



David Shoebridge MLC
Member of the NSW Legislative Council

Greens NSW Submission
7 August 2017

Greens NSW submission to the Inquiry into Human Organ Trafficking and Organ Transplant Tourism

Thank you for this opportunity to make a submission regarding the proposed offence of Organ Trafficking under division 271 of the Criminal Code and whether it would be practicable or desirable for this offence to have extraterritorial application; and Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs. The Greens NSW strongly support both of these changes.

We have a bill on the books in the NSW Parliament, the *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*. This bill would create a number of extraterritorial offences applicable to residents of NSW. **A copy of the bill, the Second Reading speech, as well as the report on submissions that we received on the draft of the bill are annexed here.**

This bill is the result of lengthy consultation process starting in 2013. An overwhelming proportion of respondents supported urgent changes to NSW law to recognise the concerns about global organ trafficking and forced harvesting. We received 2,662 online submissions in response to the consultation paper, a relatively unheard of number for even Government consultation papers, let alone those produced by members of smaller parties like the Greens.

Under the existing law of NSW, trading in tissue is prohibited, but this law does not extend to transplants that may occur overseas. There is anecdotal evidence from medical professionals that residents of NSW have engaged in unethical organ transplants overseas, receiving organs or tissues that were either purchased on the black market or taken from people without their consent.

This was confirmed by the NSW Health Minister in correspondence in January 2013:

NSW clinicians involved in the care of patients who may benefit from transplantation actively inform them of the risks of travelling overseas for the procedure. Anecdotally, a very small number of individuals in NSW requiring transplantation travel overseas to access organs.

Two forces have acted together to make the trade in trafficked organs so lucrative. First, medical advances have made organ transplantation more widespread, more affordable and more successful. The second is that across the globe organ donation rates are low and despite the occasional success such as in Spain, have remained low. This means that many people who are waiting for transplants will never receive a matching organ. This can present an incentive for some Governments and organisations to forcibly, or at the very least unethically, obtain organs from their citizens, especially from vulnerable people such as prisoners and minority ethnic and religious groups.

While most countries have laws prohibiting both the sale and forced removal of human organs, evidence suggests that the practice continues to be widespread in a number of countries. This includes countries in our region such as China.



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In a number of countries organ sales are disguised as donations with few, if any, records being kept to prove consent to donate organs. This suggests that actual informed consent is at best unlikely. There are also no requirements for ongoing cover of the medical expenses of 'donors', and many of those selling organs may be unaware of the ongoing medical issues they can face as a result.

The objects of the Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 are:

- (a) to increase the penalty for commercial trading in human organs and other human tissue, and
- (b) to create offences relating to the use of organs and other tissue taken from people without their consent, and
- (c) to impose a duty on registered health practitioners to report any reasonable suspicion they have that a patient or other person has received an organ or tissue that was commercially traded or taken without appropriate consent.

The offence of trading in tissue or organs has a maximum penalty of 40 penalty units or imprisonment for 6 months, or both. Where the amount of tissue taken would reasonably be expected to kill the person or where a vital organ is removed the maximum penalty is 25 years.

The removal of tissues without consent from a living or dead person has a maximum penalty of 40 penalty units or 6 months imprisonment. Where the organ removed is a vital organ the maximum penalty is 25 years. Using tissues removed without consent or receiving for transplantation tissues or organs so acquired carries matching penalties.

In order to ensure a level of oversight, recipients of tissues or organs overseas (who ordinarily live in NSW) must notify the Secretary of the Department of Health of the transplant. The bill introduces mandatory reporting for registered health practitioner who have reasonable grounds to suspect that a patient or other person has been transplanted with or received tissue that was either trafficked or removed without consent.

The bill specifies that failure to comply with mandatory reporting requirements is considered "unsatisfactory professional conduct". This can result in suspension of the medical practitioner from practising medicine or the removal of the practitioner's name from the Register.

We hope this bill assists you in your deliberations on this important reform. Please contact my office on 9230 3030 or david.shoebridge@parliament.nsw.gov.au if you would like to discuss this further.

Kind regards,

David Shoebridge, Justice Spokesperson for the Greens NSW

background

My office was approached by a number of community organisations and experts regarding their concerns about illegal harvesting and trafficking of organs internationally. Most concerning were anecdotal reports that residents of NSW had participated in these activities as purchasers of these organs.

While most countries have laws prohibiting both the sale and forced removal of human organs, evidence suggests that the practice continues to be widespread in a number of countries. This includes countries in our region such as China.

One way of addressing this brutal trade is for countries such as Australia to impose prohibitions on its citizens and residents from receiving trafficked organs, wherever the transplant occurs. This would make it a crime for Australian citizens to receive organs sourced by illegal and unethical means wherever that happened on the planet.

This office produced draft legislation entitled the Human Tissue Amendment (Trafficking in Human Organs) Bill 2013 which seeks to address this problem.

In late January 2013 we produced a consultation paper containing a brief background of the issue and a copy of the draft legislation. Submissions were accepted until 11 March 2013 online, via email and in hard copy.

