

Australian legal and policy issues

- 5.1 This chapter examines the current Australian legal framework relating to participation in organ trafficking and transplant tourism, and considers to what degree extraterritorial jurisdiction should be extended.
- 5.2 The chapter also examines non-legislative measures to combat organ harvesting and trafficking, including education, border-based measures, changes to immunosuppressant prescription rules, and domestic organ donation practices.

Commonwealth legislation

- 5.3 Trafficking in persons for the purposes of organ removal was first criminalised through *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005*, amending the *Criminal Code Act 1995* (the Criminal Code). The amendment proscribed the transportation of a person, by force, threat, or deception, for the purposes of exploitation, or with reckless disregard to the risk of exploitation. The removal of a person's organ in a manner contrary to State or Territory law, or without the consent or medical need of the person, was defined as a form of exploitation for these purposes.¹
- 5.4 The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* established, stand-alone offences relating to organ trafficking in the Criminal Code under Subdivision BA of Division 271. Box 3.1 outlines the key elements of the current provisions.

1 *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005*, s. 271.2.

Box 3.1 – Criminal Code Act 1995 provisions relating to organ trafficking²**Subdivision BA – Organ trafficking****271.7A Removal of organs contrary to this Subdivision**

The removal of a person's organ is contrary to this Subdivision if:

- (a) the removal, or entering into an agreement for the removal, would be contrary to the law of the State or Territory where it is, or is to be, carried out; or
- (b) neither the victim, nor the victim's guardian, consents to the removal, and it would not meet a medical or therapeutic need of the victim.

271.7B Offence of organ trafficking - entry into and exit from Australia*Entry into Australia*

- (1) A person (the offender) commits an offence of organ trafficking if:
 - (a) the offender engages in conduct consisting of the organisation or facilitation of the entry or proposed entry, or the receipt, of another person (the victim) into Australia; and
 - (b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision, by the offender or another person, after or in the course of that entry or receipt.

Exit from Australia

- (2) A person (the offender) commits an offence of organ trafficking if:
 - (a) the offender engages in conduct consisting of the organisation or facilitation of the exit or proposed exit of another person (the victim) from Australia; and
 - (b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision, by the offender or another person, after or in the course of that exit.

The penalty for these offences is imprisonment for 12 years.

271.7D Offence of domestic organ trafficking

A person (the offender) commits an offence of domestic organ trafficking if:

- (a) the offender engages in conduct consisting of the organisation, or facilitation, of the transportation or proposed transportation of another person (the victim) from one place in Australia to another place in Australia; and
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2 *Criminal Code Act 1995* (the Criminal Code), ss. 271.7A, 271.7B and 271.7D.

(b) the offender is reckless as to whether the conduct will result in the removal of an organ of the victim contrary to this Subdivision, by the offender or another person, after or in the course of that transportation.

The penalty for this offence is imprisonment for 12 years.

5.5 The fault element set out in subsections 271.7B(1)(b), 271.7B(2)(b) and 271.7D(b) – recklessness to the result of the conduct – is given meaning by subsection 5.4(2) of the Criminal Code; the offender is aware of the substantial and unjustifiable risk that the result of the conduct will occur.³ The Australian Government’s submission emphasises that:

An organ does not need to be actually removed for an organ trafficking offence to be committed. To commit the offence, the offender needs only to be reckless as to whether their conduct will result in the removal of the trafficked person’s organ...⁴

5.6 Sections 271.7C and 271.7E set out aggravated offences to the respective basic offences set out in sections 271.7B and 271.7D. Either offence is aggravated where:

- the victim is under 18;
- the offence is committed with the intent that an organ of the victim will be removed;
- the offender subjects the victim to cruel, inhuman or degrading treatment; or
- the offender engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.⁵

5.7 The penalty for each aggravated offence is imprisonment for 20 years. Where the victim is under 18, the penalty is imprisonment for 25 years.⁶

5.8 The legislation does not define ‘consent’ for the purposes of section 271.7A(b), however the explanatory memorandum indicates it:

... must be full and free consent. Accordingly, the victim or their guardian must not have been coerced or induced – monetarily or otherwise – into consenting to the removal of the victim’s organ.’

3 *Criminal Code*, s. 5.4(2).

4 Australian Government, *Submission 1*, p. 6.

5 *Criminal Code*, ss. 271.7C and 271.7E.

6 *Criminal Code*, ss. 271.7C(1) and 271.7E(1).

Extraterritorial application

5.9 Criminal Code section 271.10 provides that Category B extended geographical jurisdiction as set out by section 15.2 applies to offences against sections 271.7B and 271.7C (inter alia).⁷ The various categories of extended geographical jurisdiction are provided in Box 3.2.

Box 3.2 – Extended geographical jurisdiction – *Criminal Code Act 1995*⁸

Provision	Organ Trafficking Offences	Summary
Section 14.1 Standard Jurisdiction	Sections 271.7D and 271.7E	<ul style="list-style-type: none"> ■ Offence applies to conduct that occurs wholly or partly in Australia and/or has a result in Australia.
Section 15.1 Category A Extended Jurisdiction		<ul style="list-style-type: none"> ■ Offence applies to conduct that occurs wholly or partly in Australia and/or has a result in Australia. ■ Offence applies to conduct occurring wholly overseas by: <ul style="list-style-type: none"> ■ Australian citizens; and ■ Australian bodies corporate. ■ If the conduct occurs wholly overseas, and the offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country.
Section 15.2 Category B Extended Jurisdiction	Sections 271.7B and 271.7C	<ul style="list-style-type: none"> ■ Offence applies to conduct that occurs wholly or partly in Australia and/or has a result in Australia. ■ Offence applies to conduct occurring wholly overseas by: <ul style="list-style-type: none"> ■ Australian citizens; ■ Australian bodies corporate; and ■ Australian residents. ■ If the conduct occurs wholly overseas, and the

⁷ *Criminal Code*, s. 271.10.

