

INQUIRY INTO HUMAN ORGAN TRAFFICKING AND ORGAN TRANSPLANT TOURISM

Organisation: Australian Catholic Religious Against Trafficking in Humans
(ACRATH)

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Submission from:

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A INTRODUCTION

I About ACRATH

ACRATH (Australian Catholic Religious Against Trafficking in Humans) is an organisation that exists solely to help eradicate human trafficking. ACRATH are endorsed by Catholic Religious Australia. ACRATH's Strategic Plan 2017-2020 lists 5 key objectives:

1. Eliminate all forms of human trafficking in sexual exploitation and in forced labour
2. Eliminate forced marriage in Australia and globally
3. Ensure people who have been trafficked access their rights
4. Promote slavery-free supply chains
5. Develop our organizational sustainability and influence by growing our membership, ensuring robust finances and archiving to preserve the story of ACRATH.¹

These objectives will be achieved by

- raising awareness of human trafficking and slavery
- sharing education resources
- acting regionally and nationally
- working for systemic change locally and globally
- advocating with government
- collaborating with counter trafficking networks

ACRATH thanks the government for the opportunity to submit a paper on this important topic. This submission was prepared with the legal research assistance of students from the Thomas More Law School at Australian Catholic University.

¹ Acrath.org.au. (2017). *What we do / ACRATH*. [online] Available at: <https://acrath.org.au/about/what-we-do/> [Accessed 10 Aug. 2017].

B EXECUTIVE SUMMARY

The following submission highlights these main points:

1. Organ Trafficking is a global phenomenon. In order to address the issue of trafficking in human organs, Australia needs to improve cross national cooperation and enforcement measures. Australia should also accede to comprehensive binding international instruments such as the Council of Europe Convention Against Trafficking in Human Organs.
2. The Convention Against Trafficking in Human Organs provides an internationally agreed upon definition of trafficking in human organs, identifies activities that ratifying States must criminalise in domestic law and incorporates provisions that are specifically designed to prevent and combat illegal organ trafficking.
3. The Criminal Code Act 1995 (Cth) Division 271, Subdivision BA, criminalises activities related to human organ trafficking in Australia, providing a range of penalties for different offences under the provision.
4. Offences under Division 271 should have extraterritorial application so that Australians who procure illegal organ transplants overseas, and those who assist them, can be prosecuted. Australia should also work to strengthen its relationship with potential donor countries to improve processes for criminal investigation of illegal organ trafficking.
5. Organ trafficking exploits people who are made vulnerable by the circumstances of abject poverty. As well as becoming a signatory to international conventions that aim to protect victims of organ trafficking and prevent trafficking from occurring, Australia must consider its international obligations to assist people in developing countries, in particular, its commitment to the United Nations Sustainable Development Goals.

C THE STATISTICS OF ORGAN TRAFFICKING

I *Organ Trafficking - Definition*

The internationally agreed on definition of human trafficking is:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²

Organ trafficking is within the definition of human trafficking. It is important to note that organ trafficking does not necessarily involve “organ snatching” (the forced removal of organs), but can include a reluctant donor who sells an organ at a comparably low price. Victims can include prisoners waiting to be executed or the mentally and physically handicapped.³ Although there is a paucity of data,⁴ countries known to produce victims of organ trafficking include Nepal, India, Peru, Bolivia, Brazil, and Turkey. Recipient countries include the United States, Canada, Italy, Australia, Saudi Arabia, Israel, and Japan.⁵

II *Organ Trafficking – the Problem*

Organ trafficking takes place in a variety of forms, from hospitals which specialise in and have been prosecuted for organ trafficking,⁶ to the seller of a single organ.⁷ Inherent in organ trafficking

² United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 3, paragraph (a).

³ Leonard A Steverson, *Encyclopedia of Transnational Crime and Justice* (SAGE Publications, Inc., 2012) ch Organ Trafficking, 289-91.

⁴ United Nations Office on Drugs and Crime, Assessment Toolkit, Trafficking in Persons for the Purpose of Organ Removal, (2015) https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf

⁵ World Health Organisation, ‘The state of the international organ trade: a provisional picture based on integration of available information’ (2012) <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>

⁶ Frederike Ambagtsheer, Damian Zaitch and Willem Weimar, ‘The battle for human organs: organ trafficking and transplant tourism in a global context’ (2013) 14 *Global Crime* 1, 1.

