



THE LAW SOCIETY  
OF NEW SOUTH WALES

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*Jonathan*

Dear Mr ~~S~~mithers,

### **Inquiry into Organ Trafficking and Transplant Tourism**

Thank you for your memorandum dated 3 July 2017 requesting input for a Law Council submission in relation to the Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Organ Trafficking and Transplant Tourism ("Inquiry").

The Law Society notes that the Inquiry seeks to consider amendments to offences provided for under Division 271 of the *Criminal Code Act 1995* (Cth) ("Act"), and whether it would be practicable or desirable for:

1. the offence of trafficking in human tissue to have extraterritorial application; and
2. Australia to accede to the 2014 Council of Europe Convention against Trafficking in Human Organs ("Council of Europe Convention").

The Law Society is aware of the increasing global instances of organ tourism, with Australia identified as one of the countries of origin of patients travelling overseas to purchase organs for transplantation<sup>1</sup>.

Given the extraterritorial nature of organ trafficking, we support, in principle, amendment to the Act to cover the commercial trading, trafficking and/or taking without consent of organs and other human tissue in order to address potential human rights violations committed by residents of the Commonwealth of Australia abroad.

For the reasons set out in the submission below, the Law Society is of the view that it is desirable for Australia to accede to and implement the provisions of the Council of Europe Convention.<sup>2</sup>

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<sup>1</sup> Nancy Scheper-Hughes, 'Prime Numbers: Organs without Borders' [2005] (146) *Foreign Policy* 26.

## 1. Compatibility with Australia's international law obligations

Australia has ratified several key international human rights treaties, including the *International Covenant on Civil and Political Rights* ("ICCPR")<sup>3</sup> and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").<sup>4</sup> The following rights may be engaged by the practice of organ trafficking:

- right to life (Article 6, ICCPR);
- freedom from cruel, inhuman or degrading treatment or punishment (Article 7, ICCPR);
- right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Article 10, ICCPR); and
- right to the enjoyment of the highest attainable standard of physical and mental health (Article 12, ICESCR).

Relevantly, article 6(1) of the ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The right to life is the only right in the ICCPR that is expressly described as "inherent".

## 2. Trafficking in organs and trafficking in persons for organ removal

The Law Society notes that the Act presently addresses the commercial trading and use of human organs and other tissue taken without consent, and the trafficking in persons for the taking of organs or other tissue from:

- one place in Australia to another place in Australia<sup>5</sup>;
- one place outside Australia into another place in Australia<sup>6</sup>; or
- one place inside Australia to another place outside of Australia<sup>7</sup>.

It is unlawful to commit an act of organ trafficking, whereby a person assists in the organisation or facilitation of the entry or proposed entry, or the receipt, of another person (the victim) into Australia" and "...the offender is reckless as to whether the conduct will result in the removal of an organ of the victim ... by the offender or another person, after or in the course of that entry or receipt".<sup>8</sup> It is also an offence of organ trafficking where "...the offender engages in conduct consisting of the organisation or facilitation of the exit or proposed exit of another person ... from Australia and the offender is reckless as to whether the conduct will result in the removal of an organ of the victim...by the offender or another person, after or in the course of that exit".<sup>9</sup>

The provisions of ss 271.7A to 271.7E of the Act are therefore directed at the domestic movement of persons for the purposes of tissue and organ removal and the

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<sup>2</sup> We note that whether Australia is able to accede to the Council of Europe Convention is subject to the requirements of Article 28 of the Convention.

<sup>3</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>4</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>5</sup> Section 271.7D of the Act.

<sup>6</sup> *Ibid.* s 271.7B(1).

<sup>7</sup> *Ibid.* s 271.7B(2).

<sup>8</sup> *Ibid.* s 271.7B(1).

<sup>9</sup> *Ibid.* s 271.7B(2).

entry into, or removal from, Australia of persons for tissue and organ removal. The Act does not, however, presently make provision for:

- commercial trading and/or use of human organs and other tissue taken without consent when committed by Australian nationals abroad; or
- trafficking of organs, *per se*, as opposed to the trafficking of people.

In a joint study published in 2009, the United Nations (“UN”) and the Council of Europe concluded that trafficking in organs and trafficking in persons for organ removal are different crimes.<sup>10</sup> Trafficking in persons for organ removal is specifically defined in the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (“Trafficking in Persons Protocol”),<sup>11</sup> and does not encompass the term “trafficking in organs” or “organ trafficking”.

The Law Society notes, however, the conclusion of the Special Rapporteur on trafficking in persons in her 2013 report on the issue of trafficking in persons for organ removal that:

... the distinction between trafficking in persons for removal of organs and trafficking in organs is generally unhelpful. Certainly, there is an urgent need to ensure that laws on trafficking in persons for the removal of organs are supplemented by the effective criminalisation of all related offences that may be implicated in such cases but that may not readily or easily fall within the three-element umbrella definition of trafficking in persons. To that extent, the draft Council of Europe convention against trafficking in human organs represents a potentially important contribution to fleshing out the legal framework around trafficking in persons for the removal of organs and ensuring that all persons complicit in such offences do not escape liability. Case-based experience confirms, however, that the trade in organs is inextricably linked to actions against individuals aimed at their exploitation. There lies great danger in removing the individual victim from this picture by separating out the concept of trafficking in organs from the concept of trafficking in persons for the removal of organs.<sup>12</sup>

Accordingly, we set out below the relevant international legal frameworks for trafficking in organs and trafficking in persons for organ removal, which may be of relevance to proposed amendments to the Act.

### **3. Trafficking in organs**

The Law Society notes that currently the Council of Europe Convention is the only international treaty that specifically deals with trafficking in human organs.<sup>13</sup> This Convention aims to prevent and combat trafficking in human organs by providing for the criminalisation of certain acts, to protect the rights of victims, and to facilitate cooperation at national and international levels.<sup>14</sup>

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<sup>10</sup> Council of Europe and UN, ‘Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs’ (Report, 2009) 93.

<sup>11</sup> Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

<sup>12</sup> *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, UN GAOR, 68<sup>th</sup> sess, Agenda Item 69(b), UN Doc A/68/256 (2 August 2013) para 63.

<sup>13</sup> Opened for signature 25 March 2015, CETS No 216 (not yet in force).

<sup>14</sup> Article 1 of the Council of Europe Convention.

Although the Council of Europe Convention has not been signed by Australia and, as at the date of this submission, has not entered into force,<sup>15</sup> given that it is the first and only international treaty on organ trafficking, it may nevertheless be helpful to consider its provisions, particularly those outlined below. We note that even if Australia does not accede to the Council of Europe Convention, the provisions of the Convention may still usefully inform amendments to the Act.

The Council of Europe Convention requires States parties to criminalise the following acts, when committed intentionally:

- (a) illicit removal of organs from living or deceased donors, where:
  - (i) 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;
  - (ii) in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or comparable advantage; or
  - (iii) in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage.<sup>16</sup>
- (b) use of illicitly removed organs;<sup>17</sup>
- (c) implantation of organs outside of the domestic transplantation system, or in breach of essential principles of national transplantation law;<sup>18</sup>
- (d) illicit solicitation, recruitment, offering and requesting of undue advantages;<sup>19</sup>
- (e) preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs;<sup>20</sup> and
- (f) aiding or abetting the commission of, and attempt to commit, any of the above criminal offences.<sup>21</sup>

Importantly, State parties are only obliged to criminalise the above acts if they are committed *intentionally*. 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.<sup>22</sup> It also notes, however, that this does not mean that States parties would not be allowed to

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<sup>15</sup> As at the date of this submission, the Council of Europe Convention has been ratified by two States and signed by 18 other States. It will enter into force upon five ratifications, including by at least three member States of the Council of Europe.

<sup>16</sup> Article 4(1) of the Council of Europe Convention.

<sup>17</sup> *Ibid.*, Article 5.

<sup>18</sup> *Ibid.*, Article 6.

<sup>19</sup> *Ibid.*, Article 7.

<sup>20</sup> *Ibid.*, Article 8.

<sup>21</sup> *Ibid.*, Article 9.

<sup>22</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs* (25 March 2015) 5, para 28.

go beyond this minimum requirement by also criminalising *non-intentional* acts.<sup>23</sup> The Law Society notes that consideration should be given to including *intention* as a requirement for all offences under any proposed Bill to amend the Act.

Under Article 10(1) of the Council of Europe Convention, States parties must take such legislative or other measures as may be necessary to establish jurisdiction over the offence when it is committed, amongst other things, in its territory or by one of its nationals.<sup>24</sup> This means that States parties must adopt laws that capture the offences of commercial trading and use of human organs and other tissue taken without consent when committed by their nationals abroad. Given that the current Australian framework deals only with domestic organ trafficking, the Law Society would support an appropriate amendment to the Act to achieve such an extraterritorial effect.

Article 11 contains provisions to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed on their behalf by anyone in a leading position in them, provided that certain conditions are met. The Law Society notes that consideration should be given to extending the scope of the Act to cover corporate liability.

Article 13 requires States parties to take into consideration a number of circumstances as aggravating circumstances in determining the sanctions in relation to the offences.<sup>25</sup> The Law Society considers that similar circumstances could be appropriate for inclusion in the Act.

Furthermore, we note that the UN Special Rapporteur on trafficking in persons, recognising the human rights implications of “transplant tourism”, made the following recommendations, amongst others, in her 2013 report with respect to trafficking in persons for organ removal and related offences:

69. All States should... review the broader legal framework around transplantation-related exploitation to ensure, at a minimum, that related offences are fully and effectively criminalised and appropriately penalised. Such related offences include but are not limited to removal of an organ from a living or deceased donor without consent; removal of an organ from a living or deceased donor for financial gain or other advantage; the use of organs removed in such ways; and any form of advertising of a service relating to illicit removal and use of an organ.

...

72. National legislation should include an obligation on medical personnel to notify authorities when they become aware of cases or potential cases of trafficking in persons for the removal of organs, with appropriate attention to issues of confidentiality and risks in cases of official complicity. This obligation should extend to medical staff involved in the provision of follow-up care to recipients.

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74. All States, in particular countries of “demand”, should take steps to ensure that the jurisdictional reach of their laws relating to trafficking in persons for the removal of organs enables the effective prosecution and

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<sup>23</sup> Ibid.

<sup>24</sup> Article 10(1) of the Council of Europe Convention.

<sup>25</sup> Aggravating circumstances include: the offence caused the death of, or serious damage to the physical or mental health of, the victim; the offence was committed by a person abusing their position; the offence was committed in the framework of a criminal organisation; the perpetrator has previously been convicted of offences established in accordance with this Convention; or the offence was committed against a child or any other particularly vulnerable person.

punishment of related offences involving their nationals. For countries requiring specific legislation, this would be most effectively secured through laws that extend the national legislative prohibition on trafficking in persons for the removal of organs and related offences extraterritorially, irrespective of the legal status of the relevant acts in the country in which they occur. Extraterritorial legislation developed to combat child sex tourism and similarly situated offences can provide a useful model in this regard.<sup>26</sup>

The Law Society considers that any amendment to the Act should be consistent not only with the international instruments, but also with the UN Special Rapporteur's recommendations regarding organ trafficking offences.

#### **4. Trafficking in persons for organ removal**

In contrast with organ trafficking, the Law Society notes that there exists a well-developed international legal framework for trafficking in persons for organ removal. We outline the following provisions of international treaties ratified by Australia that may be relevant to proposed amendments to the Act and/or for Australia to accede to the Council of Europe Convention.

The Trafficking in Persons Protocol, which supplements the UN *Convention against Transnational Organised Crime*,<sup>27</sup> is the first international legal instrument that gives a definition of trafficking in persons for the purpose of organ removal.

Article 5 requires States parties to criminalise "trafficking in persons" for organ removal, as defined in article 3. Article 3(a) defines "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.

Article 3(b) provides that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of the means in article 3(a) have been used.

Article 3(c) provides that if the victim is a child,<sup>28</sup> consent is irrelevant regardless of whether any improper means (such as deception, force, abuse of a position of vulnerability) have been used. This means that trafficking in children for organ removal only requires that there be an act (recruitment, transport, transfer, harbouring or receipt of a child) for the purpose of exploitation through organ removal.

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<sup>26</sup> *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, UN GAOR, 68<sup>th</sup> sess, Agenda Item 69(b), UN Doc A/68/256 (2 August 2013) paras 69, 72 and 74.

<sup>27</sup> Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003). Australia ratified the *Convention against Transnational Organised Crime* on 27 May 2004, and the Trafficking in Persons Protocol on 14 September 2005.

<sup>28</sup> "Child" is defined as any person under the age of 18 years: Article 3(d), Trafficking in Persons Protocol.

We note that trafficking in persons for organ removal is also defined and prohibited in the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.<sup>29</sup>

Thank you for considering this submission. Should you have any questions or require further information, please contact Vicky Kuek, Principal Policy Lawyer on (02) 9926 0354 or email [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,



Pauline Wright  
**President**

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<sup>29</sup> See article 3(1)(a)(i)(b) of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002). Australia ratified the *UN Convention on the Rights of the Child* on 17 December 1990, and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* on 8 January 2007.