The Parliament of the Commonwealth of Australia

Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?

An inquiry into targeted sanctions to address human rights abuses

House of Representatives
Joint Standing Committee on Foreign Affairs, Defence and Trade

December 2020
Canberra

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Foreword

Through my long-term involvement with the Human Rights Sub-committee, I have observed Australians' awareness, interest and commitment to protecting human rights grow and consolidate.

Australians are proud global citizens. We are committed to our democracy, and the importance of upholding human rights, both within Australia and abroad. This commitment is reflected in our government's contribution to international efforts to uphold human rights, through international treaties, our own diplomatic missions, supporting aid and development programs and in collaboration with our allies.

In recent years there has been a growing recognition that country- or sector-wide sanctions often impact innocent parties disproportionately, and a new approach to creating consequences for unacceptable behavior is required. It has long been the case that kleptocrats and other perpetrators of human rights abuse and corruption have transferred assets to enjoy in countries other than the source of their funds. This is usually because they seek to secure their assets in democratic countries with stable financial systems.

Australia may not be able to influence other nations to apply suitable penalties to perpetrators of human rights abuse and corruption. However, the compelling argument about the experience of Mr Sergei Magnitsky, led by Mr Browder, has focused the efforts of international human rights experts and frontline organisations to advocate for targeted sanctions regimes to be introduced, effecting tangible consequences for individuals and their beneficiaries.

The Human Rights Sub-committee receives regular briefings and correspondence on human rights issues facing Australians and diaspora from across the globe. This program of work has brought to the Sub-committee's attention situations where Australian citizens with connections to different countries experience threats within Australia, and threats to their family members who remain abroad. Sub-committee members have also been concerned about situations where alleged human rights abusers and beneficiaries of corruption are investing money in Australian assets, financial systems and accessing Australian education and

healthcare systems for themselves and their beneficiaries. This is simply unacceptable.

In other countries, introducing targeted sanctions legislation has allowed governments to tackle this issue, using travel bans and asset seizure to prevent perpetrators from enjoying the proceeds of their crimes with impunity. The legislation is quite new in most jurisdictions, so there is not a significant amount of evidence to demonstrate its success. However, there are indications of early success in applying targeted sanctions to curtail options for enjoyment and freedoms of human rights abusers and beneficiaries of corruption. Australia's imposition of travel bans and asset freezes could apply some level of consequences in cases where they were otherwise lacking.

This inquiry was conducted during a period of widespread disruption and uncertainty arising from the COVID-19 pandemic. This presented challenges across Australia and the world, as people managed practical and logistical considerations such as health conditions, stay-at-home orders, home schooling and remote working arrangements. The extent of involvement of individuals and organisations in this inquiry, in spite of the those challenges, clearly demonstrated to the Sub-committee the significance of the issues under consideration, and the commitment and dedication of those involved in seeing matters addressed and resolved.

This inquiry generated evidence from a diverse range of sources. The Sub-committee appreciates the thoughtful and informed contributions from concerned Australian citizens, Australian diaspora groups, organisations involved in human rights advocacy and law, our international parliamentary colleagues, and internationally renowned human rights legal practitioners. This diversity of perspectives greatly strengthened the Sub-committee's appreciation of the subject matter.

The Sub-committee has recommended the enactment of a standalone, Magnitsky-style targeted sanctions Act during the 46th Parliament. Based on extensive considerations, members agreed that taking swift and decisive action will allow Australia to not only contribute to the Global Magnitsky movement, but also take the lead in developing a best practice targeted sanctions regime. I extend my thanks to Mr Geoffrey Robertson OAM QC for his contribution to the inquiry – not only evidence in a submission and in his appearance as a witness, but his draft Bill which could be used to guide implementation of recommendations in this report.

I thank the Deputy Chair and members of the Human Rights Sub-committee for their full and collaborative engagement, their thoughtful consideration of the issues and contributions throughout the inquiry.

It is my hope that the implementation of this report's recommendations will send a very strong signal to human rights abuse perpetrators and corrupt individuals about the values of Australians. Importantly, I expect it will play a significant role in reducing the incentives for engaging in these kind of acts. I also hope that this report is received as a message of solidarity by Australia's close allies, and of support to victims of human rights abuse and corruption everywhere.

Hon Kevin Andrews MP
Chair

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	Senator Kimberly Kitching	ALP, VIC
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Secretary	Ms Lynley Ducker (from 28/01/2020)
Inquiry Secretary	Ms Sonya Fladun
Senior Research Officer	Ms Emma Knezevic
	Ms Tegan Scott
Research Officer	Ms Kate Goodfruit (27/07/2020 to 23/10/2020)
Office Manager	Mrs Dorota Cooley
Administrative Officers	Ms Alexandra Grimes (from 07/09/2020)
	Ms Renee Dennis (12/09/2019 to 29/06/2020)

Terms of reference

The Committee shall examine the use of targeted sanctions to address gross human rights abuses. The Committee shall have particular regard to:

1. The framework for autonomous sanctions under Australian law, in particular the Autonomous Sanctions Act 2011 (Cth) and the Autonomous Sanctions Regulations 2011 {Cth)

2. The use of sanctions alongside other tools by which Australia promotes human rights internationally

3. The advantages and disadvantages of the use of human rights sanctions, including the effectiveness of sanctions as an instrument of foreign policy to combat human rights abuses

4. Any relevant experience of other jurisdictions, including the US regarding their Global Magnitsky Human Rights Accountability Act (2016}

5. The advisability of introducing a new thematic regulation within our existing Autonomous Sanctions Regime for human rights abuses.

List of abbreviations

DFAT	Department of Foreign Affairs and Trade
GloMag	Global Magnitsky movement
Magnitsky conduct	Range of behaviour / conduct that could be sanctioned under the proposed targeted sanctions
UNSC	United Nations Security Council

List of recommendations

7 General principles and recommendations

Recommendation 1

The Sub-committee recommends that the Australian Government enact stand alone targeted sanctions legislation to address human rights violations and corruption, similar to the United States' *Magnitsky Act 2012*.

Recommendation 2

The Sub-committee recommends that the legislation should include a preamble, which would set out the broad purposes and general principles of the Act.

Recommendation 3

The Sub-committee recommends that the range of conduct that may be sanctioned should include serious human rights abuse and serious corruption.

Recommendation 4

The Sub-committee recommends that the new targeted sanctions legislation should apply to 'serious human rights abuses' with further guidance on thresholds and applicable conduct provided in the preamble.

Recommendation 5

The Sub-committee recommends that the preamble acknowledge the importance of maintaining journalist and human rights defenders' human rights and expressly state that systematic extrajudicial actions that intend to limit media freedom can be considered human rights abuses.

Recommendation 6

The Sub-committee recommends that the legislation should name the range of conduct which can be sanctioned as 'Magnitsky conduct'.

Recommendation 7

The Sub-committee recommends that sanctions should be applicable to the immediate family and direct beneficiaries of human rights abusers.

Recommendation 8

The Sub-committee recommends that sanctions be applicable to all entities, including natural persons, corporate entities and both state and non-state organisations.

Recommendation 9

The Sub-committee recommends that sanctions be applicable to associated entities, broadly defined.

Recommendation 10

The Sub-committee recommends that the new targeted sanctions legislation should not apply to Australian citizens because they are subject to legislation with similar, if not stronger, consequences. This issue should be re-examined as part of the 3-yearly review.

Recommendation 11

The Sub-committee recommends that the new targeted sanctions legislation be applicable to conduct that has occurred prior to enactment of the legislation.

Recommendation 12

The Sub-committee recommends that an independent advisory body be constituted to receive nominations for sanctions targets, consider them and make recommendations to the decision maker.

Recommendation 13

The Sub-committee recommends that the structure of the independent advisory body should be set out in regulations, and should include the ability to conduct its inquiry in public.

Recommendation 14

The Sub-committee recommends that the new legislation should require the decision maker to consider recommendations by the advisory body and give reasons for any decision not to adopt a recommendation by the advisory body.

Recommendation 15

The Sub-committee recommends that the decision maker should be able to receive nominations from any source.

Recommendation 16

The Sub-committee recommends that the legislation, or regulations under the legislation, set out processes to allow Australian authorities to work with other jurisdictions and their sanctions regimes.

Recommendation 17

The Sub-committee recommends that the Minister for Foreign Affairs be the decision maker.

Recommendation 18

The Sub-committee recommends that the Minister for Foreign Affairs should be required to consult with the Attorney-General before making a decision.

Recommendation 19

The Sub-committee recommends that the legislation include a requirement to give the targeted person a right of reply, and a requirement for the Minister to consider this, before imposing sanctions.

Recommendation 20

The Sub-committee recommends that the Minister for Foreign Affairs should have broad discretion as to whether or not to impose sanctions. This would include the ability to remove or vary sanctions.

Recommendation 21

The Sub-committee recommends that the legislation allow for a 'watch list' of people being considered for sanctioning. Inclusion on a watch list should be for a fixed time period, after which a person must either be sanctioned or removed from the list. The watch list should be public.

Recommendation 22

The Sub-committee recommends that the evidentiary standard for a decision should be the balance of probabilities.

Recommendation 23

The Sub-committee recommends that the legislation require the publication of the names of sanctioned people and the reasons for their listing. This includes all decisions to remove or vary sanctions.

Recommendation 24

The Sub-committee recommends that the legislation require the Foreign Minister to publish an annual report to Parliament advising of sanctions.

Recommendation 25

The Sub-committee recommends that the Foreign Minister's annual report into the sanctions should stand referred to the JSCFADT for inquiry.

Recommendation 26

The Sub-committee recommends that there be limited exemptions from including information on the public register, watch list or annual report for reasons of national security or criminal investigations.

Recommendation 27

The Sub-committee recommends that the legislation include a right for a sanctioned person to request a review of decision. The Minister should be required to conduct a review on request, although the regulations may limit the obligation to conduct reviews.

Recommendation 28

The Sub-committee recommends that targeted sanctions legislation be reviewed by the government three years after commencement.

Recommendation 29

The Sub-committee recommends that the sanctions include visa / travel restrictions, limit access to assets, and restrict access to Australia's financial systems.

Recommendation 30

The Sub-committee recommends that the sanctions, to the extent possible, be implemented using existing processes and legislative schemes.

Recommendation 31

The Sub-committee recommends that the new sanctions regime be accompanied by a public diplomacy strategy to provide guidance to those affected, including Australian businesses.

Recommendation 32

The Sub-committee recommends that the Department of Foreign Affairs and Trade should be given additional resources to implement the sanctions regime. Other departments required to contribute to implementation should also be allocated dedicated resourcing for the task.

Recommendation 33

The Sub-committee recommends that the long title of the legislation should include 'Magnitsky' to emphasise links with the Global Magnitsky movement.

1

Introduction

1.1 On 3 December 2019, the Minister for Foreign Affairs, Senator the Hon Marise Payne, asked the Joint Standing Committee on Foreign Affairs, Defence and Trade to inquire into and report on the use by Australia of targeted sanctions to address gross human rights abuses. The Joint Standing Committee tasked the Human Rights Sub-committee to undertake an inquiry.

1.2 The terms of reference for the inquiry required the Sub-committee to examine this issue with particular regard to the current framework for autonomous sanctions under Australian law; the use of sanctions alongside other tools by which Australia promotes human rights internationally; the advantages and disadvantages of human rights sanctions, including the effectiveness of sanctions as an instrument of foreign policy to combat human rights abuses; any relevant experience of other jurisdictions, including the United States concerning their *Global Magnitsky Human Rights Accountability Act* of 2016; and the advisability of introducing a new thematic regulation within Australia's existing autonomous sanctions regime for human rights abuses.

1.3 Respect for human rights and fundamental freedoms has long been recognised as essential to efforts to build a more peaceful, harmonious and prosperous world. Since 1948 the United Nations Universal Declaration of Human Rights and other widely endorsed international human rights conventions have established a global framework for promoting respect for human rights.[1]

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[1] United Nations 'Peace, dignity and Equality on a healthy planet', https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html viewed 10 October 2020.

1.4 Despite this, the ability to deter human rights violations and enforce international accountability for those responsible for such abuses, have proven to be enduring problems. Measures employed by states to penalise, isolate or otherwise sanction governments responsible for human rights violations may include making restrictions on diplomatic and other contacts, boycotts of official and other significant events, arms embargoes, trade and financial sanctions.[2]

1.5 Such measures have been imposed on countries and governments with varying degrees of effectiveness and sometimes with unintended consequences. Over the past decade, however, a new approach has been developed with so-called 'targeted sanctions' directed against individual persons and associated entities including companies and business interests, engaged in or directly associated with human rights violations. There has also been a growing recognition of the linkage of human rights abuses with large-scale corruption.[3]

1.6 The Human Rights Sub-committee has watched with interest recent developments in the practice of human rights related sanctions by other Western democracies, in particular the adoption of so-called Magnitsky laws designed to allow the application of targeted sanctions against individuals identified as responsible for serious human rights violations and/or significant corruption. Modelled on or else inspired by United States legislation, these laws seek to make those responsible for human rights violations and corruption accountable by imposing restrictive measures including entry bans and financial sanctions including asset freezing.[4]

1.7 Through the Sub-committee's private briefing program, human rights organisations, advocacy groups and members of diaspora communities have repeatedly raised the subject of Magnitsky-style laws and their potential to impose a measure of accountability on those engaged in

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[2] Department of Foreign Affairs and Trade, *Submission 63*, p. 5; Law Council of Australia, *Submission 99*, p. 8; 'Sanctions: International Peace and Security,' Government of the Netherlands' <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions> viewed 10 October 2020.

[3] Human Rights First, *Submission 17*, p. 3; Avaaz Foundation, *Submission 126*, p. 5; Thomas J Biersteker, 'Watson Institute of International Studies, Brown University, www.globalpolicy.org/images/pdfs/Security_Council/Biersteker-Targeted_Sanctions.pdf, viewed 6 October 2020.

[4] Mr William Browder, Hermitage Capital Management, *Submission 4*, pp. 1-2; Also: www.euronews.com/2020/09/16/what-is-the-magnitsky-act-euronews-answers viewed 1 November 2020; Australian Centre for International Justice, *Submission 87*, pp. 7 – 8.

planning, financing or committing human rights abuses. It has been suggested that the enactment of such a law by the Australian Parliament would significantly strengthen Australia's ability to support international efforts to deter human rights abuse.