⁸ *Criminal Code*, ss. 14.1 and 15.1-15.4.

	offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country.
Section 15.3	<ul style="list-style-type: none"> ■ Offence applies to conduct in Australia or overseas.
Category C Extended Jurisdiction	<ul style="list-style-type: none"> ■ There is a defence based on the law of the foreign country if the conduct occurs wholly in the foreign country and the offender is not: <ul style="list-style-type: none"> ■ an Australian citizen; or ■ an Australian body corporate.
Section 15.4	<ul style="list-style-type: none"> ■ Offence applies to conduct in Australia or overseas.
Category D Extended Jurisdiction	<ul style="list-style-type: none"> ■ There is no defence based on the law of the foreign country where the conduct occurs.

5.10 The result of this was set out by the Australian Government submission, highlighting that sections 271.7B and 271.7C:

...can apply even when the offending conduct occurs wholly outside Australia in cases where the offender is an Australian citizen, resident or body corporate. For example, if an Australian citizen in a foreign country organised a person’s entry into Australia for the purpose of the person’s organ being removed, that would constitute an offence notwithstanding that the offender’s conduct took place overseas.⁹

Transplant tourism

5.11 Division 271 of the Criminal Code criminalises only the act of organising or facilitating the transportation for the purposes of the removal of an organ in a manner contrary to State or Territory law, or contrary to the consent or medical needs of the donor. It does not criminalise transplant commercialism or transplant tourism.

5.12 The extraterritorial provisions made by section 15.2 are of significantly limited utility in realising the application of organ trafficking offences to cases involving transplant tourism. It is the definition of the physical element of the offences, rather than extent of geographic jurisdiction, which prevents the applicability of the offences to transplant tourism. The

9 Australian Government, *Submission 1*, p. 6.

object of the offences outlined in Division 271 of the *Criminal Code* is the movement of the victim to, from, or within Australia. The offences do not address the movement of transplant recipients, nor do they address the movement of any organ or other human tissue that has already been removed from a donor.¹⁰

- 5.13 The offences may however be applicable to one mode of transplant tourism; where a donor person is trafficked from Australia to facilitate a transplant overseas. The Sub-Committee is not aware however of any evidence of Australian donors being trafficked from Australia to facilitate a transplant overseas.
- 5.14 It would appear that the transplant recipient, in this case, would only have committed an offence if they were in fact involved in the organisation or facilitation of the transportation of the donor. The offence is also predicated on the removal of the organ being contrary to section 271.7A, and the recipient being reckless to that fact. It is unclear to what extent the terms used to describe the proscribed conduct – the ‘facilitation’ and ‘organisation’ of transportation – might capture a prospective recipient engaging with an intermediary broker to procure an overseas transplant, absent any definitions provided by the legislation or the explanatory memorandum.¹¹
- 5.15 It is also important to note that an Australian resident or citizen who engages in transplant tourism in the jurisdiction of another country may have committed an offence under organ trafficking laws in that country. It stands to reason however that a person engaging in transplant tourism would choose to do so in a country without laws prohibiting organ trafficking, or laws that are not as rigorously enforced as in Australia.

State and Territory legislation

- 5.16 State and Territory legislation regulates the removal of organs for transplantation and criminalise transplant commercialism. The relevant state and territory offences are substantially consistent with each other.¹² This reflects their origin in model legislation proposed by the Australian Law Reform Commission (ALRC) in its 1977 report *Human Tissue*

10 Australian Government, *Submission 1*, p. 6.

11 B McSherry, ‘Trafficking in persons: a critical analysis of the new Criminal Code offences’ *Current Issues in Criminal Justice*, vol. 18, no. 3, 2007, p. 393.

12 See: *Transplantation and Anatomy Act 1978 (ACT)* s. 44; *Human Tissue Act 1983 (NSW)* s. 32; *Transplantation and Anatomy Act 1979 (NT)* ss. 22E-22F; *Transplantation and Anatomy Act 1979 (QLD)* ss. 39-44A; *Transplantation and Anatomy Act 1983 (SA)* s. 35; *Human Tissue Act 1985 (Tas)* s. 30; *Human Tissue Act 1982 (Vic)* ss. 38-40; and *Human Tissue and Transplant Act 1982 (WA)* ss. 29-30.

