

DIALYSIS AND TRANSPLANTATION WORKSHOP
MT ELIZA, VICTORIA, 7-8 MARCH 1977

LEGAL POSSIBILITIES

Hon Justice M D Kirby

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Chairman of the Law Reform Commission

A B S T R A C T

Mr. Justice Kirby is Chairman of the Law Reform Commission of Australia. That Commission's working paper on Human Tissue Transplants raises a great variety of issues relevant to the Workshop. The paper excludes consideration of the more adventurous, future developments of transplantation. It concentrates on three issues which are amongst the most vexed faced by the Law Reform Commission on this subject. The first relates to live donations. The protection for non-competent persons, including children and the avoidance of conflicts of interest are explored. Secondly, the paper deals with cadaver donations. The simplification and modernization of consent of relatives etc., and of the Coroner is raised. Thirdly, the paper deals with the desirability and contents of a definition of death. It proposes an approach which extends permitted conducted rather than one which imposes limiting restrictions. Finally, the paper deals with machinery questions, including a national register of donors. The paper calls for comments and criticisms and for interdisciplinary participation in law reform.

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INTRODUCTION: THE LAW REFORM COMMISSION

1. I am grateful for the opportunity to take part in this Workshop. It is another example of interdisciplinary law reform. Is there any doubt that, in preparing new laws, to meet new situations, legislators are well advised to secure the assistance of a range of expertise and public ventilation of ideas? One vehicle for doing this is the Law Reform Commission. By our use of consultants and by attending seminars such as this, we can inform ourselves, and ultimately the Parliament, upon expert views and empirical data. But we can also test suggestions for reform in the forum of the Australian community. Our working papers are designed to do just that. They are not the last word on the subject. We invite comment, indeed criticism. The views put forward at this stage are tentative only. We come here not to convince, but to learn.

2. There is an inevitable tension between science and technology and law. In a time of great technological change, the ability of the law to cope effectively with altered circumstances, diminishes. Our present age has exposed our society and our law to what has been called "future shock" or a kind of "technological jet lag". Nowhere is this problem more in evidence than in the Commission's Reference on *Human Tissue Transplants*. But that is not the only Reference which demonstrates the point. We are not an ad hoc committee set up to solve this particular problem only. We face like problems for the law in connection with the development of computers and the impact they have on our privacy. Mass means of communication make the old methods of handling defamation actions, inappropriate. There are many such examples. The point is that our task should be to suggest laws that are relevant to medical science and surgical techniques. All too often, the present laws are irrelevant, potentially dangerous to the medical

profession or positively obstructive. The Terms of Reference received from the Attorney-General are limited to suggesting laws for the Australian Capital Territory. Under the Constitution, the Commonwealth and this Commonwealth body have no wider powers. Nevertheless, our statute calls the Commission's attention to the need in some areas for uniform laws throughout Australia. Commissioner Russell Scott, who has taken the carriage of this Reference, has been having discussions with relevant State officers in the hope that this exercise can have a national utility. The report will be accompanied by draft legislation which, if desired, could serve as a model for amendments to State laws.

TISSUE DONATION BY LIVE DONORS:

3. My subject is "legal possibilities". Rapid developments in immunology make this a daunting topic for a lawyer. It is important that these questions should be considered by lawyers, indeed by society. They cannot be left to a narrow group of scientists or experts who, with all goodwill, may be blinded by the technical advances they are achieving, from seeing the social implications of what they are doing. It will be sufficient to leave the problems of genetic planning to a future workshop. For present purposes, I propose to concentrate on transplantation of specific organs of the kind referred to in the working paper. We will leave transplants of embryos, foetal tissue and the like to the future.¹

4. At present none of the Australian States or Territories has legislation dealing with live transplants. It is an area of possible legal change which immediately assumes importance in any legal review of this subject. The common law is inadequate. The Law Reform Commission has suggested that the position of live transplants should be clarified by specific legislation.² This should provide for and regulate the removal of tissue from live donors. Our law has traditionally protected the disadvantaged: children, mental incompetents and so on. Such protection will be needed here. The working paper suggests that a live donor should generally be a mentally competent adult.³ Consent should be written, informed and given free from duress and only after independent medical advice.⁴ The concept of "informed consent" has, of course, inherent difficulties. Nevertheless, there are important values to be protected here. It is important

1. See The Law Reform Commission, Working Paper No.5, Human Tissue Transplant (hereinafter referred to as "Working Paper") paras.12-15.

2. Working Paper, para. 41.

3. Working Paper, para. 42.

4. Working Paper, para. 43.

to ensure, so far as possible, that a donor has full knowledge of the nature and possible outcome of his donation. Consent in the law is traditionally negatived by duress or undue influence. But these are forces which can arise within families or amongst friends and others. That is why it is proposed that independent medical advice should be interposed between a proposed donation and the taking of tissue.

5. Our law has traditionally sought to resolve conflicts of interest, i.e. situations in which those involved cannot be fully independent where they ought because they owe conflicting duties. That is why independent medical advice is proposed from a medical practitioner not involved in the contemplated transplant. It is realized that there will always be pressures on a potential donor. We do not deceive ourselves that a necessarily short interview will remove these pressures or even ensure that a donor understands his actions. The minimization of pressures and the fair balancing of interests will always remain, in fact, a professional obligation of the conscientious medical advisor. But the law's duty is to give clear guidance to all involved in the process and to state the standards of society. This is not a sop to proper procedures. It is a statement of important principles.

