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Report of the Bills Committee on
Human Organ Transplant (Amendment) Bill 1999

Purpose

This paper reports on the deliberations of the Bills Committee on Human Organ Transplant (Amendment) Bill 1999.

Background

2. The Human Organ Transplant Ordinance (Cap. 465), which came into operation on 1 April 1998, prohibits commercial dealings in human organs intended for transplant, restricts the transplant of human organs between living persons, and regulates the importing of human organs intended for transplant.

3. Under section 5(4)(c) of the Ordinance, in cases of transplants between living persons, arrangements must be made, prior to the transplant, for the donor and the recipient to be given an explanation of the procedure and the risks involved, and their entitlement to withdraw consent at any time. This requirement is to ensure that both the donor and the recipient understand that an organ transplant is a high risk medical procedure for both of them. Certain patients may decide to refuse donation from a living donor having regard to the risk on the part of the donor.

4. Meeting the above requirement poses a problem in cases where the condition of the patient has deteriorated so rapidly that it has not been possible to arrange for him to be interviewed and given the relevant explanation. The same problem occurs when the patient is a minor or a mentally disordered or handicapped person.

The Bill

5. To overcome the problem outlined in paragraph 4 above, the Bill seeks to amend the Ordinance to specify the circumstances in which an organ transplant

may still be made notwithstanding the fact that, the recipient is, for certain specified reasons, incapable of understanding the explanation given to him under section 5(4)(c) of the Ordinance. The Bill also seeks to expand section 5 of the Ordinance to allow the Human Organ Transplant Board (the Board) to prescribe by regulation the means to establish a marriage relationship.

The Bills Committee

6. Members agreed at the House Committee meeting on 15 January 1999 to form a Bills Committee to study the Bill and take over the work of the Subcommittee on Human Organ Transplant Ordinance, which had already held four meetings to review the Ordinance with the Administration. The Bills Committee first met on 18 January 1999 and Hon Ronald ARCULLI was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I**.

7. The Subcommittee and the Bills Committee received a total of 11 submissions and met three deputations. The Bills Committee held two meetings with the Administration.

Deliberations of the Bills Committee

8. The main deliberations of the Bills Committee are set out in the following paragraphs.

<u>Consent of recipients</u>

9. Members note the common law principle that an adult patient who suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments offered. The next of kin has no legal right either to consent or to refuse consent on his behalf. Even the court does not have the jurisdiction to give consent to medical treatment on behalf of patients who are unable to give consent or to appoint some other person to give it.

10. Members have considered in detail how the wish of a recipient will be taken care of in the case of organ transplant. Since organ transplant involves a third person whose life could be at risk after donating an organ, a patient may make a decision not to receive a specific organ from a person who is dear to him. Other patients may, for religious or other personal reasons, choose to refuse organs from a specific group of persons. In the context of medical treatment in general, members note that if a medical practitioner has treated a patient without his consent or despite his refusal of consent, it will constitute the civil wrong of

trespass to the person and may constitute a crime. However, if the patient has made no choice and when the need for treatment arises, is in no position to make one, the medical practitioner can lawfully treat the patient in accordance with his clinical judgement of what is in the patient's best interests. Similarly for an organ transplant, if a patient has expressly indicated that he will not receive an organ from a specific live donor, the medical practitioner cannot act against his wish. To facilitate the work of the medical practitioners, members have suggested that a new section be added to the form for doctors to sign stating whether the patient has made any directives in this regard.

Proof of marital relationship

11. The existing legislation provides that the Board may prescribe by regulation the means to establish a genetic relationship, but has not provided the Board with similar power in relation to a marriage relationship. The Bill proposes to add a new subsection (2A) to section 5 of the Ordinance to specify that the fact of the marriage relationship should be established by such means as prescribed by the Board by regulation.

12. The Board has expressed its concerns that it is very difficult to prove the "subsistence" of marriage and that the amendment may restrict the evidence the medical practitioner can consider. To overcome the difficulties in establishing genetic or marriage relationship, the Hospital Authority has suggested three options for dealing with the matter. Option 1 is for such relationship to be established by registration documents alone, option 2 is for such relationship to be established by registration documents and a statutory declaration prescribed by the Board verifying the subsistence of marriage for not less than three years while option 3 is for such relationship to be established by a statutory declaration prescribed by the Board where no registration documents are available. Whilst option 1 gives the greatest certainty to front-line medical staff, the Hospital Authority believes that option 2 is a more practical approach. As regards option 3, there is concern that the sole reliance on statutory declarations may lead to possible abuse.

