Organ and Tissue Donation

1. INTRODUCTION

The problem

* 1. Shortage of organs available for donation
  2. Ever increasing waiting list for people needing donation
  3. Despite the fact most people support donation

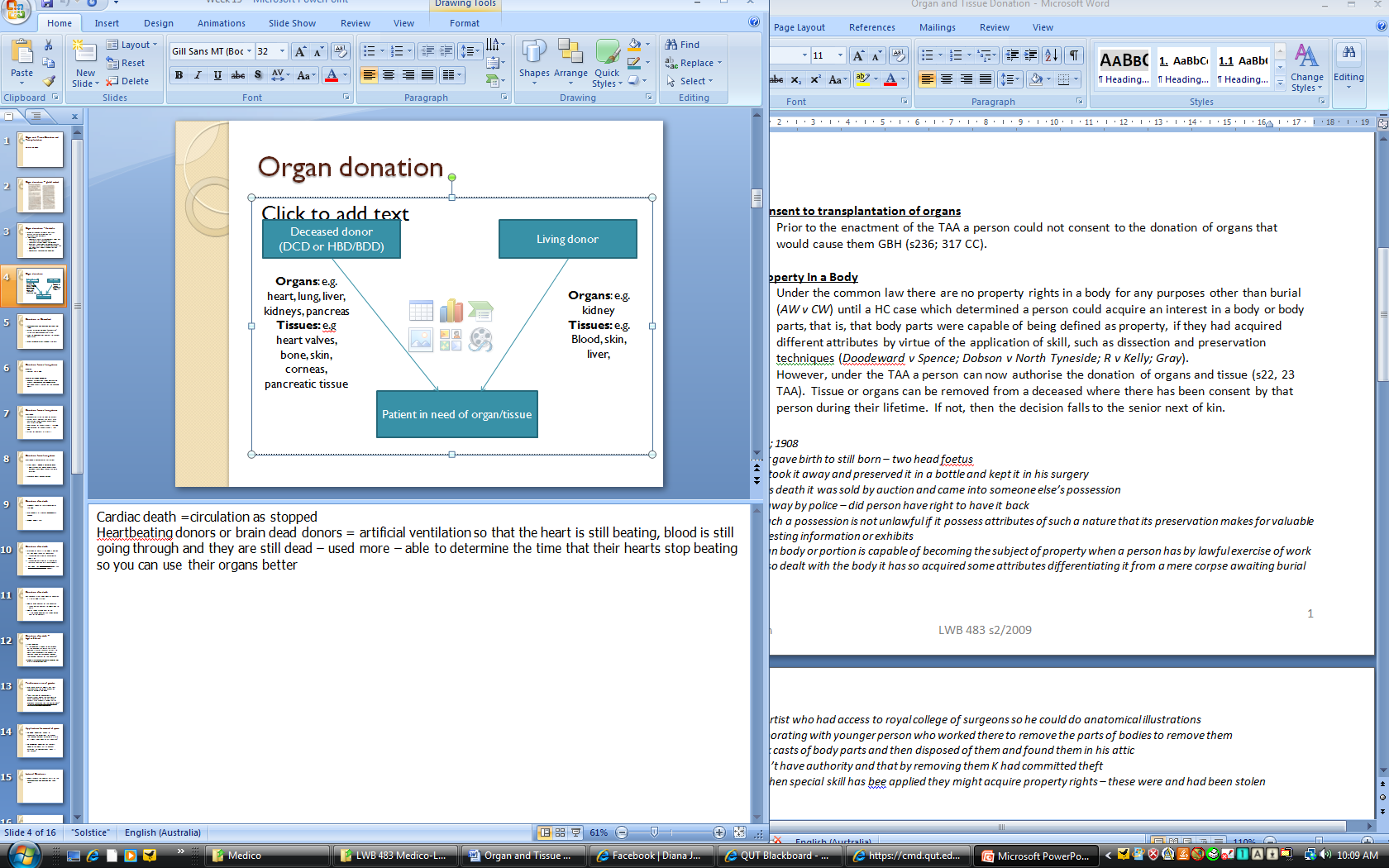
NB: Qld review of organ and tissue donation procedures select committee (readings)

