

What Australia can do to avoid complicity in foreign transplant abuse

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Because of shortage of organs, patients in need of transplants wait endlessly and become desperate, spurring transplant tourism. The Government of China has been sourcing organs from prisoners in large numbers, in violation of international ethics. I and other researchers have concluded that these sources are mostly prisoners of conscience Christians, Buddhists, Muslims and, primarily, practitioners of the spiritually based set of exercises Falun Gong. The Government of China claims that prisoner organ sourcing has stopped, but the claim is unsubstantiated and there is much contrary evidence.

Going through all relevant evidence to come to an informed conclusion on organ transplant abuse in China is a time consuming task and it is unrealistic to expect everyone interested in the issue to do that. That does not mean though that those who have neither the time nor inclination to engage in this work should do nothing.

The onus does not fall on me to show that prisoners of conscience are being killed for their organs. I do not have to explain where China gets its organs for transplants. China does.

The conclusion to which I and others have come that prisoners of conscience are being killed for their organs is not just based on huge numbers of organ transplants in China, unexplained by the sources the Government of China identifies. Rather the conclusion is based on a number of evidentiary trails; it is founded on consideration of all the evidence all together.

One foundation for the conclusion is that the precautions, both legal and ethical, that should be in place to prevent the abuse, both in China and abroad are not in place. In China,

there is a lot of money to be made from the sale of organs, a huge organ donor source which is dehumanized by its jailers, and nothing to prevent unethical behaviour. This combination became a recipe for abuse.

Australians, by obtaining transplants in China, and the Australian Government and Parliament, by allowing that to happen, become complicit in Chinese organ transplant abuse. What can Australia do to avoid that complicity?

I. The Law

Extraterritorial criminal law

The Australian criminal law applies territorially, to crimes committed in Australia, whether by nationals or foreigners.¹ The law has extra-territorial effect only when there is express mention of that in the law.²

The Australia Criminal Code makes the forced removal of organs in Australia an offence.³ The law is not explicitly extra-territorial, which means that it does not apply to complicity in forced removal of organs outside of Australia.

A bill initiated by Green Member of Parliament David Shoebridge in the New South Wales Legislative Council proposes to amend the Human Tissues Act to set out an offence of trading in organs, transplant brokerage. The offence would apply to persons ordinarily resident in New South Wales who engage in the prohibited activity outside of New South Wales. The bill also would prohibit forced organ harvesting, the extraction of organs

¹ Criminal Code section 14.1

² Criminal Code section 15.1

³ Criminal Code section 271.7

without consent, transplantation of organs sourced without consent and receiving organs removed without consent. The bill has passed first reading. Second reading debate began November 10th, less than two weeks ago.⁴

The Commonwealth Senate on 24 November, 2016 passed a resolution, without opposition, co-sponsored by Greens Senator Janet Rice and Liberal Senator Eric Abetz which invited the Australian Government to consider "making it an offence to travel overseas to receive an organ acquired from a non-consensual donor". Given the support for this resolution, that consideration will likely occur.

Civil liability

There needs to be legislation imposing civil as well as criminal liability for those complicit in transplant abuse. The families of the victims should be entitled to civil remedies.

A civil remedy raises the issue of sovereign immunity. Australian statute law provides that states can not be sued in foreign jurisdictions for acts of state.⁵ Since states do their work through individuals, the doctrine of sovereign immunity means individuals also can not be sued civilly in foreign jurisdictions for engaging in acts of state.

Cuiyang Zhang in 2008 sued former Chinese President Jiang Zemin and the 610 Office or the Falun Gong Control Office for torture and other human rights violations. The New

⁴ Parliament of New South Wales, Human Tissue Amendment (Trafficking in Human Organs) Bill 2015, Progress

<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2953>

⁵ Foreign States Immunities Act 1985

<https://www.legislation.gov.au/Details/C2016C00947>

South Wales Supreme Court held that the defendants were immune from the jurisdiction of the Court under the Foreign States Immunities Act.⁶

At customary international law state officials who violate *jus cogens*, peremptory norms of international law, can, at international law, legitimately be made liable to victims in foreign jurisdictions for their violations.⁷ So this sort of legislation, making perpetrators liable abroad civilly for organ transplant abuse, squares with international law.

An example of this sort of law is the U.S. Torture Victim Protection Act 1991. That legislation provides that "an individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture shall, in a civil action, be liable for damages to that individual".⁸

Australia could and should have a similar law for torture, but also for organ transplant abuse. The law should impose liability for damages to surviving family members of victims killed through organ extraction.

