

# בית דין צדק דסידני והמדינה

## Sydney Beth Din

Jewish Ecclesiastical Court  
25 O'Brien St, Bondi Beach NSW 2026 Australia

### Dayanim

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### The Sydney Beth Din Statement on Organ Donation in Australia.

March 15, 2015  
Adar 24, 5775

#### Background.

There is no greater mitzvah than the mitzvah of saving lives. We live in an age where we have witnessed extraordinary advances in modern medicine that have improved the general health of the population as well as advanced life expectancy. Diseases that even fifty years ago ravaged society have now almost been eradicated - small pox and polio come to mind. Antibiotics, antivirals and various other types of therapies have reduced life threatening illnesses in many cases to mere annoyances. Stem cell research is on the cusp of revolutionising how we treat disease and the growth in healthcare modalities is exponential.

One of the most promising and successful cures for certain diseases has been organ transplantation. The transplantation of a heart, lungs, kidney, liver and other organs has given a new lease of life to the recipients. Who in Australia is not aware of the new life given Fiona Coote who has grown into a vibrant young woman only because she has been the recipient of not one but two heart transplants?

However, as successful as organ donation and transplantation has been, it has been accompanied by one of the most significant medico-ethical controversies that faced the modern medical world. The determination and definition of the moment of death.

No society based upon the moral foundations of the Bible can tolerate the homicide of one person in order to save another. Each life is of almost infinite value and other than in self-defence one may not take another life nor may one murder for personal gain.

And here is the dilemma. In order for organs to be useful for transplantation they must be viable and healthy. The key element for the survival of any organ in the human body is that it be perfused with oxygenated blood. If an organ receives no

oxygen it will die. Traditionally death was said to occur when certain physical events occurred at about the same time; cessation of circulation of blood (evidenced by lack of heartbeat) together with cessation of respiration, quickly stopped the perfusion of blood and therefore oxygenation of the vital organs including the brain which inevitably led to irreversible loss of consciousness and death.

As such removal of organs from a donor was generally fraught with great difficulty because removing them before the patient had died would be homicide, and removing them after the patient had died would require great speed to retrieve a still viable organ. The desired organ would often die at the time the patient died. (Kidney transplants from a live donor of course do not present with these problems). Of course a heart transplant was impossible.

However this all changed with the advent of one of the most significant advances in the treatment of life threatening illness. The respirator. One of the life threatening aspects of the polio epidemics of the past, was the paralysis that it caused including the paralysis of those muscles and reflexes needed for autonomous breathing. The so called "iron lung" was the treatment that kept the patient breathing even though he himself could not. Subsequent changes in technique led to the modern life saving respirator. Patients either deathly ill or suffering catastrophic injury, who are unable to breathe on their own, are placed on a respirator which continues to breathe for them until they are able to breathe for themselves.

This has led to the following situation. In circumstances where normally a patient would cease breathing and subsequently the lack of oxygen would cause the death of the heart and brain, a respirator can artificially continue the breathing - or better said the oxygenation of the blood - even once the brain has died. Furthermore with a heart lung machine the circulation and oxygenation of blood can occur keeping the brain alive - even without a beating heart. So when does death occur? When breathing stops though the heart continues to beat? When the heart or spontaneous respiration stops even though the brain continues to function being perfused artificially? Or is it when the brain stops functioning even though the heart continues to beat and respiration continues artificially with a respirator?

### The *Halachic* Definitions

*Halacha* of course deals with these issues as does Australian law and most interestingly there are significant parallels. In *Halacha* there is a difference of opinion amongst the modern day decisors as to when death occurs, and indeed generally speaking, this difference of opinion actually mirrors two definitions of death recognised by law in Australia.

The first definition of death is the irreversible cessation of circulation of blood in the body of the person. In simple terms this is when the heart irreversibly stops as does respiration. We will call this *cardiac death*.

