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

By email: jscfadt@aph.gov.au

Dear Committee Secretary,

Submission to the Inquiry into Human Organ Trafficking and Organ Transplant Tourism

Please find attached a submission from Australian Lawyers for Human Rights (ALHR) to the Inquiry into Human Organ Trafficking and Organ Transplant Tourism.

We thank you for the grant of an extension of time in which to lodge our submission.

If you would like to discuss any aspect of this submission, please contact Benedict Coyne, President of ALHR, by email at president@alhr.org.au

Yours faithfully,

Benedict Coyne
President
Australian Lawyers for Human Rights



Submission to the Inquiry into Human Organ Trafficking and Organ Transplant Tourism

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1. About ALHR

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to advocate for greater Australian compliance with international human rights standards at a domestic and international level and promote and support lawyers' practice of human rights law in Australia.

2. Executive Summary

ALHR thanks the Joint Standing Committee on Foreign Affairs, Defence and Trade for the opportunity to make this submission to the Inquiry into Human Organ Trafficking and Organ Transplant Tourism (**Inquiry**).

ALHR strongly supports measures designed to protect the human rights of the many thousands of people annually who are victims of illegal human tissue trafficking and organ harvesting.

This Inquiry seeks to examine how the Australian legal system deters organ trafficking and what more can be done to prevent this offence from occurring both in Australia and internationally.

It is ALHR's strongly held view that it is highly desirably and practicable for the Federal Parliament to amend Division 271 of the *Criminal Code Act 1995 (Cth)* (**the Commonwealth Criminal Code**) such that offences relating to organ trafficking have extraterritorial application.

Australia has enacted similar provisions within the Commonwealth Criminal Code in order to capture child sex offences which occur outside Australia and a significant number of successful prosecutions have since occurred. This successful precedent demonstrates that the enactment of similar provisions to cover organ trafficking would be practicable. In this submission we have provided a brief comparative overview of Division 272 of the Commonwealth Criminal Code which deals with child sex offences outside Australia in order to highlight the framework that might be adopted in drafting amendments to Division 271 so as to realise extraterritorial application.

It is also the view of ALHR that Australia should accede to the 2014 Council of Europe Convention against Trafficking in Human Organs (**Council of Europe Convention**) as another vitally important aspect of the Australian Government's response framework to prevent organ trafficking from occurring in Australia and overseas.

3. Recommendations

1. That Division 271 of the Commonwealth Criminal Code be amended so as to

extend criminal conduct extraterritorially to include transplants that occur overseas, adopting a similar approach to that taken in relation to child sex offences outside Australia under Division 272 of the Commonwealth Criminal Code.

2. That in drafting amendments to Division 271 of the Commonwealth Criminal Code, in order to achieve extraterritorial application, particular regard be given to the importance of:
 - a. the creation of a category of aggravated offences;
 - b. capturing persistent conduct;
 - c. capturing conduct that involves procuring and benefitting from overseas organ trafficking;
 - d. capturing those who engage in conduct that seeks to encourage organ trafficking;
 - e. capturing conduct that involves preparing for or planning an organ trafficking offence;
 - f. the appropriate use of absolute liability; and
 - g. the need for specific provisions to allow the use of video link evidence from overseas.
3. That Australia accede to the Council of Europe Convention.

4. Background

As noted in the Joint Standing Committee's press release on the announcement of this Inquiry:

“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.”

NGOs and the United Nations have increasingly sought to draw attention to the need for Governments to respond. In the Asia Pacific Region, in particular, the need for appropriate domestic, regional and international responses grows increasingly urgent.

ALHR has long held grave concerns regarding the many egregious human rights and medical ethics violations associated with the systemic, forced and state-sanctioned organ harvesting and trafficking from prisoners, including non-consenting prisoners of conscience, that have been reported by organisations such as Human Rights Watch, Amnesty International and the International Coalition to End Organ Pillaging in China (EOP).

