
The Parliament of the Commonwealth of Australia

Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism

Human Rights Sub-Committee

House of Representatives

Joint Standing Committee on Foreign Affairs, Defence and Trade

November 2018
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Foreword

Human organ transplantation is one of the miracles of medical science that has given hope to hundreds of thousands of people worldwide. The act of organ donation is a tremendous demonstration of the power of compassion to transform the lives of many people.

Australia has a lot to be proud of in the field of organ transplantation. It is a world leader in successful transplant outcomes while our donation rate has more than doubled in recent years. In 2017, 1,675 Australian lives were transformed by 510 deceased and 273 living organ donors and their families. There were 832 kidney transplants, 281 liver transplants, 206 lung transplants, 98 heart transplants, 51 pancreas transplants, and a small intestine transplant.

Sadly, the reality is that the demand for donor organs outstrips supply. Around 1,400 Australians are currently waitlisted for a transplant. A further 11,000 are on dialysis, many of whom would benefit from a kidney transplant.

This shortfall is common to many countries, and it is this gap between the number of people needing organ transplants of all descriptions and the limited supply of freely donated organs, made available through compassion and altruism, that has generated a black-market trade.

In this illicit commercial market of organ trafficking and transplant tourism, desperate people, often facing end stage renal disease and other grave conditions, may travel to distant countries and pay tens of thousands of dollars and more, for an organ transplant where the donor is poor, exploited or unable to give free and informed consent to donation.

Organ trafficking, the unethical removal, transfer or commercialisation of human organs for transplantation outside legal frameworks poses severe risks for both organ recipients and donors. It is an illicit trade that changes over time with developments in transplantation surgery techniques, the availability of medical infrastructure, uneven economic development, migration patterns, demographic trends, socio-economic exclusion, and the evolution of national multinational criminal networks.

This report by the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade was prompted, in the first instance, by longstanding allegations by non-government organisations and individuals about alleged human organ harvesting and trafficking occurring in one country.

During the course of the Sub-Committee's inquiry however, it quickly became clear, especially through input from expert witnesses, that human organ trafficking is a broad international problem encompassing many countries around the world. The organ trade has evolved and continues to evolve under the influence of forces of demand and supply as well as changes in national and international regulation and law enforcement.

Judgements made about the extent and geographical focus of organ trafficking and transplant tourism a decade or more ago may have limited validity in relation to present trends and circumstances, and this report demonstrates that without the collection of accurate data, solutions will be difficult to create.

This report examines the global prevalence of human organ trafficking and the scope of Australian participation within this illicit trade. The report further considers international frameworks to combat organ trafficking and organ transplant tourism and specifically recommends that Australia sign and ratify the Council of Europe Convention against Trafficking in Human Organs.

The report further recommends that the Australian Government pursue a range of measures to strengthen Australia's involvement in international efforts to combat human organ trafficking, improve relevant data collection, support public health education programs, strengthen Australia's legal prohibitions on organ trafficking, and thoroughly investigate reforms that would enhance Australia's domestic organ donation program.

With regard to the last issue it should be noted that surveys show the majority of Australians – 69 per cent - are willing to donate their organs and/or tissue when they die. In Australia, 90 per cent of families say yes to donation when their loved one is a registered donor.

Despite this apparent support for organ donation, and a majority of Australians believing that registering is important, only one in three Australians are registered as donors. While 71 per cent of Australians think it is important to talk about organ donation with their family, only half – 51 per cent -of Australians have held this discussion about whether they want to be a donor with their loved ones.

This report largely deals with measures that are aimed at suppressing human organ trafficking and transplant tourism. However, a comprehensive solution to this grim trade must involve better harnessing the wells of altruism that exist within Australia and indeed, in countries across the world.

Compassion, not commerce is the key.

The Hon Kevin Andrews MP
Chair



Membership of the Committee

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Terms of reference

That, pursuant to paragraph two of the Committee's resolution of appointment, the Committee resolves to undertake an inquiry into Strategic Priority 4 of the Attorney General's Annual Report 2015-16, in particular with regard to the offence of Organ Trafficking under division 271 of the Criminal Code and whether it would be practicable or desirable for:

- A) this offence to have extraterritorial application; and
- B) Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs.



List of abbreviations

AAIC	The Australian Advocacy and Initiatives Committee
ALRC	Australian Law Reform Commission
ANZDATA	The Australia and New Zealand Dialysis and Transplantation Registry
ANZOD	Australian & New Zealand Organ Donation Registry
COTRS	China Organ Transplant Response System
DAFOH	Doctors Against Forced Organ Harvesting
ETAC	The International Coalition to End Transplant Abuse in China
JSCFADT	Joint Standing Committee on Foreign Affairs, Defence and Trade
OSCE	Organization for Security and Co-operation in Europe
OTA	The Organ and Tissue Authority
OTS	Overseas Transplant Survey
RACP	The Royal Australasian College of Physicians
TSANZ	Transplant Society of Australia and New Zealand
WHO	The World Health Organization
WMA	World Medical Association
UN	United Nations

UNODC United Nations Office on Drugs and Crime



List of recommendations

2 Organ trafficking and organ transplant tourism in the global context

Recommendation 1

The Sub-Committee recommends that the Australian Government pursue through the United Nations the establishment of a Commission of inquiry to thoroughly investigate organ trafficking in countries where it is alleged to occur on a large scale.

Recommendation 2

Given the contention and ongoing debate around transplant practices in China, the Sub-Committee recommends that the Australian Government:

- monitor the transplantation practices of other countries with regard to consistency with human rights obligations, including with regard to the use of the organs of executed prisoners;
- seek the resumption of human rights dialogues with China;
- continue to express concern to China regarding allegations of organ trafficking in that country; and
- offer to assist with the further progression of ethical reforms to the Chinese organ matching and transplantation system.

3 Australian involvement in organ trafficking and transplant tourism

Recommendation 3

The Sub-Committee recommends that the Australian Government meets international best practice standards by establishing a comprehensive organ donation data collection repository, based possibly on the ANZDATA model, but comprising a single point of access to data regarding all organ transplantations in Australia, including outcomes of

treatment, deaths, travel overseas for treatment, cross referencing against waiting lists and other relevant information.

Recommendation 4

The Sub-Committee recommends that the Australian Government ensures that suitably-anonymised data regarding the participation by Australians in overseas commercial transplants, or those involved in organ procured from a non-consenting donor overseas, be shared with appropriate international partners, in order to combat transnational organ trafficking through cross-jurisdictional intelligence sharing.

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.

4 International frameworks to combat organ trafficking and organ transplant tourism

Recommendation 6

The Sub-Committee recommends that the Australian Government sign and ratify the Council of Europe Convention against Trafficking in Human Organs, and works with the States and Territories to make the requisite amendments to Commonwealth and State and Territory legislation and ensure non-legislative obligations are met.

5 Australian legal and policy issues

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.

Recommendation 8

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

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

Recommendation 9

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

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.

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.

6 Case study on alleged human tissue trafficking

Recommendation 12

The Sub-Committee recommends that the Australian Government works with the States and Territories, as a matter of priority, to ensure that any person or body corporate importing human tissue into Australia for commercial purposes produces verifiable documentation of the consent of the donor person or their next-of-kin. This could include appropriate legislative changes at the Commonwealth or State and Territory level where required.

Introduction

- 1.1 On the 21 June 2017 the Human Rights Sub-Committee was tasked by the Joint Standing Committee on Foreign Affairs, Defence and Trade, to undertake an inquiry into the organ trafficking and transplant tourism.
- 1.2 The terms of reference required the Sub-Committee to examine this broad issue including what Australia is doing to prevent and deter the practice of organ trafficking and transplant tourism both in Australia and overseas. In addition the Sub-Committee was asked to consider, whether it would be desirable or practical for Australia to accede to the 2014 Council of Europe Convention against Trafficking in human organs.

Definitions

- 1.3 There are a number of key terms relating to organ trafficking and transplant tourism relevant to this inquiry. This section outlines definitions for each of these terms, as they will be used within this report.

Organ trafficking

- 1.4 'Organ trafficking' encompasses two related types of activity: trafficking in human organs; and the trafficking of persons for the purpose of organ removal.¹ 'Trafficking in human organs' refers to the unethical or illegal removal, transference or commercialisation of human organs, outside of

1 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, p. 93.

the governance system of the relevant jurisdiction. Where trafficking in human organs is a crime, the object of that crime is the organ.² The Australian Government considers 'trafficking in human organs' to mean:

...the illicit trafficking in human organs, tissues or cells obtained from living or deceased donors and transacted outside the legal national system for organ transplantation.³

1.5 'Trafficking of persons for the purpose of organ removal' refers to the recruitment of a person, transportation of a person, or transference of a person to the control of another person, for the purpose of removal of an organ, outside of the governance system of the relevant jurisdiction. Where the trafficking of persons for the purpose of organ removal is a crime, the object of that crime is the trafficked person.⁴

1.6 It is important to note that organ recipients or donors may travel internationally legitimately, outside of commercial arrangements. For example, a recipient may travel to another country where a relative is a tissue match and has volunteered to donate kidney or a partial liver without any commercial transaction having taken place.

1.7 Organ trafficking is defined in several international instruments. These instruments will be discussed in detail in chapter 4 of this report. The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* supplementing the *United Nations Convention against Transnational Organized Crime* (the Palermo Protocol which is discussed further in Chapter 4) defines organ trafficking in the context of the broader prohibition on trafficking in persons, defining 'trafficking in persons' as:

...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...the removal of organs...the consent of a victim...shall be irrelevant...⁵

1.8 The *Council of Europe Convention against Trafficking in Human Organs* (the Council of Europe Convention, this is discussed further in Chapter 4) was

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

3 Australian Government, *Submission 1*, p. 3.

4 Dr M Soledad Antonio, *Submission 10*, p. 3.

5 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003), art. 3(a).

established in part in response to a definitional gap in the Palermo Protocol identified by a joint United Nations and the Council of Europe study. The joint study established that the Palermo Protocol addressed only trafficking of persons for the purpose of organ removal, without consideration as to trafficking in human organs themselves. The Council of Europe Convention sought to address this gap, defining ‘trafficking in organs’ as the “illicit removal of human organs...without the free, informed and specific consent of the living or deceased donor” or where a “donor, or a third party, has been offered or has received a financial gain or comparable advantage” or the “transportation, transfer, receipt, import [or] export” of organs removed under these circumstances.⁶

- 1.9 The *Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (the Declaration of Istanbul, this is discussed further in Chapter 4) is a set of principles and proposals towards the prevention of organ trafficking, developed by representatives of international scientific and medical bodies. Agreed at a gathering convened by the Transplant Society and the International Society of Nephrology, the declaration defines organ trafficking as:

...the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs 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 to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.⁷

Organ transplant tourism

- 1.10 The term ‘organ transplant tourism’ refers to the cross-border travel of a person to facilitate an organ transplant. While there is no legal definition of transplant tourism under Australian law, the Australian Government considers the term to mean:

...a prospective organ recipient voluntarily travelling to a foreign country for the purpose of undergoing organ transplantation. The organ may be acquired through legal, illegal or unethical means, including without the full and free consent of the donor.⁸

6 *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).

7 *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (Declaration of Istanbul), ‘Definitions’, p. 2.

8 Australian Government, *Submission 1*, p. 3.

- 1.11 The World Health Organization (WHO) and the Declaration of Istanbul provide a shared definition, considering transplant tourism to be a subset of ‘travel for transplantation’:
- Travel for transplantation is the movement of organs, donors, recipients or transplant professionals across jurisdictional borders for transplantation purposes. Travel for transplantation becomes transplant tourism if it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centers) devoted to providing transplants to patients from outside a country undermine the country’s ability to provide transplant services for its own population.⁹
- 1.12 The Law Council of Australia notes that while the WHO/Declaration of Istanbul definition is not binding, it is “internationally accepted and hence instructive.”¹⁰ The importance of the WHO/Declaration of Istanbul definition, as the basis of a common framework between international standards bodies and the international medical community, is highlighted by the United Nations, which has noted that the previous lack of an agreed definition “made it more difficult to understand and analyse the problem and its extent, and eventually to take appropriate countermeasures at the national, regional and international levels.”¹¹

Origins and conduct of the inquiry

- 1.13 The inquiry of the Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Sub-Committee into Human Organ Trafficking and Organ Transplant Tourism arose from a series of private briefings.
- 1.14 The Human Rights Sub-Committee was approached by the Falun Dafa Association of Australia who provided a private briefing together with authors David Matas and David Kilgour on 22 November 2016 regarding the alleged ‘harvesting of organs’ sourced from political prisoners, prisoners of conscience, and those sentenced to execution by China.
- 1.15 Kilgour, Matas along with fellow author Ethan Gutman had published an update to an earlier account of the alleged trafficking of organs in China entitled: *Bloody Harvest/The Slaughter - An Update*. This publication examines information concerning the transplant programs of hundreds of

9 Declaration of Istanbul, ‘Definitions’, p. 2; World Health Organization, *Global glossary of terms and definitions on donation and transplantation*, 2009, p. 14.

10 Law Council of Australia, *Submission 61*, p. 7.

11 United Nations. *Yearbook of the United Nations*, 2006. New York: United Nations Publications, vol. 60, 2009, p.1306.

hospitals in China and claims that the Chinese government has been performing 60,000 to 100,000 transplants per year since the year 2000 (as opposed to the official Chinese claim of approximately 10,000 per year) and the primary source for transplanted organs were imprisoned Falun Dafa practitioners.¹²

- 1.16 It is outside the capacity of the Sub-Committee to prove or disprove these allegations. However given the importance of this issue, the Sub-Committee wished to establish how extensive the practice of organ trafficking may be with regard to Australian and what Australia might do to combat the illicit sale and purchase of human organs.
- 1.17 A briefing was requested from the Department of Health, the Department of Foreign Affairs, and the Attorney-General's Department to discuss organ trafficking predominantly from an Australian perspective.
- 1.18 The Sub-Committee also held a private briefing involving academics specialising in organ transplant medicine and international organ trafficking on the 9 May 2017 which was interrupted by business in the Parliament on the day. Witnesses were invited back on the 13 June 2018 to complete this briefing. These witnesses discussed the extent of organ trafficking participated in by Australians, allegations brought by the Falun Dafa Association against China, and the issue of organ transplant trafficking and tourism more broadly.
- 1.19 The Sub-Committee was concerned with the allegations raised by the Falun Dafa Association and by the apparent growth in this trade worldwide. The Sub-Committee wished to ascertain if Australian measures to deter and prevent organ trafficking in Australia and by Australians have kept pace with this growing trade.
- 1.20 Pursuant to paragraph two of its resolution of appointment, the Committee is empowered to consider and report on the annual reports of government agencies, in accordance with a schedule presented by the Speaker of the House of Representatives.¹³
- 1.21 On 21 June 2017, the Committee resolved to undertake an inquiry into the *Attorney General's Department Annual Report 2015-16*, particularly Strategic Priority 4: Pursuing national responses to serious and organised crime and improving community safety.¹⁴

12 D Kilgour, E Gutmann, and D Matas, *Bloody Harvest/The Slaughter: An Update*, 2017 revised edition, pp. 268, 364. *Exhibit 2*.

13 JSCFADT, 'Resolution of Appointment', *House of Representatives Votes and Proceedings*, No. 7, 15 September 2016, p. 157; *Journals of the Senate*, No. 4-12 September 2016, pp 138-140.

14 Attorney-General's Department, *Annual Report 2015-16*, Part 2: Strategic Priority 4, www.ag.gov.au/Publications/AnnualReports/15-16/Pages/Part2-Performance-statement/strategic-priority-4.aspx accessed 16 March 2018.

- 1.22 The Committee referred the inquiry to the Human Rights Sub-Committee to undertake with the following terms of reference:
- The Committee will have regard to the offence of Organ Trafficking under division 271 of the Criminal Code and whether it would be practicable or desirable for:
- this offence to have extraterritorial application; and
 - Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs.¹⁵
- 1.23 The Human Rights Sub-Committee launched the inquiry on 23 June 2017 with a press release.¹⁶
- 1.24 As the terms of reference for the inquiry were quite specific, the Sub-Committee took a targeted approach and sought to contact organisations and individuals with expertise in transplantation, medical ethics and the law. Contact was also made with the people and organisations that had appeared at earlier private briefings. inviting written submissions. The Committee received and published over 170 submissions. Submissions are available on the Committee’s website.¹⁷ The full list of submissions and other evidence is at Appendix A.
- 1.25 Permission was sought from the participants of the private briefings that were held prior to the commencement of the inquiry to publish the transcripts so that the information taken at the briefing could be used as evidence for the inquiry. The transcripts of the briefings are available on the Committee’s website. The full list of witnesses is at Appendix B.
- 1.26 The Committee thanks those submitters and witnesses who have provided evidence to the inquiry.

Outline of report

- 1.27 Chapter 2 assesses the global prevalence of organ trafficking, international legal frameworks and the risks of organ transplant tourism for donors and recipients.

15 JSCFADT, Inquiry into human organ trafficking and organ transplant tourism, *Terms of reference*, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Terms_of_Reference accessed 16 March 2018.

16 JSCFADT, Human Rights Sub-Committee, ‘Deterring International Human Organ Trafficking’, *Media release*, 23 June 2017, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Media_Releases accessed 16 March 2018.

17 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Submissions

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- 1.28 Chapter 3 examines the scope of Australian participation in organ trafficking and transplant tourism and the adequacy of the data available on organ trafficking by Australians.
- 1.29 Chapter 4 examines international frameworks to combat organ trafficking and organ transplant tourism and considers the question of whether Australia should sign and ratify the European Convention against Trafficking in Human Organs.
- 1.30 Chapter 5 examines the current Australian legal framework relating to participation in organ trafficking, and considers whether or to what degree extraterritorial jurisdiction should be extended.
- 1.31 Chapter 6 examines as a case study of alleged human tissue trafficking, the issues relating to the *Real Bodies* commercial anatomical exhibition on display in Australia during the course of this inquiry.

Organ trafficking and organ transplant tourism in the global context

- 2.1 In the course of this inquiry, the Sub-Committee received a range of evidence relating to known and suspected organ trafficking markets, the limitations of available data with regard to organ trafficking and transplant tourism, and the medical, ethical, social and economic risks associated with transplant tourism. This chapter examines the prevalence of organ trafficking and organ transplant tourism internationally, discussing allegations relating to organ trafficking in China, and provides an assessment of risks associated with seeking commercial organ transplants overseas.

Global prevalence

Limited availability of data

2.2 Data on the prevalence of organ trafficking is limited; and analysis of organ trafficking and transplant tourism as transnational issues has been largely reliant on qualitative research. Data collected by specific jurisdictions has limited value for transnational analysis and response due to a lack of standardisation in data reporting across jurisdictions.¹ This issue is summarised by the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children:

Available information on trafficking in persons for the removal of organs is incomplete ... those involved in trafficking in persons for the removal of organs (including victims) have very little incentive to come forward ... [healthcare] providers who end up treating persons who have obtained organs abroad may be inhibited from sharing information with the authorities owing to concerns over patient privacy, their own obligations of confidentiality, uncertainty as to whether any laws have been breached or, indeed, their own complicity in the arrangement. Furthermore, definitional problems and confusion contribute to poor reporting and analysis...²

2.3 Seeking to redress these limitations, the General Assembly of the United Nations resolved in September 2017 that the United Nations Office on Drugs and Crime would work with relevant stakeholders to enhance the collection and analysis of data relating to trafficking in persons for the purpose of organ removal. This work is to be coordinated by the United Nations Inter-Agency Coordination Group against Trafficking in Persons and is to draw data from Member States, the World Health Organization, and other UN bodies.³

1 United Nations General Assembly (UNGA), 'Report of the Special Rapporteur on trafficking in persons, especially women and children, 68th session', UN Doc. A/68/256, 2 August 2013, para. 22.

2 UNGA, 'Report of the Special Rapporteur on trafficking in persons...', UN Doc. A/68/256, 2 August 2013, para. 22.

3 UNGA resolution no. 71/322, 'Strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for the purpose of organ removal and trafficking in human organs,' UN Doc. A/RES/71/322, 25 September 2017.

Estimates of the global trade in organ trafficking and organ transplant tourism

- 2.4 Despite the limitations of available data, broad estimates have been made concerning the scale of the illicit trade in human organ transplantation.
- 2.5 Trafficking in human organs, and trafficking in persons for organ removal, are human rights crimes, as codified in a number of international instruments. The commercial trade in human organs is near-universally prohibited. Despite these prohibitions and restrictions, the illicit commercial trade in human organs has been estimated by the research advisory organisation Global Financial Integrity to be worth between US \$840 million and \$1.7 billion globally each year.⁴ Up to 10 per cent of kidney transplants worldwide may now involve commercially traded organs.⁵
- 2.6 Table 2.1 provides an estimate of rates of global commercial transplantation and prices paid by recipients as reported in the Global Financial Integrity Study published in 2017.

Table 2.1 – Overview of the commercial organ market

Organ	Global illicit transplants (per annum)	Price range (\$US)
Kidney	7,995	\$50,000-\$120,000
Liver	2,615	\$99,000-\$145,000
Heart	654	\$130,000-\$290,000
Lung	469	\$150,000-\$290,000
Pancreas	233	\$110,000-\$140,000
Total	11,966	\$840 million-\$1.7 billion

Source C May, 'Transnational crime in the developing world', Global Financial Integrity, 2017.

- 2.7 Other studies have reported similar prices for commercial transplants. For example, in 2006 a World Health Organisation Study found that price of a renal transplant ranged from between \$70,000 and \$160,000.⁶
- 2.8 This illicit trade is enabled by complex transnational criminal networks involving predatory brokers, human traffickers, unscrupulous clinicians,

4 C May, 'Transnational crime in the developing world', *Global Financial Integrity*, March 2017, p. 29.

5 P Garwood, 'Dilemma over live-donor transplantation', *Bulletin of the World Health Organization*, vol. 85, no. 1, January 2007, p. 5.

6 Y Shmazono, The state of the international organ trade: a provision picture based on integration of available information. *Bulletin of the World Health Organization*, Vol. 85, No12, 2007, pp. 901-980.

and corrupt officials.⁷ Social media and other forms of online advertising have provided a new means for brokers to target desperate prospective transplant recipients directly, inducing them to travel overseas to receive transplantation, a practice known as ‘transplant tourism’.⁸ Table 2.2 outlines the participants in this trade. Participants may take one or more roles in the network.

Table 2.2 – Roles of participants in the commercial organ trade

Role	Description
Donors (victims)	Individuals from whom the organ is removed. Donors may receive a payment, be coerced. Voluntary donors are typically motivated by socioeconomic disadvantage, yet frequently experience an overall reduction in their socioeconomic status due to the impact of physical and mental health outcomes associated with commercial donation on their employability and social standing.
Recipients (patients)	Individuals who purchase the organ and undergo transplantation. Recipients are typically middle- and high-income individuals from developed states or high-income individuals from developing states. In some instances, recipients may purchase ‘packages’ from brokers – including travel, accommodation, transplantation, and post-operative care.
Brokers	The individual who coordinates the operational network, typically framework of an organised crime group. The individual recruits clinicians and other facilitators as well as brokering transactions. The individual is responsible for the recruitment of recipients, through advertising or word-of-mouth. In larger networks, recipient recruitment and coordination roles may be undertaken by separate individuals. The broker may deceive both the donor and recipient about the nature, legality and terms of the arrangement.
Recruiters	The individual responsible for identifying and soliciting potential donors. These individuals may have been donors at one point themselves; like other forms of human trafficking, organised crime networks may seek to co-opt victims into the criminal endeavour. Recruiters may double as minders.
Minders	The individual responsible for facilitating the transportation of the donors and recipients. The individuals serve as drivers, ‘enforcers’ to ensure compliance from the donor, and service providers to recipients. Minders may double as recruiters.
Medical professionals	The surgeons, nephrologists, anaesthesiologists, nurses, technicians, etc. involved in determining whether the donor and recipient are compatible, as well as performing the actual transplantation. Some of these individuals may not be aware of the illicit nature of the transplant.
Public officials	Law enforcement, customs and immigration agents, administrators and healthcare officials who facilitate the operations of the criminal network.
Service providers	Other actors, who may or may not be aware of involvement in illicit activity, such as medical tourism agencies, transport providers, hospitals, laboratories, hotels and translators.
Sources	C May, ‘Transnational crime in the developing world’, <i>Global Financial Integrity</i> , 2017; and Directorate-General for External Policies, ‘Trafficking in human organs’, European Parliament, EP/EXPO/B/DROI/FWC/2013-08/Lot8/03, July 2015.

⁷ The Echo Project, *Submission 13*, p. 6.

⁸ Dr M Soledad Antonio, private capacity, *Committee Hansard*, 8 June 2018, p. 55.

Organ market donors

2.9 The victims of organ trafficking and transplant tourism are overwhelmingly the poor and the vulnerable.⁹ Some donors may get a meagre payout in exchange for their organ; a small proportion of the hundreds of thousands of dollars the criminal networks may receive.¹⁰ There are many claims of victims being coerced or even killed for their organs.¹¹ Where ‘donors’ receive a payment for their organ, this may be significantly less than promised.¹² Estimated rates based on known cases of kidney trafficking are detailed in Table 2.3. Although other costs are involved, the significant disparity is reflective of the exploitative mark-ups applied by the organised crime networks responsible.