⁷ Ibid, 2.

is the desperation of many of the parties involved,⁸ including those who sell their organs so that they and their families can survive and those who purchase organs because they do not believe they will survive the waiting time for a transplant. Annual mortality rates globally for those waiting for organ transplants range from 15% to 30%.⁹ Those who travel abroad to procure organs are more likely to die or have the organ fail than those who undergo a transplant in their own country.¹⁰

The World Health Organisation estimates that between 5-10% of all organ transplants globally are conducted illegally.¹¹ Global Financial Integrity, a Washington DC-based institute, ranks the trade of human organs tenth out of twelve illegal transnational activities, and estimate that organ trafficking generates profits of between \$600 million and \$1.2 billion per year globally.¹² Currently it is estimated that at least 20 nationals from Australia go abroad annually for commercial kidney transplants alone.¹³ Doctor-patient confidentiality means that it is often difficult to determine information about the willingness of donors.¹⁴

People who are selling their organs, if they are reimbursed at all, are often not adequately reimbursed nor do they have adequate post-operative care. In a sample cohort of 239 people who sold their kidneys in Pakistan, 93% were only selling their organs in order to repay a debt and 85% reported no economic improvement in their lives, or that they were even able to pay back the original debt.¹⁵ In Egypt, 78% of people who had sold organs, in a sample group of 50, reported deterioration in their health,¹⁶ and 94% regretted their organ ‘donation’.¹⁷ People who sell their organs are vulnerable to commercial exploitation, meaning that the compensation they receive does not reflect the true value of their organ.¹⁸

⁸ Ibid.

⁹ Ibid, 3.

¹⁰ Sheelagh McGuinness and Jean V McHale, ‘Transnational crimes related to health: How should the law respond to the illicit organ tourism?’ (2014) 34 *Legal Studies* 682, 690.

¹¹ Frederike Ambagtsheer, Damian Zaitch and Willem Weimar, ‘The battle for human organs: organ trafficking and transplant tourism in a global context’ (2013) 14 *Global Crime* 1, 4.

¹² Ibid.

¹³ D A Budiani-Saberi and F L Delmonico, ‘Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities’ (2008) 8 *American Journal of Transplantation* 925, 927.

¹⁴ Frederike Ambagtsheer, Damian Zaitch and Willem Weimar, ‘The battle for human organs: organ trafficking and transplant tourism in a global context’ (2013) 14 *Global Crime* 1, 11.

¹⁵ D A Budiani-Saberi and F L Delmonico, ‘Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities’ (2008) 8 *American Journal of Transplantation* 925, 927.

¹⁶ Ibid.

¹⁷ Ibid, 928.

¹⁸ Sheelagh McGuinness and Jean V McHale, ‘Transnational crimes related to health: How should the law respond to the illicit organ tourism?’ (2014) 34 *Legal Studies* 682, 691.

A large part of the problem is that countries such as Australia do not have laws that regulate travel to destination countries for the purpose of organ transplants. People who procure transplants overseas can access insured health care on their return.¹⁹ The Australian government should consider the regulation of insurance companies so that they cannot support the illegal practices surrounding organ trafficking.²⁰

¹⁹ D A Budiani-Saberi and F L Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' (2008) 8 *American Journal of Transplantation* 925, 928.

²⁰ Ibid.

D CURRENT LEGAL PROTECTIONS AGAINST ORGAN TRAFFICKING

I *The Criminal Code*

Prior to the introduction of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Slavery Act)²¹, human organ trafficking was not an offence in Australia.²² Division 271 of the Slavery Act relates to illegal organ trafficking.

The Criminal Code Act 1995 outlines five provisions relating to organ removal or trafficking in Australia, together with penalties. The Act expresses the requisite actions and characteristics necessary to fulfill each offence. In circumstances where the removal of a victim's organs is contrary to the existing laws of the state or territory where the conduct occurs, or the removal of a victim's organs is inconsistent with the victim or their guardian's consent and subsequently has no attachment to a medical or therapeutic need, section 271.7A of the Criminal Code provides that an offender has engaged in human organ removal contrary to the provisions of the subdivision.²³

Section 271.7B of the Criminal Code states that an offender who, pursuant to the provision, engages in the purchase or removal of organs;²⁴ or is reckless as to whether the removal of the victim's organs was a result of their conduct,²⁵ will be penalised by 12 years of imprisonment, regardless of whether the offender is on entry to or exit from Australia.

