STATES OF JERSEY

DRAFT HUMAN TRANSPLANTATION AND ANATOMY (JERSEY) LAW 201-

Lodged au Greffe on 27th February 2018
by the Minister for Health and Social Services

STATES GREFFE

Jersey

DRAFT HUMAN TRANSPLANTATION AND ANATOMY (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Health and Social Services has made the following statement –

In the view of the Minister for Health and Social Services, the provisions of the Draft Human Transplantation and Anatomy (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator A.K.F. Green, M.B.E.**

Minister for Health and Social Services

Dated: 23rd February 2018

REPORT

Hundreds of people die every year in the UK while waiting for an organ transplant – an estimated 6,500 people are currently waiting. Donating an organ saves lives and substantially improves the recipient's health and quality of life, with all the societal benefits that can follow. It can mean that something positive emerges from the tragic loss of a loved one. Not surprisingly, many people only realise the importance of organ donation when they become exposed to it.

Talking about death is always difficult, but in recent times there appears to have been a shift in how people view organ donation, with an acknowledgement that more could be done to increase the supply of organs for transplant. In light of this change in attitude, a number of nations are now looking at how their current schemes might operate for the wider public good by embedding a change in culture where donation is supported and a greater number of much-needed transplants take place.

One catalyst for change has been the move by the Welsh Government in December 2015 to a system of what is termed 'deemed consent' – where people are deemed to consent to donating their organs unless they actively opt out. This was a response to a large number of missed opportunities – of 30,000 deaths in Wales in 2011/12, 250 people died in a way that would have allowed them to become a potential organ donor, but only 67 people became organ donors. The move to deemed consent is the opposite of how the previous Welsh system worked where people had to specifically express consent to donate their organs.

The Scottish government has announced its intention to introduce similar legislation to Wales, supporting what it terms 'a soft opt out' system. England, Ireland and the Isle of Man have all begun to look at the issue with the aim of adopting similar approaches. France moved to a system of 'presumed (deemed) consent' in January 2017.

Marking organ donation week in an editorial on 5th September 2017, The Times stated its support for an opt-out system: 'This is one of those rare occasions when a cost-free commonsense solution is available to an urgent problem. The task of policymakers is to seize it.' In an editorial in the same month, the Jersey Evening Post stated that: 'We now have a chance to do our bit …'.

The situation in Jersey

Jersey has a relatively low proportion of people registered as organ donors, around 12%, compared to 36% in the UK. In early 2018, 12 people in Jersey were waiting for a transplant. Few deaths in Jersey occur in circumstances where the person is able to donate their organs, but this makes it even more important that when an opportunity does arise the chances of organ donation are considered. In the year to 31st March 2017, there were 3 deceased donors in Jersey whose organs were transplanted into 9 different individuals.

The Minister for Health and Social Services announced in January 2017 (see Appendix 4 to this Report) his desire to facilitate a change in approach to organ donation to make it easier for deceased Islanders to donate their organs and potentially save more lives. He was also keen that any change in approach encouraged people to have the conversation with their families about donating while still fit and well, rather than leave this until the emotive aftermath of a fatal accident or illness. He realised that a few words now could make the difference later on, with this new approach

helping to raise the profile of organ donation and make it the norm across society, including in Jersey.

The 2017 Jersey Opinions and Lifestyle Survey

A number of questions, validated by the independent Jersey Statistics Unit, were included in the 2017 JOLS. A copy of the PDF pages showing the results is available at Appendix 6.

The results show that three quarters of adult respondents wanted an organ transplant if they needed one, with only 6% turning one down. People were less inclined to donate their own organs – with over half saying they would, nearly a third not sure and 14% saying they would not. This uncertainty may be a reflection of the fact that it is not something that many people wish to think about, given the focus on death and dying, which many of us are reluctant to contemplate.

Unfortunately, the general support for organ donation is not reflected in the proportion of those registering on the Organ Donor Register (ODR) (under current arrangements) to be a donor, with only a quarter of those who said they were happy to donate being on the ODR. This is one of the reasons for suggesting a change in approach.

Of the 78% who were not on the ODR, less than a fifth had failed to do so because they did not wish to donate. Over 60% had not done so saying they had not got round to it, weren't sure how to, or didn't realise that Jersey residents could register. A deemed consent system would help alleviate these issues.

A presumed (deemed) consent approach to donation was supported by a little over half of respondents, with 19% not sure and 29% saying no. Given this question was asked with little further information on how the scheme would work, it would be reasonable to surmise that, with further information, a significant proportion of those who were not sure would, if their possible concerns were allayed, be willing to support the idea of deemed consent. If they were inclined to oppose the idea out-of-hand, they could easily have done so.

Under the deemed consent scheme there is a recognition of the key part families will continue to play in the organ donation process and this would tie in with the fact that almost half of respondents thought that families should be able to stop donation where deemed consent would otherwise apply.

There was less support for family intervention where the donor had joined the current register, with over 65% saying that the family should not be able to stop a donation. This reinforces the need to discuss people's intentions.

Promoting discussion of organ donation is one of the key aims of moving to a deemed consent process and the need for this is evidenced by the fact that, overall, only around two-fifths of adults have informed their family members of their wishes.

Proportionately fewer of those who do not wish to donate have had that conversation and so the ability to actively choose to opt out under a deemed consent system would make clear such wishes that might otherwise remain unknown.

Organ donation and transplantation crosses borders and we need to look at this as an issue that has implications beyond Jersey – people may have friends or relatives off-Island who are on the waiting list for organ donation and people in Jersey who are awaiting an organ are most likely to receive one from a UK donor. In 2017, 8 Island residents received a transplanted organ.

Here, the current system is one where individuals can choose to sign up to the Organ Donor Register (ODR) – many people carry an organ donor card, for example. However, even if someone has not signed up, a relative can authorise donation on their behalf. Per head of population, the number of organs donated by Islanders holds up well, but across the UK and Europe there are still not enough donors to meet the need.

Increasing the number of donors will always remain a challenge, particularly given that less than 1% of people die in circumstances where they can donate – because organs have to be transplanted very soon after death, they can only be donated by someone who died in hospital. However, this means that where someone dies and it is appropriate to consider organ donation then it is important that in as many cases as possible this should happen. The proposed changes are intended to help meet this aim.

A new system of 'deemed consent'

The new donation system that is being proposed in Jersey is termed 'deemed (or presumed) consent'. This means that the default legal position is one where adults are deemed or considered to have given their consent unless they specifically opt out. This approach would permit organs to be donated in cases where, for example, at the moment a person had simply not got around to signing up to the ODR. In law it would change the arrangement from one where organ donation has to be specifically authorised to one where, for adults, consent to donation is deemed to have been given unless people actively opt out. In effect, anyone who neither opts in nor opts out of donation would be signalling consent to allowing their organs to be donated (subject to certain safeguards) i.e. they have no objection to being an organ donor.

Individuals who opt-in would still be able to exclude particular organs if they wish.

For a number of groups, deemed consent would not apply. These are children under 18, adults who have not been ordinarily resident in Jersey for 12 months, and those who lack capacity to understand the notion of deemed consent. This is not to say that people falling within these groups cannot donate their organs, but express consent from an appropriate person (a parent in the case of a child, for example) would be required for this to happen.

Children

It is proposed that express consent to donate their organs will apply to anyone under the age of 18. This express consent would have to be given by a parent or guardian if they were under 16. Of course, there is nothing stopping a child making clear in discussion with their parents their views on the matter, but it would be for their parents or guardians to make the final decision.

A young person aged 16 or 17 would be able to give their own express consent where they are competent to do so (i.e. it would appear to a reasonable person that the young person has sufficient understanding to make an informed decision). If they fail to give express consent in their lifetime then express consent would be required from their parents or guardians.

People lacking mental capacity to understand opting out

It is necessary to safeguard the position of people who might not be in a position to understand that they have the choice to opt out. It could be said that someone who is in hospital immediately before their death would be considered incapable of making their own decisions, but this separate express consent clause is intended to apply when a person, over a period of time before their death, does not have the mental capacity to take a decision on donation due to cognitive impairment. This means that they could not understand, use or weigh the information presented. In these cases, express

consent would be required from someone appointed on their behalf to make such decisions for organ donation to go ahead, or by their family.

People who have not been ordinary resident in Jersey for 12 months

In common with the Welsh legislation and the likely arrangements in Scotland, it is proposed that deemed consent would not apply in the case of people who at the time of their death had not lived in Jersey for a period of at least 12 months continuously. This would safeguard people who have only been on the Island for a short time and who might not have been aware of the arrangements and the opportunity to opt out. Visitors to the Island would also not be considered as giving deemed consent. If a visitor to Jersey died while on the Island and they were thought by medical staff to be a suitable donor, checks would be made to see if they were on the organ donation register. If they were, then efforts would be made in the usual way to contact their next of kin regarding medical checks and authority to proceed.

Important role for next of kin/families

It is important that the new arrangements do not undermine public confidence in organ donation and in the health service in general. Therefore, while in law, the emphasis may change from a situation where individuals are giving express consent to one in which deemed consent is sufficient to trigger donation, families/next of kin still have an important role to play in the organ donation process. The support of the family is key to providing background information on the potential donor to enable the transplant surgeons to decide whether their organs or tissue are likely to be safe for transplantation. The involvement of a potential donor's family means that this approach is often termed a 'soft opt-out' system (as opposed to a 'hard opt-out' where no such facility would exist and family views would not be taken into account).

Ultimately, the next of kin has to give permission for the donation to go ahead. This means that donation would not proceed where the family expressed the view that their loved one did not want to be a donor. It is also unlikely that medical staff would proceed where doing so would clearly cause the family severe distress or lead to conflict. The intention would be that under the new arrangements there would be much more discussion of an individual's wishes well in advance and should choices ever have to be made, families would be more likely to be supportive if their loved one was known to have wanted to be a donor and it therefore did not come as a surprise. This is important as it appears that generally there is a tendency for families to say 'no' to organ donation if they do not know of a loved one's decision. The Times reported in September 2017 that about 460 organs a year cannot be taken for life-saving transplants in the UK because families say 'no'.

The new arrangements should reduce this likelihood.

The involvement of the family in any decisions should help reassure those who oppose the new proposals because of religious or moral reasons or because they consider 'deemed consent' amounts to the state 'taking people's organs' rather than people actively choosing to give them.

While acknowledging these views which are no doubt sincerely and strongly held, the need to act for the greater good means that as in other public policy areas, the views of the majority should prevail. And of course anyone with such concerns can opt out, while still being able to benefit from receiving an organ should they ever require one.