As far back as 1994 Human Rights Watch noted that:

“A growing worldwide trade in human organs, whereby the poor in countries such as India and Brazil are induced to sell their body parts to meet the transplant needs of high-paying customers, largely from the developed countries, has been widely condemned because of its financially exploitative nature and its abuse of medical ethics. China's extensive use of executed prisoners as a source of organs for medical transplantation purposes, a problem

which so far has received somewhat less international attention, likewise creates serious cause for concern on a number of basic human rights grounds.”¹

It is now widely acknowledged that executed prisoners are the principal source of supply of body organs for medical transplantation purposes in China.² In 2005, after longstanding denials, it was officially acknowledged that executed prisoners were harvested for their organs in China.³

As noted by the EOP’s Australian Advocacy and Initiatives Committee (**AAIC**) in its submission to this Committee’s Inquiry into the Status of the Human Rights to Freedom of Religion or Belief:

“Although China made declarations to the world in 2014 that the country would cease using organs harvested from prisoners, they have not made available any robust data on how they currently meet the demands of the extraordinarily large numbers of transplants performed each year, and offer no explanation on how they have become one of the world’s leading organ transplantation countries...They do not adhere to international standards such as the Declaration of Istanbul and the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation.”⁴

Organ trafficking and organ transplant tourism breach international laws and international ethical organ donation standards of various bodies including the World Medical Association and the Transplantation Society. The World Health Organization urges all Member States, including Australia, to implement the ‘Guiding Principles on Human Cell, Tissue and Organ Transplantation’. At the Sixty-Third World Health Assembly, the WHO called on all Member States:

“to oppose the seeking of financial gain or comparable advantage in transactions involving human body parts, organ trafficking and transplant tourism; to promote a system of transparent, equitable allocation of organs, cells and tissues, guided by clinical criteria and ethical norms, as well as equitable access to transplantation services in accordance with national capacities, which provides the foundation for public support of voluntary donation.”⁵

Australia is strategically placed to make legislative reforms to combat illegal organ transplants which occur overseas and involve Australians. Neighbouring countries such as China have refused to provide transparent and accurate data on the source of the organs, the numbers of transplants taking place, and the medical process of the organ transplants. This places Australians who travel to China for an organ transplant at risk

¹ Human Rights Watch CHINA ORGAN PROCUREMENT AND JUDICIAL EXECUTION IN CHINA August 1994 available at: https://www.hrw.org/reports/1994/china1/china_948.htm.

² Ibid.

³ Huang J. “Ethical and legislative perspectives on liver transplantation in the People’s Republic of China”. *Liver Transplantation* 2007; 13: 193–196; **人民日报** (People’s Daily) as referenced in The International Coalition to End Organ Pillaging in China’s AAIC submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into The Status of the Human Right to Freedom of Religion or Belief.

⁴ The International Coalition to End Organ Pillaging in China’s AAIC submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into The Status of the Human Right to Freedom of Religion or Belief, page 5.

⁵ World Health Organization, 63rd World Health Assembly, Geneva 17-21 May 2010 http://apps.who.int/gb/ebwha/pdf_files/WHA63-REC1/WHA63_REC1-en.pdf

of engaging in illegal activity. Without the fear of criminal sanctions, the illegal international organ transplant industry is at risk of increasing, and with it the extrajudicial killings of thousands of prisoners including prisoners of conscience in China.⁶

5. International Human Rights Law Framework

In ALHR's submission the extraterritorial application of Commonwealth legislative responses to organ trafficking and Australia's accession to the Council of Europe Convention would be consistent, and indeed is arguably absolutely essential, in order to advance the objectives of, and meet our international legal obligations under, several of the human rights conventions to which Australia is a party.

Relevantly, Australia has ratified the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons*; the *International Covenant on Economic, Social and Cultural Rights*; the *International Covenant on Civil and Political Rights*; and the *International Convention Against Torture*. These international laws all hold important provisions which aim to prevent international organ trafficking and organ transplant tourism.

Further, Australia is a signatory to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and in February 2017 announced its proposal to ratify the Optional Protocol by the end of 2017. The Optional Protocol is significant in the fight against international organ trafficking and organ transplant tourism as it will 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.⁷ The treaty also establishes a Subcommittee (the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) of the Committee against Torture. The Optional Protocol provides an effective international mechanism to ensure that those subjected to torture, cruel, inhuman or degrading treatment as a result of forced organ harvesting are protected.

Australia therefore requires domestic laws that aim to prevent international organ trafficking and organ transplant tourism so as to fulfill its international obligations and give a clear and consistent message to the world that it is taking all possible legislative measures to eradicate these heinous crimes.

6. Domestic Legislation

6.1 Current Commonwealth Legislative Framework

This Inquiry seeks to examine how the Australian legal system deters organ trafficking and what more can be done to prevent this offence from occurring both in Australia and internationally.