This report on the submissions received details the main findings of this consultation. An overwhelming proportion of respondents supported urgent changes to NSW law to recognise the concerns about global organ trafficking and forced harvesting.

It is hoped that such a prohibition could also serve to direct attention to the need to improve organ donation rates in Australia and NSW. Ultimately, addressing the scourge of the unethical and illegal trade in human organs must be addressed by both criminal sanction and increased ethical donation rates.

Since the release of the consultation paper there has been further evidence of widespread community support for these reforms. On 9 May 2013 a near record petition of over 100,000 people supporting this law reform was received in the NSW Parliament. Remarkably a further petition with an additional

Thank you for taking the time to consider these materials, we look forward to keeping you advised as the campaign continues.

Kind regards,

David Shoebridge
Greens MP and Justice Spokesperson

December 2013



Human Tissue Amendment (Trafficking in Human Organs) Bill 2015

Second Reading

Mr DAVID SHOEBRIDGE (11:14): That this bill be now read a second time.

I am extremely pleased to introduce the Human Tissue Amendment (Trafficking in Human Organs) Bill 2016. This bill would make it a crime for citizens of New South Wales to receive organs sourced by illegal and unethical means, even when that occurred overseas. It includes organ harvesting where organs are removed from people without their consent and organ trafficking where often poor and vulnerable people are taken advantage of and have their organs sold, frequently resulting in lifelong medical complications. This is a serious matter. That is why the maximum penalty of 25 years imprisonment would apply in circumstances where the removal of the organs could reasonably have been expected to have killed the person from whom they were removed.

By adopting this law, New South Wales would be moving into what is increasingly becoming a mainstream approach to organ harvesting around the world. Action similar to this has already been taken in Spain, Taiwan and Israel. The extraterritorial operation of this law is essential for it to be effective. It is rare, but not unheard of, for New South Wales laws to govern the actions of our citizens and residents wherever they are on the planet. Most recently this Parliament moved to apply the operation of Australia's surrogacy laws to residents of New South Wales whether they were in or out of the State. We have similar laws that apply in relation to child sexual exploitation, wherever it happens on the planet. The model used in this bill to apply the operation of its provisions to make it a crime to engage in the illegal or unethical trade of organs anywhere on the planet is modelled on the extraterritorial operation of those Acts.

This bill is the result of a lengthy consultation process that started in 2013 and included community members, law reform groups, medical professionals, legal sector representatives and academics, among many others. We have received input from literally thousands of stakeholders and members of the community that collectively has helped shape the form of the bill that I present today. The response from the community has been overwhelming. Indeed, petitions signed by a near record 294,745 members of the community have been tabled in this House supporting the provisions of this bill and legislation. Why have people done that? The global organ trade is growing and with it comes the temptation for residents of this State to travel overseas and buy an organ that is sourced by unethical means. As a legislative Chamber we must send a strong message that we do not tolerate such behaviour from residents in this State and we will not accept them engaging in it overseas. We must not support a world where someone overseas is quite literally killed to provide an organ to prolong the life of someone in this State.

Of all the interactions that strengthen my resolve to introduce this bill, the most compelling was a discussion I had with New South Wales transplant surgeon Jeremy Chapman. He has taken a sometimes criticised and sometimes supported role in trying to address the illegal and unethical trade of organs around the planet.

He recalled a conversation he had with a colleague who contacted him because she had an ethical dilemma. She was a renal surgeon. A patient had called to say that she would not be attending for

dialysis on the Monday because she was going to China—they were just about to shoot her donor. We must not allow that to become an ordinary practice in this State.

The benefits of this becoming law will go beyond the actual terms and the prescriptive criminal elements of the bill; it will serve a stronger social and educational function. It will raise awareness among medical practitioners and the communities around this State, and hopefully around Australia, about the practice of organ harvesting and the illegal trade in human tissue that, sadly, is a growing problem on this planet. It will also put those involved in organ trafficking, and those potentially wanting to engage in this deeply unethical trade, on notice that the citizens and residents of New South Wales will no longer be able to participate in this inhuman trade. We have an opportunity to set an example to other Parliaments, within Australia and globally, about the use of our legislative powers and use our collective strength to send a strong message condemning unethical organ harvesting and trafficking no matter where it occurs on the planet.

It will also serve to direct attention to the need to improve organ donation rates in Australia and in New South Wales—we lag woefully behind some of the better performing jurisdictions in this country. In this regard I specifically note the arrangements that operate in Spain, which has an opt-out provision for organ donations. I strongly support those arrangements. Clearly one of the reasons why people in this State turn to the organ black market is that the waiting lists in Australia to access an organ are so long and many people literally die waiting for an organ—that cannot be sustained. I am an organ donor. Those who think it is simply enough to have a notation on their driver licence are wrong because over the past 10 years the system has changed.