13. Members consider that option 2, which is the Hospital Authority's preferred option, is a practical and viable approach and have recommended it to the Board. Members note that the Administration will follow up the matter with the Board and that the regulations to be made, being subsidiary legislation, will be subject to vetting by the Legislative Council.

Time limit on the process of vetting applications

14. Approval from the Board to carry out a transplant between living persons is required in cases where the donor and the recipient are not genetically related or are married for less than three years.

15. Members have considered the proposal made by a Bills Committee member and a patients' organization that a time limit should be set for the process of vetting of applications by the Board. In response to the Bill Committee's request, the Board has briefed the Bills Committee on its working procedures in detail and has pointed out that it is not practicable and feasible to set a time frame for making a decision on such applications because of the following reasons -

(a) The Board is fully conscious of the importance of time in urgent cases. When an application is received or when an enquiry is made, the Board Secretariat will ascertain the scheduled or estimated date and time of operation and the Board will bear the time frame in mind when considering the case;

(b) Not all organ transplant operations are urgent. While liver transplants are likely to be emergencies, in the case of kidney transplants, the patients can be supported by dialysis and operations are planned well in advance and therefore allow more time for the Board to consider the applications; and

(c) In situations where the information provided is not adequate to satisfy the Board that the requirements under section 5(4) and (5) have been complied with, the Board may need clarification or further information from the applicant. If the Board is required to work under a strict time limit, it may not be possible to obtain evidence that would otherwise satisfy the Board that the required conditions have been met.

16. After discussion, members agree that to set a time limit, especially by making it a statutory requirement in the legislation, will create practical problems which may hinder the process.

Facts about commercial dealing

17. Members share the Board's view that it is difficult to set out the criteria as to how the conditions of no coercion or offer of inducement and no commercial dealing in section 5(4)(d) and (e) can be satisfied. In this connection, members note that the Board will examine whether there is any emotional tie between the donor and recipient and will approve the application if there is no grave doubt. Since disapproving an application in some cases is tantamount to signing a death warrant, members are concerned about the enormous pressure faced by the Board in making a decision. In view of the immense responsibilities involved, members consider that the Board should have immunity from legal action so that any decision it makes is not out of fear of prosecution and other consequences.

Appeal mechanism

18. Under the existing law, the only way to appeal is through judicial review. Members have considered whether there is a need for a board of appeal to be provided. After discussion, members agree that since the Board will only be challenged on its decision regarding commercial dealing, there is no need to provide a board of appeal to reassess the facts of commercial dealing established by the Board under section 5(4)(d) and (e).

Liability of medical practitioners

19. Members agree that since medical practitioners can only deal with documentary evidence provided to the best of their knowledge and if subsequently there should be discovery of forgery of document or commercial dealing, the medical practitioners concerned will not be held responsible. Although a defence provision can be added if considered necessary, members do not consider it desirable or necessary as the medical practitioners concerned should refer the case to the Board if they are in doubt about the genetic or marriage relationship.

Drafting of the Bill and Ordinance

20. Members have commented on the complicated drafting of the Bill and Ordinance which makes reading difficult and might cause misunderstanding of the provisions. In response to the Chairman's suggestion to re-draft section 5 to make it easier to understand, the Administration has undertaken to review the drafting and structure of the Ordinance and to include the proposed amendments in the next amendment bill dealing with other amendments to the Ordinance.

Committee Stage amendments

21. The Committee Stage amendments to be moved by the Administration are in **Appendix II**. The Bills Committee supports the amendments, which are technical in nature. The Legal Service Division has confirmed that the amendments are legally in order.

Consultation with the House Committee

22. The Bills Committee consulted the House Committee on 29 January 1999 and obtained its support for the Second Reading debate on the Bill to be resumed on 10 February 1999.

Legislative Council Secretariat
5 February 1999

Appendix I

Bills Committee on Human Organ Transplant (Amendment) Bill 1999

Membership List

Hon Ronald ARCULLI, JP (Chairman)
Hon Cyd HO Sau-lan
Hon Michael HO Mun-ka
Dr Hon LEONG Che-hung, JP
Hon Mrs Sophie LEUNG LAU Yau-fun, JP
Hon Jasper TSANG Yok-sing, JP
Hon YEUNG Yiu-chung
Dr Hon TANG Siu-tong, JP
Hon Andrew CHENG Kar-foo
Hon LAW Chi-kwong, JP

Total : 10 Members

Date: 21 January 1999