Jersey residents visiting the UK

Those who live in Jersey but die in another country cannot be deemed to have given their consent to donate – the Jersey law cannot apply elsewhere. In a number of cases, seriously ill patients from Jersey are flown to the UK for lifesaving treatment. If this

proves unsuccessful and the person is a potential donor then medical staff there would check the organ donor register to see whether they had opted in or out, and if they had opted in would approach their next of kin about their suitability as a donor. If they had not made any choice then the family would be approached to consider giving consent.

How deemed consent would work

Under the proposed deemed consent arrangement, the following scenarios and checks would be envisaged where someone had died in hospital and their organs could potentially be donated:

- If they had registered as opting out, no donation would proceed.
- If they had registered as opting in, their family would be informed and with their co-operation the process of examining the feasibility of donation would begin.
- If the person had not registered any decision on the ODR, they would be deemed to have consented to donation. Family or friends would be approached and asked if their relative/friend had expressed any objections to organ donation. If the person was not known to have expressed any objections then the assumption would be that donation could proceed (i.e. deemed consent).
- However, if it became clear that proceeding would cause distress to the family and lead to them potentially refusing to provide the important background information required, then donation would not proceed.
- Where no family or close friend was contactable during the required timeframe then donation would not proceed as important information about the deceased person's lifestyle and medical history (to safeguard the quality and safety of donated organs) could not be obtained.

Given the size of Jersey's population and the low number of deaths in circumstances when donation is potentially possible, it is unlikely that these changes will lead to a marked increase in organ donation. However, the intention would be that making organ donation the default position would reinforce the positive view of organ donation and this cultural change would increase the likelihood of organ donation when the situation arises. We should not forget that one organ donor can potentially save or enhance the lives of up to nine individuals.

Next steps

If the States agree to the change in the Law to give effect to a deemed consent approach to organ donation then a high-profile awareness-raising campaign will take place over the year before the new Law takes effect. This would give time to inform Islanders of the change and explain clearly the choices that are available with regard to registering an organ donation decision (opting in or out) and the implications of not registering a decision, where an individual's consent can be deemed. The campaign would be designed to ensure that as many people as possible think about organ donation.

We would need to work with our colleagues at NHS Blood and Transplant (NHSBT) – the body that provides a blood and transplantation service to the NHS – to ensure that the registration process was straightforward and that the process for opting out and opting in was clear and easy to access. This might involve registering online or by phone as well as information on how individuals add or remove their names if they wish. Those who had already opted in and on the current register would be treated as having made an opt-in decision unless they chose to change their mind.

Collective responsibility under Standing Order 21(3A)

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers for Health and Social Services, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers (R.11/2015 refers).

Financial and manpower implications

Funding in the region of £20,000 would be required to fund a public information and awareness campaign in advance of the Law being enacted. This would be funded by the Health and Social Services Department from existing resources.

Human Rights

The notes on the human rights aspects of the draft Law in **Appendix 1** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX 1 TO REPORT

Human Rights Notes on the Draft Human Transplantation and Anatomy (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Human Transplantation and Anatomy (Jersey) Law 201- (the "**draft Law**") by the Law Officers' Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers' opinion, the draft Law is compatible with the European Convention on Human Rights ("**ECHR**").

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law makes provision concerning the storage, removal and use of the body, or relevant material (defined in Article 1(1) of the draft Law) from the body, of a deceased person for the purposes of transplantation, teaching of anatomy, medical education or research and therapeutic purposes. The draft Law will repeal the Anatomy and Human Tissue (Jersey) Law 1984 (the "1984 Law") and will, to an extent, restate many of the provisions in that Law, and will continue to provide a legal basis for those who wish to register as organ donors and for their wishes to be respected when they die. The draft Law will, however, also contain a more comprehensive series of provisions around the requirement for express consent, the forms which such consent may take and, most significantly, will introduce the concept of 'deemed consent': the idea that consent to transplantation and other activity can be deemed on behalf of a person (subject to exceptions) where that person had not, in his or her lifetime, opted-out of the deemed consent system, or where family members, friends or others close to the deceased consider that the deceased would have opposed consent being given.

From a human rights perspective, the principal ECHR article engaged by the draft Law is Article 8 ECHR, the right to private life. The application of Article 8 ECHR is explored later in this note. On a general and introductory point, it is worth acknowledging that legislation regulating organ donation and transplant activity are prevalent across European states and, moreover, legislative and other legal systems around deemed consent (whether those systems are 'hard' or 'soft' opt-out systems) operate in a number of European Union and Council of Europe countries. As far as is reasonably apparent, there have been no challenges before the European Court of Human Rights ("ECtHR") as to the compatibility of such legislation or systems with the ECHR.

Moreover, it is acknowledged that the Additional Protocol to the Council of Europe's European Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (ETS No. 186) (the "Additional Protocol") provides insight into the core standards which the ECtHR might expect to be respected in this field. It includes the following key provisions –

(a) Signatory States must have a clear legally recognised system specifying the conditions under which removal of organs or tissues is authorised (Article 17).

(b) The only absolute bar to organ and tissue removal concerning a deceased person is presented if that person had objected to it (Article 17).

(c) The human body must be treated with respect and all reasonable measures must be taken to preserve the appearance of the donor corpse (Article 18).

(d) Signatory States are obliged to take "all appropriate measures to promote the donation of organs and tissues" (Article 19).

(e) The Convention requires adequate measures for the protection of the confidentiality of any donor (Article 23).

The Additional Protocol has not been signed or ratified by the UK, and does not bind Jersey, however it has ratified by 12 member States of the Council of Europe. Although not widely referred to in ECHR jurisprudence, it has been given credence by the ECtHR in the context of fertility treatment. Perhaps most telling is that compliance, in spirit, with the Additional Protocol appears to have been persuasive in the ECHR assessment of the Human Transplantation (Wales) Bill before the Welsh National Assembly – the legislation from which the draft Law has drawn significant precedent. The central tenets of the Additional Protocol feature in the elements of the draft Law, owing that the draft Law draws significantly from the Welsh Bill, and in this regard, can be taken to contribute to the overall compatibility of the draft Law with the ECHR.

Article 8 – Right to respect for private and family life

As noted above, the draft Law principally engages Article 8 ECHR, the right to private life. Article 8 ECHR provides –

> *"Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

Organ donation – express consent and deemed consent

The draft Law will permit, ultimately, registered medical practitioners (and those evidencing sufficient equivalent standing from the United Kingdom, i.e. organ transplant clinical teams coming to Jersey from the UK) to undertake 'specified activities'[1] in relation to the bodies of deceased persons. The Law provides for specified activities to be undertaken in accordance with either express consent or where consent has been deemed. Express consent is defined in Article 1(1) and its requirements are detailed as regards each class of person covered by the draft Law: for example, in the case of adults, express consent is to be determined in accordance with Article 4(4) and Table 1, and in the case of young persons (i.e. those under the age of 18), express consent is to be determined in accordance with Article 6(3) and Table 3. Deemed consent has a narrow application under the draft Law: it will only apply in the case of adults (so will not apply in the case of under-18s) who are not excepted persons, specifically (i) an adult who has died and who had not been ordinarily resident in Jersey for a period of at least 12 months immediately before dying[2]; and (ii) an adult who has died and for a significant period before dying lacked capacity to understand the notion that consent to a specified activity can be deemed to

[1] Defined in Article 1(2) of the draft Law.

[2] Article 5(3)(a) of the Law.

have been given[3]. Deemed consent will also only be applicable where there are no objections from person who stood in a qualifying relationship to the deceased (see Article 4(2)(c)).

Issues of organ donation will immediately raise questions of compliance with Article 8 ECHR as the concept of 'private life' under Article 8 ECHR has been held to cover the physical, as well as the moral, integrity of the person. Moreover, Article 8 ECHR imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity. However, it is important to appreciate, in understanding the proper application of the ECHR in this context, that the ECHR is case specific and victim led. This means that in order to bring a claim under human rights legislation an individual has to show that they are the victim of a breach of the articles of the ECHR: in this regard note that applications to the ECtHR for a violation of the ECHR may be made by "any person, non-governmental organisation or group of individuals"[4]. The ECtHR has not elaborated authoritatively on the application of rights in the pre-birth and post-death context but, while applications can be brought on behalf of deceased person whose rights were breached during their life, it is unlikely that any claim can arise once a person has died. The effect of this is that a claim would likely be unsuccessful for a violation of rights in the case of a deceased person which would otherwise have been actionable during their lifetime. However the focus of actionable ECHR claims lies, in the context of organ donation, centres around the impact on family members or those associated with the deceased.

It is useful at this juncture to note the case of *Elberte v Latvia*[5]. *Elberte* concerned the removal of a deceased man's body tissue under a system of deemed consent for organ donation in Latvia in circumstances raising doubt as to whether such removal was done with his consent. Material was removed from the body of the deceased without hospital authorities undertaking proper checks as to whether the deceased had opted out from presumed consent and without making specific enquiries in order to ascertain if there were any close relatives and to inform them of possible tissue removal.

Elberte is important for a number of reasons: in general ECHR terms in an organ donation context, it illustrates the where the focus of the Court's scrutiny lies in such matters and, specifically in systems around organ donation, it notes the essential safeguards which must be secured in those systems. As regards the general application of the ECHR in these cases, the ECtHR declared that it could not consider the claim that the transplant activity was undertaken without the consent of the deceased and whether this violated the deceased's human rights. The ECtHR did declare, however, that it could consider the impact that this had on his wife's right to *private and family life* under Article 8 ECHR, given that it was done without her consent.

As regards the more detail of the *Elberte* decision, the ECtHR found, unanimously, that there had been a breach of Article 8 ECHR. In its judgment the Court stated that any law around presumed consent in organ donation must have sufficient clarity regarding the scope and exercise of any discretion conferred on authorities. The right to express consent or refuse that consent must be sufficiently clear and foreseeable in its application as regards the exercise of this rights. In practice this means that State authorities must have established appropriate registers and other systems to record citizen's wishes in respect of organ/tissue removal and put adequate procedures in place for the wishes of the deceased and their relatives to be sufficiently clearly established. From an Article 8 ECHR perspective, where the deceased has expressed a

[3] Article 5(3)(b) of the Law.
[4] Article 34 ECHR.
[5] (2015) 61 E.H.R.R. 7.

view as to whether or not that person consents to organ donation, it is imperative that this view is respected by health authorities.

Looking at the draft Law, Articles 4, 5 and 6 set out the circumstances in which express consent is required before specified activity can be undertaken and, where consent is given or refused (whether by the deceased, an appointed person under Article 8 of the draft Law, a person with parental responsibility or a person in a qualifying relationship) that view should be respected by the authorities. In this regard the draft Law is compatible with Article 8 ECHR (and noting the central tenets of the ECtHR's judgment in *Elberte*) as it makes detailed provision around the circumstances in which express consent is required, and provides that in those circumstances specified activity cannot proceed if consent is absent (enforced by the criminal offence in Article 11).