1.8 Through the course of its recent work the Sub-committee has also noted the close connections between human rights abuse and large-scale corruption. The United Nations Human Rights Council has highlighted the 'negative impact of corruption on the enjoyment of human rights'[5] Depending on the level, pervasiveness and form of corruption, corruption undermines the functioning and legitimacy of institutions and the rule of law with devastating effects on respect for human rights. As the Human Rights Council has further observed: 'Disadvantaged groups and vulnerable persons suffer disproportionately from corruption.'[6] Those involved in the investigation, reporting and prosecution of corruption are at heightened risk of human rights violations and require effective protection.[7]

1.9 Against this background it was with considerable interest that the Sub-committee undertook this important inquiry.

Sergei Magnitsky and targeted sanctions

1.10 Legislation that enables jurisdictions to imposed sanctions on an individual who has committed human rights abuses or is guilty of significant corruption is often named, or referred to as, 'Magnitsky Legislation'. Such legislation is named after Mr Sergei Magnitsky, a Russian tax lawyer who worked for Hermitage Capital Management, owned by Mr Bill Browder, an American financier.[8]

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[5] United Nations Human Rights, Office of the High Commissioner. https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx , viewed 9 July 2020.

[6] United Nations Human Rights, Office of the High Commissioner. https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx, viewed 9 July 2020.

[7] United Nations Office of Drugs and Crime, The Doha Declaration: promoting a culture of lawlessness, www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/overview-of-the-corruption-human-rights-nexus.html viewed 2 November 2020.

[8] Mr William Browder, *Submission 4*, p. 1.

1.11 In evidence to the Sub-committee, Mr Browder described that Mr Magnitsky:

> …uncovered a massive fraud committed by Russian government officials that involved the theft of US $230 million of state taxes. Mr Magnitsky testified against the officials involved and was subsequently arrested by them, imprisoned, systematically tortured and killed in Russian police custody on November 16, 2009… the Russian authorities covered up his murder, exonerated all the officials involved … [and] put Sergei Magnitsky on trial three years after they killed him.[9]

1.10 Subsequently, as a political activist, Mr Browder sought justice for Mr Magnitsky internationally, through the enactment of legislation in the United States and elsewhere to impose asset freezes and visa bans against human rights violators with assets in Western countries.[10]

1.12 The United States Congress passed the *Sergei Magnitsky Accountability Act* in 2012 in an attempt to limit the benefits to corrupt government officials who 'would never want to keep their ill-gotten gains in their own country … Rather [in] countries like the United States, or the European Union or Australia'.[11]

1.13 The Magnitsky Act of 2012 allowed sanctions to be imposed in cases involving gross violations of internationally recognised human rights, and in which victims were 'working to expose illegal activity carried out by government officials [or to] obtain, exercise, defend, or promote internationally recognized human rights and freedoms'.[12]

1.14 The 2012 Act was followed by the *Global Magnitsky Human Rights Accountability Act (2017)* and US Presidential Executive Order 13818 'Blocking the Property of Persons Involved in Serious Human Rights or Corruption', which enables the US Government to sanction 'the world's worst human rights abusers and most corrupt oligarchs and foreign officials, freezing their US assets and preventing them from travelling to the United States.' The objective is for sanctioned individuals responsible for gross human rights abuses or significant corruption to become 'financial pariahs' and deter national and international financial institutions from interacting with them.[13]

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[9] Mr William Browder, *Submission 4*, p. 1.

[10] Mr William Browder, *Submission 4*, p. 1.

[11] Senator Cardin, *Submission 119*, p. 2.

[12] United States Department of State, *Submission 160,* Helsinki Commission How-to Guide Sanctioning Human Rights Abusers and Kleptocrats under the Global Magnitsky Act, p.2.

[13] United States Department of State, *Helsinki Commission How-to Guide Sanctioning Human Rights*

Conduct of the Inquiry

1.15 The Human Rights Sub-committee launched the inquiry on 4 December 2019 with a press release that invited interested parties to make submissions.[14] Submissions were sought from a wide range of organisations and individuals identified as having particular expertise or engagement with the issues before the Sub-committee.

1.16 The Sub-committee received and published over 150 submissions, which are available on the Sub-committee's webpage.[15] The full list of submissions and other evidence presented to the inquiry is at Appendix A.

1.17 A number of submissions contained specific allegations of human rights violations and/or corruption by various governments, organisations and individuals. In some cases allegations appeared to have not been previously made public. Some submissions contained details of the victims of human rights abuses, including information that is not publicly known, as well as other sensitive personal information. A number of submitters to the inquiry wished to remain anonymous or else requested that their submissions remain confidential.

1.18 The Sub-committee is not able to investigate or substantiate specific allegations of human rights abuse or corruption. However the Sub-committee sought to publish as much information and as many views as possible as long as they were relevant to the terms of reference of the inquiry. In the interests of transparency, redactions from published submissions and other papers were kept to a minimum, but with an eye to protect the privacy and the safety of all persons who either submitted to the inquiry or were referred to in submissions, including individuals who are subject to unsubstantiated or unproven allegations. With regards to public officials, however, the Sub-committee was of the view they should be answerable in most cases to accusations made against them. A prudent balance between privacy, fairness and transparency is an enduring constant challenge in human rights inquiries.

Abusers and Kleptocrats under the Global Magnitsky Act Submission 160, p.2.

14 See: https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Inquiry_into_a_framework_for_autonomous_sanctions_under_Australian_law_to_target_human_rights_abuses

15 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Submissions

1.19 The Sub-committee was further informed through a program of public hearings. The conduct of these hearings proceeded despite the restrictions and altered working arrangements arising from the COVID-19 pandemic. Most witnesses appeared via teleconference or videoconference.

1.20 Public hearings were held as follows

31 March 2020	Teleconference
28 April 2020	Teleconference
30 April 2020	Teleconference
15 May 2020	Teleconference / videoconference
15 June 2020	Videoconference
17 June 2020	Videoconference / Witness attendance in Canberra
25 June 2020	Teleconference
1 October 2020	Teleconference

(See Appendix B)

1.21 The Sub-Committee was particularly appreciative that Mr Browder was able to make a submission and give evidence to the inquiry. Mr Browder's advocacy for the adoption of targeted sanctions laws has generated strong attacks from the Government of the Russian Federation and other regimes responsible for serious human rights abuse and suppression of democratic freedoms. The Sub-committee received a number of submissions and related correspondence that made a range of allegations about Mr Browder and Mr Magnitsky. Mr Browder was afforded opportunities to respond to those submissions and he did so. While it was outside the terms of reference of the inquiry to examine these matters in detail, the Sub-committee fully satisfied itself as to the credibility and value of Mr Browder's views in relation to the terms of reference under consideration by the Sub-committee.

1.22 The Sub-committee thanks all persons, groups and organisations that made submissions addressing the terms of reference or provided their perspective on the challenges of deterring and combatting human rights abuses and corruption. The Sub-committee received over 400 form letters, expressing concern for human rights in Hong Kong and calling for Australia to develop a Magnitsky-style targeted sanctions regime consistent with other jurisdictions. The Sub-committee published some examples of these documents as submissions. The Sub-committee would like to thank all individuals who expressed their views on this important matter.

1.23 The level of engagement with this important inquiry has been most satisfying and has greatly assisted the Sub-committee in discharging its responsibility.

Outline of report

1.24 Chapter 2 discusses Australia's current international sanctions regimes, and examines the evidence on the fitness for purpose of these regimes for enforcing sanctions against human rights abusers.

1.25 Chapter 3 addresses the Global Magnitsky legislation landscape, looking into the history of the United States targeted sanctions legislation, including the background of Sergei Magnitsky. It also examines various other jurisdictions' Magnitsky-style Acts, and identifies alternative methods of sanctioning human rights abusers used by other states or international organisations. This chapter takes an in-depth look at aspects of the US, Canadian and UK legislation.

1.26 Chapter 4 describes the concerns and risks relating to potential legislation and its implementation, and the safeguards and protections that were identified as ways of minimising concerns. This chapter also provides an overview of evidence received from witnesses and submitters who oppose the introduction of targeted sanctions.

1.27 Chapter 5 identifies features the Sub-committee believes that a new Magnitsky-style regime should incorporate.

1.28 Chapter 6 discusses a document presented to the Sub-committee by Mr Geoffrey Robertson OAM QC, which should serve as a valuable catalyst for the development of legislation to establish a new Australian targeted sanctions regime.

1.29 Chapter 7 outlines principles that the Sub-committee considers should be adopted to guide the drafting of the new Australian targeted sanctions legislation and includes the report recommendations.

2

Current Australian sanctions legislation

2.1 This chapter will discuss Australia's current international sanctions regimes. It will then discuss the fitness for purpose of these regimes for enforcing sanctions against human rights abusers.

Australia's two sanctions regimes

2.2 There are currently two international sanctions regimes operating in Australia:

- Sanctions imposed through the *Charter of the United Nations Act 1945* (Cth) to implement decisions of the United Nations Security Council (UNSC); and
- Sanctions imposed through the *Autonomous Sanctions Act 2011* (Cth) (the Act) and the Autonomous Sanctions Regulations 2011 (Cth) (the Regulations) which allow the Australian Government to impose sanctions without reference to any United Nations decision.

2.3 In addition to the above measures, Australian sanctions may also be implemented through other legislation and regulations. For example, financial sanctions are applied under the Banking (Foreign Exchange) Regulations 1959 (Cth) and arms embargos are enforced under the Customs (Prohibited Exports) Regulations 1958 (Cth) and the implementation of defence related export controls through the Defence and Strategic Goods List 2019.

United Nations Security Council Sanctions

2.4 As a member state of the United Nations, Australia is required to implement sanctions reflecting the resolutions of the UNSC.[1] Under Article 25 of the United Nations Charter, members of the United Nations agree to accept and carry out the decisions of the Security Council.[2] This includes decisions by the Security Council relating to international or domestic conflict and/or human rights concerns to impose sanctions including economic sanctions, arms and other embargos, entry restrictions on persons from particular countries.

2.5 To date, the UNSC has established 30 sanctions regimes of which there are 14 currently active.[3]

Table 1 Current UNSC sanctions regimes

Number	Sanctions Regime
1	Somalia Sanctions Regime
2	ISIL (Da'esh) and Al-Qaida Sanctions Regime
3	Iraq Sanctions Regime
4	Democratic Republic of the Congo (DRC) Sanctions Regime
5	Sudan Sanctions Regime
6	1636 Sanctions Regime (sanctions relating to the 2005 terrorist bombing in Beirut, Lebanon)
7	Democratic People's Republic of the Korea Sanctions Regime
8	Libya Sanctions Regime
9	1988 Sanctions Regime (sanctions against the Taliban and groups associated with this organisation)
10	Guinea-Bissau Sanctions Regime
11	Central African Republic Sanctions Regime
12	Yemen Sanctions Regime
13	South Sudan Sanctions Regime
14	Mali Sanctions Regime

Source *United Nations Department of Political Affairs (UNDPA), 2020 Fact Sheets: Subsidiary Organs of the United Nations Security Council, 22 September 2020.*

2.6 Since 2004, the UNSC has moved away from comprehensive sanctions to more targeted regimes which have had a more strategic focus on

1 Human Rights Network of Australia (HRNA), *Submission 19*, p. 3.

2 Human Rights Network of Australia (HRNA), *Submission 19*, p. 3.

3 United Nations Department of Political Affairs (UNDPA), *2020 Fact sheets: Subsidiary Organs of the United Nations Security Council*, 22 September 2020, p. 4, <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf> viewed 24 September 2020.

'individuals, entities, groups or undertakings.'[4] Most commonly, UN sanctions take the form of arms embargos, freezing of assets and travel bans.[5]

2.7 UNSC sanctions are given effect by Australia through the *Charter of the United Nations Act 1945* (Cth). This legation act allows the Australia Government to implement and enforce UNSC resolutions, such as the listing of countries, individuals or entities for sanctions.[6]

2.8 Sanctions are punitive measures not involving armed force and apply to activities occurring in Australia, by citizens of Australia and/or involving Australian registered organisations overseas.[7] These measures impose restrictions on activities related to particular countries, people and entities, and/or goods and services.[8]

2.9 Each sanctions regime imposes different sanctions measures on the nation, government or individuals in question. These may include prohibitions on:

- Import or export of sanctioned goods;
- Providing services;
- Engaging in commercial activities;
- Travel restrictions; and
- Dealing with a person, entity or asset.[9]

2.10 All 14 of the current UNSC sanctions regimes are implemented with sanctions imposed under Australia's UN sanctions legislation. Some of these overlap with sanctions implemented under the *Autonomous Sanctions Act 2011* (Cth). There are also sanctions which are only implemented under the Autonomous *Sanctions Act 2011* (Cth) which is discussed further below. See figure 1:

4 United Nations Department of Political Affairs (UNDPA), *2020 Fact sheets: Subsidiary Organs of the United Nations Security Council*, 22 September 2020, p. 4, <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf> viewed 24 September 2020.

5 United Nations Department of Political Affairs (UNDPA), *2020 Fact sheets: Subsidiary Organs of the United Nations Security Council*, 22 September 2020, p. 4, <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf> viewed 24 September 2020.

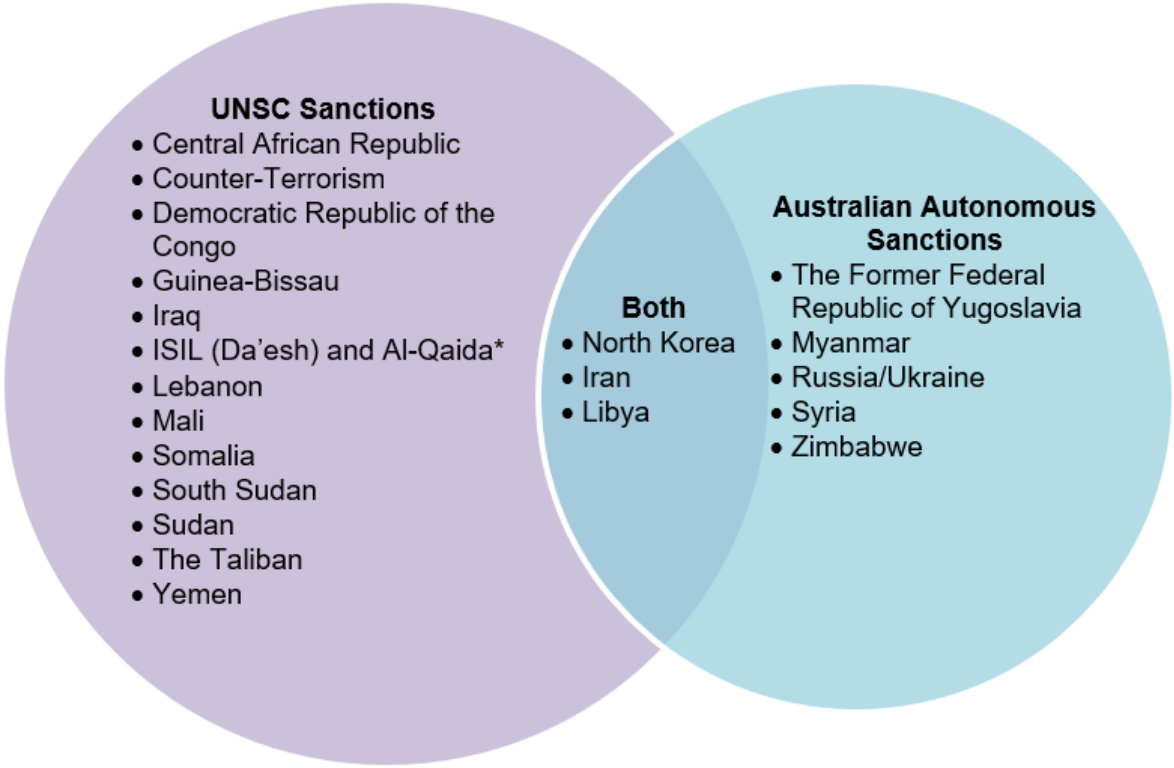
6 Save the Children, *Submission 47*, p. 7.

