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AUSTRALIAN REORT ON TISSUE TRANSPLANTS

In the November 17, 1979 issue of the JOURNAL certain criticisms were expressed of proposals for new laws on human tissue transplantation in Australia. The proposals are contained in a report of the Australian Law Reform Commission, Human Tissue Transplants (ALRC7) 1977. The proposals were formulated after the most thorough national discussion of the issue that has ever been afforded in Australia to a medico-legal topic. The Commission was assisted by a team of medical, philosophical and religious consultants of different viewpoints. Public hearings were held in all parts of the country. The issues were debated on television and by radio before audiences of a million and more. The BRITISH MEDICAL JOURNAL described the report as "the latest in an outstanding series". It is to be translated into Spanish, for use throughout South America. It is difficult to remember the last legal transplant from Australia to that Continent. The leader in THE MEDICAL JOURNAL OF AUSTRALIA, 19 November 1977, praised the demonstration of the inadequacies of present State laws and called for the introduction of new "and preferably uniform legislation" as both necessary and urgent.

Legislation, substantially based on the report, has now been enacted in the Capital Territory and Queensland. It is under consideration by a special committee in Victoria and by Health Ministries in other States. Obviously, the report reaches conclusions on sensitive issues upon which people of goodwill can reach different opinions. It would be a tragedy if the prominence given in the JOURNAL to three voices of criticism were to curtail the progress towards reformed laws which clarified the legal position of doctors and hospitals and sanctioned, with law, many current practices which are, at least in some cases, of dubious legality.

DEFINITION OF DEATH

Two Definitions. The first of two substantial objections relates to the suggested definition of death and the provisions surrounding the operation of a proposed new notion of "brain death". It is objected that proposed legislation includes a definition of death in terms both of irreversible cessation of all function of the brain and of the circulation of blood. There is no substance in the criticism that this would lead to a popular belief that there may be two kinds of death. This possibility was carefully considered, publicly debated and specifically answered in the Commission's report. It was there pointed out that, although it might be accurate to determine death exclusively by reference to cessation of brain function, it was clear that in most cases death would in practice continue to be certified or determined according to traditional respiratory-circulatory-cardiac criteria. The number of cases in which there was a need and facilities for the "brain death" criteria would be relatively few and properly so. An attempt suddenly to impose a new absolutist "brain death" definition would be likely to cause confusion and uncertainty. The aim of the reformed law should be to clarify, regulate and sanction the best current professional practice.

Detailed Criteria. It is also objected that the definition proposed did not contain detailed criteria for determining brain death. For reasons stated in our report, we considered that this would be thoroughly undesirable. Medical practitioners, but not only medical practitioners, expressed

statute. Precedents for such legislation had existed in Europe and the United States. It was pointed out that medical knowledge is constantly advancing and changing with such rapidity that scientific criteria, embedded in a statute, could well become outmoded or obsolete, yet remain legally compulsory. The electro-encephalogram, a statutory necessity in a number of European laws, was cited as a good example of how medical science can outstrip lawmakers. In October 1976 the British Royal Colleges expressed the view that the E.E.G. was not always necessary for a diagnosis of brain death. The very difficulty of getting an initial consideration of transplant laws provides a caution to those who expect Parliaments to be willing to modify laws of this kind speedily, as medical science suggests changes in respect of detailed criteria. A similar view to that taken by the Australian Law Reform Commission was expressed by the United States Commissioners on Uniform State Laws, reporting on the same subject in 1978. Explaining why their model statute was silent on the acceptable diagnostic tests and medical procedures, the U.S. Commissioners said that the purpose of the Statute was to address "the concept of brain death not the criteria used to reach the medical conclusion that brain death had occurred". Like their Australian counterparts, the U.S. Commissioners expressed the expectation that the medical profession would formulate, over time, the acceptable practices, taking into account new knowledge of brain function and diagnostic equipment available.

Preconditions. So far as the criticism that the proposed legislation placed unnecessary restrictions on practitioners, in requiring two specialists to certify brain death, it is notable that when the JOURNAL described the report in November 1977 it rightly recorded that the medical consultants advising the Commission agreed generally that the diagnosis of cerebral death "could not be made except by a specially qualified doctor". It was furthermore recorded that in Australian transplant practice, the preference to have the diagnosis of cerebral death made by a neurologist or neurosurgeon where cadaveric organ donation is involved, is simply reflected in

then, particular and additional protections are suggested which largely follow current Australian practice. The purpose of this is to engender community confidence concerning the use of the brain death criterion. Each of the articles critical of the proposals fails to take account of the fact that, as alternative to neurological or neurosurgical qualifications, the Commission and the draft legislation envisaged certification of brain death by a medical practitioner of five years' standing who "has such othe qualifications as are prescribed" (draft legislation, cl.28(2); Report, para. 136). This would permit a wider range of relevant expertise to be determined.

Conflict of Interest. So far as the possibility, mentioned in one comment, that one of the medical practitioners might be in a conflict of interest situation, being both a member of the transplant team and one of the doctors certifying brain death, the report made it plain that neither of the two medical practitioners certifying brain death "should participate in any transplant involving tissue of the deceased". (p.xv).

