

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

SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE

RESPONSES TO QUESTIONS ON NOTICE

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Table of Contents

TABLE OF CONTENTS	1
ACKNOWLEDGMENTS	2
1. RESPONSE TO QUESTIONS ON NOTICE	3
LEGISLATIVE AMENDMENTS TO THE CRIMINAL CODE	3
ALTERNATE MECHANISMS TO COLLECT DATA ON TRANSPLANTS OBTAINED OVERSEAS	5
<i>The Australian Census on Population and Housing</i>	<i>6</i>
<i>Mandatory Reporting Requirements for Medical Practitioners</i>	<i>8</i>

Acknowledgments

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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.

1. Response to questions on notice

Anti-Slavery Australia, at the University of Technology Sydney, is pleased to provide our response to questions on notice 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).

During evidence to the Senate Committee on Foreign Affairs, Defence and Trade, Professor Jennifer Burn took questions on notice.

The questions concerned:

- How should the amendment in Schedule 2 of the Bill be drafted and the terms of that amendment.
- Rather than the Incoming Passenger Card, whether a more appropriate mechanism exists to collect data on the issue of organ trafficking and transplant tourism, including the census and/or a mandatory reporting scheme for medical professionals.

Our responses to the questions on notice are outlined in the sub-sections below.

Legislative amendments to the Criminal Code

In relation to our submission regarding the amendments to Schedule 2 of the Bill, Senator David Shoebridge asked:

'If you could articulate, as precisely as you could, how that amendment should be drafted and the terms of that amendment, I'd find that really useful.'

Schedule 2 of the Bill proposes to insert after subparagraphs 5C(1)(bc)(ii) and 501(6)(ba)(ii) of the *Migration Act*, the following terms – 'an offence involving trafficking in human organs.' However, there is no such current offence in Australian law. For example, the existing provisions under Division 271 of the *Criminal Code* do not contain any 'offence involving trafficking in human organs'. Rather, section 271.7B prescribes an 'offence of organ trafficking – entry into and exit from Australia' and section 271.7D prescribes an 'offence of domestic organ trafficking'.

As noted in our previous submission, both the Human Rights Sub-Committee (the Sub-Committee) of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its *Compassion, Not Commerce Report* and the Attorney General's Department through its *Findings Report on the Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the Criminal Code* (the Findings Report) have made recommendations in relation to potential amendments to the existing organ trafficking offences under Division 271 of the *Criminal Code*.

The Sub-Committee made the following recommendation in the *Compassion, Not Commerce Report*, which the Australian Government accepted in principle:¹

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.²

The Attorney General's Department in its *Findings Report* stated:

Finding 12

Amending the offence names in Division 271 Subdivision BA to 'trafficking in persons for the purpose of organ removal' instead of 'organ trafficking' would clarify the scope and intent of these offences.³

¹ Australian Government, *Australian Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Report: Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* (February 2021) 12.

² 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) 87.

³ 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.

To date, neither of these recommendations have been implemented.

We submit that until such time as the government implements the proposed amendments to the offences of organ trafficking under the *Criminal Code* as recommended by the *Compassion, Not Commerce Report* and/or the *Findings Report*, the proposed amendments under Schedule 2 of the Bill should mirror the existing terms of the offences under Division 271 of the *Criminal Code*.

For clarification, we submit that the proposed amendments in Schedule 2 of the Bill should thus be drafted as follows:

1 After subparagraph 5C(1)(bc)(ii)

Insert:

(iia) an offence involving organ trafficking;

2 After subparagraph 501(6)(ba)(ii)

Insert:

(iia) an offence involving organ trafficking;

Alternate mechanisms to collect data on transplants obtained overseas

The Chair of the Committee, Senator Raff Ciccone, further requested information on appropriate mechanisms for data collection outside of the proposed incoming passenger card. In this regard, Senator Ciccone posed the following questions:

‘Do you think maybe something like the census would be a much more appropriate mechanism to collect data rather than this incoming passenger card?’;

‘In which environment would they be more comfortable to actually disclose information that is confidential?’; and

‘Do you think there should also be greater emphasis or scrutiny around the medical practitioners when one within the healthcare system is discovered to have received an organ transplant from overseas in a not morally acceptable manner? Do you think greater focus should also be placed on those individuals and the medical professionals?’.

Below, we outline our submissions with regard to the collection of data on overseas transplants via the Census and/or a mandatory reporting requirement for medical practitioners.

