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SOUTH AUSTRALIA

THIRTEENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO A PROPOSED UNIFORM ANATOMICAL GIFTS ACT

1972

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman*.

B. R. COX, Q.C., S.-G.

K. P. LYNCH.

J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

THIRTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA ON A PROPOSED UNIFORM ANATOMICAL GIFTS ACT

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We have considered the reference to us of the desirability of the enactment of a Uniform Anatomical Gifts Act and have the honour to report as follows:—

The whole of this area of law has now become of great importance because of organ transplants and it is for this reason that uniform legislation is, we think, desirable and we recommend its enactment.

By the early common law there was no property in or ownership of a dead body and this was reaffirmed by the Court of Appeal as late as *Williams* v. *Williams* (1882) 20 *Ch.D.* 659. However, the High Court of Australia held otherwise in *Doodeward* v. *Spence* 6 *C.L.R.* 406 and held that there was a limited property in a human body. Indeed there must always have been some power in this respect even if it is not a right of property *stricto sensu* because of the right a man has to direct that his body be cremated.

We have not dealt with the theological and other background problems to this legislation. Some legislation of this kind has already been enacted in England, France, Italy, Ontario, forty-eight of the fifty American States and the District of Columbia and the other two American States are to consider a uniform Anatomical Gifts Act during the current session of their respective legislatures.

Accordingly there has been very detailed canvassing of all these important aspects before such legislation was ever brought in and we feel that it would be a work of supererogation for us to do it all over again. On balance we feel that notwithstanding the objections to such legislation it is of such utility to the community that it ought to be enacted.

We have considered the following articles in the preparation of this report:—"The Procurement of Organs for Transplantation" by Louisell in 64 *North Western Law Review* 1970 *at pages* 607-627; "Organ Transplants" by David Foulkes in 118 *New Law Journal at pages* 486-488; "Legal Problems in Donations of Human Tissues to Medical Science" in 1968 *Vanderbilt Law Review at pages* 353-373 and "The Law Relating to Organ Transplants" by A. W. Burton in the *Medical Journal of Australia* of 6th September, 1969 *at pages* 473-482 and have also taken oral evidence from Dr. J. R. Lawrence, the Director of the Renal Unit, Queen Elizabeth Hospital, and from Dr. C. H. Manock, the Director of Forensic Pathology at The Institute of Medical and Veterinary Science. A copy of each of these articles and of the evidence taken is forwarded with this report so that the material which was before us will be available to you.

The present law regulating anatomical gifts is reasonably uniform throughout the Australian States, the basis of the various State Acts being the English Corneal Grafting Act, 1952. In Australia any person lawfully in possession of the body of the deceased may authorize the removal and use of organs for therapeutic purposes:—

(*a*) if the deceased either in writing, or orally in the presence of two witnesses during his last illness, had requested that any parts of his body be so used, and the person entitled to authorize removal has no reason to believe that the request was subsequently withdrawn (the "last illness" proviso does not apply in Western Australia where oral requests have to be evidenced in writing in any event);

(*b*) where there has been no request by the deceased he may authorize removal unless he has reason to believe that the deceased had objected to parts of his body being so used, or unless the surviving spouse or where there was no spouse the nearest surviving relative objects. (In Queensland and South Australia any relative may object, and in Tasmania the time for objection by either the spouse or relative is limited to six hours from the time of death. In Victoria where the latest legislation has been passed, a hierarchy of relatives has been established, so that the authorizing party must consult "the first in order of priority of the following persons who is available at the time of his making inquiry", (i) the spouse, (ii) an adult son or daughter, (iii) a parent, (iv) an adult brother or sister, (v) a guardian of the person of the deceased at the time of his death).

If the deceased's body lies in a hospital then authorization for the use of his organs rests with the person in charge of the hospital or his nominee and the above considerations apply.

Most State Acts now extend to the removal of parts of the body which can be processed to produce therapeutic substances and in all cases organs may be removed either for immediate use or for use at a future time.

One preliminary point remains to be dealt with. Both Dr. Lawrence and Dr. Manock adverted to the problem confronting transplant teams, in that within a very short time after the death of the donor, his organs become unusable unless removed from the cadaver. It therefore becomes imperative that the consent to use the organs should be obtained very soon after death in terms of immediacy measured in minutes, not in hours. Accordingly the recommendations made below should be considered in the light of that information.

We think the new legislation contemplated in this field should cover two general situations:—first where there has been an actual donation, either by will, donor card or by other informal means and secondly where although there is no donation made by the deceased, the body may still be used as a source for potential transplants.

