

HUMAN TRANSPLANTATION (WALES) ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 5: Consent: excepted adults

27. This section sets out the meaning of consent in relation to a transplantation activity for excepted adults, that is
- a) A deceased adult who has not been ordinarily resident in Wales for a period of least 12 months immediately before death; or
 - b) A deceased adult who lacked capacity for a significant period before death to understand that consent is deemed in the absence of express consent.
28. In the case of an excepted adult, express consent will always be required and deemed consent does not apply. This section replicates the existing legal position under the Human Tissue Act 2004 (the 2004 Act) and requires either the express consent of the individual, the express consent of a qualifying relative or the express consent of an appointed representative. It applies to deceased donation only, and not living donation.
29. A qualifying relationship is defined in the interpretation section (see section 19). The ranking of the list of qualifying relations is as set out in section 27(4) of the 2004 Act.
30. The term “ordinarily resident” is not defined, but it has been the subject of extensive case law. Ordinarily resident is primarily a question of degree and fact and suggests some habit of life. It is to be contrasted with extraordinary, occasional or temporary residence. The concept means a person’s abode in a particular place or country which has been adopted voluntarily and for settled purpose and part of the regular order of life for the time being, whether or short or long duration. A settled purpose could include education, business, employment, health or family. All that is necessary is that the purpose of living in a place has a sufficient degree of continuity to be properly described as settled, and apart from accidental or temporary absences.
31. In terms of a person who lacked capacity to understand that consent could be deemed, the exact duration that a person must have lacked capacity has not been specified. The period must, however, be significant. If a person had capacity for a prolonged period not long before they died then consent should be deemed. It is important to note that the capacity issue here (lacking capacity to understand that consent can be deemed) is slightly different to the capacity issue in section 9 (and in section 6 of the 2004 Act).
32. Under this section if no express provision (the cases in Table 2, including appointed representatives able to act) is made, then the decision regarding consent is taken by a qualifying relative. This is the same as the position under the 2004 Act. Qualifying relatives are defined in this Act (see section 19) but the ranking given to them (i.e. which relative takes the decision) is (still) done under the 2004 Act. Under section 26 of the 2004 Act the Human Tissue Authority must issue a code of practice for the purpose of

“giving practical guidance” and “laying down the standards expected” in carrying on activities with bodies and organs (including transplantation). Section 26(3) of the 2004 Act includes a specific provision to say that the Code must deal with the issue of consent. Section 27 goes on to provide that the Code must “include provision to the effect” set out in subsections (4) to (8), which includes ranking and other related practical matters, though the Authority may by virtue of subsection (3) include provision of different effect in “exceptional cases”. These 2004 Act provisions will continue to apply in Wales in respect of express consent given by qualifying relatives, but the Code of Practice will make clear that relatives and friends of long standing will not be ranked for the purposes of information provided under section 4(4)(b) of this Act. See section 15 for more detail on the Code of Practice.

33. As to the cross border effect, this section is intended to work such that if somebody who ordinarily lives in England or elsewhere dies in Wales, and therefore the transplantation activity is done in Wales, the legal position is the same as if they had died in England. This position is achieved as the question of fact relating to whether a decision of the deceased relating to consent (in practice being on the Organ Donor Register) was in force when he or she died is the same.
34. As in section 4, this section does not cover consent for transplantation activities involving excluded material which is dealt with in section 7.