

INTERNATIONAL COALITION TO  
**END TRANSPLANT  
ABUSE IN CHINA**

**Submission**

Review of the *Modern Slavery Act 2018* (Cth)

Australian Advocacy and Initiatives Committee  
International Coalition to End Transplant Abuse in China  
[endtransplantabuse.org](http://endtransplantabuse.org)

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## ETAC - Australian Committee

1. The ETAC Australian Committee (**ETAC Australia**) was formed in 2016 in response to serious human rights violations in China associated with systematic, forced and state-sanctioned organ harvesting and trafficking from prisoners, including prisoners of conscience (**forced organ harvesting**). Organ harvesting involves the removal of organs without the person's consent.
2. ETAC Australia comprises lawyers, academics, ethicists, medical professionals and human rights advocates, and is the Australian Chapter of the International Coalition to End Transplant Abuse in China (**ETAC**).
3. ETAC is an independent, non-partisan organisation that is not aligned with any political party, religious or spiritual group, government or any other national or international institution. Our members are from a range of backgrounds, belief systems, religions and ethnicities. We share a common commitment to supporting human rights and ending the heinous crime of forced organ harvesting in the People's Republic of China (**China**), and all associated crimes including torture and other inhuman or degrading treatment or punishment.
4. ETAC provides leadership and expertise on the issue of forced organ harvesting, and promotes and protects human rights by:
  - Undertaking, publishing and disseminating research regarding forced organ harvesting in China;
  - Calling for greater transparency and scrutiny of the transplantation system in China;
  - Promoting public debate regarding human tissue and organ trafficking laws and policy;
  - Raising public awareness regarding the importance of ending the detainment, torture and forced organ harvesting of prisoners of conscience in China;
  - Advocating for actions to reduce and avoid international complicity in China's violations of transplant ethics and human rights law; and
  - Seeking justice for the victims of forced organ harvesting and their families, and demanding accountability for the perpetrators.
5. The ETAC Australian Committee members include:
  - Susie Hughes, Convener
  - Madeleine Bridgett, MSW, BSW, PGDip Law, BPTC
  - Dr Robyn Clay-Williams, PhD
  - Mitchell Coidan, LLB, GDLP, BA, AIPM
  - John Edmunds
  - Professor Maria Fiatarone Singh, MD, FRACP
  - Professor Ian Kerridge FRACP, FRCPA
  - Professor David McGiffin MB BS, FRACS
  - Dr Holly Northam, PhD, RN, RM

- Michelle Nguyen, LLB
- Keith Spencer, LLB
- Professor Russell W. Strong AC CMG PJN RFD
- Catherine Stuart, MB Bch BAO, FFARSCI, Clin Dip Pall Med, MBioeth
- Professor Wendy Rogers, FRACGP, PhD

More details about members can be viewed [here](#).

## Review of the *Modern Slavery Act 2018* (Cth)

6. ETAC welcomes the Review of Australis's *Modern Slavery Act 2018* (Cth) (**Review**).
7. The *Modern Slavery Act 2018* (Cth) (**Act**) requires that a review be conducted every three years following commencement, and that review must be complete within one year and the report to be tabled in the Australian Parliament.
8. Slavery, in all forms, is an abhorrent practice and Parliaments should be committed to making laws to end all forms of slavery, such as 'Modern Day Slavery', which includes, however is not limited to, human trafficking, forced labour, debt bondage, involuntary prostitution and forced marriage.
9. The purpose of this submission is to respond to the Terms of Reference at Appendix A (**Terms of Reference**) to the Review's Issues Paper (**Issues Paper**), specifically relevant to the work and advocacy undertaken by ETAC.
10. ETAC has been actively engaged in advocacy regarding modern slavery legislation and related issues at both the Commonwealth and New South Wales level, as they relate to organ trafficking in Australia and internationally.
11. ETAC commends the Australian Government's commitment to addressing modern slavery, in particular organ trafficking offences. The Act has been a significant step in ensuring that Australians and Australian businesses are not directly, indirectly or unknowingly involved in offences related to organ trafficking. However, much more is needed to ensure businesses are not complicit in such offences, as the current laws are not adequate in safeguarding our nation from some of the most gregarious and heinous crimes associated with organ trafficking, including serious human rights violations.
12. The Australian Government must take all measures to ensure that Australian businesses are not associated with, or complicit in, organ trafficking related offences that occur both in Australia and overseas. For the reasons submitted below, ETAC are of the view that more can be done to strengthen the Act to ensure that this does not occur.