Section 271.7C of the Criminal Code provides a guideline for offences of organ trafficking which constitute an aggravated offence. These guidelines state that an offender will be criminalised for an aggravated offence if their conduct is performed on a minor²⁶, cruel or inhuman or comprises degrading treatment²⁷ or if the offender, whilst engaging in the removal of the victim's organs, is reckless to the danger of the removal²⁸ or whose conduct subjects the victim to death or serious harm.²⁹ This provision states that offenders who execute their conduct on victims who are under the age of 18, will be penalised by 25 years of imprisonment.³⁰

²¹ Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013.

²² *Human Trafficking And Slavery Legislation* (2017) | Attorney-General's Department (2017) Ag.gov.au <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Human-trafficking-legislation.aspx>>.

²³ *Criminal Code Act 1995*, s271.7A.

²⁴ *Ibid*, s 271.7B (1) (a).

²⁵ *Ibid*, s 271.7B (1) (b).

²⁶ *Ibid*, s 271.7C (1) (a).

²⁷ *Ibid*, s 271.7C (1) (c).

²⁸ *Ibid*, s 271.7C (d) (ii).

²⁹ *Ibid*, s 271.7C (d) (i).

³⁰ *Ibid*, s 271.7C.

In 2011, the Australian Federal police investigated the first, and said to be only, case of organ trafficking. An elderly Sydney woman suffering from a kidney condition was suspected of having trafficked a Filipino woman with the intention of harvesting her kidney.³¹

II Extraterritorial Application of the Criminal Code

Extraterritoriality presents a myriad of issues with regard to enforcement, national integrity and sovereignty. The Commonwealth Criminal Code currently subjects foreign citizens to Australia's laws against the trafficking of humans whilst they are present in the jurisdiction. However, the nature of this offence means that it is – in the majority of cases - a transnational crime.

As with many other human rights issues in Australia, the legislative protections against organ trafficking are largely confined to acts carried out within Australia's borders. In order to effectively and properly address the issue of organ trafficking in Australia, ACRATH support the extraterritorial application of the offence under Division 271. Furthermore, ACRATH urge consultation with other states, so that domestic criminal legislation can be developed to complement that of other nations.

Reasons for Extraterritorial Application

A provision having extraterritorial application allows the relevant enforcement body to have jurisdiction of the offender, regardless of whether they are located inside or outside of Australian territory. This jurisdiction includes enforcement of any action permitted by the statute, including financial remedies.³² In order for the offenders involved in organ trafficking to be brought to justice, extraterritorial application is imperative. Often, foreign nationals are the people who are either organising other (often unknowing) individuals to come to Australia, or to be a donor to an Australian who has travelled overseas to receive an organ transplant. Without extraterritorial application of the Division 271 offence, foreign nationals are not brought under the current jurisdiction of the code once they have left Australian borders. Furthermore, if an Australian has

³¹ *Police Investigate First Case Of Organ Trafficking* (2011) The Sydney Morning Herald
<<http://www.smh.com.au/national/police-investigate-first-case-of-organ-trafficking-20110727-1i0d7.html>>.

³² Jamie Nettleton, Mary Huang and Elizabeth Cameron, *Extraterritorial Application of Australian Law Enforcement against Foreign Companies and Risk of Extradition in respect of Gambling Offences* (18 June 2015), Addisons Lawyers
<<http://www.addisonslawyers.com.au/knowledge/assetdoc/9b0a0d56569f3df1/Extraterritorial%20Application%20of%20Australian%20Law.pdf>>.

travelled overseas to receive an organ transplant, they are also not under the jurisdiction of the current Commonwealth Criminal Code.

