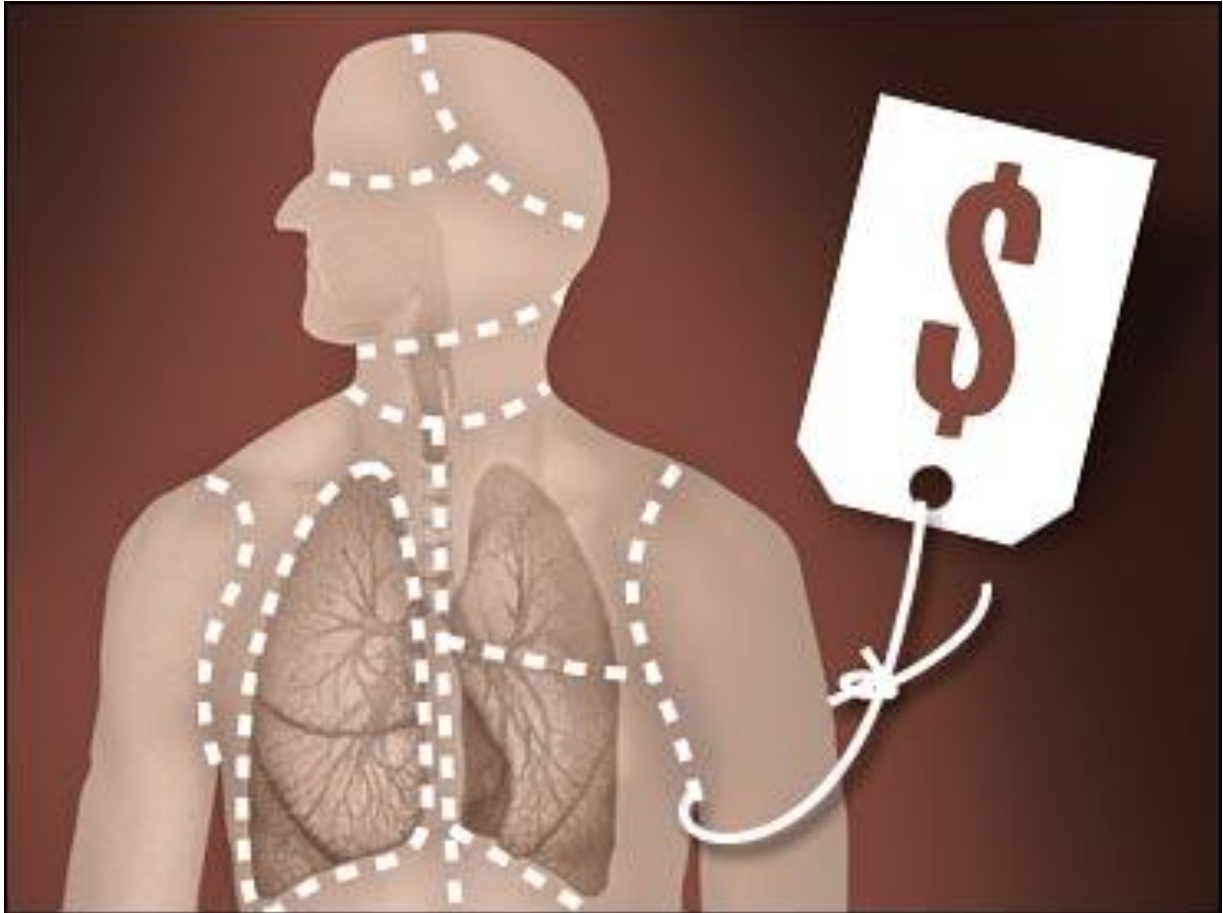




David Shoebridge MLC  
Member of the NSW Legislative Council

# Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

## CONSULTATION PAPER



Paper released  
Responses due by

22 January 2013  
28 February 2013

Consultation Paper and Survey Online: <http://davidshoebridge.org.au/organ-trafficking-ban>

Inquiries: 9230 3030 or [kym.chapple@parliament.nsw.gov.au](mailto:kym.chapple@parliament.nsw.gov.au)

## **A. Introduction**

As medical advances have improved the success of organ transplantation, there has also been a rise in the illegal harvesting and trafficking of organs. This has led to the creation of a market developing so that those with money to buy organs are able to visit countries where forced organ harvesting occurs in order to receive a life saving transplant. This produces real and ongoing abuses of human rights. At its worst organ harvesting can see people killed to order, with one person's life being deliberately taken to save another.