The Australian Census on Population and Housing

Every five years, the Australian Bureau of Statistics (the ABS) conducts a nationwide survey, known as the Census on Population and Housing (the Census), that asks questions of the whole Australian population about things such as their age, country of birth, religion, ancestry, language used at home, work and education. Census data provides 'a snapshot of Australia's people and housing' through dissemination of information on the economic, social and cultural make-up of the country.⁴

The Census is governed by the *Census and Statistics Act 1905* (Cth) (the *Census Act*). Section 8(3) of the *Census Act* provides:

For the purposes of the taking of the Census, the Statistician shall collect statistical information in relation to matters prescribed for the purposes of this section.⁵

Similarly, section 9(1)(a) of the *Census Act* provides a general power to the Statistician to 'collect such statistical information in relation to the matters prescribed for the purposes of this section as he or she considers appropriate.'⁶

The statistical information to be collected in accordance with sections 8(3) and 9(1)(a) is prescribed under the *Census and Statistics Regulation 2016* (Cth). Relevantly, regulation 13 prescribes health, health services and quarantine as one of the matters prescribed pursuant to section 9 of the *Census Act*. In 2021, question 28 of the Census specifically requested information about long-term health conditions diagnosed by a doctor or a nurse.⁷ **We submit that it is therefore within the scope of the Census to request sensitive health information from individuals completing the Census.**

⁴ See Australian Bureau of Statistics, 'The Australian Census' (Web Page) available at: <https://www.abs.gov.au/census/about-census/australian-census>; and Australian Bureau of Statistics, 'Sample Copy of 2021 Census Household Form', *Resources - Education* (Web Page) available at: <https://www.abs.gov.au/census/census-media-hub/resources/education#sample-copies-of-the-2021-census-paper-forms>.

⁵ *Census and Statistics Act 1905* (Cth) s8(3).

⁶ *Census and Statistics Act 1905* (Cth) s9(1)(a).

⁷ See Australian Bureau of Statistics, 'Sample Copy of 2021 Census Household Form', *Resources - Education* (Web Page) available at: <https://www.abs.gov.au/census/census-media-hub/resources/education#sample-copies-of-the-2021-census-paper-forms>.

One benefit of collecting sensitive information via the Census is the protection afforded by the secrecy and non-disclosure provisions of the *Census Act*. In accordance with section 12(2), the results or abstracts of statistics must not be published or disseminated in a manner that is likely to enable the identification of a particular person or organisation.⁸ Section 19 creates offences for any person who is, or has been, the Statistician or an officer to either directly or indirectly, divulge or communicate to another person any information given under the *Census Act*.⁹ In addition, section 19A provides that a person who is, or has been, the Statistician or an officer must not, for a period of 99 years starting from the date of the Census, be required to divulge or communicate any information obtained through the Census, or voluntarily provide such information, to an agency, a court or a tribunal.¹⁰ Together, these provisions ensure that information obtained through the Census remains strictly confidential, a point intentionally emphasised on the Census form in 2021.

We submit that these protections around confidentiality may encourage more honest responses and thus more accurate data when compared to responses likely to be provided via the incoming passenger card. This is because similar provisions concerning secrecy and non-disclosure are not provided under the *Migration Act*.

We note that the position of Senator Dean Smith, as well as the evidence given by the Australian Border Force to this Inquiry, is that the proposed amendments within the Bill may not give rise to any specific legal obligations on the Australian Border Force to interview or apprehend a person who answers the question regarding overseas transplantation in the affirmative. However, given the processing guidelines of the Australian Border Force are not publicly available to Australians or other individuals arriving into Australia, and the *Migration Act* contains no protections against information sharing between agencies, we reiterate our concerns that people entering Australia may be afraid to honestly declare their involvement in obtaining an organ transplant overseas. For this reason, **we submit that the Census may be a more appropriate mechanism of collecting data on overseas transplants than the proposed amendments in the Bill.** However, we note the following challenge to implementation in this regard.

⁸ *Census and Statistics Act 1905* (Cth) s12(2).

⁹ *Census and Statistics Act 1905* (Cth) s19.

¹⁰ *Census and Statistics Act 1905* (Cth) s19A.

According to the ABS, 'a successful Census relies on strong community support. This support is achieved through collecting data of national importance while also ensuring the Census is easy to complete and not seen as too intrusive.'¹¹

In order to ensure that the Census remains relevant as Australia changes and continues to maintain strong community support, the ABS undertakes a review of the Census topics at the conclusion of each Census to inform its recommendation to the Government on the topics that could be included in the next Census.