1. DONATION AFTER DEATH
   1. Definition of Death
      1. Death was traditionally defined in terms of blood circulation and pulse however this made the harvesting and transplantation almost impossible as the organs must be maintained by a blood supply. Currently, death is defined as (s45(1) TAA):
         1. The irreversible cessation of circulation of blood in the body of the person (cardiac death); or
         2. The irreversible cessation of all function of the brain of the person (brain dead/heart beating)
            1. S45(2): This must be certified in writing by 2 medical practitioners, each of whom has carried out a clinical examination of the person and 1 of whom is a [specialist neurologist](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s45.html#specialist_neurologist) or neurosurgeon or has such other qualifications as are prescribed for the purposes of this section, and neither of whom is—

(a) the medical practitioner who is attending a person who is to be the recipient of [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from the body of the first mentioned person; or

(b) the [designated officer](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#designated_officer) who gives an authority for the purposes of this Act; or

(c) a medical practitioner who is proposing to remove [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from the body of a deceased person



* 1. Types of tissue

1. The TAA makes a distinction between regenerative and non-regenerative tissue
   1. Regenerative = will be replaced by natural processes of growth or repair
   2. Non regenerative = will not be replaced
   3. Consent to transplantation of organs
      1. Prior to the enactment of the TAA a person could not consent to the donation of organs that would cause them GBH (s236; 317 CC).
   4. Property In a Body
      1. Under the common law there are no property rights in a body for any purposes other than burial (*AW v CW*) until a HC case which determined a person could acquire an interest in a body or body parts, that is, that body parts were capable of being defined as property, if they had acquired different attributes by virtue of the application of skill, such as dissection and preservation techniques (*Doodeward v Spence; Dobson v North Tyneside; R v Kelly; Gray*).
      2. However, under the TAA a person can now authorise the donation of organs and tissue (s22, 23 TAA). Tissue or organs can be removed from a deceased where there has been consent by that person during their lifetime. If not, then the decision falls to the senior next of kin.
   5. **Removal of tissue from a dead body** 
      1. Can remove tissue from body of deceased if s22/23 are satisfied
      2. Must have prior consent of the deceased
         1. Signed and written

OR

* + 1. Senior available next of kin consents
       1. Order of consent is
          1. Spouse
          2. Parent
          3. Brother or sister

Note how this is very similar to statutory health attorney

**NOTE:** that a statutory health attorney cannot consent to organ and tissue removal/donation

Becomes very frustrating in the moment for doctors to have to seek out and consult to different people for different things

* + 1. The NHMRC ethical guidelines suggest that where there are family objections:
       1. “If the objection is unlikely to be resolved or the prospect of organ and tissue donation is causing significant distress to close family members, the process of donation should be abandoned, *despite* the previous consent of the deceased.”

***Doodeward; 1908***

* *Mother gave birth to still born – two head foetus*
* *Doctor took it away and preserved it in a bottle and kept it in his surgery*
* *After his death it was sold by auction and came into someone else’s possession*
* *Taken away by police – did person have right to have it back*
* *Held: such a possession is not unlawful if it possess attributes of such a nature that its preservation makes for valuable or interesting information or exhibits*
* *A human body or portion is capable of becoming the subject of property when a person has by lawful exercise of work or skill so dealt with the body it has so acquired some attributes differentiating it from a mere corpse awaiting burial*

***Kelly***

* *K was artist who had access to royal college of surgeons so he could do anatomical illustrations*
* *K collaborating with younger person who worked there to remove the parts of bodies to remove them*
* *He took casts of body parts and then disposed of them and found them in his attic*
* *He didn’t have authority and that by removing them K had committed theft*
* *Held: when special skill has been applied they might acquire property rights – these were and had been stolen* 
  1. Posthumous use of gametes
     1. There may be circumstances in which a person may wish a doctor to harvest gametes from a person who has died. This occurred in a famous case in England and has been the subject of litigation on a number of occasions in Australia. In determining whether harvesting of gametes in such circumstances should be allowed, many ethical and legal considerations must be taken into account. These include the best interests of any child born as a result of the process, the intention of the deceased, the extent to which consents had been obtained, and legal entitlements that might result from birth of a child of the deceased.
     2. Not within the ambit of the TAA, as not for a ‘therapeutic…or for other medical or scientific purposes’ Re Gray
     3. Use of gametes (i.e. s558m sperm) after death for artificial insemination: *Blood, Gray, Baker, Denman*
     4. Must consider the impact of only having one parent for the child that is born
        1. NHMRC ethical guidelines for the use of assisted reproductive technology in clinical practice and research

