

EXECUTIVE SUMMARY

Each year, thousands of Canadians find themselves on waitlists to receive donations of vital organs, including kidneys, livers, hearts, lungs, and pancreases. However, there is a gap between the number of organs and tissues needed by Canadians and the number of organs and tissues available for donation and transplantation. Accordingly, governments continue to explore ways in which to maximize the availability of organs and tissues for transplantation, to ensure the loss of fewer Canadians to donation systems that are unable to support them.

One such method, which has already gained traction in a number of jurisdictions outside of Canada, and which, as of January 2021, has been introduced in Nova Scotia, is the implementation of a legislative system of “presumed consent” or “opt-out” organ and tissue donation. Under such a system, when there is no record of a person’s decision on organ and tissue donation, their consent will be considered, under law, to have been given. This type of system differs from all other current Canadian organ and tissue donation systems, including Manitoba’s, which maintain “express consent” or “opt-in” systems of organ and tissue donation. Under these “express consent” or “opt in” systems, legislation requires the explicit consent of donors for the use of any parts of their bodies after death for therapeutic purposes, medical education or scientific research. Under *The Human Tissue Gift Act* (“HTGA”), Manitoba’s current organ and tissue donation legislation, as under all analogous Canadian legislation aside from Nova Scotia’s, individuals will not be candidates for after-death organ or tissue donation without this express consent.

While these legislative schemes have made Canada an “express consent” jurisdiction for organ and tissue donation and transplantation, movements to improve organ and tissue donation performance for Canadians in recent years have begun to call this consent regime into question.

Accordingly, Canada is now witnessing a legislative shift towards opt-out organ donation, with Nova Scotia having successfully implemented the country’s first presumed consent regime, and with Quebec, New Brunswick, Prince Edward Island, and until recently, Ontario and Alberta, in the process of following suit.¹

The Manitoba Law Reform Commission (the “Commission”) has chosen to consider how the HTGA should be amended if the government were to decide to switch from an express consent

¹ Since the publication of the Consultation Paper, the first session of the 42nd Parliament of Ontario and the first session of the 30th Legislature of Alberta were prorogued, killing both Ontario’s and Alberta’s Bills on the respective Order Papers.

to a presumed consent statutory organ and tissue donation framework. Accordingly, the Commission takes no position in this Report on whether or not to recommend the enactment of such legislation, but on what elements ought to be included in such legislation if it were to be implemented, and how these elements should be crafted.

Ultimately, the Commission outlines nineteen recommendations in respect of the mechanisms for indicating consents and refusals to organ and tissue donation under such a framework, the exceptions to presumed consent under said framework, and the role of proxies or individuals who may consent or refuse to organ and tissue donation on someone else's behalf. The key recommendations are summarized below.

In terms of mechanisms for indicating consents and refusals, the Commission recommends the implementation of a central registry in which consents and refusals respecting organ and tissue donation can be registered. The Commission recommends that Manitobans be able to register their consents and refusals in said registry in a number of different ways, including (1) by indicating the consent or refusal in whatever standardized written or electronic forms are created for this purpose; (2) by indicating the consent or refusal to a Manitoba Health and Seniors Care representative or Manitoba Public Insurance representative when updating or applying for the issuance of a Manitoba Health Card or when applying for the issuance or renewal of a Manitoba driver's license or Manitoba Identification Card, respectively; (3) by indicating the consent or refusal in a signed, dated, and witnessed written document that is delivered to the body that is responsible for maintaining the registry; and (4) by indicating the consent or refusal orally in the presence of witnesses, and detailing this oral instruction in a signed, dated, and witnessed written document that is delivered to the body that is responsible for maintaining the registry.

The Commission recommends that reasonable efforts must be made to determine whether an individual consents or refuses to organ and tissue donation prior to determining that deemed consent has been triggered and that donation and transplantation activities can commence.

Reasonable efforts would include checking the registry for a consent or refusal, and where no consent or refusal has been registered, and where it is deemed appropriate, asking the individual or their alternate decision maker whether they wish to make a direction regarding organ and tissue donation. If after taking these steps, neither a consent nor refusal is obtained, the Commission recommends that consent should be presumed and that organ donation activities may commence.

With respect to exceptions to a presumed consent framework, the Commission recommends that an individual should not be deemed to consent to organ and tissue donation in the ordinary course where: (1) they have died and for a significant period before dying they lacked the capacity to make a decision respecting donation after death; (2) they have died and they were not ordinarily resident in the Province for a period of at least 12 months immediately before dying; (3) they were under the age of majority at the time of death; and (4) they have died and at the time of death, they have on their person a written indication of consent or refusal to organ and tissue donation that is signed, dated, and witnessed by a competent adult witness.

The Commission also recommends that under certain circumstances, certain individuals should be able to consent or refuse to organ and tissue donation on another individual's behalf.

Specifically, the Commission recommends that where an individual has died, either their proxy (where they are over the age of 18), their nearest relative (where a proxy is not authorized to act or is unavailable), or the person lawfully in possession of their body or the Inspector of Anatomy (where there is no nearest relative or the nearest relative is unavailable) may make such a decision on their behalf. More specifically, these individuals may make such a decision on a deceased person's behalf where: (1) the deceased person has registered a decision regarding donation after death, but the alternate decision maker has information that would lead a reasonable person to conclude that the deceased person would have made a different decision; (2) the deceased person has not registered a decision regarding donation after death, resulting in deemed consent, but the alternate decision maker has information that would lead a reasonable person to conclude that the deceased person would not have consented to donation after death; (3) the deceased person has registered a decision regarding donation after death, but this decision cannot be acted upon because the deceased person was not capable of understanding the nature and effect of their decision when they made it; and (4) the deceased person has not registered a decision regarding donation after death but deemed consent does not apply because of an exception to the presumed consent framework.

Where an individual is an adult and has not yet died but death is deemed to be imminent and inevitable, the Commission recommends that either their proxy (where they are over the age of 18), or their nearest relative (where a proxy is not authorized to act or is unavailable), may consent or refuse to organ and tissue donation on their behalf. More specifically, these individuals may make such a decision on the dying adult's behalf where: (1) the dying adult has not registered a decision regarding donation after death, and in the opinion of a medical practitioner, the dying adult is incapable of making a decision due to injury or disease; and (2) the dying person has

registered a decision regarding donation after death, but this decision cannot be acted upon because the deceased person was not capable of understanding the nature and effect of their decision when they made it, and in the opinion of a medical practitioner, the dying adult is incapable of making a decision due to injury or disease.

Lastly, the Commission recommends that where a person is under 16 years of age and a physician is of the opinion that the person's death is imminent and inevitable, the dying minor's nearest relative should be empowered to make decisions regarding organ and tissue donation on their behalf.

Of the Commission's other incidental recommendations in terms of who may make decisions on another individual's behalf is a recommendation to expand the definition of "nearest relative" that currently exists in the HTGA. This expansion would include the addition of less traditionally recognized family members like a person standing in loco parentis, and more distantly related family members such as grandparents, grandchildren, aunts and uncles, and nieces and nephews.

Finally, and of particular importance, is the Commission's recommendation that in crafting any presumed consent organ and tissue donation legislation, Manitoba ought to consult with Indigenous communities in the province to consider and address how Indigenous laws, culture, and experiences will impact the ways that Indigenous people will be affected by such legislation.

Additionally, Manitoba ought to consult with advocates working with the homeless and under-housed populations to understand how potential legislative changes in this area may impact those populations. The Commission notes that without the benefit of such consultation at its disposal today, it makes the recommendations in this Final Report tentatively, recognizing that additional and alternative changes will likely need to be implemented