.1. The coroner is empowered under sections 19 to 21 of the Coroners Act 1988 to direct or request a legally qualified medical practitioner to make a post mortem examination of a body. However, those provisions do not exclude the possibility of some other person conducting a post mortem examination. Nor do the terms of the Coroners Rules. Further, the provisions are framed (save with respect to one exception of little practical significance²⁴) so as to confer a discretion in the coroner without obliging him to act.
- 33.2. Prior to its repeal by the HTA 2004²⁵, s.2 of the Human Tissue Act 1961 prohibited the carrying out of a post mortem without the authority of specified persons. The coroner was one of three persons specified, the others being “*other competent legal authority*”²⁶ and “*the person lawfully*

²³ See Jervis on Coroners, 5th Ed, para 6-46 to 6-47. See *R (Kasperowicz) v HM Coroner for Plymouth* [2005] EWCA Civ 44. This was a renewed application for permission for judicial review of the decision to conduct a post-mortem. Sedley LJ said (para 15): “*If, in this case or indeed any other case, a limited post-mortem can properly be relied upon to answer the statutory question, and if to do more would wound the feelings of the surviving family, I can for my part see no legal inhibition on limiting the post-mortem examination accordingly ... It is simply that a post-mortem examination is not so defined in the statute as to require it in every case to be an invasive procedure. The choice, it seems to me, is a matter of common decency and good practice. It is not a matter of law.*”

²⁴ Section 221(4) Coroners Act 1988: upon being required to do so by the opinion of an inquest jury; see Jervis on Coroners, 2nd Ed, para 6-19.

²⁵ Sched 7(1) para 1.

²⁶ This is a term derived from the provision of the Anatomy Act 1932: see s.2(1) of the Human Tissue Act 1961. The term “competent legal authority” is used in other extant provisions without being further defined where the context would suggest that it denotes a person with a legal power or a court or tribunal with jurisdiction, e.g. Article 5 of the European Convention;

in possession of the body”²⁷. The latter ordinarily contemplated a clinical or hospital post mortem²⁸. There is no equivalent existing provision.

- 33.3. In *R v H.M. Coroner for Greater London (Southern District) Ex p. Ridley* [1985] 1 W.L.R. 1347 (QB), Saville J held that a coroner’s right to order a post mortem examination was not exclusive and that a coroner in possession of the body who unreasonably refused consent to a second post mortem could be compelled to do so. At p.1350, he said:

“It is accepted by the applicant — and indeed correctly accepted — that at this stage the coroner does have Jurisdiction over the body of the deceased in the sense of being the person having the lawful possession of the body: see for example *Reg. v. Bristol Coroner, Ex parte Kerr* [1974] Q.B. 652. That is common ground and it therefore follows, which is also common ground, that her consent or permission for a further post-mortem is required. ***But it does not, to my mind, follow that, because that consent or permission is required, the coroner is therefore exclusively vested with the right to conduct post-mortems. The statutes and statutory regulations undoubtedly give the coroner power to order a post-mortem but I can see nothing to indicate that that power is exclusive.*** There is evidence before me that it is not unusual for coroners before inquests to permit second or further post-mortem examinations to be carried out on behalf of interested parties.

In the present case therefore it seems to me that no good grounds have been advanced to support the refusal of the coroner to consent to a second post-mortem in the circumstances. It is not suggested, apart from the argument that the coroner has the exclusive right to order post-mortems, that the applicant has no rights to seek a post-mortem of her dead husband nor are there any objections from any other interested parties.”

(Emphasis added)

- 33.4. Although *Regina v H.M. Coroner for Greater London* was concerned with a case in which the coroner was in possession of the body so that as a matter of practicality his consent was required for a second post mortem, the general principle enunciated, in my view, supports the proposition that a post mortem may be conducted without his consent where he is not in possession of the body.
- 33.5. The licensing and consent requirements of the HTA 2004 expressly apply to post mortem examinations. As discussed above, in my view, the licensing requirements are displaced by a criminal justice purpose whereas the consent requirements, in those circumstances, are not engaged. It follows that a post mortem conducted for a scheduled purpose otherwise

²⁷ Section 2(2) of the 1961 Act provided “No post-mortem examination shall be carried out otherwise than by or in accordance with the instructions of a fully registered medical practitioner, and no post-mortem examination which is not directed or requested by the coroner or any other competent legal authority shall be carried out without the authority of the person lawfully in possession of the body”.

²⁸ Jervis on Coroners, 2nd Ed, para 6-18.

than with the authority of the coroner and not for criminal justice purposes will engage both the licensing and the consent requirements.