Compulsory reporting and a public registry

The David Shoebridge New South Wales Legislative Council bill further proposes amending the Health Practitioner Regulation to require that registered health practitioners report to

⁶ *Zhang v Zemin & Ors* [2008] NSWSC 1296 (14 November 2008)
<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWSC/2008/1296.html?stem=0&synonyms=0&query=cuiyang>

⁷ William S. Dodge "Is Torture an Official Act?" January 15th, 2014
<http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/>

⁸ Torture Victim Protection Act of 1991, s2(a)(1), 28 USC paragraph 1350.

the Ministry of Health any transplantation where the practitioner has reasonable grounds to believe that there has been a transplantation under a commercial arrangement or without consent. Right now in Australia, there is no compulsory reporting of transplant tourism.

Reports are supposed to include

- (a) the name of the patient,
- (b) when and where the medical practitioner or nurse provided services to the patient, and
- (c) the grounds for suspecting that tissue has been transplanted into the patient.

Under the Bill, transplants patients also must report to the appropriate authority the date, location and nature of the transplantation.

This form of reporting is an improvement over the present system, where there is no reporting at all. But it is problematic, because it gives health practitioners who are supposed to report a judgment to make and a discretion to exercise.

The person who is supposed to report has to come to a conclusion that there are reasonable grounds to believe that there has been a transplantation under a commercial arrangement or without consent. This conclusion of "reasonable grounds to believe" is to be formed by "registered health practitioners". Yet, registered health practitioners have no expertise or training in forming this sort of judgment.

It would be simpler if those obliged to report had to report all transplants and not just some of them. A private member's bill in the National Assembly by Valerie Boyer in France imposes exactly this sort of reporting obligation.⁹

⁹ Bill no. 2797 Assemblée nationale treizième législature Enregistré à la Présidence de l'Assemblée nationale le 16 septembre 2010. Proposition de loi visant à lutter contre le tourisme de transplantation d'organes

The bill requires every doctor to report to the French biomedical agency the identity of every person the doctor has examined who has undergone a transplant. The bill further requires any French national or person ordinarily resident in France who has undergone a transplant abroad to report the transplant, with a certificate attesting that the organ was voluntarily donated.

The biomedical agency in turn has in turn to report to the relevant Government Minister any person who the agency has reasonable grounds to believe has paid for an organ. In this law, the judgment of reasonable grounds to believe is allocated to a specialized agency, rather than dispersed throughout the medical profession.

The Rice/Abetz Senate motion I mentioned earlier invited the Australian Government to consider "establishing a register of Australians travelling overseas to receive organ transplants, including details on the country in which they receive them." This proposal is straightforward, and does not require an assessment from health professionals in order for an organ recipient to be put on the register.

Immigration law

There is no prohibition of entry into Australia of those complicit in organ transplant abuse. That prohibition should exist, both for immigrants and visitors.

The standard should be reasonable grounds to believe. As long as immigration officials have reasonable grounds to believe that an applicant for entry has been complicit in organ transplant abuse, entry should be barred.

US visa application forms from 2012 ask visa applicants this question: "Have you ever been

directly involved in the coercive transplantation of human organs or bodily tissue?"¹⁰ The likelihood of a person answering yes to such a question is small. The question all the same has a significant value, practical as well as symbolic. Those directly involved in the coercive transplantation of human organs or bodily tissue may well, in the face of such a question, be discouraged from applying for a visa.

Moreover, if the question is asked and a person directly involved in the coercive transplantation of human organs or bodily tissue lies on application, that lie can have legal consequences. An applicant for a visa can be barred from entry on the basis that the applicant has foreclosed relevant inquiries. It is not necessary to establish that the inquiries, if made, would have led to a finding of inadmissibility on a ground other than the misrepresentation.

Moreover, a misrepresentation once made can have consequences for the rest of the life of that person. Once the lie is uttered, then any status acquired on the basis of that lie, even citizenship, can be later unravelled because of that lie. For revocation of citizenship or permanent residence as well as for entry, authorities need not prove that the person was directly involved in the coercive transplantation of human organs or bodily tissue. It is sufficient for the authorities to establish that the lie foreclosed enquiries whether the person was directly involved in the coercive transplantation of human organs or bodily tissue.

