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### **Theme: Morality Trumps Relativism**

#### **Scholarly Analysis for Law Reform Of Trafficking of Human Organs**

- 1. Whether 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?**

International law defines Trafficking in human organs as “shall mean removal of human organs without consent, for the purpose of selfish gain, for the traffickers. The organs envisaged include *kidney, heart, liver, lung and pancreas*, by force, coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability, and the giving or receiving of payments or benefits to achieve consent of a person having control over another person”.

- Abuse of a position of vulnerability**

- a) Abuse of a position of vulnerability (APOV) is an additional means through which individuals can be recruited, transported, received, etc. into situations of exploitation. No precise definition is provided in the Protocol. The *travaux préparatoires* confirms that its exact meaning was disputed during drafting of the Protocol (United Nations Office on Drugs and Crime. Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013.);
- b) The following definition, is taken from the UN Model against Trafficking in Persons (United Nations Office on Drugs and Crime. Model Law against Trafficking in Persons 2009 [cited 2013 15 May], APOV is defined as “any situation in which the person involved believes he or she has no real and acceptable alternative but to submit”, or : “taking advantage of the vulnerable position, in which a person is placed in virtue of : having entered the country illegally or without proper documentation; pregnancy or physical or mental disease or disability of the person, including addiction to the use of any substance; related capacity to form judgements by virtue

*of being a child , or having an illness , infirmity ; physical or mental disability; promises or giving sums of money or other advantages to those having authority over a person; being in a precarious situation from the standpoint of social survival ; other relevant factors”.* (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013. (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013)

The commentary attached to these definitions confirms “ *the open ended nature of the list of vulnerability factors , noting that other elements , such as abuse of economic situation of the victim could also be included”* (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013)

These definitions are relevant for our subject matter, for it answers the questions whether the scenario where an organ donor consents to sale of his or her organ but does so out of not of a *position of vulnerability* , constitutes trafficking. ‘Recruitment, is an act most frequently cited in connection with APOV. The key component is *knowledge* of the offender of the position of vulnerability of the victim , and henceforth *abusing* that position to recruit the vulnerable person for removal of his or her organs ( United Nations Office on Drugs and Crime . Issue Paper . Abuse of a position of vulnerability and other ‘means” within the definition of trafficking in persons . Vienna 2013). Likewise, coercion, abduction , fraud , deception, and the giving or receiving of payments or benefits to achieve the consent of a person having control over another person also constitutes cases of coercion, deception and exploitation. . These terms are further detailed below.

- **Coercion**

Coercion is an umbrella term, used in the trafficking context to refer to a range of behaviours including violence and threats. (Office of the High Commissioner of Human Rights. Recommended Principles and Guidelines and Human Trafficking May 2013). Many definitions of it exist (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013.). For the purpose of this contribution , the use of the following definition : ‘Coercion ‘ shall mean the use of force or threat thereof, and some forms of non-violent manipulation or threat thereof , for the purpose of (including but not limited to ) organ removal. (Schloenhardt AG, Samantha . Trafficking in persons for the purpose or organ removal: International Law and Australian Practice . *Criminal Law Journal 2012; 36(3):145-58*).

- **Deception**

‘Deception’ shall mean any conduct that is intended to misrepresent information or to give false information to persons (Schloenhardt AG, Samantha . Trafficking in persons for the purpose or organ removal: International Law and Australian Practice . *Criminal Law Journal 2012; 36(3) :145-58*).

- **Exploitation**

Whereas the UN Model Law defines different instances of exploitation , including ‘forced labour’, ‘slavery ‘ , and ‘practices similar slavery and servitude’, it lacks a definition of ‘removal of organs ‘ in the context of exploitation (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a

position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013.). ‘Exploitation of prostitution of others’, for instance, is defined as “the unlawful obtaining of financial or other material benefit from the prostitution of another person” (United Nations Office on Drugs and Crime . Issue Paper. Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons. Vienna 2013). For the purpose of this contribution and in the context of ‘exploitation’, ‘organ removal’ is defined as follows: “*Exploitation of a person for the purpose of organ removal shall mean the unlawful gain of financial or other material benefit as result of the removal of an organ from another person.*”

Australia is a Party to the *Trafficking in Persons Protocol* , Australia, compliance with the provisions criminalising organ trafficking rests upon implementation of anti-trafficking legislation.