As mentioned above, the last Census was held in 2021. The next Census is due to take place in 2026 and as such, the review of topics process is already underway. According to the ABS's website, the Census topic review has completed both phases of public consultation and is currently at the stage of testing the proposed topics.¹²

This potentially means that the window of opportunity to raise new topics has closed and any additional proposed topic, such as the collection of information on transplants obtained overseas by Australian citizens and permanent residents, may not make its way into the 2026 Census but rather, may be held over for inclusion in the Census set for 2031.

We submit that while the Census is an appropriate mechanism to collect data on transplants obtained overseas in the long-term, the issue of organ trafficking and transplant tourism requires greater urgency and other mechanisms may therefore be required in the interim.

Mandatory Reporting Requirements for Medical Practitioners

We note that submissions to both this Inquiry and to the Sub-Committee's *Inquiry into Human Organ Trafficking and Organ Transplant Tourism* have argued in favour of the establishment of a national mandatory reporting scheme for organ trafficking and transplant tourism. We also

¹¹ Australian Bureau of Statistics, 'Information about the 2026 Census Topic Review Process', *Overview of the 2026 Census Topic Review* (Web Page) available at: <https://www.abs.gov.au/census/2026-census-topic-review/overview-2026-census-topic-review>.

¹² Australian Bureau of Statistics, 'Information about the 2026 Census Topic Review Process', *Overview of the 2026 Census Topic Review* (Web Page) available at: <https://www.abs.gov.au/census/2026-census-topic-review/overview-2026-census-topic-review>.

note that a scheme of this nature was proposed in NSW by the Human Tissue Amendment (Trafficking in Human Organs) Bill 2016, however the Bill lapsed on prorogation.¹³

Some of the proponents of a mandatory reporting scheme suggest that it is justified on the same grounds as the mandatory reporting scheme currently in place for suspected child abuse. With respect, we contend that an examination of the primary objective behind each scheme is warranted.

The primary objective of mandatory reporting on child abuse and neglect is to protect the child from further harm and to remove them from immediate danger.¹⁴ Conversely, in the case of organ trafficking and transplant tourism, the primary objective is to collect data on the issue and to punish individuals who are involved in the illegal transplantation of organs overseas. The preventative impact of such a scheme is therefore limited to deterrence given that, in this setting, the harm has already occurred.

It is also important to note that the efficacy of the mandatory reporting scheme for child abuse and neglect is heavily debated within the academic literature, with one commentator observing that, 'few clinical issues are the source of as much emotionally charged debate as mandated child abuse reporting.'¹⁵ There also remains a significant gap in high quality research on the effectiveness of mandatory reporting. In fact, a study conducted by McTavish et al concluded that the authors 'were unable to find any high-quality research studies suggesting that mandatory reporting and associated responses do more good than harm.'¹⁶

Some of the arguments advanced against mandatory reporting include concerns that reporting requirements can undermine or jeopardise existing therapeutic relationships and can reduce the likelihood of victim-survivors making disclosures or seeking assistance.¹⁷ For example, a national survey of paediatricians in the United States found that 40% of paediatricians

¹³ For further information, see Parliament of NSW, Human Tissue Amendment (Trafficking in Human Organs) Bill 2016, *Bills* (Web Page) <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2953>.

¹⁴ See Alexia Takis, 'The Mandatory Reporting Debate' (2008) 8 *Macquarie Law Journal* 125, 126 and 146; and Natalie A MacCormick, 'To Mandate or Not to Mandate: A Review of Mandatory Reporting of Suspected Child Abuse and Neglect' (2018) 26 *Journal of Law and Medicine* 334, 336.

¹⁵ Seth C Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law and Policy* (2nd ed, 1999) 41 as quoted in Alexia Takis, 'The Mandatory Reporting Debate' (2008) 8 *Macquarie Law Journal* 125, 127.

¹⁶ Jill R McTavish et al, 'Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-synthesis of Qualitative Studies' (2017) *BMJ Open* 7:e013942, 11, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5652515/pdf/bmjopen-2016-013942.pdf>.

¹⁷ See Ben Matthews et al, *Child Abuse and Neglect: A Socio-legal Study of Mandatory Reporting in Australia* (Report, April 2015) 138, available at: https://www.dss.gov.au/sites/default/files/documents/03_2016/child-abuse-and-neglect-v1-aust-gov.pdf; Alexia Takis, 'The Mandatory Reporting Debate' (2008) 8 *Macquarie Law Journal* 125, 145; and Natalie A MacCormick, 'To Mandate or Not to Mandate: A Review of Mandatory Reporting of Suspected Child Abuse and Neglect' (2018) 26 *Journal of Law and Medicine* 334, 338.

surveyed, who reported negative outcomes, indicated they had lost patients following the making of a report.¹⁸

Anti-Slavery Australia shares these concerns regarding patient welfare in the current context. The establishment of a mandatory reporting scheme for medical practitioners in relation to transplants obtained overseas may undermine the therapeutic relationship they have with patients and could lead to vulnerable people, including both recipients of an organ transplant overseas or victim-survivors of commercial transplant agreements who may be suffering from adverse health impacts, being reluctant to seek medical assistance and treatment that they require for fear of being reported. It is our view that appropriate consideration must be given to the balance between the collection of data on the issue of organ trafficking and transplant tourism and the right of individuals to the highest attainable standard of health.