Australian law prohibits entry based on any statement that is "false or misleading in a material particular".¹¹ Entry based on such a statement can lead to revocation of status granted and removal from Australia. Any entry statement in response to a question about involvement in organ transplant abuse which forecloses inquiries into that involvement would be misleading information which would justify removal, if entry is granted.

¹⁰ Immigration form DS-160

¹¹ Migration Act section 234(1)(b).

Medicare Funding

Insurance coverage for medical or surgical expenses should not be extended to patients in jurisdictions outside Australia related to the transplantation of an organ obtained through transplant tourism. Nationals who travel abroad for organ transplants provided on a commercial basis should not be allowed to get a government subsidized supply of immunosuppressant drugs.

The Australian Medicare system does not pay for transplants outside of Australia but will pay for medication before departure, medication prescribed for use during absence from Australia and on return to Australia. The Australian Pharmaceutical Benefits Scheme allows Australians to take medicines out of Australia that are for personal use.¹² There is no restriction on the basis that the medications are to be used for transplants in violation of Australian standards.

Malaysia does not pay for the anti-rejection drugs needed by a returning patient after transplant tourism.¹³ Australia needs to consider whether patients who pay huge sums abroad for illicitly obtained organs should be given a taxpayer benefit before departure and on return, through subsidized supply of prescription drugs.

Professional misconduct

¹² "Travelling Overseas with PBS Medicine" Australian Government Department of Human Services
<https://www.humanservices.gov.au/customer/services/medicare/travelling-overseas-pbs-medicine>

¹³ "Malaysia committed to eradicate human organ trafficking: Liow" 2011 10 16
<http://www.mysin Chew.com/node/65229>

The legislation proposed by David Shoebridge in the New South Wales legislature includes an amendment of Health Practitioner Regulation National Law Act. Failure to report a reasonable belief that a person has been transplanted with an organ removed under a commercial transplant arrangement or without consent would amount to unsatisfactory professional conduct. A finding of unsatisfactory professional conduct can lead to a range of remedies up to and including cancellation of the registration of the registered health practitioner.

Right now there are no Australian professional standards which relate specifically to transplant tourism. In order for state regulation of health practitioners to have some effect on that scourge, those standards need to be articulated.

II. Ethics

The National Health and Medical Research Council April 2016 published "Ethical guidelines for organ transplantation from deceased donors". The guidelines state "It is unethical and unlawful to purchase, offer to purchase or sell organs for transplantation."¹⁴ The Guidelines do not address transplant tourism directly.

Since the first version of the report David Kilgour and I produced in 2006, the medical profession has introduced, internationally and in various countries, ethical standards to prevent foreign complicity in Chinese abuse. These standards or some variation of them should be adopted throughout Australia.

Internationally, there are these professional standards worth noting:

- The Transplantation Society Ethics Committee Policy Statement - Chinese Transplantation

¹⁴ Paragraph 2.2.1

Program November 2006 and Mission Statement (TTS).

- The Declaration of Istanbul on Organ Trafficking and Transplant Tourism May 2008 (Istanbul)
- World Health Organization Guiding Principles on Human Cell, Tissue and Organ Transplantation, May 2008 (WHO)
- World Medical Association Statement on Organ and Tissue Donation October 2012 (WMA)

Nationally, there are these standards worth noting:

- Hong Kong - Professional Code and Conduct for the Guidance of Registered Medical Practitioners, Medical Council of Hong Kong (Revised in November 2000)
- Taiwan - Ethical norms for physicians and other medical personnel in relation to brokerage of organ transplantation for nationals abroad, August 2006
- Australia - Policy of major transplant hospitals on training Chinese surgeons in transplant surgical techniques, in Queensland December 2006 and in New South Wales January 2013.
- Canada - Policy Statement of Canadian Society of Transplantation and Canadian Society of Nephrology on Organ Trafficking and Transplant Tourism October 2010¹⁵
- Malaysia - Policy on supply of immunosuppressant drugs from government hospitals to Malaysians who travel abroad for organ transplants provided on a commercial basis,

¹⁵ Gill JS, Goldberg A, Prasad GV, et al. "Policy statement of Canadian Society of Transplantation and Canadian Society of Nephrology on organ trafficking and transplant tourism". *Transplantation* 2010;90:817-20.

October 2011

From these sources, I draw forty six ethical principles which I suggest Australia should adopt. While legislation is welcome and in some aspects necessary, the prevention of transplant abuse can not be left to parliamentarians alone. Ethical standards are a professional responsibility, which health practitioners should adopt and enforce whether those standards are legislated or not.

