

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

43rd Report of Session 2017–19

Organ Donation (Deemed Consent) Bill

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee who agreed this report are:

[Baroness Andrews](#)

[Lord Blencathra](#) (Chairman)

[Lord Flight](#)

[Lord Jones](#)

[Lord Lisvane](#)

[Lord Moynihan](#)

[Lord Rowlands](#)

[Lord Thomas of Gresford](#)

[Lord Thurlow](#)

[Lord Tyler](#)

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Forty Third Report

ORGAN DONATION (DEEMED CONSENT) BILL

1. This a private member's bill, introduced by Lord Hunt of Kings Heath, which had its Second Reading on 23 November. The Bill amends the Human Tissue Act 2004 ("the 2004 Act") to introduce provisions that would allow consent to organ and tissue donation in England to be deemed to have been given by a potential adult organ donor before their death, unless they had indicated that they did not wish to be an organ donor.
2. The Department of Health and Social Care has provided a Delegated Powers Memorandum.¹ Although we make no recommendation for amendment, we wish to draw one delegated power to the attention of the House.

Clause 1—Power to prescribe the human body material whose transplantation is excluded from the deemed consent regime

3. Clause 1 amends section 3 of the 2004 Act to insert provisions which allow consent to organ donation to be deemed to have been given. The new deemed consent provisions apply to the transplantation of what is described as "permitted material" from a human body. "Permitted material" is defined in new subsection (9) of section 3 of the 2004 Act (inserted by clause 1(5)). In general, it is defined to mean "material, other than gametes, which consists of or includes human cells".² But the definition also contains a regulation-making power, subject to the affirmative resolution procedure, under which the Secretary of State may by regulations specify particular material which is to be *excluded* from the definition.
4. The Department explains in paragraphs 9 to 16 of the Memorandum the reasons for including this regulation-making power. The policy position is that deemed consent should not apply to novel transplants (such as faces or limbs), and the regulation-making power will be used to exclude such novel transplants from the scope of the deemed consent regime. The Department contends that a regulation-making power is necessary to ensure flexibility to amend the list of novel transplants, in order to account for changes over time in research, technology and clinical practice, new ways of transplantation, or where rare types of transplant become more common and acceptable to the public.
5. The Department also argues that it is important that the legislation for England maintains consistency with that which applies to Wales and that which is proposed for Scotland. Both contain similar regulation-making powers to specify the material or body parts which are not subject to the deemed consent regimes in those countries.
6. While we are persuaded of the need for the regulation-making power, we found it disappointing that no indication of what might be included in the list of novel transplants has been provided for consideration alongside the Bill, particularly bearing in mind that the Human Transplantation (Excluded

1 Department of Health and Social Care, [Organ Donation \(Deemed Consent\) Bill Delegated Powers Memorandum](#)

2 The reference in new section 3(9) is to "relevant material". This is defined in section 53 of the 2004 Act to have the meaning given in this report.

Relevant Material) (Wales) Regulations 2015 (“the 2015 Regulations”) provide an example of such a list.³

7. We requested further information from Lord Hunt about this. We were told that the first step in compiling a list would be for the Government to consult informally NHS Blood and Transplant (NHSBT) and other relevant organisations about whether all the material listed in the 2015 Regulations was still considered novel. Following that pre-consultation, a list of proposed novel transplants would then be open to public consultation. Neither the pre-consultation nor the consultation has yet been undertaken.
8. **While this explains why it has not been possible to provide a list of novel transplants at this stage, we query why, at the very least, pre-consultation with NHSBT and other relevant organisations was not undertaken before the Bill was introduced so that Parliament would have had the benefit of an indicative list of novel transplants. The House may wish to press for further information on this point.**

3 Human Transplantation (Excluded Relevant Material) (Wales) Regulations 2015 ([WSI 2015/1775](#))

APPENDIX 1: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.