## Submissions on the Terms of Reference and Issues Paper

13. ETAC makes submissions with respect to the following matters as referred to in the Terms of Reference and Issues Paper:
  - a. whether it is necessary to do anything else to improve the operation of the Act and any rules;<sup>1</sup>
  - b. whether additional measures to improve compliance with the Act are necessary or desirable, such as civil penalties for failure to comply with the requirements of the Act;<sup>2</sup>
  - c. the appropriateness of the \$100 million reporting entity threshold, reporting periods and reporting deadlines;<sup>3</sup> and
  - d. whether it is necessary or desirable for an independent body, such as an Anti-Slavery Commissioner, to oversee the implementation of the Act and/or the enforcement of the Act.<sup>4</sup>

## Background to China's illegal organ transplant industry

14. Before turning to the matters in paragraph 12 above, the background to China's illegal organ transplant industry and a brief overview of the relevant human rights issues associated with forced organ harvesting in China is provided as we understand that this is a niche area covered by the modern slavery legislation and as such raises its own unique challenges.
15. The Doctors Against Forced Organ Harvesting state that the "harvesting of organs from executed prisoners in China started in 1984 when a law was implemented in China that allowed the practice. The public first became aware of this practice following the testimony of Dr. Wang Guoqi to the U.S. Congress in 2001."<sup>5</sup>
16. In 2005, after longstanding denials, it was officially acknowledged that organs were harvested from executed prisoners in China.<sup>6</sup> Worldwide, organ harvesting from executed prisoners is banned as unethical.<sup>7</sup>

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<sup>1</sup> Item 1(e) of the Terms of Reference and Issues Paper.

<sup>2</sup> Item 1(a) of the Terms of Reference and Issues Paper.

<sup>3</sup> Item 2(b) of the Terms of Reference and Issues Paper

<sup>4</sup> Item 2(c) of the Terms of Reference and Issues Paper

<sup>5</sup> <https://dafoh.org/forced-organ-harvesting/>. Accessed 22 November 2022.

<sup>6</sup> Huang J. "Ethical and legislative perspectives on liver transplantation in the People's Republic of China". *Liver Transplantation* 2007; 13: 193–196; 人民日报 (People's Daily), "收回死刑核准權：我國死刑數量必會逐步減少" ("As the [Supreme People's Court] gets back the authority to review death penalty cases: our country's death penalty figures will certainly come down gradually"), 1 November 2006, <http://npc.people.com.cn/BIG5/14957/53049/4982508.html>.

<sup>7</sup> Šućur, A and Gajović, S. *Croatian Medical Journal Nobel Peace Prize nomination for Doctors Against Forced Organ Harvesting (DAFOH) – a recognition of upholding ethical practices in medicine*. 2016 Jun; 57(3): 219–222.

17. Before China introduced a pilot voluntary organ donation programme in 2010, over 90% of organs transplanted were procured from prisoners, many imprisoned because of their religious and spiritual beliefs, and many who have been denied the right to a fair trial and killed on demand for their organs.<sup>8</sup>
18. China has claimed that the organs from executed prisoners were from prisoners who had been tried, found guilty, and executed according to Chinese law. China has not produced any evidence to support such assertions.
19. It is estimated there were thousands of people executed in China in 2015.<sup>9</sup> The ‘true extent of the use of the death penalty in China is unknown as data is treated as a state secret’.<sup>10</sup> A recent report by Amnesty International states that ‘as of 2017, it appears that China is still sourcing organs from prisoners on death row’.<sup>11</sup> Despite Chinese declarations to the world in 2014 that the country would cease using organs harvested from prisoners<sup>12</sup>, they have not made available any robust data as to how they currently supply organs for the extraordinarily large numbers of transplants performed each year.<sup>13</sup> Nor has China provided any evidence that it adheres to international standards such as the Declaration of Istanbul<sup>14</sup>, and the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation.<sup>15</sup>
20. Evidence and figures from primary Chinese sources reveal the nature and scale of these crimes, which act as a means of supplying China’s vast, lucrative organ transplantation industry. On June 22, 2016, three highly respected independent investigators published the 680-page report *Bloody Harvest/ The Slaughter: An Update (The Update)*, illustrating a state-driven industry that transplants far more organs—by an order of magnitude—than can be accounted for by official sources, which China claims are all voluntary donors. The report concludes that 60,000 to 100,000 transplants per year are currently taking place in China - as opposed to the official Chinese claim of 10,000 per year.<sup>16</sup>

## Human Rights Issues in China

21. Forced organ harvesting, removal of organs from a donor without obtaining prior free and voluntary informed consent, is not only a crime against humanity, but a serious threat to medical science in general.

