

Human body parts and tissue

What are your rights?

By Loane Skene



People commonly assume that they 'own' their body and anything removed from it. In fact, people have very few legal rights over their excised body parts and tissue. Their right to bodily autonomy – not to be touched or to have bodily material removed without consent or lawful justification (emergency, statutory authority or a court order) – is protected by the law of trespass. But after a body part or tissue has been lawfully removed, a person will generally have no proprietary interests in it.¹

What follows are some questions that may be raised by clients concerning the storage and use of human bodily material and genetic information (which may be important for relatives as well as the individuals concerned). Only Victorian statutes are considered, but the common law principles that govern most of these issues apply throughout Australia.

CAN I MAKE SURE THAT MY BODY IS CREMATED AND NOT BURIED AFTER I DIE?

No. You have no legal right to direct what will happen to your body after your death. Your executor is legally entitled to the possession of your body for the purpose of burial or cremation and is required to dispose of it as soon as possible. If your next of kin decide to act differently from your intentions, assuming they know them, the law cannot compel them to follow your wishes.

AM I LEGALLY ENTITLED TO TAKE HOME MY APPENDIX/PLACENTA, ETC, AFTER I LEAVE HOSPITAL?

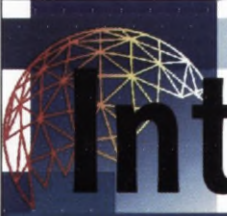
No. Since you do not 'own' tissue excised from your body, you do not have any legal right to remove it from the hospital. Excised tissue is generally regarded as 'waste' and is incinerated for hygienic reasons. Sometimes, hospitals have allowed patients to take home an appendix, a gallstone or a kidney stone preserved in antiseptic fluid as a curiosity, but it is up to the hospital whether it decides to allow that. Patients have no legal right to demand it. The same principle applies to the placenta, which women in some cultures want to bury in their garden. Hospitals are conscious of cultural traditions and may be persuaded to allow the woman to take home her placenta after she has given birth. However, she has no legal right to do so.

CAN I TAKE HOME MY ARTIFICIAL LEG AFTER IT HAS BEEN REPLACED WITH A NEW ONE? (I WAS ASKED THIS QUESTION BY A PATIENT WHO WANTED TO SELL THE LEG ON EBAY TO RAISE MONEY FOR RESEARCH.)

Probably not, although an artificial leg may arguably be subject to a different principle from human tissue (though it is likely to have at least some human tissue adhering to it). One reason why people do not legally 'own' tissue removed from their bodies is that the law has not recognised that human body parts or tissue are property (in the early cases such as *Doodeward v Spence* (1906) 6 CLR 406) or, in later cases, are not property 'owned' by the person from whom the tissue came.² Since an artificial leg is a 'thing' inserted into the body and not tissue in the body, proprietary rights may arise in the artificial leg in favour of the patient (it is hard to imagine that anyone else would 'own' an object inserted into one's body). However, hospitals may not allow the patient to take the artificial leg home because of the risk of infection from tissue adhering to it. The hospital (or whoever provided or inserted the artificial leg) might argue in contract that the leg was provided on the basis that it would

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be disposed of by the hospital after removal, and that the patient is bound by that arrangement. If there is no written provision about the disposal of the artificial leg, such a term might be implied in the public interest to safeguard against infection (although courts have been reluctant to imply terms in a contract unless that is necessary to make the contract effective³). Alternatively, a court might regard the proprietary right of the patient as short of full ownership, in the same way that the law often recognises a number of co-existing rights in the same property – rights of possession, retrieval in certain circumstances, intellectual property, etc.⁴ The patient's proprietary right may be to keep the artificial leg until it is replaced, after which the hospital is entitled to dispose of it. >>



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CAN I DONATE MY BLOOD TO A SPECIFIC PERSON (SAY, MY DAUGHTER, WHO IS ABOUT TO HAVE AN OPERATION)?

Probably not. Known as 'directed donation', this is used in some overseas blood services, along with the similar practice of 'replacement donation'. While there is no law preventing this in Australia, the Australian Red Cross Blood Service (ARCBS) has a policy preventing blood donation within families (although organs may be donated to a named family member while the donor is alive, and also after the donor's death). The reason for not allowing intra-familial blood donations is that such donors are known to be of higher risk of transmitting blood-borne infection than voluntary anonymous donors. A family member may not be frank in disclosing personal information that may be relevant to the safety of the blood, such as same-sex and other risky sexual activities, and intravenous drug use. Therefore, in order to minimise this risk, the ARCBS permits directed donations only under certain conditions: (a) it is medically required (this is extremely rare); (b) it is requested by the treating doctor, and the donor is already a voluntary blood donor; or (c) the donor is the patient's parent and the patient is a child who is unable to provide autologous blood (donate for themselves). In addition, all the usual requirements for donor eligibility, screening and crossmatching apply. When the donor is related to the patient, there are also complex issues relating to compatibility and rejection.

CAN I DONATE AN EGG TO MY SISTER FOR IVF?

Yes. There is no legal reason why eggs (and sperm) cannot be donated within families and, particularly with eggs, there is good reason for intra-familial donation. There are relatively few donated eggs available in fertility treatment programs. Couples in the programs often want to use all their eggs themselves, either immediately or to form and store embryos for later use if they are not successful after the first insemination, or if they want to have children later. Women who are not undergoing fertility treatment may be reluctant to take the risks associated with egg donation, such as taking large doses of drugs to stimulate their ovaries to produce extra eggs, and the removal of the eggs by surgery. Also, if people come from a relatively small or scattered ethnic community, obtaining an egg from a relative may be the only way to have a child who looks like the parents.

