

WESTERN AUSTRALIA.

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# BLOOD DONATION (LIMITATION OF LIABILITY) ACT 1985.

(No. 88 of 1985.)

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# BLOOD DONATION (LIMITATION OF LIABILITY).

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No. 88 of 1985.

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AN ACT to limit liability in respect of the transmission of the disease known as acquired immune deficiency syndrome through the transfusion of blood and blood products and for purposes connected therewith or incidental thereto.

[Assented to 4 December 1985.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

## PART I—PRELIMINARY.

1. This Act may be cited as the *Blood Donation (Limitation of Liability) Act 1985*. Short title.

No. 88.] *Blood Donation (Limitation of Liability)*. [1985.]

Commencement.

2. This Act shall be deemed to have come into operation on 30 June 1985.

Interpretation.

3. In this Act, unless the contrary intention appears—

“AIDS” means disease known as acquired immune deficiency syndrome in any of its stages, including its antibodies and its virus;

“AIDS related action” means action brought by or on behalf of—

(a) a person who claims to have contracted AIDS—

(i) by reason of having been administered blood supplied by the Society or a hospital or a blood product derived from blood so supplied;

(ii) by reason of having been involved in the taking, testing, preparation, processing, handling, supplying, or administering to a patient of blood supplied by the Society or a hospital or a blood product derived from blood so supplied;

or

(iii) from a person who contracted AIDS in a circumstance specified in subparagraph (i) or (ii);

or

(b) a dependant or the estate of a person who dies as a result of having contracted AIDS in a circumstance specified in paragraph (a);

“approved” means approved by the Executive Director, Public Health, by instrument in writing for the purposes of this Act;

“blood product” includes blood component;

“donor” means person who gives blood for therapeutic purposes to the Society or a hospital;

“donor declaration” means declaration made by a donor in the form prescribed or adopted by regulations made under section 14;

“hospital”, in relation to—

(a) a public hospital within the meaning of the Hospitals Act 1927, means board of that hospital; or

(b) a hospital other than a public hospital referred to in paragraph (a), means person conducting or managing that other hospital;

“medical practitioner” has the meaning given by section 3 of the Medical Act 1894;

“the Department” means the department of the Public Service of the State principally assisting the Minister in the administration of this Act;

“the Executive Director, Public Health,” means the person holding or acting in the office of the Executive Director, Public Health and Scientific Support Services, in the Department;

“the Society” means the society incorporated by Royal Charter under the name of the Australian Red Cross Society;

“the Transmissible Diseases Regulations” means the Blood and Tissue (Transmissible Diseases) Regulations 1985 made under the Health Act 1911.

PART II—INITIAL LIMITATION OF LIABILITY.

Application  
of Part II.

4. This Part applies only to or in relation to an AIDS related action arising out of—

(a) the administration during the period commencing on 30 June 1985 and ending immediately before the day fixed by proclamation for the purposes of this section to a person of—

(i) blood supplied by the Society or a hospital; or

(ii) a blood product derived from blood referred to in subparagraph (i);

or

(b) the involvement during the period referred to in paragraph (a) of a person in the taking, testing, preparation, processing, handling, supplying or administering of blood or a blood product referred to in that paragraph.

Liability of  
Australian  
Red Cross  
Society and  
hospitals  
taking blood.

5. (1) Subject to this section, in an AIDS related action against—

(a) the Society or a hospital it is a defence that—

(i) the Society or the hospital, as the case requires—

(A) obtained from the donor of the relevant blood within the 12 hours immediately preceding the donation of that blood a declaration made under the Transmissible Diseases Regulations; and

(B) caused, before the relevant blood was supplied to be administered to a person, or to be used in the preparation of a blood product to be administered to a person, a sample of that blood to be tested, using such equipment and in accordance with such a method as were then required by good medical practice, for the presence of AIDS, and that the result of that test was negative;

and

(ii) neither the Society nor the hospital, as the case requires, nor any employee of, or person working without payment for, the Society or the hospital nor any other person who took blood from a donor on behalf of the Society or the hospital was guilty of any negligence or wilful misconduct in respect of the taking or testing of the relevant blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires;

or

(b) an employee or person referred to in paragraph (a) (ii) it is a defence that that employee or person was not guilty of any negligence or wilful misconduct in respect of the taking or testing of the relevant blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires.