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. Such a prohibition should also serve to direct attention to the need to improve organ donation rates in Australia and NSW.

This office has produced draft legislation entitled the *Human Tissue Amendment (Trafficking in Human Organs) Bill 2013* which seeks to address this problem. The draft legislation is annexed to this consultation paper. We are currently asking for submissions on the draft legislation.

This consultation paper seeks to set out the international context for the bill and to consider the methods that can be adopted locally to reduce the likelihood of Australian citizens taking part in the illegal and unethical trade in human organs.

## **B. Trafficking human organs**

Organ trafficking can take a number of forms – there are cases in which organs are harvested from prisoners, those where an individual is tricked into donating an organ, cases where victims are paid for an organ, or where a person is treated for a real or imagined condition and organs are removed without their knowledge or consent.<sup>1</sup>

The selling of organs is increasingly common in some countries in response to desperate poverty and lack of opportunities. This transaction often involves the exploitation of the poor and vulnerable, without follow up health care meaning this is either a death sentence or will seriously impair their quality of life.<sup>2</sup> Those most vulnerable to this trade include migrants, homeless people and the illiterate.

Organ trafficking is considered an organised crime with a chain of offenders including the recruiter of the victim, staff and medical professionals involved, the person who transports

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<sup>1</sup> <http://www.ungift.org/knowledgehub/en/about/trafficking-for-organ-trade.html>

<sup>2</sup> Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities, D. A. Budiani-Saberi,<sup>1</sup> and F. L. Delmonico, *American Journal of Transplantation* 2008; 8: 925–929

the organ, various middlemen, the person who sells the organ to the recipient, and the recipient. As yet there has been very poor success identifying and prosecuting those involved in this trade.

In countries in which organ sales are disguised as donations, often no records are kept of consents to donate organs. This suggests that actual informed consent is at best unlikely. There are also no requirements for ongoing cover of medical expenses, and many of those selling their organs may be unaware of the ongoing medical issues they can face as a result.<sup>3</sup>

The selling of organs is illegal in all countries with the exception of Iran, where kidneys can be sold subject to certain regulations. This has not stopped the continuing existence of a large black market for organs from developing globally, with far more organs being transplanted than could possibly be explained by current donation rates. Trafficked kidneys account for estimated 5-10% of kidneys transplanted per year around the world.<sup>4</sup>

There are no globally consistent records of sources of organs, a fact that is particularly concerning where allegations are raised of forced harvesting.

### **C. Forcible Organ harvesting**

In most countries organ donation rates are low. This means that many people who are waiting for transplants will never receive a matching organ. This can be an incentive for some Governments and organisations to forcibly remove the organs of citizens – particularly vulnerable people such as prisoners and minority ethnic and religious groups.

There have been concerns raised by a number of international advocates about forcible organ harvesting in the People's Republic of China, despite laws that prohibit this. A report published in 2006 by Canadian politician, David Kilgour and human rights lawyer David Matas, examined information available on organ transplantation. This report included evidence from the websites of Chinese Hospitals which advertised extraordinarily short waiting period for matching organs of only a few weeks – compared to over a year everywhere else in the world.<sup>5</sup>

Kilgour and Matas' conclusion was that some of those in forced labour camps in China, many of whom are Falun Gong practitioners, were killed for their organs. Reports from former prisoners that they had undergone regular blood tests and been subjected to further unnecessary and intrusive organ testing, has added weight to their concerns.

