

# Submission to Inquiry into the Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023

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SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE  
LEGISLATION COMMITTEE

15 February 2024

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SUBMISSION TO INQUIRY INTO THE MIGRATION  
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## Acknowledgments

Anti-Slavery Australia acknowledges the traditional Owners of Country and the Holders of Knowledge for this place, the Gadigal people of the Eora Nation, upon whose lands and waters we work, and extend our respect to their Elders both past, present and emerging.

Anti-Slavery Australia expresses its sincere gratitude and respect for all survivors of modern slavery whose experiences have inspired and continue to drive our advocacy for survivors' rights to be protected and fulfilled.

This submission draws upon Anti-Slavery Australia's research and advocacy as well as our extensive experience in working with and providing legal advice and assistance to victims and survivors of modern slavery in Australia since 2003.

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## 1. Executive Summary

Anti-Slavery Australia, at the University of Technology Sydney, welcomes the opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee's Inquiry into the Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023 ('the Bill').

This submission draws upon Anti-Slavery Australia's research and advocacy as well as our extensive experience in working with and providing legal advice and assistance to victims and survivors of modern slavery in Australia since 2003.

This submission will address:

- Organ trafficking and transplant tourism in Australia.
- Australia's current response to organ trafficking.
- The proposed Bill and its limitations.
- The importance of a human rights-based approach to the issue of organ trafficking, which requires the development and implementation of comprehensive prevention, identification and protection frameworks to ensure the rights of those in or at risk of organ trafficking are protected and fulfilled.

## 2. About Anti-Slavery Australia

Anti-Slavery Australia is the only specialist legal, research and policy university centre in Australia working to end modern slavery. For 20 years, our team has been providing access to pro bono legal and migration services to people who have experienced or are at-risk of modern slavery; engaging in research and advocacy grounded in the firsthand experience of survivors; and delivering training on modern slavery to frontline service providers, government, community, law enforcement, business, students and educators.

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### 3. Organ Trafficking and Transplant Tourism in Australia

Organ trafficking, like other forms of trafficking, slavery and slavery-like practices, is a clandestine practice, and estimates of prevalence of this practice in Australia and around the world are problematic. The difficulty in identifying cases of organ trafficking is compounded by factors that are unique to this form of abuse. In this respect, former United Nations Special Rapporteur on Trafficking in Persons, especially women and children, Joy Ngozi Ezeilo ('the Special Rapporteur'), noted that:

'Available information on trafficking in persons for the removal of organs is incomplete and often unverified... Part of the problem lies in the clandestine nature of the trafficking. Even more so than other forms of trafficking in persons, those involved in trafficking in persons for the removal of organs (including victims) have very little incentive to come forward to researchers and criminal justice authorities with information and evidence. Victims are also unlikely to be identified through the multitude of channels now used to identify other victims of trafficking such as those subject to forced labour... [Health-care providers] may be inhibited from sharing information with the authorities owing to concerns over patient privacy, their own obligations of confidentiality, uncertainty as to whether any laws have been breached, or, indeed, their own complicity in the arrangement. Furthermore, definitional problems and confusion contribute to poor reporting and analysis and render comparisons between countries and between transplantation practices extremely difficult.'<sup>1</sup>

The Special Rapporteur made clear however, that despite the substantial gaps in existing knowledge and understanding of the issue, it is now well established that trafficking in persons for the removal of organs does in fact occur and that it is not rare.<sup>2</sup>

In the *Compassion, Not Commerce Report: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* ('the Compassion, Not Commerce Report'), the Human Rights Sub-Committee ('the Sub-Committee') of the Joint Standing Committee on Foreign Affairs,

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<sup>1</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 6 [22].

<sup>2</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 6 [23].

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Defence and Trade found that 'organ trafficking and transplant tourism is a global problem',<sup>3</sup> occurring in many different countries and regions around the world.

