



THE LAW SOCIETY
OF NEW SOUTH WALES

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29 September 2016

Mr David Shoebridge MP
Parliament House
Macquarie St
Sydney NSW 2000

By email: david.shoebridge@parliament.nsw.gov.au

Dear Mr Shoebridge,

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016

I write to you on behalf of the Law Society of NSW regarding the Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 ("Bill").

The Law Society notes that the Bill seeks to amend the *Human Tissue Act 1983* (NSW) ("Act") by increasing the penalty for commercial trading in human organs and other tissue; creating offences relating to the use of organs and other tissue taken without consent; and imposing 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 consent.

We support, in principle, proposed legislation to extend the scope of the Act to cover the commercial trading and taking without consent of organs and other tissue in order to address potential human rights violations committed by residents of NSW abroad.

However, we have a number of concerns with the enforceability and practicality of the provisions in the Bill. We provide the following specific comments on the provisions of the Bill.

1. Mandatory reporting by health practitioners

Clause 32P of the Bill provides that a registered health practitioner has a duty to report to the Secretary of the Ministry of Health if they have reasonable grounds to suspect that human organs or tissue have been obtained under a commercial transplant agreement or taken from a person without the appropriate consent. Under proposed Schedule 2, which amends the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW), a breach of the reporting obligations under clause 32P amounts to "unsatisfactory professional conduct". The consequence of this is that the health practitioner may, amongst other things, receive a caution or reprimand; have conditions imposed on their registration; be ordered to report on

their practice at the times, in the way and to the persons specified by the Medical Council of NSW; or be ordered to pay a fine of up to 50 penalty units.¹

The Law Society is concerned that the enforceability of the Bill relies on health practitioners making mandatory reports of suspected organ trafficking under the Bill. In particular, we are concerned with the mandatory reporting requirements for registered health practitioners in the absence of safeguards to protect health practitioners against claims of defamation, in tort or for breach of professional etiquette (i.e. complaints to the Health Care Complaints Commission or a professional oversight body). By contrast, good faith protections exist in the context of other mandatory reporting regimes involving health practitioners, including those made under Part 8, Division 2 of the *Health Practitioner Regulation National Law (NSW)*² and Chapter 3, Part 2 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.³

The Law Society considers that the Bill should use the test of "reasonable belief", rather than "reasonable grounds to suspect". We note that "reasonable belief" is the standard used for mandatory notifications by health practitioners under the *Health Practitioner Regulation National Law (NSW)*,⁴ and is defined in the National Board guidelines for mandatory notifications.⁵

The Law Society recommends that, if the provisions on mandatory reporting by registered health practitioners are retained in the Bill, the Bill be amended to:

- (a) provide that a registered health practitioner who in good faith makes a mandatory report under the Bill is not liable, civilly, criminally or under an administrative process, including for defamation, for making the report;
- (b) provide that the making of the mandatory report does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, if it is made in good faith; and
- (c) adopt a standard of "reasonable belief" for health practitioners.

2. Mandatory disclosure by patients

Clause 32O(1) of the Bill provides that the recipient of transplanted tissue must also notify the Secretary of the Ministry of Health within 30 days of the transplant of the date, location and nature of the treatment in connection with which the tissue was

¹ Sections 148E and 148F, *Health Practitioner Regulation (Adoption of National Law) Act 2009 (NSW)*.

² Section 237 of the *Health Practitioner Regulation National Law (NSW)* provides that a person, including a registered health practitioner, who "in good faith" makes a mandatory notification under this Law "is not liable, civilly, criminally or under an administrative process", including for defamation, for making the notification. It also provides that the making of the mandatory notification "does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct", if it is made "in good faith".

³ Section 29 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* provides that the making of a mandatory report "in good faith" to the Secretary "does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct", "does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy", and "no liability for defamation is incurred because of the report".

⁴ Section 141(1), *Health Practitioner Regulation National Law (NSW)*.

