



SARC Storage of Forensic Samples & the Human Tissue Act: FREQUENTLY ASKED QUESTIONS

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Background

The number of rapes and sexual assaults reported to the police in the UK and the prevalence indicated by the British Crime Survey are widely different. For each individual person there will be a variety of considerations that might either encourage or dissuade them to make a disclosure to the police.

Sexual Assault Referral Centres (SARCs) are organisations that provide services to complainants/complainer (Scotland) of sexual violence, including addressing their immediate forensic, health and psychological needs. Although most of the people seen at a SARC will attend following a report to the police, some complainants will have doubts as to whether they wish to make a police report. In response to this, many SARCs have extended their services to both groups, and this is encouraged by bodies such as the Faculty for Forensic and Legal Medicine (FFLM), NHS England and NHS Greater Glasgow & Clyde in collaboration with Police Scotland.

This 'self-referral or non-police reporting' component of the SARC service offers the complainant the opportunity to have addressed any medical needs such as emergency contraception, post exposure prophylaxis etc. in a timely fashion. It also provides the opportunity for a forensic examination, including an objective recording of the allegations, documentation of examination findings and the collection of relevant forensic samples, in an environment that would make evidence gathered admissible in any potential future criminal investigation. Furthermore, the professionals conducting these activities are able to provide information and advice regarding the choices available to the person so that they can make an informed decision about whether they wish to make a police report, either at the time or at some time in the future. There may be cases where the complainant agrees to anonymous forensic testing to assist the police in identifying whether a crime has been committed.

In other words, the service provides options and hands back some degree of control to the complainant.

During an examination by a forensic clinician, forensic samples may be taken which contain relevant material as defined by the Human Tissue Act 2004 (HT Act). This document provides guidance for SARCs in the form of (frequently asked questions) FAQs, on the statutory requirements of the HT Act in relation to licensing and consent.

Question 1.

In a self-referral or 'non-police' case, do forensic samples, taken with the consent of the complainant during the forensic medical examination, have to be stored on premises licensed by the Human Tissue Authority (HTA)?

ANSWER:

No. Provided that the forensic samples have been taken with the purpose of storing them for an agreed period of time whilst the complainant decides whether or not they wish to make a report to the police, these samples are exempt from licensing under the HT Act.

Question 2.

Why do the forensic samples taken as described in Q1 not come within the scope of the licensing provisions of the HT Act?

ANSWER:

Because the forensic samples are being stored 'for a criminal justice purpose' and are therefore subject to the Section 39 exemption of the HT Act.

With the exception of post-mortem examinations, Section 39(1) of the HT Act provides an exemption from licensing by the HTA for 'anything done for purposes related to: a) the prevention or detection of crime; or b) the conduct of a prosecution'. Detecting crime is defined in section 39(4) as including 'establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed, and the apprehension of the person by whom any crime was committed'. The HT Act does not limit the scope of 'anything done for purposes' to the police or to any specified group of individuals or departments, so the procurement and storage of samples by SARCs would be capable of coming within Section 39 as long as the intent is for the samples to be used for criminal justice purposes.

The HTA has advised that if the samples are taken on the basis they have the potential to be used for 'anything done for purposes' relating to the prevention or detection of crime, then they fall within the scope of Section 39. Therefore, samples taken by SARCs from a complainant do not need to be stored on premises licensed by the HTA.



Question 3.

What would be the status of forensic samples if a complainant with capacity is clear from the outset that they have no intention of making a report to the police?

ANSWER:

As part of the initial discussion when outlining the options to a complainant, the option of storage of forensic samples for an agreed fixed period should be discussed. This may also include the option of passing on anonymous information to the police. Where the complainant with capacity, as determined by the Mental Capacity Act 2005, makes an informed decision that they have no intention now or in the future of making a report to the police, then forensic samples should not be retained. Any forensic samples taken and kept in such a situation would NOT be exempt under Section 39 (1) of the HT Act and may constitute a breach of the HT Act.

Where the complainant is clear from the outset that they do not wish to make a report to the police but they do give their consent for anonymous testing, these samples can be processed by the police without a breach of the HT Act, as long as their use by the police is solely for the prevention or detection of crime or the conduct of a prosecution.

Question 4.

If a complainant initially agrees to forensic samples being taken and stored at a SARC but then has a change of mind, what should happen to the samples?

ANSWER:

As the samples are no longer being stored with a possibility that they may be used for criminal justice purposes, they are no longer exempt under Section 39 (1). Therefore, they should be destroyed in a secure manner as per the SARC policy.

Question 5.

What is the required consent process for the taking of forensic samples in self-referral or 'non-police' cases?

ANSWER:

Section 39 of the HT Act excludes the need for licensing but does not exclude the statutory requirement for consent to be obtained for use of relevant material for scheduled purposes.