Table 2.3 – Commercial renal transplant markets

Transplant jurisdiction	Donor		Recipient		Mark-up
	<i>Origin</i>	<i>Received (\$US)</i>	<i>Origin</i>	<i>Paid (\$US)</i>	
<i>China</i>	<i>China</i>	<i>\$5,000</i>	<i>Israel</i>	<i>\$100,000</i>	<i>1,900%</i>
<i>Costa Rica</i>	<i>Costa Rica</i>	<i>\$18,500</i>	<i>Israel</i>	<i>\$175,000</i>	<i>846%</i>
<i>Kosovo</i>	<i>Moldova</i>	<i>\$12,000</i>	<i>Canada</i>	<i>\$120,000</i>	<i>900%</i>
<i>Peru</i>	<i>Peru</i>	<i>\$7,000</i>	<i>Mexico</i>	<i>\$125,000</i>	<i>1,686%</i>
<i>Singapore</i>	<i>Indonesia</i>	<i>\$18,700</i>	<i>Singapore</i>	<i>\$237,000</i>	<i>1,166%</i>
<i>South Africa</i>	<i>Israel</i>	<i>\$20,000</i>	<i>Israel</i>	<i>\$120,000</i>	<i>500%</i>
<i>South Africa</i>	<i>Brazil</i>	<i>\$6,000</i>	<i>Israel</i>	<i>\$120,000</i>	<i>1,900%</i>
<i>United States</i>	<i>Israel</i>	<i>\$10,000</i>	<i>Israel, U.S.</i>	<i>\$120,000</i>	<i>1,100%</i>

Source C May, ‘Transnational crime in the developing world’, *Global Financial Integrity*, 2017.

Known and suspected organ markets

2.10 Medical anthropologist Dr Yosuke Shimazono conducted a widely-cited study on behalf of the WHO in 2007, which offered a conservative estimate that 5 per cent of all transplant recipients in 2005 underwent commercial organ transplants overseas.¹³ The study found that transplant

9 *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (Declaration of Istanbul), ‘Proposals’, p. 5.

10 N K Clare, ‘Organ trafficking and transplantation pose new challenges’, *Bulletin of the World Health Organization*, vol. 82, no. 9, 2004, p. 715.

11 With regard to alleged killings for organ removal, see the *Alleged organ trafficking in China* section of this chapter.

12 D Martin, Action to stop thriving global organ trade must start at home, *The Conversation*, 1 June 2012, available: theconversation.com/action-to-stop-thriving-global-organ-trade-must-start-at-home-7333 accessed 20 July 2018.

13 Y Shimazono, ‘The state of the international organ trade: a provisional picture based on integration of available information’, *Bulletin of the World Health Organization*, vol. 85, no. 12, 2007, p. 959.

tourism was the most common means of obtaining a transplant for people in some countries.¹⁴ According to the study, known 'organ-exporting' countries included India, Pakistan, Philippines and China, and there were suspicions regarding Bolivia, Brazil, Colombia, Iraq, Iran, Israel, Moldova, Peru and Turkey.¹⁵

- 2.11 Professor Jeremy Chapman AC, noted renal physician and Past-President of the Transplantation Society, told the Sub-Committee:

...countries where commercial transplantation is occurring [include] Egypt, Turkey, Pakistan, possibly Lebanon, India, Sri Lanka, possibly Singapore, Cambodia, Vietnam, Laos, China, Mexico and Venezuela ... they are mostly typified by having high inequality scores, by having low economic human development indicators and by having a large source of impoverished individuals on whom to prey for donors.¹⁶

- 2.12 The Stop the Traffik submission to the inquiry noted research conducted by medical anthropologist Professor Nancy Scheper-Hughes in 2005 that indicates that Australia may be amongst other organ-importing nations.¹⁷

At the WHO's Second 2007 Global Consultation on Human Transplantation, Saudi Arabia Taiwan, Malaysia and South Korea were identified as major organ-importing countries. Australia, Japan, Oman, Morocco, India, Canada and the United States were also identified as minor organ-importing countries.¹⁸ However, the methodology of the collection of this data makes corroboration difficult.¹⁹

- 2.13 In a submission to the inquiry the Holy See's Secretary for Relations with States, Archbishop Paul Gallagher, noted that the problems of organ trafficking and transplant tourism must be viewed 'within the larger context of the very grave problems of forced migration, trafficking of human beings and social-economic exclusion. Consequently, it is a problem that cannot be addressed within the confines of any one nation.'²⁰

14 Y Shimazono, 'The state of the international organ trade', p. 959.

15 Y Shimazono, 'The state of the international organ trade' p. 957.

16 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

17 N Sheper-Highes, 'Prime Numbers: organs without borders,' *Foreign Policy*, vol. 146, 2005, pp. 26-27, as cited in Stop the Traffik, *Submission 5*, p. 4.

18 Y Shimazono, 'Mapping transplant tourism', Paper presented at the World Health Organization's Second Global Consultation on Human Transplantation, Geneva, 28-30 March 2007, as cited in D A Budiani-Saberi and F L Delmonico, 'Organ trafficking and transplant tourism: a commentary on the global realities', *American Journal of Transplantation*, vol. 8 no. 5, 2008, pp. 925, 927.

19 Y Shimazono, 'Mapping transplant tourism', as cited in 'Organ trafficking and transplant tourism', pp. 925, 927.

20 Holy See, *Submission No. 62*, p. 1.

- 2.14 The evidence presented to the Sub-Committee suggests that organ transplant markets have evolved significantly over time due to a combination of factors. These include developments in transplantation surgery techniques and immunosuppressant drugs combined with uneven economic development of countries, migration patterns, demographic trends, and the evolution of criminal networks.
- 2.15 It would be a mistake however to see organ trafficking as necessarily a sophisticated and exclusively criminal enterprise. A study in the British Journal of Criminology by Seán Columb of organ trafficking in Egypt which explored Sudanese migrants makes the following observations:
- Essentially the organ trade is [often] conceptualized as a perversely criminal phenomenon, a social aberration far removed from the ethical domain of transplant medicine. This unambiguous representation is, however, a false dichotomy. There is no clear illegal/legal divide. Organ markets exist to service the surplus demand for organs generated by the commercial expansion of the transplant industry. The transfer of transplant technologies is contingent on the supply of organs. When this supply cannot be satisfied by legal channels, organs are sourced from commercial donors, or in some instances from individuals who have been coerced into having one or more of their organs removed. The informal networks that support the organ trade are not isolated units possessing a purely criminal *modus operandi*. These networks cross various divides: legal, quasi-legal and the blatantly illegal. The individuals who assume different roles in informal networks are rarely specialists in a particular criminal enterprise; rather they respond to relative opportunities in a given context. For instance, the majority of organ brokers interviewed as part of this study were involved in organ trading on a temporary basis. Their participation in organ markets was viewed as a part-time occupation, a way to supplement their income.²¹
- 2.16 The majority of countries in which organ trafficking is growing problem appear to lack a properly established deceased organ donor system. Dr Campbell Fraser noted that those who purchase organs are “generally, fairly wealthy people coming from countries that do not have a deceased-donation system.”²² He further noted that one of the best methods to combat organ trafficking and transplant tourism is to develop these

21 S Columb “Excavating the organ trade: an empirical study of organ trading networks in Cairo Egypt”, *The British Journal of Criminology*, Vol 57, 2017, p.1305 – 1306.

22 Dr Fraser Private Briefing, *Committee Hansard* 13th June 2017 p. 6

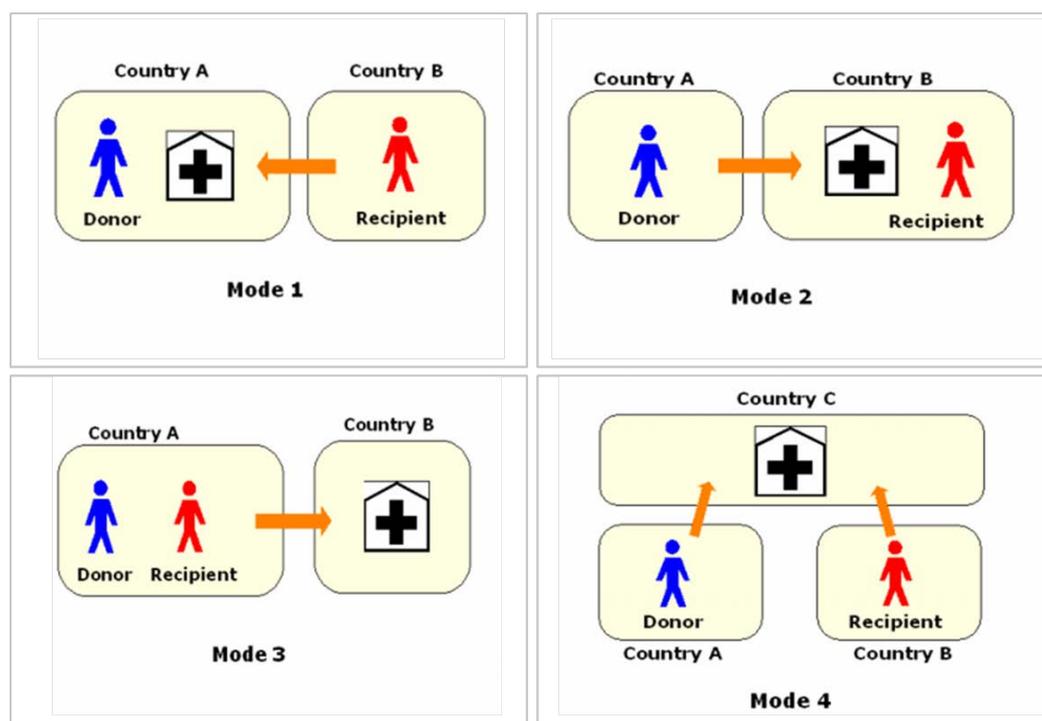
systems in other countries, so that patients have options other than seeking out organs via traffickers.²³

- 2.17 Professor Phillip O’Connell had a similar opinion, noting that introducing transparent, ethical transplantation practices in developing countries was the ideal goal: “I think any way we can assist them to do that and introduce a legal and viable alternative, would be positive in reducing trafficking, because if you do not do that, all that will happen is that the destination where it occurs will change.”²⁴

Pathways for transplantation tourism

- 2.18 Figure 2.1 depicts the recognised pathways through which travel for transplantation may occur. Travel for transplantation constitutes transplant tourism where it involves activities associated with organ trafficking (i.e. transplant commercialism).²⁵

Figure 2.1 – Modes of travel for transplantation



Source Y Shimazono, 'Mapping transplant tourism', Presentation at the World Health Organization's Second Global Consultation on Human Transplantation, 28-30 March 2007, Geneva.

23 Dr Fraser Private Briefing Committee Hansard 13th June 2017 p. 6

24 Prof O’Connell, Immediate Past-President, the Transplantation Society, Private Briefing Committee Hansard 13th June 2017 p. 6

25 World Health Organization (WHO), *Global glossary of terms and definitions on donation and transplantation*, 2009, p. 14.

- 2.19 The archetypical mode of transplant tourism is depicted in Mode 1, whereby a prospective recipient travels to the donor person's country of residence and undergoes the transplant through medical infrastructure in that country. According to Professor Chapman, Egypt is the "predominant" destination for travel at this time, with other current destinations including Pakistan and Sri Lanka.²⁶ Other prominent destination countries may include Turkey,²⁷ India,²⁸ and China.²⁹
- 2.20 Mode 2 depicts the travel of a donor person to the country of residence of the prospective recipient. This mode of transplant tourism is known or suspected to have occurred in the United States,³⁰ India,³¹ and Australia.³²
- 2.21 Mode 3 depicts the travel of both the donor person and the prospective recipient, from their mutual country of residence, to undergo the transplant using the medical infrastructure of another country. Such an arrangement may be made due to poor domestic facilities, high costs, or prohibitive legislation and enforcement in their country of residence.³³
- 2.22 Mode 4 depicts the travel of a donor person and prospective recipient, from two separate countries, to a third country, to facilitate the transplantation. This mode of transplant tourism is known or suspected to have occurred in the Philippines,³⁴ Kosovo,³⁵ South Africa,³⁶ Ukraine,³⁷ and Bulgaria.³⁸

26 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

27 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

28 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

29 The ongoing debate as to whether China continues to host transplant tourism is the subject of the next section of this report.

30 Y Shimazono, 'The state of the international organ trade', p. 957.

31 Y Shimazono, 'The state of the international organ trade', p. 957.

32 The Australian Federal Police has received one referral relating to the alleged trafficking of a person from the Philippines to Australia to facilitate an organ transplant. The details of this case are set out in chapter 3 of this report.

33 F Amazhazion, 'Epistemic communities, human rights, and the global diffusion of legislation against the organ trade', *Social Sciences*, vol. 5, no. 4, 2016, p. 4.

34 Dr Soledad Antonio, private capacity, *Committee Hansard*, Canberra, 8 June 2018, p. 56; Dr F Sarmiento III, Program Manager, Philippine Organ Donation and Transplantation Program, Philippine Network for Organ Sharing, Department of Health (Philippines), *Committee Hansard*, 8 June 2018, p. 57.

35 E Salcedo-Albarán, N Duarte and D Santos, 'Introduction to the International Trafficking of Organs', *Global Observatory of Transnational Criminal Networks: Research Paper no. 12*, pp. 11-12.

36 United Nations Office on Drugs and Crime (UNODC), 'State v. Netcare Kwa-Zulu Limited', *UNODC Case Law Database*, no. ZAF002.

37 Organization for Security and Co-operation in Europe (OSCE), 'Trafficking in human beings for the purposes of organ removal in the OSCE region', *Occasional Paper Series*, no. 6, July 2013, p. 65.

38 OSCE, 'Trafficking in human beings', pp. 64-65.

Alleged organ trafficking in China

2.23 On 22 November 2016, the Sub-Committee received a private briefing from the Falun Dafa Association of Australia, which included the participation of David Matas and David Kilgour, authors of investigative report *Bloody Harvest*, regarding allegations of trafficking of organs sourced from executed prisoners of conscience in China.

2.24 Falun Dafa, also known as Falun Gong, is a spiritual, meditative and exercise based practice that originated in China in 1992; drawing upon older Qigong, Taoism and Buddhist practices. It is not an organised religion as such, rather it is described by the Falun Dafa Association in Australia as a

... spiritual discipline in the Chinese tradition of “cultivation”, or “self-cultivation”, based on the principles of truthfulness, compassion, and forbearance (*Zhen, Shan, and Ren* in Chinese). It includes meditation and gentle exercises to improve health, energy and wellbeing.³⁹

It was initially embraced and promoted by the Chinese Government as a “positive example for its contributions to both physical and moral welfare of the Chinese population.”⁴⁰ In 1999, after a protest by 10,000 Falun Gong practitioners outside of the Communist Party headquarters in Beijing, the government outlawed Falun Dafa and the practice was classified as *xie jiao* or ‘heterodox teachings’.⁴¹ From this point Falun Dafa practitioners have faced a number of crackdowns, including imprisonment, torture and forced ‘re-education’ of its adherents.⁴² The Chinese Government and Chinese State media, describe Falun Dafa as an ‘anti-humanitarian, anti-society and anti-science cult.’⁴³

2.25 Allegations about organ trafficking in China are closely associated with broad concerns about China’s use of the death penalty. China is widely estimated to execute more people every year than the rest of the world

39 Falun Dafa Association of Australia, *Submission 24*, p. 15.

40 Falun Dafa Association of Australia, *Submission 24*, p. 15, and V Xiuzhong Xu and B Xiao ‘Falun Gong: Two Decades after a deadly ban in China, adherents still face pressure in Australia’ in *ABC News*, www.abc.net.au/news/2018-04-21/what-is-the-falun-gong-movement-and-does-china-harvest-organs/9679690, accessed 13 September 2018.

41 Falun Dafa Association of Australia, *Submission 24*, p. 15, and V Xiuzhong Xu and B Xiao ‘Falun Gong: Two Decades after a deadly ban in China’, accessed 13 September 2018.

42 Falun Dafa Association of Australia, *Submission 24*, p. 15, and V Xiuzhong Xu and B Xiao ‘Falun Gong: Two Decades after a deadly ban in China’, accessed 13 September 2018.

43 Embassy of the People’s Republic of China in the Republic of Estonia, ‘Falun Gong’s anti-humanity, anti-science, anti-society nature denounced’, *Embassy website*, www.chinaembassy.ee/eng/ztlm/jpflg/t112893.htm, accessed 1 October 2018. There are similar stories published on the United States, Australian and other Embassy websites.

combined, though the exact number is described as a state secret.⁴⁴ In 2016 China executed some 2,000 individuals according to estimates by the Dui Hau Foundation on Human rights, a human rights non-government organisation based in the United States. This figure has fallen from approximately 7,000 estimated executions in 2006, and 12,000 in 2002.⁴⁵ However, Amnesty International reports that publicly available information released by the Chinese Government covers 'only a tiny fraction of the thousands of death sentences handed out every year in China.'⁴⁶

- 2.26 China's organ transplant system was, at least at one point, dependent on the use of the organs of executed prisoners, a practice that is regarded as unethical by the international medical community.⁴⁷ The Sub-Committee received evidence from a number of organisations and individuals who indicated that state-sanctioned trafficking of organs from executed prisoners of conscience was, and possibly still is occurring in China. These allegations state that some people, suspected of particular religious or spiritual beliefs, or of particular ethnicities, are subject to extrajudicial imprisonment and execution in China, and that these people were, or are, the source of some, or most, of the organs transplanted in China.
- 2.27 Other witnesses and submitters, such as Professor Chapman, Dr Campbell Fraser, and Dr Dominique Martin disputed these allegations as overstated and unsupported by the evidence available.⁴⁸ The Sub-Committee also received evidence suggesting that China has undertaken a degree of reform towards the elimination of the use of the organs of executed prisoners.⁴⁹ These matters are of ongoing debate amongst the international human rights community.
- 2.28 A number of submissions, including by the Falun Dafa Association of Australia, Doctors Against Forced Organ Harvesting, and the Fighting For Justice Foundation, to this inquiry assert that transplant rates in China far exceed official statistics, that executed prisoners are a significant source of

44 The Dui Hai Foundation, 'Criminal Justice', *Dui Hua Website*, www.duihua.org/wp/?page_id=136, accessed 1 October 2018

45 The Dui Hai Foundation, 'Criminal Justice', *Dui Hua Website*, www.duihua.org/wp/?page_id=136, accessed 1 October 2018

46 Amnesty International, *China's Deadly Secrets*, 2017, p.11

47 World Medical Association (WMA), *WMA Council Resolution on Organ Donation in China*, adopted by the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006 and reaffirmed by the 203rd WMA Council Session, Buenos Aires, Argentina, April 2016.

48 Dr Fraser, private capacity, *Committee Hansard*, Canberra June 8 2018, p. 32 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 13 June 2017, pp. 2-3 and Dr Martin Co-Chair, Declaration of Istanbul Custodian Group, *Committee Hansard*, Canberra June 8 2018, p. 41

49 J Huang et al., 'A new era for organ transplantation in China', *Chinese Medical Journal*, vol. 129, no. 16, 2016, pp. 1891-1893.

organs used for transplants in China, and that some of these organs are sourced from extrajudicial executions who are prisoners of conscience.⁵⁰ These prisoners of conscience are alleged to include political prisoners, members of ethnic minorities such as Tibetans and Uyghur Muslims, members of unregistered Christian 'House Churches'; and Falun Gong practitioners.⁵¹

- 2.29 A number of these submissions reference Matas and Kilgour's estimate that 60,000 to 100,000 organ transplants occur per annum in China significantly more than the official figure of approximately 10,000 to 20,000 per annum.⁵² The submissions refer to hospital records, public comments by hospital administrators and officials, and transplant infrastructure utilisation rates as evidence of large numbers of undocumented transplants. These submissions allege executions of prisoners of conscience are taking place to facilitate these undocumented transplants.⁵³
- 2.30 Professor Chapman disagreed that transplant infrastructure utilisation is a viable indicator, arguing that "you cannot invoke the same number of transplants as you would in an American hospital," based on transplant infrastructure alone.⁵⁴ Professor Chapman also cited research and reporting from *The Washington Post*, which found that data compiled by healthcare information firm Quintiles IMS indicates that Chinese market demand for immunosuppressant drugs roughly reflects official transplant statistics.⁵⁵
- 2.31 Dr Dominique Martin, Co-Chair of the Declaration of Istanbul Custodian Group, also doubted the validity of the use of transplant infrastructure as a basis for estimation, asserting:

The methodology by which these large estimates have been derived simply does not add up. It is really a gross overestimate of

50 See: Fighting for Justice Foundation, *Submission 2*; International Coalition to End Transplant Abuse in China, *Submission 7*; Australian Lawyers for Human Rights, *Submission 9*; Human Rights Law Foundation, *Submission 17*; Doctors Against Forced Organ Harvesting, *Submission 22*; Falun Dafa Association of Australia, *Submission 24*; and a range of submissions made by individuals.

51 Doctors Against Forced Organ Harvesting (DAFOH), *Submission 22*, p. 6.

52 D Kilgour, E Gutmann, and D Matas, *Bloody Harvest/The Slaughter: An Update*, 2017 revised edition, pp. 268, 364. *Exhibit 2*

53 Australian Epoch Times Ltd, *Submission 21*, Doctors Against Forced Organ Harvesting, *Submission 22*, and Falun Dafa Association of Australia, *Submission 24*

54 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p. 2.

55 S Denyer, 'China used to harvest organs from prisoners. Under pressure, that practice is finally ending', *Washington Post*, 15 September 2017, as cited in Prof J Chapman AC and Prof P O'Connell, *Submission 28*, pp. 1-2.

any kind of transplant activity that has been taking place in China...⁵⁶

2.32 The International Coalition To End Transplant Abuse In China contends however that the estimates:

...are based on an average 30 day stay per patient in the hospital transplant wards. That is, the estimates are conservative and have taken into account the longer hospital stays of Chinese patients compared to those of US or Australian patients.⁵⁷

Organs 'on demand'

2.33 In its submission, the Falun Dafa Association of Australia claims that the detainment of practitioners in large numbers forms 'organ banks' – "an easily accessible pool of retail organs that facilitates brief waiting times for matching and a stable supply to meet an increasing transplantation demand."⁵⁸ The submission considers that this means "practitioners are available for 'live' organ extraction, which reportedly can improve an organ recipient's survival rate."⁵⁹

2.34 The International Coalition to End Transplant Abuse in China (ETAC) contends that it is possible to arrange an organ transplant in China for several weeks into the future, including for a transplant of a vital organ such as the heart.⁶⁰ ETAC states that this:

...requires advance identification of organs in order to match the recipient. Under Chinese law, prisoners on death row must be executed within one week of sentencing ... advance bookings suggest that organs come from prisoners who are killed on demand. ⁶¹

2.35 The Human Rights Law Foundation's submission makes the claim that an unusual number of 'emergency' transplants – where a patient presents at a hospital in acute organ failure, a deceased donor is located, and the transplant occurs, all within 24 hours – provides evidence of a pool of 'on demand' deceased donors.⁶²

56 Dr Martin, Declaration of Istanbul Custodian Group, *Committee Hansard*, Canberra, 13 June 2017, p. 5.

57 International Coalition to End Transplant Abuse in China, *Submission 7 - Supplementary Submission*, p. 1.

58 Falun Dafa Association of Australia, *Submission 24*, p. 6.

59 Falun Dafa Association of Australia, *Submission 24*, p. 7.

60 International Coalition to End Transplant Abuse in China, *Submission 7*, p. 5.

61 International Coalition to End Transplant Abuse in China, *Submission 7*, p. 5.

62 Human Rights Law Foundation, *Submission 17*, pp. 7-8.

- 2.36 The Submission of Doctors Against Forced Organ Harvesting highlighted transcripts of purported telephone conversations between *Bloody Harvest* researchers posing as prospective patients and staff at Chinese hospitals.⁶³ In these alleged transcripts, the hospital staff appear to indicate that organs sourced from imprisoned Falun Dafa practitioners are available for transplantation. However it is not possible to evaluate or confirm the authenticity of this material.
- 2.37 The Sub-Committee also received a significant number of anecdotal accounts in submissions made by Falun Dafa practitioners. These accounts made allegations of extrajudicial detainment, torture, and unusual medical examinations, which, it is alleged, were undertaken to facilitate organ matching.⁶⁴
- 2.38 A submission received from Mr Jintao Liu, a Falun Dafa practitioner, provided an account of his experience whilst detained by Chinese authorities in relation to his beliefs. Mr Liu recalled being forced to receive repeated blood tests and X-ray examinations whilst imprisoned in a labour camp. Mr Liu contrasted this apparent care for his welfare with the sustained physical and sexual abuse he alleged he was subjected to whilst in detention.⁶⁵
- 2.39 Ms Chen Heqin, a Falun Gong practitioner, provided an account of her detainment by Chinese police:
- ... [they] took me to a hospital and forced me to take a medical examination ... I did not cooperate with the doctor. A policeman rushed at me and pushed me down onto a bed. Immediately, all six police officers pressed me tightly against the bed and the doctor checked my heart with a stethoscope. I was also forced to allow the doctors to check my kidneys, liver and lungs, take blood from my finger and finally measure my blood pressure. I believe this was connected with being prepared for the forced organ harvesting.⁶⁶
- 2.40 Submission 49 (name withheld) provided the recollections of another individual allegedly subjected to similar practices as a Falun Dafa practitioner in detainment:
- I was forced to undergo a thorough medical check including blood tests, X-ray, CT scan, ultrasound, and electroconvulsive therapy ...

63 Doctors Against Forced Organ Harvesting, *Submission 22*, appendix 2, reproduced from D Matas and D Kilgour, *Bloody Harvest*, 2007, appendix 14.