The second is the death of the entire brain. (In *halachic* terms this leads to a circumstance where respiration has irreversibly ceased. In contrast to the pumping of the heart, for respiration to take place, the brain stem must be functioning. Without a functioning brain stem the reflexes and muscle control required to cause respiration simply cease to function. The continued beating of the heart however is controlled by an inner pacemaker which is independent of the brain and brain-stem, so that even if the entire brain has died the heart may continue to beat if it gets oxygenated blood. ) This *halachic* school of thought, based on a Talmudic teaching that utilises the verse "...and He (G-d) blew into his (Adam's) nostrils the breath of life", argues that death is determined by the irreversible cessation of respiration. When the brain stem has died, and how much more so when the entire brain has died, respiration has certainly irreversibly ceased. This we will call *respiratory - brain death*

If we accept only the cardiac definition of death, heart donation from a deceased donor becomes almost impossible and donation of other organs while possible, very difficult. Furthermore, in Australia opting for organ procurement by the cardiac definition of death is *halachically* absolutely prohibited. Although these patients have severe irreversible brain injury or severe cardiac or respiratory failure and are dependent upon cardio-respiratory support to maintain respiration, they do not meet the clinical criteria for brain death. In these situations, before donation after cardiac death can be considered, a separate and independent decision is made to withdraw cardio-respiratory support when in the opinion of the medical staff continuing treatment provides no prospect for recovery. While this is undertaken in Australia under strict medical and ethical guidelines, in Jewish law, the removal of these treatments causing death is considered murder.

It is only if we accept the respiratory-brain definition of death that organ donation can take place in a *halachically* acceptable manner in Australia

The *halachic* debate as to whether cardiac death or brain-respiratory death is the appropriate definition of death has not been resolved and is one of the most significant *halachic* debates of our time. Great Rabbis have taken positions on both sides of the argument.

Those who define death with the respiratory- brain definition include Rabbi Moshe Feinstein Zt"l, Rabbi Ovadiah Yosef Zt"l , Rabbi Shlomo Moshe Amar Shlit"a , Rabbi Moshe Shternbuch Shlit"a, Rabbi Mordechai Elyahu Zt"l and Rabbi Zalmen Nechemiah Goldberg Shlit"a. ( While there is some controversy as to the position of Rabbi Feinstein , the Sydney Beth Din accepts respiratory-brain death as his view based in particular upon the statements of his son Rabbi Dovid Feinstein, who is of the firm view that Rabbi Feinstein accepted the respiratory (-brain) death definition.)

Those who disagree and who require the cardiac death definition include Rabbi Eliezer Yehuda Waldernberg Zt"l, Rabbi Yosef Sholom Elyashiv Zt"l , Rabbi Shmuel Wosner Shlit"a. Rabbi SZ Auerbach Zt"l held the *halachic* view that the definition of

death is based upon destruction of the entire brain, not only the brain-stem, which is difficult to ascertain and hence a clinical diagnosis of brain death according to Rabbi SZ Auerbach was "*a safek goses safek met*".- one about whom it is uncertain if he is considered moribund or actually dead. (It is reported that Rabbi Auerbach would send those desirous of becoming donors to those Rabbis who accepted the respiratory-brain definition of death.)

The Israeli Chief Rabbinate in a unanimous decision made in the year 5747 accepted the respiratory brain definition of death, but in a later decision also specifically recognised the right of those who wish to accept only the cardiac definition of death.

It further ruled that to determine respiratory brain death not only were clinical tests required to confirm death (often termed the Harvard criteria for it was a Harvard University team that first developed clinical tests establishing brain death), but there must also be an instrumental confirmation of death such as a Brainstem Auditory Evoked Response (BAER) to confirm no brainstem electrical activity. It also required a representative of the Rabbinate, appropriately trained, to be present for the determination of death.

#### The Federal Organ and Tissue Authority and the Sydney Beth Din

As a result of an initiative by the Federal Government to reach out to all ethnic and religious groups within Australia with a view to encouraging organ donation, the Sydney Beth Din was approached by the Federal Organ and Tissue Authority to give clear *halachic* guidance to the government as well as the Jewish community in all matters related to organ donation. To that end in 2013 the SBD brought to Australia, Rabbi Professor Abraham Steinberg from Israel, a foremost *halachist*, ethicist and medical practitioner who acts as an advisor to the Government of Israel and the Chief Rabbinate. Rabbi Professor Steinberg met with the Organ and Tissue Authority and assisted both the Beth Din and government to achieve that aim.

As a result of those discussions and further research by the Beth Din, the following *Halachic* ruling and guidelines were agreed upon by all parties:

#### The Ruling and Guidelines

1. The Sydney Beth Din is not in a position to determine which definition of death is correct. Great *halachic* minds stand firmly on both sides of the debate. However the Beth Din is of the view that an individual, after consultation with his or her personal Rav, is fully entitled to follow whichever of the two views he or she chooses. Each position has strong validity and rabbinic backing. (See in great length "Respiratory Brain Death "by Rabbi Professor Abraham Steinberg, 2012 ). Furthermore for

those who choose to accept Respiratory- Brain death as the *halachic* definition, and wish to become donors, the SBD, with the full approval and co-operation of the

Organ and Tissue Authority and the medical staff of the particular hospital, will facilitate the wishes of the donor and ensure that all *halachic* criteria are met.