I strongly encourage people to take the further step of actively noting that they are a willing organ donor. Indeed, I encourage all members to get online and register to be a donor in the event of their death. Just as New South Wales should act to stop organ trafficking globally, in this place we have a responsibility to do what we can on a personal and professional level. To do so, members need to go to www.donatelive.gov.au and, provided they have their Medicare card, in a matter of five minutes they can actively register on the Australian Organ Donor Register. I also urge members to advise their family members of their willingness to become a donor so that they are not taken by surprise and resist any request if your organs are needed. We not only have a joint obligation to fix donation rates here but also to prevent our citizens from engaging in this unethical trade overseas.

I turn now to the objects of the bill, which are to increase the penalty for commercial trading in human organs and other human tissue; to create offences relating to the use of organ or another tissue taken from people without their consent; and to impose a duty on registered health practitioners to report any reasonable suspicion they have that a patient or other person has received an organ tissue that was commercially traded or taken without appropriate consent. The offence of trading in tissue or organs has a prescribed maximum penalty of 40 penalty units or imprisonment for six months or both. Where the amount of tissue taken would reasonably be expected to kill the person, or where a vital organ is removed, the maximum penalty is set at 25 years imprisonment. The removal of tissue without consent from a living or dead person has a maximum penalty of 40 penalty points or six months imprisonment. Again, where the organ removed is a vital organ the maximum penalty is set at 25 years imprisonment. Using tissue removed without consent, or receiving for transplantation tissues or organs so acquired, carries matching penalties. The bill also contains exclusions for blood products, hair and semen.

The bill introduces mandatory reporting for registered health practitioners who have reasonable grounds to suspect that a patient or other person has been transplanted with or received tissue that was either trafficked or removed without consent. The bill specifies that failure to comply with mandatory reporting requirements is considered "unsatisfactory professional conduct". This can result, depending on the discretion of the oversight body, in suspension of the medical practitioner from practising medicine or, in the most extreme case, the removal of the practitioner's name from the register. Under the existing law in New South Wales, trading in tissue within the State is prohibited, but that law does not extend to transplants that may occur overseas. There is anecdotal evidence from medical professionals that residents of New South Wales have engaged in unethical organ transplants overseas, having received organs or tissues that were either purchased on the black market or taken from people without their consent. This was confirmed by the Minister for Health in correspondence received as early as January 2013, and I quote:

NSW clinicians involved in the care of patients who may benefit from transplantation actively inform them of the risks of travelling overseas for the procedure. Anecdotally, a very small number of individuals in NSW requiring transplantation travel overseas to access organs.

The numbers from the national register are now clearer. We know that dozens of people from Australia have travelled overseas to acquire organs, and the ethical restraints on those organs is simply not considered by Australian authorities. Two forces have acted together to make the trade in trafficked organ so lucrative. First, medical advances have made organ transplantation more widespread, more affordable and more successful. Indeed, Australia and New South Wales have played a proud part in developing the skills and the capacity to allow for organ transplantation. Some of our largest teaching hospitals and finest universities have honed the skills and the talents for organ transplantation and, in part, this has created a problem.

Places such as the University of Sydney, my alma mater, has trained transplant surgeons who are now core players in the illegal unethical trade in China. Topping that list is Mr Huang Jiefu, who was shamefully given honorary professorship from that university notwithstanding the fact the he has openly admitted to engaging in the transplantation of livers from hundreds and hundreds of executed prisoners in China. Secondly, across the globe organ donation rates remain low and, despite the occasional success such as we see in Spain, remain low across the planet. This means that many people who are waiting for transplants will never receive a matching organ. This can, and does, present an incentive for some governments and organisations to forcibly, or at the very least unethically, obtain organs from their citizens, especially from vulnerable people such as prisoners and minority ethnic groups like the Uighur people and religious groups such as House Christians and Falun Gong in China.

While most countries have laws expressly prohibiting both the sale and forced removal of human organs, compelling evidence suggests that the practice continues to be widespread in a number of countries around the globe. We know organ harvesting is a problem in our region in countries such as China. We also know that organ trafficking is a real and recognised problem in countries including Brazil Colombia, Ecuador, Georgia, Haiti, India, Mexico, the Philippines, Russia and the United States of America. Recently troubling evidence has emerged that Egypt is increasingly a source for the unethical trade in organs and the profits are being diverted to terror links within the Middle East.

We should be clear about the financial incentive available for a government, organisation or criminal gang to have somebody killed to order for their organs.

Conservative estimates suggest that the value of a person's organs sold at open market and distributed to unethical recipients who are willing to pay exceeds \$US250,000. There are many people on this planet who governments and criminal organisations see as more valuable for their spare parts than as whole humans. In a number of countries organ sales are disguised as donations with few, if any, records being kept to prove consent to donate organs. This suggests that actual informed consent is, at best, unlikely. There are also no requirements for ongoing cover of the medical expenses of so-called donors, and many of those selling organs may be unaware of the ongoing medical issues they can face as a result. Case after case has been documented in countries in our region such as in the Philippines, as well as in India, where impoverished people are given the equivalent of \$AUS200, \$AUS300, \$AUS400 or \$AUS500 to have a kidney removed in brutal, unsanitary conditions and are then left with the lifelong consequences of a botched operation. We cannot allow residents of New South Wales to be a part of that problem.

