



# The Royal College of Pathologists

## GUIDANCE FOR RETENTION OF BRAIN AND SPINAL CORD FOLLOWING POST-MORTEM EXAMINATION AND WHERE CRIMINAL PROCEEDINGS ARE IN PROSPECT

### 1 Purpose

- 1.1 This document provides guidance on the retention of the brain and spinal cord following post-mortem examination on deaths which fall under the Coroner's system in England, Wales and Northern Ireland and the Procurator Fiscal system in Scotland, and in relation to which criminal proceedings may occur.
- 1.2 These notes address issues arising from the Criminal Procedure and Investigations Act 1996, as well as The Human Rights Act 1998.
- 1.3 The document is intended to be read by histopathologists, especially those engaged in forensic practice, as well as legal authorities engaged in the investigation of death.

### 2 Background

- 2.1 This document has been produced in consultation with the Professional Affairs Committee of the British Neuropathological Society, the Forensic Pathology Subcommittee, the Neuropathology Subcommittee and the Specialty Advisory Committee on Histopathology of the Royal College of Pathologists.
- 2.2 Following the issue of retained body parts at many hospitals in the UK, together with the subsequent publicity and work of the Retained Organs Commission, the practice of pathologists in relation to the retention of whole organs has become increasingly problematic.
- 2.3 As outlined in detail in the guidelines produced by the Royal College of Pathologists<sup>1</sup> (page 6, 3.3), Coroner's pathologists may retain tissue as follows:  
*"A person making a post-mortem examination shall make provision, as far as possible, for the preservation of material which in his opinion bears upon the cause of death, for such a period as the Coroner thinks fit."* (Rule 9, Coroner's Rules, 1984).

- 2.4 There is variation in interpretation of “bears upon the cause of death”, some interpreting this as relating only to the identification of the anatomic cause of death and, once this is established, wishing the brain or other organ to be returned to the body. The Coroner is responsible for determining the length of period of retention of the organ; the pathologist must make the Coroner aware of what material it is considered necessary to retain and make clear the reasons for that retention.
- 2.5 The Code of Practice in relation to the Criminal Procedure and Investigations Act 1996<sup>2</sup> (CPIA) is usually interpreted as referring not only to documents but also to other retained material that would include body tissues and/or organs if the analysis of these provided information relevant to the prosecution. Under the Code of Practice, issued under section 23 of the Criminal Procedures and Investigation Act 1996, the police have a duty to retain material of all kinds (the term ‘material’ referring to information and objects of all descriptions). They should ensure that any material that is obtained in the course of a criminal investigation and may be relevant to the investigation is retained.
- 2.6 The length of time to which material retained under the CPIA should be kept is set out in the Code of Practice.
- i. All material which is relevant to the investigation must be retained until a decision is taken as to whether to institute proceedings against a person for an offence.
  - ii. If a criminal investigation results in proceedings being instituted, all material which may be relevant must be retained at least until the accused is either acquitted or convicted, or until the prosecutor decides not to proceed with the case.
  - iii. Where the accused is convicted, all material which may be relevant must be retained at least until:
    - a) the convicted person is released from custody or discharged from hospital, in cases where the court imposes a custodial sentence or a hospital order
    - b) six months from the date of conviction in all other cases.
- 2.7 If the court imposes a custodial sentence or hospital order and the convicted person is released from custody or discharged from hospital earlier than six months from the date of conviction, all material which may be relevant must be retained at least until six months from the date of conviction.
- 2.8 If an appeal against conviction is in progress when the release or discharge occurs, or at the end of the period of six months, material which may be relevant must be retained until the appeal is determined. Similarly, if the Criminal Cases Review Commission is considering an application at that time, all material which may be relevant must be retained at least until the Commission decides not to refer the case to the Court of Appeal, or until the Court determines the appeal resulting from the reference by the Commission.
- 2.9 Material need not be retained by the police, as required above, if it was seized and is to be returned to its owner.
- 2.10 It will be evident that these ‘periods of retention’ may be unacceptable to family members of a deceased person. Some material may require storage for many years. Indeed, as is well recognised, samples taken from criminal scenes many years ago can now be used for detailed DNA analysis and a number of cases have been re-opened, some with successful convictions or acquittals.

2.11 It is also important to consider the interests of parties other than the deceased and family members where criminal prosecution is involved. As the Crown Prosecution Service Policy Directorate advice states:

*“Any failure to retain such material could have a potentially highly damaging impact on criminal prosecutions, where this deprives the defence of the opportunity to obtain their own analysis of the material. This could lead to a prosecution being stayed by the court as an abuse of process. Any defence application for such a stay may be assisted by the argument that Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, had been breached.”*

2.12 The CPIA Code of Practice does not place any direct obligation on any person other than a police officer to comply with its provisions, but others charged with the duty of conducting an investigation are expected to have regard for the Code and to take its provisions into account. Section 26 of the CPIA states:

*“A person other than a police officer who is charged with the duty of conducting an investigation with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it shall in discharging that duty have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers.”*

2.13 Recent advice from the Policy Directorate of the Crown Prosecution Service acknowledges that it:

*“is not in a position to advise on the law concerning any aspect of pathologists’ work, other than on the criminal law which applies to post mortems carried out in anticipation or furtherance of criminal proceedings”*

and has it that:

*“in the absence of any definitive court ruling, it may be considered possible that pathologists could come within the category of those who are to have regard to the code”.*

That advice goes further:

*“As a matter of good practice under the CPIA disclosure regime the police should be notified of any material which may be relevant to a criminal investigation. This material should then be retained by the relevant third party in possession of it.”<sup>3</sup>*

2.14 Advice from the Chief Medical Officer<sup>4</sup> makes a number of recommendations relating to retention of material removed at autopsy. The recommendations are not mandatory; however, the climate of public opinion for retention of tissue almost certainly means that for cases in which the interpretation of the post-mortem findings are straightforward (if that can ever be said with certainty, e.g. multiple blows or shotgun wounds), indefinite retention would not be authorised. While it may well not be necessary to retain the whole brain or spinal cord for years after conviction, it is essential that blocks and slides are retained in accordance with current guidance. It is well recognised that much of the evidence in an individual case will not be known or available at the time of the examination and may only come to light after a considerable time, often many months or even years, following a death.

2.15 Guidance on the above is intended to be incorporated into the *Guidelines for Good Practice in Neuropathology* produced by the British Neuropathological Society, 2000<sup>5</sup> and the Policy Advisory Board for Forensic Pathology *Practice Guidelines*, 2001.<sup>6</sup>

- 3 Policy for retention of brain and spinal cord following post-mortem examination and where criminal proceedings are in prospect
  - 3.1 In appropriate cases, it is advised that the brain and, if necessary, the spinal cord are retained whole, in keeping with the guidelines of the Criminal Procedure and Investigations Act 1996 (see section 2.5 above).
  - 3.2 Disposal of human material retained in this way should not be undertaken by the pathologist unless there has been consultation with all parties, including any relevant court, in accordance with advice from the Crown Prosecution Service Policy Directorate.
- 4 Cases in which it is advised the brain with spinal cord should be retained intact
  - 4.1 All alleged non-accidental injury (NAI) cases, including known or suspected head injury, as well as other cases of alleged or suspected NAI, such as suffocation or poisoning. The spinal cord should also be retained.
  - 4.2 Cases in relation to which it is unclear whether or not the gross neuropathological abnormalities are due to natural causes, e.g. intracerebral haemorrhage.
  - 4.3 Cases in which there are potential medicolegal issues relating to the causation and/or timing of a head injury (e.g. fall versus assault, or the ageing of a subdural haematoma or extradural haematoma).
  - 4.4 Any other case in which the pathologist is of the opinion that the neuropathological findings are of medicolegal relevance or may assist in determining the contribution of natural or unnatural process to death (e.g. death in relation to medical or surgical care, death in relation to epilepsy, perinatal deaths and deaths involving mental illness).
- 5 Notes
  - 5.1 There must be full discussion about the need to retain organs and tissues with the Coroner as well as the Senior Investigating Officer of the case before starting a post-mortem examination. These discussions should be fully documented in writing.
  - 5.2 The pathologist must be sure that the Coroner understands fully the background to a case and the consequences for an investigation of that case if retention is not authorised.
  - 5.3 If, in advance of the post-mortem examination, discussion with a Coroner indicates to the pathologist that retention of material which may be relevant to the investigation will not be permitted, the pathologist should decline to perform the post-mortem examination.
  - 5.4 Arrangements should be in place to allow full information to be given to the family members of the deceased in respect of the retention of any human material.
  - 5.5 If necessary, the prosecuting authority (or defence lawyer) and counsel should be advised.
  - 5.6 If, after completing an examination, retention is not permitted by a Coroner, then this decision should be immediately communicated by the Coroner to the pathologist in writing for the avoidance of doubt, and should include a statement to the effect that the pathologist in these circumstances cannot be held responsible for any problems which may arise at a later stage.

## References

1. The Royal College of Pathologists. *Guidelines for the retention of tissues and organs at post-mortem examination*. London: The Royal College of Pathologists, 2000.
2. The Criminal Procedure and Investigations Act 1996. The Stationery Office Limited.
3. Home Office Policy Advisory Board for Forensic Pathology. *Retention of Body Organs and Tissue following Autopsy, Advice to Forensic Pathologists*. Draft, August 2001.
4. *Advice from the Chief Medical Officer*. London: Department of Health, 2001.
5. *Guidelines for the Good Practice in Neuropathology*, British Neuropathological Society, 2000.
6. Home Office Policy Advisory Board for Forensic Pathology, *Practice Guidelines*, 2001.
7. The Royal College of Pathologists. *The retention and storage of pathological records and archives* (2<sup>nd</sup> edition). London: The Royal College of Pathologists, 1999.

PROFESSOR HELEN L WHITWELL

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Comments or queries may be directed to:

Professor Helen Whitwell  
Department of Forensic Pathology  
The Medico-Legal Centre  
Watery Street  
Sheffield S3 7ES

or

Professor Jim Lowe  
Division of Pathology  
School of Clinical Laboratory Sciences  
University of Nottingham Medical School  
Queens Medical Centre  
Nottingham NG7 2UH  
Tel: 0115 970 9269

Tel: 0114 273 8721