



To Alanis McQuillen
Assistant Clerk
Citizen Participation and Public Petitions Committee

10 January 2022

Thank you for the opportunity to respond to this petition. Firstly, we were saddened to learn about the death of Ms McNair's child and we pass on our sincerest condolences. The related issues raised in this petition are on face value very important for the families of such cases but need to be balanced against current legislation and the desire to establish the cause of death and the legal responsibilities that go with it, especially when criminal activities are being considered. Additionally, Pathology and Forensic services are not unlimited in their capacities and so legislation needs to pragmatically reflect such limitations.

While the details surrounding the death and subsequent interactions with services in this case are limited in the petition, it would primarily appear that most of the issues raised are already covered by existing legislation and we would suggest perhaps that there has been limited communication between the various agencies and the complainant – indeed all of the information regarding the post-mortem examination should have been made available by the agencies involved including specialist police services. We would however acknowledge that due to the complexities involved, authorisation and related forms are very complex (and dated) already, and so additional layers of legislation will simply add and potentially confuse matters.

With regards to the specific questions posed, we have added a response and provided some background information to clarify the current position.

1. “**can only be carried out with permission of the next of kin**” – Current legislation for hospital deaths, mean post-mortem examinations will **only** be carried out with permission of the next of kin or their nominated representative – this includes for child deaths. Such post-mortem examinations are relatively rare however, especially for child deaths. Most child death post-mortem examinations are those that come under the legal jurisdiction of the procurator fiscal (PF);(or Coroner system in England) – these occur mainly in the event of a sudden or unexplained death. This is important legally to retain, especially for child deaths given that the next of kin themselves can be involved in the factors leading to death of the child or indeed be the perpetrators. It would therefore be our strong view that the current system is appropriate and needs to be retained, as it is in the rest of the UK.
2. “**do not routinely remove brains**” – Again with regards to hospital, non-forensic post-mortem examinations, decisions to remove (to examine and sample) and retain whole organs (rare) need specific next of kin authorisation – so legislation is already in place. Child deaths, especially those coming under the jurisdiction of the PF or coroner, will frequently implicate head injury as a causative or contributing factor in the death of a child, so it would be appropriate for post-mortem brain examination, and again this would be at the direction of the PF working with the forensic pathologist. In all cases, the decision to remove a brain for examination is not taken lightly but can be a vital part of the investigation. This can of course be avoided in circumstances where cause of death is obvious from other examinations and would not add anything. Additionally, again, it would be standard practice to only retain small tissue samples for subsequent examination and not retain whole organs.

3. “**offer tissues and samples to next of kin as a matter of course**” – For hospital post-mortem examinations, small tissue samples taken for microscopy and diagnostic purposes are retained as part of the medical clinical record in the same way that blood and other body fluids are retained and disposed of when appropriate. This should not be confused with the issue of whole organ retention which needs specific relative authorisation over retention and disposal. Small tissue samples and microscopic slides could theoretically be returned to relatives, but the gain would be marginal and would need traded off against further complexities in the authorisation and consent processes, which are already difficult. In addition, return of such tissues would mean future analyses (such as for molecular and DNA work) opportunities would be lost if they subsequently became important. For PF directed post-mortem examinations, the same issues as above, although the timing of return of such samples would be more prolonged given the legal aspects of such cases – occurring many months in some cases after bodies are released for burial/cremation. Additionally, return of such tissues would also need PF approval to ensure valuable legal material is not lost or indeed even when returned, acknowledged/accepted that future examination possibilities are then lost – which may not be in the best interests of the Crown Prosecution or the relatives in the long term. So, the current system of small tissue samples becoming part of the medical record would seem a sensible balance that avoids complexity and provides clarity for both professionals and relatives. Again, this should not be confused with the legislation around whole organ retention as stated above.

The concept of automatically returning such small tissue samples and how that would work in practice needs consideration. In practice, automated return brings up the key issues of:

- a. Having to make a decision that the tissues are no longer of use (this is never the case with histology blocks – so this would need to be accepted).
- b. If the tissues must be buried or cremated with the body – the body needs to be kept until the tissues are finished with – will delay things considerably.
- c. If the tissues are not to be buried or cremated with the body, the options need to be explained and understood by those taking the consent – there are very few medical professionals who understand what the options mean currently – for instance, return to the relatives can mean return to the relative’s funeral director and subsequent additional cremation or burial expenses which the family may not have understood during the authorisation process.
- d. When the automatic return happens, the relatives need to sign disclaimers that they understand that future information that might be gleaned from such samples might be lost. If the PF is authorising the return of such samples, they need to understand that they may losing valuable evidence. All in all, a mountain of paperwork for no real return.
- e. Additional costs for such processes and related governance.

Summary

Post-mortem examinations by their nature, and especially if being undertaken for forensic purposes, are invasive procedures. To the general public, this will inevitably seem gruesome and very disturbing, especially in the case of a child death. As stated above, it would be our view that current legislation that exists around hospital non-forensic and forensic instructed post-mortem examinations, while not perfect in every case, covers all of the areas of concern and is on the whole adequate – in particular, PF instructed post-mortem examinations **need** to be retained, even if against the wishes of the next of kin and especially in the case of child death. In addition, current legislation around whole organ retention is appropriate, but not implicated necessarily in this case. Retention of small tissue samples and glass slides for microscopy as part of the clinical record would also seem appropriate, with the option of routinely returning these to relatives risking the loss of valuable future material for examination

and adding considerable complexity to the consent process, which is already complicated and carried out in situations of extreme relative distress – especially when involving the death of a child. So, on balance, we would not support legislative change as suggested in the petition.

Finally, it is worth noting that, as with all parts of public service, there are significant pressures on pathology, post mortem and forensic services across Scotland, with grossly inadequate facilities and staffing levels being the reality of current provision. The recent failure of the Crown Office and Procurator Fiscal Service procurement exercise to identify compliant bidders for forensic services across Scotland, even from existing providers of such services, highlights the difficulties already faced. Introduction of further complexities to the system would therefore need to be carefully thought through before any legislative changes are considered, especially given the current limitations in the services provided.

Happy to discuss any of the points above, further.

Yours faithfully

A handwritten signature in black ink, appearing to read "Bernard Croal". The signature is written in a cursive, slightly slanted style.

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