Difficulties in implementation

There are potential difficulties which may arise concerning extraterritorial application of domestic criminal law. The most significant is the conflict that may arise with another State's right to sovereignty, and political and legislative independence.³³ Each nation has a right to choose how they legislate with respect to organ trafficking. Furthermore, no nation state may decide unilaterally for the scope of their criminal law to encroach on that of another nation state. What is required is cooperation between states in relation to organ trafficking.

III National Compensation Scheme for Victims of Trafficking and Slavery

ACRATH is aware of and in favour of the current Parliamentary Joint Committee on Law Enforcement's recommendation for a National Compensation Scheme for victims of trafficking and slavery. Recommendation 7 specifies that "The committee recommends the establishment of a national compensation scheme for victims of trafficking, slavery and slavery-like offences to be funded by proceeds of crime."³⁴ ACRATH recommends that the compensation scheme includes victims of organ trafficking and organ transplant tourism.

³³ Oxford University Press, *Max Planck Encyclopedia of Public International Law* (at November 2012) Extraterritoriality, C 'Lawfulness' [6].

³⁴ Commonwealth, *Parliamentary Joint Committee on Law Enforcement: An inquiry into human trafficking, slavery and slavery-like practices*, (2017) xii.

E THE 2014 COUNCIL OF EUROPE CONVENTION AGAINST TRAFFICKING IN HUMAN ORGANS

Adopted by the Committee of Ministers of the Council of Europe in 2014, this Convention is the first legal document to provide an internationally agreed upon definition of trafficking in human organs. The Convention identifies activities that ratifying States must criminalise in their domestic law.³⁵ The Preamble outlines important international instruments that correspond with this issue, which is a serious threat to public health whilst violating human dignity and the right to life. Most importantly, the Convention provides that close international co-operation between Council of Europe member States and non-member States should be encouraged to efficiently combat the global threat posed by the trafficking in human organs.

Provisions set out in the Convention provide information on all key areas of the topic in order to guide States on how these matters should be addressed. They call on governments to establish criminal offences for organ transplants where there is no consent, authorisation, presence of financial gain or a comparable advantage.³⁶ Article 8 further extends the criminal offence to include intentional preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs. Additionally, Article 9 advises Parties to include intentional aiding or abetting and attempts to provide tougher penalties for all circumstances in human organ trafficking where the offence is aggravated. The Convention also provides protection measures for victims and witnesses.³⁷ This will ensure justice for victims who will have greater access to information relevant to their case, and be provided with assistance for their physical, psychological and social recovery and be eligible for compensation from the perpetrators.³⁸ Furthermore, prevention measures specified for both a domestic and international level approach ensure better access to transplantation services.³⁹ The Convention establishes an effective system to prevent and combat the trafficking in human organs.⁴⁰

³⁵ *Council of Europe Convention Against Trafficking in Human Organs*, opened for signature 25 March 2015, CETS No. 216 (not yet in force), Article 2; Declaration of Istanbul Custodian Group, *The Council of Europe Convention Against Trafficking in Human Organs* (2014) The Declaration of Istanbul on Organ Trafficking and Transplant Tourism <<http://www.declarationofistanbul.org/resources/recommended-reading/the-council-of-europe-convention-against-trafficking-in-human-organs>>.

³⁶ Ibid Articles 4 and 7; Treaty Office, *Details of Treaty No.216* (2017) Council of Europe <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216>>.

³⁷ Ibid Chapter IV: Articles 18, 19 and 20.

³⁸ Ibid Article 18.

³⁹ Ibid Chapter V: Articles 21 and 22.

⁴⁰ Ibid Article 1 and Chapter VI: Articles 23, 24 and 25.

This Convention could significantly benefit our domestic law in a number of areas. Article 28 provides that the Convention is open for signature for non-member States which enjoy observer status with the Council of Europe or other non-member States upon invitation by the Committee of Ministers. Australia has previously acceded to other European Conventions for global issues including refugees and cybercrime.⁴¹ In particular, the Council of Europe Convention on Cybercrime enabled co-operation between Australia and other countries for international investigations.⁴² Not only did it create procedures that made investigations more efficient, it also promoted positive changes that strengthened domestic legislation in combatting the threat of cybercrime through all possible related offences which previously lacked a coordinated approach.⁴³

