

2022-2023

The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

**Migration Amendment (Overseas Organ
Transplant Disclosure and Other
Measures) Bill 2023**

No. , 2023

(Senator Dean Smith)

**A Bill for an Act to amend the *Migration Act 1958*,
and for related purposes**

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Schedule 1—Overseas organ transplant disclosure

Migration Act 1958

1 After section 166

Insert:

166A Information regarding overseas organ transplants

- (1) The information that must be provided by a person entering Australia to a clearance authority under paragraph 166(1)(b) includes information in the form of answers to the following questions:
 - (a) “Have you received an organ transplant outside Australia within the last 5 years?”;
 - (b) if the answer to the question in paragraph (a) is affirmative—“For each organ transplant you received outside Australia within the last 5 years, what is the place (the country, and the town or city) of the medical facility at which you received the transplant?”;
 - (c) if the answer to the question in paragraph (a) is affirmative—“For each organ transplant you received outside Australia within the last 5 years, what is the name of the medical facility at which you received the transplant?”.
- (2) The regulations must provide for the questions mentioned in subsection (1) **to be included in the person’s passenger card** (as referred to in regulations made for the purposes of section 166).
- (3) The Minister must cause a report on the following to be prepared within one month after the end of each calendar year:
 - (a) the number of affirmative answers during the year to the question mentioned in paragraph (1)(a);
 - (b) information on the places of medical facilities specified in answers during the year to the question mentioned in paragraph (1)(b), including the number of times each place was specified.

Schedule 1 Overseas organ transplant disclosure

- 1 (4) The Minister must cause a copy of the report to be tabled in each
2 House of the Parliament within 10 sitting days of that House after
3 it is prepared.

Schedule 2—Organ trafficking

Migration Act 1958

1 After subparagraph 5C(1)(bc)(ii)

Insert:

(ia) an offence involving trafficking in human organs;

2 After subparagraph 501(6)(ba)(ii)

Insert:

(ia) an offence involving trafficking in human organs;

3 Application of amendments

- (1) Subparagraph 5C(1)(bc)(ia) of the *Migration Act 1958*, as in force on and after the commencement of this item, applies for the purposes of subsection 336E(2) of that Act in relation to a disclosure of identifying information that is made on or after that commencement.
- (2) Subparagraph 501(6)(ba)(ia) of the *Migration Act 1958*, as in force on and after the commencement of this item, applies to:
 - (a) a decision to grant or refuse to grant a visa, if:
 - (i) the application for the visa was made before that commencement and had not been finally determined as at that commencement; or
 - (ii) the application for the visa is made on or after that commencement; and
 - (b) a decision made on or after that commencement to cancel a visa.
- (3) The provisions of the *Migration Act 1958* mentioned in subitems (1) and (2) apply as mentioned in those subitems in relation to a person whether the conduct constituting an offence involving trafficking in human organs was engaged in before, on or after the commencement of this item.

2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**MIGRATION AMENDMENT
(OVERSEAS ORGAN TRANSPLANT DISCLOSURE AND OTHER MEASURES)
BILL 2023**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Dean Smith)

MIGRATION AMENDMENT (OVERSEAS ORGAN TRANSPLANT DISCLOSURE AND OTHER MEASURES) BILL 2023

OUTLINE

This Bill amends the *Migration Act 1958* (the “Migration Act”) to better inform the Commonwealth of Australia about persons entering Australia who have received an organ transplant and to enable certain relevant information to be made publicly available. It also amends the Migration Act to allow the Minister to refuse to grant, or to cancel, a person’s visa if the Minister reasonably suspects the person has been involved in conduct constituting an offence involving organ trafficking.

Reporting requirements regarding overseas organ transplants Currently there are no reporting requirements for arrivals entering Australia relating to organ transplants. Recommendation 2 of the 2018 report of the Joint Foreign Affairs, Defence and Trade Committee *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism* noted the importance of monitoring the transplantation practices of other countries.

The Bill amends the Migration Act to place new requirements on a person entering Australia to answer questions in their incoming passenger card regarding overseas organ transplants. They will need to declare whether they have received an organ transplant outside Australia within the last 5 years. If the person has received any organ transplants outside Australia within the last 5 years, they will be required to provide the name, and the place (as in the country, and the town or city) of the medical facility where each of those organ transplants took place.

This measure will help to improve the Australian Government’s ability to collect reliable data in relation to organ transplants upon persons entering Australia. It will provide much needed data and information about the occurrence, scale and location of potential illegal and unethical organ transplants, assist the Australian Government to monitor potential human rights abuses, and support the work of the Australian Government in combatting organ trafficking.

Updated reporting responsibilities of the Minister

The Bill will require the Minister to cause to be prepared an annual report regarding information on overseas organ transplants provided in incoming passenger cards, and to table this report in each House of the Parliament.

The report will incorporate the number of answers during the previous calendar year indicating a person has received an organ transplant overseas within the last 5 years, and information on the town or city and countries identified in the responses, including the number of times each place was identified. It will not be required that the report prepared by the Minister identify the name of medical facilities where organ transplants have occurred.

Amending the Migration Act character test

The Bill amends the Migration Act to include an express reference to an offence involving trafficking in human organs in the character test.

Trafficking persons for the purposes of organ removal was first criminalised in Commonwealth legislation through the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005*. The relevant provisions, now in Subdivision BA of Division 271 of the Criminal Code, criminalise only the act of organising or facilitating the movement of another person where the movement could result in the removal of an organ in a manner contrary to State or Territory law, or contrary to the consent or medical needs of the other person. The Subdivision does not criminalise transplant commercialism or transplant tourism.

The changes in this Bill to the character test would enable the Minister to decide to refuse to grant, or to cancel, a person's visa if the Minister reasonably suspects the person has been involved in conduct constituting an offence involving trafficking in human organs, whether the person, or another person, has been convicted of an offence constituted by the conduct.

This change to the character test will apply on and after the commencement of the Bill as enacted, regardless of whether the relevant organ trafficking conduct occurred before commencement.

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause sets out how the Bill, as enacted, is to be cited. That is, as the Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Act 2023.

Clause 2: Commencement

2. This clause provides the whole of the Bill, as enacted, commences on the day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.

Clause 3: Schedules

3. This clause provides that legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Overseas organ transplant disclosure

Migration Act 1958

Item 1 – After section 166

4. This item amends the Migration Act to insert a new section 166A. This section requires a person entering Australia to provide to a clearance authority answers to questions relating to overseas organ transplants. The questions that a person would be required to answer are set out in subsection 166A(1).

5. Paragraph 166A(1)(a) requires the person to disclose whether they have received an organ transplant outside Australia within the last 5 years. If the person has received such a transplant, the person would be required to answer 2 further questions. First, paragraph 166A(1)(b) requires the person to disclose the country, and the town or city, of the medical facility where each relevant organ transplant took place. Second, paragraph 166A(1)(c) requires the person to disclose the names of the medical facilities.
6. Subsection 166A(2) provides for the incoming passenger card to incorporate the questions relating to organ transplants set out in subsection 166A(1). A person entering Australia must answer the questions mentioned in paragraphs 166A(1)(a), (b) and (c) as included in their passenger card.
7. Subsection 166A(3) requires the Minister to cause a report to be prepared on the answers to the organ transplant questions provided by persons entering Australia to a clearance authority in the incoming passenger card. The Minister will be required to cause the report to be prepared within one month after the end of each calendar year.
8. Subsection 166A(3) requires the Minister to only cause a report to be prepared on the number of times persons have indicated in their answers that they have received an organ transplant outside Australia within the last 5 years, and information on the places of medical facilities specified in answers to the question in paragraph 166A(1)(b). The information to be contained in the report does not include information on the names of medical facilities disclosed in answers to the question in paragraph 166A(1)(c).
9. Subsection 166A(4) requires the Minister to cause a copy of the report to be tabled in both Houses of the Australian Parliament within 10 sitting days of that House after the report was prepared.

Schedule 2—Organ trafficking

Migration Act 1958

Item 1 – After subparagraph 5C(1)(bc)(ii)

10. This item inserts **a new subparagraph (ia) into paragraph 5C(1)(bc)** of the Migration Act. This provides for a non-citizen to be of “character concern” under the Migration Act if the Minister reasonably suspects that the non-citizen has been or is involved in conduct constituting an offence involving trafficking in human organs.

11. This amendment is consequential on the amendment to the character test made by item 2. Instances where the concept of “character concern” is used include **subparagraph 336E(2)(a)(iii) and paragraph 336E(2)(ec)** of the Migration Act, in relation to permitted disclosures for the purpose of data-matching or identifying non-citizens who are of character concern.

Item 2 – After subparagraph 501(6)(ba)(ii)

12. This item inserts a **new subparagraph (ia) into paragraph 501(6)(ba)** of the Migration Act, to include an express reference to an offence involving trafficking in human organs in the Migration Act’s character test. This amendment provides that **a person does not pass the character test if the Minister reasonably suspects that the person has been or is involved in**

conduct constituting an offence involving trafficking in human organs. This could be an offence against an Australian law, or a law of a foreign country.

Item 3 – Application of amendments

13. This item deals with the application of amendments made by Schedule 2.

14. Subitem 3(1) provides that new subparagraph 5C(1)(bc)(ia) of the Migration Act applies for the purposes of subsection 336E(2) of that Act, in relation to a disclosure of identifying information that is made on or after that commencement.