The World Health Organization has identified organ trafficking as something that is "likely to take unfair advantage of the poorest and most vulnerable groups, undermines altruistic donation and leads to profiteering and human trafficking". Globally, there is strong evidence that it is a multibillion dollar industry and it continues to grow. I note the support this bill has had from members of the community, including those who are in the gallery today, and I thank them for attending, and also from organisations such as Australian Lawyers for Human Rights. We have representations in support of the bill from the Human Rights Relief Foundation, whose chairman says:

We believe that the passing of this legislation is:

(a) a positive and important step for Australia to keep abreast of legislative responses in other jurisdictions around the world; AND

(b) is important to raise awareness among legal practitioners and the wider community about the practice of organ harvesting and the illegal trade in human tissue.

We have support from the Vietnamese Australian Lawyers' Association, which says:

The legislation will ensure that the most vulnerable are protected from the unconscionable conduct for financial advantage.

We have support from QT Lawyers and Associates. We also have support from the Australian Council for Human Rights Education Incorporated, whose president, Dr Ozdowski, says, in part:

We believe that the passing of this legislation is especially important to stop the practice of organ harvesting in a number of countries including China, where there is a history of selling organs from executed prisoners and prisoners of conscience. As you would know, there is evidence that residents of NSW have purchased illegally obtained organs for transplantation. Legislative initiatives such as this contribute to addressing the problem of global organ trafficking and forced organ harvesting.

We have support from Wendy Rogers of Macquarie University, who is Professor of Clinical Ethics, Department of Philosophy and Department of Clinical Medicine, and Deputy Director of the

Macquarie University Research Centre for Agency, Values and Ethics. Amongst other things, Professor Rogers says:

While the actual numbers of NSW residents who travel to receive illegal trafficked organs may be small, this proposed amendment sends a strong message that the NSW government cares about the plight of those from whom trafficked organs are sourced, no matter where in the world they reside. Organ trafficking, in its most extreme forms, amounts to a crime against humanity. In China prisoners of conscience are routinely killed on demand for their organs. We should do anything that is in our power to prevent abuses such as this. By passing this amendment, the NSW government will send a strong message that it does not tolerate abuses of human rights, and in particular, that it does not tolerate NSW residents seeking to further their own health interests at the cost of disadvantaged and abused citizens of other countries.

I have spoken with a number of transplant doctors who are in broad support of aspects of the proposed amendment, including a judicial process to determine guilt.

Professor Rogers goes on to note that there are ongoing conversations within the medical profession about the provisions in the bill that deal with unsatisfactory professional conduct. I look forward to contributions from other members of the House that deal with those difficult issues for medical practitioners. We accept that it is a difficult balancing act to protect human rights and ensure the maintenance of the doctor-patient relationship remains strong in this State. We also have support from the Sunrise Daily, the first and only Vietnamese daily newspaper in Australia, as well as support from the Vietnamese Community in Australia NSW Chapter, whose president, Dr Peter Thang Ha, says:

I am writing to you in my capacity as the President of the Vietnamese Community in Australia (NSW Chapter). I am aware of the above mentioned Draft Bill and on behalf of our constituents, I wish to advise our support for the passing of the Bill.

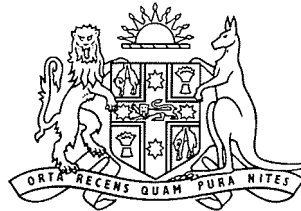
On behalf of the Vietnamese Australians in Australia, many of whom have experienced oppression and denial of human rights in the past and during the Vietnam war, I believe that it is important for us to support Bills such as this which will assist to protect human rights on a global scale.

We believe that this Bill is important as it sends a strong message to the international community that Australia is willing to support international human rights.

This bill is timely and necessary. The passage of this bill would make New South Wales a global citizen and would make a firm statement that we believe human life is precious and that nobody's life can be bought and sold to save another life. I thank the members of the community who have supported this bill. I look forward to ongoing discussions with members of the House on the passage of this bill. It is time for New South Wales to act. I commend the bill to the House.

Introduced by Mr David Shoebridge, MLC

First print



New South Wales

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to increase the penalty for commercial trading in human organs and other human tissue, and
- (b) to create offences relating to the use of organs and other tissue taken from people without their consent, and
- (c) to impose a duty on registered health practitioners to report any reasonable belief they have that a patient or other person has received an organ or tissue that was commercially traded or taken without appropriate consent.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Human Tissue Act 1983 No 164

Schedule 1 [1] and [2] update the long title of the *Human Tissue Act 1983* as a consequence of the changes proposed to be made to that Act, which deal with the unlawful removal and use of tissue from living people (whereas the long title currently refers only to the removal of tissue from deceased people).

Schedule 1 [3]–[7] and [9] update references to the holder of an office and to a Ministry.

