What do you think are the key strengths and weaknesses of the proposals to introduce 'deemed authorisation' for those who have not made their wishes on organ donation known?

The State should not be presumed to own the bodies of its citizens, whether in life or in death. Rather, its role is to serve the interests of persons whose bodily existence and remains should be honoured. What is taken without explicit consent cannot be said to have been 'donated' as a 'gift'.

Attention must be given to serious contemporary debates within the scientific community as well as amongst moral philosophers and bioethicists. Tests for diagnosing death vary from country to country and even within a single country, while a growing body of specialists regard standard tests used as potentially unreliable. Some of the latter favour abandoning the 'dead donor' rule and simply taking vital organs from those admitted to be still alive though perhaps unconscious and close to death. If such specialists are correct, then we will in some cases be dealing with operations to remove vital organs from what may still be living human beings. This is a genuine risk which must be faced in making laws on organ transplantation and promoting organ donation to the public.

Donor hearts, for example, are in practice harvested from so-called 'beating heart cadavers': something unknown to many members of the public though of course known to transplant teams themselves. It is also well-known to transplant teams that heartbeating donors move when organs are taken, unless they are paralysed by drugs, and that their blood pressure goes up when the incision is made. It is worth noting that some anaesthetists recommend that the supposed `cadaver' be anaesthetised when his/her organs are retrieved.

Most organ donors, including those who give explicit consent before they die, are unaware that their hearts may be beating when their organs are taken, and that they may be pink, warm, able to heal wounds, fight infections, respond to stimuli, etc. It is also the case that supposedly brain dead people (such as pregnant women who are given high tech medical support) can appear to survive for months while demonstrating integrated bodily activity of a kind that arguably indicates that life still remains.

While not all kinds of organ need be taken from heartbeating donors, or after tests for death of a more controversial kind, the fact must be faced that those who might become donors are mostly quite unaware of the state in which their bodies may be when certain organs may be taken. A programme to promote organ donation which glosses over these facts is surely irresponsible, as is the presumption of consent, and the harvesting of organs, from
mentally disabled people and from children, particularly in cases where it is not clear the donor has died.

In view of the uncertainties surrounding diagnosis of death, there are very real dangers in an ‘opt out’ system: if ‘opt out’ legislation is set to go ahead, those who recognise these dangers should at least try to increase the opportunity for relatives to object, and for organ harvesting from children and mentally disabled people to be restricted to non heartbeating donation, after sufficient time from the last heartbeat has elapsed. If it is difficult for potential donors generally to learn of certain facts about organ harvesting from heartbeating donors, this will be still more difficult for children and mentally disabled people who will generally have less opportunity to become aware of these facts, and of controversies in this area.

There is also reason for concern over how quickly a medical team might ‘move in’ following cessation of cardiac functioning (known as ‘donation after cardiac death’ or DCD). Fears that death is declared too quickly, in order to obtain usable organs, have been expressed and discussed by well-informed commentators.¹ One worrying move has been the move from declaring that organ removal must only be attempted after ‘irreversible’ loss of cardiac function to saying that it must only be attempted after ‘permanent’ loss of cardiac function, where the latter can include scenarios where a decision has already been made that resuscitation not be attempted. As one report puts it, “One cannot rightly claim that death has occurred if cardiac function could be restored, even if a decision has been made not to do so.”²

Even if an adult donor has given fully informed consent to organ donation after death is diagnosed, objections to donation raised by close relatives should be seen as overriding. This is particularly the case with retrieval of organs from heartbeating donors, which can be most distressing for relatives who believe - not without evidence - that their loved one may still be alive. However, there are also more general concerns about respect for the feelings of relatives, including in situations where no information exists on the potential donor’s wishes, but relatives are reluctant for organ harvesting to go ahead. Relatives should not be asked merely for information on the wishes of the potential donor, about which nothing may be known: organ harvesting should not take place against relatives’ objections, as a matter of humanity.

- **What do you think are the key strengths and weaknesses of the plans for authorisation of pre-death procedures?**

Pre-death procedures must not cause harm to the patient, and decisions to withdraw life-sustaining treatment must not be motivated by an intention to hasten death but rather to accept the over-burden or futile nature of treatment.

- **Do you have any other comments to make on the Bill?**

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¹ See the discussions of DCD, and also of brain death, Steven J. Jensen (ed) The Ethics of Organ Transplantation (2011)
² http://bioethics.org.uk/Ontheethicsoforgantransplantationfinal.pdf
The bill does not permit family members to overrule so-called ‘deemed authorisation’ for organ donation. This is difficult to square with a ‘soft’ opt-out system given that a patient who has not expressed a wish to donate will nonetheless be so treated even when the nearest relative objects. Relatives should not be asked merely for information on the wishes of the potential donor, about which nothing may be known: organ harvesting should not take place against relatives’ objections, as a matter of humanity.