In terms of 'deemed consent', a system which is based on presumption of consent that allows adequate provisions for a person to opt out would be considered compatible with the ECHR. In the draft Law, the 'opt-out' is reflected in Article 4(2)(a), allowing a person to decide not to consent to a specified activity. Systems around the registration of this opt-out will be developed prior to the commencement of the draft Law but any system must be robust and efficient in order to give due regard to the explicit consent or refusal of the deceased.

Views of the deceased and relatives

In addition to the considerations above, an ECHR compatible 'deemed consent' system must give effect to the views of the deceased concerning organ not only where expressed, i.e. through express consent or making an opt-out decision, but also where those views are known or inferred. A system for organ donation must place primacy on the views or beliefs which were either were known from what the deceased said or did, or could be inferred from other views expressed by the deceased or beliefs that the deceased held. A system which simply deemed consent where the deceased had either failed to sign up for organ donation or register an opt-out decision would not be compatible with the ECHR (as the State would effectively end up taking organs from those deceased who were either disorganised or undecided in their lifetime). A state is entitled to have a rule of presumed authorisation or consent provided that presumption could be rebutted by other evidence. A "hard" system of consent that did not seek evidence from families about the deceased's own opinions or wishes would be open to challenge.

The draft Law addresses these ECHR concerns directly in Article 4(2)(c) by making it quite clear that consent cannot be deemed for a specified activity involving the body of a deceased person in the case where, express consent not being required (i.e. a deceased with sufficient capacity before he or she died, and who had been in Jersey for more than 12 months before death) –

(a) a person who stood in a qualifying relation to the deceased person objects to the specified activity on the basis of views held by the deceased, and

(b) a reasonable person would conclude that the person who stood in a qualifying relationship to the deceased person knows that the view most recently held by the deceased person before his or her death on consent for transplantation activities was that the deceased person opposed consent being given.

Critically, in terms of the recognition of the autonomy of the deceased, Article 4(2)(c) requires that the information which must be gleaned through that exercise is evidence of the views or beliefs of the deceased, and the views of the family or others are not directly relevant. Seeking the views of family and associates of the deceased rather

than evidence of the deceased's own views could, in practice, lead to conflicts but in a presumed consent system the overriding intention should be to seek evidence of and make decisions based upon the person's own views. From a pragmatic perspective, however, it will be necessary to acknowledge and build into the deemed consent system a degree of flexibility around the views of family members. In this regard, clinicians will benefit from guidance on exercising discretion in the face of extreme objection by families. The draft Law provides at Article 21 a power for the Minister to issue codes for the guidance of any person acting under the Law and with respect to other matters. Codes issued under this power would assist considerably in ensuring practitioners are guided in dealing with these sensitive matters, in a manner that properly respects the Article 8 ECHR and Article 9 ECHR (right to freedom of conscience) rights of family members while respecting the autonomy of the deceased.

Vulnerable groups – excepted persons

The previous section of this note discussed the importance from an ECHR perspective of ensuring that the views of the deceased are respected, in cases where express consent to specified activity is provided by the individual before death or refused, and the views of family members are taken into consideration in any system of presumed consent. In addition, from an ECHR perspective particular consideration must be given to certain vulnerable groups, for example children and people lacking capacity, in determinations around organ donation.

The draft Law identifies and addresses the circumstances of a number of classes of vulnerable groups: young persons (those under 18 years of age) (see Article 6), those who lacked capacity for a significant period before death to understand that a deemed consent system applied and those who were not resident in Jersey for longer than 12 months before death (see Article 5). In the case of each of these groups, the draft Law directly addresses the difficulties around presuming consent for such persons by expressly excluding these classes of excepted persons from the deemed consent provisions in the draft Law (see Article 5(2) and 6(2) of the draft Law).

Instead, express consent is required for each excepted class. Notably, in the case of children, this approach acknowledges the right for a pre-death decision by a Gillick competent child (see Article 6(4)), but limited to 16–18 year-olds (see Article 1(2)) to make a decision with respect to organ donation after death, and that such a determination should prevail over parental objections. In doing so, the draft Law makes provision for the recognition of the Article 8 ECHR rights of young persons but looks to acknowledge recognition of 16 years being the age at which children are generally accepted as being competent to deal with issues of consent (see for comparison Article 1(1) of the Consent to Medical Treatment (Jersey) Law 1973). In the case of those who lack capacity, the draft Law has not opted for a system based around the best interests of the person who lacks capacity, i.e. the question of what would the person lacking capacity wanted. Rather, the draft Law has acknowledged that questions of best interests cannot be made in the case of a person who was not able to express a view as to deemed consent, or even to have expressed views as to organ donation to family members, in the lead up to death. This again respects the autonomy of the deceased person.

Consultation and public awareness

Article 8 ECHR requires any interference by state authorities with private life to be "in accordance with the Law". Generally speaking, this requires the measure to have some basis in domestic law (which the draft Law will amount to) but also the measure to be sufficiently "precise" and "accessible" for an individual to be able to foresee with a

reasonable degree of certainty the circumstances in which, and the conditions on which, authorities may take certain steps.

In the context of organ donation, and moving toward a system of deemed consent, there is particular importance for both public consultation before introducing any legislation and for a sufficient period of adjustment after a change to allow it to gain public consensus and bed in. As for public consultation, the extent of public engagement is detailed in the Minister's Report accompanying the draft Law – questions as to deemed consent were contained in the 2017 Jersey Opinions and Lifestyle Survey which, coupled with extensive policy research, guided policy development in this area. In terms of enabling the draft Law to 'bed' in once adopted, it is intended that the draft Law will be commenced in 2019, allowing a year of public engagement and communication to raise awareness of the impact, benefits and processes involved implemented through the legislation. This should ensure sufficient time to make people fully aware of the situation, explain options and provide simple and accessible ways of opting out.

Freedom of conscience (Article 9 ECHR) and prohibition on ill treatment (Article 3 ECHR)

As suggested earlier in this note, Article 9 ECHR and the protection it affords for beliefs and conscience may be engaged through authorities acting on express or presumed consent in the case of deceased persons. In each case, the conscience and belief concerned would be that of family members who seek to object to a specified activity as it would contravene their beliefs. In cases of express consent from the deceased, the views of family members should not override express consent, and the draft Law does not seek to permit that. In the case of deemed consent, the draft Law does not expressly permit the views of family members to constitute valid objection to deemed consent (see Article 4(2)(c)), as it must be evidence of the views of the deceased that are considered. However, as explained above, guidance to be developed in codes of practice under the draft Law could provide guidance to clinicians in addressing emphatic views of family members who consider their own conscience to be offended by proposed specified activities in relation to their deceased relative. That would, in each case, be a balancing exercise based on the rights of autonomy of the deceased and the right to freedom of conscience of family members.

In terms of Article 3 ECHR it suffices to note that in *Elberte* the ECtHR considered the level of distress caused to the deceased's wife and family caused through the removal of tissue from the deceased under a presumed consent system without pursuing mandatory engagement with the family. The ECtHR noted that the deceased's wife faced long periods of uncertainty around the treatment of her husband, anguish and distress in not knowing what organs or tissues had been removed, and in what manner and for what purpose this had been done. The ECtHR said that "it had no doubt" that the suffering caused to Ms. Elberte amounted to degrading treatment contrary to her Article 3 right, and accordingly found a violation of that provision. *Elberte* reflects an extreme case where a deemed consent system was manifestly abused and the rights of the deceased's family were disregarded. That being the case, it serves to illustrate the complexity of rights engaged in such matters and the need for the systems pursued under the draft Law to be accorded the utmost of regard.

Defence to offences – Article 6 ECHR

Articles 10(6), 11(2) and (4), and 16(2) of the draft Law provide defences to the offences specified in those provisions. In each case the defence requires the accused to make out the defence, for example that the person believed reasonably believed something to be the case. The defence provisions in the draft Law require the accused to do no more than meet a reasonable standard which should not be considered incompatible with Article 6(2) ECHR. The intent behind the offence provisions in the draft Law is to ensure protection of the autonomy of the deceased, and protect rights of family members, and, in order to secure that legislative purpose, and the need for the accused in each case to displace the evidential burden is appropriate.

How does organ donation work in practice?

Organ donation and the allocation of organs to transplant recipients is managed across the UK by NHS Blood and Transplant (NHSBT). Organs need to be carefully matched to a recipient, taking into account factors such as the blood group, age, weight and the tissue type of the donor and potential recipient. This allows the best possible chance for a transplant to be successful. If an organ is not a good match with the recipient, there is a significant risk that it won't function effectively.

Obtaining the social and medical history of the donor is also vitally important and this requires family and friends who know the potential donor well being asked sensitive 'lifestyle' questions about their loved one.

NHSBT is responsible for managing the UK's national transplant waiting list and for matching and allocating organs on a UK-wide basis. This means that donated organs from Jersey are likely to go to people in other parts of the UK (and occasionally elsewhere in Europe), and that people in Jersey are likely to receive an organ from elsewhere in the UK (or in occasional circumstances from elsewhere in Europe).

If someone is dying or dies in circumstances where they could be an organ donor, generally in the intensive care unit of the hospital, contact is made with the designated Specialist Nurse for Organ Donation (SNOD) in the UK who will check to see if the patient has authorised donation themselves. The SNOD will come over and at this point a sensitive discussion with the patient's family will begin with regard to organ donation.

If donation is to proceed, the clinical team caring for the patient will work with the SNOD, who will ensure all the necessary clinical checks are made. This will include checking that there are suitable recipients for each organ that can be donated. Throughout this process, the comfort and needs of the donor patient remain paramount and the main focus of the clinical staff in the intensive care unit will be on caring for their patient. SNODs also work hard to support the donor's family during this difficult time and to answer any questions the family has.

In cases where it is determined that donation can proceed, the organs are then retrieved by a completely different team of specialist surgeons who are not otherwise involved in the care of the patient. This team flies to Jersey and takes the patient to theatre to retrieve the organs. Organs are always removed with the greatest care and respect. They are then stored in fluid and usually kept cool to help preserve them and transported to whichever hospital or hospitals will carry out the transplant (s). As soon as possible, a separate team of surgeons will then transplant each organ into the patient who is going to receive it.

APPENDIX 3 TO REPORT

Circumstances when organ donation can be considered after brain death

Most deceased organ donors die from a devastating acute brain injury such as a spontaneous intra-cranial haemorrhage, ischaemic stroke or severe head trauma. Organ donation is possible in two circumstances following such brain injury:

DBD – donation after brain-stem death – this is where donation takes place after two doctors have confirmed that the person is clinically dead using neurological criteria to show that the person no longer has any brain-stem function (where the person is on life support and has completely and irreversibly lost the capacity for consciousness and the ability to breathe independently). The patient will usually have suffered either some form of stroke or some form of severe head trauma, for example in a car accident.