Common law powers of seizure and retention as an alternative basis

34. Sections 19 and 22 PACE leave untouched the police common law powers of seizure and retention. This is plain from the wording of the sections. Section 19(5) expressly states that “[T]he powers conferred by this section are in addition to any power otherwise conferred”. This is in contrast to other provisions of PACE which expressly abolish certain common law powers: s.17(5) which abolishes the police power to enter premises without a warrant and s.53(1) which abolishes any common law power of search by a constable of a person in police detention at a police station. The section 22 power of retention is expressly confined (by s.22(1)) to anything seized under section 19 (or s.20, which extends the s.19 power to the seizure of computerised information). Accordingly, it has no impact on existing common law police powers of retaining seized items.
35. The common law in relation to police powers of seizure and retention has been developed in the context in which those powers have historically needed to be deployed, namely, where they are needed to override some other proprietary right; typically, that arises in the search and seizure of items believed to be material evidence on arrest or following the entry into premises after or for the purpose of making an arrest with or without an arrest warrant.
 - 35.1. In ***Cowan v Condon*** [2000] 1 W.L.R. 254, at p.262C, the Court of Appeal held that the seizure of a vehicle following the arrest of a person believed to have committed offences in the vehicle was lawful at common law. The Court rejected the argument that PACE had implicitly revoked the police common law power to search and seize vehicles. Roch LJ, giving the only reasoned judgment, at p.265, chose to adopt “an interpretation of the Act which enables the police to carry out effective investigation” which involved the preservation of evidence, which was “in the interests of both the general public and an accused or suspected person”.
 - 35.2. In ***R (Rottman) v Commissioner of Police of the Metropolis*** [2002] UKHL 20, the Appellate Committee of the House of Lords held that although PACE did not provide a power to search and seize items after entering premises under a warrant for the arrest of a person wanted for extradition, the common law survived to afford such a power with respect to items reasonably believed to be material evidence.
 - 35.3. Both their Lordships in ***Rottman*** and the Court of Appeal in ***Cowan v Condon*** referred to ***Ghani v Jones*** [1970] 1 QB 693 (CA). In that case Lord Denning MR (at p.706 and 708-709) described the common law

power to retain items seized on premises in an arrest situation in terms which foreshadow those enacted in s.19 and 22 PACE: an item implicating the arrested person in some crime other than that for which entry was made may be seized; an item seized may be retained for no longer than is reasonably necessary to complete police investigations or preserve it for evidence; if a copy will suffice, the original should be returned; “[A]s soon as the case is over, or it is decided not to go on with it, the article should be returned” (p.709C). The relevant principles were stated to be (p.708G) derived from the need to balance the freedom of the individual, which dictated that his privacy and possessions “were not to be invaded except for the most compelling of reasons”, against the “interests of society in finding out wrongdoers and repressing crime”.

- 35.4. The scope of the power to retain seized items described in ***Ghani v Jones*** is broadly equivalent to the power in s.22(2)(a)(i) PACE (i.e. “for use as evidence at a trial for an offence”) but, in my view, narrower than the general test in s.22(1) PACE (“may be retained so long as is necessary in all the circumstances”).
- 35.5. In ***Hewitson v Chief Constable of Dorset*** [2003] EWHC 3296 (Admin), the Divisional Court concluded that the common law power of seizure in extradition cases as described in ***Rottman*** was confined to the seizure of material evidence in the course of the search of the premises of the arrested person on the execution of a search warrant. The court held that, in view of the importance of private property rights as reinforced by Article 8 of the European Convention on Human Rights, it would be a leap too far in the incremental development of the common law to extend it to the search 2 hours later of premises other than the scene of arrest at which the arrested person occasionally stayed.
- 35.6. In ***Settenden v Commissioner of Police of the Metropolis*** [2004] EWHC 2171 (Ch), Peter Smith J was prepared to accept (at paras 38-42) that the common law power of retention described in ***Ghani v Jones*** might justify retaining items which may be used in evidence in a criminal investigation but he concluded that it could not justify retention as against the third party owner of the property following the acquittal of the accused. The judge referred to the Privy Council decision of ***Jaroo v Attorney General of Trinidad and Tobago*** [2002] UKPC 5 at para 27 which in turn refers to ***Malone v Metropolitan Police Commissioner*** [1980] QB 49 (CA), at p70. Those cases establish that property lawfully seized by the police and shown not to be stolen cannot be retained as against the person entitled to possession on the basis of some uncertain future contingency (as opposed to some ascertainable ground) after a decision not to charge has been made. In ***Malone***, the Court of Appeal held that the police could not retain seized money which was not the subject of a charge on the basis that it

could be made available in the event of a conviction (on other charges) for the purposes of restitution, compensation or forfeiture. However, the court held (p.70 per Roskill LJ) that the money could be retained on the basis that it might become necessary to adduce it at trial in which case the handing of it back “*would obviously gravely hamper the administration of justice*”.