64 Some Submissions include: 34, 49, 48, 41, 128, 33, 32, 44

65 Mr Jintao Liu, *Submission 34*, p. 1.

66 Ms Chen Heqin, *Submission 40*, p. 1.

the police who required me to do the medical check also said that only Falun Gong practitioners were ordered to undergo these thorough examinations ... these tests were used to assess us as organ donors, which is relevant to the brutal organ harvesting from Falun Gong practitioners that is still happening in China today.⁶⁷

- 2.41 Dr Fraser asserted his view that the apparent blood testing of imprisoned Falun Dafa practitioners may have been to support the detection of communicable diseases, rather than for tissue typing to support organ matching for transplantation purposes.⁶⁸ Dr Fraser stated:

I asked [Falun Dafa practitioners], 'How much blood did you have removed?' they said they had two 10-millilitre vials of blood taken. I have consulted with my clinical colleagues, and we do not believe that two vials of blood is anything like what is required for testing for tissue typing, blood grouping and all the other tests that are required.⁶⁹

- 2.42 The International Coalition to End Transplant Abuse in China (ETAC) contended instead that initial testing for tissue typing may be undertaken with less than 10 millilitres of blood.⁷⁰ Clinical ethicist Professor Wendy Rogers, Chair of the ETAC International Advisory Committee, indicated:

...that [initial] information can go into a database. Further crossmatching, which does require an increased amount of blood, is not required until a potential recipient arrives and a donor is selected from the database.⁷¹

Prisoner executions as an organ source

- 2.43 The suspected ongoing use of the organs of executed prisoners in China is an issue of concern to some members of the international transplant community. According to a resolution of the World Medical Association, the use of the organs of executed prisoners in transplants is unethical, as prisoners set for execution are not in a position to provide free and informed consent without fear of the consequence for failing to do so.⁷²
- 2.44 In 2007, Dr Huang Jiefu, director of the China Organ Donation and Transplant Committee and then Vice-Minister of Health of the People's

67 Name Withheld, *Submission 49*, p. 1.

68 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p. 3.

69 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p. 3.

70 ETAC, *Submission 7 - Supplementary Submission*, p. 2

71 Prof Rogers, Chair, International Advisory Committee, End Transplant Abuse in China, *Committee Hansard*, Canberra, 8 June 2018, p. 10.

72 WMA, *WMA Council Resolution on Organ Donation in China*

Republic of China, confirmed that the organs of executed prisoners were being used in organ transplants, but maintained that this was occurring on a voluntary basis, saying:

...most of the cadaveric organs come from executed prisoners. It should be clarified that, at present, the only prisoners who are subject to capital punishment in the PRC are convicted criminals. In addition, the relevant governmental authorities require that prisoners or their family provide informed consent for donation of organs after execution.⁷³

2.45 With regard to organs sourced from executed prisoners in China, nephrologist Dr Gabriel Danovitch notes that there is a risk in transplanting these as:

...the mode of execution (typically a bullet to the head) makes the organ susceptible to ischemic damage to the biliary tree that is a potent source of complications several weeks after transplant, by which time the recipients of these organs have typically been repatriated.⁷⁴

2.46 In December 2014, Dr Huang reportedly announced China would cease the use of organs sourced from executed prisoners from 1 January 2015.⁷⁵ Dr Huang claimed this measure followed the establishment of a national digital organ matching and allocation system, the China Organ Transplant Response System (COTRS), in September 2013, as well as other initiatives to encourage voluntary deceased donation.⁷⁶

2.47 Dr Campbell Fraser, Professor Philip O'Connell and Dr Dominique Martin all advised the Sub-Committee that to the best of their knowledge it would appear China is transitioning away from the use of the organs of executed prisoners. Dr Fraser observed:

[China is] clearly moving towards an ethical, deceased donation model. There are still some isolated cases of executed prisoners' organs being used, but there is no evidence whatsoever that any of those organs are coming from prisoners of conscience.⁷⁷

2.48 Professor O'Connell observed that China was moving away from the use of executed prisoners' organs in favour of deceased donation, "albeit with

73 J Huang, 'Ethical and legislative perspectives on liver transplantation in the People's Republic of China' *Liver Transplantation*, vol. 13, 2007, p. 194.

74 G M Danovitch, 'The high cost of organ transplant commercialism', *Kidney International*, vol. 85, 2014, p. 249.

75 ABC News, 'China to stop using executed prisoners' organs in transplant operations', 5 December 2014.

76 J Huang et al., 'A new era for organ transplantation in China', pp. 1891-1893.

77 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

issues that we would say would be inappropriate in Australia and, I think, from a global ethical perspective are not appropriate.”⁷⁸ Dr Martin elaborated on these ethical concerns:

...[China is] now offering financial incentives to families to agree to donation after death, which of course is preferable to executing people to take their organs but is not something that much of the international community would endorse.⁷⁹

2.49 Other commentators have however expressed doubt regarding Dr Huang’s claim that China has ceased the use of the organs of executed prisoners. Of particular concern is Dr Huang’s assertion that:

Death-row prisoners are also citizens and have the right to donate organs ... once the organs from willing death-row prisoners are enrolled into our unified allocation system [COTRS], they are then treated as voluntary donation from citizens; the so-called donation from death-row prisoners doesn’t exist any longer.⁸⁰

2.50 A 2016 study in the *American Journal of Transplantation* observes that, in the absence of a repeal of the 1984 provision that provides for the use of organs of executed prisoners, there is no legislative basis to enact Dr Huang’s proclamation, therefore:

...it is not possible to verify the veracity of the announced changes, and it thus remains premature to include China as an ethical partner in the international transplant community.⁸¹

China as a transplant tourism destination

2.51 In November 2006, the *New Scientist* magazine reported that at a summit on transplants in Guangzhou, the Chinese Government announced that payments for organs and transplant tourism would no longer be permitted. The declaration further specified that Chinese nationals would receive priority for transplants, and that foreign nationals would only be treated under special circumstances. The declaration became law on 1 January 2007.⁸²

78 Prof O’Connell, the Transplantation Society, *Committee Hansard*, Canberra, 9 May 2017, p. 3.

79 Dr Martin, Declaration of Istanbul Custodian Group, *Committee Hansard*, Canberra, 13 June 2017, p. 5.

80 Beijing Times, ‘Huang Jiefu: 38 hospitals in the Mainland have suspended use of death row organs’, 4 March 2014; as cited in Allison et al., ‘China’s semantic trick with prisoner organs’, *The BMJ – Opinion*, 8 October 2015.

81 Trey et al., ‘Transplant medicine in China: need for transparency and international scrutiny remains’, *American Journal of Transplantation*, vol. 16, no. 11, August 2016.

82 *New Scientist*, ‘China agrees to ban transplant tourism’, *New Scientist*, 29 November 2006, www.newscientist.com/article/mg19225803-400-china-agrees-to-ban-transplant-tourism/ accessed 1 October 2018.

- 2.52 At the Pontifical Academy Summit (PAS) which was held by Holy See's Pontifical Academy of Sciences in 2016, Professor Huang, professor and chairman of the China National Organ Donation and Transplantation Committee, presented data on China's new policy on prohibiting the use of organs from executed prisoners. According to a Xinhua news report, Professor Huang stated that:

The total number of deceased donor liver and kidney transplant between 2010 and 2016 were 27,600 and China's Ministry of Health has submitted the detailed statistics to the Geneva-based World Health Organization (WHO) for public release.

From the beginning of 2015, China imposed a total ban on the use of executed prisoners' organs for transplantation, Huang said, describing the process as "an arduous journey."

"Rome is not built in one day, the same as for the forbidden city", he added.

According to Huang, hundreds of foreigners used to come to China every year for transplant tourism before the Chinese government banned the practice in 2009. From 2007 to 2016, the Chinese authorities formed joint task forces and cracked down on 32 illegal intermediaries, investigated 18 medical institutions, prosecuted, convicted and imprisoned 174 people including 50 medical personnel, and eradicated 14 black market dens, Huang said, referring to the "Zero Tolerance" action to behaviours violating organ transplantation regulations and laws.⁸³

- 2.53 The Sub-Committee received varied evidence on whether China continues to host substantial numbers of transplant tourists. A submission by the International Coalition to End Transplant Abuse in China asserts that transplant tourism in China continues and that:

... Australians receiving organs in China are at risk of participating in organ trafficking, and the extra-judicial and intentional killing of the non-consenting person from whom the organ is sourced. Unwitting complicity or wilful blindness to the unethical nature of organ harvesting is inextricably bound with such transplant tourism.⁸⁴

83 Xinhua, 'China vows to crack down on organ trafficking', *China Daily*, 8 February 2017, www.chinadaily.com.cn/china/2017-02/08/content_28141842.htm accessed 1 October 2018.

84 International Coalition to End Transplant Abuse in China, *Submission 7*, p. 6.

2.54 Mrs Sophia Bryskine, Australian Spokesperson for Doctors Against Forced Organ Harvesting, contended that China remains a significant transplant tourism destination. Mrs Susie Hughes of the International Coalition to End Transplant Abuse in China provided as an exhibit a November 2017 South Korean documentary film *The dark side of transplant tourism in China: killing to live*.⁸⁵ The film claims that approximately 1,000 Koreans travel to China each year to receive a commercial organ transplant at Tianjin First Central Hospital alone.⁸⁶

Mrs Bryskine summarised the films findings:

... [the film] examines in detail, with undercover footage, the process that a transplant tourist undergoes at a major transplant centre in China, the Tianjin First Central Hospital ... hidden camera footage shows the hospital doctor and nurse explaining the speed at which the organs will be made available – two weeks, or a few days if the patient donates an extra US\$15,000. A kidney costs US\$130,000 to a Korean patient.⁸⁷

2.55 Citing data collated by participants of the Pontifical Academy of Sciences Summit on Organ Trafficking, however Professor Chapman observed however that the number of transplants being performed in China for foreigners has “collapsed” in recent years.⁸⁸

2.56 Dr Martin and Professor O’Connell both stated that China had significantly reduced its intake of transplant tourists, though not necessarily completely eliminated the practice. Professor O’Connell described it as having been restricted to a “trickle.”⁸⁹ Dr Martin described having received only “occasional reports.”⁹⁰

2.57 Dr Fraser observed that, in the early 2000s, China was a preeminent destination for transplant tourism, noting that “the norm was, if there was a Malaysian patient who required a transplant, they would be officially and formally referred by their doctor to China.”⁹¹ Dr Fraser indicated that “foreigners can no longer enter China for transplantation.”⁹² Dr Fraser stated that several patients he had interviewed had been prevented from

85 Mrs Bryskine, DAFOH, *Committee Hansard*, Canberra, 8 June 2018, p. 8.

86 Mrs Hughes, ETAC, ‘The dark side of transplant tourism in China: killing to live’, first broadcast 17 November 2017, *Exhibit 10*.

87 Mrs Bryskine, DAFOH, *Committee Hansard*, Canberra, 8 June 2018, p. 8.

88 Prof Chapman AC, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

89 Prof O’Connell, The Transplantation Society, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

90 Dr Martin, Declaration of Istanbul Custodian Group, *Committee Hansard*, Canberra, 13 June 2017, p. 5.

91 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p. 3.

92 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

entering China.⁹³ Dr Fraser indicated that it is predominantly Egypt which is now meeting the demand previously filled by China.⁹⁴ This is apparently despite the fact that since 2010 it has been a criminal offence in Egypt to buy or sell an organ.⁹⁵

- 2.58 The Australia and New Zealand Dialysis and Transplantation Registry (ANZDATA) recorded a decline in recent years in the number of Australian patients who received renal transplants with organs sourced from deceased donors in China, as detailed in Table 2.4.⁹⁶

93 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 2.

94 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p 3.

95 In 2010, the Transplantation of Human Organs and Tissues Act was established in Egypt making it a criminal offence to buy or sell an organ. See: S Columb 'Excavating the organ trade'

96 Department of Health, Australia & New Zealand Dialysis and Transplant Registry (ANZDATA), *Supplementary Submission 176.1*.

Table 2.4 – Renal transplants received by Australian patients in China, ANZDATA, 2001-2016⁹⁷

Year of transplant	Deceased donor	Living donor	Donor status unknown	Total
2001	4	1	0	5
2002	2	0	0	2
2003	1	0	0	1
2004	7	2	0	9
2005	5	0	0	5
2006	1	1	0	2
2007	1	3	0	4
2008	0	1	0	1
2009	0	1	2	3
2010	1	3	0	4
2011	0	1	0	1
2012	0	0	0	0
2013	0	0	0	0
2014	0	1	0	1
2015	0	0	1	1
2016	0	0	0	0
Total	22	14	3	39

Source ANZDATA, EXHIBIT 17, 19 July 2018.

2.59 ANZDATA also found that between 2011 and 2016 only three renal transplants were recorded as having been received by Australian patients in China, with two of those from living donors and one donor of unknown origin (meaning the donor may have been living or deceased.)⁹⁸

International Parliamentary resolutions

2.60 In December 2013, the European Preliminary Union passed a resolution that, among other things,

express[ed] its deep concern over the persistent and credible reports of systematic, state-sanctioned organ harvesting from non-consenting prisoners of conscience in the Peoples Republic of China, including from large numbers of Falun Gong practitioners imprisoned for their religious beliefs, as well as from members of other religious and ethnic minority groups;⁹⁹

97 Note: this table may not reconcile with Table 3.2 as it captures only patients who were undergoing dialysis immediately prior to receipt of a transplant overseas.

98 Department of Health, Australia & New Zealand Dialysis and Transplant Registry (ANZDATA), *Supplementary Submission 176.1*.

99 The European Parliament resolution of 12 December 2013 on organ harvesting in China (2013/2981 (RSP)) also Submission 168 from Mr David Matas

- 2.61 In June 2016, the House of Representatives of the United States Congress passed by unanimous consent House Resolution 343. The resolution condemned the practice of “state-sanctioned forced organ harvesting in China” and called on China to “end the practice of organ harvesting from prisoners of conscience.”¹⁰⁰ The resolution also called upon the United States Department of State to report annually to Congress on implementation of a visa ban to be imposed on persons identified as directly involved with the coercive transplantation of human organs or bodily tissue.¹⁰¹

Australian Government response

- 2.62 Mr Graham Fletcher, First Assistant Secretary, North Asia Division, of the Department of Foreign Affairs and Trade informed the Sub-Committee of the Australian Government’s position on the allegations that organs are forcibly taken from prisoners of conscience killed in China:

...we are aware of the statistics which allege that there are a very large number of transplants occurring in China, but we do not have any basis for accepting that those statistics are accurate ... we have conducted our own investigations both in China and elsewhere to seek to establish whether the claims made about organ harvesting from prisoners of conscience have any basis, and our conclusion is we have not found evidence that supports them ... we have no evidence that prisoners of conscience are being killed in China.¹⁰²

- 2.63 Mr Fletcher indicated that the Department of Foreign Affairs and Trade has met with advocacy groups in relation to the allegations.¹⁰³ Mr Fletcher added that the Australian Government has expressed opposition to the use of the organs of executed prisoners with the Chinese Government through the Australia-China human rights dialogue process.¹⁰⁴ The Department has also specially raised allegations relating to the trafficking of organs of prisoners of conscience.¹⁰⁵

100 United States Congress, ‘H.Res.343 - Expressing concern regarding persistent and credible reports of systematic, state-sanctioned organ harvesting from non-consenting prisoners of conscience in the People’s Republic of China, including from large numbers of Falun Gong practitioners and members of other religious and ethnic minority groups’, *114th Congress of the United States*.

101 United States Congress, ‘H.Res.343 -’, *114th Congress of the United States*.

102 Mr Fletcher, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 28 March 2017, pp. 2-3.

103 Mr Fletcher, DFAT, *Committee Hansard*, Canberra, 28 March 2017, p. 3.

104 Mr Fletcher, DFAT, *Committee Hansard*, Canberra, 28 March 2017, p. 3.

105 Mr Fletcher, DFAT, *Committee Hansard*, Canberra, 8 June 2018, p. 52

- 2.64 Mr Fletcher did not provide further detail on the nature of DFAT's own investigations.¹⁰⁶ Mr John Deller, Secretary of the Falun Dafa Association of Australia, drew an analogy to the United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. Mr Deller observed of the Hon Michael Kirby AC CMG, who led the Commission of Inquiry:
- He couldn't get into North Korea; he couldn't get any of that information that we were talking about. He interviewed people who had been abused and tortured, and they gave testimony, and from that he formed a very clear picture and conclusion, which is widely accepted around the world.¹⁰⁷
- 2.65 Mr David Matas was critical of the Department of Foreign Affairs, Defence and Trades position and questioned whether Australia has conducted any credible investigations.¹⁰⁸
- The Department has conducted no independent investigation or assessment of the evidence of the killing of prisoners of conscience in China for their organs. It is inconsistent for the Department not to investigate the evidence and yet produce a conclusion on the evidence.¹⁰⁹
- 2.66 In correspondence to the Sub-Committee, Mr Fletcher advised that the Chinese Government has consistently rejected reports of forced organ harvesting in China, including at our bilateral dialogues. At various times Chinese officials have admitted that organs were previously transplanted from executed prisoners, but have highlighted more recent growing regulation in China's organ translation system, including requirements that all organ donations must be voluntary.¹¹⁰
- 2.67 Australia-China human rights dialogues are the primary formal, bilateral opportunity for Australia to raise human rights concerns with China.¹¹¹ While fifteen rounds of formal dialogue have taken place since the inception of the process in 1997, no dialogue has taken place since February 2014. The Sub-Committee understands that the Australian

106 Mr Fletcher, DFAT, *Committee Hansard*, Canberra, 8 June 2018, pp. 51- 52

107 Mr Deller, Secretary, Falun Dafa Association of Australia, *Committee Hansard*, Canberra, 8 June 2018, p. 12.

108 Mr Matas, *Submission 168*, pp. 11-12.

109 Mr Matas, *Submission 168*, p. 12.

110 *Supplementary Submission 1.1*, Email correspondence with DFAT, 19 January 2018.

111 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Australia's human rights dialogues with China and Vietnam*, June 2012, Commonwealth of Australia.

Government is seeking to resume the dialogue, but no timeline has yet been agreed to.¹¹²

Chinese Government Response

- 2.68 On 2 October 2018, shortly before the completion of this report, the Sub-Committee received from the Embassy of the People's Republic of China a submission from the Chinese Organ Transplant Development Foundation.¹¹³ This submission provided a substantive statement of the Chinese Government's official position in relation to human organ transplantation and organ donation. The submission states that the Chinese Government has "a consistent and clear attitude towards human organ transplantation" and follows "internationally-acknowledged ethical principles of organ transplantation".¹¹⁴ The Foundation's submission contends that since the introduction in 2007 of the Regulation on Human Organ Transplantation (RHOT), China has developed a reformed human organ donation and transplantation system that "reflects China's identity, culture and governance of society, including donation system, procurement and allocation system, clinical transplant service, post-transplantation registry system and transplant service regulation system."¹¹⁵
- 2.69 The Chinese Organ Transplant Development Foundation's submission identifies the adoption of the RHOT as the beginning of the "legalisation and standardisation" of organ donation and transplantation practice in China to ensure that the rights of both donors and recipients are protected. The submission also highlights the adoption in 2011 of "the Eighth Amendment to the Criminal Law of the People's Republic of China" which distinguishes organ donation with informed consent from organ trafficking and states that "whoever organises others to sell human organs shall be convicted and punished."¹¹⁶
- 2.70 Further, the submission notes the work China has done in conjunction with international organisations around the world:
- such as WHO, The Transplantation Society (TTS) and the International Society for Donation and Procurement and international experts (including famous Australian organ transplant expert, former TTS president Philip O'Connell) have

112 *Supplementary Submission 1.1*, Email correspondence with DFAT, 19 January 2018.

113 Chinese Organ Transplant Development Foundation, *Submission 170* (Translation), p.1

114 Chinese Organ Transplant Development Foundation, *Submission 170* (Translation), p.1

115 Chinese Organ Transplant Development Foundation, *Submission 170* (Translation), p.1

116 Chinese Organ Transplant Development Foundation, *Submission 170* (Translation), p.1-2

come to China to participate in and witness the establishment of [China's] human organ donation system.¹¹⁷

- 2.71 The Foundation's submission strongly emphasises voluntary, informed consent as a key principle underlying China's reformed organ donation and transplantation system, noting that Chinese citizens have the right to donate, or indeed to not donate, their organs:

Any organization or individual shall not make others donate their organs by coercion, deception or temptation. Organ donors should have full capacity for civil conduct and written consent is required for organ donation. Donors who already gave consent have the right to withdraw. If a citizen has refused to donate their organs, any organisation or individual shall not donate or procure their organs. If a citizen has not refused to donate, their organ can be donated after their death with the joint written consent of their spouse, children over the age of 18 and parents.¹¹⁸

- 2.72 The submission does not, however, address the allegations of organ harvesting from prisoners of conscience.

Sub-Committee view

- 2.73 The Sub-Committee recognises the serious nature of the allegations made with regard to organ trafficking in China. The Sub-Committee also notes with grave concern the associated allegations relating to the detainment, torture, 're-education', and the application of the death penalty to prisoners of conscience in China.¹¹⁹
- 2.74 Additionally, the Sub-Committee has particular concerns around the use of the death penalty generally. On 5 May 2016, the Human Rights Sub-Committee tabled a report into Australia's advocacy for the abolition of the death penalty entitled, *A world without the death penalty*.¹²⁰
- 2.75 The Sub-Committee notes that use of the death penalty in China can be applied to cases of over forty different crimes and thousands of executions are carried out every year.¹²¹ As executed prisoners have been a source of organs in the past, the extensive use of the death penalty in China fuels

117 Chinese Organ Transplant Development Foundation, *Submission 170 (Translation)*, p. 4.

118 Chinese Organ Transplant Development Foundation, *Submission 170 (Translation)*, p. 1-2.

119 See: Cornell Center on the Death Penalty Worldwide, *Death Penalty Database: China* www.deathpenaltyworldwide.org/country-search-post.cfm?country=China®ion=&method= accessed 13 September 2018

120 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A world without the death penalty*, May 2016, Commonwealth of Australia.

121 Amnesty International, *China's Deadly Secrets*, 2017, p.11

continuing concerns that capital punishment continues to provide a source of trafficked organs.

2.76 The capacity of the Australian Government and other Australian institutions to investigate the allegations is a matter of debate.

2.77 The Sub-Committee has read with concern the recent report released by the United States Congressional-Executive Commission On China, which outlines a number of alleged human rights violations. Whilst not specifically investigating claims into organ harvesting, the report highlights:

a dramatic increase in Communist Party Control over government, society, religion, and business; and the increasing use of technology and surveillance as a tool of repression. The Report also highlights the elevated role of the United Front Work Department, a Party institution used to influence and neutralize possible challenges to its ideological and policy agenda, and the impact this has had on religious freedom and ethnic minority communities.¹²²

The Sub-Committee has taken particular note of this report, as it demonstrates the intolerant environment some religious or spiritual practitioners find themselves in. The Sub-Committee will continue to express these concerns and seek further discussion with the Chinese government in order to address these issues.

2.78 The Sub-Committee maintains its longstanding support for the human rights dialogue process, which is an important tool for Australian bilateral human rights advocacy.¹²³ The Sub-Committee firmly supports the resumption of the Australia-China human rights dialogue.

2.79 The Sub-Committee is not in a position to conclusively establish the veracity of the allegations either in relation to past activity or current practice, but, on the balance of evidence, is inclined to conclude that organ trafficking has occurred in China and may continue to occur, albeit on a lesser scale. If the full extent of the allegations made were to be verified, it would represent a systemic campaign of human rights abuse against vulnerable ethnic and spiritual minority groups. These groups have substantial diasporas in the Australian community. The Sub-Committee considers that the Australian Government has a responsibility to apply the

122 Congressional-Executive Commission on China, 'Press Release – Chairs Release 2018 Annual Report' in *2018 Annual Report*, 10 October 2018

123 See: Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), *Australia's human rights dialogues with China and Vietnam*, June 2012, Commonwealth of Australia; and JSCFADT, *Australia's human rights dialogue process*, September 2005, Commonwealth of Australia.

- full extent of its available capability to investigate these allegations as far as possible.
- 2.80 The progress of ethical reforms to the organ matching and transplantation system in China is a matter of dispute. While reform may be occurring, the Sub-Committee believes the available evidence is insufficient to conclude that China has in fact ceased the use of organs sourced from executed prisoners. It is not clear whether China remains a major destination for transplant tourism. The Sub-Committee is however concerned that any person travelling to China to receive an organ transplant today may be participating in unethical practice.
- 2.81 There is sufficient evidence that China used the organs of executed prisoners in the past without their free consent. There are contending views about whether this practice is still occurring- although other evidence points to an ongoing, possibly worsening, regime of repression and human rights violations in China. Given this, the onus is on the Chinese authorities to demonstrate to the world that they are not overseeing or permitting the practice of harvesting organs from executed prisoners without their knowledge and free consent. In the absence of such a demonstration by the Chinese authorities, the world is entitled to question assertions of claims to the contrary.
- 2.82 However the focus of evidence that was presented to the Sub-Committee in relation to China should not detract from the reality that organ trafficking and transplant tourism is a global problem and that other countries in South Asia and the Middle East appear to be perhaps more significant locations. Information and data in relation to the extent of the trade in these regions is quite limited, a state of affairs that underling the urgent need for greater international cooperation and collaboration.
- 2.83 As the Holy See's submission to the Sub-Committee observed, it is "a problem that cannot be addressed within the confines of any one nation' and that 'robust cooperation between States will be necessary if the global criminal networks behind much of this evil trade are to be effectively checked.'¹²⁴
- 2.84 Given the international nature of this problem and the limitation of available data, the most effective course of action would seem to be for the United Nations to establish a Commission of inquiry to assess the current state of the trade across the globe and the need for action by national governments and the international community.
- 2.85 Given the gravity of the allegations which the Sub-Committee heard, Australia could pursue the establishment of a United Nations Commission

124 The Holy See, *Submission 62*, pp. 1-2.

of Inquiry into organ trafficking and transplant tourism through a draft resolution of the United Nations General Assembly or the United Nations Human Rights Council. The World Health Organisation could possibly also provide another avenue through which Australia could pursue an international inquiry.