7 Human Rights Network of Australia (HRNA), *Submission 19*, p. 3.

8 Department of Foreign Affairs and Trade (DFAT), 'What are sanctions' <https://www.dfat.gov.au/international-relations/security/sanctions/Pages/about-sanctions> viewed 28 September 2020.

9 Department of Foreign Affairs and Trade (DFAT), 'What are sanctions' <https://www.dfat.gov.au/international-relations/security/sanctions/Pages/about-sanctions> viewed 28 September 2020.

Figure 1 Sanctions regimes implemented in Australia



Source *Department of Foreign Affairs and Trade, 'Sanctions Regimes' <https://www.dfat.gov.au/node/123620> viewed 28 September 2020.*

2.11 Sanctions imposed in accordance with UNSC resolutions have been utilised recently in Australia. In July 2019, the Minister for Foreign Affairs listed Australian national Soheyb Laraibi for counter-terrorism financial sanctions under section 15(1) of the *Charter of the United Nations Act 1945* (Cth), pursuant to Australia's obligations under UNSC resolution 1373.[10]

2.12 There may be situations in which the UNSC may not be able to reach agreement regarding the decision to impose sanctions on a state, group or individual. In the last decade, many conflicts have attracted strongly divergent views between the five permanent members of the UNSC which may exercise a veto to any decision or resolution made by the Security Council.[11] This has limited the ability of the UNSC to impose sanctions. It is in this context that Australia introduced its own domestic sanctions regime.[12]

10 Save the Children, *Submission 47*, p. 7.

11 United Nations Security Council 'Voting System' <https://www.un.org/securitycouncil/content/voting-system> viewed 11 August 2020.

12 Save the Children, *Submission 47*, p. 8.

Australian Autonomous Sanctions

The current framework

2.13 The Autonomous Sanctions Bill 2010 (Cth) (the Bill) was introduced into Parliament on 26 May 2010. Then Minister for Foreign Affairs, the Hon Stephen Smith MP said in his second reading speech:

> Autonomous sanctions are a key tool in Australian diplomacy.
>
> They are highly targeted measures intended to apply pressure on regimes to end the repression of human rights, to end the repression of democratic freedoms, or to end regionally or internationally destabilising actions.[13]

2.14 Mr Smith stated that the purpose of the Bill was to:

> … strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, beyond those achievable under existing instruments, thus ensuring Australia's autonomous sanctions can match the scope and extent of measures implemented by like-minded states.[14]

2.15 According the Explanatory Memorandum for the Bill, autonomous sanctions under this legislation would have three objectives:

- to limit the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);
- to seek to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
- to penalise those responsible (for example, by denying access to international travel or to the international financial system).[15]

2.16 The Executive Memorandum defined autonomous sanctions as being 'punitive measures not involving the use of armed force which a government imposes as a matter of foreign policy…in situations of international concern.'[16] These situations include 'the grave repression of the human rights or democratic freedoms of a population by a

13 The Hon. Mr Stephen Smith MP, Minister for Foreign Affairs, *House of Representatives Hansard*, 26 May 2010, p. 4112.

14 The Hon. Mr Stephen Smith MP, Minister for Foreign Affairs, *House of Representatives Hansard*, 26 May 2010, p. 4113.

15 Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth).

16 Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth).

government, or proliferation of weapons of mass destruction or their means of delivery.'[17]

2.17 Australian autonomous sanctions are 'autonomous' in the sense that they do not arise pursuant to any other international obligations, such as a resolution of the UNSC. As such these sanctions can supplement a pre-existing UNSC sanction or can stand alone.[18]

2.18 The framework for Australia's autonomous sanctions regime is set out in the Act and the Regulations. Sanctions measures can include:

- Restrictions on engaging in certain commercial activities as well as trade in goods and services;[19]
- Travel bans restricting a person from entering Australia without authorisation;[20] and
- Targeted financial sanctions which would prevent a designated person from accessing assets in Australia or receiving assets from people or entities within Australia without authorisation.[21]

2.19 Under Section 4 of the Autonomous Sanctions Act, an 'autonomous sanction' is defined as a sanction that is intended to directly or indirectly influence a foreign government or entity, member of a foreign government, or another person or entity outside Australia in accordance with Australian Government policy or to prohibit conduct which is contrary to Australian Government policy.[22]

2.20 The autonomous sanctions legislation itself does not designate any person or entity for sanctions. Instead subsection 10(1) of the Act allows the Governor-General on advice from the Minister for Foreign Affairs (designated by the Administrative Arrangements Orders as the Minister responsible for administration of the Act) to apply sanctions through Regulations that relate to:

- Proscribing of persons or entitles;[23]
- Restriction or prevention of the supply, sale or transfer of goods, and the use, dealings and availability of assets;[24]
- Indemnities for acting in compliance with these regulations;[25] and

17 Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth).

18 Law Council of Australia, *Submission 99*, p. 9.

19 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, p. 3.

20 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, p. 3.

21 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, p. 3.

22 *Autonomous Sanctions Act 2011* (Cth), s 4.

23 *Autonomous Sanctions Act 2011* (Cth), s 10(1)(a).

24 *Autonomous Sanctions Act 2011* (Cth), ss 10(1)(b) and (c).

25 *Autonomous Sanctions Act 2011* (Cth), ss 10(1)(e).

- The provision of compensation for owners of assets that are affected by any regulation made under the above provisions.[26]

2.21 The following table lists all current autonomous sanctions relating to persons or entities in force in Australia as at the time of writing:

Table 2 Regulation 6: Countries, persons and entities currently designated under the Regulations

Countries, persons and entities		
Item	*Country*	*Activity*
1	Democratic People's Republic of Korea	a) A person or entity that the Minister is satisfied is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program. b) A person or entity that the Minister is satisfied is assisting, or has assisted, in the violation, or evasion, by the DPRK of: i) Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321 of the United Nations Security Council; or ii) a subsequent resolution relevant to a resolution mentioned in subparagraph (i).
2	Former Federal Republic of Yugoslavia	a) A person who has been indicted for an offence by the ICTY (whether or not the person has been convicted of the offence). b) A person who has been indicted for an offence within the jurisdiction of the ICTY by a domestic court in Bosnia-Herzegovina, Croatia or Serbia (whether or not the person has been convicted of the offence). c) A person who is subject to an Interpol arrest warrant related to an offence within the jurisdiction of the ICTY. d) A person who the Minister is satisfied is a supporter of the former regime of Slobodan Milosevic. e) A person who is suspected of assisting a person who is: i) indicted by the ICTY; and ii) (ii) not currently detained by the ICTY.
4	Iran	a) A person or entity that the Minister is satisfied has contributed to, or is contributing to, Iran's nuclear or missile programs. b) A person or entity that the Minister is satisfied has assisted, or is assisting, Iran to violate: i) Resolution 1737, 1747, 1803, 1929 or 2231 of the United Nations Security Council; or ii) a subsequent resolution relevant to a resolution mentioned in subparagraph (i).
5	Libya	a) A person who the Minister is satisfied was a close associate of the former Qadhafi regime.

26 *Autonomous Sanctions Act 2011* (Cth), ss 10(1)(f).

		b) An entity that the Minister is satisfied is under the control of one or more members of Muammar Qadhafi's family. c) A person or entity that the Minister is satisfied has assisted, or is assisting, in the violation of: i) Resolution 1970 or 1973 of the United Nations Security Council; or ii) a subsequent resolution relevant to a resolution mentioned in subparagraph (i). d) An immediate family member of a person mentioned in paragraph (a) or (c).
6	Myanmar	a) A former member of the State Peace and Development Council (SPDC). b) A person who the Minister is satisfied is a business associate of the Myanmar military. c) A current or former minister or a current or former deputy minister. d) A current or former military officer of the rank of Brigadier-General or higher. e) A senior official in any of Myanmar's security or corrections agencies. f) A current or former senior officeholder of the Union Solidarity and Development Party (USDP) or the Union Solidarity and Development Association (USDA). g) A senior official or executive in a state-owned or a military-owned enterprise. h) An immediate family member of a person mentioned in any of paragraphs (a) to (g).
7	Syria	a) A person or entity that the Minister is satisfied is providing support to the Syrian regime. b) A person or entity that the Minister is satisfied is responsible for human rights abuses in Syria, including: i. the use of violence against civilians; and ii. the commission of other abuses.
8	Zimbabwe	A person or entity that the Minister is satisfied is engaged in, or has engaged in, activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe.
9	Ukraine	A person or entity that the Minister is satisfied is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

Source *Autonomous Sanctions Regulation 2011 (Cth,) reg 6(1).*

2.22 The power of the Foreign Minister to make a decision to impose sanctions through amending the Regulations is very broad. Regulation 10 sets out that before making any regulations under subsection 10(1), the Minister for Foreign Affairs must be satisfied that the proposed regulation:

> a) will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or
>
> b) will otherwise deal with matters, things or relationships outside Australia.[27]

2.23 There are no other limitations on the Minister's decision making within the Act or Regulations.

2.24 In order to list a person or entity, the Minister for Foreign Affairs must undertake a two-step process. First the Minister must advise the Governor-General to amend the Regulations to identify the targeted country and the activities for which a person or entity could be designated. The Minister must then make a second instrument to designate a specific person or entity, pursuant to regulation 6(1).[28] The Minister must be satisfied that the person or entity meets a range of criteria set out in Regulation 6.[29]

2.25 For example, in 2014 the Minister for Foreign Affairs advised the Governor-General to make the Autonomous Sanctions Amendment (Ukraine) Regulation 2014 (Cth). The effect of this regulation was to amend regulation 6(1) of the Regulations to list the Ukraine (Item 9, Table 1). A Ukrainian national or entity that 'the Minister is satisfied is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine…'could then be listed as a 'designated person', step one of the two-step process mentioned above.[30]

2.26 The Foreign Minister then made the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2014 (Cth). This legislative instrument listed 113 individuals and 32 entities as designed persons or entities, preventing them from travelling to Australia (Step two of the two-step process).[31]

2.27 Because Ukraine had already been listed as a country in the Regulations in 2014, this allowed for more individuals to be listed at a later date. On January 2020, the Foreign Minister made the Autonomous Sanctions

27 *Autonomous Sanctions Act 2011* (Cth), s(10)(2)(a) and (b).

28 Law Council of Australia, *Submission 99*, p. 11.

29 Autonomous Sanctions Regulations 2011 (Cth), reg 6(1).

30 Autonomous Sanctions Regulations 2011 (Cth), reg 6.

31 Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2014 (Cth), sch 1.

(Designated and Declared Persons – Ukraine) Amendment List 2020 (Cth) which listed a further seven Ukrainian nationals as designated persons.[32]

2.28 The current criteria for imposing sanctions is framed by reference to specific countries; however regulation 6(2) allows for the listing of a person or entity if they are contributing to the proliferation of weapons of mass destruction without the requirement that the conduct in question is related to a particular nation.[33]

2.29 At the time of writing, Australia has established sanctions regimes in relation to Myanmar, the Democratic People's Republic of Korea, the Former Federal Republic of Yugoslavia, Iran, Libya, Syria, Zimbabwe and Russia/Ukraine.[34]

Use of the autonomous sanctions regime as a tool for sanctioning human rights abusers

2.30 There is provision within the current Australian autonomous sanctions regime to sanction individuals on the basis of human rights abuses. Similarly to Magnitsky-style Acts in the United States and Canada, the Act and Regulations allow for a person to be listed for financial sanctions and travel bans for human rights violations.[35]

2.31 The current autonomous sanctions regimes for both Syria and Zimbabwe both contain provisions for sanctioning individuals for human rights violations. Regarding Syria, a person or entity can be sanctioned for, among other things, violence against civilians. The autonomous sanctions regime for Zimbabwe allows individuals or entities to be sanctioned for engaging in activities that undermine democracy, the rule of law and respect for human rights.[36]

2.32 In other country-based autonomous sanctions regimes under the Act, human rights abuses may be a relevant consideration in making listings. The Regulation's sanctions regime against Myanmar allows for the listing of military officers holding certain ranks or positions. This kind of listing, although focused on position rather than the conduct of the individual, allows the Minister for Foreign Affairs to make a decision taking into account the involvement of such a person in human rights violations.[37]

32 Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020, sch 1.

33 Autonomous Sanctions Regulations 2011 (Cth), regs 6(1) and (2).

34 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, p. 3.

35 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, pp. 3-4.

36 Department of Foreign Affairs and Trade (DFAT), *Submission 63*, pp. 3-4.

37 Department of Foreign Affairs and Trade, *Submission 63*, p. 4.

2.33 The current autonomous sanctions regulations also allow for family members of sanctioned people to be listed under the Libya and Myanmar country regimes.[38]

2.34 The Law Council of Australia stated that there may be scope within the current legislative regime to expand the imposition of sanctions on individuals for gross violations of human rights. This is referred to in the Explanatory Memorandum of the Bill which details 'the grave repression of human rights or democratic freedoms of a population by a government'[39] as a situation which could incur sanctions.[40]

2.35 Mr Simon Newnham, First Assistant Secretary, Chief Legal Officer, DFAT, stated that if Australia wished to move towards a sanctions regime with a more express role for sanctioning human rights abusers, it would be possible to work within the existing Act and Regulations. He suggested it would be possible for the Australian Government to implement a thematic regime by amending the existing Act and/or Regulations.[41]

2.36 Mr Newnham further argued that the existing regime has safeguards and processes already built in which would be applicable to any new regime, such as the automatic lapsing of a listing after three years unless it is relisted, permits for exemptions to sanctions, and internal merits review. He argued that building changes into the existing regulatory regime would increase the chances of compliance and would reduce complexity.[42]

2.37 Mr Newnham stated that the decision to impose sanctions on an individual was not a step taken lightly. The range of steps built into the existing legislative regime reflects the seriousness of sanctioning.[43]

2.38 DFAT currently has 13 staff and two directors in some measure involved in administration and policy relating to sanctions, as part of the Department's Legal Division.[44]

38 Ms Jennifer Cavenagh, Director, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 10.

39 Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth), p. 1.