Transplants.¹³ The ALRC proposed a prohibition on the buying and selling of human tissue.¹⁴ The ALRC provided a model Bill with its report, which included recommended offences relating to the commercial trade in human tissue,¹⁵ including organs, and provisions that deem any contract relating to that trade to be void.¹⁶

5.17 Anti-Slavery Australia argue that existing State and Territory legislation is insufficient:

Organ trafficking is [a] severe form of exploitation and a grievous human rights abuse. The criminalisation of payment under State law may assist in addressing the exploitation of donors overseas, however the low penalty for committing this offence, and the narrow circumstances captured ... do not sufficiently recognise the extreme physical and psychological harm caused by these practices...¹⁷

5.18 The provisions contained in State and Territory legislation do not appear to provide extraterritorial coverage; they would not cover the actions of persons outside the geographical boundaries of the relevant State or Territory, such as the solicitation or receipt of a commercial transplant overseas. In general terms, statutes are restricted in their operation to activities that take place within their jurisdiction. The power of Australian jurisdictions to legislate extraterritorially depends on the intersection between the issue at hand and the 'peace, welfare and good government' of the jurisdiction.¹⁸

5.19 There is a common law presumption that statutes do not carry extraterritorial application,¹⁹ unless the statute contains words to the

13 Australian Law Reform Commission (ALRC), *Human Tissue Transplants*, ALRC Report no. 7, 1977.

14 ALRC, *Human Tissue Transplants*, ALRC Report no. 7, 1977, pp. 86-87.

15 ALRC, *Human Tissue Transplants*, ALRC Report no. 7, 1977, p. 135 (model Bill s. 40(2)).

16 ALRC, *Human Tissue Transplants*, ALRC Report no. 7, 1977, p. 135 (model Bill s. 40(1)).

17 Anti-Slavery Australia, *Submission 11*, p. 10.

18 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, pp. 372-373.

19 See: *Jumbunna Coal Mine NL v Victorian Coal Miner's Association* (1908) 6 CLR 363 (J O'Connor); *Brwonlie v State Pollution Control Commission* (1992) 61 A Crim R 400; *Zardo v Ivancic* (2001) ACTSC 4; and *Lipohar v R* (1999) 168 CLR 8. The *Criminal Code Act 1995* provides an example of the express consideration of extraterritoriality throughout. s. 14(1) sets out a standard geographical jurisdiction that applies automatically to all offence provisions, and s. 15 enables for individual enactments to apply one of three categories of 'extended' jurisdiction, as detailed in Box 3.2 of this report.

contrary,²⁰ or implies a contrary intention.²¹ An implied contrary intention might be, for example, if the express object of the legislation would be defeated if the statute applied only within the territorial limits of the jurisdiction.²² As neither the state and territory legislation in force, nor indeed the ALRC model Bill, express extraterritorial intent, and the object of the legislation is not defeated by its absence, it is apparent that no extraterritorial application is provided.

Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 (NSW)

5.20 As previously discussed, a Bill before the Parliament of New South Wales, *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*, seeks to amend the *Human Tissue Act 1983 (NSW)*. The amendment would:

- create extraterritorial offences relating to the use of organs and other tissue taken from people without their consent;
- increase the penalty for commercial trading in human organs and other human tissue; and
- impose a duty on registered health practitioners to report any reasonable suspicion they have that a patient or other person has received an organ or tissue that was commercially traded or taken without appropriate consent.²³

5.21 A number of witnesses to this inquiry expressed support for the legislation. Australian Lawyers for Human Rights (ALHR) stated that while it had advocated for the passage of the Bill:

...a federal legislative response to the overseas trade in organs is far preferred and the Commonwealth Criminal Code is the proper place for extraterritorial laws regarding organ trafficking.²⁴

Joint Committee on the Operation of the Transplantation & Anatomy Act (SA)

5.22 In November 2015, tSouth Australia's Parliamentary Joint Committee on the Operation of the *Transplantation and Anatomy Act 1983* reported on potential reform to that Act. The Committee recommended, that:

- the Act should be amended to prescribe as a criminal offence the knowing complicity or reckless knowledge of South Australian

20 *MacLeod v Attorney-General (NSW)* (1891) AC 455 (LC Halsbury) p. 458-459; *Thompson v The Queen* (1989) 169 CLR 1 (J Deane) p. 33; *R v Keyn* (1876) 2 (D Ex) 63, pp. 68, 117, 152, 160-161, and 239; *Huntingdon v Attrill* (1893) AC 150 (LJ Watson LJ), pp. 155-156.

21 *Meyer Heine Pty Ltd v. The China Navigation Co Ltd* (1966) 115 CLR 10, p. 23.

22 J Nettleton, M Huang and E Cameron, 'Extraterritorial application of Australian law', *Addisons Focus Paper*, 18 June 2015.

23 Greens NSW, *Submission 3*, p. 2.

24 Australian Lawyers for Human Rights, *Submission 9*, p. 8.

residents in sourcing abroad human organs of unknown or unethical origin;

- the Act should be amended to require mandatory reporting by medical and health professionals to the Department of Health of any South Australian resident known, or reasonably assumed, to have returned from transplant surgery abroad;
- the Act should be amended to prohibit the involvement of South Australian medical and health institutions in training, joint research or collaboration of any sort with overseas professionals who have engaged in, are engaging in, or for whom there are reasonable grounds to believe will engage in human organ abuse; and
- penalties consistent with prison sentences prescribed in the *Commonwealth Crimes (Child Sex Tourism) Amendment Act 1994* should be imposed on South Australian residents involved in the brokerage and advertising of human organs for purchase or sale abroad.²⁵

Desirability and practicability of extraterritorial jurisdiction

5.23 Were Australia to accede to the Council of Europe Convention, as recommended in chapter 4, consideration would be required as to whether Australia should make a reservation with regard to establishing extraterritorial jurisdiction over organ trafficking-related crimes. These crimes would include participation in transplant tourism in terms of:

...the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting, or for a third party.²⁶

5.24 A number of submissions to the inquiry expressed support for the extension of the extraterritorial jurisdiction of organ trafficking offences. Australian Lawyers for Human Rights described the current provisions set out in the Criminal Code as “deficient” in their capacity to address transnational crime, and considers that extraterritorial jurisdiction is

25 Joint Committee on the Operation of the Transplant and Anatomy Act 1983, *Report of the Joint Committee on the Operation of the Transplant and Anatomy Act 1983*, Parliament of South Australia, 2015, Recommendations 8, 9, 10, and 12.