Recommendation 1

The Sub-Committee recommends that the Australian Government pursue through the United Nations the establishment of a Commission of inquiry to thoroughly investigate organ trafficking in countries where it is alleged to occur on a large scale.

Recommendation 2

Given the contention and ongoing debate around transplant practices in China, the Sub-Committee recommends that the Australian Government:

- **monitor the transplantation practices of other countries with regard to consistency with human rights obligations, including with regard to the use of the organs of executed prisoners;**
- **seek the resumption of human rights dialogues with China;**
- **continue to express concern to China regarding allegations of organ trafficking in that country; and**
- **offer to assist with the further progression of ethical reforms to the Chinese organ matching and transplantation system.**

Impacts of transplant tourism

- 2.86 Evidence provided to this inquiry highlighted a range of risks to both transplant tourist patients and organ donors. These risks include negative health impacts for both patients and donors, and negative health and socio-economic outcomes for donors.

Risks to patients

- 2.87 The Sub-Committee received evidence indicating that Australians who travel overseas for a transplant experience elevated risk of viral or bacterial infection, graft failure and death. Available evidence primarily relates to risks associated with kidney transplants.¹²⁵
- 2.88 Patients who received a primary renal transplant from a deceased donor in Australia in 2015 or 2016 experienced an average one-year graft survival rate of 94 per cent and one-year patient survival rate of 97 per cent.¹²⁶ Patients who received a primary renal transplant from a living donor in Australia during that period experienced an average one-year graft survival rate of 100 per cent and one-year patient survival rate of 98 per cent.¹²⁷
- 2.89 A study of patients across four renal units in New South Wales found that patients who travelled overseas for renal transplants between 1990 and 2004 experienced a one-year graft survival rate of 66 per cent and a one-year patient survival rate of 85 per cent.¹²⁸ For comparison, one-year primary deceased donation graft survival rates averaged between 93 per cent and 96 per cent between 1990 and 2004.¹²⁹ The survey of overseas transplants also found overseas transplant recipients were at increased

125 A E Anker and T H. Feeley, 'Estimating the risks of acquiring a kidney abroad; a meta-analysis of complications following participation in transplantation tourism' in *Clinical Transplantation*, Vol 26, 2012 pp. E232-E241 and S Kennedy et al., 'Outcome of overseas commercial kidney transplantation: an Australian perspective', *Medical Journal of Australia*, vol. 182, no. 5, 2005, pp. 224-227.

126 ANZDATA, *Annual Report 2017*, Table 7.18 – Primary Deceased Donor Grafts - Australia 2009-2016, Chapter 7, p. 26.

127 ANZDATA, *Annual Report 2017*, Table 7.23 Primary Living Donor Grafts - Australia 2009-2016, Chapter 7, p. 26.

128 S Kennedy et al., 'Outcome of overseas commercial kidney transplantation: an Australian perspective', *Medical Journal of Australia*, vol. 182, no. 5, 2005, pp. 224-227.

129 Patients in Australia and New Zealand experienced a 93 percent one-year deceased donation graft survival rate in 1990-1994 (n=1906); 95 per cent in 1995-1999 (n=1779); and 96 per cent in 2000-2004 (n=1850).

ANZDATA, *Annual Report 2016*, Table 8.20 Primary Deceased Donor Grafts - Australia and New Zealand 1990-2015, Chapter 8, p. 23.

- risk of contracting human immunodeficiency virus (HIV), hepatitis B virus, cytomegalovirus and fungal infections.¹³⁰
- 2.90 These findings are consistent with the 2012 findings of a meta-analysis of 39 international studies. According to the analysis, patients who travelled overseas for organ transplants experienced heightened risk of graft failure and death than had they received the transplant in their countries of origin. Patients were also at increased risk of contracting HIV, hepatitis B, cytomegalovirus, diabetes and wound infections.¹³¹
- 2.91 Professor Patrick Coates, Honorary Secretary and President-elect of the Transplantation Society of Australia and New Zealand, told the Sub-Committee that there have been “significant [graft] rejection episodes that have occurred in transplants that have occurred overseas and the person has come back to Australia.”¹³² Professor Coates indicated that his research had identified 32 instances of infection that were detected in persons who received an organ transplant overseas, including bacterial, viral and fungal infections.¹³³ Professor Coates stated that fungal infection rates in particular exceeded rates associated with transplants in Australia.¹³⁴ Professor Coates added that treatment of avoidable infections is particularly expensive for the Australian healthcare system.¹³⁵
- 2.92 These findings are echoed by Dr Campbell Fraser, who observed:
- A renal transplant performed in Australia has a success rate in the 95 per cent or 96 per cent range. A commercial transplant done in Pakistan or Egypt is probably 55 per cent or 60 per cent. Even with that, patients are going to come back with very poor quality surgery, and very probably with infections. These infections can be fatal.¹³⁶
- 2.93 A submission made by the Declaration of Istanbul Custodian Group, states:

130 S Kennedy et al., ‘Outcome of overseas commercial kidney transplantation: an Australian perspective’, *Medical Journal of Australia*, vol. 182, no. 5, 2005, pp. 224–227.

131 A Anker and T Feeley, ‘Estimating the risks of acquiring a kidney abroad: a meta-analysis of complications following participation in transplant tourism’, *Clinical Transplantation*, vol. 26, no. 3, 2012, pp. 232–241.

132 Prof Coates, Honorary Secretary and President-elect, Transplantation Society of Australia and New Zealand, *Committee Hansard*, 8 June 2018, p. 5.

133 Prof Coates, Honorary Secretary and President-elect, Transplantation Society of Australia and New Zealand, *Committee Hansard*, 8 June 2018, p. 2.

134 Prof Coates, Honorary Secretary and President-elect, Transplantation Society of Australia and New Zealand, *Committee Hansard*, 8 June 2018, p. 2.

135 Prof Coates, Honorary Secretary and President-elect, Transplantation Society of Australia and New Zealand, *Committee Hansard*, 8 June 2018, p. 2.

136 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 13 June 2017, p. 7.

Rates of mortality and serious complications, including infection with HIV, tuberculosis and hepatitis, are much higher in transplant tourists than in patients who obtain a transplant legally in a country like Australia.¹³⁷

- 2.94 The impact on public healthcare was also referred to by Doctors Against Forced Organ Harvesting, who noted that the elevated risk of post-transplant infection experienced by transplant tourists is likely to be causing increased burden on the Australian healthcare system.¹³⁸ Similarly, a 2016 News Corp investigation observed that:

Australian taxpayers are footing the medical bills when the transplant recipients return home sick, some ending up in intensive care. Their anti-rejection medication comes from the public purse as well, costing \$10,000 to \$12,000 a year.¹³⁹

Risks to donors¹⁴⁰

- 2.95 Commercial donors of organs and victims of forced organ trafficking suffer significant and enduring physical, psychological, financial and social harm. The Asian Pacific Society of Nephrology posited that:

...patients, health professionals and others involved exploit vulnerabilities in systems designed to evaluate and protect prospective transplant candidates and organ donors; they also take advantage of broader social vulnerabilities in the form of poverty, unemployment, and poor health literacy.¹⁴¹

- 2.96 A study of commercial donors in Egypt found that inadequate pre-operative screening and post-operative care lead to 78 per cent of donors reporting deterioration in their overall health and 94 percent expressing regret about selling their organ.¹⁴² 85 per cent were unwilling

137 Declaration of Istanbul Custodian Group, *Submission 14*, p. 1.

138 Doctors Against Forced Organ Harvesting, *Submission 22*, p. 8.

139 S Dunlevy, 'Organs for sale: Australians turn to black market for human organs', *Sunday Telegraph*, 7 August 2016.

140 Studies completed on this topic are generally at least ten years old, the Sub-Committee hopes to see further academic research be undertaken in this area to further strengthen our understanding of the risks surrounding organ trafficking.

141 Asian Pacific Society of Nephrology, *Submission 6*, p 1.

142 D Budiani, 'Consequences of living kidney donors in Egypt,' paper presented at a meeting of the Middle East Society on Organ Transplants, Kuwait, November 2006, as cited in D Budiani-Saberi and F Delmonico, 'Organ trafficking and transplant tourism: a commentary on the global realities', *American Journal of Transplantation*, vol. 8, no. 5, 2008, pp. 925-929.

- to be known publicly as a vendor in the commercial organ trade, citing social rejection.¹⁴³
- 2.97 A study of commercial donors in Pakistan found 93 per cent of donors sold an organ to repay a debt and 85 per cent reported no long-term economic advantage due to direct healthcare costs and reduced earnings potential as a result of poor health outcomes.¹⁴⁴
- 2.98 A further study in Iran found that 79 per cent of commercial donors were prevented from attending post-operative follow-up sessions due to poverty, 71 per cent experienced severe post-operative depression, 60 per cent experienced anxiety and 65 per cent experienced negative employment outcomes, primarily due to reduced physical capacity to perform labour.¹⁴⁵
- 2.99 These findings are consistent with other studies in India¹⁴⁶ and the Philippines,¹⁴⁷ with deteriorating health outcomes and social rejection leading to long-term socio-economic disadvantage through reduced employment opportunities.

Sub-Committee view

- 2.100 Transplant tourism poses clear health risks to donors, including risk of infection, diminished physical capacity, and complex psychological harm, including mental illness and emotional trauma. Donor participation in transplant tourism may lead to social or economic harm or exploitation, including financial hardship associated with poor health outcomes resulting from organ removal.
- 2.101 Transplant tourism also poses serious health risks to organ recipients, including elevated risk of bacterial, viral and fungal infection, graft failure, and death. Providing medical care to patients who develop such

143 D Budiani, 'Consequences of living kidney donors in Egypt', as cited in D Budiani-Saberi and F Delmonico, 'Organ trafficking and transplant tourism: a commentary on the global realities', *American Journal of Transplantation*, vol. 8, no. 5, 2008, pp. 925-929.

144 A Daqvi, 'A socio-economic survey of kidney vendors in Pakistan,' *Transplant International*, vol. 20, no. 11, 2007, pp. 909-992.

145 J Zargooshi, 'Iranian kidney donors: motivations and relations with recipients', *Journal of Urology*, vol. 165, no. 2, 2001, pp. 386-392.

146 M Goyal, R Mehta, L Schneiderman and A Sehgal, 'Economic and health consequences of selling a kidney in India', *Journal of the American Medical Association*, vol. 288, no. 13, 2002, pp. 1589-1593.

147 Y Shimazono, 'What is left behind?', *Presentation at a World Health Organization Informal Consultation on Transplantations*, May 2006, Geneva, as cited in D Budiani-Saberi and F Delmonico, 'Organ trafficking and transplant tourism: a commentary on the global realities', *American Journal of Transplantation*, vol. 8, no. 5, 2008, pp. 925-929.

complications represents an increased and avoidable burden on the Australian healthcare system.

- 2.102 The Sub-Committee considers it is both unethical and medically hazardous for patients to travel overseas to receive a commercial organ transplant.

Australian involvement in organ trafficking and transplant tourism

- 3.1 This chapter examines the scope of Australian participation in organ trafficking and transplant tourism and measures to improve relevant data collection and broad understanding of trends in this activity.

Australian context

- 3.2 As in other countries, there is a significant shortage of organs available for transplantation in Australia. On 1 September 2018, 1,423 people were listed on organ transplant waiting lists in Australia, 1003 of which were awaiting kidney transplants.¹ 35 entries on transplant waiting lists were removed in 2016 due to the death of the patient while awaiting transplantation.²
- 3.3 The Australian Government announced in 2008 the establishment of a national reform agenda for organ and tissue donation and transplantation. The Government highlighted that Australia's rate of deceased organ donation has experienced significant growth in the period since the implementation of the national reform agenda from January 2009.³

1 Australian & New Zealand Organ Donation Registry (ANZOD), *Australian Waiting List 2018* www.anzdata.org.au/anzod/v1/waitinglist2018.html, accessed 13 September 2018.

2 ANZOD, *Annual Report 2017*, Section 12 – Organ Waiting List, pp. 3-8. Note that patients awaiting the transplantation of more than one organ may be double counted.

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

The annual number of deceased organ donors is now more than double that of 2009.⁴ The Australian Organ and Tissue Donation and Transplant Authority (OTA) notes that in 2009 the number was 247. by 2017 this had risen to 510.⁵

3.4 The Australian Organ and Tissue Donation and Transplantation Authority (OTA) was established to lead the delivery of the national reform agenda.⁶ The OTA is an independent statutory authority within the Australian Government Health portfolio and operates under the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008*.

3.5 OTA's legislated functions include:

- to formulate and implement policies, protocols, and code of practice relating to organ or tissue donation and transplantation matters;
- to collect, analyse, interpret and disseminate information relating to these matters;
- to support, encourage, conduct and evaluate training programs relating to these matters;
- to support, encourage, conduct and evaluate educational, promotional and community awareness programs that are relevant to these matters;
- to make, on behalf of the Commonwealth, grants of financial assistance in relation to these matters; and
- to support, encourage, conduct and evaluate research about these matters.⁷

3.6 The OTA funds a range of projects which support the national organ and tissue donation and transplantation program. These include the following national donation and transplantation registries:

- the Australia and New Zealand Organ Donation Registry;
- the Australian Corneal Graft Registry;
- the Australia and New Zealand Cardiothoracic Organ and Transplant Registry;
- the Australian and New Zealand Dialysis and Transplant Registry ANZDATA;
- the Australia and New Zealand Liver Transplant Registry; and

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

5 Australian Government, 'Organ and Tissue Authority (OTA)', *DonateLife.gov.au*, www.donatelife.gov.au/organ-and-tissue-authority-ota, accessed 20 July 2018.

6 Australian Government, 'Organ and Tissue Authority (OTA)', *DonateLife.gov.au*, www.donatelife.gov.au/organ-and-tissue-authority-ota, accessed 20 July 2018.

7 *Australian Organ and Tissue Donation and Transplantation Authority Act 2008*, s. 11(1).

- the National Pancreas Transplant Registry.⁸
- 3.7 In July 2018 correspondence, the Minister for Health outlined to the Sub-Committee the Australian Government's commitment to further increasing Australia's rate of organ donation and reducing the number of Australians awaiting transplants.⁹ The Minister also highlighted the April 2018 announcement by the Council of Australian Governments Health Council that the Commonwealth will lead a review of the Australian organ donation, retrieval and transplantation system.¹⁰ This review will be undertaken to identify "barriers to equity of access to transplant waiting lists and transplantation services"¹¹
- 3.8 The OTA has outlined its strategy for increasing organ donation in its report: *Progressing Australian organ and tissue donation and transplantation to 2022 The 2018-19 to 2021-22 strategy*.¹² This strategy outlines the four key objectives that the OTA are seeking to achieve in the next four years:
1. Optimise donation opportunities
 2. Provide specialist support to families involved in the donation process
 3. Increase registration and family discussion contributing to higher consent rates
 4. Enhance systems to support donation and transplantation
- 3.9 The majority of organ donations resulting in transplantation in Australia are undertaken through the deceased donor pathway.¹³ Australians register their willingness to become a deceased organ donor, should the circumstances of their death allow.¹⁴
- 3.10 The current model of organ donation in Australia is an 'Opt-In' system whereby individuals register their intent to donate their organs and/or tissue if they are a suitable candidate at the time of their death via the DonateLife website, Department of Human Services, MyGov website, the Express Plus Medicare App or by a hardcopy form.¹⁵ If an individual is

8 Ernst & Young, 'Review of the implementation of the national reform agenda on organ and tissue donation and transplantation,' August 2015, p. 16.

9 The Hon Greg Hunt MP, Minister for Health, *Submission 171*.

10 The Hon Greg Hunt MP, Minister for Health, *Submission 171*.

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

12 Australia Organ and Tissue Authority, *Progressing Australian organ and tissue donation and transplantation to 2022: The 2018-19 to 2021-22 strategy*, 2017.

13 Organ and Tissue Authority, *2017 Activity Report*, p. 4.

14 Organ and Tissue Authority, Australia Organ and Tissue Authority, *Progressing Australian organ and tissue donation and transplantation to 2022*

15 Organ and Tissue Authority, *Donate Life* website, www.donatelife.gov.au/register-donor-today, accessed 13 September 2018.

then identified as a potential donor upon or nearing their death, families are consulted and make the final decision as to whether organs will be donated.¹⁶

- 3.11 Living donation, usually of kidneys or partial livers, is also supported by the Organ and Tissue Authority and the Australian Government Department of Health provides the *Supporting Living Organ Donors Program*. This program provides up to nine weeks of payments at the National Minimum Wage to assist donors who may otherwise be unable to donate to due to the potential loss of income from needing to take extended leave from their usual occupation.¹⁷
- 3.12 The current OTA and Health Department position on organ donation is that it should remain as an ‘opt-in’ system.¹⁸ The Department told the Sub-Committee that:
- Australia’s position of ‘opt-in’ has been informed by research, evidence and discussions with state and territory governments who have responsibility for the legislative framework for organ and tissue donation for transplantation, and the clinical community.
- There is no clear evidence to support that an ‘opt-out’ model contributes to achieving higher donation rates.¹⁹
- 3.13 The Sub-Committee only received limited evidence with regard to organ donation within Australia. It does appear that evidence, at least superficially, supports opt-out strategies in favour of opt-in. Of the top ten organ donating countries in the world as of 2016,²⁰ seven have been ‘opt-out’ for a number of years,²¹ and two more have adopted an opt-out system in the past year.²² It is important to note that those countries with the highest rates of donation, and in particular Spain, have not only opt-out systems, but highly centralised and well-funded organ donation

16 Organ and Tissue Authority, *Donate Life* website, www.donatelife.gov.au/register-donor-today, accessed 13 September 2018

17 Department of Health, ‘Supporting Living Organ Donors Program’, www.health.gov.au/internet/main/publishing.nsf/Content/Leave-for-living-organ-donors, accessed 13 September 2018.

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

19 Department of Health, Answer to QoN, *Submission 176*, p. 1.

20 International Registry in Organ Donation and Transplantation, *Newsletter 2017*, June 2018.

21 Spain, Croatia, Portugal, Belgium, Czech Republic, Austria, and Finland all use an opt-out or ‘presumed consent’ system for organ donation.

22 France adopted an opt-out system in 2017 and Iceland adopted their legislation earlier in 2018.

systems in place within hospitals, changes to end of life care and how possible donors are identified.²³

- 3.14 The Sub-Committee welcomes initiatives towards increasing organ donation rates in Australia, noting that such an increase could be anticipated to reduce waiting times and mitigate the perceived appeal that travelling overseas for a commercial transplant may hold. The Sub-Committee does however consider that organ supply will not meet total transplant demand in the foreseeable future. The unavoidable reality of unmet organ demand in the short and medium terms mean that measures to mitigate Australian participation in organ trafficking and transplant tourism must be in place.

Prevalence of organ trafficking and transplant tourism

- 3.15 There has been only one reported case to date of alleged organ trafficking within Australian jurisdiction, as detailed in Box 2.1.

Box 2.1 – Alleged case of organ trafficking in Australia²⁴

In 2011, an Australian couple were alleged to have brought a woman from the Philippines to Australia, promising her monetary compensation and a working visa in exchange for a kidney donation.

The woman changed her mind upon arriving in Australia. Medical transplant integrity procedures – a pre-operative counselling session at a Sydney hospital – ensured that the situation was discovered before the removal of the organ.

The potential donor was identified as an alleged victim of organ trafficking, resulting in referral to the Australian Federal Police. Due to the death of the prospective recipient, and limitations of the legislation as then in force, the matter did not progress to prosecution.

The Australian Government advised that:

This matter did not progress to prosecution because the offence as drafted in 2011 necessitated the actual removal of the organ (the offence was broadened in 2013 to cover situations where an

23 R. Matesanz, B. Domínguez-Gil, E. Coll, B. Mahillo and R. Marazuela “How Spain Reached 40 Deceased Organ Donors per Million Population” in *American Journal of Transplantation*, 2017 vol 17 1447-1454.

24 Australian Government, *Submission 1*, p. 7; Department of Home Affairs, Answer to Question on Notice (QoN), *Supplementary Submission 166.2*; Law Council of Australia, *Submission 61*, p. 4; United Nations Human Rights Council, ‘Report of the Special Rapporteur on trafficking in persons, especially women and children, 20th session, Addendum – Mission to Australia,’ UN Doc. A/HRC/20/18/Add.1, 18 May 2012, para. 15.

offender is reckless as to whether their conduct will result in the removal of a victim's organ).²⁵

According to the Australian Government, this incident is the only known case of alleged organ trafficking in Australia.

3.16 The Australian Government noted in its *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*:

While there is a low reported incidence of organ trafficking in Australia, the clandestine nature of human trafficking means that victims of organ trafficking may be difficult to identify.²⁶

3.17 The Law Council of Australia's submission draws on commentary by Professor Andreas Schloenhardt and Ms Samantha Garbutt, reflecting on the relationship between Australian participation in transplant tourism and trafficking in persons for organ removal:

...there has been little evidence to suggest that organ trafficking is occurring in Australia on a wider scale. On the other hand, given the very significant shortage of donor organs in Australia it is perhaps surprising that cases like this do not come to light more frequently. This may, however, be offset by Australians in need for donor organs travelling overseas for that purpose.²⁷

3.18 There have been a number of media reports suggesting that Australians have participated in transplant tourism.²⁸ A number of submissions referenced a 2016 News Corp investigation, which reported:

...in February [2016] an Australian man bought a kidney off a 26-year-old Pakistani woman as part of a transplant costing

25 Department of Home Affairs, Answer to QoN, *Supplementary Submission 166.2*.

26 Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*, Commonwealth of Australia, 2014, p. 7.

27 A Schloenhardt and S Garbutt, 'Trafficking in persons for the purpose of organ removal: International law and Australian practice', *Criminal Law Journal*, vol. 36, no. 3, 2012, p. 156; as cited in Law Council of Australia, *Submission 61*, p. 7.

28 See: S Dunlevy, 'Organs for sale: Australians turn to black market for human organs', *Sunday Telegraph*, 7 August 2016; B Hall, 'China last resort for the dying', *Sydney Morning Herald*, 6 February 2011; S Lauder, 'Australian organ tourists drive sinister trade', *ABC News*, 1 September 2010; M Wade and T Reilly, 'Australians caught up in 'Dr Horror' kidney transplant racket', *Sydney Morning Herald*, 2 March 2010; C Weaver, 'Flight for survival: the woman who must flee overseas for a kidney transplant to ensure she stays alive', *Sunday Telegraph*, 23 September 2007; A Stafford, 'Patients fly out to buy organs', *The Age*, 26 December 2007; M Dunn, 'Kidney trade on death row - Aussies use Chinese prisoners' organs', *Daily Telegraph*, 19 December 2005; and V McCausland, 'Risking lives for overseas kidneys', *Daily Telegraph*, 7 March 2005.

\$116,000. We interviewed four Australians who purchased an organ overseas including three from Sydney and one from Melbourne and learned that just months ago Australian doctors shut down an attempt by a Sri Lankan to sell their kidney to an Australian patient ...²⁹

3.19 Public health specialist Dr Maria Soledad Antonio outlined the several reasons why Australia is an organ-importing state:

- need – Australian organ donation rates are increasing, however availability is still insufficient to meet demand;
- means – many Australian patients have the economic means to purchase an organ overseas; and
- opportunity – organ brokers target Australian patients through social media.³⁰

3.20 International studies have observed the tendency of patients born in a country where organ trafficking may occur, but living outside of that country, to be at a substantially higher risk of participation in transplant tourism.³¹ This would appear to be equally true in Australia, as Dr Campbell Fraser observed:

...less than five per cent of Australians who are waiting on organs are likely to even consider going overseas. ...most of the Australians who have purchased an organ overseas have ethnic family connections to the countries or regions where they buy their organs – Pakistani Australians tended to go to Pakistan, Egyptian Australians travel to Egypt, and so on.³²

Registry data

3.21 While OTA-supported registries collect and analyse data on organ and human tissue donation and transplantation in Australia, there is a paucity of data with regard to Australian participation in transplant tourism. There is currently no requirement that an Australian who may be seeking transplantation overseas to report their intentions, nor is it mandatory for a medical profession providing post-operative treatment to a patient who received their transplant overseas to report that fact.

29 S Dunlevy, 'Organs for sale: Australians turn to black market for human organs', *Sunday Telegraph*, 7 August 2016.

30 Dr Soledad Antonio, private capacity, *Committee Hansard*, 8 June 2018, p. 55.

31 See: L Wright et al., 'Kidney transplant tourism: cases from Canada', *Medicine, Health Care and Philosophy*, vol. 16, no. 4, 2013, p. 922; and J Gill et al., 'Transplant tourism in the United States: a single-center experience', *Clinical Journal of the American Society of Nephrology*, vol. 3, no. 6, 2008, p 1825.

32 Dr Fraser, private capacity, *Committee Hansard*, Canberra, 9 May 2017, p. 1.

3.22 The Australia and New Zealand Dialysis and Transplantation Registry (ANZDATA) is the only of the OTA-supported registries that publishes data relating to overseas transplants. ANZDATA is aware of 193 Australians receiving transplants overseas between 2001 and 2016, as detailed in Tables 3.1 and 3.2.

Tables 3.1 and 3.2 – Renal transplants reported to ANZDATA as occurring overseas, 2001-2016

Year	Number of transplants	Reported country of transplant	Number of transplants (2001 to 2016)
2001	11	China	57
2002	15	Egypt	2
2003	14	India	11
2004	18	Iran	3
2005	16	Iraq	2
2006	17	Ireland	3
2007	21	Korea	2
2008	11	Lebanon	4
2009	16	Pakistan	8
2010	9	Philippines	16
2011	13	Singapore	2
2012	7	Syria	2
2013	6	United Kingdom	7
2014	6	United States	3
2015	10	Uruguay	2
2016	3	Other ³³	20
Total	193	Not reported	49
		Total	193

Source Department of Health, ANZDATA, Supplementary Submission 176.1.

3.23 ANZDATA Executive Officer Professor Stephen McDonald observed that the collection of data on transplants overseas is:

...not one of the funded aims in our contract. We do, though, incidentally collect that data. If you look around at other data

33 One transplant was reported in each of: Brazil; Canada; Eritrea; Holland; Hong Kong; Indonesia; Italy; Japan; Jordan; Laos; Mauritius Nepal; Portugal; Saudi Arabia; South Africa; Sri Lanka; Sweden; Switzerland; Taiwan; and Vietnam.

sources, this is an area that is very difficult to find any sort of data about.³⁴

3.24 ANZDATA's funded purpose is limited to the collection of data relating to dialysis and transplantation taking place domestically in Australia and New Zealand. The stated purpose of OTA-administered Commonwealth funding to ANZDATA is to:

Collect, analyse and report data on renal replacement therapy (dialysis and transplantation) in Australia and New Zealand to assist in improving patient care and outcomes through greater understanding of events, treatments and outcomes in the areas of renal transplantation and dialysis.³⁵

3.25 With regard to the lack of an explicit mandate to collect data on overseas transplants, Ms Penny Shakespeare, Acting Deputy Secretary, Health Financing Group, of the Department of Health indicated that:

Health portfolio agencies, such as the Organ and Tissue Authority and the programs that it funds, including [ANZDATA], are very much focused on the delivery of services to Australians in Australia.³⁶

3.26 There a number of limitations to the data collected by ANZDATA as a measure of Australian participation in transplant tourism. A number of these limitations are intrinsic to the challenge of capturing data on transplant tourism generally. This is acknowledged by ANZDATA:

It is possible that these numbers are an underestimate of the true number, since some patients may not return to Australia...³⁷

3.27 The Australian Government also recognises these limitations, noting:

...the true prevalence of Australians engaging in this potentially dangerous practice is undocumented and likely underreported.³⁸

3.28 Capture of a patient who has received a renal transplant overseas in the ANZDATA dataset would appear to require the following conditions:

- the patient does not die overseas prior to, during, or after the transplant;
- the patient returns to Australia and seeks post-operative care;

34 Professor Stephen McDonald, Executive Officer, ANZDATA, *Committee Hansard*, Canberra, 8 June 2018, p. 46.

35 Prof McDonald, Executive Officer, ANZDATA, email correspondence, 17 June 2018.

36 Ms Shakespeare, Department of Health, *Committee Hansard*, Canberra, 8 June 2018, p. 47.

37 Australia and New Zealand Dialysis and Transplantation Registry (ANZDATA), *Annual Report 2016*, Section 8, p. 6.

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

- the medical professional providing post-operative care inquires as to where the patient received the transplant; and
 - the treating nephrologist or other medical professional reports knowledge of an overseas transplant.
- 3.29 Professor Chapman told the Sub-Committee he considers the ANZDATA data to be “99 to 99.5 per cent complete,” in terms of renal transplant recipients who return to Australia post-transplant, noting however that those who do not return to Australia are not captured.³⁹
- 3.30 The data collected by ANZDATA does not differentiate between legitimate overseas transplants – for example, those received through an altruistic donation by an overseas family members – and commercial overseas transplants. Professor Chapman told the Sub-Committee that between one third and one half of the kidney transplants Australians receive overseas are “legitimate” with the balance to be regarded as “suspicious.”⁴⁰ Ms Natasha Cole, First Assistant Secretary, Health Services Division, of the Department of Health noted the possibility that:
- ...some of those transplants were simply family members who were returning and who were seeking a kidney, for example, from a compatible family member. So we have to be careful about assuming ... that they have all been obtained in unethical arrangements.⁴¹

Overseas Transplant Survey

- 3.31 Professor Toby Coates, Honorary Secretary and President-elect of the Transplantation Society of Australia and New Zealand, is leading a project to document Australian participation in transplant tourism through the Overseas Transplant Survey. The team has collected data through anonymised survey results received from clinicians working in transplant medicine. Professor Coates provided an interim quantitative dataset to the Sub-Committee in June 2018 and an assessment of the results of the survey in September 2018.
- 3.32 The 2018 Overseas Transplant Survey (OTS) was distributed to 540 Australian nephrologists, transplant physicians and surgeons through the Transplant Society of Australia and New Zealand (TSANZ) and Australia and New Zealand Society of Nephrology. A total of 197 responses were collated, yielding a response rate of 44%.
- 3.33 The OTS results were summarised by Professor Coates as follows:

39 Prof Chapman, *Committee Hansard*, Canberra, 9 May 2017, p. 1.

40 Prof Chapman, *Committee Hansard*, Canberra, 9 May 2017, p. 1.

41 Ms Cole, Department of Health, *Committee Hansard*, Canberra, 28 March 2017, p. 4.

133 (67%) of responding practitioners reported having discussed this practice with their patients, and 105 (53%) practitioners reported having cared for a patient following overseas transplantation.

A total of 129 patients were reported between the years 1980 and 2018, with the top reported destinations being China (n=40, 31.2%), India (n=20, 15.6%), Pakistan (n=11, 8.6%), and the Philippines (n=10, 7.8%) being the most popular destinations... 25.5% (n=30) of returning patients had an infection at time of return, and 8.5% (n=11) of returning patients had transplant rejection evident at time of return. '

3.34 The study also found that:

The majority of patients were not born in Australia (n=119; 93.0%). Of these patients, the majority were born in China (n=29; 22.7%), India (n=14; 10.9%), or the Philippines (n=10; 7.8%). A total of 10 patients (7.8%) were born in Australia.

In Professor Coates view, those figures provide an imperative for culturally and linguistically appropriate education regarding the issue.

3.35 Professor Coates also provided the following comparisons of the OTS data and ANZDATA:

Comparison with ANZDATA, the Australian and New Zealand Dialysis and Transplant Registry, indicated that although ANZDATA has a greater overall number of reported cases (280 ANZDATA to 129 OTS), there has been a marked reduction of cases being reported in the past eight years.

Direct comparison of 2015-2018 ANZDATA to OTS yields 12 cases on ANZDATA whilst our survey uncovered 28 cases of overseas travel for organ transplantation.

Additionally, direct comparison of cases yielded 42 'missing cases', which were not reported to ANZDATA, with 64.3% (n=27) being from 2010 onwards. Of course, a number of limitations confound the interpretation of the survey responses, including recall and selection bias. Multiple reporting of individuals may overestimate the number of patients travelling overseas for organ transplantation. To minimise this, a detailed comparison of all case summaries was made and identified repeated cases were excluded from the analysis. ⁴²

Limitations of existing data collection

3.36 Ms Cole of the Department of Health stated that any patient returning to Australia after receiving a transplant overseas would present an opportunity for capture by transplant registries, given the necessity of post-transplant specialist follow up by the small community of transplant specialists.⁴³ Professor Coates argued instead that changes to the Pharmaceutical Benefits Scheme mean that:

...patients with these sorts of transplants being performed overseas will not necessarily have strict regular follow-up within a transplant unit but may in fact be seeing either their general practitioners or, potentially, solo practitioners in nephrology or renal medicine without necessarily being formally involved in a large program ... one of the unfortunate aspects of changes in section 100 prescribing, which came into effect a year or two ago, is that any medical practitioner can prescribe transplant drugs ... it's certainly conceivable that, if somebody turns up and was doctor shopping, it would be very easy to get what is now a six-month prescription...⁴⁴

3.37 In answers to questions on notice to the Sub-Committee, the Department of Health also outlined the difficulties involved in identifying transplant related Medicate data:

The Medicare Benefits Schedule is a list of over 5700 health professional services and their fees and rebates and covers a comprehensive range of consultation, diagnostic and procedural services.

It is not possible to list the available Medicare item numbers for patients who have had organ transplants overseas because the item numbers used will reflect the nature of the care provided which will vary from patient to patient. It will include commonly used GP consultation items (item 23 and 36) and will likely include initial and follow up consultation services with consultant physicians (items 110 and 116). There are hundreds of potentially relevant pathology and diagnostic imaging items.⁴⁵

3.38 The Department further noted that:

43 Ms Cole, Department of Health, *Committee Hansard*, Canberra, 28 March 2017, p. 4.

44 Prof Coates, *Committee Hansard*, Canberra, 9 May 2017, pp. 1-2.

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

For patients who obtain services from public hospitals, their care may not generate any Medicare billing (or Medicare record) as it will be funded through state and territory hospital budgets.⁴⁶

Measures to enhance data collection

3.39 The development of a more complete data set on overseas organ transplants would be consistent with current international efforts and best practice guidance relating to organ trafficking and transplant tourism.⁴⁷ This includes the recommendation made by representatives of the international transplant community at the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism that governments:

...establish national registries of all organ transplants performed within their jurisdiction as well as all transplants involving their citizens and residents performed in another jurisdiction, and share appropriate data with international databanks.⁴⁸

As noted by the Echo Project, a non-government advisory group focused on human trafficking issues, developing and sharing robust datasets across international jurisdictions is critical to combating transnational organised crime including organ trafficking.⁴⁹

3.40 If a decision is taken to establish a national register consideration would have to be made however with regard to:

- who would make reports and how;
- whether reporting would be voluntary or mandatory;
- the appropriate threshold for reporting;
- the purposes for which information would be collected and used;
- ensuring there are adequate controls over disclosure, both domestic and international; and
- who would receive reports and maintain administrative responsibility.

46 Department of Health, Answer to QoN, *Submission 176*, p. 1.

47 See: United Nations General Assembly, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, 68th session', UN Doc. A/68/256, 2 August 2013 and United Nations Office on Drugs and Crime (UNODC), *Assessment toolkit: trafficking in persons for the purpose of organ removal*, UNODC, Vienna, 2015.

48 Pontifical Academy of Sciences, 'Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism', available: www.casinapioiv.va/content/accademia/en/events/2017/organ_trafficking/statement.html, accessed 16 July 2018.

49 The Echo Project, *Submission 13*, pp. 2; 6.

Mandatory reporting by medical practitioners

- 3.41 A large number of submissions and witnesses argued in favour of the establishment of a nationwide mandatory reporting scheme for commercial transplants. A Bill before the Parliament of New South Wales, *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*, introduced by Mr David Shoebridge MP, seeks to amend the *Human Tissue Act 1983 (NSW)*. The amendment would, inter alia, require medical professionals to report to the NSW Secretary of Health any reasonable belief that a patient has received a commercial transplant or one sourced from a non-consenting donor.⁵⁰ This would be supported by an amendment to the *Health Practitioner Regulation (Adoption of National Law) Act 2009 (NSW)*, defining “failure to report tissue traded or transplanted illegally” as constituting unsatisfactory professional conduct by a medical practitioner.⁵¹ Practitioners demonstrating unsatisfactory professional conduct may be subject to penalties under existing regulations.
- 3.42 Such a measure, in the context of support for the application of extraterritorial jurisdiction of transplant tourism offences, was also recommended in the 2015 report of the South Australian Parliament’s Joint Standing Committee on the Operation of the *Transplant and Anatomy Act 1983 (SA)*:
- The Committee considers that 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...⁵²
- 3.43 Mr Shoebridge recommended that the Council of Australian Governments facilitate the expansion of such a scheme nationwide.⁵³ Mr Shoebridge also indicated that mandatory reporting would be an “essential element” of a potential broader Commonwealth regulatory framework against transplant tourism.⁵⁴
- 3.44 Professor Coates indicated that mandatory reporting of overseas transplants would enable the collection of data to inform policymakers about appropriate responses to transplant tourism.⁵⁵ Professor Coates

50 *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 (NSW)*, sch 1, item 8.

51 *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016 (NSW)*, sch 2.

52 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, Recommendation 10.

53 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 22.

54 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 25.

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

cited Malaysia – a country with a history of systemic engagement in organ importation⁵⁶ – as a jurisdiction where mandatory reporting had reduced participation in transplant tourism.⁵⁷

- 3.45 Doctors Against Forced Organ Harvesting (DAFOH) highlighted mandatory reporting by medical professionals as a priority.⁵⁸ DAFOH cited the cross-matching of Medicare Benefits Schedule item numbers associated with post-transplant care against registry data to be a potential means to enhance data collection.⁵⁹ Similarly, Professor O’Connell suggested that data matching with prescriptions of immunosuppressant drugs might support the development of more robust data.⁶⁰

Patient welfare and privacy

- 3.46 Reporting of overseas transplants, whether used for law enforcement purposes, or only as an evidence base to support policymaking, requires appropriate privacy controls. A mandatory reporting scheme in particular would need to be consistent with the relevant privacy safeguards such as the *Privacy Act 1988*. Ms Shakespeare of the Department of Health indicated that privacy and consent would be a key consideration for the Australian Government:

health data is considered something that is owned by the individual patient. In most of our programs, mandatory reporting would not be considered an appropriate approach...⁶¹

- 3.47 Consideration is also required as to the impact of a mandatory reporting scheme on patient welfare. Such a requirement could induce patients to conceal information relevant to their medical wellbeing, or create a disincentive for the patient to seek medical care. Professor McDonald, of ANZDATA, noted this concern, observing that transplant registries are clinical quality registers, seeking to improve the quality of patient care, and with current patient consent arrangements reflecting that purpose.⁶² Professor McDonald reflected:

It’s one thing to ask both patients and practitioners to report data on patients going through the usual consent processes for an organisation that directly links back to improving the health

56 Dr Fraser, *Committee Hansard*, 13 June 2018, Canberra, p. 2.

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

58 Doctors Against Forced Organ Harvesting, *Submission 22*, p. 25.

59 Mrs Bryskine, Doctors Against Forced Organ Harvesting, *Committee Hansard*, Canberra, 8 June 2018, p. 13.

60 Prof O’Connell, *Committee Hansard*, 8 June 2018, Canberra, p. 37

61 Ms Shakespeare, Department of Health, *Committee Hansard*, Canberra, 8 June 2018, p. 44.

62 Prof McDonald, ANZDATA, *Committee Hansard*, Canberra, 8 June 2018, p. 44.

system and the care of individual patients ... collection of data that may be incriminatory of a patient's conduct ... would certainly colour the conversations that I have as a practitioner with my patients. It's hard to see as direct a link between the collection of that data and the direct improvement of that individual patient's care.⁶³

- 3.48 Ms Madeleine Bridgett of Australian Lawyers for Human Rights argued that any privacy concerns would be allayed were participation in transplant tourism to be criminalised.⁶⁴ Ms Bridgett cited the requirement for health professionals to report suspected child abuse as a similar example of the necessity to report suspicion of an indictable offence.⁶⁵

Legal liability

- 3.49 The NSW *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*, would mandate reporting of possible organ trafficking cases where a registered health practitioner has "reasonable belief" that such activity has occurred. The provisions of this bill seek to protect health practitioners who report possible cases of organ trafficking, including protection from defamation, civil or criminal proceedings.⁶⁶ The bill provides that any such reports would not be contrary to professional standards of conduct.⁶⁷
- 3.50 An area for consideration is for the potential damage caused to persons against whom false reports are made. Whilst it is important to ensure medical professionals are adequately protected from liability when reporting, provisions for the protection of privacy, particularly given that possible 'transplant tourists' will also be vulnerable patients themselves. A presumption of innocence for anyone reported on should be considered in any mandatory reporting framework proposed.

Administrative responsibility

- 3.51 Professor O'Connell considered that ANZDATA is the appropriate body for the collection of data on transplant tourism. Professor O'Connell indicated that were it to be emphasised in ANZDATA's activities, the issue would be put to the forefront of consideration by renal professionals and reporting would be enhanced.⁶⁸ Professor O'Connell also noted that

63 Prof McDonald, ANZDATA, *Committee Hansard*, Canberra, 8 June 2018, p. 45.

64 Ms Bridgett, Co-chair, Business and Human Rights Committee, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 8 June 2018, p. 30.

65 Ms Bridgett, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 8 June 2018, p. 30.

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

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

68 Prof O'Connell, The Transplantation Society, *Committee Hansard*, Canberra, 8 June 2018, p. 38.

enhancing ANZDATA's activities would be significantly more cost-effective than establishing a separate reporting pathway.⁶⁹

- 3.52 It is important to note however that, as a renal transplant registry, ANZDATA does not capture data on non-renal transplants overseas and is not currently in a position to do so. It is not clear to what extent renal transplants are representative of transplant tourism more broadly.

Sub-Committee view

- 3.53 Participation in transplant tourism by Australians is highly undesirable. It poses medical, ethical and legal risks to the patients, is a violation of the rights and dignity of donor persons, and is a burden to the Australian healthcare system. It is a complex policy problem which requires a robust evidence base to address. Without a better understanding of how many Australians are travelling overseas for organ transplants, where they are travelling, and under what circumstances, Australia cannot adequately address this challenge.
- 3.54 Organ trafficking, including that which enables transplant tourism, is dependent on complex transnational networks involving both human traffickers and clinicians. As an organ-importing nation, Australia has a responsibility to share intelligence with international partners to assist with combating these networks. More robust reporting on Australian participation in transplant tourism – including the identities of perpetrators and those abetting them – would support partner states and international bodies to investigate and prosecute these human rights abusers.
- 3.55 The Sub-Committee considers 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.
- 3.56 The Sub-Committee acknowledges that understanding of how many Australians are participating in organ harvesting and transplant tourism is unknown due to disparate data collection and a lack of reporting mechanisms. In order to properly address the issue of transplant tourism, accurate data must be collected and analysed.

69 Prof O'Connell, The Transplantation Society, *Committee Hansard*, Canberra, 8 June 2018, p. 38.

Recommendation 3

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

Recommendation 4

The Sub-Committee recommends that the Australian Government ensures that suitably-anonymised data regarding the participation by Australians in overseas commercial transplants, or those involved in organ procured from a non-consenting donor overseas, be shared with appropriate international partners, in order to combat transnational organ trafficking through cross-jurisdictional intelligence sharing.

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.

International frameworks to combat organ trafficking and organ transplant tourism

International frameworks

- 4.1 The development of international legal frameworks and other, non-binding standards has had a significant role in advancing global responses to organ trafficking and transplant tourism.¹ Responses to organ trafficking are now codified in a range of international legal frameworks and cooperative processes and have supported the adoption of domestic legislation against the organ trade in most international jurisdictions.² International bodies have been supported by a network of transnational organisations representing the medical community, such as the Transplantation Society and the International Society of Nephrology.³

Palermo Protocol

- 4.2 Australia is a Party to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations*

1 A search of the Department of Foreign Affairs and Trade website's Australian Treaty Database shows that Australia has ratified seven Council of Europe treaty instruments, of which six remain in force. www.info.dfat.gov.au/treaties

2 F Amazhazion, 'Epistemic communities, human rights, and the global diffusion of legislation against the organ trade', *Social Sciences*, vol. 5, no. 4, 2016, p. 69.

3 F Amazhazion, 'Epistemic communities, human rights, and the global diffusion of legislation against the organ trade', *Social Sciences*, vol. 5, no. 4, 2016, p. 69.

Convention against Transnational Organized Crime (the Palermo Protocol). The Palermo Protocol addresses organ trafficking in the context of human trafficking, where the object of the crime is the trafficked person, rather than the organ itself. Parties to the Palermo Protocol are obligated, inter alia, to enact measures to proscribe, as a criminal offence, conduct constituting trafficking in persons.⁴

4.3 For the purposes of the construction of that offence in Party domestic legislation, the Palermo Protocol sets out three key elements of the definition of conduct constituting the trafficking in persons:

- the action – the recruitment, transportation, transfer, harbouring or receipt of persons;
- the means by which the action is carried out – the use of the threat of force or coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- the purpose of the action – exploitation, which includes, inter alia, the removal of organs.⁵

4.4 The United Nations' legislative implementation guidance indicates:

... trafficking consists of a combination of three basic elements, each of which must be taken from a list set out in the definition...
The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves.⁶

4.5 Parties are also obligated to proscribe, as a criminal offence, participating as an accomplice in, or organising or directing a person to commit, the offence of trafficking in persons.⁷ The Palermo Protocol also provides for measures relating to the protection and status of victims of trafficking and international cooperation on the prevention and prosecution of trafficking in persons.⁸

4 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (the Palermo Protocol), opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003), art. 5(1).

5 *Palermo Protocol*, art. 3(a).

6 United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime*, 2004, paras. 32-33.

7 *Palermo Protocol*, art. 5(2).

8 *Palermo Protocol*, arts. 6-13.

Council of Europe Convention against Trafficking in Human Organs

Impetus for the Convention

4.6 The Council of Europe Convention against Trafficking in Human Organs (the Convention) was opened for signature in March 2015, following a 2009 joint study by the United Nations and the Council of Europe into trafficking in organs, tissues and cells. The study identified a gap in the coverage of the Palermo Protocol, which addresses organ trafficking in the context of trafficking in persons for the purposes of organ removal only, observing:

Trafficking in organs ... differs from trafficking in human beings for organ removal in one of the constituent elements of the crime – the object of the criminal offence. In the former case, the object of the crime is the organs, tissues and cells, while in the latter case it is the trafficked person.⁹

4.7 The study noted that these two terms are:

...frequently mixed up in public debate and in the legal and scientific community. This leads to confusion and consequently hinders effective efforts to combat both phenomena and also to provide comprehensive victim protection and assistance.¹⁰

4.8 The study noted that the three elements of the definition of human trafficking (the proscribed action, means, and purpose), as set out in the Palermo Protocol may not always be present in trafficking in organs.¹¹ The study concluded that a new international instrument was needed to combat trafficking in organs and that this instrument should clearly proscribe the trafficking of organs as opposed to trafficking in persons for the purposes of organ removal.¹² The Council of Europe Convention was established to address this need.¹³

Key elements of the Council of Europe Convention

9 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, p. 93.

10 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, p. 93.

11 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, p. 93.

12 United Nations, 'International pact needed to prevent organ trafficking, UN-backed study says', 13 October 2009, available: <https://news.un.org/en/story/2009/10/317102-international-pact-needed-prevent-organ-trafficking-un-backed-study-says>, accessed 18 July 2018

13 Directorate-General for External Policies, 'Trafficking in human organs', *European Parliament*, July 2015, p. 56.

- 4.9 The Convention requires Parties to enact domestic legislation that criminalises trafficking in human organs.¹⁴ For this purpose, the Convention provides a definition of trafficking in human organs, which covers the intentional removal of organs from living or deceased donors where:
- the removal is performed without the free, informed and specific consent of the donor (or in the case of the deceased donor, without authorisation under domestic law); or
 - the donor or a third party has been offered or has received a financial gain or comparable advantage in exchange for the removal of the organ.¹⁵
- 4.10 The Convention requires the criminalisation of aggravated offences, including where:
- the offence caused death of or serious damage to the health of the victim;
 - the commission of the offence occurs through a person abusing a position;
 - the commission of an offence occurs in the framework of a criminal organisation;
 - the commission of an offence occurs by a person who has previously been convicted of an offence under the Convention; or
 - the commission of an offence occurs against a child or a particularly vulnerable person.¹⁶
- 4.11 The Convention requires the criminalisation of various ancillary and inchoate¹⁷ offences relating to trafficking in human organs as defined above, including:
- the solicitation and recruitment of organ donors and recipients, where carried out for financial gain by the person soliciting or recruiting;
 - the promising, offering or giving any undue advantage to healthcare professionals or public officials to facilitate an organ removal or the solicitation of such an undue advantage;
 - the preparation, preservation, storage, transportation, transfer, receipt, import or export of illicitly removed human organs; and

14 *Council of Europe Convention against Trafficking in Human Organs*, open for signature 25 March 2015, CETS 216 (entered into force 1 March 2018), art. 13

15 *Council of Europe Convention*, arts. 2(2), 4(1), 5, 8, and 9.

16 *Council of Europe Convention*, art. 13.

17 Inchoate offences are offences that are committed in preparation for other criminal offences (ie – conspiracy before committing the act).

- the intentional aiding or abetting an attempt to commit any of the criminal offences established in accordance with the Convention.¹⁸
- 4.12 The Convention requires State parties to apply extraterritorial jurisdiction over the above offences, so that their application extends to:
- the conduct of a person who is a national or habitual resident of the State, irrespective of whether the person is inside or outside the State's territory when he or she engages in the conduct; and
 - offences committed against a person who is a national or habitual resident of the State, irrespective of whether the person is inside or outside the State's territory when the offence is committed.¹⁹
- 4.13 Significantly however, article 10(3) of the Convention clarifies that any Party may, upon either signature or ratification, declare that it reserves the right not to apply the extraterritorial provisions above.²⁰
- 4.14 The Convention requires the implementation of various investigative and enforcement measures in relation to the above offences, including international cooperation.²¹ The Convention also requires the implementation of protection measures for victims, including access to information, recovery support, a legal right to compensation, legal assistance, legal standing in criminal proceedings, and witness protection measures.²²

Current status of the Convention

- 4.15 Accession to the Convention requires two steps; the first being non-binding signature and the second being binding ratification. Since the Convention opened for signature in March 2015, twenty three nations have signed the Convention. To date, Albania, the Czech Republic, Malta, Norway, and Moldova have ratified the convention.²³ Dr Marta López-Fraga, Secretary of the Council of Europe's European Committee on Organ Transplantation, indicated to the Sub-Committee that a number of countries who have signed the Convention are progressing the requisite amendments to domestic legislation in support of potential ratification.²⁴

18 *Council of Europe Convention*, arts. 7-9.

19 *Council of Europe Convention*, art. 10.

20 *Council of Europe Convention*, art 10(3).