In Australia, like in many other countries, there is a significant shortage of available organs for transplantation.<sup>4</sup> As at 1 December 2023, a total of 1,799 people were listed on the organ transplant waiting lists in Australia.<sup>5</sup> An estimated 14,000 additional people were on dialysis.<sup>6</sup> In 2022, a total of 1,224 recipients received organ transplants in Australia.<sup>7</sup> It is unclear how many people in this time period died waiting for an organ transplant. This shortage of available organs is one factor that drives people in Australia to travel for transplantation.

It is important to note that not all overseas travel for organ transplantation is unethical or illegal. There are a number of circumstances where travel overseas for the purpose of organ transplantation may be uncontroversial. For example, in a case where an organ recipient is related to a donor who resides overseas or is a citizen of that country and the donor freely and fully consents to the procedure.<sup>8</sup>

Transplant tourism, although not legally defined in Australia, refers to circumstances where an intended donor recipient travels overseas to purchase an organ.<sup>9</sup> According to the *Declaration of Istanbul*:

'Travel for transplantation becomes transplant tourism, and thus unethical, if it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and

<sup>3</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 35 [2.82].

<sup>4</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 41 [3.2].

<sup>5</sup> Australian and New Zealand Organ Donation Registry (ANZOD), *Australian Waiting List 2023-2024* <<https://www.anzdata.org.au/anzod/publications-2/organ-waiting-list/>>.

<sup>6</sup> Australian Government, Organ and Tissue Authority, *Statistics in Australia*, Donate Life (Web Page) <<https://www.donatelife.gov.au/all-about-donation/statistics-in-australia>>.

<sup>7</sup> Australian Government, Organ and Tissue Authority, *Statistics in Australia*, Donate Life (Web Page) <<https://www.donatelife.gov.au/all-about-donation/statistics-in-australia>>.

<sup>8</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 2 [1.6]; and C Rudge, R Matesanz, F L Delmonico and J Chapman, 'International practices of organ donation' (2012) 108 *British Journal of Anaesthesia* 48, 53.

<sup>9</sup> Australian Government, *Organ Trafficking – Information for Medical Professionals*, 1 <<https://www.ag.gov.au/system/files/2022-08/human-trafficking-organ-trafficking-fact-sheet.pdf>>.



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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>10</sup>

It is widely acknowledged that data on the nature and scope of organ trafficking and transplant tourism, both in Australia and abroad, is limited.<sup>11</sup> There are existing mechanisms in place that collect, analyse and publish data on organ transplants taking place domestically, (i.e. the Organ and Tissue Authority supported registries), however data with regard to Australians engaging in transplant tourism remains scarce. As noted in the Compassion, Not Commerce Report and elsewhere, there is currently no national registry that publishes data on the number of Australians who have received an organ transplant overseas and no specific mechanism for collecting such data.<sup>12</sup> For example, there is no requirement that an Australian who may be seeking transplantation overseas to report their intentions, nor is it mandatory for a medical profession providing post-operative treatment to a patient who received their transplant overseas to report that fact.<sup>13</sup>

The Australia and New Zealand Dialysis and Transplantation Registry (ANZDATA) is the only OTA-supported registry that publishes data relating to overseas transplants. It collects data on patients who have received kidney transplants overseas where this information has been reported to it. There are a number of limitations to the data collected by the ANZDATA registry, including the possibility that 'these numbers are an underestimate of the true number, since some patients may not return to Australia' and thus would not be counted.<sup>14</sup>

The limitations of the data published by the ANZDATA registry were highlighted by the findings of the Overseas Transplant Survey. For example, the research team found that between 1980 and 2018, 49 instances of overseas transplants identified by the survey (including seven non-

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<sup>10</sup> *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 'Definitions', 2 ('Declaration of Istanbul').

<sup>11</sup> See e.g. Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013); and Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018).

<sup>12</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 47 [3.21]; and G Smith et al, 'International Travel by Australians for Overseas Transplantation' (2019) 211 (10) *Medical Journal of Australia* 460, 460.

<sup>13</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 47 [3.21].

<sup>14</sup> ANZDATA, 'Chapter 7 – Kidney Transplantation', *Annual Report 2020*, 7.

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renal transplants) were not included in the ANZDATA registry which recorded 249 instances during the same time period. Of the 42 unreported kidney transplants, 17 took place between 2015-2018 which, the research team asserts, suggests that the reporting of cases of transplant tourism to the ANZDATA registry has declined in recent years.<sup>15</sup>

We are concerned that the lack of available comprehensive data on the prevalence of organ trafficking in Australia may hamper efforts to prevent Australians from engaging in transplant tourism. We are similarly concerned that the human rights, safety and welfare of victim-survivors of trafficking for the removal of organs are being neglected.

As emphasised in our previous submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade with respect to the *Inquiry into Human Organ Trafficking and Organ Transplant Tourism* ('the Organ Trafficking Inquiry'), clearly there is a need for further research into the prevalence of trafficking in human organs in Australia as well as the establishment of a robust data collection system that captures the rates of Australian citizens and residents who travel overseas for the purpose of organ transplants including whether there has been any illegality.<sup>16</sup> Research documenting the nature and scope of the problem in an Australian context is essential, so that the efficacy of existing policies and legislation can be accurately assessed.

#### 4. Australia's Current Response

Division 271, Subdivision BA of the *Criminal Code Act 1995* (Cth) ('the Criminal Code') sets out Australia's existing organ trafficking laws. Sections 271.7B to 271.7E criminalise the movement of a person into, from or within Australia for the unlawful removal of their organs.<sup>17</sup> Both offences relating to international and domestic trafficking in persons for organ removal refer to recklessness related to this conduct. Illegal organ removal under these provisions refers to circumstances where the removal is contrary to State and Territory law, or where the consent of the victim or their guardian has not been provided and there is no medical or

<sup>15</sup> G Smith et al, 'International Travel by Australians for Overseas Transplantation' (2019) 211 (10) *Medical Journal of Australia* 460, 460.

<sup>16</sup> Anti-Slavery Australia, Submission No. 11 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (2018) 6.

<sup>17</sup> Australian Government, *Organ Trafficking – Information for Medical Professionals*, 1 <<https://www.ag.gov.au/system/files/2022-08/human-trafficking-organ-trafficking-fact-sheet.pdf>>.



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therapeutic need.<sup>18</sup> Although these provisions do not define consent, it is understood to mean full and free consent. Accordingly, the victim or their guardian must not have been coerced, threatened, deceived or induced – monetarily or otherwise – into consenting to the removal of the victim's organ.<sup>19</sup>

The Attorney General's recent *Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth): Findings Report* ('the Findings Report') made two relevant findings in relation to Australia's existing organ trafficking laws. First, it found that globally, the term 'organ trafficking' is used to describe a range of clandestine practices such as the trafficking in persons for the purpose of organ removal and the trafficking in human organs. The object of the former crime is the person, while the object of the latter crime is the organ. Australia's existing offences criminalise trafficking in persons for the purpose of organ removal, in line with our international obligations under the Trafficking in Persons Protocol. The Findings Report recommended amending the offence names in Division 271, Subdivision BA from 'organ trafficking' to 'trafficking in persons for the purpose of organ removal' to avoid confusion and clarify the scope and intent of the offences.<sup>20</sup> This recommendation is in line with the recommendation made by the Special Rapporteur on good practice legal frameworks.<sup>21</sup>

In addition, the Findings Report noted that despite a robust framework of offences, including 23 separate offence provisions in Division 271, Australia has secured very few convictions.<sup>22</sup> Indeed, to date, there has only been one case of organ trafficking under the Criminal Code provisions which subsequently did not proceed to prosecution due to the death of one of the offenders. This aligns with global trends where the 'information [that] is available appears to confirm that the number of prosecutions [globally] is extremely low'.<sup>23</sup> One of the key limitations

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<sup>18</sup> *Criminal Code Act 1995 (Cth)* s 271.7A.

