

## CONSENT FOR ORGAN DONATION AFTER DEATH – THE LEGAL ASPECTS

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The principle that one can donate an organ to others is not by itself wrong; on the contrary it has been approved by Christian Churches amongst others. So, Pope Benedict VXI in an address to the International Congress on Tissue Donation (2008) said that:

*“Organ donation is a peculiar form of witness to charity. In a period like ours, often marked by various forms of selfishness, it is ever more urgent to understand how the logic of free giving is vital to a correct conception of life. Indeed, a responsibility of love and charity exist that commits one to make of their own life a gift to others, if one truly wishes to fulfil oneself. As the Lord Jesus has taught us, only whoever gives his own life can save it (cf. Lk 9: 24).”*

However, he then went on to emphasise the ethical considerations which must underpin any regulation of organ donation:

*“Therefore, it is necessary to put respect for the dignity of the person and the protection of his/her personal identity in the first place. As regards the practice of organ transplants, it means that someone can give only if he/she is not placing his/her own health and identity in serious danger, and only for a morally valid and proportional reason.”*

The vital word here is ‘give’ and the reasons for such giving and this is where we come to the question of consent for organ donation after death. It is useful here to recall why the Human Tissue Act 2004, which regulates this area, was passed. The previous legislation was the Human Tissue Act 1961 which provided by s.1(2) that the person lawfully in possession of the body of a deceased person (often the hospital or other place where the person died) could authorise the removal of any part from the body for use for the purposes of therapy, education and research where they had no reason to believe, having made such reasonable enquiries as were practicable, that either the deceased or any surviving spouse or relative objected to it. In addition, by s.1(1) a person could give express consent to donation of their organs after death provided that this was done in writing or orally in the presence of two or more witnesses during his or her last illness.

The effect was that consent could, in effect, be presumed, and this led to abuses following which Inquiries were set up which resulted in the replacement of the 1961 Act by the 2004 Act. In particular, as Price notes, *“the Reports on the Inquiries: catalogued local practices resulting in relatives, principally parents of dead children, lacking appreciation of subsequent tissue retention and use for research following (generally coroners’) post-mortem examinations, often resulting in the burial or cremation of loved ones without the realisation that they were not ‘complete’,..”*

As Price points out: *‘It was a common theme of the Inquiry Reports that the law should be reformed so that ‘informed consent’ rather than an ‘absence of objection’ should become the central guiding legal principle justifying removal,*

*retention and use of cadaveric material for various permissible purposes,..’*

This was carried through into the 2004 Act so that, as Price puts it: ‘the notion of consent constitutes the unifying theme of the legislation, described in Parliament as its ‘golden thread’.

The significance of all this is that the proposals of the Government to require individuals to ‘opt out’ of organ donation would remove this element of consent which the 2004 Act and the Inquiries which preceded it thought were so essential. As the Government’s Consultation on Introducing ‘Opt out’ Consent to Organ and Tissue Donation in England puts it:

*“Changing to an opt-out system in relation to organ and tissue donation in England would require people to actively withhold their consent if they did not want it to be a possibility after death, and certain changes to legislation would be needed to achieve this.”*

There are the following points to be made:

- (a) The Government needs to justify its contention that the element of express consent, thought essential in the 2004 Act, is now considered unnecessary.
- (b) Following on from this the Government needs to explain how the specific abuses identified by the Inquiries (see above) which led to the requirement of express consent would not re-occur once this requirement is removed.
- (c) The Government needs to explain why, when there is growing emphasis on the need for informed and express consent (see e.g. the General Data Protection Regulations 2018), these proposals go right the other way.
- (d) If the system of requiring opting out does go ahead there will need to be certain exemptions such as for those aged under 18, those who lack capacity, those who are visitors to England and those who have expressed an objection on religious grounds. Once these have all been accounted for, would it not be easier anyway to continue the present system given that there will be many who will fall into these categories and registers will have to be maintained of those in them?