

Committee Secretariat  
Senate Foreign Affairs, Defence and Trade Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
fadt.sen@aph.gov.au

## **Organ Transplant Disclosure Regime**

This submission responds to the Committee's consultation regarding the *Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023*.

In summary, I suggest that the Committee not endorse the Bill.

### **Basis**

The submission reflects research and teaching over the past fifteen years regarding regulation in the health sector, data protection, the commercialisation of body parts and property rights in derivative genetic data.

That research has appeared in a range of peer reviewed Australian and international scholarly publications. It has been informed by participation in international working parties on health data.

The submission does not represent what would reasonably be construed as a conflict of interest.

### **The Bill**

Concern regarding the denial of dignity and the exploitation of vulnerability through coerced organ transfer from, for example political prisoners, is commendable. Regrettably the Bill represents an inappropriately heavy-handed and ineffective response to that concern.

More importantly, it does not engage with the fundamental problem: the deficiencies in the Australian health system that induce Australians to travel overseas in search of a supply of organs for transplantation, potentially relying on transplants that involved coercion (ie 'donors' were political/other prisoners or in economic need).

### **Data collection**

It is axiomatic that 'just because you can do something does not mean that you should (and does not mean that you must)'. That axiom has often been disregarded by public and private sector entities that regard administrative convenience as their primary objective. Their disregard erodes the trust that is the foundation of the public health system and threatens the 'social licence' held by organisations that are deemed to be legitimate.

The Bill mandates collection, from people entering Australia, of data about receipt of an organ transplant.

It relies on the Commonwealth's border powers, which should be used with caution rather than as an administrative fix for challenges in uncoerced collection of health data from citizens and others (for example through voluntary reporting underpinned by community education).

The mandated collection is likely to be subverted, ie for a range of reasons the recipients of organs are likely to ignore the reporting requirement. Absent a body search for an unrelated reason (eg suspicion that the individual is a ‘drug mule’ or has other prohibited content in their clothing or a body cavity) there is no reason that a border officer will necessarily identify the individual as a recipient of an organ. It is unclear whether there is an intention to undertake real-time matching with Australian health records, given that some organ recipients may have undergone a transplant in Australia. Concisely, sighting a scar does not denote illegality.

### **Visa refusal/cancellation**

The Bill provides for refusal or cancellation of a visa on the basis of suspicion.

The Committee might consider the likelihood that the Bill’s exclusion model is likely to catch low-level operatives, rather than executives of organ trafficking schemes and officials in jurisdictions who are directly involved in the provision of bodies or wilfully ignorant of trafficking. There is no indication that the proposed regime will result in Magnitsky-style sanctions against public/private sector executives in for example the People’s Republic of China or India, something that might affect behaviour overseas.

Further, the Committee might note the need for wariness about action on the basis of suspicion rather than proof. Australian courts and administrative tribunals have properly been disquieted about reliance on suspicion. That disquiet is not eliminated simply by reliance on the border power. The Committee might bear in mind the regrettable history of suboptimal performance by the Department of Home Affairs in recent years, which results in questions about potential abuses or inadequacy on the basis of a suspicion that might be arbitrary and inadequately accountable. Policy failures such as RoboDebt indicate that misplaced faith in algorithmics and in an ‘ends justify the means, so contrary advice from lawyers should be ignored’ ethic reminds us that artificial intelligence will not be a fault-free fix.

### **The challenge**

The Bill sidesteps the substantive challenge regarding organ trafficking, ie the ongoing disparity in Australia and elsewhere of organ supply and demand.

As a medico-legal scholar I do *not* endorse proposals for mandatory post-mortem harvesting of organs, irrespective of consent by the deceased person and/or that person’s kin. There is instead a compelling public policy rationale for systematically building community awareness of the need for organ donation.

That awareness requires inclusion of information in the primary and secondary school curriculum as part of health and citizenship education.

It also requires greater effort at the Commonwealth and state/territory levels to inform adults of the shape of the donation regime and its community value. Australia Day saw the nation celebrate sporting and other figures – individuals traditionally characterised as heroes. We could, for example, be better recognising those individuals who chose to donate and thereby provide a public benefit that often outweighs the performance of athletes, artists, academics and politicians.

Enhanced awareness requires attention to misinformation or uncertainties regarding donation, in particular health institutions respecting the wishes of a deceased person’s family rather than the stated wish of the deceased person to donate organs on death. The individual’s decision should be binding.

Given problems with domestic supply of organs a substantive response is for strategic national investment in services such as dialysis (addressing problems with waiting lists) in the state/territory hospitals and clinics at the metropolitan and regional levels. That requires coordinated action and support for public health facilities but will result in substantive community benefit (including enhancement of national productivity and the tax base rather than merely improvements in the longevity and quality of life of people needing transplants and their families).

Dr Bruce Baer Arnold  
Associate Professor  
Canberra Law School  
University of Canberra

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