***Baker v State of Queensland, Unreported, Muir J (6 January 2003). (Muir J)***

* *Andrew Clark died on 31 December 2002 as the result of a fall. He and the applicant, who is aged 29, had lived together for about five years. Both had a strong desire to have children and they became engaged.*
* *By 31 December 2002 the couple had already set about planning their affairs to accommodate the eventual birth of children. In October 2002, for example, they changed their medical benefit cover from that applicable to a couple to family cover. In 1998 the deceased made a will in which he appointed the applicant the executrix of his estate and sole beneficiary.*
* *The applicant desires to have a child or children by the deceased by means of artificial insemination with his sperm. She is motivated, at least in part, by the belief that this is what the deceased would have wanted. In this application she seeks an order that a nominated medical practitioner be permitted to remove spermatozoa and associated tissue from the body of the deceased and that such spermatozoa and tissue be stored until further order.*
* *Re Gray [2001] 2 Qd R 35 held that the Court has no jurisdiction to authorise interference with the body of a dead person and that such interference, where not authorised by legislation, or for the purpose of interment or other proper disposition of the body, is unlawful.*
* *The creation and disposition of property and rights in property bears little semblance to the desire to create a human being and to nurture the person in a particular relationship. Nor did the law of contract evolve with a view to addressing considerations relevant to the emotions and wishes of persons in such a relationship or the welfare of the children of the relationship.*
* *The facts of Gray do not appear to me to be distinguishable from those under consideration. Application dismissed*

1. DONATION BEFORE DEATH (Living Donors)
   1. **Adults** – Sections 10-12 of the TAA
      1. Requires consent
      2. Adults can donate both regenerative and non-regenerative tissues and/or organs
      3. The purpose for transplantation can be therapeutic, medical or scientific
      4. If adult does not have capacity then must get authorisation from Guardianship tribunal
         1. Must be of sound mind
         2. Must sign for consent
            1. GO TO CAPACITY NOTES!
      5. NOTE: that if the organ being donated is not regenerative then there is a 24 hours cooling off period
      6. NOTE: that from December this year the guardianship tribunal is being replaced by QCAT

**Section 10 - Consent by adult living donor to removal of regenerative tissue**

A person who—

(a) has attained the age of 18 years; and

(b) is of sound mind;1 and

**(c)** is, in the light of medical advice furnished by a medical practitioner, prepared to do so; may, by writing signed in the presence of a designated officer, consent to the removal from his or her body of regenerative tissue specified in the consent—

(d) for the purpose of the transplantation of the tissue to the body of another living person; or

(e) for the purpose of using the tissue for other therapeutic purposes or for other medical or scientific purposes; or for any such purposes.

**Section 11 - Consent by adult living donor to removal of non-regenerative tissue for transplantation**

**(1)** A person who—

(a) has attained the age of 18 years; and

(b) is of sound mind;2 and

(c) is, in the light of medical advice furnished by a medical practitioner, prepared to do so; may, by writing signed in the presence of a designated officer, consent to the removal, after the expiration of 24 hours from the

time at which the consent is signed, from his or her body of non- regenerative tissue specified in the consent, for the purpose of the transplantation of the tissue to the body of another living person.

**(2)** A consent given under subsection (1) shall specify the time at which the consent is given.

* 1. **Children**
     1. There is no provision in the Queensland legislation for a child to donate non-regenerative tissue and there are strict consent and other provisions concerning donations by children of regenerative tissue.
        1. This can be contrasted with SA, Vic and WA who have expressly banned non-regenerative tissue donation from children
     2. By virtue of **Pt VII *Family Law Act 1975*** **(Cth)**, the Family Court has welfare jurisdiction in respect of a child of the marriage, and the jurisdiction validly extends to the authorisation of medical treatment of an incapable child of a marriage….as something which is directly related to the protection and welfare of the particular child…***In the Marriage of GWW and CMW***
     3. Children must have parental consent in order to donate S12B TAA
     4. Must also have certification from medical professionals Part 2 Div 2A TAA
     5. Children who are capable of understanding are dealt with under s12C TAA
     6. Children who are incapable of understanding are dealt with under s12D TAA
        1. If a child cannot understand the risk then that risk must be minimal and the recipient must be likely to die without it
           1. At CL the test is the best interests of the child guideline