I. *Where there has been an actual donation by the donor*

1. *Types of Donation*

There are a number of ways in which the donation may be made. In some States of the United States of America this can only be done by will. In others, and these seem to be the majority, it is done by a uniform donor card, and in some other States it can be done in an informal manner by any request properly proved which was made during the deceased's last illness. In other States of Australia any informal request properly proved, made orally or in writing is sufficient for this purpose and it would seem to us that this is the correct answer. (The question of the enforceability of a donation made by way of a uniform donor card is considered in paragraph 7.)

2. *Who can make such a donation?*

This varies in various places: the test in some cases being the age of majority; in others the equivalent of testamentary capacity and there are several other lesser tests. We recommend that any person over the age of sixteen years and who is of sound mind should be able to make such a donation.

3. *Who are the proper donees?*

This is a more difficult question because of the speed with which such transplants have to be carried out after death. It raises four problems:—first whether the naming of a donee will not in many cases defeat the value of the gift because the particular donee may have no need for it at the time. Secondly, whether the attending physician or the hospital where the donor dies should be considered to have full authority to remove and use the organ so donated. Thirdly, the allocation of transplant resources which we deal with later in this report. Fourthly, whether any donee as well as any donor ought to be excluded because of possible interference with the processes of the law. The evidence of Dr. Lawrence and Dr. Manock deals (*inter alia*) with this issue. The difficulty is that not all hospitals are properly equipped for the removal and storage of organs.

We think it proper to recommend that it is not necessary to the validity of the gift that a donee be specified, but that a donor has power to specify a donee if he or she so desires. As to whether some hospital or other donees ought to be excluded, we deal later in this report.

4. *Whether there should be a requirement of delivery to a donee?*

This is of importance again because of the very short time in which the transplant can be made. We think that it should not be a condition precedent to validity that there is a requirement of delivery of the request to a specified donee. We think that the possibility of a registry of donor cards being set up so as to facilitate with the speed required the identification of such a donation should be explored.

5. *Revocation of a donation*

We think that a donation should be capable of revocation orally in the case of oral revocation and by communication of revocation to the registry in such cases as the donor has already registered the gift with the registry.

6. *Conflicting gifts*

It is, of course, possible for the donor to make more than one disposition, some of part of his body and some of the whole. The general rule has been that the whole includes the part, but in some States it is a question of which is the later of the two dispositions. This is purely a question of policy. We would incline to think that the "whole includes the part" rule is probably the easier one to operate but we simply mention the problem as one for a policy decision.

7. *Rights of donee*

It will be necessary to specify the right of the donee as against the executors to assert the donation and this requires

in its turn a consideration of the right of the surviving family or the executors to object. This again in the last resort is a question of policy.

We ourselves think that the right of the donee should prevail as it now does in all States of Australia, New Zealand and the United Kingdom except in cases of over-riding public policy such as autopsies, coroners' inquests, police investigations and similar reasons why such gifts should not be allowed. Dr. Manock in his evidence made what the Committee considered to be a useful suggestion in this regard, namely that if it should be thought that some relatives should have the right to object to a donation taking effect, then we recommend that the consent of such relatives where they are agreeable be capable of endorsement on the uniform donor card to prevent loss of time after the death of the donee.

8. *Conflict of laws*

Clearly there is a problem in this area in that the law of the domicile at present governs the right of a grant, except where the deceased leaves land within the jurisdiction, and the deceased may well die domiciled in a State or place other than South Australia even though he does in fact die here. It will be necessary in our view to enact that the fact of the death in South Australia is sufficient to carry the jurisdiction. Then the deceased may have made one or more disposition in several States and again it will be necessary as a matter of policy to determine which of these take priority and for this reason it would be valuable in our opinion if it were possible to arrange for all six States and the two major Territories to have complementary legislation.

