

HUMAN TRANSPLANTATION (WALES) ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 4: Consent: adults

17. This section introduces the concept of deemed consent. Deemed consent is the default position in all cases apart from excepted adults (see section 5) and children (see section 6).
18. Where deemed consent can apply, there are three possible exceptions to its application. These are:

Exception 1:

19. Table 1 sets out the cases when consent must be provided expressly, and by whom:
 - a) where the adult is alive it is the adult who must give consent meaning that deemed consent can never apply when an adult is alive. However, section 9 applies in cases where a living person lacks capacity to give consent;
 - b) where the adult has died but a decision of his or hers whether or not to consent to transplantation was in force immediately before death – in such cases that decision prevails;
 - c) the adult has died, no decision of his or hers is in force, but the adult has appointed another person or persons to take the decision under section 8 of the Act. If someone is able to give consent under the appointment, they make the decision;
 - d) the adult has died, no decision of his or hers is in force, and they appointed another person or persons to take the decision under section 8 of the Act. If no-one is able to give consent under the appointment, the decision on consent falls to qualifying relatives in ranked order, as in the Human Tissue Act 2004 (the 2004 Act). For an explanation of “qualifying relationship”, see paragraph 32 below and section 19.
20. The factual concepts behind consent are the same in this Welsh Act as is the case in the 2004 Act and reflect an intentional interplay between the two pieces of legislation. For example, the factual question of whether there is “a decision of a person to consent, or not to consent, to a [transplantation] activity ... in force immediately before his or her death” is the same whether the legal framework is the Welsh legislation or the 2004 Act. In this way, the two pieces of legislation are intended to sit side by side each other.
21. If a person is alive and normally lives, for example, in England and takes part in a transplantation activity in Wales, as a matter of law the Welsh Act applies. However the effect is the same, i.e. that person’s consent is required, as if the 2004 Act applied.
22. If a person who normally lives in Wales dies in England, his or her consent cannot be deemed to have been given to a transplantation activity that takes place in England.

The 2004 Act would apply and therefore a person in a qualifying relationship would decide in the absence of express consent. This result is achieved in two ways. The first is that the 2004 Act continues to apply where the transplantation activity takes place in England or Northern Ireland. Secondly under that Act the question of fact relating to whether a decision of the deceased relating to consent (in practice being on the Organ Donor Register) was in force when he or she died is the same.

23. Appointments of representatives nominated to take the decision relating to consent after death made under either the 2004 Act or the Welsh legislation are recognised in a cross border situation. This is done by a provision in both pieces of legislation (section 8(11) of this Act and new section 4(11) of the 2004 Act, to be inserted by an order made by the Secretary of State pursuant to section 150 of the Government of Wales Act 2006) by which appointments made under one Act can be treated as having been made under the other.

Exception 2:

24. Subsection (4) sets out that a relative or friend can object to consent being deemed on the basis that they knew the deceased wished to object to donation. Such an objection can be made by any relative or friend of long standing of the deceased. The person making an objection does not have to be a qualifying relative as defined in section 19 of the Act. However, any objection must be based on the known views of the deceased and not on the views of the relative or friend.
25. An objection must therefore-
 - a) be provided by a relative or friend of long standing who knew the views of the deceased in relation to consent for transplantation activities, and
 - b) be based on information provided about the deceased's wishes that indicates that the deceased would not have consented to transplantation activities. It should lead a reasonable person to conclude that the person objecting did indeed know the most recent views of the deceased.

Exception 3:

26. Consent cannot be deemed where the transplantation activity involves "excluded relevant material". Consent in relation to such material is dealt with in section 7.