More recently a comprehensive investigation by author Ethan Gutman concluded that forcible organ harvesting from political prisoners has been ongoing in China from the 1990s.<sup>6</sup> The so-called "Xinjiang procedure", which involves medical teams harvesting organs from live prisoners who had been fatally wounded by execution squads, was first used against the minority Uighur people in North West China.

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<sup>3</sup> See for instance the story of Haleem Bibi here : <http://www.who.int/bulletin/volumes/85/1/07-020107/en/>

<sup>4</sup> Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities, D. A. Budiani-Saberi, I and F. L. Delmonico, *American Journal of Transplantation* 2008; 8: 925-929

<sup>5</sup> Full report available here: <http://organharvestinvestigation.net/>

<sup>6</sup> [http://www.weeklystandard.com/articles/xinjiang-procedure\\_610145.html](http://www.weeklystandard.com/articles/xinjiang-procedure_610145.html)

According to a statement by the UN Special Rapporteur on Torture, Manfred Nowak, there has not yet been a formal response from the Chinese Government about these allegations.<sup>7</sup>

China has, however, made formal statements that it is currently trying to crack down on organ trafficking in the country and is moving away from using organs harvested from prisoners.<sup>8</sup> These official statements are seen by many as confirmation that illegal and involuntary harvesting of organs continues to occur in China.

#### ***D. Transplant tourism***

The increasing prevalence of organ trafficking and forcible harvesting has led to an increase in global transplant tourism. Travel for transplantation is considered transplant tourism if: “it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centres) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population.”<sup>9</sup> This raises concerns where local patients are placed at a disadvantage accessing organs because priority is given to the more lucrative international patients. It can also have the flow on effect that organ donation fails to receive popular support due to the perception of a fundamental lack of fairness in how organs are allocated.

Organ recipients may travel from America or Australia to places such as Egypt, Peru or the Philippines where it is often possible to buy the organs of poor people.<sup>10</sup> They may or may not be aware that the organ they are receiving is trafficked or has been forcibly harvested – however the incredibly short waiting lists – in some places as short as a week to receive a matched organ – must raise some suspicions.

It is worth noting that there are some instances in which transplant tourism is considered both legal and ethical. For instance, when a related donor and recipient both travel from a country without transplant services to a country in which transplants can legally be carried out.<sup>11</sup> Bilateral organ sharing programs between countries also do not raise these concerns, as long as they are based on reciprocal and equal arrangements.

Globally, transplant tourism puts lives at risk and reduces the incentives in home countries to improve organ donor programs. It is understandable that those who can afford to travel to receive a life saving transplant will do so, however their actions will deprive a needy person in the destination country of access to donated organs, and can increase the risk of forcible harvesting or exploitation through organ trafficking.

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<sup>7</sup> <http://www2.ohchr.org/english/bodies/chr/docs/62chr/ec4-2006-6-Add6.doc>

<sup>8</sup> <http://www.telegraph.co.uk/news/worldnews/asia/china/9650198/China-to-phase-out-organ-harvesting-from-prisoners.html>

<sup>9</sup> The Hazards of Transplant Tourism, Francis L. Delmonico, The Clinical Journal of the American Society of Nephrology <http://cjasn.asnjournals.org/content/4/2/249.full>

<sup>10</sup> <http://www.bloomberg.com/news/2011-05-12/desperate-americans-buy-kidneys-from-peru-poor-in-fatal-trade.html>

<sup>11</sup> Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities, D. A. Budiani-Saberi, and F. L. Delmonico, *American Journal of Transplantation* 2008; 8: 925–929

### ***E. International laws and protocols***

There are a number of international protocols relating to organ harvesting, some of which have been ratified by Australia. A ban on Australian citizens and residents receiving trafficked organs would be consistent with these protocols and go some way to implementing our obligations under them.