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<sup>8</sup> Norbert, W.P., Caplan, A., Shapiro, M.E., Els, C., Allison, K.C. and Huige, Li. 2017. “Human rights violations in organ procurement practice in China” in *BMC Medical Ethics* 18:11.

<sup>9</sup> Amnesty’s Report “China’s Deadly Secrets”. 2017. <https://www.amnesty.org/en/documents/asa17/5849/2017/en/>; Amnesty International Global Figures 2015, <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Delmonico, F, Chapman, J, Fung J, Danovitch, G, Levin A, Capron A, Busuttil R, O’Connell P. Open Letter of the People’s Republic of China: China’s fights against corruption in organ transplantation. *Transplantation*. 2014; 97(8):795-6

<sup>13</sup> Kilgour, D., Gutmann, D. and Matas, D. 2016. *Bloody Harvest/The Slaughter: An Update* (available from <http://endorganpillaging.org/an-update/>).

<sup>14</sup> Website for Declaration of Istanbul <http://www.declarationofistanbul.org/>.

<sup>15</sup> WHO Guidelines can be found here: <http://www.who.int/transplantation/en/>.

<sup>16</sup> Ibid.

22. China is a one-party state led by the Chinese Communist Party (**CCP**). The country is officially divided into twenty-three provinces, five autonomous regions and four direct-controlled municipalities, and the special administrative regions of Hong Kong and Macau. The Xinjiang Uyghur Autonomous Region, located in the northwest of China, is one of the five autonomous regions located in the northwest of the China and is home to the Turkic Uyghur, Kazakhs and Kyrgyz, the Han, Tibetans, Hui, Tajiks, Mongols, Russians and Xibe.<sup>17</sup> It is a vast region with an expansive history. Each autonomous region is associated with an ethnic minority group. Xinjiang was made autonomous in 1995 and is the Uyghur Autonomous Region.
23. Xinjiang is not the only region in China where minority groups are detained in internment camps. It would be a fatal error to proceed on that basis when considering and reviewing modern slavery legislation regarding organ trafficking offences and forced labour in China.
24. In China, “re-education through labor” (**RTL**) is part of the *laogai* system. The Laogai Research Foundation estimates that the *laogai* system currently comprises over one thousand detention facilities, incarcerating millions of individuals.<sup>18</sup> The Foundation estimates that anywhere between 40 to 50 million Chinese have suffered in the *laogai* system since the founding of the People’s Republic of China. This clearly indicates that Xinjiang is not the only region where serious human rights violations, including forced labour, are being committed in China.
25. In 2018 ETAC made submissions to the Foreign Affairs, Defence and Trade Legislation Committee (**Committee**) with respect to the *Inquiry into Human Organ Trafficking and Organ Transplant Tourism*<sup>19</sup>, and subsequently gave evidence at the public hearings.<sup>20</sup>
26. ETAC raised then with the Committee the deeply concerning issue of minority groups being detained in labour camps. China refers to these camps as “re-education camps”. However, the ultimate intended aim of these camps is essentially religious, spiritual and ethnic cleansing. The correct term for these camps is “internment camps”, as minority groups are detained without charge and without trial. Heinous crimes and serious human rights abuses are committed in these internment camps, including persecution, torture, rape, slavery, forced organ harvesting and extrajudicial killings.
27. In March 2020, after twelve months of detailed scrutiny of all available evidence, the Independent Tribunal into Forced Organ Harvesting Against Prisoners of Conscience in China (**China Tribunal**)<sup>21</sup> unanimously and beyond reasonable doubt, concluded that:

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<sup>17</sup> [https://web.archive.org/web/20110520054144/http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/8152132.stm](https://web.archive.org/web/20110520054144/http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/8152132.stm), accessed 17 February 2021.

<sup>18</sup> <https://laogairesearch.org/laogai-system/>, accessed 18 February 2021.

<sup>19</sup> Submission No. 7, International Coalition to End Organ Pillaging in China – AAIC, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/HumanOrganTrafficking/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Submissions).

<sup>20</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/HumanOrganTrafficking/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Public_Hearings).

<sup>21</sup> <https://chinatribunal.com/>, accessed 17 February 2021.