(2) Subsection (1) does not apply to or in relation to an AIDS related action against—

(a) the Society or a hospital if, after the Society or the hospital, as the case requires, had taken blood to be supplied for the purpose of being administered to a person or used in the preparation of a blood product to be administered to a person, the Society or the hospital had reasonable grounds for believing that—

(i) a statement in the declaration made by the donor of that blood under the Transmissible Diseases Regulations might be false or misleading; or

(ii) that blood or blood product might contain AIDS,

and the Society or the hospital did not take all reasonable steps to ensure that that blood or blood product was not administered to a person; or

(b) any employee or person referred to in subsection (1) (a) (ii) if, after the Society or the hospital concerned or that employee or person had taken blood to be supplied for the purpose of being administered to a person or used in the preparation of a blood product to be administered to a person, that employee or person had reasonable grounds for believing that—

(i) a statement in the declaration made by the donor of that blood under the Transmissible Diseases Regulations might be false or misleading; or

(ii) that blood or blood product might contain AIDS,

and that employee or person did not—

(iii) report those grounds to the Society or that hospital; and

- (iv) take all reasonable steps to ensure that that blood or blood product was not administered to a person.

(3) Notwithstanding anything in this section, if in the opinion of not less than 2 medical practitioners—

- (a) the condition of a person was such that he was likely to die unless blood or blood products was or were administered to him; and
- (b) it was not reasonably practicable in the circumstances to obtain all or any of the blood or blood products required for administration to the person referred to in paragraph (a) from blood or blood products in respect of which the testing referred to in subsection (1) (a) (i) (B) had been carried out with a negative result,

the administration to the person referred to in paragraph (a) of any blood or blood products in respect of which the testing referred to in subsection (1) (a) (i) (B) had not been carried out does not by itself defeat a defence provided by subsection (1).

6. (1) Subject to this section, in an AIDS related action against—

- (a) a hospital (in this section called “the administering hospital”) or other person at whose premises blood supplied by the Society or a hospital, or a blood product derived from blood so supplied, was administered to a patient; or
- (b) a medical practitioner or a person acting on behalf of a medical practitioner who administered to a patient, or authorized the

Liability of hospitals and medical practitioners administering blood or blood products.

administration to a patient of, blood supplied by the Society or a hospital, or a blood product derived from blood so supplied,

it is a defence that the Society or the hospital which supplied that blood, as the case requires—

(c) obtained from the donor of that blood within the 12 hours immediately preceding the donation of that blood a declaration made under the Transmissible Diseases Regulations;

(d) caused, before that blood was supplied to be administered to a person, or to be used in the preparation of a blood product to be so administered, a sample of that blood to be tested, using such equipment and in accordance with such a method as were then required by good medical practice, for the presence of AIDS, and that the result of that test was negative; and

(e) was not guilty of any negligence or wilful misconduct in respect of the taking or testing of that blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires.

(2) Subsection (1) does not apply to or in relation to an AIDS related action against—

(a) the administering hospital or other person referred to in paragraph (a), or a medical practitioner or person referred to in paragraph (b), of that subsection if the administering hospital or that other person or that medical practitioner or person was guilty of negligence or wilful misconduct in the storage, handling, labelling or other documenting, or administering of the relevant blood or blood product;

(b) the administering hospital or other person referred to in subsection (1) (a) if, at any time up to and including the time at which the relevant blood or blood product was administered, the administering hospital or that other person—

(i) had reasonable grounds for believing that that blood or blood product might contain AIDS; and

(ii) had not taken all reasonable steps to ensure that that blood or blood product was not administered to a person;

or

(c) a medical practitioner or person referred to in subsection (1) (b) if, at the time when the relevant blood or blood product was administered, that medical practitioner or person had reasonable grounds for believing that that blood or blood product might contain AIDS.

(3) Notwithstanding anything in this section, if in the opinion of not less than 2 medical practitioners—

(a) the condition of a person was such that he was likely to die unless blood or blood products was or were administered to him;

and

(b) it was not reasonably practicable in the circumstances to obtain all or any of the blood or blood products required for administration to the person referred to in paragraph (a) from blood or blood products in respect of which the testing referred to in subsection (1) (d) had been carried out with a negative result,

the administration to the person referred to in paragraph (a) of any blood or blood products in respect of which the testing referred to in subsection (1) (d) had not been carried out does not by itself defeat a defence provided by subsection (1).

Liability of donors.

7. (1) No proceedings, civil or criminal, other than criminal proceedings under section 170 of The Criminal Code in respect of a declaration made under the Transmissible Diseases Regulations by the donor concerned, lie against a donor by reason only of a person having contracted AIDS from the administration to the person of blood given by, or of a blood product derived wholly or partly from blood given by, the donor.

(2) Subsection (1) does not apply to or in relation to a donor who has been found guilty of an offence under section 170 of The Criminal Code in respect of a declaration made by that donor under the Transmissible Diseases Regulations in respect of the giving of the blood concerned.

#### PART III—SUBSEQUENT LIMITATION OF LIABILITY.

Application of Part III.