CAN I REQUIRE THAT DONATED BLOOD MUST NOT BE USED FOR A PARTICULAR RACIAL GROUP (SAY, PEOPLE OF CHINESE ORIGIN)?

No. The ARCBS has no system in place to restrict usage of donations for any non-medical reason. Furthermore, such a practice would be considered discriminatory, unethical and contrary to the ARCBS mission to supply the gift of life to all Australians. The ARCBS does apply some universal donor selection criteria in order to safeguard the safety of blood for recipients, and some such exclusions are an integral part of human blood and tissue legislation (for example, exclusion for use of unprescribed injected drugs). However, there is no scientific basis for segregating blood products based on race,

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and likewise no justification for distributing blood products based on race.

CAN I DONATE MY BLOOD/TISSUE/ORGANS/EGGS FOR RESEARCH – AND STIPULATE WHAT RESEARCH THEY CAN OR CANNOT BE USED FOR?

Yes. Under the *Human Tissue Act 1982* (Vic), you can donate your blood for use in research (scientific purposes), both during your life (s21(b)) and after your death (s26, s3 – definition of tissue). Donating organs for research is allowed only after death. During your life, you can donate your organs only for transplantation: s8(1)). Sperm, eggs and embryos may also be donated for treatment or research: *Infertility Treatment Act 1995* (Vic) Pt 3 Divs 2, 4.

CAN MY BLOOD OR TISSUE BE LEGALLY USED FOR RESEARCH WITHOUT MY CONSENT?

Yes, subject to ethical approval. The need for consent to use human tissue (which includes blood) in research may sometimes be waived by an ethics committee. Under the *National Statement on Ethical Conduct in Research Involving Humans* (2007), published by the National Health and Medical Research Council (NHMRC),⁵ an ethics committee may allow stored human tissue to be used in research if there is a clear public benefit in undertaking the research (para 2.3.6(b)) and it is impracticable or very difficult to obtain consent from the individuals concerned (para 2.3.6(c)). This does not apply to human eggs or sperm, as specific consent must be obtained to use eggs, sperm and embryos in research: *Infertility Treatment Act 1995* (Vic) Pt 3 Divs 2, 4.

AM I ENTITLED TO BE PAID FOR DONATING BLOOD, ORGANS, TISSUE OR EGGS FOR TREATMENT OR RESEARCH?

No. Human tissue legislation and infertility treatment legislation prevent payment other than 'reasonable expenses': *Human Tissue Act 1982*, s39; *Infertility Treatment Act 1995* (Vic), s3 (definition of 'valuable consideration'), s38O ('reasonable expenses' is defined in s38O(3)). Human tissue other than sperm and ova may be bought if the minister grants a permit: *Human Tissue Act 1982* (Vic) s39(2), and tissue banks may recover their costs: s39A. In prohibiting the general sale of human tissue, Australian law is different from the law in some other countries. In the US, for example, blood donors may be paid, and human eggs are sold on the internet, sometimes for thousands of dollars.

WILL I BE ENTITLED TO SHARE IN THE PROFITS OF THE RESEARCH?

No. People who donate their tissue for research have no legal right to be compensated or to share in any profits of a scientific finding or invention that follows from the use of their tissue.⁶ The initial authority to remove the tissue, and the consent for it to be used in research, authorise the researchers to use the tissue in their research according to that consent. The donor has no proprietary rights in the tissue that would enable a claim to be made for compensation for use of the tissue, to share in any proceeds of its development, or to require its destruction.

WHAT ARE TISSUE BANKS, GENETIC DATABANKS AND BIOBANKS, AND WHAT ARE THEY USED FOR?

Tissue banks, genetic databanks and biobanks are collections of human bodily material and genetic information that are kept and collated to provide information for the people concerned and their blood relatives about genetic mutations that run in families. Information from the collections is generally provided only to medical practitioners to advise their patients, and confidential information about particular people will not be disclosed without their consent. Information and samples from the collections may sometimes be used in medical or epidemiological research but, if that occurs, it is almost always anonymised and always closely monitored by ethics committees.

IF I FIND OUT THAT I HAVE A GENETIC CONDITION, DO I HAVE TO TELL MY BLOOD RELATIVES?

No, but you would be encouraged to share the information with close blood relatives. Genetic information is familial and your close blood relatives may benefit from knowing about their genetic risk. For example, people who have an increased risk of developing cancer because of a family mutation may undertake additional screening. They may even have prophylactic surgery, such as prophylactic mastectomy where there is a high family risk of breast cancer. Genetic information is also important when couples are having children. If they are aware of a genetic risk, they may use fertility treatment procedures to screen their embryos before implantation and implant only unaffected embryos. Or, a woman may decide after becoming pregnant to terminate the pregnancy if the foetus is affected. ■

Notes: **1** A proprietary right in human tissue has been recognised in a number of cases, but the courts did not recognise a proprietary right in favour of the person from whom the tissue was taken: see, for example, *Moore v Regents of the University of California* 739 P 2d 479 (Cal 1990); *Washington University v Catalona*, 490 F 3d 667 (8th Cir (Mo) 2007; Cert denied, *Catalona v Washington University*, S Ct, 2008 WL 169438, 76 USLW 3226 (US Jan 22, 2008). **2** Property rights may arise in favour of other people who undertake 'work and skill' on the tissue, like a scientist who develops a human cell line from excised human bodily material: *Moore* and *Catalona*, note 1 above. **3** *Breen v Williams* (1996) 186 CLR 71. **4** Because of the possible 'bundle' of rights, it is better to talk about 'proprietary' rights in human bodily material than 'property' rights, which may suggest full ownership. **5** <http://www.nhmrc.gov.au/publications/synopses/files/e72.pdf>, accessed on 3 July 2008. **6** *Moore*, note 1 above.

APPENDIX – FURTHER READING

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