26 *Council of Europe Convention against Trafficking in Human Organs*, open for signature 25 March 2015, CETS 216 (entered into force 1 March 2018), art. 2(2).

- required.²⁷ The Royal Australasian College of Physicians recommends extending extraterritorial jurisdiction for the crime of organ trafficking.²⁸
- 5.25 The Law Council of Australia recommends that the Australian Government considers extending the geographical jurisdiction of sections 271.7B and 271.7C by applying Category C or D extended geographical jurisdiction (see box 3.2). The Law Council of Australia recommends that the Australian Government consider the risk profile of countries in relation to the presence of local legislation when considering whether Category C or Category D may be more appropriate, noting that the absence of comparable local legislation may be a defence under Category C extended geographical jurisdiction.²⁹
- 5.26 The Law Council of Australia also recommends that Category C extended geographical jurisdiction be considered for offences in sections 271.7D and 271.7E, enabling all persons regardless of citizenship or residence to be captured by the offences.³⁰ In terms of the potential construction of new offences with regard to prospective obligations to the Convention, the Law Council of Australia argues the Australian Government should undertake a public consultation process to examine the desirability of regulating transplant tourism.³¹

Extent of Commonwealth power to legislate

- 5.27 The Law Council of Australia observed that Australia's obligation to the Palermo Protocol to legislate against conduct constituting trafficking in persons for the purpose of the removal of organs does not in itself provide any limitation on the jurisdictional location of that conduct.³²
- 5.28 With regard to the Commonwealth's power to legislate against conduct occurring outside of Australia generally, the *Constitution of Australia* provides that:
- The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs...³³
- 5.29 In *XYZ v Commonwealth* (2006), the Commonwealth submitted, in terms of the extraterritorial application of child sex offences set out in the Criminal

27 Australian Lawyers for Human Rights, *Submission 9*, p. 7.

28 Royal Australian College of Physicians, *Submission 169*, p. 1.

29 Law Council of Australia, *Submission 61*, p. 15.

30 Law Council of Australia, *Submission 61*, p. 15.

31 Law Council of Australia, *Submission 61*, p. 19.

32 Law Council of Australia, *Submission 61*, p. 14.

33 *Commonwealth of Australia Constitution Act*, s. 51(xxix).

Code, that these offences were a 'matter of international concern,' and were as such enabled by the external affairs power. While the Court opted not to deliberate on the virtue of the Commonwealth's submission on matters of international concern, the child sex offence provisions were upheld, with the majority holding that:

...the external affairs power in the Constitution, s 51(xxix), is not limited to Australia's relations with other countries, but includes the power to make laws with respect to places, persons, matters or things outside Australia's geographical limits.³⁴

Legitimate conduct and comparisons with Division 272

- 5.30 A number of submissions drew the Sub-Committee's attention to the provisions made for extraterritorial jurisdiction for offences relating to sexual abuse against children outside of Australia, which are set out by Division 272 of the Criminal Code. Offences under Division 272 apply to Australian citizens, residents of Australia and Australian body corporates.
- 5.31 Australian Lawyers for Human Rights' submission describes Division 272 as an "excellent framework for the drafting of similar extraterritorial provisions" and recommends that Division 271 be amended in similar terms.³⁵ Australian Lawyers for Human Rights further argues that, like Division 272, any reform to create extraterritorial jurisdiction for offences under Division 271 should also ensure these offences carry absolute liability.³⁶
- 5.32 Similarly, Anti-Slavery Australia highlighted Division 273, which provides for offences relating to possession of child pornography material or other child abuse materials outside of Australia, as a potentially comparable offence.³⁷ The Law Council of Australia however observes that transplant tourism:
- ...is not as clear cut as with regards to child sex tourism given that in some circumstances organ transplants may be legitimately and safely performed.³⁸
- 5.33 Kidney Health Australia provided a similar assessment in a 2013 position statement on organ trafficking transplant tourism. While condemning transplant commercialism, the organisation acknowledged that:

34 *XYZ v Commonwealth* (2006) 227 CLR 539 (Gleeson CJ); also 546-7 (Gummow, Hayne and Crennan JJ).

35 Australian Lawyers for Human Rights, *Submission 9*, p. 9.

36 Australian Lawyers for Human Rights, *Submission 9*, p. 11.

37 Anti-Slavery Australia, *Submission 11*, p. 9.

38 Law Council of Australia, *Submission 61*, p. 19.

...there are some instances in which travelling overseas for a kidney transplant, or a live donor travelling to Australia to donate an organ, is considered both legal and ethical and it is important that such a distinction be made. For example, a small percentage of family based live kidney donors do come from overseas ... it is important that such arrangements, provided they are legal and conducted through official means, should not be discouraged.³⁹

- 5.34 The Australian Government also emphasised the importance of avoiding the capture of legitimate, ethical conduct, stating that:

...any new offence provision would need to be carefully considered to avoid perversely criminalising certain conduct. For example, there may be legitimate reasons for an Australian to travel overseas to undergo transplantation, including receiving an organ altruistically donated by an overseas family member.⁴⁰

Deterrence and enforceability

- 5.35 The Australian Government observed that the establishment of an offence may not sufficiently deter individuals:

Research suggests people who are willing to risk the significant health implications associated with organ transplant tourism are likely to be in desperate need of urgent treatment for end-stage organ failure....the risk of a criminal prosecution alone may be insufficient to discourage desperate Australians from travelling overseas to receive life-saving or life-changing organ transplantations.⁴¹

- 5.36 Similarly, the Law Council of Australia considered that a public consultation may be required to consider the public will to criminalise the conduct.⁴² Mr Nicholas Cowdery AM QC of the Law Council observed that:

Australians who would engage in what is called 'transplant tourism' are people who are seriously ill. There is a real policy issue as to whether or not and to what extent government should

39 Kidney Health Australia, 'Organ trafficking and transplant tourism position statement,' available: <http://kidney.org.au/your-kidneys/support/organ-donation/organ-trafficking>, accessed 18 July 2018.

40 Australian Government, *Submission 1*, p. 9.

41 Australian Government, *Submission 1*, p. 9-10.

42 Law Council of Australia, *Submission 61*, p. 19.

impose additional burdens and penalties on those people for seeking to improve their health outcomes.⁴³

5.37 Public health specialist Dr Antonio argued that compassion should be extended, noting that prospective transplant tourists are in a state of desperation and vulnerability.⁴⁴ Dr Antonio argues Australian transplant tourists are themselves ‘victims’ of a system that did not fulfil their needs.⁴⁵

5.38 The Australian Government considered that deterrence may be reduced by a perceived low risk of successful prosecution, noting possible enforceability challenges that the extension of extraterritorial jurisdiction over transplant tourism-related offences could present.⁴⁶ The Australian Government considered possible enforcement challenges to include:

...practical issues around investigating the circumstances in which the transplantation took place, obtaining relevant evidence located overseas, and potentially extraditing offenders, particularly in circumstances where the relevant conduct is not criminalised under the law of the foreign country.⁴⁷

5.39 Similarly the Law Council of Australia observed that extraterritorial offences generally raise “potential difficulties with reliability of evidence which can impact both the prosecution and defence.”⁴⁸ Mr Cowdery did however note that:

There are very high levels of cooperation between law enforcement in Australia and in other jurisdictions where this kind of activity is most likely to occur. For example, in India, China and the Philippines, the Australian Federal Police have very good contacts and operating relationships with the police forces in those countries.⁴⁹

5.40 The Law Council noted that, in general terms, extraterritorial offences should be approached with caution, due to the potential to impinge on the sovereignty of a foreign state.⁵⁰ The Law Council also observed however that application of extraterritorial jurisdiction to organ trafficking offences

43 Mr Cowdery AM QC, Member of National Human Rights Committee, Law Council of Australia, *Committee Hansard*, Canberra, 26 June 2018, p. 4.

44 Dr Maria Soledad Antonio, *Submission 10*, p. 3.

45 Dr Maria Soledad Antonio, *Submission 10*, p. 3.

46 Australian Government, *Submission 1*, p. 10.

47 Australian Government, *Submission 1*, p. 9.

48 Law Council of Australia, *Submission 61*, p. 9.

49 Mr Cowdery AM QC, Law Council of Australia, *Committee Hansard*, Canberra, 26 June 2018, p. 3.

50 Australian Government, *Submission 1*, p. 9.

would provide greater legal effect to the normative consideration already made by Australia's ratification of the Palermo Protocol.⁵¹

International Approaches

- 5.41 The Sub-Committee examined a number of international jurisdiction's approaches to legislating against organ trafficking and transplant tourism. A brief summary of these approaches has been included in Appendix D.

Sub-Committee view

- 5.42 It is, and should remain, a serious crime for an Australian person to exploit another person's vulnerability by soliciting the purchase of their organs, or by trafficking a person for that purpose, within the territory of Australia. The law would not, and should not, excuse such conduct on compassionate grounds were it to victimise an Australian person, in Australia. If an Australian citizen or resident violates the rights and dignity of a person in an identical manner in a foreign jurisdiction, that constitutes no less a violation of that person's rights than if it occurred in Australia. Human rights are universal; legislation should not excuse such conduct against any person regardless of geography and the conduct that the law permits of Australian people should reflect that.
- 5.43 The Sub-Committee recognises the enforceability risk posed by the extension of extraterritorial jurisdiction. Combating transnational crimes always requires close collaboration with foreign jurisdictions, and support in the form of appropriate legislation. The Sub-Committee considers enforcement is practicable to such an extent as to have a sufficient deterrent effect. The Sub-Committee also considers that the extension of extraterritorial jurisdiction of offences provided for by accession to the Council of Europe Convention without reservation would provide a normative statement against participation in organ trafficking by Australian citizens and residents.
- 5.44 The Sub-Committee is satisfied that section 51(xxix) of the Constitution provides sufficient basis for the Commonwealth to apply extraterritorial jurisdiction to criminal offences, particularly with regard to offences that in practice take a significant transnational dimension. Further, whilst noting the Commonwealth's submission in *XYZ v Commonwealth* with regard to 'matters of international concern' was not tested by the Court, the Sub-Committee considers organ trafficking to be no less of such a matter.