DONATION BY MINORS

There is more substance in the comments on the provisions concerning donation of non-regenerative tissue by legal minors. That this is a thoroughly debatable subject is evidenced by the fact that, within the Law Reform Commission itself, there were differences of view. Two Commissioners (Sir Zelman Cowen and Mr. Justice Brennan) dissented from the majority opinion on this topic. It should be emphasised that they agreed in all other recommendations including those concerning the definition of death, the lack of detailed criteria and the procedural safeguards just discussed.

The full protections proposed by the Commission are not adequately represented in the articles under reply. I will therefore list them :

1. The parent of the child donor must consent in writing.
2. The transplantation must be to the body of another member of the family of the child or a relative of his.
3. There must be medical advice to the effect that a

4. There must be medical advice regarding the nature and effect of the removal and the nature of the transplantation.
5. The child donor must have the mental capacity to understand the nature and effect of the removal and the nature of the transplantation.
6. The child donor must have agreed to the removal of the non-regenerative tissue.
7. A committee appointed by the Minister comprising a Judge, a medical practitioner and a social worker or psychologist should consider whether the transplantation should go ahead.
8. Only if the committee is unanimous and is, in all the circumstances, of the view that it is in the interests of the child that the removal of the non-regenerative tissue should take place, should authority for transplantation be given.

It is realised that some thoughtful medical and other commentators take an absolutist view about child donations of non-regenerative tissue. They cannot concede a case in which, even with the protections proposed by the Law Reform Commission, transplantation should ever be permitted or would ever be in the interests of the donor. Whilst that view is open to legislators (and was favoured by a minority of the Law Reform Commissioners) the majority took the view that with the protections proposed, an "escape" provision should be afforded by the law. Basically, it was felt that in a family crisis of the kind envisaged, the law should not stand inflexibly in the way of a family solution, which was desperately necessary, had been medically considered, was knowingly approved of by all the actors and was sanctioned by a committee headed by a Judge. The age of majority is, of necessity, an artificial line. Cases of legal "children" of 17 years knowingly consenting to a donation to a sibling who might otherwise die but prevented from doing so by an inflexible law, persuaded the majority of Commissioners to the view that, with proper protections, donations of non-regenerative tissue by a legal minor should be countenanced and not forbidden by law in every case.

The competing views have been put to many audiences both before and since the report. Typically, whether the audience comprises medical practitioners or laymen, there is a division of strongly felt opinion. Equally typically, the point of view of the majority is generally favoured by a significant majority of the audience. No scientifically sampled public opinion poll on the subject has been constructed. In the nature of things it would be difficult to test such a complex issue. However, it is suggested that if all of the protections proposed by the Law Reform Commission are observed, chances of abuse would be miniscule. It goes without saying that unless all of the preconditions are met, no transplantation of a non-regenerative tissue may be lawfully performed from a living minor.

It is of interest to note that since the Australian report was published, the Council of Europe model code of Rules for removal, grafting and transplantation of human substances, adopted by the Committee of Ministers on 11 May 1978 after lengthy debate and recommended for enactment by the legislators of Europe, takes a view similar to that adopted by the majority of the Australian Commissioners. Article 6.2 envisages permission "in a special case, justified for therapeutic or diagnostic reasons, if the [legally incapacitated] donor, having the capacity of understanding, has given his consent, if his legal representative and an appropriate authority have authorised removal and if the donor and the recipient are closely genetically related".

CONCLUSIONS

1. It is preferable, at least at this stage, to adopt the concept of "brain death" in Australian legislation. It would be confusing and counterproductive either to undermine reliance on the traditional criteria for determining death (cessation of respiration and circulation) or to incorporate in law detailed diagnostic tests and medical procedures. The latter should be formulated by the medical profession taking into account available knowledge of brain function and equipment available from time to time.

2. The requirement of independent, specialist assistance in diagnosing "brain death" simply follows current Australian practice. Critics have overlooked the facility, proposed in the model Act, for prescribing appropriate qualifications in addition to specialisation in neurology or neurosurgery. The requirement of special qualifications rests on the need to engender public and professional confidence and to avoid suggestions of conflict of interest and duty.

3. The issue of donation of non-regenerative tissue by minors is a controversial one. Criticism of the model Act may have failed to give sufficient weight to the very detailed protective measures required. It may also place undue confidence in upholding, absolutely, an arbitrary legal age of majority. Whilst the law should generally protect children, there may be some family predicaments in which the law has no business to prevent an informed and agreed family solution which is supported by medical practitioners and approved by an interdisciplinary committee headed by a judge.

4. The model Transplant Act deserves the support of the medical profession. It was developed in the closest consultation with the profession and the community. There are several other similar topics awaiting like interdisciplinary attention. It is important that discussion of such issues should proceed in a constructive way. Undue prominence should not be given to simple differences of opinion upon issues that have been thoroughly and nationally discussed. Otherwise, the end result may be that lawmakers will be frightened off and opportunities for significant law reform will be lost or long postponed.

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* Mr. Justice Kirby is Chairman of the Australian Law Reform Commission and has written this comment with the assistance of Mr. Russell Scott, former Commissioner. In 1976-7 Mr. Scott was Commissioner in charge of the Human Tissue Transplant project. He is at present resident in London.

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