

Bills Committee on
Human Organ Transplant (Amendment) Bill 2001

(a) To consider an appeal mechanism in the proposed administrative arrangement for granting exemptions to individual products for transplantation that fell within the definition of organ and yet their commercial dealings should not be prohibited.

The Administrative Appeals Board, established under the Administrative Appeals Board Ordinance (Cap. 442), is set up for the purpose of hearing appeals against certain administrative decisions. We consider that the appeal mechanism provided by the Administrative Appeals Board Ordinance would be a feasible channel for the lodging of appeal applications against decisions made regarding the granting of the relevant exemption. We shall liaise with the Administrative Appeals Board to ascertain the feasibility of adopting this mechanism for our purpose.

(b) To review the various declarations and forms required of the doctors who intended to carry out restricted organ transplants after the implementation of the Bill.

In consultation with the Human Organ Transplant Board (the Board), the Administration will review, streamline and, as appropriate, amend the various declarations and forms in relation to the Human Organ Transplant Ordinance after the enactment of the Bill.

(c) To amend “7 days” in the proposed section 7(5)(a) to “7 working days” and to consider whether the time limit could be extended to 14 working days.

The Administration accepts Members’ suggestion to amend “7 days” in the proposed section 7(5)(a) to “7 working days”.

(d) To simplify the completion of cause of death under item 1(b) of Form 1 in the Schedule to the Human Organ Transplant Regulation.

The Administration will bring this suggestion to the attention of the Board when we review the various declarations and forms in relation to the Human Organ Transplant Ordinance after the enactment of the Bill.

(e) To consider whether “legally qualified person” referred to in the proposed section 3 should be required to be so qualified in Hong Kong.

The Administration is of the view that the substantive member and panel members of the Board from the legal sector should be “legally qualified” but not necessarily be so qualified in Hong Kong, as it can give the Administration the flexibility to appoint an appropriate person with expertise in the legal field even though such person is not so qualified in Hong Kong. The Administration will vet a person’s qualification before he is appointed to ensure that he will be suitable to serve on the Board. Besides, it should be noted that the task of providing legal advice is to be undertaken by the legal adviser appointed to the Board, instead of by its substantive/panel members from the legal field.

(f) To review the proposed section 5C(5)(b) by weighing the pros and cons of requiring the same person to interview both the donor and the recipient or having two separate interviewers for the purpose.

An interviewer could have more consistent and accurate assessment if one could interview both the donor and recipient. Also, it is unlikely that this arrangement will cause bias in the assessment results towards either the donor or recipient, for the interviewer is an independent third party not involved in the transplant. Notwithstanding these merits, at the operational level, there might be situations where the interviewer is not able to conduct interviews for both the donor and recipient. In order to cater for this practical difficulty, we consider it necessary to

provide an element of flexibility by amending the provision to allow the donor and recipient to be interviewed by either the same or two different interviewers as proposed in Section 5C(5)(b) of the Bill.

(g) To consider deleting the proposed section 5D(1)(a)(ii) which stipulated that a donor must have reached the age of 16 and was married and if the suggestion could not be acceded to, to provide justifications for the provision and explain whether the existence of such a provision contravened the Family Status Discrimination Ordinance.

Under the proposed Section 5D(1)(a) in the Bill, a live donor is required to be either (i) at least 18 years old, or (ii) at least 16 years old and married. This is not a new requirement but a re-enactment of the existing Section 5(4)(b)(i) and (ii) of the Human Organ Transplant Ordinance (Cap. 465).

The original Human Organ Transplant Bill proposed the minimum age requirement of the donor to be 18 years old. The effect of Section 5(4)(b)(ii) in the existing Cap. 465, which stipulates that a person can also be donor if he/she has reached the age of 16 and is married, is to lower the minimum age requirement from 18 to 16 for married donors. This was in fact proposed by the LegCo ad hoc group formed in 1992 to study the original Human Organ Transplant Bill. The ad hoc group considered that in certain transplant operations, the use of organs from young person might be more advantageous. Research on overseas legislation showed that most of the overseas countries did not allow children to donate their organ. Also, a local opinion survey conducted on the group's proposal to lower the age of living donors revealed that the majority of the respondents did not support the suggestion, as they considered that children were too young to be able to decide independently and objectively on those matters. They also expressed concern over possible abuse by their parents/guardians. Having considered these findings, the ad hoc group alternatively proposed that, since persons aged between 16 and 18 years could get married with their parents' consent, it was reasonable to lower the age of living donors to 16 for married persons. This proposal was agreed

by the Administration.

As this provision to lower donor's minimum age requirement from 18 to 16 for married persons was previously agreed by both the LegCo and the Administration, and that there has been no sign of abuse of the provision, we consider that it should be retained as it is.

The existence of such a provision is not a contravention against the Family Status Discrimination Ordinance (Cap. 527) because of the exemption granted under Section 41 of Cap. 527. This section of Cap. 527 exempts acts which are regarded in the Ordinance as discriminations against people having family status from illegality provided that they were necessary to be done in order to comply with a requirement of an "existing statutory provision".

The Human Organ Transplant Ordinance (Cap. 465) was passed in 1995. It was enacted before the enactment of Cap. 527 in 1997. The present Section 5(4)(b)(ii) of Cap. 465 is therefore an "existing statutory provision" for the purpose of Cap. 527. The proposed Section 5D(1)(a)(ii) in the Bill, if passed into law, will re-enact the existing Section 5(4)(b)(ii) and should also be regarded as an "existing statutory provision" by virtue of Section 2(6) of Cap. 527. Hence, the relevant sections in both the existing Human Organ Transplant Ordinance and the Bill will not contravene Cap. 527 in view of the exemption provided by Section 41 of Cap. 527.

(h) To confirm whether a person who had married outside Hong Kong and reached the age of 16 (or 18 if the suggestion in item 3(h) above was agreed) could donate his/her organ to his/her spouse so long as their marriage had subsisted for not less than three years.

A person who married outside Hong Kong and has reached the age of 16, under Section 5(1)(ii) of the existing Human Organ Transplant Ordinance (which is equivalent to the proposed section 5A(1)(a)(ii) in the Bill), can donate organ to his/her spouse who has a marriage with the person which has subsisted for not less than three years, provided that all stipulated requirements are fulfilled, including in particular

Section 2A of the Human Organ Transplant Regulation. This section of the Regulation provides that the fact of the relevant marital relationship must be established by means of:

- a document that is equivalent to one issued under the Marriage Ordinance (Cap. 181) or the Marriage Reform Ordinance (Cap. 178) and that shows the donor and the recipient are the parties to a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed; and
- a statutory declaration by either the donor or the recipient to the effect that the marriage has subsisted for not less than three years.

In fact, a live and married person who is at least 16 years of age can donate organ to any person (not only his or her spouse) if the Board has given its approval to the proposed transplant under the existing Section 5(4) of the Human Organ Transplant Ordinance (which is equivalent to the proposed section 5C in the Bill).