*“Forced organ harvesting has been committed for years throughout China on a significant scale and ... Falun Gong practitioners have been one – and probably the main – source of organ supply.”*

*“In regard to the Uyghurs the Tribunal had evidence of medical testing on a scale that could allow them, amongst other uses, to become an ‘organ bank’.”*

*“Commission of Crimes Against Humanity against the Falun Gong and Uyghurs has been proved beyond reasonable doubt...”*

*“Governments and any who interact in any substantial way with the PRC [People’s Republic of China] ... should now recognise that they are, to the extent revealed above, interacting with a criminal state.”<sup>22</sup>*

28. In ETAC’s 2018 submission<sup>23</sup>, we recommended that the Australian Government work with the international community to hold China accountable for its past and present human rights violations of prisoners of conscience by seeking clear and compelling evidence that forced organ harvesting has ceased. ETAC reiterates this submission in the context of the Review, and further submits that the Australian Government must work with Australian businesses for the same purpose.
29. The Act plays a significant role in holding China accountable for these heinous crimes and violations of human rights by ensuring that businesses are not associated with, or complicit, in such crimes. The importance of businesses undertaking due diligence in this regard cannot be overstated.
30. This submission discusses the importance of adopting a due diligence approach below.

## **China’s Lack of Transparency and the Need for Law Reform**

31. There are clearly challenges for the Australian Government in developing regulations and guidelines to assist Australian businesses in identifying human rights violations in their supply chains, given the is unlikely to disclose this information on its exported goods or in its trade discussions with the Australian Government and with businesses.
32. The CCP is well known for its lack of transparency, especially when it comes to human rights issues.<sup>24</sup> Given China’s lack of transparency, it is incumbent on the Australian Government to develop laws,

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<sup>22</sup> The full judgement of the China Tribunal can be found here: [https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal\\_JUDGMENT\\_1stMarch\\_2020.pdf](https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf)

<sup>23</sup> Submission No. 7, International Coalition to End Organ Pillaging in China – AAIC, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/HumanOrganTrafficking/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Submissions).

<sup>24</sup> According to Amnesty International, “China remained the world’s leading executioner – but the true extent of the use of the death penalty in China is unknown as this data is classified as a state secret; the global figure of at least 657 excludes the thousands of executions believed to

regulations and guidelines which require transparency, in order to assess and identify modern slavery risks in supply chains associated with organ trafficking and forced labour.

33. Internationally, recent legislation has been passed in an attempt to address modern slavery risks and combat forced organ harvesting.
34. The *Medicines and Medical Devices Act 2021* (UK)<sup>25</sup> is “the first piece of UK legislation to fight against forced organ harvesting by ensuring that no medicines in the UK could include human tissues from its victims”.<sup>26</sup>
35. The UK law provides for the opportunity to prevent complicity in forced organ harvesting within the UK medicine industry. Prior to this legislation, neither the Human Tissue (Quality and Safety for Human Application) Regulations 2007 nor the *Human Tissue Act 2004* (UK) required appropriate consent for imported human tissues for use in medicines. The amendment has given powers to UK Ministers to put this right. This is the first time the UK has put into place any legislation to combat China’s forced organ harvesting of prisoners of conscience.
36. In the United States of America has introduced a Bill, the Stop Forced Organ Harvesting Act of 2021.<sup>27</sup> The Bill establishes specified measures to combat forced organ harvesting and trafficking in persons for purposes of the removal of organs, and for other purposes. The measures in the Bill include (1) establishing property-blocking and visa-blocking sanctions, (2) prohibiting exports of certain surgery devices to entities that are identified as being responsible for forced organ harvesting or related human trafficking, and (3) requiring the Department of State to report on these practices.
37. Further, The Uyghur Forced Labor Prevention Act was signed into law by President Biden on December 23, 2021, and establishes that “a rebuttable presumption that the importation of any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China, or produced by certain businesses, is prohibited by Section 307 of the Tariff Act of 1930 and that such goods, wares, articles, and merchandise are not entitled to entry to the United States”.<sup>28</sup>
38. ETAC submits that by adopting a due diligence approach to modern slavery, in particular modern slavery reporting, this will assist in overcoming some of the difficult issues posed by China’s lack of transparency.

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have been carried out in China.” <https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and-figures/#:~:text=China%20remained%20the%20world's%20leading,been%20carried%20out%20in%20China>. Accessed 18 February 2021.

<sup>25</sup> <https://www.legislation.gov.uk/ukpga/2021/3/contents/enacted/data.htm>.

<sup>26</sup> <https://www.theyworkforyou.com/lords/?id=2021-07-16a.2107.1>. Accessed 22 November 2022.

<sup>27</sup> <https://www.congress.gov/bill/117th-congress/house-bill/1592/text?r=2&s=1>.

<sup>28</sup> <https://www.cbp.gov/trade/forced-labor/UFLPA>.

