

06 September 2019

The Hon. Jill Hennessy MP
Attorney-General of Victoria
Attorney-General@justice.vic.gov.au

Dear Attorney-General,

Referral of the *Human Tissue Act 1982* to the Victorian Law Reform Commission

The Law Institute of Victoria ('LIV') invites you to consider, under section 5 of the *Victorian Law Reform Commission Act 2000*, referring the *Human Tissue Act 1982* ('the Act') to the Victorian Law Reform Commission for examination, report and recommendations.

The Act is a significant piece of legislation. It regulates the removal of human tissue for transplantation, the donation of organs and tissue before and after death, post-mortem examinations, the definition of death, the authorization of schools of anatomy, and the prescription of tissue banks.

The LIV submits that a review by the Victorian Law Reform Commission is justified on the following grounds:

- the Act was ground-breaking legislation in 1982 but it is now 37 years old. Since 1982, there have been substantial changes to medical practice and technology, particularly in the area of organ transplantation. For example, donation after cardiac death (as distinct from brain death) is becoming increasingly common due to new techniques for preserving organs. This was not the case in 1982;
- there is a need to consider "opt out" rather than "opt in" for organ donation, in light of initiatives by a number of overseas governments to increase the rate of organ donation, and given the growth in the need for transplants;
- the need to clarify the role and jurisdiction of the Coroners Court of Victoria, particularly prior to death where time is critical;
- the need to consider the consent processes for ante mortem interventions performed on potential donors, and the concept of implied consent;
- clarification of the law on who has the final say on organ donation and in particular, whether or not lawfully valid consent to donate organs can be over-riden by others;

- reviewing who should liaise with families when a loved one is eligible for organ donation but lacks the required decision-making capacity;
- reviewing the role of *Donate Life* in Victoria and whether its current approach to organ donation is limiting the conversion rate to organ donation;
- reviewing the current definition of 'death' under s.41; and
- the last major amendments were made in 2009 and were restricted to the insertion of *child* the purposes of section 21, 22 and 23: *Human Tissue Amendment Act 2009*.

The LIV has also identified following questions:

- How can the Act be re-drafted to help overcome the current low conversion rate of organ donations in Victoria?
- How should the Act interact with the *Medical Treatment Planning and Decisions Act 2016* and Part 5 of the *Assisted Reproductive Treatment Act 2008* (Vic)? Moreover, should the Act adopt the OPA's view that ante mortem interventions should not be considered a medical treatment?
- How should the Act interact with other related Acts, including the *Guardianship and Administration Act* (both 1986 and 2019) which provide for removal of tissue for the purposes of transplantation to another person (not post mortem)?
- How can the Act provide a more definitive legal framework regarding a family's ability to veto organ donation to ensure the dying person's wishes on organ donation (whether express or implied) are followed, despite the views of others?

If there is any aspect of this correspondence that you would like to discuss further, please contact Michelle Duarte, Policy Lawyer to the Health Law Committee (03) 9607 9413 or MLuarte@liv.asn.au, or Alexander Laurence, Paralegal to the Health Law Committee (03) 9607 9565 or ALaurence@liv.asn.au.

Yours sincerely,

Stuart Webb
 President
 Law Institute of Victoria