15. Subitem 3(2) provides that new subparagraph 501(6)(ba)(ia) of the Migration Act applies in relation to a decision to grant or refuse to grant a visa, if:

- the application for the visa was made before but not finally determined as at the commencement of item 3; or
- the application for the visa is made on or after the item 3.

16. Subitem 3(2) also provides that new subparagraph 501(6)(ba)(ia) applies to a decision made on or after the commencement of item 3 to cancel a visa.

17. Subitem 3(3) provides that new subparagraphs 5C(1)(bc)(ia) and 501(6)(ba)(ia) of the Migration Act apply as mentioned in subitems 3(1) and (2) in relation to a person whether conduct constituting an offence involving trafficking in human organs was engaged in before, on or after the commencement of item 3.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

This Bill amends the Migration Act to better inform the Commonwealth of Australia about persons entering Australia who have received an organ transplant. The Bill provides for questions about organ transplants to be added to the incoming passenger card for persons entering Australia. This Bill will help improve the Commonwealth's ability to collect reliable data in relation to organ transplants on persons entering Australia. The Minister will be required to cause a report to be prepared and tabled in the Parliament regarding responses to these questions.

This Bill will also expand the character test to enable the Minister to decide to refuse to grant, or to cancel, a person's visa if the Minister reasonably suspects the person has been involved in an offence involving trafficking in human organs. A person objectively failing the character test may be considered on a discretionary basis for visa refusal or cancellation on character grounds, regardless of whether there has been a conviction, or of any sentence imposed. The Bill also makes a consequential amendment to the definition of ***character concern*** in section 5C of the Migration Act.

Human rights implications

The amendments contained in this Bill are beneficial and engage the following human rights:

- Right to liberty – Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
- Trafficking in persons – Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

The practical effect of these amendments will mean a person who objectively does not satisfy the character test set out in section 501 of the Migration Act for an offence involving trafficking in human organs will be liable for consideration of refusal or cancellation of a visa on that basis.

Article 9(1) of the ICCPR states: "Everyone has the right to liberty and security of a person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The amendments do not change the framework within which the character refusal and

cancellation powers function. The updated provisions provide new grounds for refusal or cancellation of a visa in relation to conduct constituting an offence involving trafficking in human organs. The amendments only seek to provide additional, specified, objective grounds to consider refusing or cancelling a visa. The decision to refuse or cancel a visa on these grounds will be discretionary.

If a non-citizen's visa is cancelled or refused, the person is liable for immigration detention under section 189 of the Migration Act. As set out above, Article 9 of the ICCPR is a prohibition on arbitrary detention. The object of the Bill is to amend the character test to provide a specific and objective ground to consider cancellation or refusal of a visa where a non-citizen has been involved in conduct constituting an offence involving trafficking in human organs.

The provision aligns with community expectations that non-citizens who have committed serious offences such as the trafficking in human organs should not be allowed to enter Australia.

The UN Human Rights Committee has recognised in the ICCPR context that “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment” (CCPR General Comment 15, 11 April 1986).

Trafficking in persons - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime defines trafficking as: “trafficking in persons, is intended to include a range of cases where human beings are exploited by organized criminal groups, particularly where there is an element of duress involved and a transnational aspect, such as the movement of people across borders”.

The Palermo Protocol addresses organ trafficking in the context of human trafficking, where the object of the crime is the trafficked person, rather than the organ itself. Parties to the Palermo Protocol are encouraged to enact measures that make it a criminal offence in conduct constituting trafficking in persons. The updated provisions to the character test in the Migration Act work within the spirit of the Palermo Protocol and have a positive effect in advancing Australia's international commitments to deter the trafficking in people.

In 2009 the Council of Europe and the United Nations conducted a joint study on trafficking in organs, tissues and cells and trafficking in human beings. The study identified a gap in the coverage of the Palermo Protocol, which addresses organ trafficking the study stated: “Trafficking in organs ... differs from trafficking in human beings for organ removal in one of the constituent elements of the crime – the object of the criminal offence. In the former case, the object of the crime is the organs, tissues, and cells, while in the latter case it is the trafficked person”. This is why the Bill uses an all-encompassing term “an offence involving trafficking in human organs” in Schedule 2 when expanding the character test, so a visa may be refused or cancelled in relation to someone who is involved in trafficking in harvested organs or who is involved in trafficking other persons to have their organs removed without their consent. This specific reference to organ trafficking complements the existing reference in the character test provisions (subparagraph 501(6)(ba)(ii)) to an offence of trafficking in persons. The provisions expanding the character test in the Migration Act aim to strengthen deterrence measures encouraged in existing international Protocols.

Conclusion

This Bill is compatible with human rights because it works within existing international frameworks to achieve Australia's human rights obligations. It may also have the consequence of limiting human rights in some circumstances, those limitations are considered reasonable, necessary, and proportionate.

[Senator Dean Smith]