Schedule 1 [8] substitutes Part 6 to insert the following provisions creating offences relating to trading in, removal, use and transplantation of tissue:

Part 6 Offences relating to trading in, removal, use and transplantation of tissue

Division 1 Preliminary

Proposed section 32 defines words and expressions used in the proposed Part. A *commercial transplant arrangement* is defined as a contract or arrangement under which any person agrees, for valuable consideration, whether given or to be given to any such person or to any other person, to the sale or supply of any tissue from any such person's body or from the body of any other person, whether before or after that person's death or the death of that other person.

Proposed section 32A explains what the term *appropriate consent* means in the proposed Part. In relation to situations where tissue is removed from a person outside New South Wales, the term is defined so as to give effect to the laws of some other countries that allow for the next of kin of a deceased person to grant consent on the person's behalf and to laws of other countries that have an "opt-out" consent scheme, where a deceased person is treated as if he or she has consented to donating tissue unless the person specifically stated during his or her lifetime that he or she did not consent. The provision also makes it clear that prisoners and other detained persons cannot give appropriate consent.

Proposed section 32B makes it clear that offences under the proposed Part extend, in some circumstances, to conduct that occurs outside New South Wales.

Division 2 Offences relating to trading in tissue

Proposed section 32C makes it an offence to enter into, or offer to enter into or promote, a commercial transplant arrangement, to knowingly provide any services under a commercial transplant arrangement, to knowingly accept any benefit under a commercial transplant arrangement or to consent to the transplantation to a person of tissue removed under a commercial transplant arrangement. The section does not apply to arrangements relating to blood, semen, hair, or any other tissue prescribed by the regulations, where the tissue is provided under a program regulated by a hospital or government-approved organisation. (Proposed section 32E (b) provides that the proposed Division does not apply to such arrangements if they provide only for the reimbursement of any expenses necessarily incurred by the person from whom the tissue is to be removed in relation to the removal of tissue in accordance with the Act.)

Proposed section 32D creates an aggravated offence if the relevant commercial transplant arrangement relates to the sale or supply of an amount of tissue the taking of which from the body of a person would reasonably be expected to kill, or threaten the life of, the person, or to the sale or supply of a vital organ.

Proposed section 32E creates certain exemptions from the offences created by the proposed Division.

Proposed section 32F provides that contracts or arrangements entered into in contravention of proposed Division 2 are void.

Proposed section 32G provides for the Minister to approve certain contracts or arrangements.

Division 3 Offences relating to removal of tissue without consent

Proposed section 32H makes it an offence to remove tissue from the body of another person (whether living or deceased) without the appropriate consent.

Proposed section 32I creates an aggravated offence of removing an amount of tissue the taking of which from the body of a person would reasonably be expected to kill, or threaten the life of, the person, or removing a vital organ, without the appropriate consent.

Proposed section 32J creates certain exemptions from the offences created by the proposed Division.

Division 4 Offences relating to use of tissue removed without consent

Proposed section 32K makes it an offence to use any tissue that is removed from the body of a living person in the course of medical, dental or surgical treatment for any purpose, knowing that appropriate consent was not given. It will also be an offence to use any tissue that is removed from the body of a deceased person, in any circumstances, for any purpose, knowing that appropriate consent was not given.

Proposed section 32L creates an aggravated offence of using an amount of tissue the taking of which from the body of a person would reasonably be expected to kill, or threaten the life of, the person, or a vital organ, knowing that appropriate consent was not given.

Proposed section 32M makes it an offence for a person to consent to the use of any tissue removed from the body of another person for the purpose of its transplantation into the body of the person if the tissue was removed from the body of the other person without the appropriate consent and the person to whom it is transplanted knows of, or is reckless as to, that lack of consent.

Proposed section 32N creates an aggravated offence of consenting to being transplanted with an amount of tissue the taking of which from the body of a person would reasonably be expected to kill, or threaten the life of, the person, or with a vital organ, without the appropriate consent, if the person to whom it is transplanted knows of, or is reckless as to, that lack of consent.

Division 5 Mandatory reporting by registered health practitioners

Proposed section 32O imposes a duty on registered health practitioners to report any reasonable belief they have that a patient has received an organ or tissue that was commercially traded or taken without appropriate consent.

Proposed section 32P provides legal protection for registered health practitioners who make such mandatory reports.

Schedule 1 [10] omits existing offences that are replaced by the proposed offences.

Schedule 1 [11] transfers an existing offence (formerly set out in section 32 (1)).

Schedule 1 [12] makes a consequential amendment to a cross-reference.

Schedule 1 [13] provides that the aggravated offences created by the proposed Act are to be dealt with as indictable offences. The remaining offences are to be dealt with summarily before the Local Court.

Schedule 1 [14] provides for the making of savings or transitional regulations consequent on the amendment of the *Human Tissue Act 1983*.

Schedule 2 Amendment of Health Practitioner Regulation (Adoption of National Law) Act 2009 No 86

Schedule 2 makes it unsatisfactory professional conduct for a registered health practitioner to breach the duty to report a reasonable belief that human organs or human tissue have been obtained under a commercial transplant arrangement or taken from people without their consent.