<sup>19</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth)*, 42; and Australian Government, *Organ Trafficking – Information for Medical Professionals*, 2 <<https://www.ag.gov.au/system/files/2022-08/human-trafficking-organ-trafficking-fact-sheet.pdf>>.

<sup>20</sup> Attorney General's Department, *Findings Report on Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Report, 2023) 78.

<sup>21</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 20 [68].

<sup>22</sup> Attorney General's Department, *Findings Report on Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Report, 2023) 48.

<sup>23</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 12 [43].

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identified in the Findings Report in relation to the existing trafficking in persons offences under Division 271 of the Criminal Code concerned the issue of extended geographical jurisdiction.

Section 15.2 extended geographical jurisdiction (Category B) applies to organ trafficking offences under section 271.7B of the Criminal Code. Under section 15.2 of the Criminal Code, extended jurisdiction applies to circumstances where the conduct constituting the offence:

1. Occurs wholly or partly in Australia
2. Occurs wholly outside of Australia and the result of the conduct occurs wholly or partly in Australia
3. Occurs wholly outside of Australia and the alleged offender is a citizen or resident of Australia

Extended jurisdiction under section 15.2 will therefore apply to offences of organ trafficking involving the entry or exit of the victim into or out of Australia.<sup>24</sup> For this reason, circumstances where an Australian (not the victim) travels overseas for the purpose of transplant tourism or illegal organ transplantation and other related forms of exploitation, are not covered under these provisions.

Acknowledging this limitation with the current framing of Australia's trafficking in persons offences, Findings 6 and 13 of the Findings Report call for the Australian Government to amend the trafficking in persons offences under Division 271, including trafficking in persons for the purpose of organ removal, removing the requirement of movement across an Australian border to ensure the full application of Category B extended jurisdiction.<sup>25</sup> To date, any such amendment to the Criminal Code has not been made.

**We endorse the above recommendations (Findings 6, 12 and 13) set out in the Findings Report and submit that the Australian Government should proceed to make the necessary amendments to Division 271 of the Criminal Code as swiftly as possible.**

<sup>24</sup> See *Criminal Code Act 1995* (Cth) s 271.10.

<sup>25</sup> Attorney General's Department, *Findings Report on Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995* (Cth) (Report, 2023) 56 and 78-80.

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## 5. Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023

The issue of organ trafficking and transplant tourism was examined extensively by the Sub-Committee during its Organ Trafficking Inquiry. The Sub-Committee published its 148-page report, (Compassion, Not Commerce Report), in November 2018, which contains 12 recommendations on how Australia's response to preventing and deterring the practice of organ trafficking and transplant tourism in Australia and overseas could be strengthened. Anti-Slavery Australia endorses the majority of the recommendations made by the Sub-Committee in the Compassion, Not Commerce Report.

Anti-Slavery Australia notes that the proposed amendments within the present Bill were not explicitly contained in the recommendations made by the Sub-Committee in the Compassion, Not Commerce Report. Nevertheless, the insertion of s166A into the *Migration Act 1958* (Cth) ('the Migration Act'), as purported by the Bill, may be a useful tool to enhance understanding of the scale of transplant tourism in Australia. For this reason, Anti-Slavery Australia supports the amendments set out in Schedule 1 of the Bill.

However, we submit that due to the inherent limitations of the Bill, explored in the following section, a robust and comprehensive human rights-based approach might be more appropriate. A human rights-based approach to the issue of organ trafficking requires the implementation of stronger, evidence-based measures, as outlined in section 7 below.

