

HUMAN TISSUE (SCOTLAND) ACT 2006

EXPLANATORY NOTES

THE ACT – AN OVERVIEW

Part 1: Transplantation Etc.

Section 17 – Restrictions on transplants involving live donor

38. This section broadly carries forward the arrangements at present under section 2 of the [Human Organ Transplants Act 1989 \(c.31\)](#), which set up a system of scrutiny of transplantation of organs from living donors. The new provisions, which equate to section 33 of the [Human Tissue Act 2004 \(c.30\)](#), will apply not just to whole organs but also to parts of organs, to take account of developments such as the possibility of transplanting parts of the liver of a live donor. The system of scrutiny will also be extended to cover all transplants from living donors, whether they are related or unrelated. A child, or an adult with incapacity cannot be a living donor of an organ or part of an organ except in the context of a domino transplant operation and cannot be a living donor of any tissue other than regenerative tissue.
39. [Section 17\(1\)\(a\)](#) makes it an offence, subject to subsections (3), (4), (5) and (8) to remove an organ, part of an organ or tissue from a living child with the intention that it be used for transplantation. (“Adult” means a person 16 years of age or over and “child” means a person under the age of 16 – section 60(1).) [Section 17\(1\)\(b\)](#) makes it an offence, subject to subsections (3), (4), (5) and (8) to remove an organ or part of an organ from a living adult with the intention that it be used for transplantation. [Section 17\(1\)\(c\)](#) makes it an offence, subject to subsections (3), (4), (5) and (8) to remove any tissue from a living adult with incapacity with the intention that it be used for transplantation. In each case, the offence is committed where the person who carries out the removal knows, or might reasonably be expected to know that the removal is made from a living child, a living adult or, as the case may be, a living adult with incapacity.
40. [Section 17\(2\)\(a\)](#) makes it an offence, subject to the provisions of subsections (3), (4), (5) and (8), to use for transplantation, an organ or part of an organ or any tissue which has come from the body of a living child. [Section 17\(2\)\(b\)](#) makes it an offence, subject to subsections (3), (4), (5) and (8) to use for transplantation an organ or part of an organ from a living adult. [Section 15\(2\)\(c\)](#) makes it an offence, subject to subsections (3), (4), (5) and (8) to use for transplantation any tissue from a living adult with incapacity. Again the offence is committed if when the person does so he or she knows, or might reasonably be expected to know, that the organ, part of the organ or tissue has come from a living child, a living adult or, as the case may be, a living adult with incapacity.
41. Subsection (3) gives the Scottish Ministers power by regulations to provide that no offence is committed under subsection (1)(b) (in relation to removal of an organ or part of an organ from the body of a living adult intending that it be used for transplantation) or under subsection (2)(b) (in relation to using for transplantation an organ or part of an organ which has come from the body of a living adult) where the requirements mentioned in subsection (3) are met. The requirements are that the Scottish Ministers must be satisfied that no reward has been or will be given in contravention of the

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provisions of section 20 (prohibition of commercial dealings in parts of a human body for transplantation) and that such other conditions or requirements as may be specified in the regulations are complied with. Where regulations provide for such an exception from the offence provisions in subsection (1)(b) or (2)(b), it is sufficient if the person reasonably believes that the exception applies (subsection (8)).

42. Subsection (4) gives the Scottish Ministers power by regulations to provide that no offence is committed under subsection (1)(a) or (c) (in relation to removal of an organ, part of an organ or tissue from the body of a living child or the removal of any tissue from the body of a living adult with incapacity intending that it be used for transplantation) or that no offence is committed under subsection (2)(a) or (c) (in relation to using for transplantation an organ or part of an organ which has come from the body of a living adult or using for transplantation any tissue which has come from the body of a living adult with incapacity) where the requirements mentioned in subsection (4) are met. The requirements are that a person removes or uses regenerative tissue and that Scottish Ministers are satisfied that no reward has been or will be given in contravention of the provisions of section 20 and that such other conditions or requirements as may be specified in the regulations are complied with. Again, where regulations provide for such an exception from the offence provisions in subsections (1)(a) or (c) or (2)(a) or (c), it is sufficient if the person reasonably believes that the exception applies (subsection (8)).
43. Subsection (5) gives the Scottish Ministers power by regulations to provide that no offence is committed under subsection (1)(a) or (b) (in relation to removal of an organ, part of an organ or tissue from the body of a living child or the removal of an organ or part of an organ from the body of a living adult intending that it be used for transplantation) or that no offence is committed under subsection (2)(a) or (b) (in relation to using for transplantation an organ, part of an organ or any tissue which has come from the body of a living child or using for transplantation an organ or part of an organ which has come from the body of a living adult with incapacity) where the requirements mentioned in subsection (5) are met. The requirements are that a person removes from a child or an adult with incapacity an organ or part of an organ during a domino organ transplant operation which is in turn intended to be used for transplantation in respect of another living person, or uses an organ or part of an organ so removed, that Scottish Ministers are satisfied that no reward has been or will be given in contravention of the provisions of section 20 and that such other conditions or requirements as may be specified in the regulations are complied with. Again, where regulations provide for such an exception from the offence provisions in subsection (1) (a) or (b) or (2)(a) or (b), it is sufficient if the person reasonably believes that the exception applies (subsection (8)).
44. Subsection (4) provides that in making regulations under subsection (3), (4) and (5) the Scottish Ministers must include a provision allowing for appeals against decisions relating to matters dealt with by the regulations.
45. “Adult with incapacity” for the purposes of subsections (1)(c) and (2)(c), is defined in subsection (7) as an adult to whom section 17 applies and, for the purposes of the provisions dealing with domino organ transplant operations, an adult who has been assessed as incapable under section 47 of the Adults with Incapacity (Scotland) Act 2000. “Domino organ transplant operation” is defined to ensure that the transplant operation must firstly be for the benefit of the child or adult with incapacity as the primary focus.
46. “Regenerative tissue” is defined in subsection (10) as tissue which, after injury or removal, is replaced by the body of the living person by natural processes. “Reward” is defined in subsection (10) as any description of financial or other material advantage, but excluding certain types of payment in money or money’s worth. One type of payment excluded is payment for defraying or reimbursing any liability incurred by a third party in relation to removing, transporting, preparing, preserving or storing the

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organ, organ part or tissue for transplantation. This is particularly important in the context of bone marrow transplantation where there are registries which charge a fee for expenses associated with the procurement of bone marrow internationally.

47. Subsection (9) sets out the penalties attaching to an offence under section 15. It provides that a person guilty of an offence under this section will be liable on summary conviction to imprisonment for a term not exceeding 12 months, to a fine not exceeding level 5 on the standard scale, or both.