II. *Where there has been no donation before death*

Where there has been no donation before death, the present position in South Australia is as set out earlier in this report, the surviving spouse or any surviving relative being able to object to any proposed donation. In England there have been a number of private bills providing that permission be given by Statute for the donation with or without the consent of interested parties. We recommend that consent for such a donation must be obtained from the nearest surviving relative of the deceased within the jurisdiction, where this is possible, the hospital not having to wait until death has occurred, but able to seek consent before death, when it will obviously ensue. However, where a reasonable attempt to contact relatives is unsuccessful, provision should be made for consent to be given by a statutory body because of the very short time involved. We therefore recommend the establishment of a tribunal headed by the Medical Superintendent of the hospital, or his deputy, having the power to nominate a person who would then be vested with the right of giving consent to the donation, but who would be ultimately responsible to the tribunal for his decisions, and capable of replacement by the tribunal. The individual would have the right to refer any doubtful cases back to the tribunal for a decision. To avoid any subsequent legal complications we also recommend that provision be made for obtaining the City Coroner's consent where the donor has not died in hospital of a terminal illness. In such a case the Coroner should have the power to ask for a report on the organ from the transplanting surgeon if he should deem it necessary. To avoid

the problem of an unreasonable refusal by an unqualified country Coroner, we recommend that the City Coroner should be able to give consent if he considers the country Coroner's refusal unreasonable.

There are a number of other factors to be considered in enacting this Statute which do not fall into either of the above two categories, or are equally applicable to both.

1. *Definition of "Death"*

This is the most difficult matter of all because medical opinion differs on this subject. It has troubled many commentators that the desire to obtain tissue for the use of the living may cause a definition of "death" which would allow death to occur at an earlier time than would otherwise have happened, or the cessation of attempts to prolong the life of a person where such attempts might otherwise have been made.

We feel that no useful purpose would be served by legally defining when death has occurred, or by providing a set of rules by which this may be determined and accordingly make no recommendation on this subject. We do however recommend that the person making the decision as to the occurrence of death should be one attending the putative donor as a medical adviser and should not be a member of or professionally connected with the transplant team.

In making this recommendation we bear it in mind that the time of death may be of importance in matters other than transplantation, such as the end of a period after which taxation does not apply and matters of family sentiment.

2. *Gifts by living donors*

These raise somewhat difficult problems for example in the criminal law relating to maiming which we have not considered in depth and if it is desired to proceed with this aspect of the matter, it may be thought proper to refer it back to the Committee for further consideration later.

3. *Victims of criminal acts*

We recommend that organs from victims of criminal acts should not be used for transplanting unless the consent of the Coroner be first obtained, whether or not a donor card or other form of gift has been executed by the victim. Dr. Manock's evidence makes it plain that in practically all cases where criminal proceedings may possibly ensue, it would severely hamper the administration of the criminal law to permit transplants at all. The Coroner should have the power to require from the transplanting surgeon a report on the organ being used if consent is given. This would necessitate the Coroner's consent being obtained before any victim of a road accident could be used as a transplant donor, since the time required to ascertain the legal responsibilities of parties to the accident would obviously be too great to allow this process to be completed before using the body of a victim as a donor. For this reason, the suggested formation of a flying squad of doctors visiting accident scenes to remove organs from accident victims at the scene for potential transplant operations may well prove impracticable as appears from Dr. Manock's evidence.

If there is the slightest possibility of a criminal prosecution following the death then permission to transplant should not be granted.

However this last is essentially a policy decision and we make no recommendation on it, although obviously it would be essential that the donor be positively identified before any of his organs could be used.

We recommend further that any legislation should provide as does the Victorian Act, that a person removing parts of the body under this Act should not cause any damage to the body which is not necessary for the removal of the parts concerned.

4. *Specification of hospital donees*

It is obvious from the evidence of both doctors that such transplants should be carried out only at proclaimed hospitals which have the proper resources for this purpose.

5. *Allocation of transplant resources*

Again we feel that this is probably a matter for the administration tribunal. Only one out of a number of people can have the organ and the allocation of scarce resources is, we feel, not a matter for one doctor or one hospital. This again in the last resort is a matter of policy.

6. *The application of the Criminal Law*

To avoid complications arising from possible charges of assault being laid against the transplant team by dis-satisfied relatives of the donor or donee we recommend the enactment of a section making all actions of the transplant team lawful if carried out in accordance with the proposed Act.

7. *Regulation making power*

The very fast advances made in medical technology in the past ten years would indicate that up-dating of any legislation covering this sphere would frequently be necessary. To alleviate this problem we recommend that a power to make regulations be given by the Act to specify from time to time the organs or tissues to be taken and the procedures involved in taking, recording, storing and using them.

We accordingly recommend the enactment of legislation bearing in mind the factors we have enumerated and we forward, as we have said, copies of the relevant articles which we have considered and of the evidence of Dr. Lawrence and Dr. Manock.

We have the honour to be

HOWARD ZELLING

K. P. LYNCH

B. R. COX

JOHN KEELER

The Law Reform Committe of South Australia