



Law Council
OF AUSTRALIA

Organ Trafficking and Organ Transplant Tourism

Joint Standing Committee on Foreign Affairs, Defence and Trade

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Law Society of New South Wales, the Law Society of South Australia, and the Queensland Law Society in the preparation of this submission.

Executive Summary

1. The Law Council of Australia thanks the Joint Standing Committee on Foreign Affairs, Defence and Trade (**the Committee**) for the opportunity to provide a submission regarding the Inquiry into Human Organ Trafficking and Organ Transplant Tourism (**the Inquiry**).
2. The Law Council is deeply concerned about human trafficking for the purposes of organ removal, organ trafficking, itself, and organ transplant tourism. Such practices have the potential to result in detrimental and fatal consequences for victims.
3. The Terms of Reference for the Inquiry require the Committee to have regard to the offence of Organ Trafficking under division 271 of the *Criminal Code Act 1995* (Cth) (**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* (**the Convention**).
4. The Law Council notes that there are several offences under Division 271 which relate to organ trafficking rather than a singular offence provision. It is not clear, therefore, which offence is currently proposed to have extraterritorial application. Further, the proposed extraterritorial application of the organ trafficking offences in Division 271 has not been identified. This makes it difficult for organisations such as the Law Council to provide an assessment on the intended level of extraterritorial application.
5. This submission focuses on examining whether:
 - (a) the four offences relating to organ trafficking in the Criminal Code, namely, 271.7B (offence of organ trafficking – entry into and exit from Australia), 271.7C (organ trafficking – aggravated offence), 271.7D (domestic organ trafficking), and 271.7E (domestic organ trafficking – aggravated offence) should have broader extraterritorial application than that which already applies.
 - (b) Australia should accede to the Convention; and
 - (c) Australia should enact broader organ transplant tourism offences beyond the existing ‘movement of people’ offences.
6. The Law Council strongly supports extending extraterritorial application of the organ trafficking offences in the Criminal Code and Australia’s accession to the Convention. Such measures are critical as a means to prevent, deter and prosecute organ traffickers.
7. Key recommendations of this submission include:
 - Consider Category C extended geographical jurisdiction for the domestic organ trafficking offences in 271.7D and 271.7E, respectively, of the Criminal Code. This would allow anyone, regardless of citizenship or residence, to be captured by the offences. Alternatively, an express provision might be made that these offences apply to anyone, regardless of citizenship or residence, subject to removal of the ‘anywhere’ element and the defence of Category C extended geographical jurisdiction.

- Consider Category C or Category D extended geographical jurisdiction for the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C, respectively, of the Criminal Code. The Law Council would see value in the offence provisions applying to anyone anywhere regardless of citizenship or residence. However, the Committee should request the Attorney-General's Department or the Department of Foreign Affairs and Trade to provide a list of countries that may be 'high-risk' for the purposes of organ trafficking to determine whether the defence in Category D would be likely to be effective. This should then inform an assessment as to whether Category C or Category D should be applied to the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C.
- Australia should accede to the Convention and give due consideration as to necessary amendments to the Criminal Code to implement the required international obligations into domestic law.
- The Australian Government should consider utilising a public consultation process the extent to which it may be appropriate to regulate organ transplant tourism in light of Australia's accession to the Convention.

Australians, organ trafficking and organ transplant tourism

8. The first case of alleged organ trafficking in Australia was referred to the Commonwealth Director of Public Prosecutions in 2011.¹ Fortunately, the situation was discovered through medical transplant integrity procedures, and the removal of the organ did not take place.² The prosecution was later discontinued following the death of the woman accused of committing the offence.³ As of August 2016, this was the only reported case of organ trafficking investigated in Australia.⁴
9. The lack of evidence of organ trafficking in Australia is noted by Andreas Schloenhardt and Samantha Garbutt as follows:

*Domestically, 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.*⁵

10. In many instances, those Australians travelling overseas for transplantation are engaging in 'transplant tourism'. The World Health Organisation (WHO) has defined transplant tourism as:

*... [t]ravel for transplantation when it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals and transplant centers) devoted to providing transplant to patients from outside a country undermine the country's ability to provide transplant services for its own population.*⁶

11. Transplant commercialism is 'a policy or practice in which cells, tissues or organs are treated as a commodity, including by being brought or sold or used for material gain'.⁷ These WHO definitions are not binding at international law but are internationally accepted and hence instructive.
12. The Law Council is aware of the involvement of some Australians in the increasing global practice of transplant tourism. At the Second Global Consultation on Human Transplantation in 2007, it was noted that at least 20 nationals from countries, including Australia, travelled as transplant tourists for trafficked organs.⁸ In 2009, Australia was identified as one of the common countries of origin for those buying kidneys.⁹ In 2016, an investigation over three years by the *Sunday Telegraph* noted

¹ Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, 20th sess, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 6.

