

28 March 2006

Attorney-General

## LEGAL ADVICE

### CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: HUMAN TISSUE (ORGAN DONATION) AMENDMENT BILL

1. We have considered the Human Tissue (Organ Donation) Amendment Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("Bill of Rights Act"). The Bill, a Member's Bill in the name of Dr Jackie Blue MP, was introduced to the House of Representatives on 22 March 2006 and is currently awaiting its first reading. We understand that the next Members' Day is scheduled for Wednesday 29 March 2006.
2. We have concluded that clause 6 of the Bill which provides the conditions under which organs can be removed for therapeutic purposes, and clause 7 which provides the criteria for registration as an organ donor are inconsistent with section 19(1) of the Bill of Rights Act (the right to freedom from discrimination). We do not consider that these inconsistencies can be justified in terms of section 5 of the Bill of Rights Act.
3. We recommend that, as soon as practicable, you draw this to the attention of the House of Representatives pursuant to section 7 of the Bill of Rights Act and Standing Order 266. We attach a draft section 7 report for your consideration.
4. The Crown Law Office has seen this advice and agrees with the conclusions we have reached.
5. The Bill provides for a new regime to:
  - Establish a register on which people can register their legally binding wish to be an organ donor or state their objection to being an organ donor;<sup>1</sup>
  - Provide a mechanism for specifying organs for donation for therapeutic purposes or for the purpose of anatomical examination;
  - Establish public information campaigns encouraging donor registration; and
  - Transfer existing donor information from the Land Transport Safety Authority database to the register.

### SUMMARY OF THE BILL OF RIGHTS ACT ISSUES

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<sup>1</sup> While clause 6 (new section 3(1)) uses the expression 'may authorise the removal from the body of any organ,' it is unclear whether this is intended, as opposed to 'must authorise,' because the Explanatory Note to the Bill provides that the Bill intends registration on the organ donor register to be 'legally binding.'

6. The Bill provides that a person may indicate a wish to be a donor by:
  - a. Registering on the donor register; or
  - b. Requesting in either in writing, or orally (in certain circumstances), to donate organs following death.
7. Clause 7 of the Bill (new section 3D(1)(a), *Registration*) provides that persons eligible for registration as an organ donor must:
  - Be aged 18 years and over;
  - Not be mentally disordered; and
  - Not have an intellectual disability.
8. We have considered whether the limits placed on eligibility to register as an organ donor, or request to donate organs, give rise to issues of inconsistency with the right to be free from discrimination as affirmed by section 19(1) of the Bill of Rights Act on the grounds of age and disability.
9. We have concluded that the restrictions the Bill places on eligibility to register as an organ donor and to request to donate organs are inconsistent with section 19(1) of the Bill of Rights Act, and cannot be justified under section 5. Our analysis of these issues is set out below.

## **SECTION 19: FREEDOM FROM DISCRIMINATION**

10. Section 19(1) of the Bill of Rights Act protects the right of “freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” These grounds include:
  - Age (which means any age commencing with the age of 16 years); and
  - Disability (which includes psychiatric illness, and intellectual or psychological disability or impairment).
11. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
  - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
  - Does the distinction involve disadvantage to one or more classes of individuals?
12. If these questions are answered in the affirmative, we consider that the legislation gives rise to a *prima facie* issue under section 19(1) of the Bill of Rights Act.
13. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be

considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.<sup>2</sup>

## Age discrimination

### *Eligibility for registering as an organ donor*

14. Clause 7 (new section 3D, *Registration*) provides that persons may apply for registration as an organ donor if they are aged 18 years or over. The clause draws a distinction between those aged 16 or 17 and those aged 18 years and above for the purpose of registering as a donor, and uses age as a proxy for competence to consent to registration. We consider that this clause disadvantages 16 and 17 year olds, because it does not allow these persons the autonomy to decide whether they wish their organs to be available for donation upon death. Accordingly, we consider this restriction to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act.

### *Is this a justified limitation under section 5?*

15. The Explanatory Note to the Bill states that the age of 18 years was chosen for eligibility to register because this is the age at which persons become eligible to vote, purchase liquor, and serve with the armed forces. The objective of the clause, therefore, appears to be to ensure that persons who register as an organ donor are sufficiently mature to comprehend the implications of registration and can therefore give informed consent to registering. We consider this to be a significant and important objective.
16. In our view, there is not a rational connection between the objective of the provision (ensuring that persons who register to be organ donors are sufficiently mature to understand the consequences of their decision) and the means chosen to achieve this objective (restricting the age of eligibility). This is because it cannot be shown that the age of 18 years is a suitable proxy for competency to consent to organ donation.
17. In forming our view, we are cognisant of the fact the age of full consent to medical treatment and other decisions that concern bodily integrity is 16 years. Under the Care of Children Act 2004 consent or refusal to consent to medical treatment, if given by a child of or over the age of 16 years, has effect as if the child were of full age.<sup>3</sup> We have also taken into account the common law principle, as set out in

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<sup>2</sup> In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 and Supreme Court of Canada's decision in *R v Oakes* (1986) 26 DLR (4<sup>th</sup>).

<sup>3</sup> Care of Children Act 2004, section 36.

*Gillick v West Norfolk and Wisbech Area Health Authority*,<sup>4</sup> that children aged under 16 years are able to consent to medical treatment if they are mature enough to understand fully what is proposed and decide whether to accept the treatment. Whether a child or young person has sufficient capacity to consent is a question of fact in each case.<sup>5</sup>

18. We also note that the age of consent to sexual intercourse is 16 years;<sup>6</sup> and there are no age restrictions on consent to abortion.<sup>7</sup> Furthermore, under current law, any person holding a driver's license (including those under 18 years of age) may indicate their wish to be an organ donor (although this is not a legally binding decision in the sense the Bill purports to implement).
19. In our view, taking into account the relevant statutory provisions and common law principles, excluding persons aged 16 and 17 is not rationally connected to the objective of ensuring those registering as organ donors are sufficiently mature to understand the nature and consequences of their decision.

