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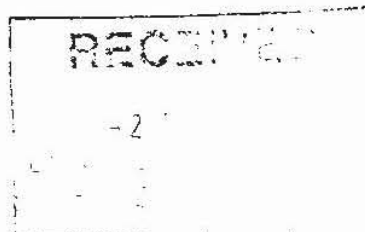
**FACULTY OF ECONOMICS, BUSINESS AND
LAW**

School of Marketing and Management
Armidale NSW 2351 Australia

Dr Josie Fisher

Telephone: +61 (0)2 6773 3706 Facsimile: +61 (0)2 6773 3914

Electronic Mail: jfisher@metz.une.edu.au



28 May, 1999

The Hon Gary Fenlon
Chair Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir,

Enclosed please find my written submission re the Transplantation and Anatomy Amendment Bill, 1998.

The submission draws on my PhD thesis (examined in 1997) *Organ Transplantation: The Ethics of Procurement* and a paper presented at the Third Annual Conference of the Australian Association for Professional and Applied Ethics, which was subsequently published in their refereed Conference Proceedings: 'Give and Let Live: Organ Donation in Australia'. In brief, I support the proposed Amendment.

Yours faithfully,

J. A. Fisher
Dr Josie Fisher

Consenting to Organ Donation

The current voluntary, posthumous organ donation policy fails to provide sufficient organs to meet the demand. For example, in the first ten months of 1998 there were 153 posthumous organ donors in Australia (who provided transplants for 506 recipients), while there are approximately 2,500 Australians on transplant waiting lists (Australians Donate, 1998; ACCORD, 1998). One way to solve the supply problem is to focus on increasing posthumous organ donation rates.

In their document *An Australian Code of Practice for Transplantation of Cadaveric Organs and Tissues* (1990:7) the NH&MRC point out that if it is known that an individual has consented to become a donor after death there is no *legal* requirement to obtain the consent of next of kin. If relatives object to donation when it is known that the deceased has consented, the relatives can *legally* be ignored. However, in *practice* the consent of next of kin is requested wherever possible and when individuals have made it known that they are prepared to donate their organs and relatives object, the wishes of the next of kin are *usually* respected.

In Australia then, it is the wishes of the family that usually determine whether or not organs are harvested from their dead relative. According to Pearson (1993:45) up to 60% of families refuse permission for organ harvesting from their dead relative who was a potential organ donor.

There are three reasons commonly given to explain the practice of requiring the consent of next of kin. First, so that medical staff can avoid legal liability; second, as a mark of respect for the wishes of the family; and third, to avoid bad publicity (Mathieu, 1988:34). I believe that it is only where an opt-in policy regulates organ harvesting *and* the potential organ donor has left no instructions about organ donation is it necessary to obtain the consent of the family. The appropriate response to the concerns of medical staff identified are then, first, to clarify legislation so that legal action cannot be taken if the donor has opted-in; second, adopt practices that are respectful of the feelings of the grieving family when they are informed that their relative has indicated that they wish to become an organ donor - there is no reason to suppose that these two aspects are mutually exclusive. Third, whether there is bad publicity will be a function of how successful public education campaigns have been in publicising the fact that it is the permission of the potential organ donor that determines whether or not organs will be harvested.

I claim that what is ethically required is the consent of the potential donor herself or himself. It is impermissible for the family to override the known wishes of the deceased with respect to organ donation. I sketch seven arguments which, I believe, support this position.

1. Donating bodies: A formal agreement is made with a university and '[t]his can only be done by the person themselves (relatives cannot make arrangements on someone's behalf)' (The Law Handbook, NSW, (1995:1193). If body donation is a matter for the individual, then why shouldn't organ donation be a matter for the individual?

2. Organ donation takes place in a health care context. Organ excision is characterised by ACCORD in their brochure as a '...normal surgical operation which involves some of Australia's leading surgeons.' *Patients* are required to consent to any medical treatment they receive (except in the case of children and those who are unable to consent for various reasons). If my consent determines whether or not I have surgery to remove my wisdom teeth,

I believe my consent should determine whether or not I have my organs removed following brain death.

3. According to the Law Handbook, NSW, (1995:1186), if the deceased has appointed an executor, the executor has the *authority and obligation* to arrange a funeral according to the directions in the will. If the executor is obliged to comply with the deceased's wishes concerning burial or cremation it is plausible to claim that the executor or next of kin have a similar obligation with relation to the wishes of the deceased's concerning organ donation.

4. A. Pearson, P. Hickson and G. Curry (1992:45) point out that
[t]he act of consenting to donation means that the embodied state of a loved one is to be violated for a stranger, an act which intellectually runs contrary to Western society's concept of the primacy of the family unit. In effect, [they say,] relatives are asked to subordinate family bonds to wider societal demands. Furthermore, the decision of family members to consent to organ donation may not be unanimous, and may remain a source of conflict and guilt for individual family members for years afterwards.

If this claim is correct, it provides another good reason to move the responsibility for making the decision about organ harvesting *away* from the family and to the individual concerned.

5. F.M. Kamm (1993:223) claims that 'persons have a property-like relation to their own bodies, but family should not automatically have similar property-like rights in a relative's remains.' She argues that if an individual has indicated either willingness to donate or unwillingness to donate the family ought not be able to override this decision. Kamm claims that a family does not have 'a moral right to control the [potential donor's] body superseding his own right simply because their feelings will be hurt if [the] organs are taken, any more than they may arrange for taking when he has explicitly refused' (Kamm, 1993:209). While I believe that there are problems associated with the concept of property rights in one's own body, I do not think that these problems undermine the key notion in Kamm's claim.

6. One of the common features of organ donation is that the death of the potential donor has often been the result of an unexpected accident. It is claimed that by permitting their loved one's organs to be donated the family can feel that some good is achieved in an otherwise tragic situation. But there is no reason why this aspect of organ donation would be lost by a policy of regarding the wishes of the deceased binding. Although their loved one is dead, the family could feel comforted by the knowledge that others will benefit from the generosity of their relative.

7. If I care more about not upsetting my family than I do about organ donation, I can refrain from opting-in leaving instructions that my family is to decide about organ donation.

The proposed amendment to the Transplantation and Anatomy Act would give legal effect to marking the organ donor space on drivers' licenses. If a potential donor dies who has marked their driver's license this should be taken as opting-in and if their organs are suitable for transplantation, then the organs should be able to be harvested without any further consent being required. I believe that the proposed amendment should be supported.

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