² *Ibid.*

³ Natalie O'Brien, 'Organ trafficker's death closes case', *Sun-Herald* (Sydney), 25 March 2012, 3.

⁴ Sue Dunlevy, 'Transplant surgeon wants Australians who travel overseas for an illegal organ transplant charged on their return', *The Advertiser* (online), 9 August 2016

<<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>>.

⁵ Andreas Schloenhardt and Samantha Garbutt, 'Trafficking in persons for the purpose of organ removal: International law and Australian practice' (2012) 36(3) *Criminal Law Journal* 145, 155.

⁶ World Health Organisation 'Global Glossary of Terms and Definitions on Donation and Transplantation' (Geneva, November 2009) at 14.

⁷ *Ibid.*

⁸ Yosuke Shimazono, 'Mapping "Transplant Tourism' (Paper presented at the World Health Organization's Second Global Consultation on Human Transplantation, Geneva, March 28–30, 2007), cited in D A Budiani-Saberi and F L Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' (2008) 8(5) *American Journal of Transplantation* 925, 927.

⁹ Nancy Scheper-Hughes, 'Prime Numbers: Organs without Borders' (2005) 146 *Foreign Policy* 26.

that 176 Australians had a kidney transplant overseas in the past 13 years, of which specialists estimated that half were illegal.¹⁰

13. The Law Council supports Resolution 25/1 of the Commission on Crime Prevention and Criminal Justice (**CCPCJ**) adopted at its 25th session. Among other things, the CCPCJ said that it:

*Requests the United Nations Office on Drugs and Crime, in carrying out the study on trafficking in human organs requested by the Commission in its resolution 23/2, based on the analysis of information provided by Member States, to engage in a dialogue with relevant intergovernmental international organizations, where appropriate, in close consultation with Member States, to enable it to collect data and analyse instances of human organ trafficking and relevant prosecutions, as well as to collect examples of applicable legislation, while bearing in mind that the data on trafficking in persons for the purpose of organ removal is being gathered for the Global Report on Trafficking in Persons, in accordance with General Assembly Resolution 70/179 of 17 December 2015.*¹¹

14. Implementation of this Resolution would allow Australia to make more accurate assessments about the effectiveness or otherwise of its Criminal Code offences.

Criminal Code offences

15. The offence of trafficking in organs was enacted in 2013 with the passing of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth). This Act gives effect to Australia's international obligations, as outlined in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Protocol)*.¹²
16. The current physical and fault elements for the two general organ trafficking offences in the Criminal Code are as follows.

Section 271.7B – Offence of organ trafficking – entry into and exit from Australia

17. Subsection 271.7B(1) creates an offence where a defendant engages in conduct consisting of the organisation or facilitation of *the entry or receipt* of another person (the victim) into Australia. The fault element for this offence is intention (section 5.6 of the Criminal Code). However the defendant only needs to be reckless as to whether the conduct will result in the removal of an organ of the victim contrary to subdivision BA, by the offender or another person, after or in the course of that entry or receipt (sub-paragraph 271.7B(1)(b) of the Criminal Code).
18. Subsection 271.7B(2) creates an offence where a defendant engages in conduct consisting of the organisation or facilitation of the exit or proposed exit of another person (the victim) from Australia. The fault element for this offence is intention (section 5.6 of the Criminal Code). However the defendant only needs to be reckless

¹⁰ Sue Dunlevy, 'I Paid \$120,000 for a Kidney – Sunday Special Investigation', *Daily Telegraph* (Sydney), 7 August 2016, 8.

¹¹ United Nations Commission on Crime Prevention and Criminal Justice, *Report on the 25th Session (11 December 2015 and 23-27 May 2016)*, UN Doc E/2016/30-E/CN.15/2016/13 (13 June 2016) 16 [6].