⁵ Australian Health Practitioner Regulation Agency, *National Board Guidelines for Registered Health Practitioners: Guidelines for Mandatory Notifications* (March 2014) para 2.1.

transplanted to them. Clause 32O(3) provides that failure to comply with this disclosure requirement, without reasonable excuse, carries a maximum penalty of 40 penalty units and/or six months' imprisonment.

The Law Society is concerned with the mandatory disclosure requirements for patients who consent to a transplant under this clause. We consider that the requirement to report within 30 days may be too onerous for the patient, and the penalty for failure to meet this requirement is excessive.

The Law Society considers that the proposed offences in the Bill are sufficient, and that mandatory disclosure by patients is unnecessary.

3. Commercial trading, and removal and use of tissue without consent

The Law Society notes that the Bill creates new offences relating to trading in tissue (Division 2), removal of tissue without consent (Division 3), and use of tissue removed without consent (Division 4). We note that these offences carry the same maximum penalty of 40 penalty units and/or six months' imprisonment,⁶ or 25 years' imprisonment where the offence is aggravated.⁷

While we consider that trading in tissue should be an offence, we query whether certain offences related to trading in tissue should have a lesser penalty than the offences of removal or use of tissue without consent, given that there may be circumstances where commercial transplant arrangements are entered into by a donor with their consent.

4. Trading in tissue

Clause 32C(1) of the Bill provides for the offence of trading in tissue under a commercial transplant arrangement. Clause 32C(2) provides an exception for commercial transplant arrangements relating to blood, semen or hair where that tissue is provided under a program regulated by a hospital or government-approved organisation.

The Law Society considers that this exception may be too narrow. We note that there may be other tissue, now or in the future, that can be removed without any lasting impairment of the donor under a program regulated by a hospital or government-approved organisation – for example, bone marrow, peripheral blood stem cell, cerebrospinal fluid, etc.

The Law Society submits that consideration should be given to providing for additional exceptions in the Bill, for example, by way of regulation.

5. Offences relating to use of tissue removed without consent

Clause 32K of the Bill 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, or of a deceased person in any circumstances, for any purpose without the appropriate consent to the removal and use. Clause 32L creates an aggravated offence of using an amount of tissue the taking of which from the body of a person would reasonably

⁶ Clauses 32C(1), 32H, 32K and 32M, Bill.

⁷ Clauses 32D(1), 32I(1), 32L(1) and 32N(1), Bill.

be expected to kill or threaten the life of the person, or a vital organ, without the appropriate consent.

The Law Society is concerned that knowledge on the part of the person using the tissue, at the time of its use, that the tissue has been removed without the appropriate consent, is not required for the person to commit an offence or aggravated offence under these clauses.

The Law Society considers that knowledge or intent should form an element of these offences.

6. Compatibility with Australia's international law obligations

Australia has ratified several key international human rights treaties, including the *International Covenant on Civil and Political Rights* ("ICCPR")⁸ and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").⁹ The following rights may be engaged by the practice of organ trafficking:

- right to life (article 6, ICCPR);
- freedom from cruel, inhuman or degrading treatment or punishment (article 7, ICCPR);
- right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10, ICCPR); and
- right to the enjoyment of the highest attainable standard of physical and mental health (article 12, ICESCR).

Relevantly, article 6(1) of the ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The right to life is the only right in the ICCPR that is expressly described as "inherent".

Trafficking in organs and trafficking in persons for organ removal

The Law Society notes that the Bill addresses the commercial trading and use of human organs and other tissue taken without consent, but does not explicitly address trafficking in persons for the taking of organs or other tissue.

In a joint study published in 2009, the United Nations ("UN") and the Council of Europe concluded that trafficking in organs and trafficking in persons for organ removal are different crimes.¹⁰ Trafficking in persons for organ removal is specifically defined in the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* ("Trafficking in Persons Protocol"),¹¹ and does not encompass the term "trafficking in organs" or "organ trafficking".

The Law Society notes, however, the conclusion of the Special Rapporteur on trafficking in persons in her 2013 report on the issue of trafficking in persons for organ removal that:

⁸ Opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976).

