

Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

To the Joint Standing Committee on Foreign Affairs, Defence and Trade

I do pro bono work for the Western Australia's Religious against Trafficking in Humans and other humanitarian agencies.

I will address the following criteria from the set terms of reference.

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.

Organ transplantation is now widely practiced around the world. Organ shortages are an ongoing constraint to treatment and recovery for many patients experiencing organ failure. These shortages have created a demand for organs that is being exploited by traffickers and through the practice of organ transplant tourism. "We will also examine what activities and measures Australia is taking through its work with other partner countries to strengthen regional criminal laws that relate to organ trafficking and transplant tourism," Mr Andrews said.

Victim protection is one of the key objectives of international and domestic efforts against trafficking in persons.

Non-criminalisation/non-punishment clauses should be applicable to victims of trafficking in persons for the purpose of organ removal.

Neither the Transnational Organised Crime Convention nor its Trafficking in Persons Protocol make non-criminalization mandatory. Article 2(b) of the Protocol states its purpose is to "protect and assist the victims of such trafficking, with full respect for their human rights".

Non-binding guidelines, declarations and resolutions call on States to prevent trafficked persons from being prosecuted.

The non-criminalisation of victims of trafficking for the purpose of organ removal is essential as demonstrated in this case study.

Case study 1: A lady trafficked from the Philippines. This woman has a new life in Australia and has been supported as a victim of trafficking. In Australia the law is strong that it is illegal for someone to buy an organ within Australia or traffic someone into Australia for a paid transplant.

The organ trafficking was uncovered after a female victim, who came from a poor village in the Philippines underwent mandatory counselling at a Sydney hospital before the transplant. In this case the victim was educated enough to be able to speak out. The hospital was then on notice with its organ integrity procedures the woman had not consented to the removal of her kidney for the elderly woman who was responsible for bringing her into Australia.

Existing legal instruments in Australia contain a range of mechanisms to protect the rights of victims of trafficking, providing them with material assistance, counselling, and shielding them from coercion, threats, and harm by their traffickers.

There was no prosecution in Australia's first case of organ trafficking.

The case collapsed given the sole person to be prosecuted was an elderly Sydney woman accused of illegally soliciting a kidney died of kidney failure before the matter came to court.¹ It is not clear if there were other parties involved in the supply chain as there are some conflicting reports in relation to the procurement for the purpose of the transplant and when the law would apply. One report stated: "The case did not proceed because the kidney was not actually harvested before the woman was caught; the law had to be strengthened to cover this type of situation."² In this case of a woman being flown in from the Philippines for surgery, Australian law adequately covers trafficking someone into Australia for a paid transplant.

The problem with the current law - If any Australian citizen wishes to travels overseas to purchase an organ this is not an offence because as currently drafted, the law requires that a donor has been moved to, from or within Australia.

¹ O'Brien N 2012. Organ trafficker's death closes case. *Sydney Morning Herald* 25 March.

<http://www.smh.com.au/national/organ-traffickers-death-closes-case-20120324-1vqvn.html>

² <http://www.adelaidenow.com.au/lifestyle/health/transplant-surgeon-wants-australians-who-travel-overseas-for-an-illegal-organ-transplant-charged-on-their-return/news-story/95bf3927ba7f35f4684299a46203a32c>

So if an Australia used any of these websites³ to buy an organ and returned to Australia currently there would be no offence committed in Australia:

Transplant tourism web sites identified by the World Health Organisation

Name of organization, web site	Location of transplant ation	Transplant package
BEK-transplant(http://www.bek-transplant.com/joomla/index.php)	China	Kidney (US\$ 70 000)Liver (US\$ 120 000)Pancreas (US\$ 110 000) Kidney and pancreas (US\$ 160 000)
China International Transplantation Network Assistance Center (http://en.zoukiishoku.com/)	China	Kidney (US\$ 65 000)Liver (US\$ 130 000)Lung (US\$ 150 000) Heart (US\$ 130 000)
Yeson Healthcare Service Network(http://yeson.com/index.htm)	China	Kidney, liver, heart and lung
Aadil Hospital(http://www.aadilhospital.com/index.html)	Pakistan	Kidney
Masood Hospital(http://www.masoodhospital.com/services/surgery/kt p/kidney_transplant.htm)	Pakistan	Kidney (US\$ 14 000)
Renal Transplant Associates(http://www.renaltransplantsurgery.com/index.html)	Pakistan	Kidney [Euro 16 000 (US\$ 20 500)]
Kidney Transplant Associates(http://www.kidney.com.pk)	Pakistan	–
Liver4You(http://www.liver4you.org/)	Philippines	Kidney (US\$ 85 000)

Extra territorial criminal sanctions do not apply to organ tourism. In Australia extra territorial criminal sanctions currently apply to child sex offences, piracy and corruption.

³ <http://www.who.int/bulletin/volumes/85/12/06-039370-table-T1.html>

There is no reason why the class of extraterritorial sanctions could not be extended to include Australians returning from an illegal organ transplant in another country. If there is no legal impediment are we in fact condoning the current known practice of Australians being involved in illegal organ tourism?

