



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

INTERNATIONAL COALITION TO
**END TRANSPLANT
ABUSE IN CHINA**

Joint Position Statement

Section 32 Trading in Tissue in the *Modern Slavery Act 2018* (NSW)

Background

1. This is a joint position statement representing the collective views of Australian Lawyers for Human Rights (ALHR) and the International Coalition to End Transplant Abuse in China (ETAC) regarding s 32 of the *Human Tissue Act 1983* as a modern slavery offence in the *Modern Slavery Act 2018* (NSW).
2. On 15 February 2018 ALHR became aware of the draft *Modern Slavery Bill 2015* (NSW) (**Draft Bill**).
3. The Draft Bill did not contain any organ trafficking provisions.
4. On 23 February 2018 ALHR provided Paul Green MLC with relevant documents for his consideration regarding organ trafficking laws in Australia and internationally.¹
5. On 6 March 2018 the *Modern Slavery Bill* (NSW) (**Bill**) was introduced by Paul Green MLC in the Legislative Council. The Bill did not contain any provisions relating to organ trafficking, including any of the Commonwealth provisions contained in ss 271.7A-271.7E of the *Criminal Code 1995* (Cth) (**Criminal Code**).

¹ Madeleine Bridgett, Co-Chair for the Business and Human Rights Subcommittee, ALHR, provided Paul Green MLC with relevant documents, including submissions by ALHR and ETAC regarding the Federal Inquiry into Human Organ Trafficking and Organ Transplant Tourism, and a copy of the *Modern Slavery Act 2015* (UK) which defines organ trafficking as a modern slavery offence.

6. The Bill did not define organ trafficking as a modern slavery offence.²
7. On 1 May 2018 the Greens proposed an amendment to the Bill to include “trading in tissue” as a modern slavery offence pursuant to s32 of the *Human Tissue Act 1983* (s 32).
8. On 3 May 2018 the Bill was passed in the Legislative Council with amendments, including the s 32 amendment in paragraph 7 above.
9. On 21 June 2018 NSW Parliament passed the *Modern Slavery Act 2018 (NSW) (Act)*.
10. The Act is yet to come into force.
11. Around June 2019 the Act, a draft *Modern Slavery Amendment Bill 2019 (Amendment Bill)* and draft *Modern Slavery Regulation 2019* were referred to the Standing Committee on Social Issues for consultation, inquiry and report.
12. Relevantly, the Amendment Bill proposed to omit the offence contained in s32 from the list of modern slavery offences in Schedule 2 to the Act and insert instead references to offences in the Commonwealth Criminal Code relating to organ trafficking.
13. ALHR and ETAC made submissions³ regarding s 32 in the Act, and collectively submitted that the offence contained in s 32 should not be omitted from the Act.

The importance of trading in tissue as a modern slavery offence

14. Trafficking in human organs and trafficking in persons for the removal of organs are two distinct crimes. This distinction is legally significant. So much so, that an international treaty has been specifically drafted to provide for the necessary legal protections associated with crimes relating to trafficking in human organs.
15. In March 2015 the *Council of Europe Convention against Trafficking in Human Organs (Convention against Trafficking in Human Organs)* was opened for signature following a joint study by the United Nations and the Council of Europe into trafficking in organs, tissues and cells.
16. The joint study identified a gap in international organ trafficking laws, observing that

² See: First Print of the *Modern Slavery Bill* (NSW), Accessed on 17 November 2019, <https://www.parliament.nsw.gov.au/bill/files/3488/First%20Print.pdf>

³ ALHR Submission No. 35, available at <https://www.parliament.nsw.gov.au/lcdocs/submissions/66114/0035%20Australian%20Lawyers%20for%20Human%20Rights.pdf>; ETAC Submission No. 59, available at [https://www.parliament.nsw.gov.au/lcdocs/submissions/66139/0059%20Australian%20Advocacy%20and%20Initiatives%20Committee%20\(AAIC\).pdf](https://www.parliament.nsw.gov.au/lcdocs/submissions/66139/0059%20Australian%20Advocacy%20and%20Initiatives%20Committee%20(AAIC).pdf)

Trafficking in organs ... differs from trafficking in human beings for organ removal in one of the constituent elements of the crime – the object of the criminal offence. In the former case, the object of the crime is the organs, tissues and cells, while in the latter case it is the trafficked person.⁴

17. The United Nations Office for Drugs and Crime (UNODC) expert group has further recommended that

... while there is a clear need to distinguish both crimes (to provide adequate criminal justice responses), there is also a need to promote the legal instruments against both trafficking in human organs and trafficking in persons for organ removal, to have a more effective, comprehensive legal framework against illegal transplant activities.⁵

18. The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)* supplementing the *United Nations Convention against Transnational Organized Crime*, addresses trafficking of persons for the purpose of organ removal, however it does not provide for offences relating to trafficking in human organs.⁶

19. In Australia, there is a similar gap in organ trafficking laws, and subsequently a gap in the modern slavery risks an entity must report on in its modern slavery statement.

20. The Commonwealth organ trafficking provisions largely relate to offences of trafficking in persons for the removal of organs, save for s 271.7A of the Criminal Code which prohibits the removal of organs.

21. Section 271.7A of the Criminal Code provides that

The removal of a person's organ is contrary to this Subdivision if:

(a) the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out; or

⁴ Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Directorate General of Human Rights and Legal Affairs, Council of Europe, 2009, p. 93.

⁵ UNODC, *Trafficking in persons for the purpose of organ removal: Assessment Toolkit*, 2015, p. 19.

⁶ Human Rights Committee, House of Representatives Joint Standing Committee on Foreign Affairs, Defence and Trade, *Commerce not Compassion: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism*, November 2018; see also *Ibid.*

(b) neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim.

22. Whilst s 271.7A prohibits the removal, or entering into an agreement for the removal, of a person's organ without their consent, in order for this provision to have force the removal of the organ has to be unlawful in the country where the removal is to be carried out. This is because s 271.7A does not have extraterritorial application under the Criminal Code.

23. Further, the Commonwealth laws are silent on some of the fundamental trafficking in human organ laws contained in the *Council of Europe Convention against Trafficking in Human Organs (Convention)*, including but not limited to:

- a. "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" (Article 4(1)(b) of the Convention);
- b. "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" (Article 4(1)(c) of the Convention);
- c. "the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party" (Article 7(1) of the Convention); and
- d. "the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, with a view to having a removal or implantation of a human organ..." (Article 7(3) of the Convention); and
- e. "the request or receipt by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ..." (Article 7(4) of the Convention).

24. We note that there have been no organ trafficking prosecutions in Australia, despite Australians travelling overseas for organ transplants.⁷

⁷ Smith, G. et al., 'International travel by Australians for overseas transplantation,' *The Medical Journal of Australia*, Volume 211, Issue 10, September 2019, 460.

The importance of entities reporting risks associated with trading in tissue

25. Given that trading in human organs is increasing, particularly by citizens of economically wealthy countries⁸, having laws in NSW which require entities to report on risks associated with trading in organs is important.
26. Not only do Australians travel overseas to purchase organs for transplantation purposes, there are Australian companies, including universities and hospitals, who do business with countries such as China, Philippines, India and Indonesia, for various purposes including training Chinese doctors in organ transplants, and purchasing equipment and office supplies. These countries have all been associated with trading in organs.⁹
27. In China, there is particular concern that minority communities, including the Uyghurs and Falun Gong, are detained, without trial, in forced labour camps, tortured and subjected to the involuntary and forced removal of organs, often resulting in their death.
28. The evidence about forced organ harvesting against prisoners of conscience in China is now conclusive given the China Tribunal's recent findings whereby it concluded, unanimously and beyond reasonable doubt, that "in China forced organ harvesting from prisoners of conscience has been practiced for a substantial period of time involving a very substantial number of victims".¹⁰
29. The China Tribunal also concluded that the commission of crimes against humanity against the Falun Gong and Uyghurs has been "proved beyond reasonable doubt".¹¹
30. Section 32 provides greater legal protections compared to the current Commonwealth organ trafficking laws in terms of trafficking in human organs. Further, s 32 has extraterritorial application in the Act.
31. Further, s 32 contains exemptions, including for when trading in tissue is made for therapeutic, medical or scientific purposes.
32. Section 32 is therefore significant and important in terms of the reporting requirement in the Act, as it means entities will be required to report modern slavery

⁸ Hughes, N. *Prime Numbers: Organs without Borders* [2005] (146) Foreign Policy 26.
<http://foreignpolicy.com/2009/10/21/organs-without-borders/>.

⁹ Yosuke Shimazono, *The state of the international organ trade: a provisional picture based on integration of available information*, Bulletin of the World Health Organization, Volume 85, Number 12, December 2007, 901-980,
<https://www.who.int/bulletin/volumes/85/12/06-039370/en/>.

¹⁰ Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China (China Tribunal),
<https://chinatribunal.com/>.

¹¹ Ibid.

risks associated with trading in tissue, which includes trading in human organs both domestically and overseas.

33. Section 32 in the Act is therefore an important legislative mechanism to prevent and deter companies from engaging or participating in trafficking in human organs for financial gain.
34. For the reasons above, we are collectively of the view that s 32 should not be omitted from the Act.