Introduced by Mr David Shoebridge, MLC

First print



New South Wales

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016

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New South Wales

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016

No. , 2016

A Bill for

An Act to amend the *Human Tissue Act 1983* to make further provision with respect to the commercial or non-consensual trading of human organs and other human tissue; and for related purposes.

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 [NSW]

The Legislature of New South Wales enacts:

1

1 Name of Act

2

This Act is the *Human Tissue Amendment (Trafficking in Human Organs) Act 2016*.

3

2 Commencement

4

This Act commences on the date of assent to this Act.

5

Schedule 1	Amendment of Human Tissue Act 1983 No 164	1
[1]	Long title	2
	Insert “and use” after “removal”.	3
[2]	Long title	4
	Insert “living or” before “deceased” where firstly occurring.	5
[3]	Section 4 Definitions	6
	Omit the definition of <i>Director-General</i> from section 4 (1).	7
	Insert in alphabetical order:	8
	<i>Secretary</i> means the Secretary of the Ministry of Health.	9
[4]	Section 4 (1), definition of “governing body”	10
	Omit “Director-General” from paragraph (b) (iii). Insert instead “Secretary”.	11
[5]	Sections 4 (7) (b), 21C (1) and (5), 21Z (2) (b), 27A, 33A (2), 33I (2), (3) and (7) (b), 33J (1), (3) and (5) and 37A (2)–(6)	12
	Omit “Director-General” wherever occurring. Insert instead “Secretary”.	13
[6]	Section 5 Designated officers and designated specialists	14
	Omit “of the Department of Health” from section 5 (2) (a).	15
[7]	Sections 27 (1A) (a) and 39 (1A) (c)	16
	Omit “Director-General of the Department of Health” wherever occurring.	17
	Insert instead “Secretary”.	18
[8]	Part 6	19
	Omit the Part. Insert instead:	20
	Part 6 Offences relating to trading in, removal, use and transplantation of tissue	21
		22
		23
	Division 1 Preliminary	24
	32 Definitions	25
	In this Part:	26
	<i>appropriate consent</i> —see section 32A.	27
	<i>commercial transplant arrangement</i> means a contract or arrangement under	28
	which any person agrees, for valuable consideration, whether given or to be	29
	given to any such person or to any other person, to the sale or supply of any	30
	tissue from any such person’s body or from the body of any other person,	31
	whether before or after that person’s death or the death of that other person.	32
	<i>vital organ</i> means an organ that a person cannot survive without, or one of a	33
	pair of organs that a person cannot survive without, and includes any of the	34
	following:	35
	(a) heart,	36
	(b) lung,	37

(c) kidney,	1
(d) liver,	2
(e) pancreas.	3
32A Meaning of “appropriate consent”	4
(1) In this Part:	5
<i>appropriate consent</i> , in relation to the removal of tissue, or the removal of tissue and its use for a particular purpose, means:	6
(a) in the case of tissue of a person that is removed or used in New South Wales—a consent or authority that is, under this Act, sufficient authority for the tissue to be removed from the person or to be removed from the person and used for that particular purpose, or	7
(b) in the case of tissue of a person that is removed or used outside New South Wales:	8
(i) the consent of the person from whom the tissue is removed to the removal of the tissue or to the removal of the tissue and its use for that particular purpose, or	9
(ii) if the person from whom the tissue is removed is a minor or otherwise lacks capacity to consent—the consent of the parent or guardian of the person to the removal of the tissue or to the removal of the tissue and its use for that particular purpose, or	10
(iii) if the person from whom the tissue is removed is deceased and the laws of the place of death allow for the removal of tissue with the consent of the next of kin of the deceased person—the consent of a senior available next of kin to the removal of the tissue or to the removal of the tissue and its use for that particular purpose, or	11
(iv) if the person from whom the tissue is removed is deceased and the laws of the place of death provide that a deceased person is taken to have given consent to the removal or use of the person’s tissue unless the person has, during the person’s lifetime, specifically indicated that he or she does not give consent—the presumed consent of the person arising from failure of the person during the person’s lifetime to specifically indicate that he or she does not give consent to the removal of the tissue or to the removal of the tissue and its use for that particular purpose.	12
(2) Despite subsection (1):	13
(a) if the person from whom the tissue is removed is imprisoned or otherwise detained by a police force or government (whether in a gaol, a hospital or elsewhere), or was so imprisoned or detained immediately before he or she died, then the person cannot give appropriate consent, and	14
(b) if the place of death of the person from whom the tissue is removed is one prescribed by the regulations, consent will not be presumed and only consent expressed by the person himself or herself during his or her lifetime, or the consent of a senior available next of kin, is <i>appropriate consent</i> for the purposes of this Part.	15
(3) The regulations may create exceptions to the operation of paragraph (b) (iv) of the definition of <i>appropriate consent</i> in subsection (1).	16