Existing Commonwealth laws against organ trafficking are legislated under Division 271

⁶ Kilgour, D., Gutmann, D. and Matas, D. 2016. *Bloody Harvest/The Slaughter: An Update*. <http://endorganpillaging.org/an-update/>

⁷ Article 1, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Subdivision BA of the Commonwealth Criminal Code and make it an offence to traffic victims into and out of Australia, or within Australia, for the purpose of organ removal.⁸ The penalty for these offences is 12 years imprisonment but it can be as high as 25 years imprisonment if aggravating features are present.⁹

Section 271.7A of the Commonwealth Criminal Code also states that the removal of a person's organ is contrary to the Code if the removal, or agreement for the removal, is contrary to the law of the State or Territory where the removal is, or is to be, carried out or where the victim, or their guardian, has not consented to the removal and the removal would not meet a medical or therapeutic need of the victim.

It is important to note that whilst Section 271B makes it an offence for a person to arrange for the entry to or exit from Australia of another person for the purpose of having an organ removed, it does not capture persons who travel outside Australia or participate in the organisation of such travel for the purposes of receiving an illegally harvested organ.

Given the information outlined in the background section of this submission, it is ALHR's view that the Commonwealth Criminal Code is currently deficient and amendments are necessary to give effect to organ trafficking crimes which occur overseas but which have an Australian connection.

6.2 Human Tissues Act 1993 (NSW)

Section 32 of the *Human Tissues Act 1993* (NSW) prohibits persons from entering into, or offering to enter into, a contract or profitable arrangements for the sale or supply of tissue from a person's body before or after that person's death.¹⁰

The NSW legislation also makes it an offence to remove tissue from the body of another living or deceased person without their consent or authority¹¹. Tissue is defined under Section 4 of the Act as including "an organ, or part of a human body and substance extracted from, or from part of the human body."¹²

The NSW Act, however, also fails to address conduct occurring overseas - an omission which the NSW Greens have sought to address via the introduction of the *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*.¹³ The amendments proposed by this Bill seek to extend the criminal conduct currently covered by the *Human Tissues Act 1993* (NSW) to transplants that occur overseas so that a person would commit an offence under the Act even if one or more of the activities occurs outside NSW.

⁸ Sections 271 .7B and 271.7D of the *Criminal Code 1995 (Cth)*

⁹ Section 271 .7C of the *Criminal Code 1995 (Cth)*

¹⁰ Section 32 *Human Tissue Act 1993 (NSW)* and see also Submission of the NSW Bar Association on the *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016*

¹¹ Section 36 *Human Tissue Act 1993 (NSW)*

¹² Section 4 *Human Tissue Act 1993 (NSW)*

¹³ *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016* available at: <https://www.parliament.nsw.gov.au/bills/DBAssets/bills/BillText/2953/b2012-156-d25-House.pdf>

The Bill also seeks to:

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

In the absence of adequate Commonwealth criminal provisions, ALHR has advocated for the passage of this Bill through the NSW parliament. However, in our submission 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.

7. The Comparative Example of Child Sex Offences Outside Australia: Division 272 Commonwealth Criminal Code

Division 272 of the Commonwealth Criminal Code ensures that Australians who commit, procure, encourage or benefit from sexual offences against children while overseas will not escape the tough penalties they would have received if the offences were committed at home.

In ALHR's submission there is a very clear and urgent need for the enactment of similar extraterritorial provisions to capture the conduct of Australian citizens, residents and corporate entities who receive, procure, encourage or benefit from the overseas harvesting and transplant of trafficked organs.

Pursuant to the provisions of Division 272 of the Commonwealth Criminal Code it is a criminal offence for persons to leave Australia and engage in the sexual exploitation of children. Alleged offenders can only be prosecuted if, at the time of the offence they are:

- (a) an Australian citizen; or
- (b) a resident of Australia; or
- (c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- (d) any other body corporate that carries on its activities principally in Australia.

The penalties under Division 272 differ depending on the offence committed with the most serious offences punishable by a maximum term of 25 years imprisonment and *lesser* offences attracting a penalty of up to 7 years imprisonment. Fines of up to \$825,000 may be imposed for corporate bodies.

It is very important to note that significant elements of the child sex tourism offences created under Division 272 of the Commonwealth Criminal Code are ones of 'absolute liability.' This means that there are no fault elements that must be proved – it is enough

that the act was committed, and there is no defence of mistake.¹⁴

Federal and State Police actively monitor and prosecute child sex offenders. The Australian Federal Police (**AFP**) cooperates with other countries' law enforcement authorities to actively monitor and investigate Australian citizens, permanent residents or companies that are associated with such offences. The Australian government promotes public awareness of these offences and provides information on how to report them on its Smart Traveller website.¹⁵

ALHR submits that Division 272 of the Commonwealth Criminal Code provides an excellent framework for the drafting of similar extraterritorial provisions to ensure that Australia's laws extend criminal conduct beyond the trade in human organs to transplants that occur overseas.