¹² *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 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('Protocol').

as to whether the conduct will result in the removal of an organ of the victim contrary to subdivision BA, by the offender or another person, after or in the course of that exit (sub-paragraph 271.7B(2)(b) of the Criminal Code).

19. The maximum penalty for these offences is imprisonment for 12 years.

Section 271.7D – Offence of domestic organ trafficking

20. A person commits an offence where they engage 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. The fault element for this offence is intention (section 5.6 of the Criminal Code). However the defendant only needs to be reckless as to whether the conduct will result in the removal of an organ of the victim contrary to subdivision BA, by the offender or another person, after or in the course of that transportation (paragraph 271.7D(b) of the Criminal Code).

21. There is a maximum penalty for this offence of imprisonment for 12 years.

22. Section 271.7E provides for an aggravated domestic organ trafficking offence with a maximum penalty of imprisonment for 25 years if the victim is under 18, or imprisonment for 20 years in any other case.

Extraterritorial application

23. Extraterritorial offences should generally be approached with caution because of the potential to impinge on the sovereignty of a foreign state and potential difficulties with reliability of evidence which can impact both the prosecution and defence. Extraterritorial application has the potential to stand as an exception to the general principle of 'international comity' that:

*... each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has no harmful consequences within the territory of the state which imposes the punishment.*¹³

24. However, extraterritorial offences can be an important part of global efforts to prevent, deter or punish those responsible for organ trafficking which is often a transnational crime. To protect individuals from organ exploitation it may be necessary to have extraterritorial laws relating to organ trafficking. Such laws may deter individual buyers, thereby reducing demand in foreign countries.

25. In Australia, the Commonwealth Parliament is empowered to enact extraterritorial laws under its trade and commerce power¹⁴ or external affairs power.¹⁵ Any consideration of expanding the current extraterritorial application of the Criminal Code organ trafficking offences must be considered in this light.

26. This section summarises how geographical jurisdiction currently works in the Criminal Code, the current level of extraterritorial application for the organ trafficking offences in the Criminal Code, the extent to which the Commonwealth can legislate to further

¹³ *Treacy* [1971] AC 537, per Diplock LJ, at 564.

¹⁴ *Australian Constitution*, s 51(i). See *Crowe v Commonwealth* (1935) 54 CLR 69 at 85, 86 per Starke J, at 90, 91 per Dixon J;

¹⁵ *Australian Constitution*, s 51(xxix). See also *XYZ v Commonwealth* (2006) 227 CLR 532.

extend geographical jurisdiction for these offences and the desirability or otherwise of doing so.

Geographical jurisdiction in the Criminal Code

27. Section 14.1 of the Criminal Code provides a default rule for the geographical reach of all Commonwealth offences. However, sections 15.1 to 15.4 of the Criminal Code allow for Commonwealth offences to have extended geographical application based on a range of categories A-D. An alternative provision about geographical jurisdiction may also apply to specific offences.
28. Standard geographical jurisdiction (section 14.1) is a relatively narrow territorial-based type of geographical jurisdiction. It applies automatically to offences created on or after 24 May 2001 in the Criminal Code, unless specified otherwise. An offence with standard jurisdiction applies where any part of the conduct constituting an offence occurs in Australia or on an Australian aircraft or ship. The offence also applies if any part of the result of the conduct constituting the offence occurs in Australia or on an Australian aircraft or ship. A defence may apply where the offence is committed outside Australia and there is no equivalent offence under the law of the local jurisdiction.
29. If an offence needs to have extraterritorial application, an alternative provision regarding geographical jurisdiction may be specified or one of the optional categories in the Criminal Code may be specified to apply.¹⁶ The optional categories are as follows:

Extended geographical jurisdiction

Provision	Category of extended geographical jurisdiction	Summary
Section 15.1	Category A	<p>Coverage of conduct that occurs wholly or partly in Australia.</p> <p>Coverage of Australian citizens and Australian bodies corporate for what they do anywhere in the world.</p> <p>Coverage of conduct that has a result in Australia.</p> <p>If the conduct occurs wholly in a foreign country, 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.</p>

¹⁶ Office of Parliamentary Counsel, *Drafting Direction No. 3.5 Offences, penalties, self-incrimination, secrecy provisions and enforcement powers* (13 February 2013) <https://www.opc.gov.au/about/docs/drafting_series/DD3.5.pdf?new> 7 [35].