DCD – donation after circulatory death – this is where donation takes place after doctors have confirmed that the person is dead using cardio-respiratory criteria (where the heart has stopped beating and they have stopped breathing for a period of five minutes). The person will have suffered some form of critical illness and death occurs after it is agreed that their life-sustaining treatment should be withdrawn because they cannot recover or breathe without life support.

> [Based on Glossary of Terms, page 39; Organ and Tissue Donation and Transplantation – A consultation on increasing numbers of successful donations (Scotland) – December 2016.]

Statement by the Minister for Health and Social Services in the States on 17th January 2017

Organ donation has received much publicity recently.

Perhaps one of the most important initiatives in regards to organ donation has been in Wales. In December 2015, Wales moved to a system of presumed consent – in other words, it is effectively assumed you will donate your organs unless you actively opt otherwise.

Elsewhere in the UK, the system remains one where you sign up to the organ donation register in advance if you wish to donate your organs.

In response to questions in this Assembly about the Welsh initiative, I have previously stated that Jersey, like other jurisdictions, was adopting a 'watch and learn approach'.

The Scottish government has just embarked on a 14-week consultation exercise to ask its citizens for their views on organ and tissue donation, including the introduction of a system akin to the Welsh model.

Personally, I support a change in approach in Jersey.

However, I need to be sure that a majority of Islanders agree with me.

While most of the voices I've heard are supportive of change, I am aware that some doubters may feel reluctant to express their reservations – after all the number of people in Jersey registered as organ donors is around 12% compared to a UK average of around 36%.

To gauge Islanders' views on this issue I have agreed that my officers will work with the States Statistics Unit to produce a short questionnaire on the issue of organ donation. This way, a representative sample of Islanders will be invited for their views on the broad issues surrounding organ donation. I'm hoping that this work, including the results, will be completed by early summer.

If Islanders' responses indicate a positive approach to change then I will bring a Proposition to the assembly for a new approach based around the concept of presumed consent, with, of course, the appropriate safeguards for those who wish to opt out.

In the meantime, I would continue to encourage Islanders to sign up to the organ donation register at www.organdonation.nhs.uk.

I am convinced that we can achieve a significant increase in Jersey's number of registered donors through greater publicity, awareness and education around the issues involved, and by making sure that people have the conversation about donating with their families while they are still fit and well – it's far too late and entirely unrealistic to leave this until the emotive aftermath of a potentially fatal accident.

While the number of Islanders on the register is lower than on the mainland, we can take solace from the fact that in terms of organs donated by Islanders we are making a fair contribution. In the last six months, Jersey has referred four possible donors to the UK team – one was suitable and several of their organs were used successfully.

Recently we have undertaken the first corneal transplants locally with donor material sourced from the UK and US. We are also looking at the prospects for providing donor tissue.

Losing a loved one can be a traumatic experience, but for many people the knowledge that organ donation is saving and transforming the lives of others can provide some comfort at a time of loss.

I'm hoping that the very fact that I'm raising this issue today, could mean that more families have conversations around the issue and that people's wishes are therefore more likely to be known and acted upon – whatever system is ultimately in place around organ donation.

Organ donation figures for Jersey

Number of people who have registered to donate their organs in Jersey and in the UK since 2006

Table 1
Jersey ODR Figures as at 16/02/2018

Year of Registration	Number registered	Number on the ODR
2006	810	4852
2007	555	5407
2008	790	6197
2009	645	6842
2010	573	7415
2011	457	7872
2012	404	8276
2013	1654	9930
2014	596	10526
2015	657	11183
2016	503	11686
2017	669	12355
Current number on ODR	**12,418**	

Table 2
UK ODR Figures as at 16/02/2018

Year of Registration	Number registered	Number on the ODR
2006	1145217	12642625
2007	1000161	13642786
2008	1057794	14700580
2009	1029502	15730082
2010	1086986	16817068
2011	1026163	17843231
2012	918412	18761643
2013	1115982	19877625
2014	966200	20843825
2015	1126138	21969963
2016	1356842	23326805
2017	1281854	24608659
Current number on ODR	**24,772,240**	

NOTE: These numbers exclude people who have died or been removed from the ODR. The year of registration figures represent only the people who registered in that year and are still on the ODR.

The percentage of people in Jersey and the UK who are organ donors

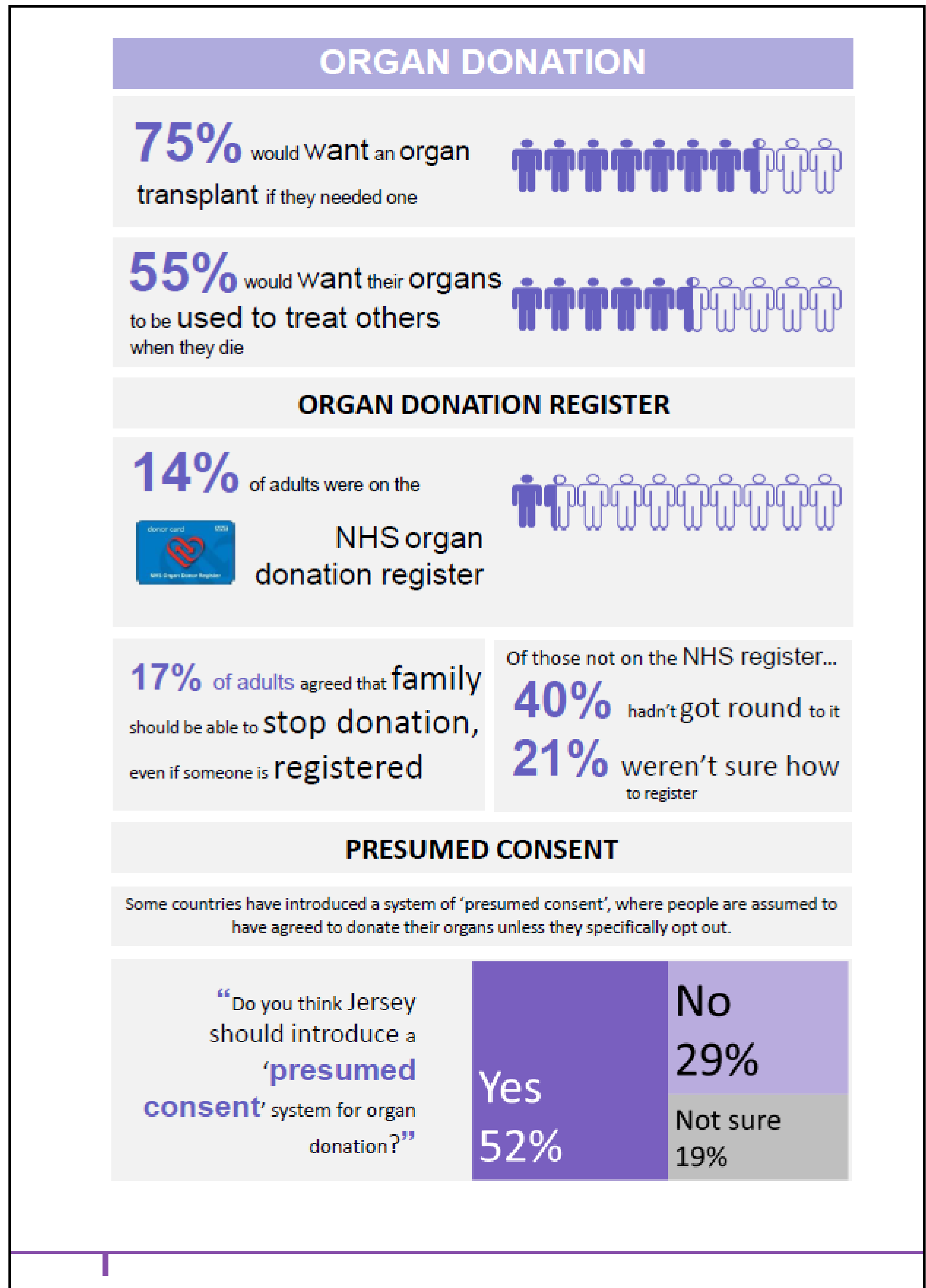
Table 3	Percentage of people that are opt-in registrations in the UK and Jersey (as at 16/02/2018)		
Area	**Number of opt-in registrations**	**Population estimate**	**Proportion registered**
UK	24,772,240	65,350,000	38%
Jersey	12,418	102,700	12%
Channel Islands	18,827	160,000	12%

NOTE: Population estimates for UK and Channel Islands are from mid-2015 estimates based on ONS 2013 Census figures. Population estimates for Jersey are from https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Population%20Estimate%202015%2020160621%20SU.pdf, which is estimated at the end of 2014.

Number of organs donated in Jersey each year since 2006

Table 4	Number of organs donated from deceased organ donors in Jersey as at 16/02/2018	
Donation Year	**Organ donors**	**Organs donated**
2006	1	3
2007	1	4
2008	1	3
2009	3	11
2010	7	18
2011	5	7
2012	2	2
2013	4	9
2014	3	5
2015	1	2
2016	4	12
2017	4	10

Jersey Opinions and Lifestyle Survey 2017



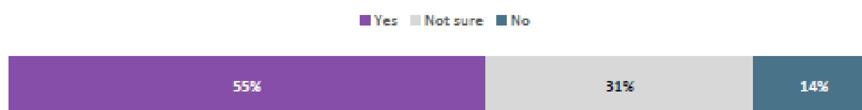
Chapter 3 – Organ donation

General views on organ donation

Organ transplant is an operation that removes an organ or tissue from one person and places it in another person. Organ donation is when you allow your organs or tissues to be removed and given to someone else.

When you die, would you want your organs to be used to treat others ('organ donation')?

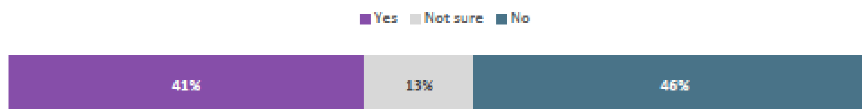
Figure 3.1 When you die, would you want your organs to be used to treat others ('organ donation')?



- over half (55%) of adults said they would want to donate their organs, and almost a third (31%) were unsure
- for nearly all age groups, over half of adults said they would want to donate their organs, with those aged 65 and over being the exception at 43%

Have you made members of your family aware of whether or not you want to donate your organs?