40 Law Council of Australia, *Submission 99*, p. 12.

41 Mr Simon Newnham, First Assistant Secretary, Chief Legal Officer, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 7.

42 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p.7.

43 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 12.

44 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 14.

Non-legislative measures to prevent human rights abuses

2.39 Beyond the two legislative Sanctions frameworks, the Australian Government has other tools at its disposal in order to discourage and respond to human rights abuses overseas.

2.40 Australia is a signatory to the Universal Declaration of Human Rights, and promotes its role as a 'leading proponent of its consistent and comprehensive implementation'.[45] The Department of Foreign Affairs and Trade states that it promotes human rights through constructive bilateral dialogue, where appropriate through development assistance and humanitarian support, and in instances of gross human rights violations, through sanctions.[46]

2.41 DFAT stated that Australia's 'commitment to human rights reflects our national values… and an underlying principle of Australia's engagement with the international community'.[47]

2.42 Mr Newnham suggested that 'sanctions will not always be the most appropriate or effective response to human rights violations and abuses.'[48] Other avenues which may be more effective in certain circumstances could include bilateral representations, dialogue, development programs, or representations at the UN Human Rights Council with Australia serving as a member of the Council in 2018-2020. A range of diplomatic tools could be used in combination or in a sequence. [49]

2.43 Mr Newnham said:

> Sanctions might not be effective. In certain circumstances, they may close off opportunities to positively influence a situation, and they may not be in our interests. There will be work that Australia does with other countries, with different systems and different standards, principles and values. Sometimes we work with systems that don't uphold human rights and freedoms in the same way that we do in Australia, but we do so to meet other

45 The Department of Foreign Affairs and Trade, https://www.dfat.gov.au/international-relations/themes/human-rights/Pages/human-rights, accessed 28 July 2020.

46 The Department of Foreign Affairs and Trade, https://www.dfat.gov.au/international-relations/themes/human-rights/Pages/human-rights, accessed 28 July 2020.

47 The Department of Foreign Affairs and Trade, https://www.dfat.gov.au/international-relations/themes/human-rights/Pages/human-rights, accessed 28 July 2020.

48 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 6.

49 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 6.

objectives—for example, on counterterrorism, transnational crime, economic issues and so forth.[50]

2.44 Ms Janice Le, representing the Human Rights Network of Australia (HRNA), suggested that other legislation such as the *Proceeds of Crime Act 2002* (Cth), the *Migration Act 1958* (Cth), and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) could be used as further tools for promoting Australia's human rights.[51]

2.45 HRNA discussed other tools that the Australian Government uses to advance human rights abroad as well as suggestions for expanding those techniques.

- Annual dialogues between Australia and countries of concern. These dialogues provide an opportunity for the Australian Government to raise issues regarding human rights in a particular country and give recommendations on how to improve in these areas. This practice could be improved by allowing civil society and human rights organisations to take part.[52]
- Providing aid to civil society and human rights organisations within countries of concern. Currently, the Australian Government provides funding to civil society organisations that are registered with the government and have their activities restricted by authorities. This can be very limiting to organisations which are experiencing harsh repression within their own countries. HRNA suggested that these aid programs should be extended to unregistered civil society organisations which meet the same requirements as a similar organisation in Australia.[53]
- Implementing human rights provisions in free trade agreements (FTAs). Australia could use FTA negotiations as ways to leverage our trading partners to commit to improvements in human rights within their own countries. This could be particularly useful in the area of labour rights and preventing child labour.[54]

2.46 Save the Children divided Australia's non-legislative methods for promoting human rights into multilateral and bilateral advocacy.

- Multilateral advocacy includes working through various arms of the United Nations, such as through the Security Council and Human

50 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 6.

51 Ms Janice Le, Representative, Human Rights Network of Australia, *Committee Hansard*, 28 April 2020, p. 2.

52 Human Rights Network of Australia, *Submission 19*, p. 5.

53 Human Rights Network of Australia, *Submission 19*, p. 5.

54 Human Rights Network of Australia, *Submission 19*, p. 5.

Rights Council.[55] It also includes working through regional organisations such as the Association of South East Asian Nations (ASEAN) and the Pacific Islands Form (PIF).[56]

- Bilateral advocacy can involve a number of strategies, such as tying aid policy to the advancement of human rights, human rights dialogues (such as those currently ongoing with Vietnam, Laos and Iran)[57] and including human rights provisions in free trade agreements (a common practice in the European Union).[58]

Flaws in current regime

2.47 Many organisations and individuals gave evidence to the Committee expressing the view that the current autonomous sanctions regime in Australia is not sufficient for targeting, deterring and punishing human rights violations.

2.48 Ms Rawan Arraf, Director of the Australian Centre for International Justice (ACIJ) stated that of the nine countries which are subject to Australian autonomous sanctions regimes in place, only two (Zimbabwe and Syria) mention protecting human rights. While other country regimes may have an implicit purpose of targeting human rights abusers, this raises questions about the appropriateness and effectiveness of the current sanctions regime as a tool for protecting human rights.[59]

2.49 Ms Pauline Wright, President of the Law Council of Australia, made similar comments, stating that although there is room within the existing autonomous sanction framework to target human rights violations, in practice this has rarely occurred and the current Act and Regulations lack express criteria directed at this objective.[60]

2.50 The Law Council of Australia noted that the current sanctions regime lacks a specific requirement for the consideration of human rights issues and 'is oblique on how they are considered in practice.'[61] The Act makes no mention of human rights violations as a basis for imposing sanctions and the Regulations only make minimal mention of it.[62]

55 Save the Children, *Submission 47*, pp. 14-16.

56 Save the Children, *Submission 47*, pp. 16-17.

57 Save the Children, *Submission 47*, p. 18.

58 Save the Children, *Submission 47*, p. 19.

59 Ms Rawan Arraf, Director, Australian Centre for International Justice, *Committee Hansard*, Canberra, 31 March 2020, p. 11.

60 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 7.

61 Law Council of Australia, *Submission 99*, pp. 12-13.

62 Law Council of Australia, *Submission 99*, pp. 12-13.

2.51 As mentioned above, the Regulations only identifying human rights abuses as a factor for the designation of a person or entity twice, in relation to the regimes for Zimbabwe and Syria. While human rights violations may have been a consideration for sanctioning in regards to other country regimes, there is currently no specific guidance or trigger for policy makers to ensure that human rights are considered in making a designation.[63]

2.52 The Law Council's submission noted that it is unclear whether the Act and Regulations could be used to sanction individuals or entities for corruption as neither piece of legislation expressly refers to this.[64]

2.53 The Law Council further stated that the Act and Regulations gave too much power to the Minister in decision making and also placed too much emphasis on the role of the State in human rights abuses, as opposed to more targeted sanctions regimes which focus on sanctioning individuals.[65]

2.54 Ms Elaine Pearson, Australian Director of Human Rights Watch, held a similar view. She gave evidence that the current autonomous sanctions regime lacked specificity in regards to sanctioning individuals for human rights abuses and corruption. Ms Pearson described the true power of Magnitsky-style Acts as their role as deterrents, and argued that an Australian sanctions regime which explicitly referred to human rights abuses and corruption as grounds for sanctioning would be a powerful deterrent.[66]

2.55 Mr Simon Henderson, Head of Policy at Save the Children Australia, argued that the Australian autonomous sanctions regime was not fit-for-purpose and lacked both flexibility and precision.[67] Mr Henderson outlined four main problems with the current Australian sanctions regime:

- The Act and Regulations do not mention international humanitarian law, international human rights law or corruption. Human rights in general are only mentioned briefly in the Explanatory Memorandum of the Autonomous Sanctions Bill 2010 (Cth).[68]
- The Act and Regulations lack a clear criteria and methodology for sanctions listing and de-listing. The current legislative regime has only limited guidance for Departmental staff and the decision maker on

63 Law Council of Australia, *Submission 99*, p. 13.

64 Law Council of Australia, *Submission 99*, p. 14.

65 Law Council of Australia, *Submission 99*, p. 14.

66 Ms Elaine Pearson, Australian Director, Human Rights Watch, *Committee Hansard*, Canberra, 31 March 2020, p. 2.

67 Mr Simon Henderson, Head of Policy, Save the Children Australia, *Committee Hansard*, Canberra, 31 March 2020, pp. 6-7

68 Mr Simon Henderson, Head of Policy, Save the Children Australia, *Committee Hansard*, Canberra, 31 March 2020, p. 7.

criteria to follow. Mr Henderson noted that the explanations for imposition of sanctions are often only a few sentences long and lack information on how assessments were made. Fact sheets provided by DFAT often lack this information as well.[69]

- The current regime lacks specific provisions for civil society engagement in decision making through both the Act and the Regulations.[70]
- The current autonomous sanctions regime lacks parliamentary oversight, such as obligations to report to Parliament or a review process.[71]

2.56 Ms Arraf stated that the current autonomous sanction regime is not based on objective criteria. She gave the example of the financial sanctioning and travel bans placed on high level military officials from Myanmar for human rights abuses against the Rohingya. The UN Independent International Fact Finding Mission on Myanmar recommended the sanctioning of six high ranking military generals. The Australian Government listed four individuals for sanctions, of which only three were people named in the UN's findings. The Australian Government also did not sanction the two highest ranking members of the Tatmadaw, the Burmese Armed Forces, though these two individuals were sanctioned by the United States, Canada and European countries. Ms Arraf said that this reflected the arbitrary and inconsistent nature of the current Australian sanctions regime and showed the need for a sanctions regime that focussed specifically on human rights.[72]

2.57 Professor Rosalind Croucher, President of the Australian Human Rights Commission, expressed the view that the Autonomous Sanctions regime lacks procedural safeguards which may make it inconsistent with the principles of human rights. She said further that having a sanctions regime which targeted individuals for human rights abuses and serious corruption would provide clarity to the existing legislation as well as providing a deterrent to potential human rights abusers.[73]

2.58 Dr Elizabeth Biok, Secretary General of the International Commission of Jurists Australia (ICJA), held the view that the current Australian regime

69 Mr Simon Henderson, Save the Children Australia, *Committee Hansard*, Canberra, 31 March 2020, p. 7.

70 Mr Simon Henderson, Save the Children Australia, *Committee Hansard*, Canberra, 31 March 2020, p. 7.

71 Mr Simon Henderson, Save the Children Australia, *Committee Hansard*, Canberra, 31 March 2020, p. 7.

72 Ms Rawan Arraf, Australian Centre for International Justice, *Committee Hansard*, Canberra, 31 March 2020, pp. 11-12.

73 Prof Rosalind Croucher, President, Australian Human Rights Commission (AHRC), *Committee Hansard*, Canberra, 17 June 2020, p. 1.

does not reflect the reality of human rights abuses occurring currently, that the perpetrators of these abuses often act with state sanction and avoid legal consequences within their own countries. The view of the ICJA is that the definition of autonomous sanctions imposed within Section 4 of the Act (a sanction intended to influence a foreign government member or entity in accordance with Australian Government policy[74]) is too imprecise and uncertain.[75]

2.59 As evidence for this, Dr Biok gave the example of the movements of Lieutenant General Kiki Syahnakri, a retired Indonesian military official. Despite being named as one of the alleged organisers of militia violence in East Timor in 1999, Lt. Gen. Syahnakri has been able to enter Australia three times, on the last occasion in 2014, after the introduction of the Act.[76]

2.60 Save the Children's submission stated there were three omissions of the current legislative regime which were concerning to them. The current regime makes only minimal mention of human rights law (as mentioned in the Explanatory Memorandum to the Bill – see discussion above), and makes no mention of international humanitarian law or of corruption.[77]

2.61 Although there are some country listings under the Regulations which make reference to human rights, there is no requirement to link sanctions to human rights violations. Save the Children stated that even in cases where human rights are mentioned within the Regulations, there is a lack of information on what human rights abuses are being targeted.[78] For example, the Regulation relating to Zimbabwe refers to

> A person or entity that the Minister is satisfied is engaged in, or has engaged in, activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe.[79]

2.62 Save the Children also noted that DFAT's fact sheet for Zimbabwe does not list the human rights abuses or violations which have resulted in the decision to sanction the country.[80]

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74 *Autonomous Sanctions Act 2011* (Cth), s 4.

75 Dr Elizabeth Biok, Secretary General, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 1.

76 Dr Elizabeth Biok, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 2. Further information about the movements of Lt. Gen. Syahnakri to and from Australia was described by Mr Patrick Walsh, who raised questions about the screening practices, promotion of screening practices, and level of information available to immigration officials, see: Mr Patrick Walsh, *Submission 132*, p. 3.

77 Save the Children, *Submission 47*, p. 9.

78 Save the Children, *Submission 47*, pp. 8-9.

79 Autonomous Sanctions Regulation 2011 (Cth), reg 6, item 8.

80 Save the Children, *Submission 47*, p. 10.

2.63 Save the Children was also concerned by the lack of reference to corruption in the current sanctions regime, especially considering the prevalence of corruption in South East Asia and the Pacific. Save the Children has offices in the Solomon Islands and has identified corruption as a major obstacle to the Australian Government's aid and development aims in the region. A targeted sanctions regime that allowed for individuals to be sanctioned for corruption would complement Australia's aims in the Pacific region, especially around good governance.[81]

2.64 Save the Children also argued that the Act and Regulations provide limited assistance to decision makers or to those engaged in implementing the sanctions. Regulation 6 lists the entities or individuals which may be sanctioned by country but provides little detail on the reason for a designation. Clear criteria and a methodology for listing and de-listing sanctions would ensure transparency and accountability for Government.[82]

2.65 Save the Children also stated that the current sanctions regime is used relatively infrequently compared to other regimes in countries like the United States. Australia has not sanctioned any individuals from Cambodia despite its high levels of corruption, or any of the individuals from Saudi Arabia implicated in the murder of Jamal Khashoggi, despite condemning the murder at the Human Rights Council.[83]

2.66 Save the Children further argued there is a lack of civil society engagement in the sanctions process. Civil society organisations and diaspora groups have access to valuable evidence documenting human rights abuses and corruption where they are occurring which could be very valuable to Australian decision makers in making a decision to sanction someone.[84] Save the Children noted that, in its experience, decisions to impose autonomous sanctions have involved very limited external input.[85]

2.67 Save the Children was also concerned by the lack of information in the Act and the Regulations about procedural safeguards such as merits review for people or entities subject to sanctions.[86] It was also concerned about the lack of parliamentary oversight, noting there is no specific reporting or review process for the sanctions regime.[87]

81 Save the Children, *Submission 47*, p. 11.
82 Save the Children, *Submission 47*, p. 11.
83 Save the Children, *Submission 47*, p. 12.
84 Save the Children, *Submission 47*, p. 12.
85 Save the Children, *Submission 47*, p. 13.
86 Save the Children, *Submission 47*, p. 13.
87 Save the Children, *Submission 47*, p. 14.