The *UN Trafficking Protocol (2000)* has been ratified by Australia and includes a definition of “Trafficking = exploitation of human beings for sexual exploitation, forced labor, slavery, servitude or for the removal of organs.”<sup>12</sup> The Optional Protocol on the sale of children, child prostitution and child pornography (2000) to the UN Convention on the Rights of the Child (1989) recommends a specific prohibition of the sale of children for the purpose of transferring their organs.<sup>13</sup>

In 2004, the *World Health Assembly (WHA)* issued a resolution urging member states “to take measures to protect the poorest and vulnerable groups from transplant tourism and the sale of tissues and organs, including [drawing] attention to the wider problem of international trafficking in human tissues and organs.”<sup>14</sup>

The *Declaration of Istanbul on Organ Trafficking and Transplant Tourism*<sup>15</sup> was initiated by The Transplantation Society and the International Society of Nephrology in 2008 with over 150 representatives of scientific and medical bodies from 78 countries.

The declaration contains provisions specifying that organs for transplantation should be equitably allocated within countries without prejudice, and that financial considerations should not influence the allocation of organs. Furthermore the declaration identifies organ trafficking and global transplant tourism as violating “the principles of equity, justice and respect for human dignity ... Because transplant commercialism targets impoverished and otherwise vulnerable donors, it leads inexorably to inequity and injustice and should be prohibited”.

### ***F. The situation in NSW***

There is currently a prohibition against trading in tissue in NSW under section 32 of the [Human Tissue Act 1983](#). This imposes a penalty for paying for organs or other tissues within NSW of 40 penalty units or 6 months imprisonment. This only applies to payments made entirely within NSW, and does not preclude residents of NSW from travelling overseas to buy organs and then returning to NSW.

Extraterritorial prohibitions are relatively rare in the law of NSW. One was put in place prohibiting overseas commercial surrogacy arrangements in January 2011. Arguments advanced in the NSW Parliament to support this included serious concerns about the

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<sup>12</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en)

<sup>13</sup> <http://www2.ohchr.org/english/law/crc-sale.htm>

<sup>14</sup> *Resolution on human organ and tissue transplantation*. Geneva: WHO; 2004 (WHA 57.18). Available at: [http://www.who.int/transplantation/en/A57\\_R18-en.pdf](http://www.who.int/transplantation/en/A57_R18-en.pdf)

<sup>15</sup> <http://www.declarationofistanbul.org/>

exploitation of women, particularly in the developing world.<sup>16</sup> The sale of organs and tissues raises similar concerns with the WHO identifying the poor as most at risk of the trade.

### **G. The Human Tissue Amendment (Trafficking in Human Organs) Bill 2013**

This office has drafted a proposed private members bill entitled the *Human Tissue Amendment (Trafficking in Human Organs) Bill 2013*. It is in part based on draft Canadian legislation known as [BILL C-500](#) which was proposed to amend the Canadian Criminal Code (trafficking and transplanting human organs and other body parts).

#### **Summary of the draft bill**

The draft bill seeks to amend the existing NSW *Human Tissue Act 1983* by

- Increasing the penalty for commercial trading in tissue or organs
- Create offences for the use of human organs and tissues taken without consent
- Create an aggravated offence where the removed, traded or trafficked is a vital organ, with a penalty equivalent to manslaughter (a maximum of 25 years imprisonment)
- Extend the law to offences that occur outside of NSW and Australia where the person engaging in the conduct is ordinarily resident in NSW.

It **maintains the existing prohibition against trading in tissues (organ trafficking)** – explicitly expanding this to cover all of those involved in the commercial arrangement.

It creates a definition of "**commercial transplant arrangement**" to make it clear that all selling and purchasing of human organs is covered by the operation of the bill.

The bill expands the existing prohibition against **trading in tissues** to make it an offence to enter into a commercial arrangement to sell organs or tissues, to benefit from such an arrangement or to provide services – including medical services for such a transplant.