8. This Part applies only to or in relation to an AIDS related action arising out of—

- (a) the administration on or after the day fixed by proclamation for the purposes of section 4 to a person of—
  - (i) blood supplied by the Society or a hospital; or
  - (ii) a blood product derived from blood referred to in subparagraph (i);

or

- (b) the involvement on or after the day referred to in paragraph (a) of a person in the taking, testing, preparation, processing, handling, supplying or administering of blood or a blood product referred to in that paragraph.

9. (1) Subject to this section, in an AIDS related action against—

Liability of  
Australian  
Red Cross  
Society and  
hospitals  
taking blood.

(a) the Society or a hospital it is a defence that—

(i) the Society or the hospital, as the case requires—

(A) obtained from the donor of the relevant blood within the prescribed period immediately preceding the donation of that blood a donor declaration; and

(B) caused, before the relevant blood was supplied to be administered to a person, or to be used in the preparation of a blood product to be administered to a person, a sample of that blood to be tested, using approved equipment and in accordance with an approved method, for the presence of AIDS, and a certificate in an approved form purporting to be signed or initialled by an approved person and stating that the result of that test was negative was attached to the container in which the relevant blood or blood product was contained;

and

(ii) neither the Society nor the hospital, as the case requires, nor any employee of, or person working without payment for, the Society or the hospital nor any other person who took blood from a donor on behalf of the Society or the hospital was guilty of any negligence or wilful misconduct in respect of the

taking, testing or certification of the relevant blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires;

or

- (b) an employee or person referred to in paragraph (a) (ii) it is a defence that that employee or person was not guilty of any negligence or wilful misconduct in respect of the taking, testing or certification of the relevant blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires.

(2) Subsection (1) does not apply to or in relation to an AIDS related action against—

- (a) the Society or a hospital if, after the Society or the hospital, as the case requires, had taken blood to be supplied for the purpose of being administered to a person or used in the preparation of a blood product to be administered to a person, the Society or the hospital had reasonable grounds for believing that—

- (i) a statement in the donor declaration made by the donor of that blood might be false or misleading; or

- (ii) that blood or blood product might contain AIDS,

and the Society or the hospital did not take all reasonable steps to ensure that that blood or blood product was not administered to a person; or

(b) any employee or person referred to in subsection (1) (a) (ii) if, after the Society or the hospital concerned or that employee or person had taken blood to be supplied for the purpose of being administered to a person or used in the preparation of a blood product to be administered to a person, that employee or person had reasonable grounds for believing that—

(i) a statement in the donor declaration made by the donor of that blood might be false or misleading; or

(ii) that blood or blood product might contain AIDS,

and that employee or person did not—

(iii) report those grounds to the Society or that hospital; and

(iv) take all reasonable steps to ensure that that blood or blood product was not administered to a person.

(3) Notwithstanding anything in this section, if in the opinion of not less than 2 medical practitioners—

(a) the condition of a person was such that he was likely to die unless blood or blood products was or were administered to him; and

(b) it was not reasonably practicable in the circumstances to obtain all or any of—

(i) the blood required for administration to the person referred to in paragraph (a) from blood in respect of which the testing referred to in subsection (1) (a) (i) (B) had been carried out with a negative result; or

(ii) the blood products required for administration to the person referred to in paragraph (a) from blood products—

(A) to the containers or outer containers of which were attached labels endorsed in accordance with section 10 (1) (c); or

(B) in respect of which the testing referred to in subsection (1) (a) (i) (B) had been carried out with a negative result,

the administration to the person referred to in paragraph (a) of any blood or blood products to the containers or outer containers of which were not attached labels endorsed in accordance with section 10 (1) (c) or in respect of which the testing referred to in subsection (1) (a) (i) (B) had not been carried out, as the case requires, does not by itself defeat a defence provided by subsection (1).

Liability of hospitals and medical practitioners administering blood or blood products.

10. (1) Subject to this section, in an AIDS related action against—

(a) a hospital (in this section called “the administering hospital”) or other person at whose premises blood supplied by the Society or a hospital, or a blood product derived from blood so supplied, was administered to a patient; or

(b) a medical practitioner or a person acting on behalf of a medical practitioner who administered to a patient, or authorized

the administration to a patient of, blood supplied by the Society or a hospital or a blood product derived from blood so supplied,

it is a defence that—

(c) in the case of a blood product, at the time when the relevant blood product was administered there was endorsed on a label attached—

(i) to the container in which that blood product was contained; or

(ii) if the container in which that blood product was contained was itself contained within an outer container, to the outer container,

a statement in an approved form; or

(d) the Society or the hospital which supplied that blood, as the case requires—

(i) obtained from the donor of that blood within the prescribed period immediately preceding the donation of that blood a donor declaration;

(ii) caused, before that blood was supplied to be administered to a person, or to be used in the preparation of a blood product to be so administered, a sample of that blood to be tested, using approved equipment and in accordance with an approved method, for the presence of AIDS, and a certificate in an approved form purporting to be signed or initialled by an approved person and stating that the result of that test was negative is attached to the container or outer container in which that blood or blood product was contained; and

(iii) was not guilty of any negligence or wilful misconduct in respect of the taking, testing or certification of that blood or of the storage, preparation, processing, handling, supplying, labelling or other documenting, or administering of that blood or of the relevant blood product derived from that blood, as the case requires.

