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The Research Director  
Review of Organ and Tissue Donation Procedures Select Committee  
Parliament of Queensland  
Corner George and Alice Streets  
BRISBANE QLD 4000

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Dear Ms Cawcutt

## **REVIEW OF ORGAN AND TISSUE DONATION**

Thank you for providing the Queensland Law Society with an opportunity to make a submission to the Review of Organ and Tissue Donation Procedures Select Committee.

The Queensland Law Society (the Society) is the State's peak representative body for Queensland solicitors and speaks for over 7,500 professional members. Many of the members of our Society deal with issues of testamentary intention and individual rights on a daily basis. On this basis the Society is well placed to provide comment on aspects of the reference of the Select Committee.

The comprehensive Issues Paper produced for the Review clearly demonstrates the breadth of considerations associated with Organ and Tissue Donations. The final outcome of the Review must be a balance of legal, ethical, moral and social considerations as well as good public policy. Achieving this goal goes beyond merely addressing legal issues.

### **The Legal Foundation of Organ Donation in Australia**

The common law foundation of the laws dealing with the remains of recently deceased persons was examined in some detail in the Australian Law Reform Commission Paper of 1977 on Human Tissue Transplants (the ALRC Report). That report found the state of the common law at the time did not established within it sufficient guidance to address the complexities of organ donation and called for the establishment of legislation to cover the field with respect to organ donation. In Queensland following the ALRC Report the *Transplantation and Anatomy Act 1979* (the Act) was passed.

Both the ALRC Report and the Act agreed that a person should have the right to decide within their lifetime whether their body or any part of it should be used for therapeutic donation. There is, however, discord relating to the level of involvement of the deceased person's next of kin in this process.

The common law is instructive of the role of the next of kin for a deceased person and the interaction of this role with the living wishes of the deceased for their body after death. The basic position is succinctly summarised by Lord Cottenham's golden rule in *Walworth v Holt* (1841) 4 My & Cr 619, 635; 41 ER 238, 244, at 681 where his Lordship said,

Although ... the body is not property in the usually recognised sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed.

Justice Young of the New South Wales Supreme Court expressed his view of ownership of the body in *Smith v Tamworth City Council and Ors* [1997] NSWSC 197 (14 May 1997) at 691

There are other passages in the authorities to similar effect. I will quote only one more from the judgment of a Missouri court in *Polhemus v Daly* 296 SW 442, 444 (1927) based on Corpus Juris, "while there is no right of private property in a dead body in the ordinary sense of the word, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial." This states the law in New South Wales.

Martin J said in *CALMA v. SESAR and ORS* (1992) 106 FLR 446 (1992) 2 NTLR 37 [1992] NTSC 17 (27 March 1992) at 9

In more modern times in *Robertson v Pinegrove Memorial Park Limited* (1986) ACLD 496 Waddell J held that the rule of the general law that an executor has a right to possession of the corpse of the deceased for the purpose of its lawful disposal by burial or otherwise extends to the ultimate disposal of the remains. "An executor has a right to possession of the ashes of a deceased who has been cremated to direct how they shall finally be disposed of and that right will be supported by a Court, particularly where the executor intends to act in accordance with the wishes of the deceased".

The common law has long recognised that the next of kin of a deceased (often as the executor) has a special and important role to play in dealing with a deceased person's remains.

### Competing Priorities

The discussion paper prepared for the Committee paints many disturbing pictures of the rates of organ donation in Australia and few are more telling than the statistic that nationally in 2007 only 37% of families volunteered consent for organ donation from their deceased loved ones.

The Society apprehends there is a significant problem associated with obtaining consent for organ donation and especially with the role family are asked to play in the existing legislation.

Interestingly, the ALRC Report proposed the following recommendation at Chapter 11, paragraph 144

*Adult donor's wish to be paramount:* A competent adult should have the right to give his body or any part of it for the purposes of transplantation or other therapy or for medical or scientific

purposes. His wishes should be paramount. No person (except for the coroner in a case falling within his jurisdiction) should have the power to overrule the decision.

*Death in hospital – inquiry of relatives:* Where a person dies in hospital or his body is brought into a hospital, the hospital itself, by a designated officer, should have the power to authorise removal of tissue for transplant or the other purposes described above after first making inquiry for the existence of consent and objection by the deceased, or, if none exist or can be ascertained, objection by relatives. The terms of any consent or objection of the deceased will have effect. The hospital's duty of inquiry should be to make "such inquiry as may be reasonable in the circumstances".

