



Western Australia

## **Blood Donation (Limitation of Liability) Act 1985**

Compare between:

[30 Aug 2010, 01-g0-02] and [01 Oct 2010, 01-h0-02]



Western Australia

## **Blood Donation (Limitation of Liability) Act 1985**

**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.**

## **Part I — Preliminary**

### **1. Short title**

This Act may be cited as the *Blood Donation (Limitation of Liability) Act 1985*<sup>1</sup>.

### **2. Commencement**

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

### **3. Interpretation**

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 and Health Services 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 to that term in the *Medical Practitioners Act 2008* section 4;

**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*.

[Section 3 amended by No. 103 of 1994 s. 18; No. 22 of 2008 s. 162.]

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**3A. This Act not to apply to or in relation to liability under  
*Workers' Compensation and Injury Management Act 1981***

(1) Nothing in this Act applies to or in relation to any liability of the Society, a hospital, a medical practitioner or any other person under the *Workers' Compensation and Injury Management Act 1981* to pay compensation, and to pay for the provision of other benefits, in relation to the injury or death, as a result of the contraction of AIDS, of a worker who was at the relevant time employed by the Society, hospital, medical practitioner or other person.

(2) In subsection (1) —

*injury* and *worker* have the respective meanings given by the *Workers' Compensation and Injury Management Act 1981*.

*[Section 3A inserted by No. 52 of 1987 s. 4; amended by No. 42 of 2004 s. 156 and 174.]*

## **Part II — Initial limitation of liability**

### **4. Application of Part II**

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.

### **5. Liability of Australian Red Cross Society and hospitals taking blood**

- (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

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- (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. Liability of hospitals and medical practitioners administering blood or blood products**

- (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 authorised 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 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 has reasonable grounds for

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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 reasonable 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).

**7. Liability of donors**

- (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**

#### **8. Application of Part III**

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. Liability of Australian Red Cross Society and hospitals taking blood**

- (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 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 purposes 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 —

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- (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 the 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).

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

- (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 authorised 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

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- (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).

**11. Manner in which donor declarations to be made**

- (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) authorised to permit a statutory declaration to be made before him;

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- (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 and Midwives Act 2006* as a registered nurse and is employed for the taking of tissue,

which person is hereby authorised 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.

*[Section 11 amended by No. 50 of 2006 s. 114.]*

**12. Liability of donors**

- (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.
- (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. Evidentiary certificates and endorsed statements**

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

- (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. Regulations**

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.

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### Notes

- <sup>1</sup> This is a compilation of the *Blood Donation (Limitation of Liability) Act 1985* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any reprint.

### Compilation table

| Short title   | Number and year | Assent      | Commencement   |
|---|-----------------|-------------|--|
| <i>Blood Donation (Limitation of Liability) Act 1985</i>  | 88 of 1985      | 4 Dec 1985  | 30 Jun 1985 (see s. 2)   |
| <i>Blood Donation (Limitation of Liability) Amendment Act 1987</i>  | 52 of 1987      | 30 Oct 1987 | 30 Jun 1985 (see s. 3)   |
| <i>Hospitals Amendment Act 1994 s. 18</i>   | 103 of 1994     | 11 Jan 1995 | 3 Feb 1995 (see s. 2 and <i>Gazette</i> 3 Feb 1995 p. 333)   |
| <b>Reprint 1: The <i>Blood Donation (Limitation of Liability) Act 1985</i> as at 1 Aug 2003</b><br>(includes amendments listed above) |                 |             |  |
| <i>Workers' Compensation Reform Act 2004 s. 156 and 174</i>   | 42 of 2004      | 9 Nov 2004  | s. 174: 4 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7131);<br>s. 156: 14 Nov 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7131 and 17 Jun 2005 p. 2657);<br>Para (b) of proclamation published 31 Dec 2004 p. 7131 revoked (see <i>Gazette</i> 17 Jun 2005 p. 2657) |
| <i>Nurses and Midwives Act 2006 s. 114</i>  | 50 of 2006      | 6 Oct 2006  | 19 Sep 2007 (see s. 2 and <i>Gazette</i> 18 Sep 2007 p. 4711)  |
| <i>Medical Practitioners Act 2008 s. 162</i>  | 22 of 2008      | 27 May 2008 | 1 Dec 2008 (see s. 2 and <i>Gazette</i> 25 Nov 2008 p. 4989)   |

- <sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

### Provisions that have not come into operation

| Short title | Number and year | Assent | Commencement |
|-------------|-----------------|--------|--------------|
|-------------|-----------------|--------|--------------|

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|--|------------|-------------|--|
| <i>Health Practitioner<br/>Regulation National Law<br/>(WA) Act 2010<br/>Pt. 5 Div. 7</i> <sup>3</sup> | 35 of 2010 | 30 Aug 2010 | <del>To be proclaimed</del> <a href="#">18 Oct 2010</a><br>(see s. 2(b)) and <a href="#">Gazette</a><br><a href="#">1 Oct 2010 p. 5075-6</a> |
|--|------------|-------------|--|

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<sup>2</sup> Formerly referred to the *Workers' Compensation and Assistance Act 1981* the short title of which was changed to the *Workers' Compensation and Rehabilitation Act 1981* by the *Workers' Compensation and Assistance Amendment Act 1990* s. 5. The reference was changed under the *Reprints Act 1984* s. 7(3)(gb).

<sup>3</sup> On the date as at which this compilation was prepared, the *Health Practitioner Regulation National Law (WA) Act 2010* Pt. 5 Div. 7 had not come into operation. It reads as follows:

**Division 7 — *Blood Donation (Limitation of Liability) Act 1985*  
amended**

**35. Act amended**

This Division amends the *Blood Donation (Limitation of Liability) Act 1985*.

**36. Section 3 amended**

In section 3 delete the definition of *medical practitioner* and insert:

*medical practitioner* means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

**37. Section 11 amended**

Delete section 11(1)(e) and insert:

- (e) registered under the *Health Practitioner Regulation National Law (Western Australia)* in the nursing and midwifery profession whose name is entered on Division 1 of the Register of Nurses kept under that Law as a registered nurse and is employed for the taking of tissue,

***Blood Donation (Limitation of Liability) Act 1985***

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