***In the Marriage of GWW and CMW******(1997) 21 Fam LR 612***

* + *The parents of B applied for an order to permit the harvesting of bone marrow from B which could then be donated to B’s maternal aunt who was suffering from leukemia.*
  + *B had been tested and it had been ascertained that B was a suitable donor.*
  + *The child was separately represented so that the court received submissions which were considered by the child representative to address the best interests of the child, even if there was a conflict with the child’s wishes.*
  + *Issues of concern for the Fam Ct were:*
* *Did the Ct have jurisdiction to hear the application?*
* *The procedure was for the benefit of a third party*
* *Was bone marrow donation a special case to which parents could not give consent?*
* *What factors need to be taken into account to determine child’s best interests?*

***HELD***

* + *The application was one which invoked the welfare jurisdiction of the Fam Ct.*
  + *The child did not have sufficient depth of understanding of the proposed procedure to have the capacity to give informed consent.*
* *Ct used to Gillick test to determine capacity to consent🡪 A minor is, according to this principle, capable of giving informed consent when he or she “achieves a sufficient understanding or intelligence to enable him or her to understand fully what is proposed.”*
  + *The proposed procedure was one which constituted a “special case” as it fell outside the scope of the parent’s power to consent on behalf of the child.*
* *The courts will intervene to restrict a parent’s power to consent where the procedure is “invasive, irreversible and major surgery” and where there is a significant risk of making the wrong decision and the consequences of a wrong decision are particularly grave.* 
  + *In determining the what was in the child’s best interests, the court was to have regard to the matters set out in* ***s.68F(2) Family Law Act****.*
  + *Ct determined that having regard to all those matters, including the expressed wish of the child to donate bone marrow, the minimal risks of the procedure to him, and the fact that the proposed donee was the child’s aunt, on balance, it was in the child’s best interests to permit him to participate as donor.*

**Section 12B Consent by parent to removal of regenerative tissue for transplantation**

A person who—

(a) is a parent of a child; and

(b) is of sound mind; and

(c) is, in the light of medical advice furnished by a medical practitioner, prepared to do so;

may, by writing signed in the presence of a designated officer, consent to the removal from the body of the child of regenerative tissue specified in the consent, **for the purpose of the transplantation of the tissue to the body of a brother, sister or parent of the child.**

**Section 12C - Certificate of agreement by a child who is capable of understanding**

A medical practitioner may, by writing signed in the presence of a designated officer, certify that at the time of the certification—

(a) the medical practitioner had explained to a child referred to in section 12B the nature and effect of the removal from the body of the child of tissue specified in the consent and the nature of the transplantation; and

(b) the child understood the nature and effect of the removal of the tissue and the nature of the transplantation; and

(c) the child was in agreement with the consent given under section 12B.

**Section 12D - Certifications where child is not capable of understanding by reason of age**

**(1)** Where a child referred to in section 12B, by reason of his or her age, is not capable of understanding the nature and effect of the removal of the tissue and the nature of the transplantation, each of 3 medical practitioners may, by writing signed in the presence of a designated officer, certify that, at the time of certification—

(a) the child, by reason of his or her age, was not capable of understanding the nature and effect of the removal and the nature of the transplantation; and

(b) the brother, sister or parent of the child, in the medical practitioner’s opinion, is likely to die unless the tissue specified in the consent is transplanted to the body of that brother, sister or, as the case may be, parent; and

(c) the risk to the child, in the medical practitioner’s opinion, is minimal.

**(2)** However, 1 of the 3 medical practitioners shall be a specialist paediatrician and another shall be a specialist anaesthetist.

**(3)** In this section—

**“specialist anaesthetist”** means a person registered under the *Medical Practitioners Registration Act 2001* as a specialist registrant in thespecialty of anaesthetics.

**“specialist paediatrician”** means a person registered under the *Medical Practitioners Registration Act 2001* as a specialist registrant in thespecialty of paediatrics.

**Section 14A - Consent under s 12B**

Subject to section 15, a consent under section 12B is, where a certificate has been given in accordance with section 12C or certificates have been given in accordance with section 12D and a certificate has been given in accordance with section 12E in relation to the consent, certificate or certificates, sufficient authority for a medical practitioner other than—

(a) the medical practitioner by whom the medical advice referred to in section 12B(c) or the explanation referred to in section 12C(a) was furnished; and

(b) the designated officer by whom the certificate referred to in section 12E was given;

to remove, at any time after the expiration of 24 hours from the time at which the latest relevant consent under section 12B was given, the regenerative tissue referred to in the consent for the purpose of the transplantation of the tissue to the body of the brother, sister or parent of the child referred to in the consent.