Storage for a criminal justice purpose is not storage for use for a scheduled purpose under the HT Act. However, the HTA advises that the complainant is fully informed and their consent is sought for the storage of the samples. Local policies should include details of the information that the SARC self-referral complainant is given at the outset with regards to:

- a. Their options in terms of making a police report.
- b. The option of having forensic samples taken and stored by the SARC and information about the duration of the storage, including that at the end of this agreed period, in the absence of notification from the complainant otherwise, the samples will be destroyed in a secure manner.
- c. The option of having forensic samples taken and anonymous samples being forwarded to police for forensic analysis, in the absence of any personal information, to allow identification of the suspect (see FAQ 9 below). In this case, the complainant's DNA profile will be processed only to exclude their DNA from potential suspect DNA. Any samples processed will be disposed of when no longer required as potential evidence.

Confidentiality protocols must be agreed and in place between the SARC and Police to deal with situations where anonymous testing of self-referral samples results in the identification of a suspect. This must be made clear to the complainant prior to any samples being analysed.

The SARC should seek informed consent from the complainant prior to obtaining any samples. The HTA has suggested that the SARC consent form is signed by self-referral/non-police complainants and contains the following details:

- Personal information of the complainant; as a minimum, this should include name, age and contact details.
- A statement as to why the sample is being taken and retained, which must be for a criminal justice purpose.
- A statement as to how long the material will be retained, if no indication is received from the complainant that they wish to pursue a criminal investigation. If there are reasons for longer retention, this should be clearly documented and agreed by both the SARC and the complainant.
- A clear statement of consent signed and dated by the complainant (or if a signature is not possible, witnessed by a person who can properly represent the interests of the complainant).
- A statement to the effect that the sample will be destroyed at the end of the retention period.

Each sample should be clearly marked and retained in a secure environment and be auditable, with suitable cross referencing with any case papers and the consent form.



Question 6.

How long should SARCs store self-referral or 'non-police' case samples for?

ANSWER:

Advice from the Forensic Science Regulation Unit at the Home Office is that SARCs retain self-referral samples for up to two years. This is based on two main considerations:

- That the longer samples are stored without a complainant deciding that they wish to make a report to the police, the less compelling the argument that the samples are being stored for a criminal justice purpose (either the prevention or detection of crime or the conduct of a prosecution), calling into question the scope for them to fall within the licensing exemption of the HT Act under Section 39(1).
- The greater the time that elapses between the alleged assault and the eventual report to the police, the less likely the police are to be able to successfully investigate and find evidence to prove or disprove the allegations.

Whilst there have been many cold case reviews of previously unsolved rapes and murders, often involving samples that were taken decades previously, these have in most instances been regarding cases previously known to the police and so there had been an opportunity of gathering evidence close to the time of the crime.

Question 7.

Would products of conception being stored as a forensic sample in 'self-referral/Non-police cases' by a SARC be exempt from the Human Tissue Act 2004 as per Section 39(1)?

ANSWER:

As long as the sample has been taken with the purpose of potentially being used in a criminal justice process, for example to assist in the identification of an alleged assailant or to be used as evidence in bringing a case to trial, then it would be exempt from the HT Act as per Section 39 (1).

Question 8.

What should happen when a complainant lacks capacity to consent to a forensic examination?

ANSWER:

There will be situations where a person is temporarily incapacitated and a forensic clinician makes a decision that it is in the person's best interest (as determined by the Mental Capacity Act 2005) to undergo a forensic examination and have forensic samples taken. For example, an unconscious patient in an Intensive Care Unit suspected of having been a victim of sexual violence. In these circumstances, forensic samples may be temporarily stored at the SARC as a 'self-referral' case, even if the police are involved in the investigation, pending the person's own decision on whether or not to make a police report. Once the patient

regains capacity they can be approached, have the actions explained to them and be given the opportunity of requesting the samples are handed over to the police, kept at the SARC for an agreed length of time or destroyed immediately.

Question 9.

Can samples be used for DNA analysis?

ANSWER:

Section 45 of Part 3 of the HT Act sets out provisions in relation to the non-consensual analysis of DNA. It makes it an offence for a person to hold bodily material intending to analyse its DNA without consent, unless the results of the analysis are to be used for an excepted purpose.

If self-referral or non-police case samples are held on the basis that they may be used for DNA analysis at some point in the future, this would be to DNA-profile material belonging to the alleged attacker and to use that to either identify the alleged attacker or provide evidence against him. The HTA has advised that this may be considered to be storage of the material (and subsequent use of the results of DNA analysis) for the excepted purposes of 'the prevention or detection of crime' or 'the conduct of a prosecution', so the consent of the alleged attacker would not be required. However, this is on the basis that the material is being held with the decision of the complainant or pending their decision to make a police report, not on the basis that they have made a decision not to refer the matter to the police.

Where it is not or is no longer reasonable to believe that DNA analysis will be conducted for a criminal justice purpose, the s.45 exemption would not apply and it would be necessary for the SARC to dispose of the sample unless it seeks the consent of the suspect as well as complainant. Retaining the sample in these circumstances without the consent of those whose DNA is retained, would constitute an offence.

This guidance has been developed in consultation with The Human Tissue Authority.

For further advice on the consent process see FFLM document *Consent from patients who may have been seriously assaulted*

The HTA can be contacted for additional advice: enquiries@hta.gov.uk