32B	Offences extend to conduct that occurs outside New South Wales	1
	Without limiting the application of Part 1A of the <i>Crimes Act 1900</i> , a person commits an offence under this Part even if one or more of the acts constituting the offence occurs outside New South Wales and the person who does the acts constituting the offence, or the person from whom the relevant tissue is removed, is ordinarily resident in New South Wales.	2 3 4 5 6
	Division 2	7
	Offences relating to trading in tissue	
32C	Offence of trading in tissue	8
(1)	A person must not:	9
(a)	enter into, or offer to enter into or promote, a commercial transplant arrangement, or	10 11
(b)	knowingly provide any services (including medical services) under a commercial transplant arrangement, or	12 13
(c)	knowingly accept any benefit under a commercial transplant arrangement, or	14 15
(d)	consent to the transplantation to the person of tissue removed from the body of another person under a commercial transplant arrangement.	16 17
	Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.	18
(2)	This section does not apply to commercial transplant arrangements relating to blood, semen, hair, or any other tissue prescribed by the regulations, where that tissue is provided under a program regulated by a hospital or government-approved organisation.	19 20 21 22
(3)	For the purposes of this section, a person who consents to the transplantation to the person of tissue removed from the body of another person under a commercial transplant arrangement is taken to have accepted a benefit under that commercial transplant arrangement.	23 24 25 26
32D	Aggravated offence of trading in tissue	27
(1)	A person commits an offence under this section if the person commits an offence under section 32C and the commercial transplant arrangement concerned relates to the sale or supply of:	28 29 30
(a)	an amount of tissue the taking of which from the body of a person would reasonably be expected to kill, or threaten the life of, the person, or	31 32
(b)	a vital organ.	33
	Maximum penalty: imprisonment for 25 years.	34
(2)	If, on the trial of a person for an offence under this section, the jury is not satisfied that the person is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under section 32C, it may find the person not guilty of the offence charged but guilty of an offence under section 32C, and the person is liable to punishment accordingly.	35 36 37 38 39
32E	Exemptions	40
	This Division does not apply to or in respect of:	41
(a)	the sale or supply of tissue if the tissue has been subjected to processing or treatment and the sale or supply is made for the purpose of enabling the tissue to be used for therapeutic, medical or scientific purposes, or	42 43 44

(b)	a contract or arrangement providing only for the reimbursement of any expenses necessarily incurred by the person from whom the tissue is to be removed in relation to the removal of tissue in accordance with this Act.	1 2 3 4
32F	Contracts or arrangements in breach of certain provisions void	5
	A contract or arrangement entered into in contravention of this Division is void.	6 7
32G	Minister may approve contracts or arrangements	8
(1)	If the Minister considers it desirable by reason of special circumstances to do so, the Minister may, by instrument in writing, approve the entering into of a contract or arrangement that would, but for the approval, be void by virtue of this Division.	9 10 11 12
(2)	This Division does not apply to or in respect of a contract or arrangement entered into in accordance with such an approval.	13 14
Division 3	Offences relating to removal of tissue without consent	15
Note.	This Division prohibits the removal of tissue without consent. Part 2 of this Act regulates the donation of tissue (which includes organs) by living persons with consent. Part 4 regulates the removal of tissue (including organs) after death, where the deceased person had, during his or her lifetime, given his or her consent to that removal.	16 17 18 19
32H	Offence of unlawful removal of tissue	20
	A person must not remove tissue from the body of any other person (whether living or deceased) without the appropriate consent. Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.	21 22 23
32I	Aggravated offence of unlawful removal of tissue	24
(1)	A person commits an offence under this section if the person commits an offence under section 32H and the offence involves removing:	25 26
(a)	an amount of tissue from the body of a living person that would reasonably be expected to kill or threaten the life of the person, or	27 28
(b)	an amount of tissue from the body of a deceased person that would, if the person were alive, reasonably be expected to kill or threaten the life of the person, or	29 30 31
(c)	a vital organ.	32
	Maximum penalty: imprisonment for 25 years.	33
(2)	If, on the trial of a person for an offence under this section, the jury is not satisfied that the person is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under section 32H, it may find the person not guilty of the offence charged but guilty of an offence under section 32H, and the person is liable to punishment accordingly.	34 35 36 37 38
32J	Offences do not apply to conduct authorised by law	39
	This Division does not apply to or in respect of anything authorised by or under:	40 41
(a)	the <i>Coroners Act 2009</i> , or	42
(b)	the <i>Anatomy Act 1977</i> , or	43
(c)	any other law.	44