However, section 22 of the Act provides:

**22 Authority to remove tissue where body of deceased in a hospital**

(1) Subsection (2) applies if—

(a) the body of a deceased person is in a hospital; and

(b) it appears to a designated officer for the hospital, after making reasonable inquiries, that the deceased person had not, during his or her lifetime, expressed an objection to the removal after death of tissue from his or her body; and

(c) the senior available next of kin of the deceased person has consented to the removal of tissue from the body of the deceased person for—

(i) transplanting it to the body of a living person; or

(ii) use of the tissue for other therapeutic purposes or for other medical or scientific purposes.

(2) The designated officer may, by signed writing, authorise the removal of tissue from the body of the deceased person under the consent.

This provision clearly does not accord with the ALRC Report recommendations and implements an alternate system requiring the consent of the senior available next of kin to the removal of tissue. This effectively makes any form of living election of a person regarding organ donation in Queensland a nullity – unless separately and independently the next of kin is willing to respect the living wishes of the deceased. The national statistics would indicate that in the majority of circumstances in Australia this is presently not the case.

**Opt-Out / Opt-In Models**

After consideration of the available research on the issue of an Opt-Out model and consideration of the seminal ALRC Report, the Society is opposed to the establishment of a system of presumed consent to organ donation (the 'Opt-Out' model).

The Society's fundamental objection to a system of presumed consent to organ donation is that consent requires demonstration through positive conduct rather than inaction. At a fundamental level it is a

dangerous rationale for the State to adopt that its citizens are deemed to consent to actions that they may not have known about or ever considered simply by not actively objecting.

A further objection to a system of presumed consent is that it will derogate from active consent to organ donation – what incentive is there for a citizen to turn their mind to organ donation and the many issues this raises for families if the default position is donation?

The Society's third ground of objection to a system of presumed consent is that it is effectively transferring the decision about whether to donate organs or not onto the next of kin of the deceased, as presumably most people, through inaction, will be deemed donors. It is the Society's view that the current system of organ donation does little to respect the wishes of the deceased in relation to organ donation and this position is a further step away from 'the right to choose'.

A system of presumed consent may not have a significant increase in the numbers of organs donated if the existing role of the deceased family is retained in deciding whether to donate. A wider pool of potential donors may not translate into greatly increased donations but rather significantly more objections.

It is the Society's position that organ donation should be the product of a freely expressed consent and be respected by all others in accordance with the notion of *Adult donor's wish to be paramount* expressed in the ALRC Report.

### **Registration Processes**

The Society commends the system of a national donor register supported by binding written elections and increased public awareness.

It is the Society's view that an important part of providing organ donation consent is raising the issue with next of kin making them aware of a donor's reasons and wishes for doing so while they are still alive.

The Society has reviewed the form currently used by the national donor register and while the Society commends using such a document it appears to be confusing and overly administrative in appearance. It is the Society's view that making the election to donate organs after death is a decision which should be celebrated and should be reinforced as giving the 'Gift of Life' as is marketed in the Manitoba province of Canada.

### **Other Issues**

The Society sees there is a requirement for greater effort to be expended in raising the benefits of organ donation and of respecting a loved one's living wishes in this regard.

The Society supports the formation of a national organ and tissue donation body as it would enable a unified approach towards donation and greater utilization of resources. The Society understands that a large part of the success experienced in Spain is attributable to their central coordination and dedication of resources.

The Society supports the greater development of specialist resources for organ and tissue donation e.g. doctors, nurses, hospitals, surgeries, organ and tissue storage centres, to ensure that organs and tissues taken are used to their maximum potential.

A final issue which may be of interest to the Committee arises in the line of decisions in Queensland relating to taking spermatozoa from recently deceased men for the purposes of their female partner / wife conceiving children. This issue has been considered three times in Queensland and both *In the matter of Gray* [2000] QSC 390 and *Simone Baker and The State of Queensland* [2003] QSC 002, their Honours Chesterman and Muir respectively found that there were strong public policy arguments against the taking of sperm for the conception of 'fatherless' children. Conversely, the Hon Justice Atkinson came to the opposite conclusion *In the Matter of an Application by Elizabeth Ann Denman* [2004] QSC 070 arguing at page 7

No doubt it is preferable for a child to have not one but two parents, both of whom fulfil their parental responsibilities, but many children do not have that, and there are many children who do extremely well in one parent families. It cannot be thought that because the child will only have one living parent that will necessarily not be in its best interests, particularly when the alternative is for the child not to exist at all.

This dichotomy of views about public policy and the donated use of spermatozoa is a further complexity which arises in the context of organ donation. This issue would usefully be considered by the Select Committee, and ultimately by Parliament.

Thank you for providing the Queensland Law Society with the opportunity to provide comments to the Select Committee.

Yours sincerely



Megan Mahon  
**President**