36. Applying those principles to the very different context of the seizure and retention of human material in a post mortem, in my view:

36.1. The principal difference between the two contexts is that there is no need when seizing and retaining human tissue in a post mortem to override the proprietary rights of a person entitled to possession of the material in the same way as there is when seizing and retaining ordinary items in an arrest situation. The right to possession of the body vested in the personal representatives of the deceased (as discussed above) is not a property right in the ordinary sense. Nonetheless, it is capable of giving rise to a claim for possession of the body and therefore some police power is needed, absent consent, for the police to be lawfully in possession of the body or human material taken from it.

36.2. There are, to my knowledge, no cases in point applying common law police powers of seizure and retention to the context of the seizure and retention of human tissue in a post mortem. That is no doubt because there has never been any need to develop the common law in this context. Where human tissue is taken in a post mortem by the police, in practice, it is in the course of a post mortem authorised by the coroner, the police are present on the premises as of right²⁹ and human material samples taken as police exhibits are taken with the consent and agreement of the coroner. The material taken is not taken from a living person capable of raising objections and the personal representatives are unlikely to do so.

36.3. It is reasonable to conclude that, prior to the enactment of PACE, the same arrangements applied, i.e. suspicious death post mortems invariably were conducted under the authority of the coroner and the taking and keeping of human material samples by police for the purpose of criminal proceedings was not, in practice, challenged. If anyone addressed their minds to the authority for such practices, no doubt, it was explained in terms of a hybrid power derived from common law and the authority of the coroner.

²⁹ The current Coroners’ Rules 1984 (as amended) (SI 1984/552) provide that: where the chief officer of police informs the coroner that a person may be charged with murder, manslaughter or infanticide of the deceased, the coroner should consult the chief officer of police as to the selection of the legally qualified medical practitioner who is to make the post-mortem examination (r.6(1)(b)); and that the coroner shall notify the chief officer of police of the date, time and place of the post-mortem if the chief officer of police has notified the coroner of his desire to be represented at the examination, in which case, he may be represented by a legally qualified medical practitioner or a member of his police force (r.7).

- 36.4. The developed common law police power of retention of seized items permits them to be retained for the duration of criminal proceedings but for no longer. That is because it is concerned with balancing the rights of the person entitled to possession of property against the need to fight crime. At the conclusion of criminal proceedings, the rights of the person entitled to possession of ordinary property, which is neither prohibited nor stolen, are not ordinarily displaced by any compelling criminal justice purpose. No doubt, it would extend additionally to any period required by the CPIA. However, given the very clear limitation as to time developed in the cases, it is not a natural basis for justifying the extended retention of human material samples long after criminal proceedings have concluded.
- 36.5. In so far as there is a gap left by s.19 and 22 PACE which the common law might fill, it would be possible to argue that the different context demands a development of the common law to permit the retention of human tissue taken in a post mortem for a period which outlasts the conclusion of the criminal proceedings so long as there remains a compelling criminal justice purpose. That argument faces two obvious counter-arguments. First, it might be said that the PACE provisions are declaratory of the common law and subject to the same limitation in terms of permitted duration of retention. In my view, s.22 is drafted in deliberately wider terms and is not merely declaratory of the common law. Secondly, and more persuasively, it might be said that such development would be a leap too far in the incremental development of the common law. In my view, private property rights as reinforced by Article 8 of the European Convention on Human Rights are not engaged as forcefully in relation to post mortem samples as they are (and were in *Hewitson*) in relation to seized items on arrest; and, consequently, it is arguable that the courts should be less resistant to the development of the common law, particularly in so far as it endorses what has long been unchallenged practice.
- 36.6. However, it does not seem to me that there is a gap left by s.19 and 22 PACE. Although these provisions plainly have their antecedents in the common law, they are, in my view, drafted sufficiently widely (as discussed above) to justify the retention of human material for so long as there remains a compelling criminal justice purpose.
- 36.7. The one possible exception is in relation to human material seized from a place other than “premises” (to which s.19 cannot apply) and not subsequently seized in premises. It is likely to be of little practical significance. Were a case to arise in which an issue arose as to the lawfulness of seizing human material from such a place, in my view, it would be surprising if the courts did not conclude that there was a common law power to do so.

37. In short, although an argument can be made for deploying common law police powers for seizure and retention of human material in a post mortem, there is no direct support in the cases for such powers and the argument is not without its difficulties. Section 19 and 22 PACE, in contrast, avoid those difficulties and, in my view, should be preferred.