Airport controls improvement to address organ tourism. Australia has excellent controls currently when you go to and from the country. To prevent organ tourism a question could be added to the Customs departure and arrival process to ask about a person's reason for travel for medical tourism. This one question could provide valuable data and allow border staff to be able to follow up on potential indicators for irregular transplant activities.

Data collection and research the UN Office of Drugs and Crime finds "there is inadequate information available about trafficking in persons for the purpose of organ removal. This lack of knowledge hails the need for increased data collection and research on trafficking in persons for the purpose of organ removal."⁴ Data collection could be commenced by the airport arrival and departure cards or other appropriate systems in Australia.

Investigations need to focus on key elements with organ tourism. Enforcement officials will need to be trained in this area of extraterritorial crime involving illegal organ tourism for any effective enforcement of a proposed offence.

The UN Office of Drugs and Crime in their Assessment Toolkit for Trafficking in Persons the subject of Organ Removal suggests these would be the questions below to be asked for an illegal transplant recipient returning home -if a extraterritorial offence was introduced.

Organ transplantation

1. What was exact location of the medical facility; hospital, private clinic?
2. Establish the identity and description of the medical personnel involved;
3. Was any medical briefing provided prior medical briefing as to the rights, risks and consequences of the transplantation?
4. Did the recipient sign any documentation consenting to the surgery?
5. Was the recipient asked to sign any confidentiality agreement?
6. Which organ was provided?
7. How long did the recipient spend at the facility?
8. Did the recipient meet with the organ supplier at any stage and or does the recipient know the identity of the organ supplier
9. What was the length and nature of post-operative care?
10. What medication was supplied to the recipient?
11. Establish the details of return journey to home;
12. Did the recipient receive any post-transplant care provided at home? If so, establish full details.

⁴ Page 55, https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf

Payment

1. What price was agreed by the recipient to purchase the organ?
2. What was the recipient's source of the money; did the recipient pay from own resources, borrow it or was the sum paid through private medical insurance;
3. What was the method of payment; cash, bank transfer, money transfer; date, time and location of payment; to whom paid
4. Would the recipient have paid the price if s/he had known how much was paid to the organ supplier?

Witnesses and suspects

1. Establish details of all corroborative witnesses; family and friends, medical professionals at home location;
2. Establish detailed descriptions of all suspects involved in the crime; their relationships and roles; their association with each other;
3. Establish specific incidents illustrating guilty knowledge, especially any incidents to show that the traffickers must have known that the organ supplier was not a family member or spouse of the recipient;
4. Establish any related information, vehicles used, financial accounts, communications etc.

Impact evidence

1. Establish the state of health since the transplantation
2. What has been the impact on health and lifestyle?

- This comprehensive list of questions demonstrating effective enforcement has been considered internationally.

2014 Council of Europe Convention against Trafficking in Human Organs This Convention is essential as it criminalises organ trading in cases where there has been no human trafficking. Under current international law, trafficking people in order to sell their organs is punishable. Not everyone is trafficked. This instrument covers donors travelling for surgery without being threatened or physically coerced.

The Convention requests governments to establish as a criminal offence the illegal removal of human organs from living or deceased donors.

The Convention addresses anyone guilty of aiding and abetting organ trading in the entire supply chain can be punished.

The Convention places an unprecedented focus on support for victims. It would be up to states and courts to define who the victims are. The definition under this Convention can include the donors, or the recipients, or even both. The victim will have a right to compensation, to be paid by the perpetrators which may cover the costs of injury and medical treatment. Suffering a victim experienced could also be included.

If Australia acceding to the 2014 Council of Europe Convention against Trafficking in Human Organs this Convention would encompass a wide reaching comprehensive tool together with the current laws.

International law The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons *Especially Women and Children*, supplementing the United Nations Convention against Transnational Organised Crime is the main international agreement to define and address trafficking in persons.

In the Protocol a distinction exists between:

1. Trafficking in persons for the purpose of organ removal, which is covered by the Protocol and
2. Trafficking in organs separate from the donor is not covered.

International cooperation must be considered to establish rules pertaining to overseas transplants to stop the illegal international organ trade. This Protocol seeks to prevent organ trafficking. Organs include a list that covers the kidney, liver, heart, lung, and pancreas. The removal of human cells and tissue are not covered.

Conclusion:

I respectfully submit in regard to the offence of Organ Trafficking under division 271 of the Criminal Code it would be desirable for this offence to have extraterritorial application.

Trafficking in persons for the purpose of organ removal is a clear offence but the acceptance of organs in relation to organ tourism must come with the classes of other extra territorial offences Australia has wisely introduced to combat other forms of crime.

For Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs would cover a known legal gap that exists.

Thank you for the opportunity to make a submission.
Felicity Heffernan LLB, Hons Masters, Harvard Exec Education
Humanitarian Lawyer
ACRATH Western Australia
felicityheffernan@hotmail.com