21 *Council of Europe Convention*, arts. 15-17.

22 *Council of Europe Convention*, arts. 18-20.

23 Council of Europe, 'Chart of signatures and ratifications of Treaty 216 – Council of Europe Convention against Trafficking in Human Organs', updated 16 July 2018, available: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/signatures> accessed 17 July 2018.

24 Dr López-Fraga, Scientific Officer, European Directorate for the Quality of Medicines and Healthcare, Council of Europe, *Committee Hansard*, Canberra, 8 June 2018, p. 58.

- 4.16 Mr Oscar Alarcón Jiménez, Co-Secretary of the Council of Europe's European Committee on Crime Problems, emphasised to the Sub-Committee the universality of the Convention.²⁵ Accession to the Council of Europe Convention is open for signature and ratification is not limited to only Council of Europe member or observer countries.²⁶

Declaration of Istanbul on Organ Trafficking and Transplant Tourism

- 4.17 The International Summit on Transplant Tourism and Organ Trafficking was convened by The Transplantation Society and International Society of Nephrology in Istanbul, Turkey, between 30 April and 2 May 2008. A statement signed by participants, the Declaration of Istanbul, is a set of principles and proposals towards the prevention of organ trafficking and transplant tourism.²⁷
- 4.18 The Declaration of Istanbul argues that organ trafficking and transplant tourism violate the principles of equity, justice and respect for human dignity and should be prohibited.²⁸ The Declaration of Istanbul provides guidance as to the standardisation, transparency and accountability of organ matching and transplantation systems, as well as to the ethical reimbursement of costs associated with organ donation to avoid transplant commercialism.²⁹ The Declaration of Istanbul was endorsed by the Australian Government's National Health and Medical Research Council in 2011.³⁰

Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism

- 4.19 On 7 and 8 February 2017, the Pontifical Academy of Sciences hosted a summit on organ trafficking and transplant tourism at the Vatican. 77 representatives of the international transplantation community were signatory to a statement. The statement makes the following key recommendations to governments:

25 Mr Alarcón Jiménez, Co-Secretary of the European Committee on Crime Problems, Council of Europe, *Committee Hansard*, Canberra, 8 June 2018, p. 59.

26 Council of Europe, 'Details of Treaty No.216: Council of Europe Convention against Trafficking in Human Organs', available: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216/> accessed 17 July 2018.

27 Declaration of Istanbul Custodian Group, *Submission 14*, p. 1.

28 *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism* (The Declaration of Istanbul), 'Definitions', p. 2. 'Principles', p. 3.

29 The Declaration of Istanbul, 'Proposals', pp. 4-5.

30 Australian Government Health Portfolio, *Answer to Estimates Questions on Notice – SQ16-000601*, Supplementary Budget Estimates 2016-2017, 19 October 2016.

- condemn organ trafficking and human trafficking for organ removal, including the use of organs from executed prisoners;
- establish legal frameworks to prevent and prosecute transplant-related crimes, regardless of the location where the crimes may have been committed, by, for example, becoming a Party to the *Council of Europe Convention against Organ Trafficking*;
- establish national registries of all organ transplants performed within their jurisdiction as well as all transplants involving their citizens and residents performed in another jurisdiction, and the sharing of data internationally; and
- develop legal frameworks for healthcare and other professionals to communicate information about suspected cases of transplant-related crimes, as well as for the investigation of transplant-crimes committed within their jurisdiction or committed by their citizens or residents in another jurisdiction.³¹

United Nations Office on Drugs and Crime's Assessment Toolkit

4.20 In 2015, the United Nations Office on Drugs and Crime released an *Assessment Toolkit for Trafficking in Persons for the Purpose of Organ Removal* (the Assessment Toolkit). The Assessment Toolkit includes a series of recommendations that seek to draw together core standards, guidelines and regulatory approaches developed by the international community.

- 4.21 Key recommendations made by the Assessment Toolkit include:
- addressing both organ trafficking demand- and supply-side issues;
 - awareness raising and training about the risk factors of persons vulnerable to organ trafficking and the health risks associated with transplant tourism;
 - the development of domestic legislation which carries extraterritorial application and ensures victims are not held liable;
 - identifying potentially illegal transplant activities before organ removal occurs, through donor screening and counselling procedures, consent documentation, and record-keeping;
 - discouraging health insurance companies from reimbursing the costs of transplants abroad if the source of the organ cannot be identified
 - providing support services to victims; and

31 Pontifical Academy of Sciences, 'Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism', available: www.casinapioiv.va/content/accademia/en/events/2017/organ_trafficking/statement.html accessed 16 July 2018.

- putting in place information and intelligence sharing arrangements with other jurisdictions.³²

Desirability and practicability of accession to the Council of Europe Convention

4.22 The Sub-Committee's terms of reference included consideration of accession to the Council of Europe Convention (the Convention). Noting that Convention provides for the opportunity to make a reservation with regard to the requirement to establish extraterritorial jurisdiction,³³ these matters are dealt with separately in Chapter 5.

Trafficking in organs and trafficking in persons for organ removal

4.23 Existing Commonwealth legislation is a product of Australia's obligations to the Palermo Protocol.³⁴ The Palermo Protocol addresses organ trafficking in the context of human trafficking, thus the Criminal Code proscribes offences as trafficking in persons for the purposes of organ removal, rather than trafficking in organs themselves per se.³⁵

4.24 Parties to the Palermo Protocol, including Australia, are obligated to criminalise trafficking in persons as defined by the three basic elements of the offence:

- the action – the recruitment, transportation, transfer, harbouring or receipt of persons;
- the means by which the action is carried out – the use of the threat of force or coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- the purpose of the action – exploitation, which includes, inter alia, the removal of organs.³⁶

32 United Nations Office on Drugs and Crime (UNODC), *Assessment toolkit: trafficking in persons for the purpose of organ removal*, UNODC, Vienna, 2015, Chapter 4 – Good practice responses and recommendations.

33 *Council of Europe Convention against Trafficking in Human Organs*, open for signature 25 March 2015, CETS 216 (entered into force 1 March 2018), art 10(3).

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

35 *Palermo Protocol*, art. 5(1).

36 *Palermo Protocol*, art. 10(3).

4.25 The legislative implementation guidance to the Palermo Protocol states that the three element definition of trafficking in persons is to be included in domestic law:

As defined, trafficking consists of a combination of three basic elements, each of which must be taken from a list set out in the definition... The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves.³⁷

4.26 ‘Trafficking in organs’ and ‘trafficking persons for the purpose of the removal of organs’ are separate but related activities, with the latter a subset of the former.³⁸ Organ trafficking may occur independently of the definition of ‘trafficking in persons’ provided by the Palermo Protocol; the three elements of the definition provided may not always be present.³⁹ The relatively restrictive definition may not capture the conduct of persons who are not involved in the recruitment, transportation or transference of the person, but may be integral to the criminal endeavour.⁴⁰

Desirability of accession

4.27 Submissions to this inquiry expressed strong support for accession to the Council of Europe Convention. This consensus is supplemented by the general support for the Convention among transplant professionals. Such support is apparent in the recent recommendations made by the Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism⁴¹ and the Declaration of Istanbul Custodian Group.⁴²

37 United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime*, paras. 32-33.

38 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, p. 93.

39 Council of Europe and the United Nations, *Study on trafficking in organs, tissues and cells and trafficking in human beings*, 2009, pp. 93-98.

40 M López-Fraga, et al., ‘A needed Convention against trafficking in human organs’, *Lancet*, vol. 383, 2014, p. 2188.

41 Recommendation 4: That governments establish a legal framework that provides an explicit basis for the prevention and prosecution of transplant-related crimes, and protects the victims, regardless of the location where the crimes may have been committed, for example by becoming a Party to the Council of Europe Convention against Organ Trafficking. Pontifical Academy of Sciences. *Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking and Transplant Tourism*. Available: www.casinapioiv.va/content/accademia/en/events/2017/organ_trafficking/statement.html accessed 16 July 2018.

42 Declaration of Istanbul Custodian Group, *Submission 14*.

The Royal Australasian College of Physicians also supports accession to the Convention.⁴³

- 4.28 Dr Maria Soledad Antoni, who gave evidence in her private capacity as a practising public health specialist in the Philippines and an Ph.D candidate from Griffith University, highlighted the distinction between trafficking in organs and trafficking in persons for organ removal as separate issues, and argues both should be adequately addressed in Australian law.⁴⁴ The Law Council of Australia recommended accession, arguing that a clear distinction between these two activities is required to better prevent and prosecute such acts.⁴⁵ Ms Felicity Heffernan of Australian Catholic Religious Against Trafficking in Humans considered accession to be “essential,” on the basis that the Convention criminalises organ trafficking independent of human trafficking.⁴⁶ Ms Heffernan notes that, in terms of exploitation for organ removal, “not everyone is trafficked.”⁴⁷
- 4.29 The Declaration of Istanbul Custodian Group also highlighted the comprehensive and encompassing definition of organ trafficking provided for by the Convention.⁴⁸ The Custodian Group noted that jurisdictions may current face difficulties prosecuting those individuals who contribute to and benefit from organ trafficking and transplant tourism, if the person is not directly involved in the brokering of a commercial organ transaction.⁴⁹
- 4.30 Australian Lawyers for Human Rights argued that accession would provide greater legal effect to existing Australian human rights policy and the international legal instruments to which Australia is already a Party.⁵⁰ Australian Catholic Religious Against Trafficking in Humans supported accession and noted the success of Australian ratification of other Council of Europe instruments in the past.⁵¹ The Asian Pacific Society of Nephrology recommended accession and observed that it would represent a significant normative statement by Australia in the Asia-Pacific region.⁵²

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

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

45 Law Council of Australia, *Submission 61*, p. 17.

46 Felicity Heffernan, Australian Catholic Religious Against Trafficking in Humans (Western Australia), *Submission 4*, p. 5.

47 Felicity Heffernan, Australian Catholic Religious Against Trafficking in Humans (Western Australia), *Submission 4*, p. 5.

48 Declaration of Istanbul Custodian Group, *Submission 14*, p. 2.

49 Declaration of Istanbul Custodian Group, *Submission 14*, p. 2.

50 Australian Lawyers for Human Rights, *Submission 9*.

51 Australian Catholic Religious Against Trafficking in Humans, *Submission 8*, p. 11.

52 The Asian Pacific Society of Nephrology, *Submission 6*, p. 2.

4.31 The Catholic Archdiocese of Sydney recommended accession to the Convention and highlighted its value as a framework to support information-sharing with international partners to combat criminal activity.⁵³ This sentiment was echoed by the Law Council of Australia who noted:

...the Convention recognises the importance of and promotes close international cooperation to combat the global threat posed by trafficking in human organs. By acceding to the Convention, Australia can benefit from international engagement regarding this issue.⁵⁴

4.32 Anti-Slavery Australia stopped short of recommending Australia accede, rather recommending that Australia monitor the progress of the Convention and consider what approach might best suit the Australian context.⁵⁵

Practicability of accession

4.33 The Sub-Committee identified no firm impediments to accession to the Convention, though notes the requisite legislative reform would require the collaboration of the Commonwealth and the States and Territories.

4.34 The explanatory memorandum to the Council of Europe Convention notes that obligations made under the Convention are subservient to constitutional rules or other fundamental principles provided for in Party jurisdictions.⁵⁶

4.35 The Australian Government response, provided by the Department of Home Affairs, to questions posed by the Sub-Committee around the practicality of accession to the Convention noted that the Government would have to be invited by the Council of Europe's Committee of Ministers in order to become a party to the Convention as Australia is not a member state of the European Union or a non-member state with observer status.⁵⁷ But, it is not aware of any potential challenges relating to adopting the dual obligations of both the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*,

53 Catholic Archdiocese of Sydney, *Submission 42*, p. 3.

54 Law Council of Australia, *Submission 61*, p. 17.

55 Anti-Slavery Australia, *Submission 11*, p. 4.

56 Council of Europe, *Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs*, 2015, para. 28.

57 Department of Home Affairs, Answer to Questions on Notice (QoN), *Submission 166*, p. 1.

*supplementing the United Nations Convention against Transnational Organized Crime and the Convention.*⁵⁸

- 4.36 The Government also noted that the Commonwealth *Crimes Act 1914* has a number of mechanisms through which offenders' circumstances are able to be taken into account at sentencing and that any introduction of a new offence would take into account "the seriousness of the conduct proposed to be criminalised and the consistency of the proposed maximum penalty with other commensurate offences."⁵⁹ The government confirmed that all slavery-like offences in Division 270 and trafficking in persons offences in Division 271 of the *Criminal Code Act 1995* have extended geographical jurisdiction; and that any consideration to apply extended jurisdiction would take into account a range of factors including the seriousness of the offence and the practical considerations around enforceability.⁶⁰
- 4.37 The Law Council of Australia observed that Australia's existing approach, whereby intent is considered as an aggravating factor, rather than a critical element of the offence, would be compatible with the Convention:

The explanatory report to the Council of Europe Convention notes that the interpretation of the word 'intentionally' is left to domestic law, but the requirement for intentional conduct relates to all the elements of the offence. It also notes, however, that this does not mean that States parties would not be allowed to go beyond this minimum requirement by also criminalising non-intentional acts.⁶¹

Sub-Committee view

- 4.38 Existing legislative approaches are limited by the narrow definition of the object of the crime with regard to the physical movement of the victim. These approaches are no longer sufficient to address transnational organ trafficking. The Sub-Committee agrees with the findings of the joint United Nations and Council of Europe study which concluded that adoption of a new international instrument is required to address trafficking in human organs, rather than trafficking in persons for the purposes of organ removal alone.
- 4.39 The Sub-Committee notes the prohibition against the use of organs for commercial purposes, at present, is largely uniform in State and Territory

58 Department of Home Affairs, Answer (QoN), *Submission 166*, p. 1.

59 Department of Home Affairs, Answer (QoN), *Submission 166*, p. 2.

60 Department of Home Affairs, Answer (QoN), *Submission 166*, p. 2.

61 Law Council of Australia, *Submission 61*, p. 16; citing Council of Europe, *Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs*, 2015, para. 28.

law, though considers that both the existing Australian legislative and policy approaches could do more to address the transnational problem.

- 4.40 The Convention is an important framework to combat the transnational organised crime entities involved in this trade, which induces the involvement of Australians in the subjugation of victims across multiple international jurisdictions. Australia has an obligation to demonstrate leadership as a notable organ-importing jurisdiction, and now has the opportunity to do so through accession to the Convention. The Sub-Committee endorses the Convention and recommends the Australian Government commences engagement with the States and Territories and other key stakeholders to progress signature and ratification.

Recommendation 6

The Sub-Committee recommends that the Australian Government sign and ratify the Council of Europe Convention against Trafficking in Human Organs, and works with the States and Territories to make the requisite amendments to Commonwealth and State and Territory legislation and ensure non-legislative obligations are met.

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
-

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.

Case study on alleged human tissue trafficking

‘Real Bodies’

- 6.1 The *Real Bodies* commercial anatomical exhibition, on display in Australia during the course of this inquiry, was brought to the attention of the Sub-Committee by a number of witnesses and is illustrative of an apparent gap in the current legislation. The *Real Bodies* exhibition involves the commercial display of 20 plastinated human cadavers, and ‘over 200’ plastinated organs, embryos and foetuses.¹

Allegations of the trafficking of organs and other human tissue

- 6.2 Mr David Shoebridge MP of the New South Wales Parliament informed the Sub-Committee as to the nature of the exhibition:

...[they] are real bodies ... they are displayed in quite grotesque circumstances – some of them literally sawn down the middle and presented as a human standing and divided in two so that you can look into the internal parts of them. There are pregnant women.

1 Another exhibition called BODY WORLD’s Vital which also features plastinated human bodies that is currently on display in Australia. The exhibition is not associated with Real Bodies: The Exhibition. The BODY WORLD website states that the bodies on display are from donors ‘who declared during their lifetime that their bodies should be made available after their deaths for the training of physicians and instruction of laypersons.’ See <https://bodyworlds.com>

There are multiple fetuses ... put on display for commercial gain ... it is a grossly exploitative process. The proprietors ... have been asked about the circumstances in which these bodies came into their possession, and they have been unable and unwilling to prove that any of the persons on display ever gave their consent.²

- 6.3 The human tissue used in the exhibition has been preserved through a method known as plastination. Plastination involves the removal of the skin and replacement of tissue fluids through the forced vacuum impregnation of silicone, epoxy, and polyester resin into the tissue.³
- 6.4 Mr Thomas Zaller, president of exhibition organiser Imagine Exhibitions, has stated the human bodies and tissue were sourced from China and were unclaimed by relatives of the deceased.⁴ Mr Zaller told News Corporation that there is “no documentation” as to the identities of the cadavers and fetuses.⁵ Mr Zaller has indicated that the cadavers were sourced from Dr Hong-Jin Sui of Dalian Medical University in China between 2000 and 2004.⁶ In a statement to News Corp, Dr Sui said the cadavers were “originally received from the city morgue and then transferred to medical universities in China” and that the cadavers “have been legally donated ... certified to have died of natural causes.”⁷
- 6.5 According to an investigative report by *Der Spiegel*, a number of human cadavers sourced from Dr Sui between 2000 and 2004 were later observed to have bullet holes in their skulls.⁸ According to the same report, Dr Sui, in email correspondence dated 29 December 2001, described two specific cadavers he had obtained as “very fresh,” having been shot and had their livers removed, allegedly for transplantation purposes, that same day.⁹ According to *The Guardian*, Dalian Medical University is geographically

2 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, p. 22.

3 O Singh, et al., ‘Plastination: a promising method for preserving biological specimens’, *International Journal of Scientific and Research*, vol. 3, no. 6, 2013.

4 E Pacitti, ‘Real Bodies controversy: how Australian museums regulate the display of human remains’, *The Conversation*, 30 April 2018, available: <http://theconversation.com/real-bodies-controversy-how-australian-museums-regulate-the-display-of-human-remains-95644>, accessed 12 July 2018.

5 M Palin, ‘Real Bodies: The Exhibition’, controversy about ‘disturbing’ origins of corpses’, *News.com.au*, 9 April 2018, available: <https://www.news.com.au/technology/science/human-body/real-bodies-the-exhibition-controversy-about-disturbing-origins-of-corpses/news-story/fb3e9d7702cfdbb1bba171b87df9ca32>, accessed 12 June 2018.

6 E Joyce, ‘Ever wanted to see a real human body, from the inside out?’, *TimeOut Sydney*, 13 April 2018, available: <https://www.timeout.com/sydney/news/ever-wanted-to-see-a-real-human-body-from-the-inside-out-041318>, accessed 12 July 2018.

7 M Palin, ‘Real Bodies: The Exhibition’, controversy’

8 S Robel and A Wassermann, ‘Händler des Todes’, *Der Spiegel*, 19 January 2004.

9 S Robel and A Wassermann, ‘Händler des Todes’, *Der Spiegel*, 19 January 2004.

proximate to three facilities allegedly used to detain Falun Gong practitioners and other prisoners of conscience, including between 2000 and 2004.¹⁰ A number of advocacy groups claim to have corroborated these allegations.¹¹

Australian Government position

- 6.6 The Chair of the Sub-Committee wrote to the Attorney-General and the Ministers for Home Affairs, Health, and Communications and the Arts requesting that they update the Sub-Committee on the circumstances in which the human tissue used in the exhibition came to be on commercial display in Australia and any relevant powers available to their portfolios.¹²
- 6.7 The Attorney General advised the Sub-Committee that he retains administrative responsibility for the *Criminal Code Act 1995*, and that the policies in regards to the *Real Bodies* Exhibition are the responsibility of the Minister for Home Affairs, the Minister for Communication and the Arts and the Minister for Health.¹³ He noted that he “would consider any proposed amendments to the Criminal Code” the Sub-Committee might recommend and he welcomed the Sub-Committee raising this issue with him.¹⁴
- 6.8 The Minister for Law Enforcement and Cyber Security, responding on behalf of the Home Affairs Portfolio, outlined that the circumstances of the removal of organs and their commercialisation is a matter dealt with by state and territory legislation.¹⁵ The Minister indicated that the human remains imported for the purposes of the exhibition do not require importation permits under the *Customs Act 1901* and *Customs (Prohibited Imports) Regulations 1956*.¹⁶ In a related Question on Notice response, the Home Affairs portfolio indicated that the Department of Health has not

10 L Harding, ‘Von Hagens forced to return controversial corpses to China’, *The Guardian*, 23 January 2004.

11 Australian Committee of the International Coalition to End Transplant Abuse in China, ‘Open Letter signed by lawyers, academics and ethicists urges the Australian Government to close “Real Bodies: The Exhibition”’, 19 April 2018, available: <https://endtransplantabuse.org/open-letter-urges-for-real-bodies-the-exhibition-to-be-closed-down/>, accessed 20 July 2018.

12 Copies of letters from each of these ministers are available in Appendix F of this report.

13 The Hon Christian Porter MP, Attorney-General, *Submission 174*.

14 The Hon Christian Porter MP, Attorney-General, *Submission 174*.

15 The Hon Angus Taylor MP, Minister for Law Enforcement and Cyber Security, *Submission 172*.

16 The Hon Angus Taylor MP, Minister for Law Enforcement and Cyber Security, *Submission 172*.

sought an amendment to the *Customs (Prohibited Imports) Regulations 1956* to class these items as prohibited.¹⁷

- 6.9 The Minister for Health advised the Sub-Committee that the Health Portfolio is responsible for administering the human health aspects of the *Biosecurity Act 2015*, which includes the importation of human remains into Australia.¹⁸ The Minister noted that there is no basis provided for by the *Biosecurity Act 2015* for the refusal of importation on any grounds other than biosecurity risk.¹⁹ The Minister informed the Sub-Committee that the human remains imported for the *Real Bodies* Exhibition were assessed to pose no risk to public health.²⁰
- 6.10 The Minister for Communications and the Arts noted the sensitivities associated with the exhibition and confirmed the Arts Portfolio has not provided any funding, support or approvals in relation to the exhibition, nor is the exhibition associated with any publicly-funded arts institution.²¹

Treatment under current legislation

- 6.11 The importation of the organs and other forms of human tissue used in the exhibition does not appear to contravene current Commonwealth human trafficking laws set out in the *Criminal Code Act 1995*. As previously stated, the current legislation captures only trafficking in persons for the purposes of organ removal; it does not capture trafficking in organs and other human tissue itself. This gap appears to be compounded by limitations to the capacity of state and territory legislation to adequately deal with ethical issues relating to human tissue sourced overseas.
- 6.12 The Royal Australasian College of Physicians (RACP) has called for the exhibition to be closed unless Imagine Exhibitions "can prove these bodies and organs have been ethically sourced and have adequate donor consent".²² RACP further argued that the exhibition was in breach of the requirements for the public display of donor consent forms per the *Anatomy Act 1977 (NSW)*.²³

17 Department of Home Affairs, Answer to Question on Notice (QoN), *Supplementary Submission 166.1*.

18 The Hon Greg Hunt MP, Minister for Health, *Submission 171*.

19 The Hon Greg Hunt MP, Minister for Health, *Submission 171*.

20 The Hon Greg Hunt MP, Minister for Health, *Submission 171*.

21 Senator the Hon Mitch Fifield, Minister for Communications and the Arts, *Submission 175*.

22 Royal Australasian College of Physicians, 'Experts call for ban on Real Bodies - The Exhibition', 11 July 2018, available: <https://www.racp.edu.au/news-and-events/media-releases/experts-call-for-ban-on-real-bodies---the-exhibition>, accessed 12 July 2018.

23 RACP, 'Experts call for ban on Real Bodies - The Exhibition'

- 6.13 Mr Shoebridge MP argued that the existing provisions under New South Wales (NSW) legislation – the *Anatomy Act 1977 (NSW)* and the *Crimes Act 1900 (NSW)* – are “defective,” as they are not sufficiently robust or practical to prevent the exhibition of human remains without identity and consent documentation.²⁴ Mr Shoebridge indicated that he had sought to refer this matter for prosecution to the NSW Police who responded, ‘we’re not in a position to identify whether or not consent was given in China.’²⁵ Mr Shoebridge called upon the Commonwealth to ensure:
- ...if bodies and body parts are brought into this country for commercial or other exploitative use, there be certification as to consent.²⁶
- 6.14 After an examination of the available evidence regarding the circumstances of the *Real Bodies* exhibition, Mr David Matas observed:
- Consent alone should not be sufficient. The consent must come from someone not in prison. Consent obtained from a prisoner that his/her body could be displayed after death in a body exhibit should not be considered a truly free consent, and therefore should not be acceptable.²⁷
- 6.15 Mr Matas further recommended that, for Australia to better control the entry of human remains from overseas, three conditions should apply. Each body or body part, in addition to consent, should have documentation that shows ‘the source of the body and body part and the cause of death.’²⁸
- 6.16 Doctors Against Forced Organ Harvesting expressed concern surrounding how the exhibition was classified by Customs, the Department of Home Affairs, and the Department of Health.²⁹ They contend that the process for approval was not rigorous enough and that under the existing *Biosecurity Act 2015*, human remains cannot be classified as ‘goods’.³⁰ They suggest that under the current laws, the *Real Bodies* exhibition could have been denied entry to Australia.³¹
- 6.17 Doctors Against Forced Organ Harvesting noted a number of international approaches to such exhibitions and recommended that

24 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 22.

25 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 22.