In March 2013 , the *Crimes Legislation Amendment ( Slavery , Slavery –like Conditions and People Trafficking Act 2013* (Cth ) introduced a new Subdivision BA entitled ‘organ trafficking’ into Division 271 of the *Criminal Code* (Cth) , which is fundamentally changed the criminal offences relating to trafficking in persons for the purpose of organ removal . The new title of Subdivision BA is misleading as the provisions under new ss 271 .7A -271E, technically do not –as the title suggests –capture the trafficking of organs, but in line with *Trafficking in Persons Protocol*, apply to trafficking in persons for the purpose of organ removal. In short, as with other forms of trafficking, it is the person who is trafficked that is the object of the offence, not the separated organ, which is technically and legally distinct.

The new offences follow a similar template as the existing offences relating to trafficking in persons in Division 271, Subdivision B of the *Criminal Code* (Cth) , New ss 271 7B and 271.7C criminalises situations in which the accused organises or facilitates the entry or proposed entry , receipt, exit or proposed entry, ‘being 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 , receipt or exit. The new offence carries a penalty of 12 years imprisonment. New s271.7C provides an aggravated offence for cases involving minors, cruel, inhuman or degrading treatment, or conduct that gives rise to a danger of death or serious harm to the victim or another person. Domestic trafficking in persons for the purpose of organ removal, including identical aggravations, is criminalised under new ss 271.7D and 271.E of the *Criminal Code* ( Cth).

Yes , Division 271 of the *Criminal Code* would be practicable and desirable for this offence to have extraterritorial application

## **2. Whether Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs?**

### **International Law**

In international law, the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons , especially Women and Children* , inter alia , seeks to prevent and suppress trafficking for the purpose of organ removal. Article 3 (a) of the Protocol, which sets out the definition of

trafficking in persons, includes the sole reference to organ in the Protocol by listing the removal of organs as one form of exploitation.

With the term 'removal of organs' is not further defined in the Protocol, certain limitations apply. Organs envisaged by the Protocol include kidney, liver heart, lung, pancreas, but removal of human cells is not covered. A further distinction has been drawn trafficking in persons for the purpose of organ removal, which is covered by the Protocol, and trafficking in organs separate from the donor, which is not.

Article 5 (1) of the *Trafficking in Persons Protocol* requires States Parties to criminalise trafficking in persons for the purpose of organ removal. As with other forms of trafficking under the Protocol, any consent to the removal of organs by the donor voluntarily and deliberately agrees to have his or her organ removed, often for payment. The consent of the donor is also void if any of the means listed in Article 3(a), such as fraud, deception, coercion etc, are employed.

Yes, Australia should accede the 2014 Council of Europe Convention against Trafficking in Human Organs

### **Case Study In Australia**

A study presented suggests that annually at least 20 Australians nationals travel abroad as transplant tourists for trafficked organs (D. Budiani – Saberi & F Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on Global Realities' (2008) 8 *American Journal of Transplantation* 925, 926-927, citing Y Shimazono, 'Mapping "Transplant Tourism"', presentation at *World Health Organization Second Global Consultation on Human Transplantation*, Geneva, 28-30 Mar 2007).

The first case in which charges relating to trafficking in persons for the purpose of organ removal was reported in Australia media on 28 July 2011:

[A] elderly Sydney woman suffering from a kidney condition was suspected to have trafficked a younger woman from the Philippines with the intention of harvesting an organ. The deal was allegedly made without the woman's consent, and discovered during the interviews at Sydney Hospital. A police spokesman indicated that 'this is the first organ trafficking case investigated by the Australian Federal Police (Y Narushima, 'Police Investigate first case of organ trafficking', *The Sydney Morning Herald (Sydney)*, 28 July 2011, 6.).

### **Conclusion**

In view of the analysis herein, Australia should further amend *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking Act 2013* (Cth) to safeguard trafficking of human organs in Australia. It would be wise to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs.