

HUMAN TISSUE (SCOTLAND) ACT 2006

EXPLANATORY NOTES

THE ACT – AN OVERVIEW

Part 2: Post-Mortem Examinations

Section 23 – Meaning of post-mortem examination for purposes of Act

63. [Section 23](#) provides a comprehensive definition of a post-mortem examination for the purposes of the Act, defining it in terms of the examination of the body of a deceased person and the purposes for which that examination is carried out.

Section 24 – Disapplication of sections 23 and 27 to 37 as respects procurator fiscal

64. [Section 24](#) provides that none of the relevant provisions Part 2 of the Act (sections 23 and 27 to 37) affect anything done for the purposes of the functions, or under the authority of, the procurator fiscal. These provisions apply therefore only in relation to post-mortem examinations as defined in section 23 (in practice referred to generally as “hospital post-mortems”), as opposed to examinations of dead bodies instructed by or carried out for the purposes of the procurator fiscal.

Section 25 – Disapplication of sections 27 to 35 and 37: bodies of persons dead for at least 100 years

65. [Section 25](#) provides that sections 27 to 35 and section 37 do not apply in relation to a post-mortem examination of a body of a person who died at least 100 years before the day on which section 27 comes into force.

Section 26 – Consent by procurator fiscal to post-mortem examination

66. Subsection (1) equates to the provision in section 1(5) of the [Human Tissue Act 1961 \(c.54\)](#) with regard to post-mortem examinations. Where the person proposing to undertake a post-mortem examination knows, or has reason to believe, that the fiscal’s purposes may require an examination of the body, the post-mortem examination may not be carried out unless the consent of the fiscal has been obtained. Subsection (2) provides that for the purposes of subsection (1) the fiscal may give consent verbally, provided it is confirmed in writing as soon as is reasonably practicable.

Section 27 – Requirements for carrying out post-mortem examination

67. This section provides that a hospital post-mortem examination cannot be carried out unless it has been duly authorised in accordance with section 29, 30, 31, 32 or 33 and the further requirements in relation to post-mortem examination and removal and retention of organs under section 35 are satisfied.

Section 28 – Removal during examination and retention of organs and other parts of a body

68. **Section 26(1)** provides that where a post-mortem examination has been duly authorised, certain parts of the body of the deceased person may be removed from the body during examination for the purposes of the examination or for the purposes of audit, education, training or research; those parts may also be retained and used thereafter for any those purposes. Subsection (5) defines the parts of the body which can be removed during the examination or retained thereafter for any of the specified purposes. Subsection (6) provides that no other part of the body may be removed at post-mortem examination, and it follows therefore that no other part of the body could be retained as a result of a post-mortem examination. (These, and subsequent provisions relating to authorisation are based on the fact that authorisation of a hospital post-mortem examination includes authorisation of the removal and retention of tissue samples as part of the deceased person's medical record.)
69. Subsection (2) provides that an organ may be removed during a post-mortem examination for the purposes of audit, education training or research if the removal is duly authorised for the purpose in question under the relevant section of the Act. Similarly, an organ may be retained and used thereafter for any of these purposes only if the purpose in question has been duly authorised under the relevant section of the Act.
70. Subsection (3) provides that any part of the body of a deceased person (other than an organ) which is duly removed during a post-mortem examination by virtue of authorisation under the relevant section of the Act will form part of the medical records of the deceased person after its removal. Subsection (4) thereafter provides that where an organ has been removed in this manner, samples may, by virtue of that authorisation be taken from the organ and, if taken, will form part of the medical records of the deceased person.

Section 29 – Authorisation of post-mortem examination etc.: adult

71. Subsection (1) enables an adult to authorise a hospital post-mortem examination of his or her body after his or her death. An adult may also authorise the removal from their body during the post-mortem examination of an organ, and the retention and use of an organ for one or more of the purposes specified in section 28(2)(a) (audit, education, training or research).
72. Subsection (2) provides that such an authorisation under subsection (1) must be in writing and signed, or expressed verbally by the adult. If expressed verbally, this must be done in the presence of 2 witnesses.
73. Subsection (3) provides that a written authorisation may be withdrawn by the adult provided that it is withdrawn in writing, signed by the adult, and that a verbal authorisation may be withdrawn by the adult either in writing and signed by the adult, or verbally by the adult in the presence of 2 witnesses.
74. Subsection (4) provides that if an adult is blind or unable to write, another adult can sign a written withdrawal of authorisation on their behalf in the presence of one witness.
75. Subsection (5) provides that a withdrawal of authorisation which is signed by a signatory on behalf of an adult who is blind or unable to write, must contain a statement, signed by the signatory and the witness in the presence of each other, which states that the adult expressed the intention to withdraw the authorisation and requested the signatory to sign the withdrawal on their behalf.
76. Subsection (6) provides that nothing in subsection (4) prevents an adult who is blind from withdrawing authorisation for a post-mortem examination and/ or removal, retention and use of an organ, in accordance with paragraph (a) of subsection (3).

Section 30 – Authorisation of post-mortem examination etc by adult’s nominee or nearest relative

77. Section 30(1) provides that an adult can nominate one or more people to authorise a post-mortem examination on the adult after the adult’s death and the removal and retention and use of organs for one or more of the purposes specified in section 28(2)(a) (audit, education, training or research). Subsection (2) further provides that where on the adult’s death there is neither an authorisation nor such a nomination of a representative in place, the nearest relative may authorise a post-mortem examination on the adult and the removal and retention of organs for one of the specified purposes.
78. Subsection (3) provides that where a nominated person is unable to give authorisation or there is insufficient time to contact that person the nomination must be disregarded and the nearest relative could provide authorisation as if there were no such nomination in place.
79. Subsection (4) provides that authorisation by a nominated person must be in writing and signed by the nominated person and witnessed by one other person who has not been so nominated. Subsection (5) further provides that authorisation by a nearest relative must be in writing and signed by the nearest relative and witnessed by one other person. Subsection (6) provides that in providing authorisation under subsections (1) or (2), a nominee or nearest relative must state, in relation to a post-mortem examination, that they have no actual knowledge that the adult was unwilling for a post-mortem examination to be carried out and, in relation to the removal or retention and use of an organ after the examination, that they have no actual knowledge that the adult was unwilling for the activity in question to be carried out.
80. Subsections (7) and (8) provide that authorisation can be withdrawn by the nominated person or nearest relative in writing, signed by the nominated person or nearest relative in the presence of one witness. In the case of a nominee withdrawing their authorisation in writing, the witness to that writing cannot be another nominee.

Section 31 – Authorisation of post-mortem examination etc.: child 12 years of age or over

81. Subsection (1) allows a child who is 12 years of age or older to authorise a post-mortem examination after the child’s death and the removal from their body and retention and use thereafter of organs for one or more of the purposes specified in section 28(2)(a) (audit, education, training or research).
82. Subsection (2) provides that such authorisation must be in writing signed by the child and witnessed by 2 witnesses. It may be withdrawn by the child in writing signed by the child. Alternatively, if the child is blind or unable to write, such authorisation and the withdrawal of such authorisation may be signed by an adult on the child’s behalf and witnessed by one witness. Subsection (3) provides that where a signatory signs authorisation or withdraws authorisation on behalf of a child the authorisation or withdrawal must contain a statement signed by the adult and the witness that the child expressed the intention to either give or withdraw the authorisation and requested the adult to sign on his or her behalf. Subsections (4) and (6) provide that any such authorisation on behalf of a child who is 12 years of age or over who is blind or unable to write must contain or be accompanied by certification from both the signatory and the witness that in their opinion the child understands the effect of the authorisation and is not acting under undue influence in giving it. A similar certification is required from both witnesses to an authorisation which is signed by the child himself or herself under subsection (2). Subsection (5) provides that nothing in the provisions in subsection (2) dealing with authorisation or withdrawal signed by a signatory on the child’s behalf prevents a child who is blind from giving or withdrawing authorisation without such a signatory under subsection (2).

Section 32 – Authorisation of post-mortem examination etc as respects child 12 years of age or over by nominee or person with parental rights and parental responsibilities

83. Subsection (1) provides that a child 12 years of age or over can nominate one or more people to authorise a post-mortem examination on the child after the child's death and the removal, retention and use of organs for one or more of the purposes specified in section 28(2)(a) (audit, education, training or research). Subsection (2) further provides that where on the child's death there is neither an authorisation nor such a nomination by the child or a representative in place, a person who immediately before the death of the child had parental rights and responsibilities in relation to the child (but who is not a local authority) can give authorisation for a post-mortem examination on the child and the removal and retention of organs for one of the specified purposes.
84. Subsection (3) provides that where the child's nominee is unable to give authorisation or there is insufficient time to contact that person then the nomination must be disregarded and the nearest relative could provide authorisation as if there were no such nomination in place.
85. Subsection (4) provides that authorisation by a child's nominee must be in writing, signed by the nominee and witnessed by 2 witnesses who have not been so nominated. Subsection (5) further provides that where authorisation is given by a person with parental rights and responsibilities in relation to the child this must be in writing, signed by the person and witnessed by 2 witnesses.
86. Subsection (6) provides that in providing authorisation under subsection (1) or (2) the child's nominee or the person with parental rights and responsibilities in relation to the child must state, in relation to a post-mortem examination, that they have no actual knowledge that the child was unwilling for a post-mortem examination to be carried out and, in relation to the removal or retention and use of an organ after the examination, that they have no actual knowledge that the adult was unwilling for the activity in question to be carried out.
87. Subsections (7) and (8) provide that authorisation can be withdrawn by the nominated person or person with parental rights and responsibilities in writing, signed by the person in the presence of two witnesses. In the case of a nominee withdrawing their authorisation in writing, neither of the witnesses to that writing can be another nominee.

Section 33 – Authorisation of post-mortem examination etc as respects child under 12 years of age

88. **Section 33** relates to a child who dies under 12 years of age. Subsection (1) enables a person who had parental rights and responsibilities in relation to such a child immediately before the child's death (but who is not a local authority) to authorise a post-mortem on the child after the child's death. Such a person can also authorise the removal and retention of organs for the purposes of section 28(2)(a) (audit, education, training or research).
89. Subsection (2) provides that where such authorisation is given by a person with parental rights and responsibilities in relation to the child, that authorisation must be in writing, signed by the person and witnessed by 2 witnesses. Authorisation may be subsequently withdrawn in writing, signed by the person who gave the authorisation and witnessed by one witness.

Section 34 – Nomination of person under section 30(1) or 32(1): additional provisions

90. Subsection (1) sets out the additional formalities relating to the appointment of a nominee by an adult under section 30(1) (authorisation of post-mortem examination etc, by adult's nominee) or by a child 12 years of age or over under section 32(1)

*These notes relate to the Human Tissue (Scotland) Act 2006
(asp 4) which received Royal Assent on 16 March 2006*

(authorisation of post-mortem examination etc as respects child 12 years of age or over by nominee). Such nominations must be both made and withdrawn by the adult or child in writing, signed by the adult or child in the presence of one witness. A witness cannot be another nominee.

91. Subsection (2) provides that a witness to a nomination by an adult under section 30(1) or by a child under 22(1) must at the time of witnessing certify that in their opinion, the adult or child understands the effect of the nomination and is not acting under undue influence in giving it.
92. Subsection (3) provides that a person nominated by an adult under section 30(1) or by a child 12 years of age or over in terms of section 32(1) cannot act under the nomination if the purported nominee is not an adult. A person nominated under those sections is entitled to renounce the nomination.
93. Subsection (4) provides that where more than one person is so nominated, authorisation can be given by any one of the nominees or by all of the nominees acting together.

Section 35 – Post-mortem examination and removal and retention of organs: further requirements

94. Subsection (1) provides that a person cannot carry out a post-mortem examination nor can they remove, retain or use any organs for any of the purposes specified in section 28(2)(a) (audit, education, training or research) unless they have satisfied themselves that it has been duly authorised in accordance with the relevant section and, as regards the carrying out of the examination, the consent of the procurator fiscal has been given where required.
95. Subsection (3) provides that the person intending to carry out the post-mortem examination or any other activity referred to in subsection (1) is entitled to be satisfied that the relevant authorisation is in place in certain specified circumstances. The authorisation forms which will be prescribed by regulations under section 47 will be adapted to make sure they reflect each of the requirements which are set out in this subsection in relation to written authorisations.
96. Paragraph (a) applies to both written and verbal authorisations under Part 2 of the Act. Paragraphs (b), (d), (e), (g) and (h) all relate to written authorisations under various provisions in Part 2. Paragraph (f) relates to written authorisation which has been signed by an adult under section 31(1) on behalf of a child who is 12 years of age or over and who is blind or unable to write. These paragraphs reflect the fact that the person proposing to carry out the activity will need to know when it is acceptable for them to proceed, in the light of the fact that, under section 37, an offence will be committed if the activity is not authorised by the relevant provision in Part 2.
97. Paragraph (c) relates to verbal authorisation by an adult under section 29(1). In such cases, there requires to be what the person proposing to carry out the activity considers to be an appropriate record of the authorisation by the adult. The person is also entitled to be satisfied that the removal is authorised in accordance with section 29(1) if the verbal authorisation bears from the record to be as respects the deceased adult, to authorise the activity (and to authorise the purpose in certain cases) and to have been expressed verbally by the adult in the presence of two adult witnesses. Again, this provision reflects the fact that the person proposing to carry out the activity will need to know when it is safe for them to proceed, in light of the offence provisions. What is or is not an appropriate record of the verbal authorisation is a matter to be determined by the person proposing to carry out the activity. “Appropriate record” is not defined for the purposes of this provision, to avoid being too prescriptive and thereby allow for advancing technology over time in relation to recording devices.

Section 36 – Organ or tissue sample removed before day on which section 27 comes into force

98. **Section 36** provides that an organ or tissue sample removed from the body of a deceased person during an examination carried out prior to the authorisation requirements of section 27 coming into force and held immediately before that day for any purpose set out in section 23(a) to (d) can continue to be retained and used for any or all of those purposes. The examination in question must, however, have had the characteristics of a post-mortem examination under the Act.

Section 37 – Offences: post-mortem examinations

99. Subsection (1) provides that a person commits an offence if that person carries out a post-mortem examination which has not been authorised in accordance with section 29, 30, 31, 32 or as the case may be 33, or removes or retains an organ at post-mortem examination without that removal or retention having been authorised in accordance with one of those provisions. It is a defence under subsection (2) for a person charged with an offence under subsection (1) to show that at the time of carrying out the activity, the person reasonably believed the activity to have been duly authorised in accordance with the relevant section under Part 2 of the Act.
100. Subsection (3) provides that a person guilty of an offence under subsection (1) will be liable on summary conviction to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or both. On conviction on indictment, that person will be liable to imprisonment for a term not exceeding 3 years, to a fine, or both.