This makes it clear that it is not just those directly benefiting from the transaction that can be found guilty, but any of those who knowingly facilitate the transaction and transplant, and profit from doing so.

The current penalty for trading in tissues of 40 penalty units or 6 months imprisonment is maintained.

It is made clear that this offence does not cover any commercial arrangements relating to blood, semen or hair through regulated programs or organisations.

The bill also creates a definition of "**appropriate consent**" – this definition recognises that in some jurisdictions outside NSW consent arrangements are based on opt-out schemes, or allow the next of kin to give consent and that this should be recognised as appropriate consent in those cases.

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<sup>16</sup> Debate on this Bill in the NSW Legislative Council is here :  
<http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20101111047>

A new set of offences are created to cover the **removal of tissue without consent**. The offence is committed if a person removes tissue from another person or a body without consent. The proposed penalty for this is the same as the existing offence of trading in human tissue at 6 months or 40 penalty units or both.

An additional offence is created of **using tissue obtained without consent** – a penalty applies to this of 40 penalty units or 6 months.

A further offence is created of "**unlawfully receiving for transplantation tissue removed without consent**". The offence requires the person to know or be reckless as to the lack of consent.

A central provision in the bill **extends the offences to conduct that occurs outside of NSW** – as long as the person who does the acts or from whom the tissue is removed are ordinarily resident in NSW.

The proposed bill creates an **aggravated version of the above offences** if the organ that is removed, traded or trafficked, is either a vital organ (defined to include the heart, lung, kidney, liver or pancreas) or an amount of tissue where the removal would reasonably be expected to kill the person. **In this case there is a maximum penalty able to be imposed of 25 years imprisonment** – a penalty that matches the seriousness of such an offence.

Given the forced removal of a person's vital organs will inevitably lead to their death, the bill equates the removal and receipt of such organs from a person who did not provide fully informed consent to manslaughter.

In the case of the aggravated offences, if the jury is not satisfied that the additional offences are proven, it is available to them to find the person guilty of the lesser offence – either of removal of tissue without consent or trading in tissue.

#### ***H. Limitations of a legislative approach***

There are clear legislative limitations in any law made by the Parliament of NSW. Whilst it can prohibit residents and citizens of NSW from undertaking activities overseas (via an extraterritorial provision), enforcement can only occur in NSW. The bill could not prevent persons genuinely establishing domicile in another state, territory or country either before or after a procedure and thereby avoiding the penalties.

Despite these limitations, by criminalising the conduct, the bill may achieve its goal of reducing the number of NSW residents willing to undertake the activity. If this change is supported in NSW, it could also be a first step in greater international regulation of this activity and, if adopted by numerous other states, territories or nations could lead to a significant reduction in this illegal and unethical trade.

### ***I. Improving organ donation rates***

With current donation rates, the global demand for organs far exceeds the available ethical supply. In the U.S. for example, 110,693 people are on waiting lists for organs, with fewer than 15,000 donors a year. There is an ongoing global need to find improved and ethical systems to respond to the high demand for organ transplants. The continued existence of transplant tourism is not only a human rights abuse, it is also a serious barrier to addressing local organ shortages.

### ***J. Consultation***

This office is actively seeking submissions from interested parties on both the draft bill (see Annexure A) and the matters raised in this consultation paper. Submissions will be received up to 28 February 2013.

Submissions can be made either by:

1. Completing the online survey: <http://davidshoebridge.org.au/organ-trafficking-ban>
2. Completing the survey enclosed in this consultation paper and sending it to [kym.chapple@parliament.nsw.gov.au](mailto:kym.chapple@parliament.nsw.gov.au)
3. Printing the survey enclosed in this consultation paper and sending it to NSW Parliament House, Macquarie Street, Sydney NSW 2000. More detailed submissions can also be received this way.

We are hoping to introduce this legislation into the NSW Legislative Council in 2013.