With respect to the amendments contained in Schedule 2 of the Bill, we have read the submission made by the International Coalition to End Transplant Abuse in China (ETAC) as part of this Inquiry and note the potential issues identified by ETAC with respect to the definitions used. We submit that the insertion of subparagraph 5C(1)(bc)(ii) and subparagraph 501(6)(ba)(ii) may not be necessary based on the very broad existing provisions under subparagraph 5C(1)(c)(ii) and subparagraph 501(6)(c)(ii) regarding the 'non-citizen's past and present general conduct'.<sup>26</sup> It is reasonable to assume that the past and present general conduct of a person who engages in the act of trafficking in human organs would result in that person being considered a 'non-citizen of character concern' under subparagraph 5C(1)(c)(ii)

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<sup>26</sup> *Migration Act 1958* (Cth) subparagraphs 5C(1)(c)(ii) and 501(6)(c)(ii).

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and further, would result in that person failing to pass the character test pursuant to subparagraph 501(6)(c)(ii).

## 6. Limitations of the Proposed Bill

Anti-Slavery Australia wishes to draw attention to the potential limitations and/or issues related to the proposed amendments set out in the Bill.

It should be noted that data collected via passenger arrival cards does not distinguish between travel for transplantation that may be legitimate and illegal conduct such as organ trafficking. Caution should thus be taken when analysing and interpreting this data to avoid assumptions that all overseas transplants have been received via illegal and/or unethical arrangements.<sup>27</sup>

Anti-Slavery Australia also notes that the objective of the Migration Act is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.'<sup>28</sup> Thus, the mandatory disclosure of health information from citizens via the passenger arrival card may fall outside the scope of the Migration Act. If this is correct, then the Bill will fail in its objective to capture data on the number of overseas transplants received by Australian citizens and residents and to give effect to the provision there would need to be further legislative amendment pursuant to another Act that would authorise the collection of this data.

Further, in the event that the recommended amendments are made to the Criminal Code provisions that capture unethical conduct such as trafficking in human organs and/or transplant tourism, it is unlikely that persons entering Australia will honestly answer the disclosure question given the potential for them to be investigated for a crime. This will have an impact on the accuracy of the data captured.

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<sup>27</sup> Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (Report, November 2018) 50 [3.30].

<sup>28</sup> *Migration Act 1958* (Cth) s 4(1).

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## 7. Human Rights-Based Response to Trafficking in Persons for the Removal of Organs

The importance of a rights-based and victim-survivor centred approach to trafficking in persons is now firmly established under international law. However, as noted by the Special Rapporteur, very little attention has been paid to how such a response should be developed and applied in the context of trafficking in persons for the removal of organs.<sup>29</sup> In her report to the General Assembly, the Special Rapporteur outlined the key elements of a rights-based approach to the issue of trafficking in persons for the removal of organs. Each of the key elements and their application in the Australian context are discussed below.

### Prevention and identification frameworks

A key feature of any human rights-based response to trafficking in persons is a robust identification framework given that a failure to swiftly and accurately identify victim-survivors results in them effectively being denied the rights to which they are entitled, namely protection and assistance. As evidenced by the lack of data on this issue, both globally and in Australia, victim-survivors of trafficking in persons for the purpose of organ removal are almost never identified.<sup>30</sup> **We submit that in order to meet its international obligation, Australia should examine and, where necessary, amend its existing trafficking in persons identification policies and procedures to ensure they effectively address the unique characteristics and complexities of this particular crime.**<sup>31</sup>

In terms of measures that would assist in the development of effective prevention and identification strategies, Anti-Slavery Australia submits that Australia's current response could be strengthened through the implementation of the following initiatives.

### Awareness, Education and Training

As emphasised in our previous submission to the Organ Trafficking Inquiry, the Australian Government, through the *Organ and Tissue Authority's Strategy 2022-2027*, has

<sup>29</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 15 [51].

<sup>30</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 15 [52].

<sup>31</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 16 [53].