Extended geographical jurisdiction

Provision	Category of extended geographical jurisdiction	Summary
Section 15.2	Category B	<p>Coverage of conduct that occurs wholly or partly in Australia.</p> <p>Coverage of Australian citizens, Australian bodies corporate and Australian residents for what they do anywhere in the world.</p> <p>Coverage of conduct that has a result in Australia.</p> <p>If the conduct occurs wholly in a foreign country, 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.</p>
Section 15.3	Category C	<p>Unrestricted coverage.</p> <p>If the conduct occurs wholly in a foreign country, 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.</p>
Section 15.4	Category D	<p>Unrestricted coverage.</p> <p>There is no defence based on the law of the foreign country where the conduct occurs.</p>

Organ trafficking offences and extraterritorial application

30. The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) introduced new Subdivision BA offences of organ trafficking into Division 271 of the Criminal Code, along with particular extended jurisdictional reach as follows:

Extended geographical jurisdiction for organ trafficking offences

Provision	Category of extended geographical jurisdiction	Summary
Section 271.7B	Category B	Offence of organ trafficking – entry into and exit from Australia
Section 271.7C	Category B	Organ trafficking – aggravated offence
Section 271.7D	Standard geographical jurisdiction applies	<p>Offence of domestic organ trafficking – section 271.11 of the Criminal Code provides that a person will only commit an offence if one of the below applies:</p> <ul style="list-style-type: none">(a) the conduct constituting the offence occurs to any extent outside Australia(b) the conduct constituting the offence involves transportation across State borders, either for reward or in connection with a commercial arrangement(c) the conduct constituting the offence occurs within a Territory or involves transportation to or from a Territory(d) the conduct constituting the offence is engaged in by, or on behalf of, a constitutional corporation, or in circumstances where the victims of the trafficking conduct were intended to be employed by a constitutional corporation(e) some of the conduct constituting the offence is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(v) of the Constitution, or(f) the victim of the conduct constituting the offence is an alien for the purposes of paragraph 51(xix) of the Constitution.

Section 271.7E	Standard geographical jurisdiction applies	Domestic organ trafficking – aggravated offence – section 271.11 of the Criminal Code provides that a person will only commit an offence if one of the below applies: <ul style="list-style-type: none"> <li data-bbox="783 454 1297 548">(a) the conduct constituting the offence occurs to any extent outside Australia <li data-bbox="783 582 1297 748">(b) the conduct constituting the offence involves transportation across State borders, either for reward or in connection with a commercial arrangement <li data-bbox="783 781 1297 875">(c) the conduct constituting the offence occurs within a Territory or involves transportation to or from a Territory <li data-bbox="783 909 1297 1137">(d) the conduct constituting the offence is engaged in by, or on behalf of, a constitutional corporation, or in circumstances where the victims of the trafficking conduct were intended to be employed by a constitutional corporation <li data-bbox="783 1171 1297 1373">(e) some of the conduct constituting the offence is engaged in by communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(v) of the Constitution, or <li data-bbox="783 1406 1297 1536">(f) the victim of the conduct constituting the offence is an alien for the purposes of paragraph 51(xix) of the Constitution.
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Further extension of extraterritorial application

31. The Law Council notes that there remains scope to extend the extraterritorial application of division 271.

32. In the context of organ trafficking the Australian Parliament is empowered to enact extraterritorial laws primarily under its external affairs power.¹⁷ If further extraterritorial

¹⁷ *Australian Constitution*, s 51(xxix). See also *XYZ v Commonwealth* (2006) 227 CLR 532.

application was to be supported under this power, it is suggested that it may need to be linked closely to Australia's international law obligations.