51 Law Council of Australia, *Submission 61*, p. 14.

- 5.45 The Sub-Committee notes the challenge posed by the location of Australian organ trafficking legislation across both Commonwealth and State and Territory law. The Sub-Committee considers that the Commonwealth and the States and Territories should collaborate to apply extraterritorial jurisdiction to Australian laws, in the context of accession without reservation to the Council of Europe Convention.
- 5.46 The Sub-Committee considers issues relating to foreign state sovereignty and considers that the Australian Government should consider foreign affairs sensitivities when constructing offences. The Sub-Committee considers that this is not of particular concern in this instance, noting the near-universal prohibition on organ trafficking in foreign jurisdictions. In terms of the particulars of foreign legislation, the 'defence under foreign law' provisions made by three of the four extended geographic jurisdiction categories provided for by section 15 of the Criminal Code provide further opportunities to mitigate sovereignty risk.

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:

- **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.**

Non-legislative measures

- 5.47 The Australian Government considers that:
- ...a holistic approach should continue to be taken to address [transplant tourism], including efforts through the national reform agenda to encourage more lawful organ donations and to raise awareness of the risks associated with transplant commercialism.⁵²
- 5.48 The Australian Government has a range of non-legislative measures to compliment the laws in place to deter, prevent and prosecute cases of organ trafficking, which are outlined below.
- 5.49 The Sub-Committee considers that enhancing non-legislative measures in terms of increased education and awareness of the issue, along with more accurate reporting and increasing domestic donation rates will be invaluable to preventing Australians from seeking out organs from unethical sources, including transplant tourism.

Existing measures

- 5.50 There are a number of existing measures that the Australian government has put in place to deter and prevent organ harvesting and transplant tourism, in line with its commitment to combating human trafficking and slavery. The approach is collaborative and government wide. The Interdepartmental Committee on Human Trafficking and Slavery is a multi-department committee chaired by the Department of Home Affairs, comprising eleven agencies that oversee Australia's response to human trafficking.⁵³
- 5.51 *The National Action Plan to Combat Human Trafficking and Slavery 2015-2019* provides a strategic framework for the Australian Government and its departments to respond to all types of human trafficking and slavery.⁵⁴ It has four key areas:
- prevention and deterrence, detection and investigation, prosecution and compliance, and victim support and protection. Together, they address the full cycle of human trafficking and slavery, from recruitment to reintegration, and give equal weight

52 Australian Government, *Submission 1*, pp. 9-10.

53 Department of Home Affairs, 'Australia's response to human trafficking', *Home Affairs Website* <https://www.homeaffairs.gov.au/about/crime/human-trafficking/australias-response>, accessed 13 September 2018.

54 Australian Government, *Submission 1*, p. 5.

to the critical areas of prevention, law enforcement and victim support.⁵⁵

- 5.52 The Department of Home Affairs provides information and advice to medical professionals to assist them in identifying possible cases of organ harvesting, including the *Organ Trafficking: Information for Medical Professionals Fact Sheet*.⁵⁶
- 5.53 The Australian Government provides assistance and support to victims of trafficking through a range of measures, including the Support for Trafficked People Program and the Human Trafficking Visa Framework.⁵⁷ These programs provide individual support to potential victims and witnesses of human trafficking to assist them in remaining in Australia to receive appropriate care and support as well as assisting law enforcement in investigating cases.⁵⁸
- 5.54 The Australian government provides training to staff in immigration, law enforcement and diplomatic positions to enable frontline workers in a variety of government positions to be able to identify possible victims and witnesses of human trafficking, including organ trafficking.⁵⁹ This includes the biannual Human Trafficking Investigations Course which is designed to advance expertise in areas critical to the successful investigation of human trafficking and slavery, including legislation, investigative methodologies, and victim liaison and support.⁶⁰
- 5.55 The Australian Government regularly engages with the international community in regards to human trafficking, and in 2016 launched the *International Strategy to Combat Human Trafficking and Slavery*.⁶¹ Australia is a co-chair of the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime – Working Group on Trafficking in Persons* and continues to work with other countries in the region to strengthen approaches to combating human trafficking.⁶²

55 Australian Government, *Submission 1*, p. 5.

56 Department of Home Affairs, *Organ trafficking: Information for medical professionals* (factsheet) <https://www.homeaffairs.gov.au/crime/Documents/organ-trafficking-fact-sheet.PDF> accessed 13 September 2018.

57 Australian Government, *Submission 1*, p. 7.

58 Australian Government, *Submission 1*, p. 7.

59 Australian Government, *Submission 1*, p. 7.

60 Australian Government, *Submission 1*, p. 7.

61 Australian Government, *Submission 1*, p. 8.

62 Australian Government, *Submission 1*, p. 8.

Education

5.56 The Australian Government considers education to be an important pillar of the organ donation program and notes:

An important element of the Australian Government's national reform agenda is a co-ordinated community education and awareness program to increase knowledge about organ donation and transplantation. There may be some opportunity to raise awareness of organ trafficking and/or transplant tourism through this activity.⁶³

5.57 Although there is much information available through disparate sources, there is currently no uniform approach to education surrounding organ trafficking and transplant tourism in Australia. There are a number of education and awareness raising campaigns around organ donation and registering with the OTA, but these do not address transplant tourism or organ harvesting.