26 Mr Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 22.

27 Mr David Matas, *Submission 168*

28 Mr David Matas, *Submission 168*

29 Doctors Against Forced Organ Harvesting, *Supplementary Submission 22.1*

30 Doctors Against Forced Organ Harvesting, *Supplementary Submission 22.1*

31 Doctors Against Forced Organ Harvesting, *Supplementary Submission 22.1*

Australia make clear amendments in relevant legislation that specifies the need for comprehensive documentation in regards to any human remains to be imported.³² They also recommends banning exhibitions of human remains that are a commercial venture, “to protect the dignity of the deceased”.³³

Sub-Committee view

- 6.18 The Sub-Committee considers that the Commonwealth is best placed to consider the ethical provenance of human tissue imported into Australia from another country.
- 6.19 The Sub-Committee stresses that it has not been presented with evidence of a breach of Commonwealth legislation or any form of legal wrongdoing by Mr Zaller or Imagine Exhibitions. The Sub-Committee instead contends that, it is not desirable for human tissue, regardless of its source, to be brought to Australia without appropriate documentation of free, informed and specific consent obtained from either the donor person, or from their next-of-kin. The Sub-Committee considers that the burden to demonstrate the ethical, consent-based sourcing of organs and other forms of human tissue should fall upon the organisers of the exhibition in this case, and in others like it.
- 6.20 The concerning circumstances raised by the allegations of the killings of prisoners of conscience in China, during the period this human tissue was sourced, illustrate the importance of that documentation. These concerns are of particular significance with regard to public, commercial exhibitions such as this. Cognisant of the extent to which these matters may fall to the States and Territories, the Sub-Committee considers that the Commonwealth should work with the jurisdictions to ensure adequate controls are in place to prevent a reoccurrence of such a case.
- 6.21 The Sub-Committee notes that accession to the Council of Europe Convention would obligate Australia to expand the scope of existing legislation to criminalise, inter-alia, the transportation, transfer, receipt, import and export of organs removed without the “free, informed and specific consent of the living or deceased donor.”³⁴ The Sub-Committee considers this case to be compelling evidence for the value of accession to the Council of Europe Convention.

32 Doctors Against Forced Organ Harvesting, *Supplementary Submission 22.1*

33 Doctors Against Forced Organ Harvesting, *Supplementary Submission 22.1*

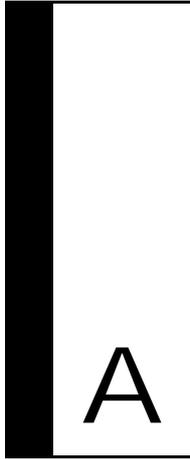
34 *Council of Europe Convention against Trafficking in Human Organs*, open for signature 25 March 2015, CETS 216 (entered into force 1 March 2018), art. 2(2).

Recommendation 12

The Sub-Committee recommends that the Australian Government works with the States and Territories, as a matter of priority, to ensure that any person or body corporate importing human tissue into Australia for commercial purposes produces verifiable documentation of the consent of the donor person or their next-of-kin. This could include appropriate legislative changes at the Commonwealth or State and Territory level where required.

The Hon Mr Kevin Andrews MP
Chairman
Human Rights Sub-Committee
3 December 2018

Senator the Hon Ian McDonald
Chairman
Joint Standing Committee on
Foreign Affairs, Defence and Trade
3 December 2018



Appendix A — List of Submissions

- 1 Attorney-General's Department
 - 1.1 Supplementary to submission 1
- 2 Fighting for Justice Foundation
 - 2.1 Supplementary to submission 2
- 3 Greens NSW
- 4 Felicity Heffernan
- 5 Stop the Traffik
- 6 The Asian Pacific Society of Nephrology
- 7 International Coalition To End Organ Pillaging In China - AAIC
 - 7.1 Supplementary to submission 7
 - 7.2 Supplementary to submission 7
 - 7.3 Supplementary to submission 7
- 8 Australian Catholic Religious Against Trafficking in Humans Inc
- 9 Australian Lawyers for Human Rights
- 10 Maria Soledad Antonio
- 11 Anti-Slavery Australia
 - 11.1 Supplementary to submission 11
- 12 Xiaoyu Li
- 13 The Echo Project
- 14 The Declaration of Istanbul Custodian Group
- 15 The International Society of Nephrology
- 16 The Transplantation Society
- 17 Human Rights Law Foundation
- 18 Andrew Bush
- 19 Melville Miranda
- 20 Yang Lin
- 21 Australian Epoch Times Ltd

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- 22 Doctors Against Forced Organ Harvesting
- 22.1 Supplementary to submission 22
 - 22.2 Supplementary to submission 22
- 23 Stefania Cox
- 24 Falun Dafa Association of Australia Inc
- 24.1 Supplementary to submission 24
- 25 Name Withheld
- 26 Tran Chau Nguyen Ly
- 27 Vietnamese Community in Australia - QLD Chapter
- 28 Prof Jeremy Chapman and Prof Philip O'Connell
- Additional Information
- 29 Name Withheld
- 30 Confidential
- 31 Dongdi ZHU
- 32 Yong Zhang
- 33 Manhua YU
- 34 Jintao Liu
- 35 Bizhen Stacey Wang
- 36 Australia Chinese Traditional Culture Promotion Association
- 37 Kevin Jiang
- 38 Yumei WU
- 39 Linda Lin
- 40 Heqin Chen
- 41 Name Withheld
- 42 Justice and Peace Office, Catholic Archdiocese of Sydney
- 43 Lee Hutchison
- 44 Confidential
- 45 Leon Gao
- 46 Name Withheld
- 47 Name Withheld
- 48 Mark Hutchison
- 49 Name Withheld
- 50 Amy Duncan
- 51 Greens NSW
- 52 Name Withheld
- 53 Fengchun Wu
- 54 Erin Toirkens
- 55 Henry Jom
- 56 Lianjun Liu
- 57 Name Withheld
- 58 Name Withheld

59	Name Withheld
60	Nancy Chen
61	Law Council of Australia
62	Holy See
63	Name Withheld
64	Name Withheld
65	Name Withheld
66	Name Withheld
67	Mel Ozdemir
68	Yuanxin Luan
69	Name Withheld
70	Ling Ling Dong
71	Zhansheng Liu
72	Changzhi Yue
73	Yanqin Liu
74	Name Withheld
75	Name Withheld
76	Mingzhen Jia
77	Nong Jin
78	Li Yin
79	Alan Wang
80	Peter Tiong
81	Barbara McGuirrin
82	Sheau May Chang
83	Yongyang Lu
84	Li Zhongqiang
85	Sveta Mei
86	Fengqiang Zhang
87	Philippa Rayment
88	Cindy Lu
89	Ms Elaise
90	Kauser Huq
91	Lili Zhang
92	Name Withheld
93	Name Withheld
94	Name Withheld
95	Dong Wang
96	Elizabeth Li
97	Confidential
98	Robert Vinnicombe
99	Confidential
100	Confidential

101 Name Withheld
102 Jason Lin
103 Heidi Hoang
104 Keng Onn Wong
105 Kathy McWilliams
106 Name Withheld
107 Name Withheld
108 Naveah Liu
109 Yuqin Lei
110 Fengying Zhang
111 Joey Huang
112 Hoang Bui
113 Jingmin Zhao
114 Yumin Zhao
115 Jing Li
116 Zheng Zeng
117 Name Withheld
118 Guangyao QU
119 Name Withheld
120 Shihui Fan
121 Ministry of Public Security of Vietnam
122 Mingyuan SUN
123 Gui Xian Wang
124 Grace Mann
125 Xiang Liu
126 Brad Toh
127 Qi Jiazhen
128 Ping Yu
129 Dong Fan Zhang
130 Name Withheld
131 Liu Liandi
132 Nicholas A Earle
133 Louise Morrison
134 Yehong Huang
135 Christine Ford
136 Jenny Wang
137 Ting Li
138 Ms Ye
139 Thi Thudung Do
140 Nam Nguyen
141 Minh Trung Nguyen
142 Barbara Schafer

143	Qian Wang
144	Yichun Chen
145	fangfei Yang
146	Silvina Phan
147	Feng Liang
148	Dingyi Huang
149	Jessica Kneipp
150	Janine Rankin
151	Jan Becker
152	Jane Dai
153	An Yuan
154	Maryann Leatham
155	Jun Meng
156	Wei Li
157	Paul Wang
158	Nissrine Smyth
159	Name Withheld
160	Name Withheld
161	Brian Yan
162	Yang Chen
163	Charles Camenzuli
164	Name Withheld
165	Council of Europe / Conseil de l'Europe
166	Department of Home Affairs
	■ 166.1 Supplementary to submission 166
	■ 166.2 Supplementary to submission 166
	■ 166.3 Supplementary to submission 166
	■ 166.4 Supplementary to submission 166
167	Confidential
168	Dr David Matas
169	The Royal Australasian College of Physicians
170	China Organ Transplant Development Foundation
171	Minister for Health
172	Minister for Law Enforcement and Cyber Security
173	Professor Toby Coates
174	Attorney-General
175	Minister for Communications, Minister for the Arts
176	Department of Health
	■ 176.1 Supplementary to submission 176



Appendix B — List of Exhibits

1. Falun Dafa Association
Bar Association-Human Tissue Amendment (Trafficking in Human Organs) Bill, Human Tissue Amendment (Trafficking in Human Organs) Bill 2016-Second Reading Speech, Australian and International Development Summary, 2016
2. Falun Dafa Association
Bloody Harvest: The Killing of Falun Gong for their Organs [hard copy], The Killing of Prisoners of Conscience for Organs in China[hard copy], China Organ Harvesting Research Centre, 2017 [hard copy]
3. Falun Dafa Association
Medical genocide: Hidden mass murder in China's organ transplant industry [VIDEO – hard copy], Medical Genocide Hidden Mass Murder in China's Organ Transplant Industry [hard copy]
4. The Royal Australian College of Physicians RACP
The Royal Australian College of Physicians RACP statutory review of the NSW Human Tissue Act 1983, 2018
5. Dr Maria Soledad Antonio
Diagram – Forms of Transplant Tourism, 2018
6. Professor Philip O'Connell
Slides from the PAS conference at the Vatican and covering email, 2017
7. Professor Jeremy Chapman from Controversial Conversations Convention
Transplant Tourism and Organ Trafficking
8. Dr Dominique Martin
Prevention of Transnational Transplant-Related Crimes – What more can be done?
9. Dr Campbell Fraser

An Overview of the Fulung-Gong Organisation and its Claims of Organ-Harvesting, 2017

10. Ms Susie Hughes, International Coalition to End Transplant Abuse in China (ETAC)
South Korean Documentary (Seven Deadly Sins) LINK, 2018
11. Ms Susie Hughes, International Coalition to End Transplant Abuse in China (ETAC)
Form Guide for Entrance to USA, International Coalition to End Transplant Abuse in China (ETAC) Mission statement, 2018
12. Confidential
13. Dr David Matas
Interaction with Chinese transplant professionals, Remarks prepared for a poster presentation at the Harvard Medical School Centre for Bioethics Conference, 2018
14. Dr David Matas
Ethical standards and Chinese organ transplant abuse, Revised remarks for a presentation to the Royal Australasian College of Physicians Ethics Committee, 2018
15. Ms Andrea Tokaji, Fighting For Justice Foundation
Parliamentary briefing document from 11 September 2017
16. Ms Natasha Cole and Ms Ann Frizzell, Department of Health
Statement of the Pontifical Academy of Sciences Summit on Organ Trafficking held at the Vatican, 7-8 February 2017
Email with list of Australian attendees to Pontifical Academy of Sciences Summit on Organ Trafficking
Internal spreadsheet with data regarding Australians who have travelled overseas for organ transplantation



Appendix C—Witnesses who appeared at public hearings

Canberra, Tuesday, 28 March 2017

Department of Health

Ms Natasha Cole, First Assistant Secretary, Health Services Division

Department of Foreign Affairs and Trade

Mr Graham Fletcher, First Assistant Secretary, North Asia Division

Attorney-General's Department

Mr Ryan Perry, People Smuggling and Trafficking Section

Canberra, Tuesday, 9 May 2017

Professor Jeremy Chapman, AC

Dr Campbell Fraser

Declaration of Istanbul Custodian Group

Dr Dominique Martin, Co-Chair

The Transplantation Society

Professor Philip O'Connell, Immediate Past President

Canberra, Tuesday, 13 June 2017

Professor Jeremy Chapman, AC

Dr Campbell Fraser

Declaration of Istanbul Custodian Group

Dr Dominique Martin, Co-Chair

The Transplantation Society

Professor Philip O'Connell, Immediate Past President

Canberra, Friday, 8 June 2018**Transplantation Society of Australia and New Zealand - via Skype**

Professor Patrick Toby Hewlett Coates, Honorary Secretary and President-elect

Falun Dafa Association of Australia

Mr John Deller, Secretary

Dr Lucy Zhao, President

Doctors Against Forced Organ Harvesting

Ms Caroline Dobson, Researcher

Mrs Sophia Bryskine, Australian Spokesperson and Policy Adviser

**International Coalition to End Transplant Abuse In China – Australian
Advocacy and Initiatives Committee**

Ms Madeleine Bridgett, Member, Australian Advocacy and Initiatives Committee

Mrs Susanne Gaye Hughes, Executive Director and Acting Chair, Australian
Advocacy and Initiatives Committee

Professor Wendy Anne Rogers, Chair, International Advisory Committee, and
Member, Australian Advocacy and Initiatives Committee

Doctors Against Forced Organ Harvesting

Ms Anastasia Lin, International Guest Speaker

Fighting for Justice Foundation

Miss Andrea Tokaji, Founder and Director

Greens NSW

Mr David Shoebridge, Member of Parliament

Australian Lawyers for Human Rights

Ms Madeleine Bridgett, Business and Human Rights Committee

Anti-Slavery Australia

Ms Elizabeth Sheridan, Researcher

Ms Anastasia, Lin International Guest Speaker

The Transplantation Society

Professor Philip O'Connell, Immediate Past President

Dr Campbell Fraser – Private capacity**Declaration of Istanbul Custodian Group**

Dr Dominique Martin, Co-Chair

Department of Health

Ms Louise Clarke, Assistant Secretary, Office of Health Technology Policy Branch

Ms Penny Shakespeare, Acting Deputy Secretary, Health Financing Group

Australian Organ and Tissue Donation and Transplantation Authority

Ms Lucinda Barry, Chief Executive Officer

Australia & New Zealand Dialysis and Transplant Registry

Professor Stephen McDonald, Acting Chief Executive

Department of Home Affairs

Ms Rebecca Mills, Acting Director, People Smuggling and Trafficking Section

Ms Tracey Pearce, Acting Assistant Secretary, Transnational Crime Policy Branch

Department of Foreign Affairs and Trade

Mr Graham Fletcher, First Assistant Secretary, North Asia Division

Dr Maria Soledad Antonio – Private capacity**Philippine Network for Organ Sharing, Department of Health (Philippines)**

Dr Francisco III Sarmiento, Program Manager, Philippine Organ Donation and Transplantation Program

Council of Europe via Skype

Mr Oscar Alarcon Jimenez, Co-Secretary, European Committee on Crime Problems

Dr Marta Lopez Fraga, Scientific Officer, European Directorate for the Quality of Medicines and HealthCare

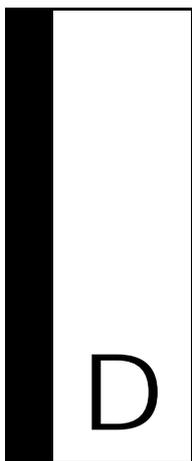
Canberra, Tuesday, 26 June 2018

Law Council of Australia

Mr Nicholas, AM QC Cowdery, Member of National Human Rights Committee

Dr Natasha Molt, Deputy Director of Policy, Policy Division

Ms Kristen Zornada, Policy Lawyer, Policy Division



Appendix D — Overseas legislative approaches to prohibit transplant tourism

Jurisdictional approaches

- 1.1 A number of specific overseas jurisdictions have passed laws which prohibit citizens from engaging in transplant tourism. The following is a summary of the legislative approaches in notable organ-importing jurisdictions overseas.

Canada

- 1.2 The primary coverage of organ trafficking provided by Canadian law is the offence of causing a person, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed, as provided for by the Canadian Criminal Code.¹
- 1.3 In December 2013, then-Member of Parliament Mr Irwin Cotler MP introduced a private member's bill, Bill C-561. The bill would have created penal sanctions for persons who are knowingly involved, within or outside of Canada, in the medical transplant of human organs or other body parts obtained or acquired as a consequence of a direct or indirect financial transaction, or without the donor's consent.² The bill was not carried passed into law.

1 *Criminal Code (Canada)*, s. 279.04(3).

2 *An Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking and transplanting human organs and other body parts)*, Bill C-561, 41st Parliament of Canada.

Israel

- 1.4 Prior to 2008, Israel was a notable organ importing state.³ Health insurers were enabled to directly reimburse patients for commercial transplantations performed abroad.⁴ Mr David Shoebridge MP of the New South Wales Greens observed:

The private health insurance industry in Israel looked at the figures and realised it was cheaper to fly the patient to China to obtain an unethically-traded organ, bring them back and deal with medical treatment following the transplantation rather than keep them on dialysis. There was a large number of Israeli residents going and doing that.⁵

- 1.5 In March 2008, the Israeli Knesset passed the *Organ Transplant Act 2008* (the Act). The Act provided for a range of measures to incentivise living organ donation, as well as criminalising participation in organ commercialism, both within and outside of Israel. The legislation prohibits: the purchase or sale of a human organ outside of a defined costs-reimbursement structure; brokering the purchase or sale of a human organ; the trafficking of a human organ across an Israeli border; and the subsidisation of a commercial transplantation by an insurer.⁶ The proscribed conduct applies on an extraterritorial basis; that is, to transplants occurring within Israel or outside of it.⁷

Taiwan

- 1.6 Amendments made in 2015 to Taiwan's *Human Organ Transplantation Act 1987* stipulate that patients who received a transplant overseas are required to provide details as to the hospital at which the transplant occurred and who was involved.⁸ Patients who are unable to demonstrate that the transplant occurred on a legal, consensual basis may not receive publicly-funded post-operative care upon their return to Taiwan.⁹ Patients

3 A Efrat, 'The rise and decline of Israel's participation in the global organ trade', *Crime, Law and Social Change*, vol. 60, no. 1, 2013.

4 Dr Lucy Zhao, President, Falun Dafa Association of Australia, *Committee Hansard*, Canberra, 8 June 2018, p. 15.

5 Mr David Shoebridge MP, Greens NSW, *Committee Hansard*, 8 June 2018, Canberra, p. 25.

6 Declaration of Istanbul, 'Organ Transplant Act 2008 (Israel)' (in translation), available: www.declarationofistanbul.org/index.php?option=com_content&view=article&id=267

7 J Lavee and A Stroler, 'Reciprocal altruism: the impact of resurrecting an older moral imperative on the national organ donation rate in Israel', *Law and Contemporary Problems*, vol. 77, no. 3, 2014, p. 326.

8 A Hsiao, 'Organ transplant laws tightened', *Taipei Times*, 13 June 2015.

9 Doctors Against Forced Organ Harvesting, 'Taiwan legislation sets a new standard in the combat against rogue organ harvesting practices,' 2015, available: <https://dafoh.org/taiwan->

proven to have received an illicit organ transplant overseas have committed an offence and may be subject to a maximum of five years imprisonment.¹⁰

United Kingdom

- 1.7 The legislative provisions relating to organ commercialism are provided for by the *Human Tissue Act 2004*. Although the Act criminalises trafficking in human tissue for the purposes of transplantation,¹¹ the Act contains no specific provision for its application on an extraterritorial basis. The United Kingdom has signed but not yet ratified the Council of Europe Convention against Trafficking in Human Organs.

United States

- 1.8 While the *National Organ Transplant Act 1984* creates a federal offence for the commercial trade in organs, the Act does not provide for extraterritorial application.¹² The United States has however taken particular action with regard to alleged organ trafficking in China.

- 1.9 United States immigration law has since 2002 prohibited the provisions of visas to persons who have engaged in coerced organ or bodily tissue transplantation. Per section 232 of the *Foreign Relations Authorization Act*, the Secretary of State is required to “direct consular officials not to issue a visa to any person whom the Secretary finds, based on credible and specific information, to have been directly involved with the coercive transplantation of human organs or bodily tissue...”¹³ This requirement is apparent in the question on visa applications for temporary travel to the United States:

“Have you ever been directly involved in the coercive transplantation of human organs or bodily tissue?”¹⁴

- 1.10 In June 2016, the House of Representatives of the United States Congress passed by unanimous consent House Resolution 343. The resolution

[legislation-sets-a-new-standard-in-the-combat-against-rogue-organ-harvesting-practices/](#) (accessed 16 July 2018).

10 DF Tsai et al., ‘The outcomes and controversies of transplant tourism – Lessons of an 11-year retrospective cohort study from Taiwan’, *PLoS One*, vol. 12, no. 6, 2017, p. 12.

11 *Human Tissue Act 2004 (UK)*, s. 32(1).

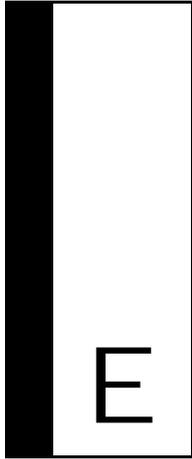
12 IG Cohen, ‘Can the Government ban organ sale? Recent court challenges and the future of US law on selling human organs and other tissue’, *American Journal of Transplantation*, vol. 12, 2012, p. 1984.

13 8 USC s. 1182f - Denial of entry into United States of Chinese and other nationals engaged in coerced organ or bodily tissue transplantation.

14 International Coalition to End Transplant Abuse in China, *Submission 7 - Supplementary Submission*, p. 3.

condemned the practice of “state-sanctioned forced organ harvesting in China” and called on China to “end the practice of organ harvesting from prisoners of conscience.”¹⁵ The resolution also called upon the United States Department of State to report annually to Congress on implementation of the visa ban noted above in relation to persons who are directly involved with the coercive transplantation of human organs or bodily tissue.

15 United States Congress, ‘H.Res.343 - Expressing concern regarding persistent and credible reports of systematic, state-sanctioned organ harvesting from non-consenting prisoners of conscience in the People’s Republic of China, including from large numbers of Falun Gong practitioners and members of other religious and ethnic minority groups’, *114th Congress of the United States*.