(2) Subsection (1) does not apply to or in relation to an AIDS related action against—

(a) the administering hospital or other person referred to in paragraph (a), or a medical practitioner or person referred to in paragraph (b), of that subsection if the administering hospital or that other person or that medical practitioner or person was guilty of negligence or wilful misconduct in the storage, handling, labelling or other documenting, or administering of the relevant blood or blood product;

(b) the administering hospital or other person referred to in subsection (1) (a) if, at any time up to and including the time at which the relevant blood or blood product was administered, the administering hospital or that other person—

(i) had reasonable grounds for believing that that blood or blood product might contain AIDS; and

(ii) had not taken all reasonable steps to ensure that that blood or blood product was not administered to a person;

or

(c) a medical practitioner or person referred to in subsection (1) (b) if, at the time when the relevant blood or blood product was administered, that medical practitioner or person had reasonable grounds for believing that that blood or blood product might contain AIDS.

(3) Notwithstanding anything in this section, if in the opinion of not less than 2 medical practitioners—

(a) the condition of a person was such that he was likely to die unless blood or blood products was or were administered to him; and

(b) it was not reasonably practicable in the circumstances to obtain all or any of—

(i) the blood required for administration to the person referred to in paragraph (a) from blood in respect of which the testing referred to in subsection (1) (d) (ii) had been carried out with a negative result; or

(ii) the blood products required for administration to the person referred to in paragraph (a) from blood products—

(A) to the containers or outer containers of which were attached labels endorsed in accordance with subsection (1) (c); or

(B) in respect of which the testing referred to in subsection (1) (d) (ii) had been carried out with a negative result,

the administration to the person referred to in paragraph (a) of any blood or blood products to the containers or outer containers of which were not attached labels endorsed in accordance with subsection (1) (c) or in respect of which the testing referred to in subsection (1) (d) (ii) had not been carried out, as the case requires, does not by itself defeat a defence provided by subsection (1).

Manner in which donor declarations to be made.

11. (1) A donor declaration shall be made by a donor, who is hereby permitted to make the donor declaration, before a person who is—

- (a) authorized to permit a statutory declaration to be made before him;
- (b) a designated officer, or the delegate of a designated officer, for the purposes of the Human Tissue and Transplant Act 1982;
- (c) a medical practitioner;
- (d) a staff member of the blood transfusion service operated by the Society; or
- (e) registered under the Nurses Act 1968 as a general nurse and is employed for the taking of tissue,

which person is hereby authorized to permit that declaration to be made before him and shall sign it, date it and endorse on it the time at which it was made and the category specified in paragraph (a), (b), (c), (d) or (e) to which he belongs.

(2) In subsection (1) (e)—

“tissue” includes—

- (a) organ or part of; or
- (b) substance extracted from, or from a part of,  
the human body and intended for therapeutic use.

Liability of donors.

12. (1) No proceedings, civil or criminal, other than criminal proceedings under section 170 of The Criminal Code in respect of a donor declaration made by the donor concerned, lie against a donor by reason only of a person having contracted AIDS from the administration to a person of blood given by, or of a blood product derived wholly or partly from blood given by, the donor.

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(2) Subsection (1) does not apply to or in relation to a donor who has been found guilty of an offence under section 170 of The Criminal Code in respect of a donor declaration made by that donor in respect of the giving of the blood concerned.

13. In an AIDS related action referred to in section 9 or 10—

Evidentiary  
certificates  
and  
endorsed  
statements.

(a) a certificate purporting to be signed by the person in charge of the laboratory at which a sample of blood was tested and stating that—

(i) that sample was tested, using approved equipment and in accordance with an approved method, for the presence of AIDS; and

(ii) the results of the test referred to in paragraph (a) specified in that certificate were obtained,

is evidence of the matters so stated and of the facts on which they are based; or

(b) an endorsed statement referred to in section 10 (1) (c) is evidence of the matters stated in that endorsed statement and of the facts on which those matters are based.

14. The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to this Act and, in particular, prescribing, or adopting with or without modifications from the Transmissible Diseases Regulations, the form of the declaration to be made by a donor for the purposes of this Part.

Regulations.