5.58 Anti-Slavery Australia, have created an e-learning program designed for workers in frontline positions (such as social workers, medical professionals and lawyers). The e-learning program aims to provide training about a variety of slavery and slavery-like practices, how to identify these and how to approach and support victims.⁶⁴ This program, funded by the Australian Government is also available to members of the public via the Anti-Slavery Australia website.

5.59 Further education of workers dealing directly with those who require organ transplantation is seen as key to identifying patients considering going abroad to purchase an organ by experts in international transplantation.⁶⁵ Medical professionals are in the best position to engage with patients about the many risks involved in traveling for major surgery. The Royal Australasian College of Physicians supports "Producing guidance and educational resources for potential organ recipients and for transplant physicians regarding the personal health and social dangers of transplant tourism"⁶⁶

63 Australian Government, *Submission 1*, p. 9.

64 Ms Elizabeth Sheridan, Anti-Slavery Australia, *Committee Hansard*, June 8 2018, p. 29 and Anti-Slavery Australia e-learning course <http://www.antislavery.org.au/e-learning.html> accessed 13 September 2018.

65 B Dominguez-Gil, M Lopez-Fraga, E Muller, J S Gill, 'The key role of health professionals in preventing and combating transplant-related crimes,' *Kidney International*, vol. 92, no. 6, pp. 1299-1302.

66 Royal Australasian College of Physicians, *Submission 169*, p. 1.

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.

Border-based measures

- 5.60 Currently, Australian law does not prohibit Australian citizens traveling out of the country to obtain or purchase an organ. To be in contravention of the law as it stands, “a donor must be moved to, from or within Australia.”⁶⁷ A number of submissions suggested including a declaration on the customs form upon entering Australia, that a person would tick if they had undergone transplant surgery overseas.
- 5.61 Co-Chair of the Declaration of Istanbul Custodial Group, Dr Dominique Martin, outlined her view that requiring a declaration as to whether a person has received a transplant overseas may be ineffective, observing:
- ...that would be very difficult, practically, to enforce and the complications that would ensue from trying to do that would not be worth the effort, given that people could find loopholes anyway.⁶⁸
- 5.62 A submission by Ms Heffernan of Australian Catholic Religious Against Trafficking in Humans, Western Australia, highlighted a checklist of ‘red flag’ indicators and law enforcement interview guidance materials

67 Felicity Heffernan, Australian Catholic Religious Against Trafficking in Humans (Western Australia), *Submission 4*, p. 2.

68 Dr Martin, Declaration of Istanbul Custodial Group, *Committee Hansard*, 8 June 2018, Canberra, p. 42.

developed by the United Nations Office on Drugs and Crime.⁶⁹ This guidance is designed to support the identification and response to trafficking for the purposes of organ removal. The guidance includes material for use when interviewing recipients of overseas organ transplants.

- 5.63 The Sub-Committee believes that highlighting to potential participants the dangers associated with transplant tourism is imperative, should be multi-lingual and approached in a variety of ways, including through DFAT's Smart Traveller website and through general practitioners and transplant specialists interactions with patients.

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.

Schedule 100 Highly Specialised Drugs Program

- 5.64 Immunosuppressant medications are prescribed to organ transplant patients post-operatively in order to prevent the patient's immune system from attacking the new organ and rejecting it.⁷⁰ These medications must be administered and monitored very carefully to ensure the correct amount remains in the patient's bloodstream.⁷¹
- 5.65 Most immunosuppressant medications are classified under the "Schedule 100 - Highly Specialised Drug" category by the Pharmaceutical Benefits Scheme, however some of these drugs now fall under Schedule 4 - Prescription Only Medicine.⁷² Some transplantation specialists are

69 Felicity Heffernan, ACARTH WA, *Submission 4*, pp. 4-5.

70 Transplant Australia, 'Medication', Transplant Australia website <https://transplant.org.au/living-with-your-transplant/the-first-few-days/medication/> accessed 13 September 2018.

71 Transplant Australia, 'Medication', Transplant Australia website <https://transplant.org.au/living-with-your-transplant/the-first-few-days/medication/> accessed 13 September 2018.

72 For example, Tacrolimus is a medication commonly prescribed for transplant patients has a number of classifications. One packet of Tacrolimus 5mg (50 capsules) may be prescribed by a medical practitioner with up to three repeats; but two packets Tacrolimus 5mg (100 capsules) with up to five repeats has to be authorised by a specialist within a transplant unit. See the PBS

concerned that those travelling overseas for a transplant could be prescribed these drugs by a General Practitioner who does not have the specialist knowledge required to safely administer them, and that individuals who have partaken in transplant tourism could simply 'doctor shop' until they found a GP who would provide them with the prescription they desire.⁷³

- 5.66 Medical professionals are likely in the best position to identify possible cases of transplant tourism for two key reasons: patients requiring transplantation will have been identified as such by specialists before they attempt to travel and those returning from overseas after having undergone transplantation will require ongoing medical care, including immunosuppressant drugs. Whilst the majority of GPs would refer a patient requiring transplant medication to a specialist, it is possible that some would simply prescribe the medication without further question.⁷⁴ This not only obscures the number of people turning to transplant tourism, but could put individual's health at risk.
- 5.67 Immunosuppressant drug prescriptions for transplant patients could provide one way in which transplant tourism is tracked and identified, but the discrepancies in the classification of these drugs make this difficult. However, the recent agreement at the April Council of Australian Governments Health Council meeting on progressing real-time prescription monitoring as a federated model is indicative that such tracking is feasible.⁷⁵
- 5.68 The Sub-Committee is concerned that an unintended consequence of the discrepancies in the prescription guidelines for immunosuppressant medications could be aiding patients who have participated in transplant tourism and also potentially putting their health at risk.

website <http://www.pbs.gov.au/medicine/item/6217F-8648E-9561F>, accessed 4 October 2018. Similarly, another immunosuppressant medication Mycophenolate can be prescribed by any medical practitioner in the 250mg (50 capsules) for six packets and up to five repeats, but to prescribe twelve packets and up to five repeats the authority of a transplant unit must be gained. See <http://www.pbs.gov.au/medicine/item/1836P-1837Q-1839T>, accessed 4 October 2018.