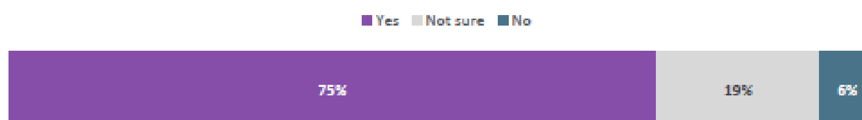
Figure 3.2 Have you made members of your family aware of whether or not you want to donate your organs?



- around two-fifths (41%) of adults have made their family members aware of their wishes
- of adults who want to donate, three-fifths (61%) have informed their family and over a quarter (28%) have not (11% were unsure)
- of adults who do not wish to donate, two-fifths (40%) have told their family and over half (57%) have not (3% were unsure)

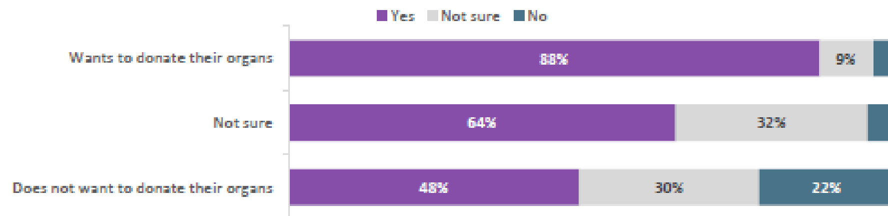
If you needed an organ transplant would you want one?

Figure 3.3 If you needed an organ transplant would you want one?



- three-quarters (75%) of adults would want an organ transplant if they needed one (19% were unsure)
- for nearly all age groups, around 5% would not want an organ transplant if they needed one, with those aged 65 and over being the exception, with 18% not wanting one

Figure 3.4 If you needed an organ transplant would you want one? by whether they want to donate

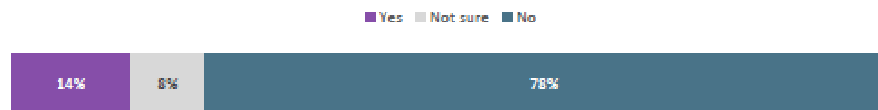


- for all views on personal organ donation, the most commonly cited answer was yes to receiving an organ transplant
- people who wanted to donate their own organs were the most likely to also want to receive an organ donation if they needed one

Current organ donation system

The NHS Organ Donor Register lists people who have said they would want to donate their organs in the event of their death. Have you registered to donate your organs on the NHS Organ Donor Register?

Figure 3.5 Proportion of people who have registered on the NHS Organ Donor Register



- 14% of adults said they were on the NHS organ donor register
- of adults who want to donate, 25% said they were on the NHS donor register

If you have not registered to donate your organs, why is this?

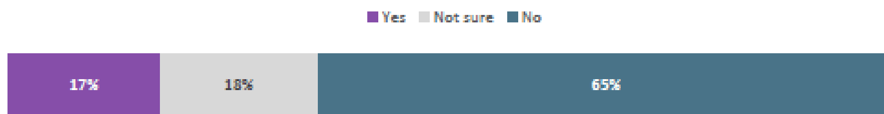
Figure 3.6 Reasons why people have not registered to donate their organs (respondents could choose more than one)

- of those who chose "Other", common reasons given were that they hadn't decided yet or they thought their poor health would exclude them[10]

[10] There is no age limit on organ donors, and most medical conditions do not prevent organ donation

When someone who has registered to donate their organs dies, their family can stop the donation. Do you agree with this?

Figure 3.7 When someone who has registered to donate their organs dies, their family can stop the donation. Do you agree with this?



- almost two-thirds (65%) of adults thought the family should not be able to stop relatives donating
- the proportion of adults disagreeing that families could stop relatives from donating was similar across all age groups (over 60%)

Presumed consent for organ donation

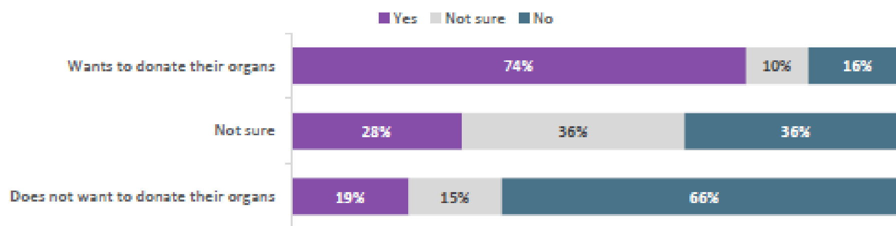
Some countries have introduced a system of 'presumed consent', where people are assumed to have agreed to donate their organs unless they specifically opt out.

Do you think Jersey should introduce a 'presumed consent' system for organ donation?

Figure 3.8 Do you think Jersey should introduce a 'presumed consent' system for organ donation?

- half (52%) of adults thought that Jersey should introduce presumed consent for organ donation

Figure 3.9 Do you think Jersey should introduce a 'presumed consent' system for organ donation? by whether they want to donate or not



- three-quarters (74%) of adults who wanted to donate agreed with introducing presumed consent
- the reverse was true of those who did not want to donate; two-thirds (66%) of them disagreed with introducing presumed consent

If a system of presumed consent were introduced, and someone who died had not specifically opted out of donating their organs, should their family be able to stop the donation?

Under a system of presumed consent, if a person dies who has *not* opted out of donating their organs, they are regarded as having consented to the donation of their organs.

Figure 3.10 If a system of presumed consent were introduced, and someone who died had not specifically opted out of donating their organs, should their family be able to stop the donation?

- almost half (46%) of adults thought families should be able to stop their relatives donating under presumed consent
- the youngest age group, 16 to 34-year-olds, had the highest proportion (52%) in favour of families being able to stop relatives donating under presumed consent
- 65 and over was the age group least in favour of this proposal, with 37% in favour

Explanatory Note

This Law makes provision concerning the storage, removal and use of the body, or relevant material (as defined in *Article 1(1)*) from the body, of a deceased person for the purposes of transplantation, teaching of anatomy, medical education or research and therapeutic purposes.

Article 1 provides definitions for certain words used in this Law. The term "adult" is defined to mean a person who is 18 years of age or over and the term "young person" is defined to mean a person who is under 18 years of age.

Under *Article 1(2)* a young person is competent to deal with the issue of consent if the young person is 16 years of age or over and it would appear to a reasonable person that the young person has sufficient understanding to make an informed decision on that issue. A young person is not competent to deal with the issue of consent if the young person is under 16 years of age.

Article 2 defines the term "transplantation activity" to mean –

(a) storing the body of a deceased person for the purpose of transplantation;

(b) carrying out tests and investigations to determine whether relevant material is suitable for use for the purpose of transplantation;

(c) removing from the body of a deceased person, for the purpose of transplantation, any relevant material of which the body consists or which it contains;

(d) storing for the purpose of transplantation any relevant material which has come from the body of a deceased person; or

(e) using for the purpose of transplantation any relevant material which has come from the body of a deceased person.

By *Article 2,* the term "specified activity" is defined to mean a transplantation activity, the removal of the body of a deceased person for use in teaching of anatomy, medical education or research, therapeutic purposes or any other activity as may be specified in Regulations made by the States.

Article 3 provides that a person may carry out a specified activity in Jersey with express consent where that is required by *Article 4, 5, 6 or 7* or otherwise with consent deemed to be given by *Article 4 or 9*. Storing for the purpose of transplantation any relevant material which has come from the body of a deceased person under *Article 2(1)(d)*, or using for the purpose of transplantation any relevant material which has come from a body of a deceased person under *Article 2(1)(e),* is lawful without the need for consent if it is carried out in Jersey and the relevant material has been lawfully imported into Jersey or the removal of the relevant material from the person's body took place lawfully outside Jersey.

Under *Article 4,* consent is deemed to be given for a specified activity involving the body, or relevant material (other than excluded material) from the body, of an adult who is not an excepted person (as defined in *Article 1(1)*) unless –

(a) a decision of the adult not to consent to the specified activity was in force immediately before his or her death;

(b) the case is one in which express consent is required; or

(c) the case is not one for which express consent is required and –

(i) a person who stood in a qualifying relationship to the deceased person objects to the specified activity on the basis of views held by the deceased, and

(ii) a reasonable person would conclude that the person who stood in a qualifying relationship to the deceased person knows that the most recent view of the deceased before death on consent for transplantation activities was that the deceased person opposed consent being given.

Article 4 requires express consent in certain cases for a specified activity involving the body, or relevant material (other than excluded material) from the body, of an adult. The meaning of express consent in relation to a specified activity depends on the circumstances as follows –

(a) if the adult is alive, express consent is the adult's consent;

(b) if the adult has died and a decision of the adult as to consent to the specified activity was in force immediately before his or her death, express consent is the adult's consent;

(c) if the adult has died and paragraph (b) does not apply and the adult had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment, express consent is the consent of the person or persons appointed; or

(d) if the adult has died and paragraph (b) does not apply and the adult had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity but no such person is available to give consent under the appointment, express consent is the consent of a person who stood in a qualifying relationship (as defined in *Article 1(3)*) to the adult immediately before death.

Article 5 requires express consent for a specified activity involving the body, or relevant material (other than excluded material) from the body, of an excepted person. An excepted person is an adult who has died and who had not been ordinarily resident in Jersey for a period of at least 12 months immediately before dying; or an adult who has died and for a significant period (as defined in *Article 5(4)*) before dying lacked capacity to understand the notion that consent to specified activity can be deemed to be given. The meaning of express consent in relation to a specified activity depends on the circumstances as follows –

(a) if a decision of the excepted person as to consent to the specified activity was in force immediately before the excepted person's death, express consent is the excepted person's consent;

(b) if paragraph (a) does not apply and the excepted person had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment, express consent is the consent of the person or persons appointed;

(c) if paragraph (a) does not apply and the excepted person had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the specified activity and no such person is able to give consent under the appointment, express consent is the consent of a person who stood in a qualifying relationship to the excepted person immediately before death;

(d) if paragraphs (a), (b) and (c) do not apply, express consent is consent of a person who stood in a qualifying relationship to the excepted person immediately before death.

Article 6 requires express consent for a specified activity involving the body of, or relevant material (other than excluded material) from the body, of a young person. The meaning of express consent depends on the circumstances as follows –

(a) if the young person is alive and paragraph (b) does not apply, express consent is the young person's consent;

(b) if the young person is alive and no decision of the young person as to consent to the specified activity is in force, and either the young person is not competent to deal with the issue of consent, or is competent to deal with the issue but fails to do so, express consent is the consent of a person who has parental responsibility for the young person;

(c) if the young person has died and a decision of the young person as to consent to the specified activity was in force immediately before the young person's death, express consent is the consent of the young person;

(d) if the young person has died, paragraph (c) does not apply, the young person had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment, express consent is the consent of the person or persons appointed;

(e) if the young person has died, paragraph (c) does not apply and the young person had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the activity, but no such person is available to give consent under the appointment, express consent is the consent of a person who has parental responsibility for the young person immediately before the young person's death, or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

Under *Article 6(4)*, a decision or appointment made by a young person is only valid if, in accordance with *Article 1(2)*, the young person was competent to deal with the issue of consent when it was made.