## The importance of a due diligence approach

39. The United Nations Guiding Principles on Business and Human Rights (**UNGPs**) were unanimously adopted by the Human Rights Council in 2011. They provide that a State is responsible for the protection of human rights and on businesses to respect human rights and on both to provide effective access to a remedy where those rights are breached<sup>29</sup>.
40. As the global standard of 'expected conduct for all business enterprises wherever they operate,'<sup>30</sup> the responsibilities exist independently of the existence or lack of domestic law provisions and regardless of the nature, size or ownership of businesses.<sup>31</sup> Consequently, even where States fail to fulfil their own responsibility to *protect* human rights, due to their inability or unwillingness, businesses are not absolved from their duty to *respect* human rights.<sup>32</sup>
41. The responsibilities of businesses pursuant to the UNGPs, including transplant, university and medical institutions, requires a proactive approach to the monitoring, management and preservation of human rights risks. To manage this responsibility, all businesses are obliged to identify, mitigate and remediate adverse human rights impacts along their entire value and supply chain.<sup>33</sup> To manage this responsibility, all businesses are required to identify, mitigate and remediate adverse impacts on human rights where the conduct of the entity:
- (a) is directly causative of the harm through their own activities;
  - (b) is contributory to the harm, either directly, through associated activities, or a third party (such as a Government, business or other entity); or
  - (c) impacts on the harm, and is linked to its own operations, products or services and, in turn, caused or contributed by or linked to an entity with which it has a business relationship.
42. The UNGPs require that any due diligence conducted should commence by identifying and assessing the actual or potential human rights impacts that it may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.<sup>34</sup>
43. In the 2022 ETAC commissioned the international law firm, Global Rights Compliance (**GRC**), to provide a report and guidance about the risks of complicity in human rights abuses in

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<sup>29</sup> UN Office of the High Commissioner on Human Rights (OHCHR), Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect, and Remedy" Framework (United Nations 2011) HR/PUB/11/04 (UNGPs)

[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)

<sup>30</sup> *ibid* Guiding Principle 11, commentary.

<sup>31</sup> *ibid* General Principles.

<sup>32</sup> *ibid* Guiding Principle 11, commentary.

<sup>33</sup> UNGPs Guiding Principle 17.

<sup>34</sup> *ibid* Guiding Principle 18.

transplantation medicine and how to avoid these.<sup>35</sup> GRC published two documents in that same year: [Legal Advisory Report](#) and [Policy Guidance \(Do No Harm: Mitigating Human Rights Risks when Interacting with International Medical Institutions & Professionals in Transplantation Medicine\)](#).<sup>36</sup>

44. The documents report on the business and human rights obligations of, and risks of complicity for, all stakeholders associated with organ transplantation medicine. They identify potential intersections between transplantation medicine, research and training, and international organ trafficking crimes, and explore the human rights risks of international collaborations in the field of organ transplantation. The Advisory Report outlines the hard and soft law obligations that govern such collaborations, while the Policy Guidance provides practical advice for mitigating risks, and outlines circumstances where disengagement may be required.
45. The Policy Guidance outlines four distinct steps for individuals and institutions to avoid complicity in human rights abuses associated with transplant medicine. These are: 1) Identify and assess the human rights risks; 2) Prevent, mitigate and remediate any identified human rights risks; 3) monitor risk on an ongoing basis; and 4) if risks cannot be prevented, mitigated or remediated, then disengage with the relevant parties.
46. The Legal Advisory Report emphasises the need for medical institutions and transplant-associated businesses to undertake due diligence, having regard for the UNGPs.
47. The report specifically states that  

medical institutions and transplant-associated businesses must carry out assessments of existing high-risk “business” relationships (i.e., business relationships that involve geographies, products or sectors that have been identified as presenting high risks of adverse impacts such as organ trafficking or forced organ harvesting)<sup>37</sup>, to inform an assessment as to what extent transplantation institutions may be causing, contributing to or are linked to the practice of unethical organ transplantation.<sup>38</sup>
48. In addressing forced organ harvesting, it is critical that transplant-associated businesses and professionals conduct due diligence and disengage when they become aware of unethical or criminal conduct. The Act plays an important role in ensuring this occurs.

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<sup>35</sup> Global Rights Compliance. 2022. Legal Advisory Report, *Do No Harm – Mitigating Human Rights Risks when Interacting with International Medical Institutions & Professionals in Transplantation Medicine*, p4. <https://globalrightscpliance.com/project/do-no-harm-policy-guidance-and-legal-advisory-report/>.

<sup>36</sup> GRC’s methodology to produce the Legal Advisory Report and supplementary Policy Guidance included a literature review of primary and secondary sources, and stakeholder interviews with experts in relevant fields, including transplantation surgeons, nephrologists, anaesthetists, nursing staff, bioethicists, journal editors, and journalists. Based on GRC’s expertise in international and national business and human rights obligations, international human rights law and international criminal law, GRC provides a legal analysis of the findings of the literature review and the information gathered from the stakeholder interviews, resulting in the Legal Advisory Report and supplementary Policy Guidance

<sup>37</sup> OECD, OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018) 66 <<https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>>.

<sup>38</sup> Global Rights Compliance, n21, p39.

49. The Legal Advisory Report states that:

While the risk of *causing* organ trafficking or forced organ harvesting is for medical institutions and transplant-associated entities in many cases low where they do not actively commit organ trafficking or forced organ harvesting themselves, the risk of *contributing* to the impact or being *involved* in the impact due to relationships and links to its own operations, products or services through activities is very high for many of the target stakeholders. This is because medical institutions' own activities, such as the provision of clinical training, the provision of medical equipment and immunosuppressant drugs, or undertaking clinical research, could facilitate the means for entities to carry out organ trafficking or forced organ harvesting. In turn, the risk of medical journals causing or contributing to organ trafficking or forced organ harvesting is low, for they do not engage in the published clinical research themselves. The risk is, however, significantly higher under threshold (c) as entities causing or contributing to organ trafficking or forced organ harvesting may make use of medical journals' "products or services" - that is, publication of research papers - to indirectly promote the use of organs removed without donors' consent and distribute research results to further advance transplantation medicine that is based on unethical practices.

50. ETAC, in our submission made in 2020 to the Joint Standing Committee on Trade and Investment Growth with respect to the *Inquiry into Diversifying Australia's Trade and Investment Profile*<sup>39</sup>, highlighted that in light of the human rights abuses which have occurred, and continue to occur in China, in relation to organ transplantation, Australia must, whilst preserving a cooperative and mutually beneficial trade relationship, ensure that it is not overly reliant on collaboration and funding from China, including international students and professional training schemes. This submission has equal force with regard to the Review.

51. ETAC raised concerns in that submission about how in 2016 the NSW Ministry of Health entered into a Memorandum of Understanding (**MOU**) with China's Health and Family Planning Commission of Shandong<sup>40</sup>, expressly affirming the parties' "commitment to developing the workforce through staff exchange; developing training and education including 'complex surgical procedures'; developing medical research and new technologies; and developing the evidence base supporting Traditional Chinese Medicine."<sup>41</sup>

52. The parties agreed to facilitate a 'special relationship' between Qilu Hospital, Shandong University and Westmead Hospital, Sydney. Among the agreed opportunities were considerations of exchanges in surgical training in 'advanced and complex surgical procedures' through clinical training in China and rotating training positions in Sydney.

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<sup>39</sup>[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Joint\\_Standing\\_Committee\\_on\\_Trade\\_and\\_Investment\\_Growth/DiversifyingTrade/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/DiversifyingTrade/Submissions), accessed 18 February 2021.

<sup>40</sup> <https://www.health.nsw.gov.au/ministers/Pages/mou-shandong-province-nsw-moh.aspx>, accessed 18 February 2021.

<sup>41</sup> *Ibid*, p2.

53. The Chinese hospitals involved in the MOU, namely Qilu Hospital and BinZhou Medical University Hospital are, or have been, involved with China's illegal organ trade.
54. Despite concerns raised by ETAC, our understanding is that this MOU has not been reviewed.
55. The above example highlights the importance of due diligence with respect to forced organ harvesting in China, and ensuring through Australia's modern slavery legislation that a due diligence approach is adopted.

## Definition of 'modern slavery'

56. The issues paper, rightly, raises the potential definitional difficulty for businesses as to what they should be reporting, largely because for many businesses they do not have the required legal knowledge of certain offences and risks relating to modern slavery. This is particularly so for organ trafficking offences, in particular forced organ harvesting in China.
57. Further, modern slavery legislation has largely grown out of the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs operate on a three-pillar framework, known as the Protect, Respect, Remedy Framework, the second pillar imposing an obligation on businesses to respect human rights.
58. It is not possible for the Act to adopt the term 'human rights' in the definition of 'modern slavery', as has been done in the Corporate Duty of Vigilance Law (France), because Australia does not have a Human Rights Act at the Federal level. Thus, the Act must rely on provisions in the *Criminal Code 1995 Act* (Cth) (**Criminal Code**) and relevant international instruments.
59. The Explanatory Memorandum and the Supplementary Memorandum of the Act do not explain why the Act defines 'modern slavery' in the way that it does. There is no explanation, and it is not clear on its face, why the two international instruments in s 4 of the Act form part of the definition, as opposed to other international instruments.
60. Australia has ratified several key international human rights treaties, including the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The treatment of those detained in internment camps and forced organ harvesting offences are serious breaches of a number of fundamental human rights including the right to life (Article 6, ICCPR); right to a fair trial (Article 14, ICCPR); freedom from cruel, inhuman or degrading treatment or punishment, in particular, no one shall be subjected without his free consent to medical or scientific experimentation (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).

