

Holyrood's proposed organ opt-out is misleading

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The number of persons waiting for life-saving organs is, unfortunately, continuing to increase right across the world, including in Scotland.

As a result, the Scottish Government is seeking to change the law with the Human Tissue (Authorisation) (Scotland) Bill in an attempt to increase the number of organs from deceased persons that can be removed for transplantation.

But although the intentions of the Government are commendable in attempting to save more lives, it is actually misinforming the Scottish public about what is really being suggested in the bill.

This is because it is distorting the truth when stating that the primary purpose of the bill “is to introduce a ‘soft’ opt-out system of organ and tissue donation for the purpose of transplantation”. In this regard, opt-out systems represent legal systems enabling persons to instruct that their organs not be removed for transplantation after death (for example, by carrying a refusal card, informing relatives or joining a register) while the organs from all those, who have not left such instructions, can be removed.

These include soft opt-out systems whereby nearest relatives have a final say as to the removal of organs and hard opt-out systems whereby relatives do not have a say.

When the propose Scottish bill is actually examined, however, it is clear that what is being suggested is a form of hard opt-out system for the most common organs such as heart, lungs, kidneys, liver, eyes, pancreas, and not a soft opt-out system where relatives have a final say.

Indeed, according to the proposed bill, when the deceased has left no indications about what should happen with his or her organs, then the deceased is ‘deemed’ to have authorised the removal and use of his or her organs for transplantation.

Moreover, in this case, if no clear evidence exists that the deceased was unwilling to donate his or her organs, nearest relatives would have absolutely no legal right to oppose the removal of these common types of organ.

This means that Scotland would become one of the very few countries in the world to enact a form of hard opt-out system for organ removal for transplantation which is generally considered as unduly traumatic for relatives in most other European countries.

The nearest relative would only be able to have a final say, in certain circumstances, for the removal and use of less common types of organs for transplantation, such as the face, reproductive organs and limbs. Only, in this case, would a form of soft opt-out system exist.

Moreover, the bill suggests that organs can still be removed from the deceased and used for research, education, training, audit and quality assurance even if he or she has left no indications for such a possibility.

This is because when relatives have no actual knowledge that the deceased person was unwilling for his or her organs to be used in such a manner and this person has not opted-out of transplantation or left any indications about such purposes, then these relatives may still authorise the use of organs in these ways.

Most people welcome the possibility of donating their organs after death in a spirit of altruism. But this bill will completely transform the context to one in which the state may be entitled to appropriate the organs of those who have left no wishes without their nearest relatives having any legal right to a final say.

This is unfortunate, since when the relatives of a deceased person have no final say about whether certain organs should be removed in an opt-out system, this could lead to an undermining of public confidence in the whole system and thereby eventually reduced the number of available organs. An example of the dangers that may arise when healthcare professionals 'deem', 'assume' or 'presume' are the wishes of a person is what specifically led to the scandal at Alder Hey Children's Hospital in Liverpool in the 1990s.

At this hospital, body parts of children were retained after post-mortem examination when healthcare professionals 'presumed' that this would be acceptable to parents without consultation. The Scottish Government should not, therefore, make^[11]_{SEP} the same mistake in preventing nearest relatives to have a legal right to a final say about what happens to their loved-one's organs.