Acceding to the Council of Europe Convention Against Trafficking in Human Organs will have a similar impact. It will increase deterrence against trafficking in human organs both domestically and internationally. The Convention provides a comprehensive legal framework that will assist in preventing and combating illegal transplant activities.⁴⁴ Those who are involved in violating basic human rights, regardless of position and role in the illicit activity, may be liable under the new provisions.⁴⁵ The Convention is also key to prioritising the importance of victim and witness protection whilst assisting with recovery and providing the right to compensation.⁴⁶

⁴¹ Minister for Foreign Affairs, *Australia to Accede to International Cybercrime Convention* (30 April 2010) Department of Foreign Affairs and Trade <<http://foreignminister.gov.au/releases/2010/fa-s100430.html>>. Refugee Council of Australia, *The Refugee Convention* (14 May 2016) Refugee Council <<http://www.refugeecouncil.org.au/getfacts/international/internationalsystem/the-refugee-convention/>>.

⁴² Hamish Barwick, *Australia Signs Up to Europe Convention on Cybercrime* (5 March 2013) Computerworld <[https://www.computerworld.com.au/article/455433/australia_signs_up_europe_convention_cybercrime_/](https://www.computerworld.com.au/article/455433/australia_signs_up_europe_convention_cybercrime_/>)>.

⁴³ Minister for Foreign Affairs, above n 28.

⁴⁴ European Directorate for the Quality of Medicines and Healthcare, above n 23.

⁴⁵ Ibid.

⁴⁶ *Council of Europe Convention Against Trafficking in Human Organs*, opened for signature 25 March 2015, CETS No. 216 (not yet in force), Article 18.

F OTHER RELEVANT INTERNATIONAL INSTRUMENTS

I *Declaration of Istanbul on Organ Trafficking and Transplant Tourism*

Australia participated in the summit that resulted in the Declaration. Principle 6 of the Declaration states that “Organ trafficking and transplant tourism violate the principles of equity, justice and respect for human dignity and should be prohibited.”⁴⁷

II *Australia’s Commitments to the UN Sustainable Development Goals*

ACRATH has a strong concern for the countries from which the organ ‘donors’ are originating. From the cases that are reported on, most of these ‘donors’ are from developing nations that lack the proper education, resources and stability to properly address the issue of organ trafficking.

Many of these ‘donors’ are unaware that they are being trafficked for the purpose of organ trade. They are simply in need of money and so involve themselves with people who orchestrate the organ trade process on their behalf for the recipient in developed nations (such as Australia), who pay a large sum of money in return.⁴⁸ The reasons for organ trade usually arise from desperate circumstances.

ACRATH requests a firmer commitment to the UN Sustainable Development Goals which pledge under Goal 8 to “Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”.⁴⁹ In light of the SDGs, ACRATH recommends a national initiative by the Australian Government for an awareness raising campaign for the Australian community outlining the human rights infringements of the organ transplant process in the exploitation of vulnerable people. There is an obvious demand for organ donors in our Australian community. However, the solution cannot continue to come from trafficked organs from developing nations. Australians who are participating in organ trade need to be educated as to the severe effects of organ trafficking - on the donor and the recipient alike.

⁴⁷ Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 3.

⁴⁸ TC Bierne School of Law, *Organ Trafficking*, The University of Queensland, <<https://law.uq.edu.au/research/research-activities/human-trafficking/organ-trafficking>>.

⁴⁹ The General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, Agenda Items 15 and 116, UN Doc A/RES/70/1, (25th September 2015) [14].

G RECOMMENDATIONS

From the discussion above, ACRATH recommends the following:

1. Offences under Division 271 should have extraterritorial application.
2. Australia should accede to the 2014 Council of Europe Convention against Trafficking in Human Organs.
3. In accordance with the Parliamentary Joint Committee on Law Enforcement's recommendation for a National Compensation Scheme for victims of trafficking and slavery, victims of organ trafficking should also be able to access this compensation scheme.
4. The Australian government should strengthen its relationships with other nations involved in human trafficking to create a complementary global legislative scheme to address trafficking.
5. The Australian government should affirm its commitment to alleviating the circumstances of poverty that facilitate trafficking in humans through the active pursuit of the UN Sustainable Development Goals.

Thank you again for this opportunity to present a submission.

Australia Catholic Religious Against Trafficking in Humans- ACRATH