2.68 It was also submitted to the inquiry that Australia diplomacy has not been effective in discouraging human rights abusers in foreign countries.

2.69 Mr Hemara In, President of the Cambodia National Rescue Party of Victoria, gave evidence that soft diplomacy and aid from the international community have had limited effect on the Hun Sen regime's human rights record and the high levels of corruption within Cambodia.[88]

2.70 Professor Irwin Cotler, Chair of the Raoul Wallenberg Centre for Human Rights, stated that regarding China's human rights record, trade considerations have often taken precedence. He went on to say that:

> The same rule of law that is to uphold human rights also upholds principles of international trade and respect for the rule of law. With regard to China, we have allowed this impunity to continue. By indulging it, we [have] become enablers.[89]

Amending existing legislation vs new legislation

2.71 The Department of Foreign Affairs and Trade advised that their preference is to amend the current Act and Regulations in order to introduce a human rights based sanctions regime.[90]

2.72 Mr Newnham of DFAT stated that amendments to the Regulations, in particular Regulation 6, could be used to create a human rights targeted sanctions regime. Amending the Act and Regulations would allow for operational consistency with regards to applications for renewal, granting of permits, as well as providing a list of sanctioned people that would flow from the previous version of the Regulations. Mr Newnham also claimed that a consolidated sanctions regime within one Act and Regulations would be more accessible for the public and would further support compliance.[91]

2.73 In contrast to the position of DFAT, a wide range of other interested organisations and persons strongly held the view that new legislation, focused on targeted sanctions for human rights abuses and serious corruption is required. Many witnesses and submitters agreed that the

88 Mr Hemara In, President, Cambodia National Rescue Party of Victoria, *Committee Hansard*, Canberra 31 March 2020, p. 23.

89 Prof Irwin Cotler, Chair and Founder, Raoul Wallenberg Centre for Human Rights, *Committee Hansard*, Canberra, 15 May 2020, p. 23.

90 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, pp. 6-7.

91 Mr Simon Newnham, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, pp. 6-7.

new legislation would have a powerful symbolic and practical effect to advance respect for human rights internationally.[92]

2.74 Ms Amal Clooney, Deputy-Chair of the High-Level Panel of Legal Experts on Media Freedom, stated that adopting new targeted human rights sanctions legislation 'would allow Australia to be a global human rights leader.'[93] Ms Clooney further observed that the Australian Government would be able to act without the UNSC imposing sanctions and could work with other like-minded nations in order to promote human rights. Ms Clooney said further:

> At a time when authoritarian leaders are becoming more united and innovative in finding ways to abuse human rights, surely governments that are defending human rights should do the same. Yet, so far, only three states, the US, Canada and the UK, have robust global powers to impose targeted sanctions on human rights grounds. I think it [is] time that Australia joined the club.[94]

2.75 The Law Council of Australia's submission also addressed the option of developing separate Magnitsky-style legislation, after identifying shortcomings in the current Autonomous Sanctions Regime:

> While there may be overlap and some confusion due to having three sanctions regimes in place, there may be advantages in that a Magnitsky Act would be more visible than an amended AS regime in expressly filling a gap in the broader international framework of Magnitsky Laws. Australia would be more emphatically joining a growing international movement of countries tackling human rights abuses and serious corruption through explicitly targeted domestic legislation which strengthens its overall legislative framework on these issues.[95]

2.76 Allens, an international law firm, noted that the existing autonomous sanctions regime could accommodate Magnitsky-style sanctions, but stated:

> We consider that the enactment of legislation comparable to the Magnitsky Act could give the Australian Government more strength and capacity to respond to gross human rights violations

92 Mr Vladimir Kara-Murza, Vice-President, Free Russia Foundation, *Committee Hansard*, Canberra, 15 May 2020, p. 1; Rt. Hon. Lord David Neuberger of Abbotsbury, Chair, High Level Panel of Legal Experts on Media Freedom, *Committee Hansard*, Canberra, 15 May 2020, p. 28; Mr Geoffrey Robertson OAM QC, *Committee Hansard*, Canberra 15 May 2020, p. 40.

93 Ms Amal Clooney, Barrister, Doughty Street Chambers; Deputy Chair, High-Level Panel of Legal Experts on Media Freedom, *Committee Hansard*, Canberra, 15 May 2020, p. 11.

94 Ms Amal Clooney, Barrister, Doughty Street Chambers; Deputy Chair, High-Level Panel of Legal Experts on Media Freedom, *Committee Hansard*, Canberra, 15 May 2020, p. 11.

95 Law Council of Australia, *Submission 99*, p. 38.

> abroad. For that reason, we support in principle the proposal to enact such legislation.[96]

Calls for Australia to adopt targeted sanctions

2.77 The Sub-committee received evidence during this inquiry from a wide range of organisations and individuals interested in the discussion on targeted sanctions, and possibility of legislation, using such a mechanism, to protect human rights.

International views

2.78 The inquiry received evidence from a number of jurisdictions around the world outlining their progress in introducing targeted sanctions legislation[97] (further detail in Chapter 3), and the importance to other jurisdictions and international human rights advocacy groups of Australia introducing targeted sanctions legislation.[98]

2.79 The United States Helsinki Commission is an independent commission of the U.S. Government which monitors human rights in accordance with the 1975 Helsinki Accords. It stated in its submission that:

> The United States, Canada, the United Kingdom and now the European Union have already adopted Magnitsky-style legislation. However, the lack of similar sanctions mechanisms in other democratic states reduces the impact of our collective effort. Democratic allies need to close ranks around this new policy for fighting human rights abuses and grand corruption lest we risk becoming refuges for those already unwelcome in countries that have adopted Magnitsky laws … Australia has long been a global leader in human rights advocacy and is the most robust democracy in the region … our voices are stronger when we speak together.[99]

2.80 A number of submitters pointed to the importance of addressing human rights abuse and corruption within the Asia Pacific region[100], and the

96 Allens, *Submission 28*, p. 2.

97 Netherlands Ministry of Foreign Affairs, *Submission 51*; Ministry of Foreign Affairs Lithuania, *Submission 75*; Global Affairs Canada, *Submission 109*, US Senator Cardin, *Submission 119*; Lord Ahmed of Wimbledon, *Submission 120*; US Department of State, *Submission 80*.

98 US Helsinki Commission, *Submission 10*; p.1; Norwegian Helsinki Committee, *Submission 22*, p.2; Sjoerd Sjoerdsma, *Submission 31,* p.1.

99 US Helsinki Commission, *Submission 10*, p. 1.

100 Save the Children Australia, *Submission 47*, p.16; International Commission of Jurists Australia, *Submission 95*, p.5; Presbyterian Church of Victoria, *Submission 27*, p.1; Benjamin Cronshaw, *Submission 48*, p.1.

potential impact that targeted sanctions could have on officials and individuals within the region.[101]

Australian support for targeted sanctions

2.81 The inquiry received evidence from Australian citizens who described their support for targeted sanctions legislation, and for Australia to join the global effort to address human rights abuse and corruption through Magnitsky-style targeted sanctions legislation.[102] Ms Tonya Steven, for example submitted that:

> A Global Magnitsky Act … would also be the most effective way for Australia to protect the 'fair go' we believe in so passionately and to stop hostile forces and foreign powers removing this from us.[103]

2.82 A number of submissions described concerns that if Australia does not align itself with other jurisdictions that have introduced Magnitsky-style legislation, by introducing more rigorous targeted sanctions legislation to address human rights abuse and corruption, it risks becoming a safe haven for corrupt and abusive individuals and their families.[104]

2.83 On this perspective, one submitter (name withheld) stated:

> It is my concern that … Australia would become a safe haven for mass human rights abusers and agents of authoritarian states. As these criminals face sanctions and becoming [sic] increasingly difficult to enter western democracies, they will turn to Australia and settle with their ill-gotten gains if we do not have an appropriate sanction scheme that is comparable to other western democracies.[105]

2.84 Other submitters outlined concerns that Australians could end up inadvertently doing business with human rights abusers. Mrs Carol Baulch described her concerns on this matter:

> I do not wish to do business with, or liaise with individuals or organisations who have benefited in any way through the abuse of human rights. Australians expect that when doing business or consuming products from within Australia, that they are not contributing to human rights abuses or supporting those with a history of committing human rights abuses.[106]

101 Senator Leila M. de Lima, *Submission 151*, p. 2; Name Withheld, *Submission 83*, p.3.

102 Tonya Stevens, *Submission 84*; Name Withheld, *Submission 53*; Benjamin Cronshaw, *Submission 48*.

103 Tonya Stevens, *Submission 84*, p. 1.

104 Wing Tang, *Submission 38*; Glen McNamara, *Submission 8*.

105 Name Withheld, *Submission 45*, p. 1.

106 Mrs Carol Baulch, *Submission 15*, p. 1

2.85 Some submissions highlighted the potential role of a targeted sanctions scheme in maintaining and protecting Australia's multicultural society and ensure that Australians from other countries are safe from threat and fear of reprisals 'to protect the rights of their compatriots resident in Australia, whose relatives at home could be endangered'.[107]

2.86 Evidence received from Mr Jon O'Brien, whose son Jack was killed in the attack on flight MH17 over Ukraine on 17 July 2014, described his support for the introduction of a targeted sanctions regime, and the importance of holding perpetrators to account to the extent possible:

> It may be that those responsible for orchestrating the events that led to the shooting down of MH17 will never be prosecuted. But people should not be able to commit serious crimes and egregiously exploit others with impunity. It is important that we hold people who have committed such crimes to account, as far as that is possible. We believe and trust that Australia has a responsibility not only to uphold human rights and the rule of law in our own country, but to do what we can to promote them within our world.[108]

Representations by diaspora groups

2.87 The inquiry received a large number of submissions from Australians who experienced human rights abuse and corruption in their homeland before migrating to Australia, and also from people who have been subjected to abuse, or threatened while living in Australia. Australians from Kurdistan submitted that:

> Members of the various diaspora communities in Australia are often aware of the appearance here of corrupt leaders and those who have committed human rights violations in their countries of origin, or the family members of such abusers.[109]

2.88 This inquiry received evidence from a large number of individuals and groups, expressing their support for Australia to introduce a targeted sanctions scheme. Many submissions as well as a large amount of correspondence were received from individuals and groups with connections to Hong Kong[110] and China,[111] including with links to Uyghurs in China's Xinjiang province.[112]

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107 Glen McNamara, *Submission 8*, p. 1.

108 Mr Jon O'Brien, *Submission 146*, p. 2.

109 Australians for Kurdistan, *Submission 152*, p. 1.

110 Selected examples include: Hong Kong Watch, *Submission 114;* Fight for Freedom Stand with Hong Kong, *Submission 37*; Mr Keith Chan, *Submission 103*; Kenneth So, *Submission 91*; Livia Leung, *Submission 79;* Name Withheld, *Submission 70.*

2.89 Cambodian diaspora groups reported incidents of corruption and human rights abuse, and active threats from Cambodian officials against Australian citizens, their families in Cambodia and consequences of speaking out against human rights abuses such as banning individuals from returning to their home country.[113]

2.90 Evidence provided to the Sub-committee included claims that corrupt Cambodian officials have laundered money through investments in Australia, or send their children to be educated in Australia. There were also descriptions of Cambodian Australian citizens with connections to the Cambodian embassy in Australia, recruiting people to put pressure on members of Australia's Cambodian community.[114]

2.91 Members of the Cambodian diaspora described threats and distress faced by diaspora living in Australia, arising from the reach of the Cambodian People's Party (CPP) within Australia. One witness described this as:

> …this regime now is penetrating very deeply in the community here because of its money-laundering, because of its power and because of its money… [the CPP] are here. They are dividing the community. They threaten the community. They have threatened the lives of people here in Melbourne, physically.[115]

2.92 Mr Meng Heang Tak described support from the Cambodian diaspora for Australia to join international targeted sanctions efforts, and the risks of not doing so:

> …it's about time that Australia played a role in curbing this regime. Given our geographic location, if we don't have a Magnitsky or we don't have enough measures to curb this interference in Australia, Australia is a very good place for the ruling party, for the elite, to park their assets. In my electorate and in neighbouring electorates, we already know that there are relatives of the elite who park their assets here.[116]

2.93 Mr Hemara In described support for the introduction of targeted sanctions legislation:

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111 Selected examples include: Michelle Li, *Submission 143*; Zhen Yang, *Submission 142*; Association of Chinese Human Rights and Democracy, *Submission 135*; Im Xin Chen, *Submission 136*; Kent Luo, *Submission 137.*

112 Selected examples include: East Turkistan Australian Association, *Submission 88*; Sabit Ruzehaji, *Submission 124*; Avaaz, *Submission 126.*

113 Mr Hong Lim, *Submission 121*, p. 1.

114 Mr Hong Lim, *Submission 121,*p. 2; International Federation for Human Rights, *Submission 127*, p. 2; Cambodian Action Group, *Submission 73*, p. 2.

115 Mr Hong Lim, President, Cambodian Australian Federation, *Committee Hansard*, Canberra, 31 March 2020, p. 15.

116 Mr Meng Heang Tak, private capacity, *Committee Hansard*, Canberra, 31 March 2020, p. 18.

> It will limit the ability to violate human rights and to gather wealth. This will also cause damage to their influence and reputation not only in Cambodia but also internationally. These people are the people in the leadership around Hun Sen. Not only is their wealth and influence used inside Cambodia; their wealth is sent to their children, relatives, wife or husband living overseas. Having a Magnitsky act for individuals will send a clear message that the international community will not tolerate human rights violations.[117]

2.94 According to Mr Hemara In, if Australia were to adopt a Magnitsky-style targeted sanctions regime it would send a message to people around the world. He stated that it would 'send[s] hope to ordinary people that the international community understands their plight and is willing to stand by them and to help them. It is a message of hope.'[118]

2.95 Some evidence was received by the Sub-committee relating to concerns that human rights abusers have gained Australian citizenship[119], and are living with impunity in Australia. Some witnesses described that they are being monitored and threatened by foreign Governments while they live in Australia. The Sub-committee recognises that it is quite possible that many Australians would be unaware of this situation, and the difficulties facing diaspora groups.