**David Shoebridge, Greens MLC**



Print & send in, or complete online: <http://davidshoebridge.org.au/organ-trafficking-ban>

## Organ Trafficking Bill Consultation Questions

**1. Do you support the NSW Parliament acting to outlaw human organ trafficking and organ harvesting without consent as proposed in this bill?**

- Yes
- No
- Don't know

Any comments? (optional)

**2. Is illegal international human organ trafficking a sufficient problem that action should be taken to prevent or minimise it?**

- Yes
- No
- Don't know

Any comments? (optional)

**3. Would creating a law that made it illegal for people in NSW to receive an organ overseas that has been trafficked or illegally harvested help stop these practices?**

- Yes
- No
- Don't know

Any comments? (optional)

**4. Does this bill put in place a scheme that would make it possible to identify people who have received trafficked or illegally harvested organs?**

- Yes
- No
- Don't know

Any comments? (optional)

**5. Are the penalties for the offences created in this Bill appropriate?**

- Yes
- No
- Don't know

Any comments? (optional)

**6. Are the exemptions contained in the bill for hair, blood and semen appropriate?**

- Yes
- No
- Don't know

Any comments? (optional)

**7. Is the proposed distinction between vital organs and other tissues (and the greater penalties for offences involving vital organs) appropriate?**

- Yes
- No
- Don't know

Any comments? (optional)

**8. Is the exemption for countries that operate default organ donation consent regimes with "opt-out" mechanisms appropriate?**

- Yes
- No
- Don't know

Any comments? (optional)

**9. Should NSW wait for the Federal Government to make changes to laws about overseas organ harvesting and trafficking?**

- Yes
- No
- Don't know

Any comments? (optional)

**10. Any further comments including any more detailed submissions as to drafting and or efficacy of the bill?**

**Note: all submissions will be treated as public documents unless confidentiality is specifically sought. All requests for confidentiality will be accepted.**

Please send responses to: [kym.chapple@parliament.nsw.gov.au](mailto:kym.chapple@parliament.nsw.gov.au)  
Office of David Shoebridge, Parliament House, Macquarie Street, Sydney NSW 2000

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Introduced by Mr David Shoebridge MLC

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**Warning note: This is a draft version of a Non-Government Bill**

New South Wales

## **Human Tissue Amendment (Trafficking in Human Organs) Bill 2013**

### **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 human organs and other human tissue taken from other persons without their 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.

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Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

Explanatory note

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## **Schedule 1            Amendment of Human Tissue Act 1983 No 164**

**Schedule 1 [1]** updates the long title of the Act as a consequence of the proposed changes, which deal with the unlawful removal of tissue from living people as well as deceased people.

**Schedule 1 [2]** inserts 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 Interpretation**

**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. In the case of prisoners and other detained persons, only actual consent expressed by the person is treated as appropriate consent for the purposes of the proposed Part.

### **Division 2 Offences relating to trading in tissue**

**Proposed section 32B** 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 the person of tissue removed under a commercial transplant arrangement. The section does not apply to arrangements relating to blood, semen or hair. (Proposed section 32M (3) 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 32C** 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.

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Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

Explanatory note

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**Division 3 Offences relating to removal of tissue without consent**

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

**Proposed section 32E** 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 of a vital organ, without the appropriate consent.

**Division 4 Offences relating to use of tissue removed without consent**

**Proposed section 32F** 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 without the appropriate consent. It will also be an offence to use any tissue that is removed from the body of a deceased person, in any circumstance, for any purpose without the appropriate consent.

**Proposed section 32G** 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 of removing a vital organ, without the appropriate consent.

**Proposed section 32H** makes it an offence for a person to consent to the use of any tissue removed from the body of another purpose 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 or is reckless as to that lack of consent.

**Proposed section 32I** 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 Disclosure of transplants required**

**Proposed section 32J** requires the recipient of tissue to disclose the transplant.

**Division 6 Miscellaneous**

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

**Proposed section 32L** creates certain exemptions from the offences created by the proposed Part.

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

**Proposed section 32N** provides for the Minister to approve certain contracts or arrangements

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Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

Explanatory note

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**Schedule 1 [3]** omits existing offences that are replaced by the proposed offences.