⁹ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁰ Council of Europe and UN, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009).

¹¹ Opened for signature 15 November 2000, 2237 UNTC 319 (entered into force 25 December 2003).

... the distinction between trafficking in persons for removal of organs and trafficking in organs is generally unhelpful. Certainly, there is an urgent need to ensure that laws on trafficking in persons for the removal of organs are supplemented by the effective criminalisation of all related offences that may be implicated in such cases but that may not readily or easily fall within the three-element umbrella definition of trafficking in persons. To that extent, the draft Council of Europe convention against trafficking in human organs represents a potentially important contribution to fleshing out the legal framework around trafficking in persons for the removal of organs and ensuring that all persons complicit in such offences do not escape liability. Case-based experience confirms, however, that the trade in organs is inextricably linked to actions against individuals aimed at their exploitation. There lies great danger in removing the individual victim from this picture by separating out the concept of trafficking in organs from the concept of trafficking in persons for the removal of organs.¹²

Accordingly, we set out below the relevant international legal frameworks for trafficking in organs and trafficking in persons for organ removal, which may be of relevance to this Bill.

Trafficking in organs

The Law Society notes that currently the Council of Europe *Convention against Trafficking in Human Organs* ("Council of Europe Convention") is the only international treaty that specifically deals with trafficking in human organs.¹³ This Convention aims to prevent and combat trafficking in human organs by providing for the criminalisation of certain acts, to protect the rights of victims, and to facilitate cooperation at national and international levels.¹⁴

Although the Council of Europe Convention has not been signed by Australia and, as at the date of this submission, has not entered into force,¹⁵ given that it is the first and only international treaty on organ trafficking, it may nevertheless be helpful to consider its provisions, particularly those outlined below.

The Council of Europe Convention requires States parties to criminalise the following acts, when committed intentionally:

- (a) Illicit removal of organs from living or deceased donors:
 - (i) where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;
 - (ii) where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage; or

¹² UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, 68th sess, UN Doc A/68/256 (2 August 2013) para 63.

¹³ CETS No 216, opened for signature on 25 March 2015.

¹⁴ Article 1.

¹⁵ As at the date of this submission, the Council of Europe Convention has been ratified by one State and signed by 15 other States. It will enter into force upon five ratifications, including by at least three member States of the Council of Europe.

- (iii) where, in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage.¹⁶
- (b) Use of illicitly removed organs;¹⁷
- (c) Implantation of organs outside of the domestic transplantation system or in breach of essential principles of national transplantation law;¹⁸
- (d) Illicit solicitation, recruitment, offering and requesting of undue advantages;¹⁹
- (e) Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs;²⁰ and
- (f) Aiding or abetting the commission of, and attempt to commit, any of the above criminal offences.²¹

Importantly, States parties are only obliged to criminalise the above acts if they are committed intentionally. The explanatory report to the Council of Europe Convention notes that the interpretation of the word “intentionally” is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence.²² It also notes, however, that this does not mean that States parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.²³ The Law Society notes that consideration should be given to including intention as a requirement for all offences under the Bill.

Under article 10(1), States parties must take such legislative or other measures as may be necessary to establish jurisdiction over the offence when it is committed, amongst other things, in its territory or by one of its nationals.²⁴ This means that States parties must adopt laws that capture the offences of commercial trading and use of human organs and other tissue taken without consent when committed by their nationals abroad. The Law Society acknowledges that the Bill seeks to do this.

Article 11 contains provisions to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed on their behalf by anyone in a leading position in them, provided that certain conditions are met. The Law Society notes that consideration should be given to extending the scope of the Bill to cover corporate liability.

Article 13 requires States parties to take into consideration a number of circumstances as aggravating circumstances in determining the sanctions in relation

¹⁶ Article 4(1), Council of Europe Convention.

¹⁷ Article 5, Council of Europe Convention.

¹⁸ Article 6, Council of Europe Convention.

¹⁹ Article 7, Council of Europe Convention.

²⁰ Article 8, Council of Europe Convention.

