

HUMAN ORGAN TRANSPLANT BOARD
人體器官移植委員會

Your Ref.:

Our Ref.: HOT/I, 2 XII

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Urgent by Fax 2840 0467 (3 pages)

28 January 1999

Secretary for Health and Welfare
(Attn : Mr Eddie POON)
19-20/F Murray Building
Garden Road
Hong Kong

Dear Mr POON,

Human Organ Transplant (Amendment) Bill 1999

I refer to my letter dated 16 January 1999 on the captioned Bill and thank you for reflecting the Board's views to the LegCo Bills Committee.

The Board appreciates that there has been some discussion on the proposed addition of section 5(2A) at Bills Committee meeting on 18 January 1999. The Board feels very strongly that it is necessary to reiterate its concerns about this proposal to specify that the marital requirement must be established by a means prescribed by the Board by regulation. It wishes to emphasise that the amendment might not assist the medical practitioner to establish the fact of the marriage and its duration, but would limit the types of evidence he can consider. In effect, it might create more problems than to solve them.

The Board understands that the concern of the medical profession is that the front line personnel are not necessarily in the best position or qualified to investigate and verify the fact and nature of a relationship, and that their responsibilities should not extend beyond exercising due diligence in verifying such matters. The Board appreciates this concern and considered, and recommended, that these concerns would be better addressed by including defences of due diligence for the person who has to be satisfied that the required relationship is established.

The Board does not consider that the proposed section 5(2A) will meet these concerns. If it is intended that this amendment will meet these concerns, it would be appreciated if this could be clarified to the Board. It is noted that the Explanatory Memorandum to the Bill does not indicate why the measure has been introduced. At present it appears that the intention is to restrict the means of proving the marital relationship.

The Board is also concerned as to what it is envisaged the Board may consider as suitable and appropriate means to prove the fact of the marital relationship. The Board has requested this information before and will need to receive advice on the appropriate means if section 5(2A) is enacted. Given that the penalty proposed in section 5(8) is less than the penalty for breach of section 36 of the Crimes Ordinance it may be that consideration has been given to the means being something less than a statutory declaration. However the Board would be concerned to ensure that any provision does not facilitate the circumvention of the purpose of the Ordinance in prohibiting commercial dealings.

The Board urges that the Administration and the LegCo would consider the Board's views further and the implications of the proposed new subsection before making a final decision on the Bill. Alternatively, more detailed discussion on this proposal would be allowed if the provision were taken out of the Bill and considered together with the overall review of the Ordinance. To facilitate consideration, an extract of the Board's views on the subject in its letter dated 16 January 1999 is attached at Annex.

Thank you for your attention.

Yours sincerely,

(Ms Fausta Ng)
Secretary, Human Organ Transplant Board

c.c. LegCo Bills Committee on the Human Organ Transplant (Amendment)
Bill 1999

The marital requirement

Section 5(1)(ii) of the Ordinance permits a transplant between living persons without the approval of the Board where the person into whom the organ is to be transplanted is, at the time of the transplant, the spouse of the person from whom the organ is removed and the marriage has subsisted for not less than three years. At present, there is no restriction upon how it is to be ascertained either that the two persons are married or that the marriage has subsisted for not less than three years.

It has been proposed to add section 5(2A) to specify that the marital requirement must be established by a means prescribed by the Board by regulation. In this respect, the Board has grave concerns that the amendment may not assist the medical practitioner to establish the fact of the marriage and its duration, it will merely restrict him as to what evidence he can consider. Moreover, it is not clear whether "the fact of the relationship" which is to be established by prescribed means is limited to establishing that there is a valid marriage or whether this extends to determining that the marriage subsists, and has done so for not less than three years. If it is limited to merely establishing the fact of a marriage, the possibly major problem, so far as the registered medical practitioner is concerned, of how to determine that the marriage still subsists, still exists. Even with the amendment, even if the medical practitioner believes he has established the relationship, its duration and its subsistence by the prescribed means, if in fact the relationship does not exist there remains the possibility that an offence contrary to section 5(1) will be committed.

From the experience of establishment of genetic relationship by medical practitioners based on means prescribed in the Regulation by the Board, there have been concerns that the means prescribed have restricted the ways the medical practitioners can establish the genetic relationship. The Board is in fact considering to widen the means of establishing genetic relationship by making reference to some established procedures of interviewing patients by professionals to provide greater flexibility in this respect. There are also comments from the medical profession that it would be very difficult to prove the "subsistence" of marriage. It would therefore leave more leeway as to how the subsistence of marriage is to be satisfied by not requiring the proof of the relationship to be established by prescribed means.

If the new subsection 5(2A) is to be added, then the Board wishes to be advised as to what the draftsman has in mind as to what information will be supplied in accordance with such regulations. It is noted that the penalty under section 36 of the Crimes Ordinance, Cap 200, of making a false statutory declaration is more severe than that proposed in section 5(8) and that there is no provision similar to the proposed section 5(8) in relation to the regulations made for the determination of a genetic relationship.