**Schedule 1 [4]** transfers an existing offence (formerly set out in section 36 (1) (b)).

**Schedule 1 [5]** makes a consequential amendment to a cross-reference.

**Schedule 1 [6]** provide 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 [7]** provides for the making of savings or transitional regulations consequent on the amendment of the *Human Tissue Act 1983*.

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New South Wales

## **Human Tissue Amendment (Trafficking in Human Organs) Bill 2013**

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Introduced by Mr David Shoebridge MLC

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New South Wales

# Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

No , 2013

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## 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 organs and other human tissue; and for related purposes.

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Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

Clause 1

**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Human Tissue Amendment (Trafficking in Human Organs) Act 2013*.

**2 Commencement**

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

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Human Tissue Amendment (Trafficking in Human Organs) Bill 2013  
Schedule 1 Amendment of Human Tissue Act 1983 No 164

## **Schedule 1 Amendment of Human Tissue Act 1983 No 164**

- [1] **Long title**  
Omit “deceased” where firstly occurring.
- [2] **Part 6**  
Omit the Part. Insert instead:

### **Part 6 Offence relating to trading in, removal, use and transplantation of tissue**

#### **Division 1 Interpretation**

##### **32 Definitions**

(1) In this Part:

*appropriate consent* has the meaning given by section 32A.

*commercial transplant arrangement* means 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.

*vital organ* means an organ that a person cannot survive without, or one of a pair of organs that a person cannot survive without, and includes any of the following:

- (a) heart,
- (b) lung,
- (c) kidney
- (d) liver,
- (e) pancreas.

(2) 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.

##### **32A Meaning of “appropriate consent”**

(1) In this Part:

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Amendment of Human Tissue Act 1983 No 164 Schedule 1

*appropriate consent*, in relation to the removal or use of tissue, means:

- (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 used for the relevant purpose, or
  - (b) in the case of tissue of a person that is removed or used outside New South Wales:
    - (i) the consent of the person from whom the tissue is removed to the removal of the tissue or use of the tissue for the relevant purpose, or
    - (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 minor to the removal of the tissue or use of the tissue for the relevant purpose, or
    - (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 use of the tissue for the relevant purpose, or
    - (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 use of the tissue for the relevant purpose.
- (2) Despite subsection (1), 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, only consent expressed by the person himself or herself during his or her lifetime is *appropriate consent* for the purposes of this Part.

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Schedule 1 Amendment of Human Tissue Act 1983 No 164

**Division 2 Offences relating to trading in tissue**

**32B Offence of trading in tissue**

(1) A person must not:

- (a) enter into, or offer to enter into or promote, a commercial transplant arrangement, or
- (b) knowingly provide any services (including medical services) under a commercial transplant arrangement, or
- (c) knowingly accept any benefit under a commercial transplant arrangement, or
- (d) consent to the transplantation to the person of tissue removed from the body of another person under a commercial transplant arrangement.

Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

(2) This section does not apply to 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.

**32C Aggravated offence of trading in tissue**

(1) A person commits an aggravated offence under this section if the person commits an offence under section 32B and the commercial transplant arrangement concerned relates to the sale or supply of:

- (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
- (b) a vital organ.

Maximum penalty: imprisonment for 25 years.

(2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of commission of the offence under this section, committed an offence under section 32B, the jury may acquit the person of the offence charged and find the person guilty of the offence under section 32B, and the person is liable to punishment accordingly.

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**Division 3 Offences relating to removal of tissue without consent**

**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.

**32D Offence of unlawful removal of tissue**

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.

**32E Aggravated offence of unlawful removal of tissue**

(1) A person commits an offence under this section if the person commits an offence under section 32D and the offence involves removing:

(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

(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

(c) a vital organ.