²¹ Article 9, Council of Europe Convention.

²² Council of Europe, *Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs* (25 March 2015) 5, para 28.

²³ *Ibid.*

²⁴ Article 10(1), Council of Europe Convention.

to the offences.²⁵ The Law Society considers that similar circumstances could be appropriate for inclusion in the Bill.

Furthermore, we note that the UN Special Rapporteur on trafficking in persons, recognising the human rights implications of "transplant tourism", made the following recommendations, amongst others, in her 2013 report with respect to trafficking in persons for organ removal and related offences:

69. All States should... review the broader legal framework around transplantation-related exploitation to ensure, at a minimum, that related offences are fully and effectively criminalised and appropriately penalised. Such related offences include but are not limited to removal of an organ from a living or deceased donor without consent; removal of an organ from a living or deceased donor for financial gain or other advantage; the use of organs removed in such ways; and any form of advertising of a service relating to illicit removal and use of an organ.

...

72. National legislation should include an obligation on medical personnel to notify authorities when they become aware of cases or potential cases of trafficking in persons for the removal of organs, with appropriate attention to issues of confidentiality and risks in cases of official complicity. This obligation should extend to medical staff involved in the provision of follow-up care to recipients.

...

74. All States, in particular countries of "demand", should take steps to ensure that the jurisdictional reach of their laws relating to trafficking in persons for the removal of organs enables the effective prosecution and punishment of related offences involving their nationals. For countries requiring specific legislation, this would be most effectively secured through laws that extend the national legislative prohibition on trafficking in persons for the removal of organs and related offences extraterritorially, irrespective of the legal status of the relevant acts in the country in which they occur. Extraterritorial legislation developed to combat child sex tourism and similarly situated offences can provide a useful model in this regard.²⁶

The Law Society considers that the Bill is broadly consistent with the UN Special Rapporteur's recommendations regarding organ trafficking offences.

Trafficking in persons for organ removal

In contrast with organ trafficking, the Law Society notes that there exists a well-developed international legal framework for trafficking in persons for organ removal. We outline the following provisions of international treaties ratified by Australia that may be relevant to the Bill.

²⁵ Aggravating circumstances include: the offence caused the death of, or serious damage to the physical or mental health of, the victim; the offence was committed by a person abusing their position; the offence was committed in the framework of a criminal organisation; the perpetrator has previously been convicted of offences established in accordance with this Convention; or the offence was committed against a child or any other particularly vulnerable person.

²⁶ UN General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 68th sess, UN Doc A/68/256 (2 August 2013) paras 69, 72 and 74.

The Trafficking in Persons Protocol, which supplements the UN *Convention against Transnational Organised Crime*,²⁷ is the first international legal instrument that gives a definition of trafficking in persons for the purpose of organ removal.

Article 5 requires States parties to criminalise “trafficking in persons” for organ removal, as defined in article 3. Article 3(a) defines “trafficking in persons” as:

... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include... the removal of organs.

Article 3(b) provides that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of the means in article 3(a) have been used.

Article 3(c) provides that if the victim is a child,²⁸ consent is irrelevant regardless of whether any improper means (such as deception, force, abuse of a position of vulnerability) have been used. This means that trafficking in children for organ removal only requires that there be an act (recruitment, transport, transfer, harbouring or receipt of a child) for the purpose of exploitation through organ removal.

We note that trafficking in persons for organ removal is also defined and prohibited in the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.²⁹

The Law Society considers that the Bill is broadly consistent with these human rights obligations.

Thank you for considering this submission. Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214 or email Meagan.Lee@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer

²⁷ Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 25 December 2003). Australia ratified the *Convention against Transnational Organised Crime* on 27 May 2004, and the Trafficking in Persons Protocol on 14 September 2005.

²⁸ “Child” is defined as any person under the age of 18 years: Article 3(d), Trafficking in Persons Protocol.

²⁹ See article 3(1)(a)(i)(b), *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002). Australia ratified the UN *Convention on the Rights of the Child* on 17 December 1990, and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* on 8 January 2007.