## **Disability discrimination**

### *Eligibility for registering as an organ donor or requesting to donate organs*

20. Clause 6 of the Bill (new section 3(1)(a), *Removal of organs for therapeutic purposes*) and clause 7 (new section 3D, *Registration*) appears to provide that a request to donate organs or a registration to be an organ donor, made while a person is intellectually disabled or mentally disordered, is void. This means that persons who are mentally disordered or intellectually disabled are treated differently on the basis of their disability, and do not have the autonomy to decide whether they wish their organs to be available for donation upon death. Like the age restriction outlined above, the Bill treats disability status as a proxy for competency to consent.
21. The Bill defines 'intellectual disability' with respect to the definition in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 ('IDCCR Act'): 'a permanent impairment that results in significantly sub-average general intelligence; and results in significant deficits in adaptive functioning';<sup>8</sup> and defines 'mentally disordered' with reference to the Mental Health (Compulsory Assessment and Treatment) Act 1992 ('MHCAT Act') as 'an abnormal state of mind (whether of

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<sup>4</sup> [1985] 3 All ER 402

<sup>5</sup> *Gillick*, above n4, at 409.

<sup>6</sup> Crimes Act 1961, section 134

<sup>7</sup> Care of Children Act 2004, section 38.

<sup>8</sup> Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, section 7.

a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it poses a serious danger to the health or safety of that person or of others; or seriously diminishes the capacity of that person to take care of himself or herself.<sup>9</sup>

22. We consider that this clause disadvantages mentally disordered and intellectually disabled persons, because it does not allow these persons the autonomy to decide whether they wish their organs to be available for donation upon death. Accordingly, we consider this restriction to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act.

*Is this a justified limitation under section 5?*

23. The objective of these provisions, according to the Bill's Explanatory Note, is to ensure that persons who register as organ donors or request to donate organs upon death are aware of the implications of their decision and, therefore, give informed consent. We agree that this is a significant and important objective. However, we consider that the restriction on eligibility to register as a donor or request to donate organs is not rationally connected to the objective.
24. The Bill imports definitions of 'intellectual disability' and 'mental disorder' from unrelated Acts, and uses these definitions as proxies for competency to consent to registering as an organ donor or requesting to donate organs after death. When assessing the rationality of this measure, we have noted that the compulsory treatment under the MHCAT Act only applies in respect of mental health treatment, and cannot be invoked to impose treatment for other conditions, for which the presumption of competence to consent remains.<sup>10</sup> In addition, persons within the jurisdiction of the IDCCR Act, even of diminished capacity, are presumed competent to consent to medical treatment.<sup>11</sup> This means that being subject to either the MHCAT or IDCCR regime does not oust a patient or care recipient's legal competence to make other decisions, including decisions about medical treatment.
25. In relation to medical treatment generally, we note that whether a person is competent to consent to treatment depends on whether the person can understand the nature of the proposed treatment and can make an informed and voluntary choice on that basis.<sup>12</sup> In *Re MB (Caesarean Section)*,<sup>13</sup> the English Court of Appeal framed the test for incompetency as a lack of capacity due to some impairment or disturbance of mental functioning that renders the person unable to consent to medical treatment. That inability to make a decision will occur where a

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<sup>9</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, section 2.

<sup>10</sup> Bell, Sylvia and Brookbanks, Warren, *Mental Health Law in New Zealand*, page 111

<sup>11</sup> Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, section 62.

<sup>12</sup> See Health and Disability Commissioner Act 1994, section 2.

<sup>13</sup> [1997] 8 Med LR 217, 224 (English Court of Appeal).

person is unable to comprehend and retain the information which is material to the decision to have the treatment.

26. Other statutes support the presumption of competence. The Protection of Personal and Property Rights Act 1988 (which provides, *inter alia*, for a regime to protect and promote the personal rights of persons who are not fully able to manage their own affairs) contains a presumption that every person has capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, until the contrary is established.<sup>14</sup>
27. In addition, the *Code of Health and Disability Services Consumers' Rights*<sup>15</sup> states that consumers "must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent;" and further states that "where a consumer has diminished competence, that consumer retains the right to make informed choices and give informed consent, to the extent appropriate to his or her level of competence."
28. In our view, therefore, using the definitions of 'mentally disordered' and 'intellectually disabled' to establish a threshold for competency to consent to donation of organs is not rational; and prohibiting these persons from proactively requesting to donate organs or registering as organ donors is not rationally connected to the objective of ensuring competence to make such a decision, because it does not take into account individuals' abilities and circumstances.

## Conclusion

29. The age and disability status restrictions the Bill places on registering as an organ donor or indicating a request to donate organs infringes the right to freedom from discrimination affirmed in section 19(1) of the Bill of Rights Act. Although it can be argued that these clauses have a significant and important objective (ensuring informed consent is given to becoming a donor), we do not consider that the restrictions on the right can be described as rationally connected to the objective.
30. Accordingly, clauses 6 and 7 of the Bill appear to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act, and do not appear to be justifiable in terms of section 5 of that Act.
31. We recommend that, as soon as practicable, you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act and Standing Order 266. We attach a draft section 7 report for your consideration.

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<sup>14</sup> Protection of Personal and Property Rights Act 1988, section 5.

<sup>15</sup> Regulations promulgated under the Health and Disability Commissioner Act 1994.

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