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demonstrated a commitment to awareness raising and public education programs throughout Australia related to organ transplantation. One of the stated goals and objectives of the Strategy is to 'Build Support' so 'more people say yes to donation' through, amongst other initiatives, awareness raising.<sup>32</sup> This is a positive step toward preventing transplant tourism, as research indicates that improved local donation rates can reduce the number of patients seeking transplants overseas.<sup>33</sup>

It is integral that these education and awareness campaigns also address the issue of transplant tourism directly, by informing the public about the consequences of organ trafficking for both the recipient and the donor. As noted in the opening paragraph of this submission, a key issue in the identification of organ trafficking is a reluctance from both donors and recipients to self-identify to authorities. For this reason, research should be conducted to identify groups and communities in which there may be a higher prevalence of transplant tourism. Awareness-raising materials should be developed in consultation with communities to ensure efficacy. These materials should provide key information on referral pathways and emergency service providers to communities across Australia. Materials should also highlight the support services available to victims of organ trafficking in Australia. They should include information on how organ trafficking may appear in different forms and outline the offences of organ trafficking under Australian law.

It is essential that these materials be made available in community languages and should be distributed overseas in countries that have been identified as source countries for transplant tourism. These materials should also be made available in rural and regional communities throughout Australia, through local service providers, community centres and various agencies to ensure that rural and regional patients have access to information, services and support. Anti-Slavery Australia has produced a number of multi-lingual resources related to exploitative practices including forced labour and forced marriage.

In addition, Anti-Slavery Australia recommends that frontline workers and healthcare professionals receive robust and targeted training around the indicators of modern slavery, including the specific indicators of organ trafficking, to ensure these practices are identified and the appropriate procedures are followed. This would tie into the government's *National*

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<sup>32</sup> Australian Government, Organ and Tissue Authority, *Strategy 2022-2027*, 5-6.

<sup>33</sup> Glenn Cohen, 'Transplant Tourism: The Ethics and Regulation of International Markets for Organ' [2013] *Global Health and the Law* 269.

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*Action Plan to Combat Modern Slavery 2020-2025*, specifically Strategic Priorities 1 and 2, and complement existing information and resources available to medical practitioners, such as the Attorney General's Department, Organ Trafficking – Information for medical professionals.

Training should include clear outlines of the obligations that medical professionals have to their patients. This will help clarify the role that healthcare professionals can play in the identification of matters, and assist in the long term collection of data and information for research purposes.

Training should also clearly identify referral pathways. Where relevant, referral pathways may be used by healthcare and other professionals to ensure that potential cases of organ trafficking and transplant tourism are identified and responded to.

The Compassion, Not Commerce Report made the following two recommendations with respect to awareness, education and training:

**Recommendation 8**

The Sub-Committee recommends that the Australian Government establishes a multi-lingual public health education program that:

- addresses the legal, ethical and medical risks associated with participation in organ transplant tourism;
- includes a stream for educating frontline staff such as medical professionals about how to best identify possible cases of organ harvesting and support both vulnerable victims and desperate patients, based possibly on the Anti-Slavery Australia e-learning model;
- is multi-lingual; and
- is designed in particular to educate Australians who were born in, or have family associations in, countries where human organ trafficking is known or suspected to occur.

**Recommendation 9**

The Sub-Committee recommends that the Australian Government includes information on trafficking in human organs and transplant tourism on relevant government websites, including on the SmartTraveller.gov.au website, on country-specific pages of countries where human organ trafficking is known or suspected to occur.

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**Anti-Slavery Australia endorses Recommendations 8 and 9 of the Compassion, Not Commerce Report and recommends that the Australian Government take swift action to implement these initiatives.**

**Data collection and research**

The central principle we wish to emphasise in this submission is the critical need for a systematic system of data collection as well as an appropriately funded national research project that explores the issue of organ trafficking in Australia. Accurate data must be captured to assist understanding of the nature, scale and scope of the problem and must be linked to a national registry. Once this data has been captured, an examination of which data fields could assist to fill existing knowledge gaps should be conducted. For example, data could be linked to prescriptions of immunosuppressant medication.