Uyghur peoples

2.96 The inquiry received evidence from Uyghur diaspora representatives and individuals, and the Sub-committee noted their clear concerns about speaking publicly on issues of human rights abuse in submissions that were made public, and a number of confidential submissions.

2.97 Witnesses described the experience of being in Australia and receiving threatening contact from Chinese embassy officials as a result of speaking out on human rights issues. Some evidence described situations where family members who are living in China had been threatened as a result of Australian-based Uyghurs speaking out publicly on human rights matters in Australia.[120]

117 Mr Hemara In, President, Cambodia National Rescue Party of Victoria, *Committee Hansard*, Canberra, 31 March 2020, p. 22.

118 Mr Hemara In, President, Cambodia National Rescue Party of Victoria, *Committee Hansard*, Canberra, 31 March 2020, p. 22.

119 Name Withheld, *Submission 70.1*, p. 2; Cambodian Action Group, *Submission 73*, p.2.

120 Mr Alim Osman, President, Uyghur Association of Victoria, *Committee Hansard*, Canberra 30 April 2020, p. 3.

Committee comment

2.98 The Sub-committee is very appreciative of contributions to the inquiry by many individuals from Australia and some from other countries, who made submissions, and provided evidence at public hearings.

2.99 Members of the Sub-committee would particularly like to acknowledge those individuals who reflected upon their personal experiences of human rights violations.

2.100 A number of witnesses requested that their evidence be taken confidentially, citing fear of retribution, either through threats made in Australia, or to family overseas. The Sub-committee wishes to thank all witnesses and submitters who put forward evidence despite their fears of further repercussions.

2.101 It is a matter of serious concern to the Sub-committee that, notwithstanding the passage of new National Security Legislation aimed at countering foreign interference, a number of witnesses appeared reluctant to provide public evidence to this inquiry. Many people instead wished to make confidential submissions, have their names withheld from submissions, or opted to express their views through private correspondence, stating that they feared retaliation and retribution against family members overseas and against themselves in Australia.

2.102 This is an issue of significant concern that highlights the importance of the measures being considered in this report.

Conclusion

2.103 The Sub-committee agrees with many of the concerns raised about the effectiveness and scope of the existing autonomous sanctions regime. The Sub-committee supports the introduction of new, stand-alone Magnitsky-style legislation to allow for targeted sanctions of individuals who have committed human rights abuses.

3

The global Magnitsky landscape

Introduction

3.1 Targeted sanctions regimes have been enacted in a number of jurisdictions around the world.

3.2 This Chapter will first examine the United States targeted sanctions legislation, including the background of Sergei Magnitsky.

3.3 It will then review various Magnitsky-style Acts in other countries, as well as providing a brief overview of methods used by other states or international bodies to sanction human rights abusers.

3.4 This Chapter looks at aspects of these United States, Canadian and United Kingdom Acts, comparing and contrasting the various pieces of legislation.

3.5 These pieces of legislation, from countries with legal systems similar to the Australian legal system, provide examples of how Australia could approach the introduction of targeted sanctions, and how that might contribute to global efforts to combat human rights abuse and corruption.

What are 'Magnitsky' sanctions or targeted sanctions?

3.6 The use of sanctions for diplomatic and other purposes is a well-established aspect of statecraft. It was argued that the traditional focus of sanctions has been on sanctioning states, and until recently there has been

little focus on sanctioning individuals.[1] It was suggested to the inquiry that this been the case with Australia's current sanctions regime.[2]

3.7 Mr Geoffrey Robertson OAM QC observed that although human rights abuses can be listed as designating criteria for sanctioning, under Australia's current regime, there is little scope for sanctioning an individual for corruption.[3]

3.8 'Magnitsky' sanctions, or targeted sanctions, differ from older sanction regimes in that they are expressly created to sanction individuals who are responsible for human right abuses and serious corruption within their own countries.[4] These sanctions take the form of travel bans that restrict a sanctioned person from entering a country, and the freezing or seizure of financial assets held by that person within a sanctioning country.[5]

3.9 The aim of these sanctions is primarily to act as a deterrent – by reducing the opportunity to enjoy 'ill-gotten gains' with impunity. Sanctions limit the ability for human rights abusers or those benefitting from corruption to enjoy the profits or proceeds internationally, by limiting travel and investment in real estate, and access to high quality education and healthcare systems.

> In the age of know your customer, no bank is going to give facilities to a potential customer who's on a Magnitsky list, and social media is going to report it. A Google search means that a Magnitsky listing, naming, blaming and shaming, is going to be feared by wrongdoers, and it may deter them from doing wrong. It may deter them, it's logical to believe, from becoming complicit in human rights abuses.[6]

3.10 The transparency aspects of targeted sanctions may involve publicly identifying a 'watchlist' of individuals being considered for sanctioning, as well as publishing a list of those who have been sanctioned, including the reasons for the sanctions. This combination serves to 'name and shame' and can also alert banks or other institutions that may otherwise do business with or facilitate transactions of sanctioned individuals. As Professor Cotler of the Raoul Wallenberg Centre for Human rights observed:

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1 Name withheld, *Submission 57*, p. 1.

2 Name withheld, *Submission 57*, p. 1.

3 Mr Geoffrey Robertson OAM QC, 'Why Australia needs a Magnitsky law', *Australian Quarterly*, Oct-Dec 2018, p. 24.

4 Law Council of Australia, *Submission 99*, p. 7.

5 Mr Vladimir Kara-Murza, Vice-President, Free Russia Foundation, *Committee Hansard*, Canberra, 15 May 2020, p. 1.

6 Mr Geoffrey Robertson OAM QC, *Committee Hansard,* Canberra, 15 May 2020, p. 40.

> …such legislation operates not only to name and shame the human rights violators abroad, not only to impose travel bans or freeze their assets, not only to prevent such violators sending their children to schools abroad et cetera but it operates so as to exercise serious reputational damage and thereby deter others who might engage in the same kinds of violations … sometimes the very threat of sanctions, even without them being imposed, can achieve their desired effect. This occurred with regard to Mohamed Nasheed, the President of the Maldives. When the UN Working Group on Arbitrary Detention declared his detention illegal and arbitrary, the very threat of sanctions brought about his release and achieved its desired purpose.[7]

The origins of the United States targeted sanctions legislation

3.11 In 1996, American financier William Browder moved to Russia and created an investment fund called Hermitage Capital. This fund grew to become the largest investment fund in Russia.[8]

3.12 In the case of his fund operations, Mr Browder uncovered various acts of corruption relating to previously state owned assets in Russia. Mr Browder engaged in 'naming and shaming' the people involved in this corruption in the international press.[9]

3.13 By late 2005, Mr Browder had been expelled from Russia. Eighteen months after this, Hermitage Capital's offices, and the offices of the law firm representing Hermitage Capital, were raided by Russian police and documents relating to the ownership of various investment holding companies were seized.[10]

3.14 Soon after this, Mr Browder discovered that ownership of these investment holding companies had been re-registered into the names of

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7 Professor Irwin Cotler, Chair and Founder, Raoul Wallenberg Centre for Human Rights, *Committee Hansard*, Canberra, 15 May 2020, p. 20.

8 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 30.

9 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 30.

10 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, pp. 30-31.

new owners, completely unknown to Mr Browder. In order to investigate this, Mr Browder hired a Russian lawyer named Sergei Magnitsky.[11]

3.15 In the course of his investigation Mr Magnitsky uncovered large scale tax fraud on the part of the new owners of these companies. Mr Magnitsky filed official complaints and made sworn statements to various Russian regulatory and law enforcement organisations.[12]

3.16 In July 2008, Mr Magnitsky's allegations became public in Russia, 'causing…serious embarrassment and annoyance to the Russian government.'[13] In November 2009 Mr Magnitsky was arrested and charged with conspiracy to commit tax evasion. He was remanded in custody and all applications for bail were denied.[14]

3.17 Mr Browder told the Sub-committee of Mr Magnitsky's treatment in Butyrka prison:

> When he was in pre-trial detention, he was then tortured to get him to withdraw his testimony. They put him in cells with 14 inmates and eight beds and left the lights on 24 hours a day to impose sleep deprivation. They put him in cells with no windows and no heating in December in Moscow, so he nearly froze to death. They put him in cells with no toilet; just a hole in the floor so the sewage would bubble up. They moved him from cell to cell to cell in the middle of the night. The purpose of this was to get him to withdraw his testimony against the corrupt police officers.[15]

3.18 Mr Magnitsky's health deteriorated in prison and he developed pancreatitis. On 16 November 2009, Sergei Magnitsky was moved from Butyrka prison to another facility with a medical wing where he died.[16]

3.19 After this, Mr Browder lobbied the United States government to sanction the individuals who were responsible for Mr Magnitsky's death. This campaign eventually lead to the passage of the first 'Magnitsky Act' in 2012.[17]

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11 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 31.

12 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 31.

13 Australian Lawyers for Human Rights, *Submission 33*, p. 12.

14 Australian Lawyers for Human Rights, *Submission 33*, p. 13.

15 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 31.

16 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, pp. 31-32.

17 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 32.

Targeted sanctions legislation globally

The United States of America, Canada and the United Kingdom

3.20 In 2012, the United States Senate passed the *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012* (USA). This Act focused on sanctioning the people responsible for the detention and death of Sergei Magnitsky as well as other Russian officials involved in human rights violations against people seeking to expose illegal behaviour and promote human rights within the country.[18]

3.21 In 2016 this previous Act was superseded by the *Global Magnitsky Human Rights Accountability Act 2016* (USA) (the Global Magnitsky Act).

3.22 This saw the legislation expanded on the previous Act to allow targeted sanctions against any foreign person responsible for human rights violations and corruption.[19]

3.23 The scope of the US Targeted Sanctions regime was further expanded by Executive Order 13818 (*Executive Order Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption*), signed into effect by President Donald J Trump on 21 December 2017.

3.24 The Executive Order created a broader victim class, expanding the application of the Act to include 'serious human rights abuses' (rather than the previous scope of 'gross human rights abuses' and allowed the sanctioning of secondary participants in human rights abuses.[20]

3.25 Since the implementation of the original Magnitsky Act in 2012, 275 designations have been made: 114 against entities and 116 against individuals.[21]

3.26 In 2017, the Canadian Government introduced similar legislation to the United State's Global Magnitsky Act, the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) 2017*.[22] The Canadian Government has sanctioned 70 individuals under this Act.[23] It has sanctioned individuals for the extra-judicial murder of journalist Jamal Khashoggi, Myanmar military personnel for their roles in the Rohingya

18 Australian Human Rights Commission, *Submission 21*, p. 9.

19 Australian Human Rights Commission, *Submission 21*, p. 9.

20 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, pp. 23-24.

21 Australian Human Rights Commission, *Submission 21*, p. 10.

22 SC 2017, c 21.

23 Australian Human Rights Commission, *Submission 21*, p. 11.

humanitarian crisis, and Venezuelan government officials for the persecution of political dissidents.[24]

3.27 In the United Kingdom there are two laws which provide a legislative framework for sanctioning individuals for human rights abuses: the *Sanctions and Anti-Money Laundering Act 2018* (UK), and amendments to the *Proceeds of Crime Act 2002* (UK).[25]

3.28 In July 2020, the *Sanctions and Anti-Money Laundering Act* was used to impose targeted sanctions against:

- 25 Russian individuals for their involvement in the death of Sergei Magnitsky;
- 20 Saudi individuals for their involvement in the death of journalist Jamal Khashoggi;
- Two Myanmar generals for their involvement in the persecution of the Rohingya people and other ethnic minorities within that state; and
- Two organisations involved in torture, murder and forced labour in North Korean prison camps.[26]

The British Overseas Territory of Gibraltar and the British Crown Dependency of Jersey, both centres of financial activity, have also adopted Magnitsky-style targeted sanction regimes.[27]

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24 Islamic Council of Victoria (ICV), *Submission 105*, p. 7.

25 Australian Human Rights Commission, *Submission 21*, p. 11.

26 Foreign and Commonwealth Office, 'The UK sanctions list' <https://www.gov.uk/government/publications/the-uk-sanctions-list> viewed 25 September 2020.

27 Gibraltar's Sanctions Act 2019 provides for the automatic recognition and enforcement of United Nations and United Kingdom sanctions imposed through the UK's Sanctions and Anti-Money Laundering Act 2018. Gibraltar's Sanctions Act 2019 provides for separate Gibraltar sanctions designations to be made by the relevant competent authorities in Gibraltar if necessary. There are no such designations at present. See <https://www.gfiu.gov.gi/sanctions> viewed 26 September 2020 and <https://www.gfiu.gov.gi/uploads/UcjV5_Financial_Sanctions_Guidance_Notes_v1.0.pdf> viewed 27 September 2020. Jersey's Sanctions and Asset-Freezing (Jersey) Law 2019 and Sanctions and Asset-Freezing (UK Human Rights Designations) (Jersey) Order 2020 similarly implements United Nations and United Kingdom sanctions imposed through the UK's Sanctions and Anti-Money Laundering Act 2018. See <https://www.gov.je/Government/Departments/JerseyWorld/Pages/SanctionsFAQ.aspx> viewed 26 September 2020. Both Gibraltar and Jersey thus automatically implement the United Kingdom's Magnitsky-style targeted sanctions.

Other States

3.29 The Baltic states of Estonia, Lithuania and Latvia have also enacted targeted sanctions regimes inspired by the 'Magnitsky Acts' in 2016, 2017 and 2018 respectively.[28]

3.30 These Acts, although similar to the Acts passed in the United States and Canada, are mostly focused on travel bans against Russian officials involved in the death of Sergei Magnitsky.[29]

3.31 The Republic of Kosovo has also adopted a Magnitsky-style targeted sanctions regime.[30]

Other Sanctions Regimes

The European Union

3.32 The European Union (EU) has the ability to impose sanctions (or 'restrictive measures') based on the decisions of the European Council.[31] These sanctions are typically reflective of UNSC sanctions, but in some cases have gone further.[32] There are currently over 40 EU sanctions measures in place.[33]

3.33 There are no specific criteria that must be met before imposing sanctions however the *Treaty on European Union* does state that the actions of the EU must be in accordance with certain principles:

> …democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[34]

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28 Falun Dafa Association of Australia, *Submission 6*, pp. 13-14.

29 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, pp. 21-22.

