



Human Tissue (Authorisation) (Scotland) Act 2019

2019 asp 11

PART 3

AUTHORISATION OF REMOVAL AND USE OF PART OF BODY OF DECEASED PERSON

CHAPTER 5

PRE-DEATH PROCEDURES RELATING TO TRANSPLANTATION

23 Pre-death procedures relating to transplantation

(1) After section 16 of the 2006 Act insert—

“Pre-death procedures relating to transplantation

16A Meaning of “pre-death procedure”, “Type A procedure” and “Type B procedure”

- (1) In this Part, a “pre-death procedure” means a medical procedure—
- which is carried out on a person for the purpose of increasing the likelihood of successful transplantation of a part of the person’s body after the person’s death, and
 - which is not for the primary purpose of safeguarding or promoting the physical or mental health of the person.
- (2) In this Part, a pre-death procedure is—
- a “Type A procedure” if it is a pre-death procedure or category of pre-death procedure specified in regulations made by the Scottish Ministers under section 16B(1),
 - a “Type B procedure” if it is a pre-death procedure or category of pre-death procedure specified in regulations made by the Scottish Ministers under section 16C(1).

16B Type A procedures

- (1) The Scottish Ministers may by regulations specify a pre-death procedure or category of pre-death procedure as a Type A procedure for the purposes of sections 16D to 16F.
- (2) Regulations under subsection (1) may make different provision for different procedures or categories of procedure and in particular may specify that a pre-death procedure or category of pre-death procedure is a Type A procedure only where that procedure is carried out in a particular way.
- (3) Regulations under subsection (1) may specify a pre-death procedure (or category of pre-death procedure) as a Type A procedure only if the Scottish Ministers consider that it is appropriate that the carrying out of the procedure or, as the case may be, the category of procedure should be in accordance with section 16E.
- (4) Before laying draft regulations under subsection (1) before the Scottish Parliament, the Scottish Ministers must consult such persons as they consider appropriate.

16C Type B procedures

- (1) The Scottish Ministers may by regulations specify a pre-death procedure or category of pre-death procedure (other than one specified in regulations under section 16B(1)) as a Type B procedure for the purposes of section 16D and 16E.
- (2) Regulations under subsection (1)—
 - (a) may also make provision about—
 - (i) the circumstances in which Type B procedures may be carried out,
 - (ii) the way in which the carrying out of Type B procedures may be authorised,
 - (iii) the process for authorisation of Type B procedures, and
 - (iv) the carrying out of Type B procedures, and
 - (b) may make different provision for different procedures or categories of procedure.
- (3) Regulations under subsection (1) may specify a pre-death procedure (or category of pre-death procedure) as a Type B procedure only if the Scottish Ministers consider that it is appropriate that the procedure or, as the case may be, the category of procedure should be subject to provision mentioned in subsection (2)(a)(i) to (iv).
- (4) Before laying draft regulations under subsection (1) before the Scottish Parliament, the Scottish Ministers must consult such persons as they consider appropriate.

Status: This is the original version (as it was originally enacted).

16D Restrictions on carrying out of pre-death procedures

- (1) A pre-death procedure may be carried out only if it is a Type A procedure or Type B procedure.
- (2) A Type A procedure may be carried out only in accordance with section 16E.
- (3) A Type B procedure may be carried out only in accordance with—
 - (a) section 16E, and
 - (b) any provision made in regulations under section 16C(1) in relation to that procedure (or category of procedure).

16E Carrying out of Type A and Type B procedures

- (1) A Type A procedure or Type B procedure may be carried out only if—
 - (a) the health worker who is to carry out the procedure or who has authorised a person to carry out the procedure considers that the requirements of subsection (2) are met,
 - (b) that health worker—
 - (i) has no actual knowledge that the person was unwilling for the procedure to be carried out,
 - (ii) has had regard to the person's past wishes and feelings so far as reasonably ascertainable (having had regard to any evidence referred to in section 16H(6)(c) or 16I(4)(c)), and
 - (iii) is satisfied that if the person were capable of making a decision about authorisation of the procedure, the person would not be unwilling for the procedure to be carried out,
 - (c) the use of a part of the person's body for transplantation is authorised by virtue of section 6, 6D, 6E, 6F, 6G, 8, 9, 10 or, as the case may be, 10A,
 - (d) in the case of a Type A procedure, the carrying out of the procedure is authorised under section 16F, and
 - (e) in the case of a Type B procedure, the carrying out of the procedure is authorised in accordance with any provision made under section 16C(1) in relation to that procedure (or category of procedure).
- (2) The requirements mentioned in subsection (1)(a) are met if—
 - (a) in the view of the health worker primarily responsible for the person's medical treatment, the person is likely to die imminently (including as a result of the withdrawal of life-sustaining treatment),
 - (b) where the person is receiving life-sustaining treatment, the decision to withdraw that treatment has been taken by that health worker,
 - (c) the carrying out of the procedure is necessary (see subsection (3)),
 - (d) the carrying out of the procedure is not likely to cause more than minimal discomfort to the person, and
 - (e) the carrying out of the procedure is not likely to harm the person.
- (3) For the purposes of subsection (2)(c), the carrying out of a procedure is necessary if either of the following apply—

- (a) it is necessary to carry it out for the purpose of ascertaining whether a part of the person's body is suitable for transplantation,
- (b) it is necessary to carry it out for the purpose of increasing the likelihood of successful transplantation of a part of the person's body.

16F Authorisation of Type A procedures

- (1) For the purposes of section 16E(1)(d), the carrying out of a Type A procedure is authorised in relation to a person if—
 - (a) the person has expressly authorised the carrying out of the procedure,
 - (b) in the case of an adult who, at the relevant time, has not expressly authorised the carrying out of any procedure, if the adult's nearest relative is, at the relevant time, entitled to authorise the removal and use of a part of the adult's body by virtue of section 6E or 6F and the adult's nearest relative authorises the carrying out of the procedure,
 - (c) in the case of a child who, at the relevant time, has not expressly authorised the carrying out of any procedure—
 - (i) if a person who has parental rights and parental responsibilities in relation to the child is, at the relevant time, entitled to authorise the removal and use of a part of the child's body by virtue of section 8D or 10 and that person authorises the carrying out of the procedure,
 - (ii) if a person is, at the relevant time, entitled to authorise the removal and use of a part of the child's body by virtue of section 10A and that person authorises the carrying out of the procedure,
 - (d) in the case of an adult who, at the relevant time, has not expressly authorised the carrying out of any procedure, there is in force an express authorisation by the adult of removal and use of a part of the adult's body for transplantation,
 - (e) in the case of a child who, at the relevant time, has not expressly authorised the carrying out of any procedure, there is in force an authorisation by virtue of section 8 by the child of removal and use of a part of the child's body for transplantation, or
 - (f) in the case of an adult, the adult is deemed by virtue of section 6D to have authorised the removal and use of a part of the adult's body for transplantation.
- (2) For the purposes of subsection (1)(b), the nearest relative of an adult may not give authorisation—
 - (a) if the relative has actual knowledge that the adult was unwilling for the procedure to be carried out, or
 - (b) unless the relative—
 - (i) has had regard to the adult's past wishes and feelings so far as reasonably ascertainable (having had regard to any evidence referred to in section 16H(6)(c)), and
 - (ii) is satisfied that if the adult were capable of making a decision about authorisation of the procedure, the adult would not be unwilling for the procedure to be carried out.
- (3) For the purposes of subsection (1)(c), a person may not give authorisation—

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- (a) if the person has actual knowledge that the child was unwilling for the procedure to be carried out, or
 - (b) unless the person—
 - (i) has had regard to the child’s past wishes and feelings so far as reasonably ascertainable (having had regard to any evidence referred to in section 16I(4)(c)), and
 - (ii) is satisfied that if the child were capable of making a decision about authorisation of the procedure, the child would not be unwilling for the procedure to be carried out.
- (4) Where a person has expressly authorised the carrying out of one or more Type A procedures under subsection (1)(a), subsection (1)(f) does not authorise the carrying out of a Type A procedure not mentioned in that authorisation.
- (5) An authorisation under subsection (1)(a), (b) or (c) must be—
- (a) in writing, or
 - (b) given orally to a health worker.

16G Authorisation of Type A procedures: transitory provision

- (1) Until section 6D comes into force, section 16E(1)(b)(ii) applies as if the words “(having had regard to any evidence referred to in section 16H(6)(c) or 16I(4)(c))” were omitted.
- (2) Until section 6D comes into force, section 16F applies as if—
- (a) in subsection (1)—
 - (i) for paragraph (b) there were substituted—
 - “(b) in the case of an adult, a person who is entitled to authorise the removal and use of a part of the adult’s body by virtue of section 7(1), (2) or (3) authorises the carrying out of the Type A procedure,”,
 - (ii) for paragraph (c) there were substituted—
 - “(c) in the case of a child, a person who is entitled to authorise the removal and use of a part of the child’s body by virtue of section 9(1), (2) or (3) or 10(1) authorises the carrying out of the Type A procedure,”,
 - (iii) paragraphs (d) to (f) were omitted,
 - (b) in subsection (2)(b)(i), the words “(having had regard to any evidence referred to in section 16H(6)(c))” were omitted,
 - (c) in subsection (3)(b)(i), the words “(having had regard to any evidence referred to in section 16I(4)(c))” were omitted,
 - (d) subsection (4) were omitted.”.
- (2) In section 59(3) of the 2006 Act (regulations subject to affirmative procedure), after paragraph (ac) insert—
- “(ad) regulations under section 16B(1) or 16C(1);”.