Maximum penalty: imprisonment for 25 years.

(2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of commission of the offence under this section, committed an offence under section 32D, the jury may acquit the person of the offence charged and find the person guilty of the offence under section 32D, and the person is liable to punishment accordingly.

**Division 4 Offences relating to use of tissue removed without consent**

**32F Offence of use of tissue removed without consent**

A person must not:

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(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) without the appropriate consent, or

(b) use any tissue that is removed from the body of a deceased person, in any circumstances, for any purpose without the appropriate consent.

Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

**32G Aggravated offence of use of tissue removed without consent**

(1) A person commits an offence under this section if the person commits an offence under section 32F and the offence involves the use of:

(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

(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

(c) a vital organ.

Maximum penalty: imprisonment for 25 years.

(2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of commission of the offence under this section, committed an offence under section 32F, the jury may acquit the person of the offence charged and find the person guilty of the offence under section 32F, and the person is liable to punishment accordingly.

**32H Offence of unlawfully receiving for transplantation tissue removed without consent**

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:

(a) the tissue was removed from the body of the other person without the appropriate consent, and

(b) the person to whom it is transplanted knows or is reckless as to that lack of consent

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Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

**32I Aggravated offence of unlawfully receiving for transplantation of tissue removed without consent**

(1) A person commits an offence under this section if the person commits an offence under section 32H and that offence involves the use for transplantation of:

- (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
- (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
- (c) a vital organ.

Maximum penalty: imprisonment for 25 years.

(2) If, on the trial of a person for an offence under this section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of commission of the offence under this section, committed an offence under section 32H, the jury may acquit the person of the offence charged and find the person guilty of the offence under section 32H, and the person is liable to punishment accordingly.

**Division 5 Disclosure of transplants required**

**32J Recipient of tissue must disclose transplant**

(1) A person who consents to the transplantation to the person of any tissue removed from the body of another person must notify the Director-General, within 30 days after the transplant occurs, of the date, location and nature of the treatment in connection with which the tissue was transplanted to the person.

(2) Subsection (1) extends to a transplant that occurs outside New South Wales if the person to whom the tissue is transplanted is ordinarily resident in New South Wales.

(3) A person who fails, without reasonable excuse, to comply with subsection (1) is guilty of an offence.

Maximum penalty: 40 penalty units or 6 months imprisonment, or both.

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(4) A person is not excused from complying with subsection (1) on the ground that compliance might incriminate the person or make the person liable to a penalty.

## **Division 6 Miscellaneous**

### **32K Offences extend to conduct that occurs outside New South Wales**

Without limiting the application of Part 1A of the *Crimes Act 1900*, 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.

### **32L Exemptions**

(1) This Part does not apply to or in respect of anything authorised by or under:

- (a) the *Coroners Act 2009*, or
- (b) the *Anatomy Act 1977*, or
- (c) any other law.

(2) Divisions 2–5 do not apply to or in respect of 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.

(3) Division 2 does not apply to or in respect of 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.

### **32M Contracts or arrangements in breach of certain provisions void**

A contract or arrangement entered into in contravention of Division 2 is void.

### **32N Minister can approve contract of arrangements**

If the Minister considers it desirable by reason of special circumstances so to do, 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 Division 2 and nothing in Division 2 applies to or in respect of a contract or arrangement entered into in accordance with such an approval.



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**[3] Section 36 Miscellaneous offences**

Omit section 36 (1) and (1A).

**[4] Section 36 (2B)**

Insert after section 36 (2A):

(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. Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

**[5] Section 36 (4)**

Omit "(1),".

**[6] Section 38**

Omit the section. Insert instead:

**38 Proceedings for offences**

(1) Proceedings for an offence under this Act are to be dealt with summarily before the Local Court.

(2) Despite subsection (1), an offence under section 32C, 32E, 32G or 32I is to be dealt with as an indictable offence.

**[7] Schedule 1 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

any other Act that amends this Act