2. There are clear criteria and procedures endorsed by the Australian and New Zealand Intensive Care Society (ANZICS) whose "statement on death and organ donation" has been recognised by the Federal Government Organ and Tissue Authority as the standard for determination of death for transplant in Australia. These criteria are some of the strictest in the world and indeed require determination not just of death of the brain stem (as is the requirement in some other jurisdictions) but require determination of death of the entire brain.

3. The ANZICS criteria involve various clinical tests to be performed in strictly defined circumstances by two doctors, none of which may be on the transplant team. These tests are performed to test the level of consciousness known as the Glasgow Coma Scale and all reflexes controlled by the brainstem. A negative response to these various stimuli indicate death of the whole brain. These include for example testing spontaneous respiration, dilation of pupils and the gag reflex. (As mentioned these tests are often known as the Harvard criteria). In situations where these clinical tests may not be conclusive, ANZICS recommends a further diagnostic imaging test be performed where a scan is taken of the brain that conclusively shows that blood flow to the entire brain has ceased meaning the brain has died. ANZICS considers "Four vessel intra-arterial catheter angiography" as the gold standard test for the absence of perfusion to the brain and recommends both angiography and radionuclide imaging as the preferred imaging techniques for assessing blood flow to the brain.

4. As stated above, when developing legislation in Israel, the Chief Rabbinate of Israel together with leading doctors and Rabbis, provided for organ donation and transplantation using respiratory brain death criteria similar to those endorsed by ANZICS. However the Israeli legislation and the Rabbinic rulings required an additional objective instrumental measure to be taken in each and every case, not just when the previous tests were inconclusive. Furthermore the ruling of 5747 required a rabbinic "witness" to be present at the final determination of death.

5. As a result of the above mentioned discussions, and in line with the criteria mentioned in paragraph four above, the Organ and Tissue Authority has agreed to allow all the *Halachic* requirements of the Chief Rabbinate of Israel to be met in order to facilitate organ donation in an *halachically* acceptable manner for Jewish donors in Australia. They have agreed that in the case of a Jewish donor who requests that organ donation be done in a *halachically* acceptable manner, all tests including diagnostic imaging tests such as intra-arterial catheter angiography will take place to determine respiratory-brain death, and only where this is possible will *halachically* sanctioned organ donation proceed. They have agreed to the appointment of specially trained and certified Beth Din observers to independently

witness the testing process for determination of brain death. Two members of the Beth Din have already been so certified.

6. At this stage it is not yet possible to adequately prescribe one's wishes on the Australian Organ Donor Register to ensure all *halachic* criteria are met. However what is possible - and for those choosing to become organ donors essential - is to leave clear instructions in either an *enduring guardianship* document or *end of life care directive* that should such circumstances arise, one wishes to be an organ donor provided that all aspects of the donation take place in accordance with *halacha* and the guidelines established by the Sydney Beth Din. These documents should be drawn up with the assistance of a solicitor and family members made aware of their existence so that the donor's wishes can be fulfilled. Furthermore they should include a specific instruction that the supervising Rabbis be authorised to give *halachic* instructions in relation to the proper care and burial of the donor and any organs not used for transplantation.

### **Summary:**

1. To save a life is one of the greatest *mitzvot* - but not at the expense of taking another life.
2. Therefore organ donation is generally only permissible once the donor has died.
3. There is an unresolved *halachic* dispute as to whether cardiac death or respiratory- brain death is the correct definition of death
4. The Sydney Beth Din, while not deciding this dispute, will facilitate *halachic* organ donation for those choosing the respiratory brain definition of death
5. The Sydney Beth Din will provide trained observers to witness the performance of clinical and diagnostic imaging testing to determine Respiratory Brain Death has occurred.
6. This is a matter of individual choice, after consultation with one's individual Rabbi, and in no way may one be forced to accept one definition over the other.
7. In Australia, regardless of which *halachic* opinion one chooses, the current hospital protocol associated with cardiac death as a definition of death for organ donation is not *halachically* acceptable. ( However if cardiac death were to take place after respiratory-brain death without any passive or active intervention hastening such death, then organ retrieval would be permissible even according to the *halachic* view that accepts only the cardiac definition of death. )