

Call for views – Human Tissue (Authorisation) (Scotland) Bill

Response from the Faculty of Advocates

What do you think are the key strengths and weaknesses of the proposals to introduce 'deemed authorisation' for those who have not made their wishes on organ donation known?

We have no specific comments to make on strengths and weaknesses but our general observations on the Bill are set out below.

What do you think are the key strengths and weaknesses of the plans for authorisation of pre-death procedures?

We have no specific comments to make on strengths and weaknesses but our general observations on the Bill are set out below.

Do you have any other comments to make on the Bill?

There are 3 specific areas on which we wish to comment –

1. Deemed consent and the duty of Scottish Ministers to promote information and awareness

The policy of deemed consent can be justified on the basis that adults with mental capacity, who have been ordinarily resident in Scotland for 12 months or more, can be assumed to know of the policy and its effects, so long as effective steps are taken to make the policy widely known. Accordingly, if adult residents do not agree, they can opt out, and if they chose not to opt out, consent can be assumed.

Section 1 of the Bill amends Section 1 of the Human Tissue (Scotland) Act 2006 to place a duty on Scottish Ministers to promote information and awareness of *inter alia* how deemed authorisation may be given.

However, the Bill does not specifically require information-raising campaigns to be carried out at regular intervals. In the absence of regular information-raising campaigns it is far from obvious that individuals coming from non UK countries would naturally become aware of the policy of deemed consent simply from living in Scotland for a period of 12 months. Accordingly, the justification for deemed consent based on 12 months' residence in Scotland, and by implication deemed knowledge of the policy, requires some underpinning in light of the modern mobile population.

By way of comparison, and no doubt with this consideration in mind, in Section 2(2) of the Human Transplantation (Wales) Act 2013 the Welsh Assembly married a policy of deemed consent based on 12 months residence in Wales with a duty on Welsh Ministers to promote a public information campaign on deemed consent at least every 12 months.

If deemed consent based on 12 months residence in Scotland is to be considered fully justifiable, we suggest that section 1 of the Bill should contain a provision requiring that campaigns to raise awareness should take place at least every 12 months.

2. Residence, deemed consent and individuals moving between UK countries

By virtue of section 7 of the Bill, deemed authorisation will not apply to a person who was not ordinarily resident in Scotland for a period of at least 12 months prior to the "relevant time". It is also noted that Wales already has an "opt out" system and there are proposals to introduce one in England.

We consider that there is scope for unintended consequences in relation to UK residents who move between UK countries. In particular, individuals who wish to donate and move from one "opt out" UK

country to another may naturally assume that they will be immediately covered by deemed authorisation and therefore do not require to register a positive choice to donate. In fact, deemed consent will only apply to them once they have been ordinarily resident in Scotland for 12 months. It would be unfortunate if it resulted in organs, which would otherwise be donated, being lost.

There will be some differences in the “opt out” systems applying to different UK countries. In these circumstances, further consideration should be given to whether it will be appropriate to apply deemed authorisation automatically to those who have lived in a UK “opt out” country (or a succession of UK “opt out” countries, including Scotland) for 12 months prior to the “relevant time”. If on further consideration, it was not thought appropriate to make such provision, we suggest the issue would require to be dealt with as part of regular awareness-raising campaigns.

3. The provision of a Code of Practice

We note that there is currently no provision in the Bill for the preparation of a Code of Practice to assist those given the task of implementing the legislation.

We consider that the lack of such a provision is a significant deficiency in the Bill.

The Scottish Government’s Policy Memorandum which accompanies the Bill explains how the Scottish Government anticipates that the legislation will operate in practice. Understandably, some of those details are not contained within the Bill, which provides the framework but not all of the finer details. As the Policy Memorandum makes clear, the subject-matter requires sensitive implementation. In our response to the Scottish Government’s consultation *Organ and Tissue Donation and Transplantation - a consultation on increasing numbers of successful donations* (March 2017), we pointed to the Welsh Code of Practice, which seems to have been effective.

That experience suggests the provision of a Code of Practice would be of great assistance in giving practical advice and assistance to those who

have to apply the provisions to real life situations and it would encourage best practice. It would help ensure that the legislation is applied in a uniform way throughout Scotland and reduce the risk of different Health Boards or indeed individual hospitals taking different approaches in their implementation of the underlying policy.

In Section 15 of the Human Transplantation (Wales) Act 2013, the Welsh Assembly accompanied their “opt out” policy with the requirement for the production of a Code of Practice. The information within that document – Code of Practice on the Human Transplantation (Wales) Act 2013 – appears to be very helpful. It contains detailed guidance including flow charts.

We note that section 18 of the Bill allows Scottish Ministers to make regulations about the manner in which, or by whom, various specified decisions may be made but this would appear not to cover many of the matters which could be dealt with in a Code of Practice.

We suggest the subject-matter is sufficiently important for that Code of Practice to be mandated by statute. A useful parallel may be found in the Mental Health (Care and Treatment) Act (Scotland) 2003, where the Scottish Parliament recognised the benefits of a Code of Practice and, in section 274 of that Act, required the Scottish Ministers to produce one in respect of the operation of that Act. We suggest a similar approach in this case.