* 1. Who is authorised to remove the tissue & adult consent
     1. This is dealt with in sections 13 and 14 respectively

**Section 13 - Consents under s 10**

Subject to section 15, consent under section 10 is, where a certificate has been given in accordance with section 12 in relation to that consent, sufficient authority for a medical practitioner, other than the medical practitioner by whom the medical advice referred to in section 10 was furnished, and other than the designated officer in whose presence the consent was signed, to remove the regenerative tissue referred to in the consent—

(a) for the purpose of the transplantation of the tissue to the body of another living person; or

(b) for the purpose of using the tissue for other therapeutic purposes or for other medical or scientific purposes; or for any such purposes.

**Section 14 - Consent under s 11**

Subject to section 15, a consent under section 11 is, where a certificate has been given in accordance with section 12 in relation to that consent, sufficient authority for a medical practitioner, other than the medical practitioner by whom the medical advice referred to in section 11 was furnished, and other than the designated officer in whose presence the consent was signed, to remove, at any time after the expiration of 24 hours from the time at which the latest relevant consent under section 11 was given, the non-regenerative tissue referred to in the consent for the purpose of the transplantation of the tissue to the body of the other person referred to in the consent.

* 1. Blood transfusions to children

In some circumstances, a medical practitioner can give a blood transfusion to a child without the consent of the parent or other person having authority to consent, or where the consent of the parent is refused.

**s20 Blood transfusions to children without consent**

1. Where a blood transfusion is administered by a medical practitioner to a child, the medical practitioner shall not incur any criminal liability by reason only that the consent of a parent of the child or a person having authority to consent to the administration of the transfusion was refused or not obtained if –
   1. in the opinion of the medical practitioner a blood transfusion was necessary to preserve the life of the child; and
   2. either –
      1. upon and after in person examining the child, a second medical practitioner concurred in such opinion before the administration of the blood transfusion; or
      2. the medical superintendent of a base hospital, being satisfied that a second medical practitioner is not available to examine the child and that a blood transfusion was necessary to preserve the life of the child, consented to the transfusion before it was administered

* Consent may be given by the child’s parent if removal of blood not prejudicial to the health of the child: **s 18**
  1. Conflict Between Legislation
     1. There is a potential conflict between the intent of the Queensland legislation and the Commonwealth *Family Law Act* 1975. For example, the Queensland legislation makes no provision for the donation by children of non-regenerative tissue and so there is no legal protection for a Queensland child who wishes to donate a kidney for transplantation into his or her mother or father. However, it is possible that using “the welfare of the child” provisions of the *Family Law Act*, a court might make an order permitting such a donation

1. Trade in organs
   1. It is an offence under the Act to sell, offer for sale or trade in human body parts (s40-2)
2. **40 Unauthorised buying of tissue prohibited**
   1. Subject to this section, a person shall not buy, agree to buy, offer to buy, hold himself or herself out as being willing to buy, or inquire whether a person is willing to sell to the person or another person--
3. [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue); or
4. the right to take [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from the body of another person.
5. Maximum penalty--20 penalty units or 6 months imprisonment.
   1. Where the Minister considers it desirable by reason of special circumstances so to do, the Minister may, by a permit in writing, authorise a person, subject to such conditions and restrictions as may be specified in the permit, to buy [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) or the right to take [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from the body of another person.
   2. Nothing in subsection (1) applies to anything done under and in accordance with a permit granted under subsection (2).
   3. The Minister may at any time, by notice in writing given to a person to whom a permit has been granted under this section, cancel the permit.
   4. Where a permit has been granted under subsection (2) subject to any conditions or restrictions specified therein, a person shall not act on the authority of the permit unless the conditions or restrictions, as the case may be, are or have been complied with.
   5. Maximum penalty--10 penalty units or 3 months imprisonment.
6. **41 Advertisements relating to buying of tissue restricted**
7. A person shall not--
8. publish or disseminate by newspaper, other periodical, book, broadcasting, television, cinematograph or other means whatever; or
9. exhibit to public view in a house, shop or place; or
10. deposit in the area, yard, garden or enclosure of a house, shop or place;
11. an advertisement relating to the buying of [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) or of the right to take [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from the bodies of persons unless the proposed advertisement has been approved by the Minister and contains a statement to that effect.
    1. Maximum penalty--10 penalty units or 3 months imprisonment.
12. **42 Unauthorised selling of tissue prohibited**
13. Subject to this section, a person shall not sell, agree to sell, offer to sell, hold himself or herself out as being willing to sell, or inquire whether a person is willing to buy from the person or another person--
    1. [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) (including his or her own [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue)); or
    2. the right to take [tissue](http://www.austlii.edu.au/au/legis/qld/consol_act/taaa1979298/s4.html#tissue) from his or her body or the body of that other person.
    3. Maximum penalty--10 penalty units or 3 months imprisonment.
14. Nothing in subsection (1) applies to a sale, or an agreement to sell, to a person who is, or is reasonably believed by the vendor to be, acting subject to, and in accordance with a permit granted under section 40(2).