Article 7 gives the Minister the power by Order to specify types of relevant material that is, or is not, excluded material. In the case of a specified activity involving the removal of excluded material, express consent is required, and such express consent must be specific to the removal of excluded material. The meaning of express consent in relation to a specified activity involving the removal of excluded material depends on whether the person is an adult or young person and on the circumstances as follows –

(a) in the case of an adult –

  (i) if the adult is alive, express consent is the adult's consent;

  (ii) if the adult has died and a decision of the adult as to consent to the specified activity was in force immediately before the adult's death, express consent is the adult's consent;

  (iii) if the adult has died, sub-paragraph (ii) does not apply, the adult had appointed one or more persons to deal with the issue of consent in relation to the specified activity, and such a person is available to give consent under the appointment, express consent is the consent of the person or persons appointed;

(iv) if the adult has died, sub-paragraph (ii) does not apply and the adult had appointed one or more persons to deal with the issue of consent in relation to the specified activity, but no such person is able to give consent under the appointment, express consent is the consent of a person who stood in a qualifying relationship to the adult immediately before the adult's death;

(v) if the adult has died and sub-paragraph (i), (ii), (iii) and (iv) do not apply in relation to the adult, express consent is the consent of a person who stood in a qualifying relationship to the adult immediately before the adult's death;

(b) in the case of a young person –

(i) if the young person is alive and sub-paragraph (ii) does not apply, express consent is the young person's consent;

(ii) if the young person is alive and no decision of the young person as to consent to the specified activity is in force, and either the young person is not competent to deal with the issue of consent or is competent to deal with the issue but fails to do so, express consent is the consent of a person who has parental responsibility for the young person;

(iii) if the young person has died and a decision of the young person as to consent to the specified activity was in force immediately before the young person's death, express consent is the young person's consent.

(iv) if the young person has died and sub-paragraph (iii) does not apply and the young person had appointed one or more persons under *Article 8* to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment, express consent is the consent of the person or persons appointed;

(v) if the young person has died, sub-paragraph (iii) does not apply and the young person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment, express consent is the consent of a person who has parental responsibility for the young person immediately before the young person's death, or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time;

(vi) if the young person has died and sub-paragraphs (iii), (iv) and (v) do not apply in relation to the young person, express consent is consent of a person who had parental responsibility for the young person immediately before the young person died or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

Under *Article 7(5)*, a decision or appointment made by a young person is only valid if, in accordance with *Article 1(2)*, the young person was competent to deal with the issue of consent when it was made.

Article 8 permits a person to appoint one or more persons to represent him or her after death in relation to express consent for the purpose of this Law. An appointment may be general or may limited to express consent in relation to one or more specified activities as may be specified in the appointment. An appointment may be made orally or in writing. An oral appointment is only valid if made in the presence of at least 2

witnesses present at the time the appointment is made. A written appointment is only valid if it is signed by the person making it in the presence of at least one witness who attests to the signature or is signed at the direction of the person making it, in his or her presence and in the presence of at least one witness who attests to the signature or it is contained in the will of the person making it. Where a person appoints 2 or more persons in relation to the same specified activity, they are to be regarded as appointed to act jointly and severally unless the appointment provides that they are appointed to act jointly. An appointment may be revoked at any time and a person appointed may at any time renounce the appointment. A person may only act under an appointment if the person is an adult or is not of a description prescribed. If it is not reasonably practicable to communicate with a person appointed within the time available if consent is to be acted upon, the person appointed is to be treated as being not able to give consent to an activity under the appointment.

Article 9 makes provision for consent to be deemed to have been given by an adult who lacks capacity to consent to a transplantation activity under *Article 2(1)(d) or (e)* if the transplantation activity is carried out in circumstances of a kind specified in Regulations made under *Article 19(1)(a).*

Article 10 specifies that the removal and use of any relevant material from the body of a deceased person for a specified activity must not be effected except by a registered medical practitioner or person qualified for registration as a registered medical practitioner, who must be satisfied by personal examination of the body that life is extinct (*Article 10(1)*).Where the removal of the body of a deceased person is for use in the teaching of anatomy, medical education or research or therapeutic purposes, no such removal shall be effected until after 48 hours from the time of the person's decease, without a certificate of cause of death or without notice to the Medical Officer of Health; except under the supervision of a registered medical practitioner, who must be satisfied by personal examination of the body that life is extinct; and except in a coffin or shell appropriate for that purpose. The person removing the body, or causing it to be removed, must make provision for the body to be decently interred in consecrated ground or in some public burial ground in use for persons of that religious persuasion to which the person whose body was so removed belonged, or to be cremated. That person must also transmit a certificate of interment or cremation of the body to the Medical Officer of Health within 2 years from the date of removal of the body *(Article 10(3)*). A person who contravenes *Article 10(1)* is guilty of an offence and liable to imprisonment for a term of 2 years and to a fine. A person who contravenes *Article 10(3) is* guilty of an offence and liable to a fine.Where a person removes the body of a deceased person for use in teaching of anatomy, medical education or research or therapeutic purposes contrary to *Article 10(3)*, the person is guilty of an offence unless the person reasonably believes that 48 hours has passed since the time of the person's death.

Article 11 makes it an offence to carry out specified activity without consent. A defence is provided if the person reasonably believes that the specified activity is done with consent or the activity carried out is not a specified activity. It is also an offence for a person to make a false or misleading representation to another person whom he or she knows or believes intends to carry out a specified activity that there is a consent to the doing of the activity or that the activity is not a specified activity but the person would not be guilty of the offence if the person did not know that the representation was false or misleading or believed it to be true. The consent of the Attorney General is required to institute proceedings for an offence under *Article 11.*

Article 12 permits the person having the control or management of a hospital, nursing home or other institution to take steps for the purpose of preserving relevant material

from the body of a deceased person lying in the institution if the relevant material is or may be suitable for use for transplantation.

Article 13 provides that nothing in this Law applies to anything done for the purposes of functions of the Viscount under the Inquests and Post-Mortem Examinations (Jersey) Law 1995. *Article 13* also provides that where a person has reason to believe that an inquest may be required to be held on a body or that a post-mortem examination of a body may be required at the instance of the Viscount, that person shall not, except with the consent of the Viscount give an authority under this Law in respect of the body or act on such an authority given by any other person. A person who contravenes *Article 13(2)* is guilty of an offence and liable to a fine. *Article 14* specifies that no consent shall be given under this Law in respect of any body of a deceased person by a person entrusted with that body for the purpose only of its interment or cremation. In the case of a body lying in a hospital, nursing home, or other institution, any consent may be given on behalf of the person having the control and management of the body by any person designated for that purpose by the first-mentioned person.

Article 15 clarifies that nothing in this Law shall be construed as rendering unlawful any dealing with the body, or with any part of the body, of a deceased person which is lawful otherwise than under this Law.

Article 16 provides for a person to be guilty of an offence and liable to imprisonment for a term of 2 years and to a fine if the person makes, in any document, material, evidence or information which is required to be provided to any person entitled to the information under this Law, a statement, that, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or that omits to state any material fact the omission of which makes the statement false or misleading.

Article 17 makes provision for the criminal liability of partners, directors and other officers of partnerships with separate legal personality and of bodies corporate.

Article 18 provides for the limitation of liability of the States, the Minister or the Medical Officer of Health or any person who is, or is acting as, an officer, employee or agent in an administration of the States for which the Minister is assigned responsibility. The limitation of liability does not apply so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of Article 7(1) of the Human Rights (Jersey) Law 2000.

Article 19 gives the States the power by Regulations to make such provision as the States may think fit for the purposes of carrying this Law into effect. This includes the power to make Regulations to provide for the charging of fees for reports required under this Law or the Regulations, for the amount of such fees and to create offences for contravention of the Regulations.

Article 20 gives the Minister the power by Order to make provision prescribing any matter that is to be prescribed under this Law.

Article 21 makes provision for the Minister to issue codes of practice for the purposes of this Law and, in particular (but without limitation), for the guidance of any person acting under this Law in connection with a transplantation activity or other specified activity and with respect to such other matters, arising out of this Law, as the Minister may think fit.

Article 22 makes provision for the power to make Rules of Court under the Royal Court (Jersey) Law 1948 to include a power to make Rules for the purposes of this Law.

Article 23 repeals the Anatomy and Human Tissue (Jersey) Law 1984 which is replaced by this Law.

Article 24 provides for the citation of this Law and provides for it to come into force on such day or days as the States may by Act appoint.

DRAFT HUMAN TRANSPLANTATION AND ANATOMY (JERSEY) LAW 201-

Arrangement

Article

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DRAFT HUMAN TRANSPLANTATION AND ANATOMY (JERSEY) LAW 201-

A LAW to make provision concerning the storage, removal and use of the body, or relevant material from, the body of a deceased person for transplantation, teaching of anatomy, medical education or research and therapeutic purposes, and for related matters.

Adopted by the States	*[date to be inserted]*
Sanctioned by Order of Her Majesty in Council	*[date to be inserted]*
Registered by the Royal Court	*[date to be inserted]*

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

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1 Interpretation

(1) In this Law unless the context otherwise requires –

"embryo" means a live human embryo where fertilisation is complete, and references to an embryo include an egg in the process of fertilisation, and, for this purpose, fertilisation is not complete until the appearance of a 2 cell zygote;

"excepted person" has the meaning given by Article 5(3);

"excluded material" means relevant material of a type specified to be excluded material by an Order made by the Minister under Article 7(1);

"express consent" has the meaning given –

(a) in the case of an adult, by Article 4(4);

(b) in the case of an excepted person, by Article 5(5);

(c) in the case of a young person, by Article 6(3); or

(d) in the case of a specified activity involving the removal of excluded material, by Article 7(3) or (4);

"gametes" means live human gametes, but do not include eggs in the process of fertilization;

"adult" means a person who is 18 years of age or over;

"Minister" means the Minister for Health and Social Services;

"parental responsibility" has the meaning given by Article 1(1) of the Children (Jersey) Law 2002[1];

"prescribed" means prescribed by Order made by the Minister;

"registered medical practitioner" has the meaning given by Article 1(1) of the Medical Practitioners (Registration) (Jersey) Law 1960[2];

"relevant material" means material, other than gametes, which consist of or includes human cells but does not include embryos outside the human body or hair and nail from the body of a living person;

"specified activity" has the meaning given by Article 2(2);

"transplantation activity" has the meaning given by Article 2(1);

"young person" means a person who is under 18 years of age.

