



Australian Government

Attorney-General's Department

**Criminal Justice Policy
and Programmes Division**

**Australian Government submission to the Joint Standing
Committee on Foreign Affairs, Defence and Trade Inquiry into
Human Organ Trafficking and Organ Transplant Tourism**

August 2017

Introduction

This submission provides information about the Australian Government's response to organ trafficking and organ transplant tourism, and has been prepared by the Attorney-General's Department (AGD) as chair of the Interdepartmental Committee on Human Trafficking and Slavery (IDC), on behalf of the following Commonwealth agencies:

- Australian Federal Police (AFP)
- Department of Foreign Affairs and Trade (DFAT)
- Department of Health
- Department of Immigration and Border Protection (DIBP), and
- Department of Social Services (DSS).

This submission outlines Australia's legislative framework to combat organ trafficking and organ transplant tourism; trends and statistics relating to investigations; and support and protections available to victims.

Information in this submission is current at 7 August 2017.

Terminology

In this submission the Australian Government uses the term '**organ trafficking**' to refer to conduct that would constitute an offence under sections 271.7B, 271.7C, 271.7D or 271.7E of the Commonwealth *Criminal Code Act 1995* (Criminal Code).

The Australian Government understands the term '**transplant commercialism**' to mean a policy or practice in which an organ is treated as a commodity, including by being bought or sold or used for material gain.

The Australian Government understand the term '**organ transplant tourism**' to refer to a prospective organ recipient voluntarily travelling to a foreign country for the purpose of undergoing organ transplantation. The organ may be acquired through legal, illegal or unethical means, including without the full and free consent of the donor.

The Australian Government understands the term '**trafficking in human organs**' to mean the illicit trafficking in human organs, tissues or cells obtained from living or deceased donors and transacted outside the legal national system for organ transplantation.

Global prevalence and the Australian context

It is well recognised there is a global shortage of organs available for transplantation. This is a long-standing issue with demand continuously exceeding supply.

The Global Observatory on Donation and Transplantation (World Health Organization) has reported there were almost 120,000 solid organs transplanted in 2014, with more than 40 percent being living kidneys. It has also been estimated the number of organs transplanted in that same year was less than 10 per cent of the global need.

Poverty, unemployment and the lack of socioeconomic opportunities are all factors that make people vulnerable to trafficking for the purpose of organ removal.

In 2015, the Discours of the Council of Europe Convention against Trafficking in Human Organs stated that organ trading is one of the world's top ten illegal money-making activities generating an estimated \$1.2 billion in illegal profits globally each year.

Organ trafficking

Australia's strong migration controls, geographic isolation, and relatively high degree of regulatory, compliance and enforcement capability make it difficult for offenders to traffic people into and out of, or exploit people within, Australia.

Australia is primarily a destination country for human trafficking and slavery-related exploitation. Historically, the majority of victims identified by Australian authorities have been women from Asia who were exploited in the sex work industry. However, in recent years the number of men, women and children exploited in other industries – including the domestic work, hospitality, agriculture and construction industries – as well as within intimate or family relationships, has exceed those exploited within the sex work industry.

While there has only been one reported case of organ trafficking in Australia to date, the clandestine nature of this crime may mean that victims are difficult to identify.

Organ transplant tourism

There are inherent risks with organ transplant tourism, for both the recipient and the donor. This may include deterioration of health, organ rejection, medical complications and even death.

Media reports have made reference to Australians travelling overseas for organ transplantation; however, the true prevalence of Australians engaging in this potentially dangerous practice is undocumented and likely underreported.

Transplant recipients often require ongoing, long-term medical treatment. Organ transplants and follow-up treatments in Australia are carried out by a limited number of specialist medical professionals, often through the public healthcare system under the stringent oversight of the Australian medical community. Robust state and territory regulatory frameworks also make it difficult—albeit not impossible—for returning transplant recipients to seek aftercare without attracting the attention of medical professionals or government authorities.

There is currently no requirement that an Australian who may be seeking organ transplantation overseas to report their intentions to do so. Two existing registries collect data on kidney transplants and organ donations, the Australian and New Zealand Dialysis and Transplantation Registry (ANZDATA) and the Australian and New Zealand Organ Donation Registry (ANZOD). Both registries are voluntary and provide limited information on Australians receiving transplantations overseas as they only record information reported by clinicians relating to incidents/patients in Australia and New Zealand.