Ancillary questions relating to the treatment of human material at the conclusion of a criminal investigation or proceedings

38. I agree with the views expressed in the Framework Document and Discussion Paper on these questions.
39. Human material can only be lawfully held under some form of lawful authority.
40. If the police authority is exhausted, the human material may either be held thereafter by the coroner assuming authority for it or it should be disposed of. There is no legal or regulatory scheme which governs the disposal of human material held under police authority. Accordingly, it is necessary to develop appropriate protocols. Those suggested in the Framework Document and Discussion Paper, in my view, strike the right balance between the various competing considerations.
41. However, as will be apparent from my discussion above in relation to the central question, police authority to retain human material is not, in my view, necessarily exhausted at the conclusion of the criminal investigation or proceedings.
- 41.1. There will always be an incontrovertible case for retaining material until any appeal is determined or until the possibility of an appeal can reasonably be excluded. This is made explicit in paras 5.7 to 5.10 of the Code of Practice under Part II of the CPIA which specifies as the appropriate period for the retention of material a period of 6 months from conviction or until the conclusion of any appeal or until the completion of the consideration of an application to the Criminal Cases Review Commission and any resulting reference.
- 41.2. It is difficult to lay down any hard and fast rules because, as set out above, the judgment of whether it is necessary to retain human material under s.22 PACE is a fact-specific one based on a proportionality assessment of all the relevant considerations. However, in my view, there are bound to be cases in which it is entirely appropriate for the police, or for a forensic pathologist holding material under police authority, to retain key samples long after the criminal investigation or proceedings have come to an end. Cases are appealed out of time. Experience demonstrates that questions as

to the procedures adopted or the interpretation of samples can be raised many years later.

- 41.3. However, I would expect the lawfulness of that retention (or, at any rate, the ability to demonstrate its lawfulness) to depend upon certain minimum requirements. They are the type of requirements which have been incorporated into the protocols suggested in the Framework Document and Discussion Paper.
- a. The rationale for retention should be recorded with reference to the test in s.22 PACE.
 - b. The lines of authority and decision-maker/s should be clearly defined.
 - c. There should be provision for reasonably regular reviews of the question.
 - d. The routine holding of all samples indefinitely in all cases on a vague ‘just in case’ basis is unacceptable³⁰. The system adopted should be, and should be seen to be, one which strives to identify an end point for police retention. There may be cases in which retention of some samples is virtually indefinite but that should be the result of the application of a test to the particular case which in at least some if not most cases results in an end point being reached.
42. Where the criminal justice purpose is exhausted, the HTA 2004 requirements are capable of being engaged with respect to the continued retention of human material. Practically speaking, this ought not to be a difficulty. The possible permutations at the time that the criminal justice purpose is exhausted are:
- a. The material is disposed of by the police in accordance with an appropriate protocol. The HTA 2004 does not apply.
 - b. The material is retained on the coroner’s authority. The consent requirements of the Act necessarily will not apply (s.11 HTA 2004). The licensing requirements will. The coroner and those holding the material on his behalf will need to take steps to comply with those requirements.

³⁰ A salutary reminder of the reach of Article 8 of the European Convention on Human Rights with respect to the retention of human material was provided by the recent Supreme Court decision of *R (GC) v The Commissioner of Police of the Metropolis; R (C) v The Commissioner of Police of the Metropolis* [2011] UKSC 21 concerning the retention of biometric samples (DNA and fingerprints) in the course of criminal investigations.

- c. The material is retained on no authority. The consent requirements and the licensing requirements will apply in the circumstances described in para 6.2 above and any breach of them will sound in liability.

How does the disclosure regime applicable to criminal proceedings apply to coronial samples?

43. The simple answer is that if material may be relevant to a criminal investigation, there is a duty on the police to retain it if it is already in police possession or to obtain it and retain it where its relevance had not previously been appreciated: CPIA Code of Practice, paras 5.1 and 5.3. Potentially relevant human material should not, therefore, be solely coronial samples: they should either be jointly held or solely held by the police. Samples may be retained under the dual authority of both the coroner and the police and, where they are, the HTA 2004 consent requirements do not apply and the s.39 HTA 2004 exemption from the licensing requirements does apply³¹.
44. Where human material is solely held on the coroner's authority and is not relevant to the criminal investigation, the disclosure regime applicable to criminal proceedings does not apply.
45. There is, in addition, an independent duty of disclosure placed on experts, including forensic pathologists, in criminal proceedings enshrined both in common law and in the Criminal Procedure Rules. However, the same assessment of relevance is required. Relevant material should be retained under police authority.
46. Please do not hesitate to contact me if I can assist further.

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17 June 2011

³¹ See the discussion above and para 79 of HTA Code of Practice 3 – 'post-mortem examination'.