30 Progressive Lawyers Group (Hong Kong), *Submission 112*, p. 5.

31 European Commission, 'Restrictive Measures (sanctions)' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/sanctions_en#commission> viewed 24 September 2020.

32 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 35.

33 European Commission, 'Restrictive Measures (sanctions)' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/sanctions_en> viewed 25 September 2020.

34 *Treaty on European Union*, art 21(1).

3.34 EU sanctions can involve asset freezes and travel bans on individuals and entities as well as arms embargoes and other economic measures like restricting trade.[35]

3.35 In 2019 EU foreign ministers 'agreed to launch the preparatory work for a global sanctions regime to address serious human rights violations,'[36] which would act as the EU equivalent of other Magnitsky Acts.[37]

3.36 On 16 September 2020 the President of the European Commission, Ursula von der Leyen said in her State of the Union address that the EU will soon bring forth a 'European Magnitsky Act.'[38]

Other regional bodies

3.37 There are other regional bodies with the power to impose targeted sanctions on countries or individuals which may then be implemented by member states.

3.38 In Africa, the African Union can impose political and economic sanctions against member states that 'fail to comply with the decisions and policies of the Union.'[39] Article Three of the Constitutive Act of the African Union states that one of the objectives of the African Union is to 'promote and protect human and people's rights.'[40] Article 23 of the Constitutive Act empowers African nations to impose sanctions on member states for non-payment of budget or contributions, failure to comply with the African Unions decisions and policies, and for unconstitutional changes of Government. In practice however, it would seem the main focus of African Union sanctions have related to the non-payment of budgetary contributions.[41]

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35 European Commission, 'Restrictive Measures (sanctions)' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/sanctions_en> viewed 25 September 2020.

36 J Barigazzi, 'EU to prepare Magnitsky-style human rights sanctions regime' *Politico*, 10 December 2019, <https://www.politico.eu/article/eu-to-prepare-magnitsky-style-human-rights-sanctions-regime/> viewed 25 September 2020.

37 J Barigazzi, 'EU to prepare Magnitsky-style human rights sanctions regime' *Politico*, 10 December 2019, <https://www.politico.eu/article/eu-to-prepare-magnitsky-style-human-rights-sanctions-regime/> viewed 25 September 2020.

38 European Commission, 'State of the Union Address by President von der Leyen at the European Parliament Plenary,' <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655> viewed 25 September 2020.

39 *Constitutive Act of the African Union*, art 23(2).

40 *Constitutive Act of the African Union*, art 3(f).

41 The Sanctioning Success of the African Union—Part Success, Part Failure Dr Konstantinos D. Magliveras, Department of Mediterranean Studies, University of the Aegean, Greece;

3.39 However, the African Union has also imposed sanctions against individuals. Such sanctions have included visa denials, travel bans and asset freezes.[42] In 2015, the African Union's Peace and Security Council imposed sanctions on 'Burundian stakeholders whose actions and statements contributed to the perpetuation of violence', making note of an increase in human rights abuses.[43]

3.40 The Economic Community of West African States (ECOWAS), a 15 member, regional grouping of West African nations,[44] also permits a member state to be sanctioned if it 'fails to fulfil its obligations to the Community.'[45] Sanctions include suspension of financial loans or aid, suspension of ECOWAS projects within the country and suspension of the country's participation in ECOWAS activities, including voting rights.[46]

3.41 ECOWAS has since enacted other measures allowing it to sanction individuals and entities. In 2012 the *Supplementary Act A/SA 13/02/12 of 17 February 2012 on the imposition of sanctions against Member States that do not honour their obligations towards ECOWAS* was introduced. This Act was used in 2018 to impose travel bans and asset freezes on 20 individuals involved in a political crisis in Guinea-Bissau.[47]

3.42 Regional bodies in the Americas, such as the Organization of American States and the Inter-American Commission, do not have a sanctions regime.[48] Similarly there is no regional human rights focussed sanctions regime for the various Asian regional organisations.[49]

3.43 In 2011, the Arab League imposed financial sanctions on the Syrian Government as well as travel bans on senior Syrian officials travelling to

https://au.int/en/pressreleases/20181127/african-union-strengthens-its-sanction-regime-non-payment-dues; https://www.voanews.com/africa/south-sudan-focus/african-union-sanctions-south-sudan-nonpayment.

42 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 38.

43 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 38.

44 For a full list of the member nations of ECOWAS see <https://www.ecowas.int/member-states>.

45 *Revised Treaty of the Economic Community of West African States*, art 77(1).

46 *Revised Treaty of the Economic Community of West African States*, art 77(2).

47 Economic Community of West African States (ECOWAS), 'ECOWAS imposes individual sanctions for non-implantation of the Conakry agreement in Guinea-Bissau' *Media Release*, 7 February 2018, available at <https://www.ecowas.int/ecowas-imposes-individual-sanctions-for-non-implementation-of-the-conakry-agreement-in-guinea-bissau/> viewed 25 September 2020.

48 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 39.

49 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 39.

other Arab League nations for the repression of anti-government protests.[50]

3.44 The Commonwealth of Nations has not asked its members to impose economic sanctions since those imposed on apartheid South Africa and Rhodesia.[51]

Comparative analysis of Magnitsky-style sanctions legislation

Triggers/Activation

3.45 The US, UK and Canadian Targeted Sanctions legislation have differing methods for nominating an individual or entity to be sanctioned.

3.46 Under the US Global Magnitsky Act, the President should consider information provided by the following groups when deciding whether an individual should be nominated for sanctions:

- The Chairperson and ranking member of 'appropriate Congressional Committees';[52]
- Other countries; and
- Non-government organisations that monitor human rights.[53]

3.47 The Canadian Act does not have a role for the non-government organisations such as diaspora groups or a non-executive branch of government to trigger a nomination. However, interested parties can submit evidence and reports to the Parliamentary All-Party Human Rights Caucus which does provide an informal method for supporting sanctions listings.[54] The *Canadian Justice for Victims of Corrupt Foreign Officials Act* has no requirement that the government respond to any evidence submitted to this Caucus. It is unique in this regard as both the US and UK Acts both

50 'Syria Unrest: Arab League adopts sanctions in Cairo' BBC News, 27 November 2011, <https://www.bbc.com/news/world-middle-east-15901360> viewed 25 September 2020.

51 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 39.

52 The Committee on Banking, Housing and Urban Affairs and the Committee on Foreign Relations of the Senate and the Committee on Financial Services and the Committee on Foreign Affairs of the House of Representatives – *Global Magnitsky Human Rights Accountability Act* S.284 USC §§ 2(1) (A) and (B).

53 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(c).

54 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 34.

have requirements for the government to respond publicly to submitted proposals for sanctioning.[55]

3.48 The UK Sanctions and Anti-Money Laundering Act is similar to the Canadian Act in that it also does not have a formal mechanism through which interested parties can submit information to the executive decision maker in order to trigger consideration of a sanctioning decision.[56] However, the UK Act does impose several reporting requirements on the government (discussed in more detail below).

3.49 More specifically, the UK Act requires the decision maker to make an annual report to Parliament which would detail, among other things, a response to any recommendations made by a Parliamentary Committee relating to sanctioning an individual.[57] This provision (section 32(1)(c)) indicates that there may be a role for Parliamentary Committees to recommend to Government that an individual be sanctioned and that stakeholder groups and other NGOs could make submissions to Committees recommending sanctions against an individual.[58]

Decision maker and factors in the decision

3.50 All three Acts place decision making for sanctions in the hands of the Executive government, though there are differences. See below:

	The United States	**Canada**	**United Kingdom**
Decision Maker	The President.[59] This is expanded to the Secretary of the Treasury acting in consultation with the Secretary of State and the Attorney	The Governor in Council[61] In practice this is done on the recommendations of the Minister for Foreign Affairs.[62]	'An Appropriate Minister'[63] This is defined to be Secretary of State or the Minister of the Treasury.[64]

55 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 34.

56 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 30.

57 *Sanctions and Anti-Money Laundering Act 2018* (UK) s32(1)(c).

58 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 31.

59 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(a).

61 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s4(1).

62 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 32.

63 *Sanctions and Anti-Money Laundering Act 2018* (UK) s1.

64 *Sanctions and Anti-Money Laundering Act 2018* (UK) s1 (9).

	General in Executive Order 13818.[60]

3.51 In the United Kingdom, in practice decisions around listing are made by the Foreign Office and implementation of those decisions is handled by the Department of Treasury and other government departments.[65]

3.52 The US, UK and Canadian Acts are all silent on what information the decision maker must take into account when making a decision to sanction an individual.

3.53 It should also be noted that the US, UK and Canadian Acts do not contain provisions for a sanctioned person to challenge a potential designation.

Sanctions – People, Conduct and Consequences

3.54 The three Acts have similar provisions for sanctionable conduct, who can be sanctioned and what form sanctions take, with some key differences. See below:

	The United States	**Canada**	**The United Kingdom**
Sanctionable conduct	• Serious human rights abuses[66] • Corruption[67]	• Extrajudicial killings, torture or other gross violations of internationally recognised human rights[68] • Acts of significant corruption[69]	• Gross human rights abuses[70] (see below for definition).
Sanctionable people	• 'Foreign persons'[71] • 'Any person' in the case of secondary participants[72]	• Foreign nationals[73]	• 'Any designated person'[74]

60 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii).

65 UK Parliament, Commons Select Committee on Foreign Affairs, 'Fragmented and incoherent: the UK's sanctions policy', *Committee Report*, 12 June 2019, p. 11.

66 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii)(A).

67 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii)(B)(1).

68 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s2(a).

69 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s2(c).

70 *Sanctions and Anti-Money Laundering Act 2018* (UK) s1(7).

71 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii).

72 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(iii).

73 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s2(a).

74 *Sanctions and Anti-Money Laundering Act 2018* (UK) s9.

Sanctions	• Denial of visas to enter the US and withdrawal of existing visas[75] • Blocking of all transactions in property and interests in property within the US[76]	• Denial of visas to enter Canada[77] • The seizure, sequestration, or freezing of property[78]	• Immigration sanctions (denial of visas and entry)[79] • Financial sanctions (freezing of funds and prevention of financial transactions)[80] • Trade, aircraft and shipping sanctions[81]

3.55 The Canadian, UK and US Acts all specifically state that human rights abuses are sanctionable conduct. The Canadian and UK Acts identify 'gross' human rights abuses as cause for sanctioning.

3.56 Under the US's 2016 Magnitsky Act, 'gross human rights abuses' and 'serious corruption' were grounds for sanctioning.[82] This was expanded in the 2017 Executive Order to 'serious human rights abuses' and 'corruption'.[83] The term 'serious human rights abuses' is not defined and is considered to be broader than 'gross human rights abuses'. Similarly the use of the term 'corruption' rather than 'serious corruption' in the Executive Order has broadened the sanctioning power of the US.[84]

3.57 The UK Act takes its definition of 'gross human rights abuses' from s241A of the *Proceeds of Crime Act 2002* (UK). Broadly, this Act defines 'gross human rights abuses' as torture or the intentional infliction of severe pain or suffering onto a person who has sought to expose illegal activity (i.e. corruption) of a government official or who is trying to promote human rights and freedoms.[85] See Appendix A for the full text of this section.

3.58 The UK Act does not make specific mention of corruption as being a cause for sanctioning.

75 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(b)(1)(A) and (B).

76 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(b)(2)(A).

77 *Immigration and Refugee Protection Act SC 2001* c 27 s35(1)(e).

78 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s4(1)(b).

79 *Sanctions and Anti-Money Laundering Act 2018* (UK) s4; *Immigration Act 1971* (UK) s8B(4)(b).

80 *Sanctions and Anti-Money Laundering Act 2018* (UK) s3.

81 *Sanctions and Anti-Money Laundering Act 2018* (UK) s5-7.

82 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(a)(1) and (3).

83 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii)(A) and (B)(1).

84 International Bar Association Human Rights Institute, *Report on the Use of Targeted Sanctions to Protect Journalists*, 2020, p. 23.

85 *Proceeds of Crime Act 2002* (UK) s241A.

3.59 Both the US and Canadian Acts specify that only foreign nationals can be sanctioned under these Acts.[86] Executive Order 13818 does expand on this to allow sanctioning of 'any person' who has materially assisted or provided support for human rights abuses (secondary participants in human rights abuses).[87]

3.60 The UK Act does not limit itself to only foreign citizens, and a 'designated person' is defined to include corporate entities and other organisations.[88]

3.61 None of the three Acts have explicit provision for sanctioning family members of human rights abusers.

3.62 The US and Canadian Acts have very similar sanctioning provisions. Both deny visas to sanctioned people wishing to enter the respective country and both allow for the blocking of all property and property interests of a sanctioned person.

3.63 The UK's sanctioning powers go further, expanding sanctions beyond immigration and financial sanctions to sanctions of trade, aircraft and shipping sanctions. Governments may have other executive powers available to them under other legislation.

After the fact – review powers, de-listing, and transparency

3.64 All three Acts have differences about the post-decision processes.

	The United States	Canada	The United Kingdom
Post decision review	• Act is silent	• The relevant Parliamentary Committees may review sanctions and make recommendations to the Government about sanctioned people[89]	• A sanctioned person has the right to review by the Minister[90] • A sanctioned person has the right to judicial review by the High Court[91]
De-listing	• President has power to terminate sanctions if certain conditions are	• A sanctioned person has the right to apply to the relevant	• A sanctioned person has the right to review by the Minister.[94]

86 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(ii); *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s2(a).

87 Exec. Order No. 13818, 82 CFR 60839 (2017) § 1(a)(iii).

88 *Sanctions and Anti-Money Laundering Act 2018* (UK) s9(5).

89 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s16(3).

90 *Sanctions and Anti-Money Laundering Act 2018* (UK) s23.

91 *Sanctions and Anti-Money Laundering Act 2018* (UK) s38(2).

94 *Sanctions and Anti-Money Laundering Act 2018* (UK) s23.

	met[92] (see 3.68 below)		Minister for delisting[93]	• A sanctioned person has the right to judicial review by the High Court[95]
Reporting and transparency	• President must report annually to the relevant Committees[96] (see 3.69 below)	• Within five years after the Act comes into force, the relevant Committee must review the Act and report to Parliament[97] • Committees are also able to review sanctioning decisions and report to the Government (see above)[98]		• The Minister must perform a periodic review of all sanctioning decisions every three years[99] • The Secretary of State must provide Parliament annual reports with a list of all sanctioned people, any changes to existing sanctions and the human rights purpose of the sanctioning. The Secretary must also specify which sanctions have resulted from Parliamentary Committee recommendations[100]

3.65 Under the US Legislation, the President has the power to terminate sanctions which have been imposed on an individual if the sanctioned individual can show:

- There is credible information the individual did not engage in the conduct which lead to their sanctioning;[101]
- The individual has been appropriately prosecuted for the activity which led to their sanctioning;[102] or

92 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(h).