A General Policy

1. Every national and regional professional health association and society should develop a written ethics policy on transplant tourism, including the subject of prisoners killed for their organs. (TTS)
2. There should be no recovery and no complicity in the recovery of organs or tissues from prisoners killed for their organs. (TTS and WMA)
3. Organ trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity (Istanbul).

Accountability

4. The practice of donation and transplantation requires oversight and accountability by health authorities in every country to ensure transparency and safety. (Istanbul)
5. Mechanisms for transparency of process and follow-up need to be established. (Istanbul).

6. The organization and execution of donation and transplantation activities, as well as their clinical results, must be transparent and open to scrutiny. (WHO)

7. There should be no referrals of patients to countries where information on the source of organs is not transparent. (Taiwan).

Referrals

8. A doctor would be acting unethically if he or she made a referral outside Australia without ascertaining the status of the donor

9. The benefit and welfare of every individual donor outside Australia as well as within should be respected and protected in organ transplantation.

10. Consent must be given freely and voluntarily by any donor, whether inside or outside Australia.

11. If there is doubt as to whether the consent is given freely or voluntarily by the donor, the doctor should reject the proposed donation. (Hong Kong)

12. Medical personnel should not, with or without charge, introduce patients to intermediaries or organ transplant brokers (Taiwan).

13. There should be no referrals to countries where the local law does not prohibit the sale of organs.

14. There should equally be no referrals to countries in which there are gross human rights violations and absence of the rule of law.

15. As well, where it is known that there are, in a country, violations of medical ethics in organ transplantation, there should be no referrals to that country. (Taiwan)
16. Medical personnel should not go abroad with a patient for organ transplantation and receive compensation (Taiwan).

Advertising and brokerage

17. There should be no advertising (including electronic and print media) promoting the sale of organs abroad.
18. There should be no soliciting of patients to buy organs abroad.
19. There should be no brokering of the purchase and sale of organs abroad. (Istanbul)
20. Medical personnel should not contact foreign organ transplant institutions to broker organ transplantation. (Taiwan)

Patient counselling

21. All patients who are candidates for transplantation should receive information about both the dangers and ethical concerns regarding transplant tourism and organ trafficking. (Canada)
22. Health care providers should inform patients that, where this is the case, insurers will not extend insurance coverage for medical or surgical expenses or pharmaceutical expenses incurred by patients in jurisdictions outside Australia related to the transplantation of an

organ obtained through transplant tourism. (Canada)

23. Patients interested in purchasing an organ transplant should receive pre-transplant counselling from health care professionals with expert knowledge of the pre-transplant and post-transplant medical and surgical management of transplant recipients. (Canada)

24. Patients should be told that individuals who purchase transplants overseas are at an increased risk for complications, including death, organ failure, and serious infections. (Canada)

25. Patients should also be told that health care providers often receive little or no advance notice or documentation of commercial transplantations making the post-transplant care of recipients of commercial transplantations more difficult.

26. Counselling should include information that, without documentation of the surgical procedure, post-transplant course and complications, health care providers may not have the necessary information to provide optimal care, diagnoses may be delayed, and the patient's well-being may be compromised.

27. Patients should be informed that health care providers may not be able to obtain clinical information from the centres which performed the transplantations.

28. Patients should be counselled that the information which is obtained cannot be trusted or verified.

29. Patients should know that health care providers have no ability to validate the accuracy of any documents that may be provided by individuals or centres engaging in transplant tourism and have no professional relationship with individuals who may be

performing illegal activities in their countries.

30. Patients should be aware that uncertainty regarding the details of commercial transplantations may compromise individual patient care.

31. Patients should be warned that abroad they may be transferred before they are clinically stable.

32. Patients should be advised that immediate post-transplant care is complicated and is best directed by the original transplant team. (Canada)

Malaysian doctor Ghazali Ahmad wrote in the book *State Organs*, in the chapter he contributed titled "The Spoils of Forced Organ Harvesting in the Far East":

"Even though the number of renal transplant patients returning from China had dwindled significantly since 2006 (see table 1) the management of such patients became unfortunately more complicated and challenging. The main reason for this circumstance is due to the fact that ALL new returning transplant recipients from China since 2006 no longer bring along with them any form of documentation to guide the clinicians in Malaysia to provide optimal follow up care. Such a practice is a part of deliberate attempts by the syndicate members to remain anonymous, unaccountable and leave absolutely no trace of their illegal activities. However, the absence of any information on the perioperative as well as postoperative findings, clinical summary, necessary information on the type and dose of the induction agents given, the best serum allograft function achieved and the lack of many other standard test results had caused a serious gap in the ability of the local clinicians to deliver a quality and effective care deserved by such patients who had not only risked their lives and parted with their hard earned life savings to obtain a new, safer and better quality of life but now faced real and potentially serious transplant related

complications."