33. Article 5 of the Protocol imposes upon Australia an obligation to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct of 'trafficking in persons' done for the purpose of enabling the removal of organs. That obligation was not stated as being circumscribed, or limited to the territories that constitute Australia.
34. The Preamble to the Protocol notes that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination. This alludes to the fact that trafficking in persons done for the purpose of organ removal involves many 'intermediaries'.¹⁸ The offending conduct travels across state borders, and consequently involves persons of different nationalities. The Law Council considers that provisions that seek to eradicate human organ trafficking will fall short of their aims if they only target Australian citizens or residents that might be involved in such conduct. Extending the extraterritorial application of the offence of trafficking in organs would give greater legal effect to the purpose of the Protocol. If Australia acceded to the Convention, Australia would be subject to the requirement that States parties take the necessary legislative and other measures to establish jurisdiction over organ trafficking when it is committed, amongst other things, by or against one of its nationals or a person who has his or her habitual residence in its territory.¹⁹
35. Category C extended geographical jurisdiction should be considered for the domestic organ trafficking offences in 271.7D and 271.7E, respectively. This would allow anyone regardless of citizenship or residence to be captured by the offences. This may be useful in circumstances where visitors to Australia engage in conduct constituting the domestic organ trafficking offences. The other aspects of category C jurisdiction that depend upon whether or not the conduct or the result of the conduct constituting the alleged offence occurs in Australia appear less relevant given that the offences are specifically framed as domestic provisions. The Category C defence which may be employed by a non-citizen defendant or non-resident defendant (namely, that the conduct involved was not unlawful in the other country in which it occurs) would appear to have no work to do as the conduct must necessarily occur in Australia. Further extension to category D would therefore not appear to offer any further benefit. An express provision could also be made that these offences apply to anyone, regardless of citizenship or residence, subject to removal of the 'anywhere' element and the Category C defence.
36. Category C or Category D extended geographical jurisdiction should be considered for the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C, respectively. The Law Council would see value in the offence provisions applying to anyone anywhere regardless of citizenship or residence.
37. However, a question arises as to whether any further extension of jurisdiction should permit a defence that the conduct involved is not unlawful in the other country in which it occurs.
38. This is a difficult assessment to make without first undertaking an analysis of the laws in a broad range of foreign countries. It may be difficult to establish what may be

¹⁸ Arthur Caplan et al, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009)

<http://www.ont.es/publicaciones/Documents/OrganTrafficking_study.pdf> 58.

¹⁹ *Council of Europe Convention against Trafficking in Human Organs*, opened for signature 25 March 2015, CETS No 216 (not yet in force) art 10.

lawful or unlawful in any particular country. It would appear that the defence would effectively require the laws in the foreign country to criminalise the organisation or facilitation of *the entry or receipt or exit or proposed exit* of another person (the victim) into/out of Australia or, generically, countries other than the foreign country.

39. The Law Council submits that the Committee should request the Attorney-General's Department or Department of Foreign Affairs and Trade to provide a list of countries that may be 'high-risk' for the purposes of organ trafficking to determine whether the defence in category D would be likely to be effective. This should then inform an assessment as to whether Category C or Category D should be applied to the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C.
40. The Law Council also appreciates that there may be international relations considerations which may come into play if either Category C or Category D jurisdiction is chosen. The Department of Foreign Affairs and Trade is well-placed to advise the Committee on these aspects.

Recommendations:

- **Consider Category C extended geographical jurisdiction for the domestic organ trafficking offences in 271.7D and 271.7E respectively. This would allow anyone regardless of citizenship or residence to be captured by the offences. Alternatively, an express provision should be made to these offences which would allow them to apply to anyone regardless of citizenship or residence but whereby the 'anywhere' element and the defence of Category C extended geographical jurisdiction are removed.**
- **Consider Category C or Category D extended geographical jurisdiction for the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C respectively. The Law Council would see value in the offence provisions applying to anyone anywhere regardless of citizenship or residence. However, the Committee should request the Attorney-General's Department or Department of Foreign Affairs and Trade provide a list of countries that may be 'high-risk' for the purposes of organ trafficking to determine whether the defence in Category D would be likely to be effective. This should then inform an assessment as to whether Category C or Category D should be applied to the organ trafficking offence and the aggravated organ trafficking offence in sections 271.7B and 271.7C.**

The Council of Europe Convention

41. The Council of Europe Convention is the only international treaty that specifically deals with trafficking in human organs.²⁰ The Council of Europe 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.²¹
42. The Council of Europe Convention requires States parties to criminalise the following acts, when committed intentionally:

²⁰ *Council of Europe Convention against Trafficking in Human Organs*, opened for signature 25 March 2015, CETS No 216 (not yet in force) ('*Council of Europe Convention*').