A further criticism of the mandatory reporting system for child maltreatment is that the system fails to relieve social disadvantage which contributes significantly to many cases. For example, Hansen and Ainsworth criticised the current system for perpetuating a culture that blames parents and holds them solely responsible for their abusive or neglectful behaviour without addressing the associated stressors that increase risk of abuse, such as poverty, lack of support services, poor housing, social isolation, mental illness, substance abuse and intellectual disability.¹⁹

A similar argument could be mounted in relation to the establishment of a mandatory reporting scheme designed to combat organ trafficking and transplant tourism. Mandatory reporting by medical professionals fails to address the structural barriers that lead vulnerable people to seek organ transplantation overseas, such as a lack of available organs domestically and a lack of education around the risks involved to both the donor and recipient of overseas organ transplants. Moreover, it fails to address any of the underlying social or economic determinants, such as poverty, lack of employment opportunities, homelessness and disability, that increase the risk of individuals donating their organs through commercial agreements.

¹⁸ Emalee G Flaherty et al, 'Paediatrician characteristics associated with child abuse identification and reporting: Results from a National Survey of Paediatricians' (2006) 11(4) *Child Maltreat* 361, 364.

¹⁹ Patricia Hansen and Frank Ainsworth, 'Australian Child Protection Services: A Game Without End' (2013) 22(1) *International Journal of Social Welfare* 104, 106 and 108. See also, Natalie A McCormick, 'To Mandate or Not to Mandate: A Review of Mandatory Reporting of Suspected Child Abuse and Neglect' (2018) 26 *Journal of Law and Medicine* 334, 338.

For the reasons outlined above, we recommend that caution be taken not to overstate the effectiveness of any mandatory reporting scheme for medical professionals to combat the issue of organ trafficking and transplant tourism.

In the *Compassion, Not Commerce Report*, the Sub-Committee considered a number of the concerns raised in relation to any proposed mandatory reporting scheme. Ultimately, the Sub-Committee found that:

‘...medical professionals should have an obligation to report knowledge constituting reasonable cause to believe that a person under their care may have been involved in the violation of the rights and dignity of others. It is important however that the appropriate protections are in place to preserve both the privacy of patients and the quality of clinical care. Should the reporting threshold extend to suspicion rather than actual knowledge of a case of transplant tourism, due regard should also be taken to minimise any legal liability for medical professionals with a mandatory reporting obligation.’²⁰

The Sub-Committee subsequently made the following recommendation:

Recommendation 5

The Sub-Committee recommends that the Australian Government works with the States and Territories, transplant registries, and the medical community, to consider the appropriate parameters, protections, and other considerations, to support a mandatory reporting scheme whereby medical professionals have an obligation to report, to an appropriate registry or authority, any knowledge or reasonable suspicion that a person under their care has received a commercial transplant or one sourced from a non-consenting donor, be that in Australia or overseas.²¹

Anti-Slavery Australia endorses the Sub-Committee’s recommendation, in part. We urge the government to undertake a process of consultation with all relevant stakeholders to determine whether a mandatory reporting scheme for medical practitioners is appropriate. If indeed it is determined to be appropriate, then we

²⁰ 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) 57 [3.55].

²¹ 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) 58.

recommend further consultation to determine the relevant scope of the duty and the necessary safeguards required to protect the health and welfare of patients.

In addition, and in line with our previous submission, we submit that any mandatory reporting scheme for medical professionals should form but one part of a comprehensive, rights-based approach to addressing the issue of organ trafficking and transplant tourism. It is critical that the establishment of the scheme be accompanied by a targeted public awareness campaign, clear protocols on identifying and reporting potential cases of organ trafficking and transplant tourism as well as high quality, specialised training for medical professionals to build their capacity to effectively identify, respond and report.

SUBMISSION TO INQUIRY INTO THE MIGRATION
AMENDMENT (OVERSEAS ORGAN TRANSPLANT
DISCLOSURE AND OTHER MEASURES) BILL 2023



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