Australia's response to organ trafficking

The Australian Government is committed to combating all forms of human trafficking and slavery, including organ trafficking, and has had a comprehensive whole-of-government strategy to combat these crimes in place since 2004. The strategy is guided by the *National Action Plan to Combat Human Trafficking and Slavery 2015-19* (National Action Plan), which provides the strategic framework for our response and sets clear goals and measurable deliverables that align to Australia's domestic laws and international obligations.

Australia's anti-trafficking strategy is founded on four central pillars: prevention and deterrence, detection and investigation, prosecution and compliance, and victim support and protection. Together, they address the full cycle of human trafficking and slavery, from recruitment to reintegration, and give equal weight to the critical areas of prevention, law enforcement and victim support.

The IDC is responsible for oversight of Australia's strategy, including monitoring its implementation, reporting to the Australian Government on its effectiveness, and ensuring emerging issues are addressed on a whole-of-government basis. Relevant agencies remain responsible for administering individual components of the strategy.

A key area of focus under the National Action Plan is to increase awareness-raising of human trafficking and slavery-related issues among vulnerable groups, frontline responders and the general community. In line with this, AGD has developed and published a fact sheet on organ trafficking, which is available online at: www.ag.gov.au/humantrafficking.

Legislative framework

The Australian Government has comprehensively criminalised human trafficking, slavery and slavery-like practices, including organ trafficking, under Divisions 270 and 271 of the Criminal Code, fulfilling our international obligations under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Trafficking Protocol), which supplements the *United Nations Convention Against Transnational Organised Crime*.

Organ trafficking has been criminalised in Australia since 2005 as part of the broader trafficking in persons offences in Division 271.

In 2013, the Criminal Code was amended to create the following four standalone organ trafficking offences:

- section 271.7B: Offence of organ trafficking – entry into and exit from Australia
- section 271.7C: Organ trafficking – aggravated offence
- section 271.7D: Offence of domestic organ trafficking, and
- section 271.7E: Domestic organ trafficking – aggravated offence.

While organ trafficking was previously captured by the broader trafficking in persons offences, the standalone offences clarified and broadened the conduct which is criminalised. The maximum penalty for an organ trafficking offence is 12 years' imprisonment or 25 years' imprisonment if an aggravating factor is present, such as where the victim is under 18 years of age or subjected to cruel, inhuman or degrading treatment.

The organ trafficking offences apply to the offender's conduct in organising or facilitating the relevant entry into, exit from, or transportation within, Australia (or proposed entry, exit or transportation). An organ does not need to be actually removed for an organ trafficking offence to be committed. To commit the offence, the offender needs only to be reckless as to whether their conduct will result in the removal of the trafficked person's organ, either in circumstances that are contrary to law of the relevant state or territory, or where the trafficked person or their guardian has not consented and the removal would not meet a medical or therapeutic need of the trafficked person.

Australia's transnational organ trafficking offences (sections 271.7B and 271.7C) have extended geographical jurisdiction (category B), meaning they can apply even when the offending conduct occurs wholly outside Australia in cases where the offender is an Australian citizen, resident or body corporate. For example, if an Australian citizen in a foreign country organised a person's entry into Australia for the purpose of the person's organ being removed, that would constitute an offence notwithstanding that the offender's conduct took place overseas.

Any actual removal of a person's organs within Australia is not an offence under the Criminal Code and is instead regulated under state and territory law. Importantly, the Criminal Code does not prevent a medical professional removing an organ of a person without their consent if doing so would save the person's life or avoid significant harm to that person.

Investigations and prosecutions

Human trafficking and slavery-related investigations are a high priority for the AFP. The AFP has dedicated Human Trafficking Teams in Sydney, Melbourne and Brisbane to investigate human trafficking and slavery-related matters, both proactively and through referrals from other Commonwealth or state and territory government agencies, industry, unions or non-government organisations (NGOs).