²¹ *Ibid* art 1.

- (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;²²
- (b) use of illicitly removed organs;²³
- (c) implantation of organs outside of the domestic transplantation system, or in breach of essential principles of national transplantation law;²⁴
- (d) illicit solicitation, recruitment, offering and requesting of undue advantages;²⁵
- (e) preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs;²⁶ and
- (f) aiding or abetting the commission of, and attempt to commit, any of the above criminal offences.²⁷

43. 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.²⁸ 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.²⁹

44. The Law Council considers that accession to the Convention could assist in addressing a gap in Australian domestic legislation regarding the offence of organ trafficking. The offence of organ trafficking, as provided for in division 271 of the Criminal Code, does not make it an offence, as such, to traffic organs.³⁰ Rather, as outlined above, it makes it an offence for a person to engage in conduct that facilitates the entry to, or exit from, Australia of another person (or between different places in Australia), and the person is reckless as to whether the other person may be exploited by way of unlawful organ removal.

²² Council of Europe Convention art 4(1).

²³ Ibid art 5.

²⁴ Ibid art 6.

²⁵ Ibid art 7.

²⁶ Ibid art 8.

²⁷ Ibid art 9.

²⁸ Council of Europe, *Explanatory Report to the Council of Europe Convention against Trafficking in Human Organs* (25 March 2015) <<https://rm.coe.int/16800d3840>> 5 [28].

²⁹ Ibid.

³⁰ Trafficking in Persons Working Group, *Trafficking in Persons for the Purpose of Organ Removal* (11 July 2016) The University of Queensland <<https://law.uq.edu.au/research/research-activities/human-trafficking/organ-trafficking>>.

45. Therefore, it is not organ trafficking per se that is an offence but, rather, the movement of people for the purpose of facilitating the unlawful removal of organs. Trafficking in organs, and trafficking in people for the purpose of organ removal, are two distinct matters, although they 'are often mixed up or dealt with together'.³¹ A clear distinction is required to better prevent and prosecute such acts. In this regard, the Law Council notes that the Convention aims to supplement '... the existing international legal instruments in the field of trafficking in human beings for the purpose of the removal of organs' through the introduction of new offences.³²
46. More broadly, the Law Council notes that the Convention recognises the importance of and promotes close international cooperation to combat the global threat posed by trafficking in human organs.³³ By acceding to the Convention, Australia can benefit from international engagement regarding this issue.
47. If Australia accedes to the Council of Europe Convention, there will need to be an assessment of the consistency of its provisions with the Criminal Code. For example, the Convention requires States parties to take the necessary legislative and other measures to:
- (a) ensure that legal persons can be held liable for offences established in accordance with this Convention, when committed for their benefit by any natural person in the circumstances specified;³⁴ and
 - (b) ensure that a number of specific circumstances may be taken into consideration as aggravating circumstances in determining the sanctions in relation to the offences.³⁵

Recommendation:

- **Australia should accede to the 2014 Council of Europe Convention against Trafficking in Human Organs and give due consideration as to necessary amendments to the Criminal Code to implement the required international obligations into domestic law.**

Organ Transplant Tourism

48. Currently, the Criminal Code does not include offences for organ transplant tourism as they are only limited to human trafficking for organ removal. This gap has been implicitly recognised in recent calls to criminalise the conduct of Australians in travelling overseas for the purpose of receiving an illicitly removed organ.³⁶ Each

³¹ Arthur Caplan et al, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (2009)

<http://www.ont.es/publicaciones/Documents/OrganTrafficking_study.pdf> 55.

³² *Council of Europe Convention* Preamble para 7.

³³ *Ibid* Preamble para 9, art 17.

³⁴ *Ibid* art 11.

³⁵ *Ibid* art 13.