Appendix E — Correspondence from the Embassy of the People's Republic of China

1. Letter received from Embassy of the People's Republic of China
2. English translation of letter received from Embassy of the People's Republic of China

澳大利亚联邦议会外交、国防和贸易联委会人权分委会：

中国政府对器官移植工作态度是一贯和明确的，我们坚定遵循国际上公认的关于器官移植的伦理学原则，坚持中国公民逝世后器官捐献自愿、无偿的原则，使用符合伦理学原则的器官，严格控制活体器官移植，禁止旅游移植，保障器官捐献者和接受者权利，实现人体器官科学、公正的分配，推动中国器官移植工作在法治的框架内规范发展。自 2007 年《人体器官移植条例》（以下简称《条例》）颁布实施以来，中国已建立了符合中国国情、文化和社会治理结构的人体器官捐献与移植工作体系（包括捐献体系、获取与分配体系、移植临床服务体系、移植后科学注册体系以及移植服务监管体系），成立了中国人体器官捐献与移植委员会，有力地推动了中国人体器官捐献与移植事业的发展。

一、人体器官捐献与移植法制建设方面

2007 年，国务院颁布实施《条例》，对器官捐献与器官移植各方的法律责任进行了详细规定，标志着中国人体器官捐献与移植工作进一步走上了法制化和规范化的轨道。2011 年，《中华人民共和国刑法修正案（八）》中，进一步对器官捐献知情同意及器官买卖进行严格界定，将“组织出卖人

体器官”作为严重的刑事犯罪予以严厉打击。同时，国家卫生健康委和中国红十字会出台 30 余个配套文件进一步规范人体器官捐献与移植行为。中国人体器官捐献与移植工作遵循以下原则：

（一）自愿无偿原则。《条例》对人体器官捐献有明确规定：人体器官捐献应当遵循自愿、无偿的原则，禁止器官买卖，《刑法修正案八》已将器官买卖罪入刑。

（二）知情同意（明确同意）的原则。公民享有捐献或不捐献其人体器官的权利；任何组织或者个人不得强迫、欺骗或者利诱他人捐献人体器官。捐献人体器官的公民应当具有完全民事行为能力。公民捐献其人体器官应当有书面形式的捐献意愿，对已经表示捐献其人体器官的意愿，有权予以撤销。公民生前表示不同意捐献其人体器官的，任何组织或者个人不得捐献、摘取该公民的人体器官；公民生前未表示不同意捐献其人体器官的，该公民死亡后，其配偶、成年子女、父母可以以书面形式共同表示同意捐献该公民人体器官的意愿。

（三）回避的原则。《条例》及其配套文件明确规定：获取捐献器官，应当在捐献人死亡后进行。从事人体器官移植的医务人员和人体器官获取组织（OPO）工作人员不得参与捐献人的死亡判定。

（四）伦理审查的原则。明确要求各器官移植医院必须

成立人体器官移植技术临床应用与伦理委员会，对每一例器官移植进行伦理审查。未通过审查的，不得获取器官进行器官移植手术。

（五）活体器官移植管理的原则。活体器官移植是在公民逝世后器官捐献无法满足需要的一种不得已而为之的补充措施，在管理上中国采取了较国际上其他国家（如美国等）更为严格的活体器官移植监管措施，维护器官捐献者与接受者合法权益，确保活体器官移植在法律的框架内规范开展。在政策层面，中国在《刑法修正案（八）》、《人体器官移植条例》及其配套文件的框架下，形成了活体器官移植管理的政策体系并付诸实施。明确规定将活体器官捐献严格限定在亲属间，不得摘取不满 18 周岁公民的器官用于移植。所有活体器官移植手术必须经主诊医生、医院伦理委员会及省级卫生计生行政部门三级审核同意后方可实施。目前，中国活体器官捐献主要以父母向子女捐献为主，其余为配偶间捐献，子女向父母捐献，以及兄弟姐妹间的捐献。

（六）器官科学公平分配的原则。《条例》及《中国人体器官分配与共享基本原则和核心政策》明确规定：申请人体器官移植手术患者的排序，应当符合医疗需要，遵循公平、公正和公开的原则。

基于此政策，中国已建立了中国人体器官分配与共享计算机系统（以下简称 COTRS）。要求所有捐献器官必须通过

COTRS 进行分配，确保捐献器官的分配科学、高效、公平。

（七）可溯源管理的原则。中国已搭建了以 COTRS 和各器官移植登记中心为核心的大数据信息化监管平台，实现了器官可溯源管理。

（八）违法必究的原则。对于违反中国人体器官移植相关法律的行为。一经查实，我们将依据法律规定，对涉案医务人员和医疗机构给予暂停直至吊销执业证书或取消器官移植资质的处罚。涉及违反《刑法》等法律法规的，移交司法机关查处。

综上所述，中国对器官移植管理的法规和政策与世界卫生组织（WHO）《人体细胞、组织和器官移植指导原则》完全一致，在活体器官移植管理等方面甚至采取了更加严格的管理措施。

二、人体器官捐献方面

自 2010 年起，国家卫生健康委与中国红十字会密切协作，依据《条例》及两部门配套文件，立足于中国社会结构特点，建立了由中国红十字会作为第三方参与的人体器官捐献体系。中国在 2015 年实现器官来源的根本性转型，公民自愿捐献器官成为器官移植的唯一合法来源。器官捐献的理念得到社会广泛认同。中办、国办在《关于党员干部带头推进殡葬改革的意见》中，鼓励党员干部逝世后捐献器官和遗体。部分省份还通过地方立法，完善人体器官捐献法律保障

体系。

截至 2018 年 8 月底，我国已累计完成公民逝世后器官捐献达 1.9 余万例，捐献大器官突破 5.4 万个，其中，2017 年度，我国完成公民逝世后器官捐献 5146 例，捐献与数量均居世界第 2 位。

三、人体器官获取与分配方面

中国建立起了一支 2000 余名经过规范培训与考核的器官捐献协调员队伍。出台了《中国人体器官分配与共享基本原则和核心政策》，明确了器官分配的原则和政策，同时使用中国人体器官分配与共享计算机系统（以下简称 COTRS）分配捐献器官，确保捐献器官的分配科学、高效、公平。2016 年，建立了多部门协作的、以民航与高铁为核心的、低成本高效率的器官转运“绿色通道”，体现了政府对器官捐献与移植事业和保障人民群众健康安全的高度重视，彰显了“以人为本、生命优先”的理念。

四、人体器官移植服务能力方面

目前，中国有 178 所器官移植资质医院，有肝脏、肾脏、心脏、肺脏移植资质的医院数量分别为 136 所、97 所、46 所、32 所。2017 年共实施器官移植手术 16687 例。其中，86%来源于公民逝世后捐献，14%来源于亲属间活体捐献。

五、人体器官捐献与移植管理方面

国家卫生健康委成立了肝脏、肾脏、心脏、肺脏 4 个移

植数据中心（质控中心），分别独立承担肝脏、肾脏、心脏和肺脏移植数据注册登记、统计分析和移植质量控制等工作。目前，各数据中心与 COTRS 共同构成了中国器官移植管理的核心信息系统，开展了趋势预警分析、日常动态监测与重点监测，实现了移植器官的可溯源管理，形成了大数据信息化监管与点对点飞行检查紧密结合的监管机制。同时，国家卫生健康委员会联合国家公安部建立数据资源共享机制，严厉防范打击器官买卖犯罪行为。

六、国际交流方面

中国人体器官捐献与移植事业也得到了国际社会的大力支持。世界卫生组织（WHO）、国际移植协会（TTS）和国际器官捐献与获取协会（ISODP）等国际组织和相关国际专家（包括澳大利亚著名器官移植专家、TTS 前任主席 Philip O'Connell）多次来华并全程参与、见证了中国人人体器官捐献体系的构建，在器官获取组织（OPO）建立、人体器官捐献协调员培训、器官分配政策研究、人体器官捐献与移植的各种技术标准制定，以及人体器官捐献与移植管理等方面开展了广泛而又深入的合作和交流。

2016 年 8 月，在香港举办的第 26 届国际器官移植大会上，举办了“中国器官移植的新时代”专场会议，中国人体器官捐献与移植委员会黄洁夫主任委员作为唯一受邀嘉宾在大会主论坛作主旨发言，向世界展示了中国人体器官捐献

与移植工作改革发展取得的成就，得到了包括 WHO 和 TTS 在内的国际组织和专家的高度评价。WHO 代表表示中国目前的人体器官捐献与移植体系与 WHO 的指导原则完全一致。2016 年 10 月，在北京人民大会堂举办的中国-国际器官捐献大会上，时任世卫组织总干事陈冯富珍女士在视频讲话中高度赞扬中国在器官捐献与移植领域的进展，她表示中国的改革方向正确，行动迅速，许多成功经验可以作为样板，供其他国家学习借鉴。2017 年 2 月，在梵蒂冈举办的反对器官贩卖全球峰会上，展示了中国政府反对器官贩卖的坚决态度并倡议成立 WHO 器官捐献与移植特别委员会，统筹协调器官捐献与移植全球治理。2018 年 3 月，在梵蒂冈教皇科学院举办的全球践行伦理道德峰会上，与会各国专家一致认可中国在预防和打击器官贩卖工作中作出的重要贡献。会后发布《梵蒂冈教皇科学院践行伦理道德会议宣言》中，认为预防和打击器官贩卖的“中国模式”体现了世界卫生组织关于公正、透明和公平的指导原则，可供他国学习借鉴。2018 年 7 月，在中国倡议和积极推动下，WHO 器官捐献与移植工作委员会正式成立，中国和美国成为唯一拥有两位委员的国家。中国将在未来几年的国际器官移植全球治理的格局中贡献更多力量。

中国器官移植发展基金会

Joint Standing Committee on Foreign Affairs, Defence and Trade's Human Rights Sub-Committee:

The Chinese government has a consistent and clear attitude towards human organ transplantation. By firmly following the internationally-acknowledged ethical principles of organ transplantation, we insist that Chinese citizens voluntarily donate their organs after death. The organs being transplanted are in line with ethical principles. Living organ transplants are strictly monitored and transplant tourism is forbidden. We make sure that the rights of both organ donors and recipients are protected, human organ allocation is scientific and fair, and organ transplantation practices in China are developing legally. Since the introduction of the *Regulation on Human Organ Transplantation* (RHOT) in 2007, China has developed a system of human organ donation and transplantation which reflects China's identity, culture and governance of the society, including donation system, procurement and allocation system, clinical transplant service, post-transplantation registry system and transplantation service regulation system. Another achievement is the establishment of the National Organ Donation and Transplantation Committee. The development of human organ donation and transplantation in China has been promoted in the following areas:

1. Legislation of Human Organ Donation and Transplantation

The RHOT was introduced by the State Council in 2007, which stipulates in detail the legal responsibilities of all parties involved in organ donation and transplantation. This marked the legalization and standardization of human organ donation and transplantation practices in China. In 2011, the Eighth Amendment to the Criminal Law of the People's Republic of China came into effect, which strictly distinguishes organ donation with informed consent from organ trafficking, stating that "whoever organizes others to sell human organs shall be convicted and punished." Since then, the National Health Commission and the Red Cross Society of China has introduced more than 30 supporting documents which further regulates human organ donation and transplantation practices. The following principles are observed in the area of human organ donation and transplantation in China:

(1) **Voluntariness:** The RHOT stipulates clearly that all kinds of human organ donation should be voluntary and without payment, and that organ trafficking is forbidden. The Eighth Amendment to the Criminal Law defines organ trafficking as a crime.

(2) **Informed Consent:** It is a Chinese citizen's right to donate or not donate their organs. Any

organization or individual shall not make others donate their organs by coercion, deception or temptation. Organ donors should have full capacity for civil conduct and written consent is required for organ donation. Donors who already gave consent have the right to withdraw. If a citizen has refused to donate their organs, any organization or individual shall not donate or procure their organs. If a citizen has not refused to donate, their organ can be donated after their death with the joint written consent of their spouse, children over the age of 18 and parents.

(3) Evasion: The RHOT and its supporting documents stipulate clearly that organ procurement should be conducted after death. Doctors and medical staff working in human organ transplant and staff of organ procurement organizations shall not be involved in the death determination of donors.

(4) Ethics Review: In all hospitals performing organ transplants, committees on the clinical application of technologies and ethics of human organ transplantation are required to establish to conduct ethics review on every case of organ transplant. For cases that could not pass the ethics review, organ procurement and organ transplant surgery are not allowed.

(5) Regulation of Living Organ Transplant: Living organ transplant is a last resort when organ donation fail to meet the demand. Living organ transplant regulations in China are stricter than other countries including the US. Under such regulations, the legal rights of organ donors and recipients are protected, and living organ transplants are performed legally. In the area of policy, the Eighth Amendment to the Criminal Law, the RHOT and the supporting documents have contributed to a system of living organ transplant regulation policies. It is clearly stipulated that living organ donor and recipient have to be genetically or maritally related, living organs of citizens under the age of 18 shall not be procured for transplant, and each living organ transplant surgery has to be reviewed and approved by the attending doctor, the ethics committee of the hospital and the provincial health department. Currently, the majority of living organ donors in China are parents of the recipients, and other donors include spouse, children and siblings of the recipients.

(6) Scientific And Fair Allocation of Organs: The RHOT and the Basic Principles and Core Policy of Human Organ Allocation and Sharing in China clearly stipulate that the arrangement of human organ transplant surgery applicants should be fair and transparent, and medical requirements need to be considered. A computer-based organ allocation and sharing system called the China Organ Transplant Response System (COTRS) has been developed. Every organ is allocated through this system to ensure scientific, efficient and fair allocation.

(7) Traceability Management: China has developed a big data digital regulation platform based on COTRS and organ transplant registries to improve traceability of organs allocation.

(8) Prosecution of Lawbreakers: Any confirmed violation of human organ transplant regulations

in China will be punished. The certificates of the doctors and medical staff involved will be suspended or revoked. For medical organizations involved, their qualification of organ transplant will be revoked. Those who violate the Criminal Law will be investigated by the judicial branch.

In conclusion, the law and policies regarding organ transplant regulations in China are perfectly in line with the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation. In the area of living organ transplant regulation, China has taken stricter measures.

2. Human Organ Donation

Since 2010, the National Health Commission and the Red Cross Society of China has worked together to build an organ donation system in which the Red Cross Society takes part as a third party. This system is based on the RHOT and supporting documents drafted by these two departments, and reflects the social structure of China. The source of organs was fundamentally changed in 2015 when voluntary donation became the only legitimate source for organ transplant. The concept of organ donation is widely accepted. General Office of the Communist Party of China and General Office of the State Council has jointly released the Opinion on Party Member and Cadre Leading Funeral Reform, in which party members and cadres are encouraged to donate their organs and bodies. Some provinces has improved legal protection for human organ donation by local legislation.

By August 2018, the amount of after-death organ donors in China has accumulated to more than 19,000 people, while donation of major organs has reached 54,000 cases. In 2017, 5146 Chinese citizens donated their organs after death, which was the second largest number in the world.

3. Human Organ Procurement and Allocation

China has more than 2,000 organ donation coordinators who have received training and assessments. Meanwhile, the Basic Principles and Core Policy of Human Organ Allocation and Sharing in China states the principles and policy of organ allocation; COTRS is used to allocate organs to make sure the allocation is scientific, efficient and fair. In 2016, different departments worked together to introduce an organ transport “fast track” with low cost and high efficiency using civil aviation and high speed railway. This effort proves that the government attaches great

importance to the course of organ donation and transplantation as well as the health and safety of its people; it reflects the concept of "putting people first".

4. Capacity of Human Organ Transplant Service

Currently, China has 178 hospitals which are qualified for organ transplant, including 136 qualified for liver transplant, 97 for kidney transplant, 46 for heart transplant and 32 for lung transplant. In 2007, China saw 16,687 organ transplant surgeries, among which 86% were after-death donation and 14% were living donation from recipients' family members.

5. Human Organ Donation and Transplant Regulation

The National Health Commission has established 4 transplant data centres (quality control centres) targeting liver, kidney, heart and lung transplant respectively. They are responsible for organ transplant data registration, analysis and transplant quality control. These centres and COTRS form a core information system of organ transplant regulation, which performs trend analysis, daily monitoring and intensive monitoring. It makes traceability of organs allocation possible, and helps to develop a regulation system which uses combined methods of digital monitoring and unannounced field audits. The National Health Commission has worked with Ministry of Public Security to build an information integration platform to prevent and combat criminal behaviors like organ trafficking.

6. International Communication

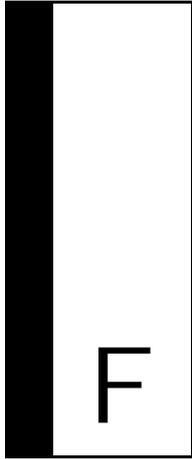
The course of human organ donation and transplant in China has received substantial support from all over the world. Many international organizations such as WHO, The Transplantation Society (TTS) and the International Society for Donation and Procurement and international experts (including famous Australian organ transplant expert, former TTS president Philip O'Connell) have come to China to participate in and witness the establishment of human organ donation system. They took part in extensive cooperation and communication with the Chinese in areas like the establishment of organ procurement organizations, organ donation coordinator training, organ allocation policy research, standard-setting for organ donation and

transplantation, and organ donation and transplantation regulation.

In August 2016, the 26th International Congress of the Transplantation Society was held in Hong Kong. A dedicated session titled "The New Era of Organ Transplantation in China" was held. Dr. Jiefu Huang, the Chair of the China Organ Donation and Transplant Committee gave the keynote speech as the only invited guest. He presented the achievements of human organ donation and transplantation reform to the world, which received praises from international organizations including WHO and TTS and experts. WHO representatives said that the current organ donation and transplantation system in China is in line with the WHO Guiding Principles. In October 2016, at the China International Organ Donation Conference held in the Great Hall of the People in Beijing, Margaret Chan Fung Fu-chun, former director-general of the WHO, spoke highly of China's development in the area of organ donation and transplantation. She said that the reform in China was not only fast but also on the right track, and China's success could serve as a model for other countries to learn from. In February 2017, the Summit on Organ Trafficking and Transplant Tourism was held in Vatican. During the summit, the Chinese government showed its resolve to combat organ trafficking and proposed the establishment of a WHO task force on organ donation and transplantation which arranges and coordinates global governance of organ donation and transplantation. In March 2018, the Ethics in Action Meeting on Modern Slavery, Human Trafficking, and Access to Justice For The Poor and Vulnerable was held at the Pontifical Academy of Sciences in Vatican. Experts from all over the world acknowledged the important contribution China made to preventing and combating organ trafficking. The Final Declaration of the Ethics in Action Meeting states that the "China model" is illustrative of the WHO Guiding Principles of equity, transparency, and fairness and may serve as an example of an operational mechanism to combat organ trafficking for the rest of the world. In July 2018, thanks to China's initiative and promotion, the WHO Task Force on Donation and transplantation of Human Organs and Tissues was formally established. China and the US are the only two member states to have two members in the task force. China will continue to contribute to global governance of organ transplantation in the near future.

China Organ Transplant Development Foundation





Appendix F — Correspondence from Ministers relating to the importation of body parts and human organs for Real Bodies: The Exhibition

1. Letter received from The Hon Christian Porter MP, Attorney General, 21 August 2018.
2. Letter received from The Hon Greg Hunt MP, Minister for Health, 6 July 2018.
3. Letter received from The Hon Angus Taylor MP, Minister for Law Enforcement and Cyber Security (Former), 6 July 2018.
4. Letter received from Senator the Hon Mitch Fifield, Minister for Communications and the Arts, 3 July 2018.



The Hon Christian Porter MP
Attorney-General

MC18-005637

21 AUG 2018

The Hon Kevin Andrews MP
Chair
Human Rights Sub-Committee
Joint Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ 

Thank you for your letter of 15 June 2018 regarding the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into human organ trafficking and organ transplant tourism. I appreciate being kept apprised of the work of your Sub-Committee.

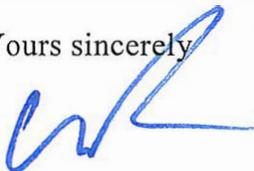
I acknowledge the Committee's concerns regarding allegations of human and organ trafficking in China and the provenance of exhibits displayed in the 'Real Bodies' touring exhibition. These allegations are indeed concerning.

While I retain administrative responsibility for the *Criminal Code Act 1995*, following recent machinery of government changes to establish the Department of Home Affairs, policy relating to the criminalisation of human and organ trafficking is the responsibility of the Minister for Home Affairs, the Hon Peter Dutton MP. I also note that policy relating to exhibitions is a matter for the Minister for Communications and the Arts, Senator the Hon Mitch Fifield, and the importation of human remains is a matter for the Minister for Health, the Hon Greg Hunt MP. I note you have also written to these ministers along similar lines.

I will, of course, consider any proposed amendments to the Criminal Code that may result from your Sub-Committee's recommendations. My department has also been working closely with other departments to consider the issues you raise and will continue to do so. Accordingly, I am grateful that you have written to me on these matters.

Thank you again for bringing your concerns to my attention.

Yours sincerely



The Hon Christian Porter MP
Attorney-General

6 JUL 2018



**The Hon Greg Hunt MP
Minister for Health**

Ref No: MC18-014374

The Hon Kevin Andrews MP
Chair
Human Rights Sub-Committee
Joint Standing Committee on Defence, Foreign Affairs and Trade
PO Box 6021
Parliament House
CANBERRA ACT 2600

6 JUL 2018

Dear Mr Andrews

I refer to your letter of 15 June 2018, on behalf of the Human Rights Sub-Committee of the Joint Standing Committee on Defence, Foreign Affairs and Trade, concerning the importation of deceased human bodies and human organs into Australia as part of the 'Real Bodies' exhibition being held in Sydney.

In regards to your concerns about the 'Real Bodies' exhibition, my Department administers the human health aspects of the *Biosecurity Act 2015* (the Act), including the bringing of human remains into Australian territory. The Minister for Foreign Affairs and Trade and Minister for Home Affairs have responsibility for human rights and the Criminal Code respectively and I understand that they will respond separately.

As set out in the *Biosecurity (Managing Human Remains) Instrument 2016*, human remains coming into Australia for display purposes require the permission of a Commonwealth Human Biosecurity Officer. In order to provide permission, a Commonwealth Human Biosecurity Officer assesses the risk of an infectious disease entering, emerging, establishing, or spreading in Australian territory due to the human remains.

I can advise that a thorough assessment of the human biosecurity risk associated with 'Real Bodies' was undertaken, and permission granted by a Commonwealth Human Biosecurity Officer. In this instance, the plastinated remains in question, do not pose a risk to public health.

I also note your ethical concerns regarding 'Real Bodies', however, this is not something that can be assessed by my Department under the Act. A Human Biosecurity Officer cannot refuse entry of remains into Australia on any grounds other than the biosecurity risk.

Senior officials from my Department, together with the Chief Executive Officer of the Australian Organ and Tissue Donation and Transplantation Authority, attended as witnesses to the Hearing of the Public Inquiry into Human Organ Trafficking and Organ Transplant Tourism, held on Friday 8 June 2018.

I would like to reconfirm the Australian Government's commitment to increasing Australia's rate of organ donation, and to reducing the number of Australians on transplant waiting lists at any given time. In Australia, as there is globally, the number of people on transplant waiting lists continues to exceed the number of available organs.

To further ensure that our health system has the capacity and capability to optimise deceased donation and transplantation opportunities the COAG Health Council at its meeting on 13 April 2018, agreed to the Commonwealth leading a review of the organ donation, retrieval and transplantation system. The purpose of the review is to identify barriers to equity of access to transplant waiting lists and transplantation services, and where there may be areas within our health system which could compromise future growth and sustainability of organ donation and transplantation outcomes.

The review, led by my Department, is being undertaken in collaboration with Australian Organ and Tissue Donation and Transplantation Authority, the states and territories and the clinical community. The outcomes of the review will inform the development of a long-term strategy for organ retrieval and transplantation which will build on the Government's ongoing national reform agenda for organ donation and transplantation.

Thank you for writing on this matter.

Yours sincerely



Greg Hunt

6 JUL 2018

cc: The Hon. Ken Wyatt AM, MP, Minister for Aged Care and Minister for Indigenous Health



THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MC18-011952

The Hon Kevin Andrews MP
 Chair, Human Rights Sub-Committee
 Joint Standing Committee on Foreign Affairs, Defence and Trade
 Parliament House
 CANBERRA ACT 2600

Dear Mr Andrews *Kevin*

Thank you for your correspondence of 15 June 2018 concerning the 'Real Bodies' anatomical exhibition in Sydney. Your correspondence has been referred to me as aspects of this matter fall within my portfolio responsibilities. I understand that you have also written in similar terms to the Minister for Health, the Hon Greg Hunt MP, who will respond separately.

The importation of human remains into Australia is the joint responsibility of the Department of Health and the Department of Agriculture and Water Resources. Importing human remains for purposes other than burial, cremation, scientific or research purposes (such as for display or as curios) requires the permission of a Commonwealth Human Biosecurity Officer in the Department of Health. Human remains arriving in Australia are cleared by the Department of Agriculture and Water Resources for bio-security purposes.

As outlined in the Department of Home Affairs' response to a question taken on notice (HOT/001), these items are not considered to be prohibited or restricted goods and do not require permits upon importation into Australia under the Commonwealth *Customs Act 1901* or the *Customs (Prohibited Imports) Regulations 1956*. As a result, the role of the Australian Border Force is limited to ensuring that such goods are imported correctly (for example, that cargo reporting and the tariff classification are accurate).

Human trafficking for the purpose of the removal of organs has been criminalised in Australia since 2005. Division 271 of the Commonwealth *Criminal Code Act 1995* criminalises the trafficking of persons into, from or within Australia for exploitative purposes, including for the removal of organs. This is consistent with, and fulfils Australia's international obligations under, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, which supplements the *United Nations Convention Against Transnational Organized Crime*.

There is no Commonwealth criminal offence for removing or trafficking in human body parts. The actual removal of organs is regulated under state and territory laws. State and territory laws criminalise the removal of organs for the trade or sale of the organs. The investigation of state and territory crimes are a matter for state and territory law enforcement.

At this stage, the Australian Government is not actively considering acceding to the *Council of Europe Convention against Trafficking in Human Organs*.

Thank you for raising this matter.

Yours sincerely

A handwritten signature in blue ink that reads "Angus Taylor". The signature is written in a cursive style with a large initial 'A' and a stylized 'T'.

ANGUS TAYLOR



SENATOR THE HON MITCH FIFIELD
 DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
 MINISTER FOR COMMUNICATIONS
 MINISTER FOR THE ARTS

Ref No: MC18-005306

The Hon Kevin Andrews MP
 Chair
 Human Rights Sub-Committee
 Joint Standing Committee on Defence, Foreign Affairs and Trade
 PO Box 6021
 Parliament House
 CANBERRA ACT 2600

Dear ~~Chair~~ **Kevin**

‘Real bodies’ Exhibition

Thank you for your letter of 15 June 2018 regarding ‘Real Bodies: The Exhibition’ currently being displayed at the Byron Kennedy Hall in Moore Park, Sydney.

I am aware of the sensitivities regarding this exhibition and can advise the Human Rights Sub-Committee that my portfolio has not provided any funding, support or approvals for this exhibition, nor is it supported by, or associated with, any publicly funded gallery or museum in Australia. This is not an arts portfolio exhibition and my portfolio has no role in relation to the staging of non-arts ventures by private organisations.

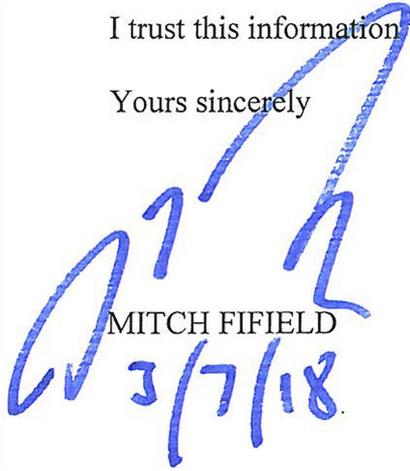
In relation to any measures, powers, or protections within my portfolio, in 2015, the Australian Government issued an Australian Best Practice Guide to Collecting Cultural Material. Whilst not a mandatory code, this guide describes the ethical and legal issues that museums, galleries and libraries should consider when they acquire or borrow cultural material. It is intended that institutions determine how best to administer or reflect acquisition and borrowing requirements for their own purposes however the guide’s Statement of Principles clearly articulates that Australian public collecting institutions should “not acquire or knowingly borrow biological or geological material that has been collected, sold or otherwise transferred in contravention of applicable national or international laws, regulations or treaties.” Should the Sub-Committee be interested in examining this guide, it is available online at www.arts.gov.au/publications/australian-best-practice-guide-collecting-cultural-material.

Most Australian galleries and museums, including the eight National Collecting Institutions within my own portfolio, are members of the International Council of Museums (ICOM), which has established a global network of museum and heritage professionals committed to establishing professional and ethical standards for museum activities.

While I am not in a position to comment on the allegations regarding the circumstances by which exhibition material for 'Real Bodies' was sourced, my portfolio remains committed to upholding the highest professional and ethical standards and Australians can have confidence that our public galleries, libraries and museums work ethically and legally to ensure their collections and exhibitions accord with best practice and are consistent with international standards.

I trust this information will be of assistance to the Committee.

Yours sincerely



MITCH FIFIELD
3/7/18