61. The UK Act inserts definitional provisions into the legislation. This may be of some help to businesses, given the Act requires businesses to access and read the Criminal Code and other relevant laws. This extra task may deter businesses from accessing the relevant laws. Needless to say, some of the laws as drafted in the Criminal Code are not easy to understand and interpret, organ trafficking laws a case in point.
62. ETAC submits that a careful review of how 'modern slavery' is defined in the Act is required to overcome some of these difficulties.
63. There seems to be another definitional difficulty as it relates to organ trafficking. The Guidance for Reporting Businesses (**Guidance**)<sup>42</sup> does not appear to be consistent with the definition in the Act, or at least may cause some confusion for businesses. For example, paragraph 3 of the Guidance states, "[m]odern slavery is only used to describe serious exploitation. It does not include practices like substandard working conditions or underpayment of workers". The term 'serious' is not defined in the Guidance, and some of the relevant offences in the Criminal Code are not simply about 'serious exploitation'.
64. Further, paragraph 6 of the Guidance defines 'modern slavery' as including eight types of serious exploitation, however makes no express mention of 'organ trafficking' as this offence is a subdivision of 'Trafficking in persons' in the Criminal Code. In Table 5 of Appendix 1, in defining 'Trafficking in persons' there is no mention of organ trafficking. In fact, in the Guidance, there is no mention of organ trafficking at all.
65. ETAC notes that the current definition of 'organ trafficking' in the Criminal Code does not include an offence for the trafficking of human organs as provided for in the Council of Europe Convention against Trafficking in Organs (Convention)<sup>43</sup>, but rather is an offence of trafficking in persons for the removal of organs. Further, the Criminal Code does not provide for offences such as the unlawful trading in organs.
66. The Commonwealth organ trafficking laws are silent on some of the fundamental trafficking in human organ laws contained in the Convention, including but not limited to:
  - a. "where, 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" (Article 4(1)(b) of the Convention);

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<sup>42</sup> <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-businesses.pdf>.

<sup>43</sup> <https://rm.coe.int/16806dca3a>.

- b. “where 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” (Article 4(1)(c) of the Convention);
- c. “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” (Article 7(1) of the Convention); and
- d. “the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, with a view to having a removal or implantation of a human organ...” (Article 7(3) of the Convention); and
- e. “the request or receipt by healthcare professionals, its public officials or persons who direct or work for private sector entities, in any capacity, of any undue advantage with a view to performing or facilitating the performance of a removal or implantation of a human organ...” (Article 7(4) of the Convention).

67. ETAC notes that there have been no organ trafficking prosecutions in Australia, despite Australians travelling overseas for organ transplants.<sup>44</sup>

68. In the *Compassion, not Commerce: an Inquiry into human organ trafficking and organ transplant tourism*<sup>45</sup> report, the Human Rights subcommittee of the Joint Standing Committee on Foreign Affairs, Trade and Defence, recommended that the Australian Government sign and ratify the Convention. This is yet to be done.

69. ETAC recommends that the Guidance be amended to include organ trafficking as a stated offence so that businesses, who may only read the Guidance and not the Criminal Code, are informed about organ trafficking given Australia’s close geographical association with countries associated with organ trafficking.

70. ETAC further recommends that the review of the Act considers making a recommendation that the Australian Government sign and ratify the Convention and that once the Convention is signed and ratified, the Act be amended to include the Convention in the definition of ‘modern slavery’ in s 4 of the Act.

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<sup>44</sup> Smith, G. et al., ‘International travel by Australians for overseas transplantation,’ *The Medical Journal of Australia*, Volume 211, Issue 10, September 2019, 460.

<sup>45</sup>

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/HumanOrganTrafficking/Tabled\\_Reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Tabled_Reports).