A national organ transplant registry, coupled with a national research project, will not only assist in the development of effective policies to combat organ trafficking but may themselves be efficient public awareness initiatives.

The Compassion, Not Commerce Report made the following recommendation in relation to the establishment of a national organ transplant registry:

**Recommendation 3**

The Sub-Committee recommends that the Australian Government meets international best practice standards by establishing a comprehensive organ donation data collection repository, based possibly on the ANZDATA model, but comprising a single point of access to data regarding all organ transplantations in Australia, including outcomes of treatment, deaths, travel overseas for treatment, cross referencing against waiting lists and other relevant information.

**Anti-Slavery Australia endorses the above recommendation.**

In addition, we reiterate the recommendation previously made in our submission to the Organ Trafficking Inquiry that stated:

**Further research is required to address existing gaps in knowledge on organ trafficking in Australian contexts and should include:**

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- **Research on the prevalence of organ trafficking within Australia;**
- **Research on the number of Australian citizens and residents who receive organs in overseas jurisdictions including:**
  - **Documented or reported instances where an organ donor was exploited**
  - **Identification of circumstances where the absence of policies or domestic frameworks led to a risk that an organ donor was exploited.**

**Strong legal and regulatory framework**

As highlighted in section 4 above, Australia must do more to strengthen its existing legal framework to address the current levels of impunity that exist around organ trafficking. Recommendation 7 of the Compassion, Not Commerce Report made the following suggestion:

**Recommendation 7**

The Sub-Committee recommends that the Australian Government amend the Criminal Code Act 1995 and any other relevant legislation insofar as offences relating to organ trafficking [to]:

- include trafficking in human organs, including the solicitation of a commercial organ transplant;
- apply to any Australian citizen, resident or body corporate;
- apply regardless of whether the proscribed conduct occurred either within or outside of the territory of Australia;
- apply regardless of the nationality or residence of the victim; and
- apply regardless of the existence, or lack thereof, of equivalent laws in the jurisdiction in which the offending conduct occurred.

We note that the Australian Government has previously stated the offence of trafficking in persons for the purpose of organ removal is distinct from trafficking in human organs, as reflected in the different approaches adopted by other jurisdictions such as the UK and Canada. As such, the issue of trafficking in human organs lies outside the scope of Division 271.<sup>34</sup> In response, Anti-Slavery Australia emphasises the comments of the Special Rapporteur that:

<sup>34</sup> Attorney General's Department, *Findings Report on Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)* (Report, 2023) 76.

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‘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 criminalization 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.’<sup>35</sup>

Hence, **in addition to supporting amendments to the organ trafficking offences under Division 271 of the Criminal Code as outlined in section 4 above, Anti-Slavery Australia also submits that the Criminal Code should be amended in line with Recommendation 7 of the Compassion, Not Commerce Report or alternatively, be addressed through other relevant legislation.**

**Strengthen existing organ donation system in Australia**

As noted previously, transplant tourism by Australians is driven, in large part, by a lack of organs available for transplant in Australia. In the Compassion, Not Commerce Report, the Sub-Committee made the following recommendation:

**Recommendation 11**

The Sub-Committee recommends that the Australian Government seeks to improve organ donation rates through a number of approaches including:

- consultation with the relevant agencies, continue the promotion of organ donation including education and awareness campaigns.
- ongoing funding of the Supporting Leave for Living Organ Donors program and the Australian Paired Kidney Exchange Program (AKX).

<sup>35</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 19 [63].



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- further investigation of other countries donation programs, including Opt-Out organ donation programs to determine whether such a program could be appropriate for the Australian health system.