(2) For the purposes of this Law –

(a) a young person is competent to deal with the issue of consent if the young person is 16 years of age or over and it would appear to a reasonable person that the young person has sufficient understanding to make an informed decision on that issue; and

(b) a young person is not competent to deal with the issue of consent if the young person is under 16 years of age.

(3) For the purposes of this Law, the following are qualifying relationships –

(a) spouse, civil partner or cohabiting partner;

(b) parent or child;

(c) brother or sister;

(d) grandparent or grandchild;

(e) child of a brother or sister;

(f) stepfather or stepmother;

(g) half-brother or half-sister;

(h) in the case of a person in respect of whom a care order is made under Article 24(1)(a) of the Children (Jersey) Law 2002, the Minister; or

(i) friend of long standing.

(4) In this Law, a reference to transplantation is to transplantation to a human body and includes transfusion.

(5) For the purposes of this Law, material is not to be regarded as from a human body if it is created outside the human body.

(6) For the purposes of this Law –

(a) references to material from the body of a living person are to material from the body of a person who is alive at the point of separation of the material;

(b) references to material from the body of a deceased person are to material from the body of a person who is not alive at the point of separation of the material.

(7) For the purposes of this Law, a person is a cohabiting partner of another person if those 2 persons are living together as if they were spouses or civil partners for a continuous period of 6 months and neither of them are married to, or in a civil partnership, with any other person.

2 Transplantation activity and other specified activity

(1) In this Law "transplantation activity" means –

(a) storing the body of a deceased person for the purpose of transplantation;

(b) carrying out tests and investigations to determine whether relevant material is suitable for the purpose of transplantation;

(c) removing from the body of a deceased person, for the purpose of transplantation, any relevant material of which the body consists or which it contains;

(d) storing for the purpose of transplantation any relevant material which has come from the body of a deceased person; or

(e) using for the purpose of transplantation any relevant material which has come from the body of a deceased person.

(2) In this Law "specified activity" means –

(a) any transplantation activity;

(b) the removal of the body of a deceased person for use in –

(i) the teaching of anatomy,

(ii) medical education or research,

(iii) therapeutic purposes; or

(c) any other activity specified in Regulations made by the States.

3 Authorisation of specified activities

(1) Subject to paragraph (2) and Article 10, a person may carry on a specified activity if carried out in Jersey –

(a) with express consent in accordance with Article 4, 5, 6 or 7, as the case may be; or

(b) otherwise with consent deemed to be given in accordance with Article 4 or 9.

(2) A transplantation activity within Article 2(1)(d) or (e) shall be lawful without the need for consent if it is carried out in Jersey and –

(a) the relevant material has been lawfully imported into Jersey; or

(b) the removal of the relevant material from the person's body took place lawfully outside Jersey.

4 Consent – adults

(1) This Article does not apply in relation to consent for a specified activity involving the removal of excluded material.

(2) Consent is deemed to be given for a specified activity involving the body, or relevant material from the body, of an adult who is not an excepted person unless –

(a) a decision of the adult not to consent to the specified activity was in force immediately before his or her death;

(b) the case is one for which express consent is required in accordance with paragraph (3); or

(c) the case is not one for which express consent is required in accordance with paragraph (3) and –

(i) a person who stood in a qualifying relation to the deceased person objects to the specified activity on the basis of views held by the deceased, and

(ii) a reasonable person would conclude that the person who stood in a qualifying relationship to the deceased person knows that the view most recently held by the deceased person before his or her death on consent for transplantation activities was that the deceased person opposed consent being given.

(3) Express consent is required for a specified activity involving the body, or relevant material from the body, of an adult who is not an excepted person in each case mentioned in the first column of Table 1 in paragraph (4).

(4) For each case mentioned in the first column of the following Table 1, the meaning of express consent in relation to a specified activity involving the body, or relevant material from the body, of an adult who is not an excepted person is as provided in the second column of that table –

TABLE 1

	Case	**Meaning of express consent**
1.	The adult is alive.	The adult's consent.
2.	The adult has died and a decision of the adult as to consent, to the specified activity was in force immediately before his or her death.	The adult's consent.
3.	The adult has died, case 2 does not apply and the adult had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment.	Consent of the person or persons appointed.
4.	The adult has died, case 2 does not apply and the adult had appointed one or more persons to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment.	Consent of a person who stood in a qualifying relationship to the adult immediately before death.

5 Consent – excepted persons

(1) This Article does not apply in relation to consent for a specified activity involving removal of excluded material.

(2) Express consent is required for a specified activity involving the body, or relevant material from the body, of an excepted person.

(3) An excepted person is –

(a) an adult who has died and who had not been ordinarily resident in Jersey for a period of at least 12 months immediately before dying; or

(b) an adult who has died and for a significant period before dying lacked capacity to understand the notion that consent to a specified activity can be deemed to have been given.

(4) For the purpose of paragraph (3), "significant period" means a sufficiently long period as to lead a reasonable person to conclude that it would be inappropriate for consent to be given.

(5) For each case mentioned in the first column of the following Table 2, the meaning of express consent in relation to a specified activity involving the body, or relevant material from the body, of an excepted person is as provided in the second column of that table –

TABLE 2

Case		Meaning of express consent
1.	A decision of the excepted person as to consent to the specified activity was in force immediately before the excepted person's death.	The excepted person's consent.
2.	Case 1 does not apply and the excepted person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment.	Consent of the person or persons appointed.
3.	Case 1 does not apply and the excepted person had appointed one or more person under Article 8 to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment.	Consent of a person who stood in a qualifying relationship to the excepted person immediately before death.
4.	Cases 1, 2 and 3 do not apply in relation to the excepted person.	Consent of a person who stood in a qualifying relationship to the excepted person immediately before death.

6 Consent – young persons

(1) This Article does not apply in relation to consent for a specified activity involving the removal of excluded material.

(2) Express consent is required for a specified activity involving the body, or relevant material from the body, of a young person.

(3) For each case mentioned in the first column of the following Table 3, the meaning of express consent in relation to a specified activity involving the body, or relevant material from the body, of a young person is as provided in the second column of that table –

TABLE 3

Case		Meaning of express consent
1.	The young person is alive and case 2 does not apply.	The young person's consent.
2.	The young person is alive and no decision of the young person as to consent to the specified activity is in force, and either the young person is not competent to deal with the issue of consent or is competent to deal with the issue but fails to do so.	Consent of a person who has parental responsibility for the young person.
3.	The young person has died and a decision of the person as to consent to the specified activity was in force immediately before the young person's death.	The consent of the young person.
4.	The young person has died, case 3 does not apply, the young person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment.	Consent of the person or persons appointed.
5.	The young person has died, case 3 does not apply and the young person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment.	Consent of a person who has parental responsibility for the young person immediately before the young person's death, or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

6.	The young person has died and cases 3, 4 and 5 do not apply in relation to the young person.	Consent of a person who had parental responsibility for the young person immediately before the young person died or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

(4) In this Article, a decision or appointment made by a young person is only valid if, in accordance with Article 1(2), the young person was competent to deal with the issue of consent when it was made.

7 Consent – specified activities involving excluded material

(1) The Minister may by Order specify relevant material that is excluded material for the purposes of this Law.

(2) In the case of a specified activity involving the removal of excluded material, express consent is required, and such express consent must be specific to the removal of the excluded material in question.

(3) For an adult, for each case mentioned in the first column of the following Table 4, the meaning of express consent in relation to a specified activity involving the removal of excluded material is as provided in the second column of that table –

TABLE 4

Case		**Meaning of express consent**
1.	The adult is alive.	The adult’s consent.
2.	The adult has died and a decision of the adult as to consent to the specified activity was in force immediately before the adult’s death.	The adult’s consent.
3.	The adult has died, case 2 does not apply, the adult had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity, and such a person is available to give consent under the appointment.	Consent of the person or persons appointed.
4.	The adult has died, case 2 does not apply and the adult had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment.	Consent of a person who stood in a qualifying relationship to the adult immediately before the adult’s death.

5.	The adult has died and cases 1, 2, 3 and 4 do not apply in relation to the adult.	Consent of a person who stood in a qualifying relationship to the adult immediately before the adult's death.

(4) For a young person, for each case mentioned in the first column of the following Table 5, the meaning of express consent in relation to a specified activity involving the removal of excluded material is as provided in the second column of that table –

TABLE 5

Case		**Meaning of express consent**
1.	The young person is alive and case 2 does not apply.	The young person's consent.
2.	The young person is alive, no decision of the young person as to consent to the specified activity is in force, and either the young person is not competent to deal with the issue of consent or is competent to deal with the issue but fails to do so.	Consent of a person who has parental responsibility for the young person.
3.	The young person has died and a decision of the young person to as to consent to the specified activity was in force immediately before the young person's death.	The young person's consent.
4.	The young person has died, case 3 does not apply, the young person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity and such a person is available to give consent under the appointment.	Consent of the person or persons appointed.
5.	The young person has died, case 3 does not apply and the young person had appointed one or more persons under Article 8 to deal with the issue of consent in relation to the specified activity, but no such person is available to give consent under the appointment.	Consent of a person who has parental responsibility for the young person immediately before the young person's death, or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

6.	The young person has died and of cases 3, 4, and 5 do not apply in relation to the young person.	Consent of a person who had parental responsibility for the young person immediately before the young person died or where no such person exists, the consent of a person in a qualifying relationship to the young person at that time.

(5) In this Article, a decision or appointment made by a young person is only valid if, in accordance with Article 1(2), the young person was competent to deal with the issue of consent when it was made.

8 Appointed persons

(1) A person may appoint one or more persons to represent him or her after death in relation to express consent for the purpose of this Law.

(2) An appointment under this Article may be general or may limited to express consent in relation to one or more specified activities as may be specified in the appointment.

(3) Subject to paragraph (4), an appointment under paragraph (1) may be made orally or in writing.

(4) An oral appointment under this Article is only valid if made in the presence of at least 2 witnesses present at the time the appointment is made.

(5) A written appointment under this Article is only valid if –

(a) it is signed by the person making it in the presence of at least one witness who attests to the signature;

(b) it is signed at the direction of the person making it, in his or her presence and in the presence of at least one witness who attests to the signature; or

(c) it is contained in the will of the person making it.

(6) Where a person appoints 2 or more persons in relation to the same specified activity, they are to be regarded as appointed to act jointly and severally unless the appointment provides that they are appointed to act jointly.

(7) An appointment under this Article may be revoked at any time.