**OTHER RELEVANT LEGISLATION**

**Deceased in HOSPITAL**

**Section 22 Authority to remove tissue where body of deceased in a hospital**

**(1)** Subsection (2) applies if—

(a) the body of a **deceased** person is in a hospital; and

(b) it appears to a **designated officer** for the hospital, after making reasonable inquiries, that the **deceased person had not, during his or her lifetime, expressed an objection** to the removal after death of tissue from his or her body; and

(c) the **senior available next of kin of the deceased person has consented** to the removal of tissue from the body of the deceased person for—

(i) transplanting it to the body of a living person; or

(ii) use of the tissue for other therapeutic purposes or for other

medical or scientific purposes.

**(2)** The designated officer may, by signed writing, authorise the removal of tissue from the body of the deceased person under the consent.

**(3)** The senior available next of kin of a person if he or she has no reason to believe that the person has expressed an objection to the removal after the person’s death of tissue from the person’s body for any of the purposes referred to in subsection (1)(c), may make it known to a designated officer at any time before the death of the person that the senior available next of kin has no objection to the removal, after the death of the person, of tissue from the body of the person for any of the purposes referred to in subsection (1)(a).

**(4)** Where there are 2 or more persons of a description referred to in section 4, definition “senior available next of kin”, paragraph (a)(i) to (iv) or (b)(i) to (iv), an objection by any 1 of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

**(5)** Where a deceased person, during his or her lifetime, by signed writing consented to the removal after death of tissue from his or her body for any of the purposes referred to in subsection (1)(c) and the consent had not been revoked by the deceased person, the removal of tissue from the body of the deceased person in accordance with the consent for any of those purposes is hereby authorised.

**(6)** A consent under subsection (1)(c), and a communication under subsection (3) by the senior available next of kin, must be in writing.

**(7)** However, if it is not practicable for the consent or communication to be given in writing because of the circumstances in which it is given, it may be given orally.

**(8)** If the consent or communication is given orally under subsection (7), the designated officer must ensure that, as soon as practicable—

(a) the fact of the giving of the consent or communication and the details of the consent or communication are reduced to writing and placed on the deceased person’s hospital records; and

(b) reasonable attempts are made to have the consent or communication confirmed in writing by the senior available next of kin.

**(9)** The designated officer must ensure that a document obtained under subsection (6) or (8)(b) is placed on the deceased person’s hospital records as soon as practicable.

**(10)** Subsection (8) does not affect the operation of subsection (7).

**Deceased NOT IN HOSPITAL**

**Section 23 Authority to remove tissue where body of deceased not in hospital**

**(1)** Subject to this part, where the body of a **deceased person is in a place other than a hospital**, a **senior available next of kin of the deceased person may, by signed writing, authorise the removal of tissue from the body of the deceased person—**

(a) for the purpose of the transplantation of the tissue to the body of a living person; or

(b) for the purpose of using the tissue for other therapeutic purposes or for other medical or scientific purposes; or for any of those purposes.

**(2)** Where the senior available next of kin of the deceased person has reason to believe that—

(a) the deceased person had, during his or her lifetime, expressed an objection to the removal of tissue from his or her body and had not withdrawn that objection; or

(b) another next of kin of the same or a higher order of the classes in section 4, definition “senior available next of kin”, paragraph (a)(i) to (iv) or (b)(i) to (iv) has an objection to the removal of tissue from the body of the deceased person; the senior available next of kin shall not, under subsection (1), authorise the removal of tissue from the body of the deceased person.

**(3)** Where a deceased person, during his or her lifetime, by signed writing consented to the removal after death of tissue from his or her body for any of the purposes referred to in subsection (1) and the consent had not been revoked by the deceased person, the removal of tissue from the body of the deceased person in accordance with the consent for any of those purposes is hereby authorised.