73 Prof Coates *Committee Hansard*, 8 June 2018, Canberra, p. 2.

74 B Dominguez-Gil, M Lopez-Fraga, E Muller, J S Gill, 'The key role of health professionals in preventing and combating transplant-related crimes,' *Kidney International*, vol. 92, no. 6, pp. 1299-1302.

75 COAG Health Council *Communique*, 13 April 2018.

Recommendation 10

The Sub-Committee recommends that the Australian Government

- work with medical professionals, and other relevant stakeholders, to examine the impact of non-specialist prescribing of immunosuppressant medication on the efficacy of post-operative care and;
- examine ways to implement capture of data relating to the prescribing of immunosuppressant medication including that relating to transplants occurring overseas.

Domestic donation reform

- 5.69 In answers to questions on notice from the Sub-Committee, the Health Department asserted that Australia's position of "opt-in" has been informed by research, evidence and discussions with state and territory government, and the medical community. The Department observed that 'there is no clear evidence to support that an "opt-out" model would contribute to achieving higher donation rates.⁷⁶
- 5.70 The OTA has noted however that at present only one-third of Australians are registered as donors, despite the fact that more than two-thirds state that they would be willing to donate their organs. This clear discrepancy remains, despite nearly a decade of the reform agenda being in place.
- 5.71 The organ donation rate in Australia for 2017 was 20.7 donations per million people.⁷⁷ According to the Organ and Tissue Authority's 2017 Activity Report, of the 1192 deaths in hospitals that were potential donors, 1093 were requested, of these 642 consented and 510 actual donors were used. The 132 donations that did not proceed were due to medical reasons.⁷⁸ Since the OTA's establishment in 2009, organ donation rates in Australia have risen markedly, but Australia still sits well outside the top ten countries for organ donation rates worldwide.⁷⁹
- 5.72 Internationally, countries have taken a number of different approaches to organ donation. As noted in the Australian Context section of this chapter,

76 Department of Health, Answer to Question on Notice (QoN), *Submission 176*, p. 1.

77 Australian Government Organ and Tissue Authority, *2017 Australian Donation and Transplantation Activity Report*, 2017.

78 Australian Government Organ and Tissue Authority, *2017 Australian Donation and Transplantation Activity Report*, 2017.

79 International Registry in Organ Donation and Transplantation, 'Newsletter 2017', http://www.irodat.org/img/database/pdf/NEWSLETTER2018_June.pdf accessed 13 September 2018.

the majority of the top organ-donating countries do have some form of opt-out system. Spain has an opt-out system, and their donation rate now sits at 46.9 donations per million people, the highest in the world.⁸⁰ Importantly, the Spanish system also ensures that intensive care units are adequately staffed with medical professionals who are able to identify potential donors quickly, and at least one 'transplant coordinator' is employed full time in each hospital to enable swift identification of potential donors, communication between families, potential recipients, the *Organizacion Nacional de Trasplantes*, or ONT and medical staff.⁸¹ Emphasis is placed upon working with potential donors and their families to ensure that consent for donations is received.

- 5.73 An opt-out system of organ donation is currently being considered by the parliament in the United Kingdom.⁸² There is debate as to whether this would be an effective strategy in Australia. This is an important issue, but it was not the focus of this inquiry, and the Sub-Committee notes that there are a range of views that would need to be explored should any changes be proposed.
- 5.74 Dr Helen Opdam, National Medical Director of the Australian Organ and Tissue Authority has expressed doubt in the opt-out system being a 'silver bullet', as it could lead to families not discussing organ donation, and suspicion that people's wishes may not be taken into account.⁸³ She further notes:
- The most powerful and strongest way we get families to agree to donate to donation is through opting in," she says. "[A system of presumed consent] may actually cause more distrust in the community. People may be less willing to donate than if we had a different strategy and positive messaging about donation.⁸⁴
- 5.75 The Sub-Committee notes that increasing the organ donation rate in Australia would be a highly effective method to reduce transplant tourism, as fewer patients would feel they need to seek organs from elsewhere. Australia should carefully examine countries with high performing organ donation systems to seek potential improvements in our own organ donation rates.

80 International Registry in Organ Donation and Transplantation, Spanish data <http://www.irodat.org/?p=database&c=ES#data>, accessed 13 September 2018.

81 C. Baraniuk 'Spain leads the world in organ donation - what's stopping other countries catching up?' *The Independent*, 29 July 2018.

82 A. Matthews-King 'Organ donation consent law change could 'undermine' public trust, ethics experts warn' *The Independent*, 23 February 2018.

83 C. Rodie, 'Opt-out organ donation', *The Saturday Paper*, 2 June 2018.

84 C. Rodie, 'Opt-out organ donation', *The Saturday Paper*, 2 June 2018.

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).
- 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.