Division 4	Offences relating to use of tissue removed without consent	1
		2
32K	Offence of use of tissue removed without consent	3
	A person must not:	4
	(a) use any tissue that is removed from the body of a living person in the course of medical, dental or surgical treatment carried out in the interests of the health of the person for any purpose (other than for the purposes of treating the person), knowing that appropriate consent was not given for the removal and use, or	5 6 7 8 9
	(b) use any tissue that is removed from the body of a deceased person, in any circumstances, for any purpose, knowing that appropriate consent was not given for the removal and use.	10 11 12
	Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.	13
32L	Aggravated offence of use of tissue removed without consent	14
	(1) A person commits an offence under this section if the person commits an offence under section 32K and the offence involves the use of:	15 16
	(a) an amount of tissue removed from the body of a living person that would reasonably be expected to kill or threaten the life of the person, or	17 18
	(b) an amount of tissue removed from the body of a deceased person that would, if the person were alive, reasonably be expected to kill or threaten the life of the person, or	19 20 21
	(c) a vital organ.	22
	Maximum penalty: imprisonment for 25 years.	23
	(2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the person is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under section 32K, it may find the person not guilty of the offence charged but guilty of an offence under section 32K, and the person is liable to punishment accordingly.	24 25 26 27 28
32M	Offence of unlawfully receiving for transplantation tissue removed without consent	29 30
	A person must not consent to the use of any tissue removed from the body of another person (whether living or deceased) for the purpose of its transplantation to the body of the person if:	31 32 33
	(a) the tissue was removed from the body of the other person without the appropriate consent to the removal and use, and	34 35
	(b) the person to whom it is transplanted knows of, or is reckless as to, that lack of consent.	36 37
	Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.	38
32N	Aggravated offence of unlawfully receiving for transplantation tissue removed without consent	39 40
	(1) A person commits an offence under this section if the person commits an offence under section 32M and that offence involves the use for transplantation of:	41 42 43
	(a) an amount of tissue removed from the body of a living person that would reasonably be expected to kill or threaten the life of the person, or	44 45

- (b) an amount of tissue removed from the body of a deceased person that would, if the person were alive, reasonably be expected to kill or threaten the life of the person, or 1
 - (c) a vital organ. 2
- Maximum penalty: imprisonment for 25 years. 3
- (2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the person is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under section 32M, it may find the person not guilty of the offence charged but guilty of an offence under section 32M, and the person is liable to punishment accordingly. 4

Division 5 Mandatory reporting by registered health practitioners 11

32O Mandatory reporting by registered health practitioners 12

- (1) A registered health practitioner has a duty to provide a report to the Secretary if he or she has a reasonable belief that a patient or other person has been transplanted with or received tissue that was removed from the body of another person (whether living or deceased): 13
- (a) under a commercial transplant arrangement, or 14
 - (b) without the appropriate consent to the removal or to its use in that patient or other person. 15
- (2) A registered health practitioner is only under such a duty if that reasonable belief arises during the course of or from the health practitioner's work. 16
- (3) That report must: 17
- (a) be provided as soon as practicable and in the manner required by the regulations, and 18
 - (b) include the name, or a description, of the patient or other person, and the grounds for the registered health practitioner forming that reasonable belief. 19
- (4) In this Division: 20
- registered health practitioner* means a person registered under the Health Practitioner Regulation National Law to practise a health profession (within the meaning of that Law), other than as a student. 21

32P Protection of registered health practitioners who make reports 22

- If a registered health practitioner makes a report in good faith to the Secretary under section 32O: 23
- (a) the making of the report does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and 24
 - (b) no liability for defamation is incurred because of the report, and 25
 - (c) the making of the report does not constitute a ground for any civil proceedings, including proceedings for malicious prosecution or for conspiracy or for breach of any duty of confidentiality, and 26
 - (d) the registered health practitioner is not subject to any criminal liability in relation to the making of the report. 27

[9] Sections 33A Appointment of inspectors	1
Omit “Director-General may appoint any officer of the Department of Health, or any person who the Director-General” from section 33A (1).	2 3
Insert instead “Secretary may appoint any officer of the Ministry of Health, or any person who the Secretary”.	4 5
[10] Section 36 Offences	6
Omit section 36 (1) and (1A).	7
[11] Section 36 (2B)	8
Insert after section 36 (2A):	9
(2B) A person must not enter into, or offer to enter into, a contract or arrangement under which any person agrees, for valuable consideration, whether given or to be given to any such person or to any other person, to the post-mortem examination of any person’s body after that person’s death or the body of any other person after the death of that other person.	10 11 12 13 14
Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.	15
[12] Section 36 (4)	16
Omit “(1),”.	17
[13] Section 38	18
Omit the section. Insert instead:	19
38 Proceedings for offences	20
(1) Proceedings for an offence under this Act or the regulations are to be dealt with summarily before the Local Court.	21 22
(2) Despite subsection (1), an offence under section 32D, 32I, 32L or 32N is to be dealt with as an indictable offence.	23 24
[14] Schedule 1 Savings, transitional and other provisions	25
Omit clause 1 (1). Insert instead:	26
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends this Act.	27 28

Schedule 2	Amendment of Health Practitioner Regulation (Adoption of National Law) Act 2009 No 86	1
		2
Schedule 1	Modification of Health Practitioner Regulation National Law	3
	Insert after section 139B (1) (e) in Schedule 1 [13]:	4
	(e1) Failure to report tissue traded or transplanted illegally	5
	Failing to report having a reasonable belief (arising during the course of or from the registered health practitioner's work) that a patient or other person has been transplanted with or received tissue that was removed from the body of another person (whether living or deceased) under a commercial transplant arrangement, or without the appropriate consent to the removal and use in that patient or other person (within the meaning of the <i>Human Tissue Act 1983</i>).	6 7 8 9 10 11 12 13