Organ trafficking raises unique identification challenges, given that the exploitative act occurs only once, as opposed to other forms of exploitation that may involve ongoing provision of labour or services.

To date, the AFP has received one referral relating to suspected organ trafficking in Australia. In 2011, an elderly Australian couple were alleged to have brought a woman from the Philippines to Australia promising her monetary compensation and a working visa if she altruistically ‘donated’ her kidney. The woman changed her mind upon arriving in Australia, resulting in a referral to the AFP. Due to the death of the prospective recipient and the technicalities of the case, this matter did not progress to prosecution. The woman was granted a permanent visa recognising that she had made a contribution to the investigation and would be in danger if returned to the Philippines.

The investigation of human trafficking and slavery matters can be protracted, complex and resource intensive, particularly given their often transnational nature. There are significant practical challenges in investigating crimes across international borders, including the challenges of communication, and differences in the role of national institutions, legal and political systems. Victims, offenders and evidence can be located in more than one country, and the same set of circumstances can generate investigations and prosecutions in more than one jurisdiction. The AFP maintains an extensive network of officers posted to Australia’s overseas missions, who provide a conduit for Australian and overseas law enforcement agencies to exchange information and progress these investigations.

Victim support and protection

Suspected victims of human trafficking, including organ trafficking, may be eligible to receive support through the Australian Government’s Support for Trafficked People Program (STPP). The STPP provides a range of individual case-managed services to eligible trafficked people, including access to accommodation, financial assistance, legal and migration advice, training and social support.

The Australian Government’s Human Trafficking Visa Framework enables suspected victims and witnesses of trafficking who are not Australian citizens to remain in Australia to receive support and assist in the criminal justice process. The framework includes a permanent visa option for suspected victims or witnesses who meet prescribed criteria.

Training for Australian Government officials

The Australian Government invests in training programs for law enforcement, immigration compliance and Australian diplomatic and consular officials overseas to ensure they are equipped to recognise the indicators of all forms of human trafficking and slavery, including organ trafficking, and how to respond appropriately.

The AFP’s biannual Human Trafficking Investigations Course is designed to advance expertise in areas critical to the successful investigation of human trafficking and slavery, including legislation, investigative methodologies, and victim liaison and support.

The Commonwealth Director of Public Prosecutions provides training to a variety of agencies including the AFP, DIBP and state and territory police, in relation to issues arising in the investigation and prosecution of human trafficking and slavery-related cases.

DIBP provides tailored training to departmental officers, officers on posting in other countries and field officers and Human Trafficking Contact Officers of the Australian Border Force in order to equip them with the knowledge to better detect and support suspected trafficked people.

International engagement

In March 2016, the Australian Government launched its *International Strategy to Combat Human Trafficking and Slavery* (International Strategy), which complements the National Action Plan. The International Strategy demonstrates Australia's commitment to being a regional leader in the eradication of these crimes.

Australia works with regional partners to enhance cooperation and coordination to combat human trafficking and slavery, including through the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* (Bali Process). As co-chair of the Bali Process Working Group on Trafficking in Persons with Indonesia, Australia has worked collaboratively to develop a series of policy guides on criminalising human trafficking, and identifying and protecting trafficking victims. The policy guides enable sharing of best practice approaches to combat transnational crime across the region, such as organ trafficking and organ transplant tourism. Australia also recently drove the development of a new regional policy guide on using anti-money laundering techniques to strengthen investigation of human trafficking cases.

Australia promotes and provides training on the policy guides to regional countries, to facilitate their effective implementation and use. Australia also works bilaterally with key partner countries in our region, including Indonesia, Malaysia, Pakistan, Sri Lanka and Vietnam, to strengthen their legal frameworks and capacity to prevent human trafficking.

Australia's response to organ transplant tourism

In Australia, state and territory governments are responsible for the regulation of organ donation and transplantation. Donation and transplantation activity is undertaken by jurisdictions in accordance with the various relevant state and territory legislation.

In 2008, to increase Australia's historically low rate of deceased organ donation, the Australian Government announced the national reform agenda for organ and tissue donation for transplantation. Since the national reform agenda was implemented on 1 January 2009, Australia's rate of deceased organ donors has seen significant growth, with the annual number of deceased organ donors now more than double than that in 2009.