³⁶ Sue Dunlevy, 'Transplant surgeon wants Australians who travel overseas for an illegal organ transplant charged on their return', *The Advertiser* (online), 9 August 2016

<<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>>;

Wendy Rogers, 'Here's what Australia can do to help end the Chinese organ trade', *The Conversation*

State and Territory has legislation, however, that regulates the removal of organs and other tissues.³⁷

49. Organ transplant tourism can have severely detrimental or even fatal consequences for both victims and recipients.³⁸ Yosuke Shimazono observes:

*In several instances, newspaper articles have reported the deaths of patients who went abroad for overseas commercial transplants; the abuse, fraud and coercion of paid kidney donors are also frequently reported.*³⁹

50. Nancy Scheper-Hughes notes that:

*Since the first report into the matter in 1990, there has been an alarming number of post-operative deaths of “transplant tour” recipients from botched surgeries, mismatched organs and high rates of fatal infections, including HIV and Hepatitis C contracted from sellers’ organs. Living kidney sellers suffer from post-operative infections, weakness, depression, and some die from suicide, wasting, and kidney failure.*⁴⁰

51. A further issue of concern is the sourcing of organs for transplants. There are reports, for example, of China continuing to harvest organs from its executed prisoners,⁴¹ despite officials having previously announced the end of this practice.⁴²
52. In some cases, however, organ transplants may be safely and legally undertaken in a foreign jurisdiction. In these cases, it may be what is needed to save the life of an Australian.
53. ‘Transplant tourism’ is not specifically provided for in the relevant treaties to which Australia is a party. However, if Australia accedes to the Convention, it will be required to criminalise conduct which underlies this practice. For instance, as noted previously, the Convention requires States to criminalise ‘...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’.⁴³ The extraterritorial reach required by the Convention would position Australia to have

(online), (9 August 2016) <<http://theconversation.com/heres-what-australia-can-do-to-help-end-the-chinese-organ-trade-63701>>.

³⁷ See, eg, section 32 of the *Human Tissue Act 1983* (NSW) (Human Tissue Act) which prohibits trading in tissues in New South Wales. Among other things, section 32 of the Human Tissue Act criminalises entering into a contract or an agreement under which any person agrees, for valuable consideration, to the sale or supply of tissue. Section 4 of the Human Tissue Act provides that the term ‘tissue’ include an organ.

³⁸ See, eg, D A Budiani-Saberi and F L Delmonico, ‘Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities’ (2008) 8 *American Journal of Transplantation* 925; I Glenn Cohen ‘Transplant Tourism: The Ethics and Regulation of International Markets for Organs’ (2013) 41(1) *The Journal of Law, Medicine and Ethics* 269.

³⁹ Yosuke Shimazono, ‘The state of the international organ trade: a provisional picture based on integration of available information’ (December 2007) 85(12) *Bulletin of the World Health Organization* 955, 958.

⁴⁰ Nancy Scheper-Hughes, *Organ Trafficking: A Protected Crime* (3 September 2013) The Conversation <<https://theconversation.com/organ-trafficking-a-protected-crime-16178>>.

⁴¹ Ryan Connelly Holmes and Dan Sagalyn, ‘One doctor’s war against global organ trafficking’, *PBS NewsHour* (online), 29 May 2017 <<http://www.pbs.org/newshour/updates/one-doctors-war-global-organ-trafficking/>>; Megan Palin, ‘The ‘living dead’: prisoners executed for their organs then sold to foreigners for transplants’, *News.com.au* (online), 3 June 2017 <<http://www.news.com.au/world/asia/the-living-dead-prisoners-executed-for-their-organs-then-sold-to-foreigners-for-transplants/news-story/4048895e300f415a0a078e229d697bf7>>.

⁴² ‘Weaning China off organs from executed prisoners’ (3 January 2015) 385 *The Lancet* 1, 1.

⁴³ *Council of Europe Convention* art 7(1).

jurisdiction over its nationals, or a person who has his or her habitual residence in its territory, if they engage in transplant tourism.⁴⁴

54. Consequently, the Law Council recommends that the Australian Government consider through a public consultation process the extent to which it may be appropriate to regulate organ transplant tourism to prevent individuals from travelling abroad for the purpose of purchasing an organ. The Law Council notes in this context that the Criminal Code makes it illegal for an Australian to travel overseas to engage in sexual activity with a minor.⁴⁵ The situation regarding organ transplants, however, 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.

Recommendation:

- **The Australian Government consider, utilising a public consultation process, the extent to which it may be appropriate to regulate organ transplant tourism in light of Australia's accession to the Convention.**

⁴⁴ Ibid art 10.

⁴⁵ *Criminal Code Act 1995* (Cth) div 272.