33. When it comes to transplant tourism into China, patients should be advised that organs may have been taken by force, and individuals may even been killed to obtain their organs. (Canada)

34. Patients should be advised that the transplant tourism industry relies on secrecy, making it is impossible to determine whether donor information provided by organ brokers, who are motivated by financial gain, is accurate. (Canada)

Pre-transplant care

35. The fiduciary responsibility of physicians to do what is in the best interest of their patients does not include the performance of investigations in preparation for transplantation of a purchased organ. (Canada)

36. Individual physicians may elect not to provide medical records to patients if they believe the information will be used in support of an abusive transplant performed in a system which violates international human rights standards and that there is a significant risk of harm to the patient or organ source. (Canada)

37. Physicians should not prescribe medications or otherwise facilitate obtaining medications which will be used during the transplantation of a purchased organ. (Canada)

Post-transplant care

38. In non-emergency situations, individual physicians may elect to defer to another physician care of a patient who has returned from transplant tourism abroad. In such

situations, the physician should ensure that the patient has reasonable access to the proposed alternative care provider. (Canada)

39. Physicians should advise patients, where this is the case, of their unwillingness to provide post-transplant care for patients who obtain transplants through transplant tourism.(Canada)

Research and collaboration

40. Only those doctors who conduct clinical practice ethically should be permitted to become members of professional associations.(TTS)

41. Collaboration amongst transplant professionals in different countries must protect the vulnerable, promote equality between donor and recipient populations, and not violate other basic organ transplant principles. (Istanbul).

42. Collaboration within clinical studies should only be considered if the study does not violate ethical principles, for example through the sourcing of organs or tissues from executed prisoners. (TTS)

43. Collaboration with experimental studies should only be considered if no material derived from executed prisoners or recipients of organs or tissues from executed prisoners is used in the studies. (TTS)

44. Clinical scientific studies which analyse patient outcome or entail therapeutic or mechanistic approaches should be considered for acceptance only if they have been performed under ethical principles. (TTS)

45. Presentations of studies involving patient data or samples from recipients of organs or tissues from executed prisoners should not be accepted. (TTS)

Training of Chinese transplant professionals

46. Hospitals should not accept for clinical or pre-clinical training any candidate for training in transplant surgical techniques unless the candidate accepts the membership policy and code of ethics of The Transplantation Society (New South Wales, Australia).

Neil Laurie, Clerk of the Queensland Parliament, by letter dated November 1, 2006, sent a petition to Stephen Robertson, the Minister of Health for the Queensland Government in Australia, asking for an investigation of the forced organ harvesting from Falun Gong. The Minister of Health, on December 1, 2006 in response, wrote that the Prince Charles Hospital has "a policy of not training any Chinese surgeon in any transplant surgical technique'.

The Prince Charles Hospital is one of the major transplant hospitals in Queensland. I have been told informally that, though no other Australian State Health Minister has issued a similar statement, other transplant hospitals in Australia now follow a similar policy.

Doctors Danovitch, Shapiro, and Lavee, in a 2011 article, wrote

"Training of Chinese transplant professionals by the international community must be conditioned on commitments that trainees will not engage, directly or indirectly, in the use of organs from executed prisoners."¹⁶

Conclusion

¹⁶ G.M. Danovitch, M.E. Shapiro, and J. Lavee "The Use of Executed Prisoners as Sources of Organ Transplants in China Must Stop" Volume 11 pages 426 428.

The ability of those outside of China to stop the killing in China of prisoners of conscience for their organs is limited. Yet, there are two practical steps we can take. One is to do nothing to be complicit in the Chinese abuse. The second is to avoid giving any status to the abusers.

A significant driver for change of transplant practices in China is the desire to achieve international respectability. Giving Chinese transplant professionals any form of international status while transplant abuse continues in China undermines the efforts to end the abuse.

Adopting and then following the laws and policies set out above would achieve both those goals. They would avoid complicity. They would also avoid giving respectability and status to the Chinese transplant profession in advance of conformity to international ethical standards.

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