

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Human Tissue (Organ
Donation) Amendment Bill 2006

*Presented to the House of Representatives pursuant
to Section 7 of the New Zealand Bill of Rights Act
1990 and Standing Order 266 of the Standing Orders
of the House of Representatives*

Human Tissue (Organ Donation) Amendment Bill 2006

I have considered the Human Tissue (Organ Donation) Amendment Bill 2006 for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). I have concluded that the effect of clauses 6 and 7 of the Bill, which restrict eligibility to register as an organ donor or request to donate organs on the basis of age and disability status, appears to be inconsistent with section 19(1) of the Bill of Rights Act. These inconsistencies do not appear to be justified in terms of section 5 of the Bill of Rights Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

The Bill

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;
- 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.

The Bill provides that a person may indicate a wish to be a donor by either:

- a. Registering on the donor register; or
- b. Requesting in either in writing, or orally (in certain circumstances), to donate organs following death.

Inconsistency with the Bill of Rights Act

The Bill gives rise to an issue of inconsistency with section 19(1) of the Bill of Rights Act, which provides that "everyone has the right to 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).

The inconsistency arises because clauses 6 and 7 of the Bill do not allow persons who are aged 16 or 17 years old to register as an organ donor, and do not allow 'mentally disordered' or 'intellectually disabled' persons to register as an organ donor or request to donate organs. The Bill, therefore, draws distinctions on the basis of age and disability status, and uses age and disability status as proxies for competence to consent to registration (in respect of age), and registration or request (in respect of disability status). I consider that these clauses disadvantage 16 and 17 year olds and 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, I consider this restriction to be *prima facie* inconsistent with section 19(1) of the Bill of Rights Act.

I have therefore gone on to consider whether this *prima facie* inconsistency with section 19(1) can be justified under section 5 of the Bill of Rights Act (*Justified limitations*). 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.

Is this a justified limitation under section 5?

In my view, the objective of the relevant clauses appears to be to ensure that persons who want to register as organ donors or request to donate organs are sufficiently mature to comprehend the implications of their decision, and are therefore capable of giving informed consent to organ donation. This is a significant and important objective.

I consider, however, that there is no rational connection between the objective of these provisions (ensuring that persons who register to be organ donors are sufficiently competent to understand the consequences of their decision) and the means chosen to achieve this objective (restricting eligibility on the basis of age and disability status). This is because it cannot be shown that the age and disability status criteria in the Bill are suitable proxies for competency to consent to organ donation.

In relation to the discrimination on the basis of age, I have taken account of the age of full consent to medical treatment and other decisions that concern bodily integrity. 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.¹ I have also taken into account the common law principle, as set out in *Gillick v West Norfolk and Wisbech Area Health Authority*,² 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.

In relation to the discrimination on the basis of disability status, I have noted that the Bill imports definitions of 'intellectual disability' and 'mental disorder' from the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and the Mental Health (Compulsory Assessment and Treatment) Act 1992. However, persons defined as 'intellectually disabled' or 'mentally disordered' under these Acts are presumed competent to consent to medical treatment generally. Being subject to either regime does not, of itself, oust a patient or care recipient's legal competence to make other decisions, including decisions about medical treatment.

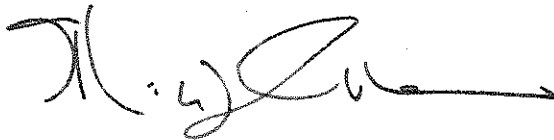
¹ Care of Children Act 2004, section 36.

² [1985] 3 All ER 402.

Conclusion

The age and disability status restrictions the Bill places on registering as an organ donor, or indicating a request to donate organs, infringes upon the right to freedom from discrimination affirmed in section 19(1) of the Bill of Rights Act. Although these clauses have a significant and important objective (ensuring informed consent is given to becoming a donor), I do not consider that the restrictions on the right can be described as rationally connected to that objective, because it cannot be established that these proxies are suitable indicators of competency to consent to registration as an organ donor or to make a request to donate organs.

Accordingly, I conclude that clauses 6 and 7 of the Human Tissue (Organ Donation) Amendment 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.

A handwritten signature in black ink, appearing to read 'M. Cullen', with a long horizontal flourish extending to the right.

Hon Dr Michael Cullen
Attorney-General