6. The most vexed issue in live donations is the use of tissue from children. Different points of view have been expressed. They range from the opinion that tissue should in no case be removed from a child for transplantation to the view that parents should be able to donate the tissue of their children on their behalf. Submissions have pointed out to us that different considerations may apply to regenerative and non-regenerative tissue. At this stage, the Commission is inclined to take an intermediate approach. It recognizes that the donation of tissue by a child will generally arise in tragic circumstances involving, potentially, the death of another child in the family group. In the working paper it has been suggested that as a general proposition no person below the age of majority (now generally 18) should have capacity to consent to removal of non-regenerative tissue.⁵ Nor should parents of a minor or other incompetent, have power to consent on their behalf.⁶ To cover the exceptional family case, the Commission tentatively proposes that the removal of non-regenerative tissue could be authorized an informal independent tribunal or by a judge. The ground proposed is that, on balance, the proposed removal is "*in the interests of the donor*".⁷ In some family situations, we believe, that test could be

5. Working Paper, para 46.

6. Working Paper, para 47.

satisfied. This is a tentative solution. The practicalities have to be further explored with you. In the case of regenerative tissue, there may be a case for authorizing parental consent. But should it be to the whole age of 18? Is it acceptable today that parents can speak on behalf of a youth of say 17? Where the child can appreciate the nature of the removal of tissue, his wishes should surely be taken into account.

CADAVER TRANSPLANTS

7. In Australia, the majority of transplants presently carried out are, I understand, from cadavers. It is particularly important that the law should keep pace with medical developments in this field. It should provide an adequate framework for the removal of tissues from cadavers. The Australian Capital Territory, the immediate focus of our attention, at present has no legislation on the subject. Each State has legislation. Although approaches differ, there is generally a provision that tissue may be removed after consent by the donor or consent (or absence of objection) by surviving relatives. Is this approach adequate? Should the law provide that there should be a right to use tissue from all bodies in the absence of prior objection by the deceased? Various submissions have been received on this. In our working paper we have suggested a modification and clarification of existing laws.

- (i) Transplants should be possible after a donation by the deceased person.
- (ii) Such donation should not be capable of being overridden or vetoed by any other person, except a Coroner in appropriate cases.
- (iii) Provision should be made for use of tissue by a hospital after an authorized officer has made enquiries for the existence of objection by the deceased or by surviving relatives.
- (iv) To overcome existing uncertainties about the "person in lawful possession" of a body, we propose that where a person dies in a hospital, it should be the hospital authorities who have the right to authorize the use of the body. ⁸

Existing Australian laws concerning the necessary enquiries to be made of

8. Working Paper, para. 89.

surviving relatives differ. Problems can arise in determining the extent to which enquiry should be made. The South Australian law requires that inquiries "as may be reasonable in the circumstances" should be made. This appears appropriate. Those relatives to be consulted should be limited to close relatives.⁹ In the absence of a spouse, the parents, children, brothers or sisters would suffice. It should be sufficient for a hospital to ascertain the views of the first available relatives.¹⁰ The Commission has also proposed the modernization of procedures to obtain the Coroner's consent.¹¹

THE DEFINITION OF DEATH

8. Probably the most important and difficult question in our review relates to the determination of life and death. There are several ways in which the law could deal with this subject in transplant legislation.

- (i) First it could prescribe a statutory definition by reference to brain function to apply in all circumstances or, at least, in relation to cases of transplantation. Such a definition could include detailed criteria or be limited to a brief definition as enacted in Manitoba and some States of the United States.
- (ii) Alternatively, the view could be taken that a statutory definition is not desirable and that the decision should simply be passed to the medical profession, without guidance or criteria for them or for the law.

The issue before the Commission is whether it is desirable for legislation to contain a definition of death in this context and to do so by reference to brain function.¹² Would it eliminate existing legal confusion? Would it recognize acceptable current practice? Would it, in this vital area, guide the medical profession? It could avoid the perils of rigidity by being framed in terms of authorization rather than requirement.¹³ This is not an issue that should be avoided by the law. Questions of life and death have traditionally greatly concerned the law because they are crucial to human experience.

A NATIONAL REGISTER?

9. The Commission is specifically directed by its terms of Reference to consider the need for a national register of donors. Such

9. Working Paper, para 89(d).

10. *Ibid.*

11. Working Paper, para 89(g).

12. See Working Paper, para 77.

13. Working Paper, para 77(h).

a register could be prescribed in legislation or could be a facilitative procedure set up on an administrative basis, as is the case with the existing register of potential recipients of kidneys. The working paper recommends against the establishment of a national register of donors.¹⁴ We do so on the basis that the practical disadvantages of a register would outweigh the benefits. Apart from certain legal problems in the establishment of a national register by a Commonwealth statute, administrative difficulties and expense in maintaining a 24-hour up-to-date register which provided instant access and yet ensured the privacy of potential donors would be very great. Furthermore, under the scheme of donation which the Commission has at this stage recommended, a register would be merely one way of indicating a wish to donate tissue. If however, the Commission is convinced of the appropriateness of a scheme whereby all bodies are available in the absence of objection by the deceased, perhaps a register of objections would be of greater importance.

10. Although we have recommended against the establishment of a national register, this does not mean that we see no value in existing and suggested methods of making ones wish to become a kidney donor known. Even if schemes such as kidney donor cards and driving licence endorsements do not result in a substantial number of potential cadaver donors having made their wishes known there is nonetheless value in such schemes. They increase community awareness and acceptance of the need for tissue for transplantation.¹⁵ If people have gone to the trouble of completing a card or similar form, then this evidence of their wishes should be sufficient.

CONCLUSION

11. These are only some of the contentious issues raised by this Reference that call for sensitive, informed treatment by the law. The Commission is appreciative of this opportunity and others to work closely with the medical profession on this subject. It is to be hoped that it is only the first of many interdisciplinary tasks by which the Commission, working with medical and other experts can help to haul the Australian legal system into the modern age.

14. Working Paper, para. 108.

15. Working Paper, para. 108(f).