A brief exploration of some of the key extraterritorial offences created within Division 272 provides a useful guide as to how similar provisions may be framed to address some of the complex challenges associated with the global back market trade in organs and the extraterritorial application of Commonwealth offences.

7.1 Creating a Category of Aggravated Offences

In ALHR's submission there is a specific need to recognise categories of aggravated offences in conduct occurring overseas.

Section 272.10 of the Commonwealth Criminal Code creates categories of indictable aggravated child sex tourism offences punishable by a maximum term of 25 years imprisonment in recognition of instances where the circumstances surrounding the sexual exploitation of the child are particularly egregious.

ALHR submits that a similar category of aggravated extraterritorial offences for organ trafficking should be created to cover situations where:

- (a) the amount of tissue taken would be reasonably expected to kill or threaten the life of the victim; or
- (b) the organ taken is one of their vital organs; or
- (c) the victim is a non-consenting person.

These aggravating features would be in addition to the existing features in Division 271.C of the Commonwealth Criminal Code, which we submit should be applied extraterritorially.

It is our view that a maximum prison sentence of 25 years would be commensurate with the seriousness of such offending.

We note that the NSW *Human Tissue Amendment (Trafficking in Human Organs) Bill*

¹⁴ See Section 6 and Division 272 of the *Criminal Code 1995 (Cth)*

¹⁵ See Smart Traveller Website: <http://smartraveller.gov.au/guide/all-travellers/laws/pages/child-sex-offences.aspx>

2016¹⁶ proposes this category of aggravated offences and the Committee may find it useful to refer to those provisions.¹⁷

7.2 Persistent Conduct

Section 272.11 of the Commonwealth Criminal Code addresses the persistent sexual abuse of a child outside Australia. Where an offender is found to have engaged in one of the child sex offences under the Division on 3 or more separate occasions, a maximum term of 25 years imprisonment may be imposed.

ALHR submits that a similar extraterritorial provision covering persistent involvement in organ trafficking should be created to cover circumstances where criminal conduct has been engaged in on 3 or more separate occasions.

7.3 Procuring and Benefitting from Overseas Organ Trafficking

Section 272.14 of the Commonwealth Criminal Code deals with the procuring of a child to engage in sexual activity outside Australia and Section 272.18 and makes it an offence for a person to engage in conduct with the intention of benefiting from an offence against the Division, where that conduct is reasonably capable of resulting in the person benefiting from such an offence.

Both of these offences are punishable by up to 20 years' imprisonment. It is notable that these offences stand whether or not an offence against the Division is in fact ultimately committed.

These offences and their penalties appropriately reflect the seriousness of criminal conduct whereby a person or body corporate seeks to profit from child sex tourism. It is ALHR's view that those seeking to profit from the black market international trade in organs should be subject to similar criminal provisions and penalties.

7.4 Engaging in Conduct that Seeks to Encourage Organ Trafficking

Section 272.19 of the Commonwealth Criminal Code makes it an offence, punishable by up to 20 years imprisonment, to engage in conduct with the intention of encouraging any of the child sex tourism offences created under Division 272¹⁸ where that conduct is deemed reasonably capable of encouraging such an offence.

In this section, *encourage* means to:

- (a) encourage, incite to, or urge, by any means whatever, (including by a written, electronic or other form of communication); or
- (b) aid, facilitate, or contribute to, in any way whatever.

¹⁶ *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016* available at: <https://www.parliament.nsw.gov.au/bills/DBAssets/bills/BillText/2953/b2012-156-d25-House.pdf>

¹⁷ *Human Tissue Amendment (Trafficking in Human Organs) Bill 2016* clauses 32D, 32I, 32L, 32N and penalty clause 38(2).

¹⁸ (other than this section or section 272.20)

Again, we propose that a similarly drafted provision should be incorporated into Division 271 of the Commonwealth Criminal Code in order to capture those who engage in conduct that seeks to encourage organ trafficking.

7.5 Preparing for or Planning and Organ Trafficking Offence

Section 272.20 of the Commonwealth Criminal Code creates offences relating to preparing for or planning a child sex tourism offence. These offences apply whether the act is done within or outside Australia; and whether or not an offence is in fact ultimately committed. They also apply whether or not the act is done in preparation for, or planning a specific offence or more than one offence.

ALHR submits that it would be both desirable and practicable to include similar provisions in amendments seeking to give Division 271 extraterritorial application.

7.6 Absolute Liability

Importantly, significant elements of the extraterritorial child sex tourism offences created under Division 272 of the Commonwealth Criminal Code are ones of ‘absolute liability.’ This means that for aspects of these offences there are no fault elements that must be proved – it is enough that the act was committed, and there is no defence of mistake.

Whilst ALHR recognises the vital importance of safeguarding the rights of defendants to a fair trial, we are of the view that the elements to which absolute liability applies in respect of overseas child sex offences achieves an appropriate balance.

It is our view that a similar approach should be adopted in drafting any amendments to Division 271.

7.7 Video Link Evidence from Overseas

Finally we note that, in recognition of the evidentiary complexities and challenges that can be associated with the prosecution of extraterritorial offences, Subdivision D of Division 272 makes specific provision for video link evidence from overseas in the prosecution of overseas child sex offences.

It is our recommendation that specific provision for video link evidence also be made in Division 271.

Recommendation: That the Commonwealth Criminal Code be amended so as to extend criminal conduct extraterritorially to include transplants that occur overseas, adopting a similar approach to that taken in relation to child sex offences outside Australia under Division 272 of the Act.

Recommendation: That in drafting amendments to Division 271 of the Commonwealth Criminal Code, in order to achieve extraterritorial application, particular regard be given to the importance of:

- **the creation of a category of aggravated offences**

- capturing persistent conduct
- capturing conduct that involves procuring and benefitting from overseas organ trafficking
- capturing those who engage in conduct that seeks to encourage organ trafficking
- capturing conduct that involves preparing for or planning an organ trafficking offence
- the appropriate use of absolute liability
- the need for specific provisions to allow the use of video link evidence from overseas

8. Australia's accession to the Council of Europe Convention

The ALHR supports Australia's accession to the Council of Europe Convention to enable effective domestic organ trafficking laws, and preventing illegal organ transplants internationally. The Council of Europe Convention is "the first legal document that provides an internationally agreed definition of trafficking in human organs, identifying the activities that ratifying States criminalize in their national laws."¹⁹

The Council of Europe Convention calls on governments to establish laws which criminalise "the illegal removal of human organs from living or deceased donors:

- where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;
- where, in exchange for the removal of organs, the living donor, or a third party, receives a financial gain or comparable advantage;
- where in exchange for the removal of organs from a deceased donor, a third party receives a financial gain or comparable advantage."²⁰

Compensation for victims and preventative measures to ensure transparency and equitable access to transplantation services are important elements of the Council for Europe Convention. In order for it to enter into force, five ratifications including from at least 3 member States of the Council of Europe is necessary. To date, two member States of the Council of Europe have ratified. There have been no non-member States who have ratified. Australia's accession is therefore imperative for it will assist greatly in the treaty's entry into force, and in encouraging other countries to also ratify.

It is ALHR's strong view that Australia accede to the Council of Europe Convention, to recognise the need for effective domestic laws and to recognise the important international role Australia can play in eradicating organ trafficking and organ transplant tourism.

Recommendation: That Australia accede to the 2014 Council of Europe Convention against trafficking in Human Organs.

¹⁹ The Declaration of Istanbul on Organ Trafficking and Transplantation website, <http://www.declarationofistanbul.org/resources/recommended-reading/the-council-of-europe-convention-against-trafficking-in-human-organs>

²⁰ Council of Europe website, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/216>

10. Conclusion

Australia is well placed to make landmark legislative reform in the area of international organ trafficking and organ transplant tourism both domestically and internationally. This inquiry is timely and much-needed given the extensive and widespread illegal and unethical organ trade around the world. Geographically, Australia, being located in the Asia Pacific region, is faced with its own unique and challenging issues arising from international organ trafficking and transplant tourism. Issues of long waiting lists for organ transplants locally in Australia, and easy accessibility to countries like China, places Australia and Australians at risk of engaging in crimes, which can be viewed as crimes against humanity.

In order to protect all Australians from engaging in such conduct overseas, and preventing such heinous crimes, it is ALHR's submission that amendments to the Commonwealth Criminal Code should be made so as to have extraterritorial application and that Australia should accede to the Council of Europe Convention.

If you would like to discuss any aspect of this submission, please contact Benedict Coyne, President Australian Lawyers for Human Rights, by email at president@alhr.org.au

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