(8) Paragraphs (3), (4), (5) and (6) apply to the revocation of an appointment under this Article as they apply to making of such an appointment.

(9) A person appointed under this Article may at any time renounce the appointment.

(10) A person may only act under an appointment under this Article if the person –

(a) is an adult; or

(b) is not of a description prescribed.

(11) For the purposes of Articles 4(4), 5(5), 6(3) and 7(3) or (4), if it is not reasonably practicable to communicate with a person appointed under this Article, within the time available if consent is to be acted upon, the person is to be treated as being not able to give consent to an activity under the appointment.

(12) In this Article "adult" means a person who is 18 years of age or older.

9 Activities involving material from adults who lack capacity to consent

(1) This Article applies where –

(a) a transplantation activity under Article 2(1)(d) or (e) is carried out involving relevant material from the body of a person who –

(i) is an adult, and

(ii) lacks capacity to consent to the transplantation activity; and

(b) no decision of the person to consent, or not to consent, to the transplantation activity is in force.

(2) Where this Article applies, the consent of the person referred to in paragraph (1) shall be deemed to have been given if the transplantation activity is carried out in circumstances of a kind specified in Regulations made under Article 19(2)(a).

10 Other conditions regarding removal and use of relevant material from the body or removal of a body

(1) Subject to paragraph (3), the removal and use of any relevant material from a body of a deceased person for a specified activity shall not be effected except by –

(a) a registered medical practitioner;

(b) a person qualified for registration as a registered medical practitioner,

who must be satisfied by personal examination of the body that life is extinct.

(2) In doing anything permitted under paragraph (1), a person described in paragraph (1)(b) does not thereby contravene Article 2 of the Medical Practitioners (Registration) (Jersey) Law 1960.

(3) Where the removal of a body of a deceased person is for use in teaching of anatomy, medical education or research, therapeutic purposes, no such removal shall be effected –

(a) until after the end of the period of 48 hours beginning with the time of the person's death;

(b) without a certificate of cause of death;

(c) without notice to the Medical Officer of Health;

(d) except under the supervision of a registered medical practitioner, who must be satisfied by personal examination of the body that life is extinct; and

(e) except in a coffin or shell appropriate for such a removal,

and the person removing the body, or causing it to be removed, shall –

(i) make arrangements for the body to be decently interred in consecrated ground or in some public burial ground in use for persons of that religious persuasion to which the person whose body was so removed belonged, or be to be cremated; and

(ii) transmit a certificate of interment or cremation of such body to the Medical Officer of Health within 2 years from the date of removal of the body.

(4) A person who contravenes paragraphs (1) shall be guilty of an offence and liable to imprisonment for a term of 2 years and to a fine.

(5) Subject to paragraph (6), a person who contravenes paragraph (3) shall be guilty of an offence and liable to a fine.

(6) Where a person removes the body of a deceased person for use in the teaching of anatomy, for use in medical education or research or for therapeutic purposes, the person shall not be guilty of an offence if the person reasonably believes that 48 hours has passed since the time of the person’s death.

11 Prohibition of specified activity without consent

(1) Subject to paragraph (2), a person who carries out specified activity in Jersey without consent shall be guilty of an offence and liable to imprisonment for a term of 2 years and to a fine.

(2) A person shall not be guilty of an offence under paragraph (1) if the person reasonably believes that –

(a) the specified activity is carried out with consent; or

(b) the activity carried out is not a specified activity.

(3) Subject to paragraph (4), a person who makes a false or misleading representation to another person whom he or she knows, or believes, intends to carry out a specified activity –

(a) that there is a consent to the activity; or

(b) that the activity is not a specified activity,

shall be guilty of an offence and liable to imprisonment for a term of 2 years and to a fine.

(4) A person shall not be guilty of an offence under paragraph (3), if the person did not know that the representation was false or misleading or believed it to be true.

(5) No proceedings for an offence under this Article may be instituted except by or with the consent of the Attorney General.

12 Preservation for transplantation

(1) Where relevant material from the body of a deceased person lying in a hospital, nursing home or other institution is or may be suitable for use for transplantation, the person having the control or management of the institution may –

(a) take steps for the purpose of preserving the body or relevant material from the body for use for transplantation; and

(b) to retain the body for purpose of paragraph (a).

(2) Paragraph (1)(a) applies to permit only –

(a) the taking of minimum steps necessary for the purpose mentioned in that sub-paragraph; and

(b) the use of the least invasive procedure.

(3) Paragraph (1) ceases to apply once it has been established that express consent authorizing the removal of relevant material from the body of the deceased has not been, and will not be, given and that consent is not deemed to be given.

(4) An act done under paragraph (1) shall be treated as being an activity to which Article 3 does not apply.

(5) In this Article "person having the control or management of the institution" includes a person authorized by the person having management or control of the institution to take the steps under paragraphs (1)(a) or to retain the body under paragraph (1)(b).

13 Inquest or post-mortem examination of a body by the Viscount

(1) Nothing in this Law applies to anything done for the purposes of functions of the Viscount under the Inquests and Post-Mortem Examinations (Jersey) Law 1995[3].

(2) Where a person has reason to believe that an inquest may be required to be held on a body or that a post-mortem examination of a body may be required at the instance of the Viscount, that person shall not, except with the consent of the Viscount –

(a) give consent under this Law in respect of the body; or

(b) act on such consent given by any other person.

(3) A person who contravenes paragraph (2) shall be guilty of an offence and liable to a fine.

14 No authority for cremation etc.

(1) No consent shall be given under this Law in respect of any body of a deceased person by a person entrusted with that body for the purpose only of its interment or cremation.

(2) In the case of a body of a deceased person lying in a hospital, nursing home, or other institution, any consent under this Law may be given on behalf of the person having the control and management of the body by any person designated for that purpose by the first-mentioned person.

15 Other lawful dealings with body

Nothing in this Law shall be construed as rendering unlawful any dealing with the body, or with any part of the body, of a deceased person which is lawful otherwise than under this Law.

16 False or misleading information

(1) A person who makes, in any document, material, evidence or information which is required to be provided to any person entitled to the information under this Law, a statement that –

(a) at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact; or

(b) omits to state any material fact the omission of which makes the statement false or misleading,

shall be guilty of an offence and liable to a fine of level 3 on the standard scale.

(2) A person shall not be guilty of an offence under paragraph (1) if the person did not know that the statement was false or misleading or believed it to be true.

17 Criminal liability of partners, directors and other officers

(1) Where an offence under this Law committed by a limited liability partnership, a separate limited partnership, any other partnership having separate legal personality or a body corporate, is proved to have been committed with the consent or connivance of –

(a) a person who is a partner of the partnership, or director, manager, secretary or other similar officer of the body corporate; or

(b) any person purporting to act in any such capacity,

the person is also guilty of the offence and liable in the same manner as the partnership or body corporate to the penalty provided for that offence.

(2) Where the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to acts and defaults of a member in connection with the member’s functions of management as if he or she were a director of the body corporate.

18 Limitation of liability

(1) A person to whom this Article applies shall not be liable in damages for anything done or omitted in the discharge or purported discharge of any function under, or authorized by or under, this Law or any other enactment unless it is shown that the act or omission was in bad faith or without due and reasonable care.

(2) This Article applies to the States, any Minister or the Medical Officer of Health or any person who is acting as, an officer, employee or agent in an

administration of the States for which the Minister is assigned responsibility.

(3) The limitation of liability under this Article does not apply so as to prevent an award of damages made in respect of an act on the ground that the act was unlawful as a result of Article 7(1) of the Human Rights (Jersey) Law 2000[4].

19 Regulations

(1) The States may by Regulations make any provision as the States think fit for the purposes of carrying this Law into effect.

(2) Without prejudice to the generality of paragraph (1), Regulations made under this Article may –

(a) specify circumstances in which a transplantation activity may be carried out for the purpose of Article 9;

(b) provide for the charging of fees for reports required under this Law or the Regulations and for the amount of such fees;

(c) create offences for contravention of the Regulations and specify penalties for such offences not exceeding imprisonment for 2 years and a fine;

(d) make provision for the registration of express consent, or express refusal to consent, to a specified activity;

(e) make such consequential, incidental, supplementary and transitional provisions as may appear to be necessary or expedient, including provisions making amendments to any other enactment as appear to the States to be expedient –

(i) for the general purposes, or any particular purpose, of this Law,

(ii) in consequence of any provision made by or under this Law, or

(iii) for giving full effect to this Law or any provision of it.

20 Orders

The Minister may by Order make provision prescribing any matter that is to be prescribed under this Law.

21 Codes of practice

(1) The Minister may issue codes of practice for the purposes of this Law and, in particular (but without limitation) –

(a) for the guidance of any person acting under this Law in connection with a transplantation activity or other specified activity;

(b) with respect to such other matters, arising out of this Law, as the Minister may think fit.

(2) A person must have regard to any relevant code of practice issued under paragraph (1) where that person is acting under this Law.

(3) Paragraph (4) applies where it appears to the Court or to the Tribunal, when conducting any civil or criminal proceedings, that –

(a) a provision of a code of practice issued under this Article; or

(b) a failure to comply with a requirement of a code of practice issued under paragraph (1),

is relevant to a question arising in those proceedings.

(4) Where this paragraph applies, the relevant provision or failure must be taken into account in determining the question, but a failure to comply with a code of practice issued under paragraph (1) shall not of itself make a person liable to any civil or criminal proceedings.

(5) The Minister may amend a code of practice issued under paragraph (1) from time to time as the Minister may see fit.

(6) A code of practice issued under paragraph (1) may make, as respects any matter in relation to which it makes provision –

(a) the same provision for all cases, or different provision for different cases or classes of case, or different provision for the same case or class of case for different purposes; and

(b) any such provision either unconditionally or subject to any specified conditions.

(7) Before issuing or amending a code of practice issued under paragraph (1), the Minister must consult such bodies as appear to the Minister to be concerned.

(8) The Minister must publish any code of practice issued under paragraph (1) which is for the time being in force in such manner as may appear to the Minister to be appropriate for bringing it to the attention of persons likely to be concerned with or affected by its provisions.

22 Rules of Court

The power to make Rules of Court under the Royal Court (Jersey) Law 1948[5] shall include a power to make Rules for the purposes of this Law.

23 Anatomy and Human Tissue (Jersey) Law 1984 repealed

The Anatomy and Human Tissue (Jersey) Law 1984[6] is repealed.

24 Citation and commencement

This Law may be cited as the Human Transplantation and Anatomy (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint.

[1] *chapter 12.200*
[2] *chapter 20.600*
[3] *chapter 07.455*
[4] *chapter 15.350*
[5] *chapter 07.770*
[6] *L.12/1984 (chapter 20.025)*