**Anti-Slavery Australia endorses this recommendation.**

However, as the Special Rapporteur highlighted, the demand for organs will likely never be met through a system of altruistic donations from deceased and living donors. She cautioned against prioritising systematic approaches to increase donor rates at the expense of human rights-based approaches, stating:

'It is ... dangerous to develop policy responses on the basis that the only long-term solution to trafficking in persons for the removal of organs lies in an expansion of supply to meet demand.'<sup>36</sup>

Thus, while we endorse the Sub-Committee's recommendation, **we submit that any initiative by the government to increase the number of organ donors, including any potential awareness raising or public education campaign as suggested above, must form part, but not all, of the government's overall strategy to combat the trafficking of persons for the removal of organs and the trafficking in human organs.**

**Protection for victim-survivors**

The nature of trafficking in persons for the removal of organs presents specific challenges in relation to victim-survivor protection and support.<sup>37</sup> Debates concerning appropriate approaches to organ transplantation too often focus on the needs of donors and rarely, if ever, involve those with lived experience of trafficking for the purpose of organ removal. Similarly, those with lived experience of organ trafficking are often excluded from policy decision-making processes relating to trafficking in persons more generally. As a result, existing mechanisms and procedures are failing to meet the specific and complex needs of victim-survivors of this crime.

For example, Australia could strengthen its response to organ trafficking by ensuring that victim-survivors of trafficking for the purpose of organ removal have access to high-quality

<sup>36</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 18 [60].

<sup>37</sup> Joy Ngozi Ezeilo, *Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children*, UN Doc A/68/256 (2 August 2013) 16 [54].

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medical services that can address both their immediate and long-term needs as well as support their psychological and emotional recovery.

The right of victim-survivors to effective remedy should also be protected and fulfilled through the establishment of a national compensation scheme. This would assist in mitigating any financial disadvantage a person may experience as a result of the deterioration in their health caused by their experience of exploitation.

Furthermore, victim-survivors should not be subject to criminalisation for crimes committed in connection to their exploitation. In the context of organ trafficking, victim-survivors may be subject to criminal sanction for violating laws prohibiting the sale of organs. They may also be subject to criminalisation for other status-related offences such as irregular migration, document forgery or fraud. In line with international good practice, Australia should enshrine the non-punishment principle into domestic law.

**Anti-Slavery Australia recommends that the Australian Government examine and, where necessary, amend its existing trafficking in persons policies and procedures to ensure they adequately protect the rights and support the complex needs of victim-survivors of organ trafficking.**

## Conclusion

Anti-Slavery Australia supports the intention set out in the Bill to improve the Australian Government's ability to collect reliable data in relation to organ transplants upon persons entering Australia. As the present submission and our previous submission to the Organ Trafficking Inquiry emphasise, there is a critical need for greater data collection and research into the issue of organ trafficking. As such, Anti-Slavery Australia supports the proposed amendments outlined in Schedule 1 of the Bill in principle.

However, it is our view that while the proposed changes outlined in the Bill may assist to enhance understanding of the issue of transplant tourism in Australia, the Bill contains a number of inherent limitations. Thus, Anti-Slavery Australia submits that a more comprehensive human rights-based response to the issue is preferred. Such a response would include the following additional measures: the promotion and strengthening of education, awareness and training on the issue of organ trafficking and transplant tourism; the

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enhancement of data collection systems including the establishment of a national organ donation data collection repository that includes information on organ transplants undertaken overseas; greater investment in research on the scale, nature and scope of the issue of organ trafficking and transplant tourism in order to better inform prevention and identification strategies; amendments to the existing organ trafficking provisions under Division 271 of the *Criminal Code*; and specific protection measures aimed at ensuring the rights of victim-survivors of trafficking in persons for the removal of organs are protected and fulfilled.

We further submit that the amendments outlined in Schedule 2 of the Bill may not be necessary given existing provisions in the Migration Act confer on the Minister very broad discretion when determining whether a person is a 'non-citizen of character concern' and equally whether a person meets the prescribed character test.



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15 February 2024