While this growth in organ donation has resulted in a sustained and positive impact on the number of Australians in need of a life-saving or life-transforming organ transplant, the number of people on transplant waiting lists continues to exceed the number of available organs.

An important element of the Australian Government's national reform agenda is a co-ordinated community education and awareness program to increase knowledge about organ donation and transplantation. There may be some opportunity to raise awareness of organ trafficking and/or transplant tourism through this activity.

Existing legislative frameworks

Organ transplant tourism would only constitute an organ trafficking offence under the Criminal Code if a person organised or facilitated the transport, or proposed transport, of the donor to, from or within Australia. Organ transplant tourism is not otherwise currently prohibited under Commonwealth law.

Australia's states and territories have robust frameworks in place to regulate the lawful donation and transplantation of organs and tissue for therapeutic purposes. All Australian states and territories have legislated against the sale of organs, regardless of consent. These frameworks prohibit any financial trade, or practice whereby an organ or tissue is treated as a commodity. Similarly, all states and territories have legislated against the removal of organs without full and free consent. Accordingly, there is no consent if the victim or their guardian has been coerced or induced, monetarily or otherwise, into agreeing to the removal of the victim's organ.

Depending on the factual circumstances of each case, state and territory offences may apply to organs sourced overseas.

Possible organ transplant tourism offence provisions

The potential for the Commonwealth to criminalise organ transplant tourism would need to be investigated and appropriate legal advice obtained.

The elements of any new offence provision would need to be carefully considered to avoid perversely criminalising certain conduct. For example, there may be legitimate reasons for an Australian to travel overseas to undergo transplantation, including receiving an organ altruistically donated by an overseas family member.

The enforceability of any organ transplant tourism offence with extraterritorial application would present a number of challenges. This may include practical issues around investigating the circumstances in which the transplantation took place, obtaining relevant evidence located overseas, and potentially extraditing offenders, particularly in circumstances where the relevant conduct is not criminalised under the law of the foreign country.

Research suggests people who are willing to risk the significant health implications associated with organ transplant tourism are likely to be in desperate need of urgent treatment for end-stage organ failure. If the demand for organs continues to outweigh the supply, the risk of a criminal prosecution alone may be insufficient to discourage desperate Australians

from travelling overseas to receive life-saving or life-changing organ transplantations. This would particularly be the case if level of enforcement of the offences and perceived risk of successful prosecution was low.

The Australian Government considers a holistic approach should continue to be taken to address this issue, including efforts through the national reform agenda to encourage more lawful organ donations and to raise awareness of the risks associated with transplant commercialism.

Accession to the Council of Europe Convention against Trafficking in Human Organs

The Council of Europe Convention against Trafficking in Human Organs (the Convention) was adopted by the Committee of Ministers of the Council of Europe in July 2014 and opened for signature in March 2015. The Convention will enter into force following ratification by five signatories, including at least three member States of the Council of Europe.

As at 7 August 2017, 18 member States of the Council of Europe have signed the Convention. Albania and the Republic of Moldova (both member States) are the only signatories to have ratified the Convention to date. While it remains open to non-member States to sign and ratify the Convention, none have done so. The Australian Government is not considering becoming a party to the Convention at this time.

The Convention requires States Parties to criminalise the illegal removal of human organs from living or deceased donors 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
- in exchange for the removal of organs, the living donor or a third party receives a financial gain or comparable advantage, and
- in exchange for the removal of organs from a deceased donor, a third party receives a financial gain or comparable advantage.

The Convention also includes prevention measures to ensure transparency and equitable access to transplantation services, as well as protection and compensation for victims.

The Trafficking Protocol imposes obligations on State parties to address trafficking in persons for the removal of organs. While the Preamble to the Convention bears in mind the Trafficking Protocol, the Convention is intended to separately and distinctly address only the trafficking in human organs.

There are a number of other international protocols, declarations and guidelines addressing organ trafficking and transplant commercialism. This includes the 2008 Declaration of Istanbul on Organ Trafficking and Transplant Tourism, which sets out a series of principles for organ donation, transplantation and trafficking. Australia contributed to the drafting of the Declaration.