## Penalties, threshold and Anti-Slavery Commissioner

71. ETAC supports the introduction of penalties. Without sanction, the provisions within the Act are ornamental and a ‘toothless tiger’.
72. The Act does not provide for the prosecution or imposition of any penalty for a breach of its provisions, including any failure by a relevant entity to undertake the requirements to report annually on the risks of modern slavery in their operations and supply chains<sup>46</sup>. Presently, the extent of any penal sanction for failure to comply with any provision of the Act is that the Minister may, if reasonably satisfied, request the entity to:
- a. provide an explanation for the failure to comply within a period of 28 days, or longer after the request is given;<sup>47</sup>
  - b. undertake specified remedial action in relation to that requirement in accordance with the request within a specified period of 28 days or longer after the request is given.<sup>48</sup>
73. Such sanctions provide little or no incentive for compliance.
74. ETAC supports lowering the threshold of \$100 million to \$50 million to capture smaller businesses who may be engaging in organ trafficking related offences. The businesses who are potentially at risk of being complicit in modern slavery offences relating to organ trafficking vary from small, middle and large businesses. It is important that the Australian Government sends a clear message to all businesses that engaging in modern slavery is unlawful, regardless of the size of the business.
75. ETAC supports the provision of an Anti-Slavery Commissioner to strengthen the Act. Without oversight, investigation and monitoring of the effectiveness of modern slavery reporting, and the Act, it will be difficult to know if any real change is occurring in the business sector in preventing modern slavery and respecting human rights.

## Commission of Inquiry into organ trafficking offences

76. In the Australian Government report, *Compassion, Not Commerce: An Inquiry into Human Organ Trafficking and Organ Transplant Tourism*,<sup>49</sup> the Human Rights Committee recommended that the Australian Government pursue through the United Nations the establishment of a Commission of inquiry to thoroughly investigate organ trafficking in countries where it is alleged to occur on a large scale. Given what is now known about internment camps in China, the Australian Government should

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<sup>46</sup> See ss 3, 5, 11, 13 -15 of the Act.

<sup>47</sup> s. 16A(1)(a) of the Act.

<sup>48</sup> s. 16A(1)(b) of the Act.

<sup>49</sup>[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/HumanOrganTrafficking/Tabled\\_Reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/HumanOrganTrafficking/Tabled_Reports)

pursue through the United Nations the establishment of a Commission of inquiry to thoroughly investigate internment camps in China, with a view to eradicating all such camps.

77. The veil of secrecy surrounding the internment camps in China must be lifted to ensure that the human rights of those detained in these camps are protected, and to ensure that businesses are not associate with, or complicit in, human rights violations related to organ trafficking, in particular forced organ harvesting in China.
78. ETAC recommends that the Australian Government take all measures, including developing regulations and guidelines, to assist Australian businesses to assess and undertake due diligence as to business' risk of modern slavery with respect to forced organ harvesting in China.

## Recommendations

79. The Australian Government adopt a due diligence approach to identify, monitor and prevent risks of modern slavery in businesses and their supply chains.
80. The Australian Government develop regulations and guidelines to assist Australian businesses to assess and undertake due diligence with respect to internment camps and forced organ harvesting in China.
81. That the Guidance be amended to include organ trafficking as a stated offence so that businesses, who may only read the Guidance and not the Criminal Code, are informed about organ trafficking given Australia's close geographical association with countries associated with organ trafficking.
82. That Australia signs and ratifies the Council of Europe Convention against Trafficking in Organs (Convention).
83. On signing and ratifying the Convention, the Act be amended to include the Convention in s 4 of the Act.
84. That the Australian Government consider laws similar to those in the UK and the USA to combat forced organ harvesting in China and transplant tourism.
85. That the Australian Government work with the international community to hold China accountable for its past and present human rights violations of prisoners of conscience by seeking clear and compelling evidence of the numbers of internment camps in China and evidence that forced organ harvesting has ceased as claimed by the CCP. This can only assist Australian businesses to identify modern slavery risks in their supply chain.

86. That the Australian Government pursue through the United Nations the establishment of a Commission of Inquiry to thoroughly investigate internment camps and forced organ harvesting in China, with a view to eradicating all such camps.

## Conclusion

87. Notwithstanding the challenges identified in this submission, having legislation which strengthens business' obligations to report, prevent, and remedy modern slavery risks, is an important step in preventing and eradicating forced organ harvesting in China and all associated human rights violations.

If you wish to discuss this submission further, please do not hesitate to contact Madeleine Bridgett, ETAC Australian Committee, on [madeleine.bridgett@endtransplantabuse.org](mailto:madeleine.bridgett@endtransplantabuse.org).