93 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s8(1).

95 *Sanctions and Anti-Money Laundering Act 2018* (UK) s38(2).

96 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 4.

97 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s16(1-2).

98 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s16(3).

99 *Sanctions and Anti-Money Laundering Act 2018* (UK) s24.

100 *Sanctions and Anti-Money Laundering Act 2018* (UK) s32(1).

101 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(h)(1).

102 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(h)(2).

- The individual has shown 'a significant change in behaviour, has paid an appropriate consequence…and has credibly committed to not engage in…' the activity which lead to their sanctioning.[103]

The President must write to the relevant Congressional Committees to inform them of this de-listing at least 15 days before the termination of the sanctions.[104]

3.66 The US Act also places reporting obligations on the President. The President is required to annually report to the appropriate Congressional Committees with information including a list of all people sanctioned in the previous year, a description of the types of sanctions imposed, any de-listing decisions made and the reasons for those de-listings.[105]

3.67 This annual report also requires that the President describe the efforts made to encourage other governments to impose similar sanctions.[106] This is a unique feature of the US Act, and makes it the only Act of the three countries to have an advocacy role within it.

3.68 The Canadian Act is the only Act which specifically requires a review of the legislation. Under Section 16, the Canadian Act must be reviewed within five years of coming into force by Senate and House Committees.[107] These Committees must submit a report to the Parliament within one year of the review being undertaken.[108]

3.69 In general the post-decision processes for all three Acts are fairly limited. This seems to be a reflection of the relative newness of these Acts. The UK has the most comprehensive review powers of the three Acts, perhaps reflecting that this is a newer Act which has benefited from the analysis of implementation to date of other jurisdictions' Magnitsky Acts.

Referencing Sergei Magnitsky

3.70 The Sub-committee notes that two of the three Acts, the US and Canadian Acts, reference Sergei Magnitsky's name in their titles. Mr William Browder gave evidence to the Committee of the importance of keeping Sergei Magnitsky's name attached to targeted sanctions legislation:

> At this point in the world of human rights 'Magnitsky' has become a verb. When you look for information you 'Google' something. If

103 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(h)(3).
104 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 3(h).
105 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 4(a)(1)-(5).
106 *Global Magnitsky Human Rights Accountability Act* S.284 USC § 4(a)(6).
107 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s16 (1).
108 *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017, c 21, s16 (2)-(3).

> you want to sanction somebody, you Magnitsky them. Because nine other countries have Magnitsky's name in their legislation, not having it would effectively be a political gift to Vladimir Putin, who desperately doesn't want the name on anyone's legislation, because it's a reminder of where this thing originated from. To not have his name on it would just, basically, be a political gift to Vladimir Putin, and we can't allow that to happen.[109]

109 Mr William (Bill) Browder, Head, Global Magnitsky Justice Campaign, *Committee Hansard*, Canberra, 15 May 2020, p. 37.

4

Concerns over targeted sanctions legislation

4.1 The inquiry received a large amount of evidence in support of a new Australian targeted sanctions regime; however witnesses and submitters also raised concerns about potential legislation and the implementation of sanctions. The first part of this chapter sets out those concerns and risks. The second part describes the safeguards and protections that may reduce these concerns. Some submitters opposed the introduction of targeted sanctions on principle, and the final section of the chapter discusses their views.

Concerns

Inconsistent application of sanctions

4.2 Some witnesses highlighted concerns about the potential for targeted sanctions to be politicised, and applied inconsistently. Submitters were concerned that decisions about whether or not to apply sanctions may be made primarily on the basis of Australia's trade or diplomatic relationships.

4.3 It was suggested that it is unlikely Australia would apply sanctions against officials from allied nations, or where trade agreements or other diplomatic efforts could be compromised. In her testimony to the Sub-committee, Ms Amal Clooney, Deputy Chair, Panel of High Level Experts on Media Freedom argued that:

> … one of the main problems in how sanctions have worked, and certainly one of the main criticisms that you always hear, is that they're selective—states will have this legislation, but they'll only use it against soft targets, or they'll only use it against states that

> aren't friends or who they don't need to trade with et cetera. But, on the other hand, it's understandable that a foreign minister can't come into office and, on the first day, sanction their counterparts in 100-plus countries where human rights violations might be occurring on some level.[1]

4.4 Mr Tony Kevin, a former Australian diplomat, described his concerns that 'no Australian Foreign Minister would responsibly impose sanctions on human rights grounds against our allies in the US and UK' despite arguable human rights abuses in such cases as Julian Assange's treatment, and US violations of asylum-seekers' and undocumented immigrants' human rights.

4.5 Mr Kevin expanded on the implications of this, stating that 'selective application of autonomous sanctions on human rights grounds gives rise to huge anomalies and inconsistencies'. He cited examples where the Syrian and Iranian governments being sanctioned on human rights grounds, but not the Government of Saudi Arabia, a US ally; suggesting that the inconsistencies could 'expose Australian Governments to accusations of hypocrisy and double standards'.[2]

4.6 The Australian Centre for International Justice highlighted the importance of an independent oversight body in implementing targeted sanctions legislation for a variety of reasons including 'to help depoliticise' the process.[3]

4.7 The issues of inconsistent application of sanctions, perceptions of political bias and politically influenced decision-making were also raised a as problem with the current Autonomous Sanctions scheme, including why sanctions have been applied to countries such as Zimbabwe and Myanmar, but not to other countries with comparable records of human rights abuse and alleged corruption.[4]

Risk of sanctions undermining other diplomatic engagement

4.8 Australia's approach to foreign affairs includes an extensive commitment to diplomacy, through in-country presence, participation in international fora, and relationship building. The Sub-committee heard that the application of sanctions, including targeted sanctions, could affect efforts to manage international relations through diplomacy.

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1 Ms Amal Clooney, Deputy Chair, Panel of High Level Experts on Media Freedom, *Committee Hansard*, Canberra, 15 May 2020, p. 13.

2 Mr Tony Kevin, *Submission 145*, pp. 3-4.

3 Australian Centre for International Justice, *Submission 87*, p. 17.

4 Law Council of Australia, *Submission 99*, p. 13; Save the Children, *Submission 47*, p. 12; Australian Centre for International Justice, *Submission 87*, p. 10.

4.9 Mr Kevin testified that in some cases diplomacy has been negatively impacted by sanctions. He argued that 'the operation of Western sanctions against Russia and individually named Russians has corrupted and soured the conduct of normal East-West diplomacy since 2007'. He further argued that 'Sanctions outside the UNSC threaten international peace and security, by creating conditions conducive to inflamed relations and risk of outbreaks of war.'[5]

4.10 The Sub-committee notes that Mr Kevin refers to autonomous sanctions, rather than Magnitsky-style targeted sanctions where an individual (as distinct from a nation or sector) is sanctioned. However, other submissions argued that diplomatic approaches had failed to protect human rights.

4.11 In the case of Cambodia, for example, it was argued that 'Australia's strategy … has been criticised by some civil society organisations for its "quiet diplomacy" approach, especially in the lack of integration between public and private advocacy.'[6]

Targeted sanctions and proceeds of crime

4.12 Sanctions that involve freezing or confiscating assets give rise to practical concerns such as enforcement of bans on managing the assets of sanctioned persons, the length of time sanctions are applicable for, and the process for releasing assets in instances where sanctions are subsequently lifted.

4.13 The Law Council of Australia's submission addressed the potential connections between the *Proceeds of Crime Act 2002* (Cth) (POC Act) and possible Magnitsky-style legislation. The Law Council submitted that a variety of human rights violations may fall within the scope of offences of concern to the POC Act:

> The POC Act provides for forfeiture of property and interim orders for freezing and restraining property pending final orders.
>
> The POC Act provides for both conviction based and, in certain circumstances, non- conviction based confiscation of assets (orders for the forfeiture of assets), including where the court is satisfied that the property is proceeds of a relevant offence. With non-conviction based confiscation, property must first be subject to a restraining order for at least six months before the forfeiture order can be made and a finding of the court need not be based on a finding that a particular person committed any offence, or as to the commission of a particular offence.

5 Mr Tony Kevin, *Submission 145*, p. 3.

6 Save the Children Australia, *Submission 47*, p. 16.

> For the above purposes, relevant offences include: *foreign indictable offences – conduct that constituted an offence against a law of a foreign country and if the conduct had occurred in Australia at the time of assessment, the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment.*
>
> Relevantly, this includes, for example:
>
> • offences against humanity and related offences under Chapter 8 of the Criminal Code Act 1995 (Cth) (genocide, crimes against humanity, war crimes);
>
> • trafficking in persons offences under Division 271 of the Criminal Code Act 1995 (Cth); and
>
> • Serious offences against the person such of murder and rape under state and territory criminal laws.[7]

4.14 It appears that these existing mechanisms could be used to freeze or confiscate assets within Australia. However they have not been used in relation to human rights abusers or those who have engaged in serious corruption.

4.15 The Law Council of Australia noted a lack of information on specific instances in which the POC Act has been used to freeze, restrain or confiscate assets of individuals who have engaged in gross violations of human rights or serious corruption outside Australia.[8] Further, the Department of Foreign Affairs and Trade advised the Sub-committee that it has no record of any asset of a person or entity designated under Australia's autonomous sanctions regime being frozen in Australia.[9]

Effectiveness

4.16 The Sub-committee recognises that limited evidence was received that demonstrates the effectiveness of targeted sanctions regimes. A number of human rights advocates and legal experts suggested that this is because targeted sanctions regimes have not been in place for a long period, and, until recently, there were only a small number of jurisdictions that had enacted targeted sanctions legislation.

4.17 Some evidence described the difficulty in demonstrating the success of targeted sanctions, and referred to anecdotal indications of their effectiveness. It was noted that globally the implementation of targeted sanctions is in the early stages, with legislation being new in many jurisdictions.

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7 Law Council of Australia, *Submission 99*, pp 18-19.

8 Law Council of Australia, *Submission 99*, p. 19.

9 Department of Foreign Affairs and Trade, *Submission 63.2 Answers to Questions on Notice*, p. 5.

4.18 Ms Clooney addressed this issue, citing the case of President Nasheed of the Maldives. The President was imprisoned on bogus grounds, but the prospect of sanctions being imposed on individuals responsible for his imprisonment led to his release. Ms Clooney described positive outcomes including President Nasheed's subsequent election and subsequent enactment of legal reforms to promote human rights within the Maldives, as well as re-engagement with the Commonwealth and United Nations. Ms Clooney also noted that 'these sanctions regimes are quite new and [that] deterrence specifically … is particularly difficult to prove'.[10]

4.19 The Sentry, an organisation dedicated to investigating, reporting on and advocating against corruption that is connected to African war criminals, emphasised the importance of specific goals to ensuring effectiveness of targeted sanctions:

> …when used against carefully selected targets to achieve specific goals, whilst minimising potentially negative impacts on innocent parties or unintended consequences of more wide-ranging sanctions. Sanctions are also most effective when multiple sanctions programmes either at the national (for example the US) or regional level (for example the EU) act together to coerce or constrain a target's ability to carry out unacceptable behaviour, or as a means of sending a strong political signal that such behaviour is intolerable.[11]

Unintended consequences

4.20 Some submissions addressed the issue of unintended consequences arising from country-based sanctions regimes.[12] Much of the evidence discussing unintended consequences related to broadly applied sanctions regimes, rather than Magnitsky-style targeted sanctions limited to an individual and their close beneficiaries.

4.21 NKhumanitarian argued that in the case of North Korea, there are unintended consequences that affect the economic, social and cultural rights of North Korean people and create barriers for international humanitarian organisations to operate, to the detriment of a large part of the population.[13]

4.22 Mr Kevin cited examples of unintended consequences of sanctions outside the UN Security Council system, including the 'complete destruction of the Libyan state and narrowly averted destruction of the Syrian state …

10 Ms Amal Clooney, *Committee Hansard*, Canberra, 15 May 2020 p. 12.

11 The Sentry, *Submission 30*, p. 10.

12 NKhumanitarian, *Submission 118*, pp. 1 – 3; Mr Tony Kevin, *Submission 145*, p. 3.

13 NKhumanitarian, *Submission 118*, p. 2.

[and] current US-led sanctions against Venezuela and Iran are having a serious impact on the public health services of these nations'.[14]

4.23 In contrast, other evidence made the distinction between broader, country-based sanctions regimes and Magnitsky sanctions, noting that targeted sanctions are designed to focus on individuals and beneficiaries of their actions.[15]

4.24 Jurisdictions that have introduced, or are working towards introducing Magnitsky-style legislation, described their goal of seeking to effect change in the behaviour of targeted individuals, to avoid unintended consequences of national or sector-wide sanctions regimes.[16]

4.25 The Sub-committee recognises that targeted Magnitsky-style sanctions could still potentially impact vulnerable dependents of sanctioned individuals, including children and other relatives. A sanctioned individual may not be able to continue to support their family if assets are seized or frozen. There is also potential to breach the human rights of sanctions targets, if their assets were frozen or seized and they could no longer meet their basic living expenses. Another possible situation of concern could arise where a sanctioned individual ended up as a refugee, and sanctions could result in a breach of Australia's non-refoulement obligations.

Considerations for Australian businesses

4.26 Limited evidence was received regarding the potential compliance implications for Australian companies, should a human rights and corruption targeted sanctions regime be introduced in Australia.

4.27 The issue was addressed in a submission from the law firm Allens, who suggested that a Magnitsky-style Act could 'complicate the sanctions compliance landscape for Australian companies' and that companies may need to develop and implement sophisticated sanctions compliance systems.[17]

4.28 This point was echoed in testimony from Ms Louise McGrath, Head of Industry Development and Policy, Australian Industry Group, who expressed support for actions to address human rights issues, but

14 Mr Tony Kevin, *Submission 145*, p. 3.

15 Avaaz Foundation, *Submission 126*, p. 4; Law Council of Australia, *Submission 99*, p. 22; The Sentry, *Submission 30*, p. 10.

16 Senator Cardin, *Submission 119*, p. 2; Lord Ahmad of Wimbledon, Foreign & Commonwealth Office, Department for International Development, *Submission 120*, p. 2; Nico Schermers, Head of Bureau of Political Affairs/Sanctions, Netherlands Ministry of Foreign Affairs, *Submission 51*, p. 3.

17 Allens, *Submission 28*, p. 2.

described a need for guidance from Government on what companies can do to remain compliant with new sanctions measures.[18]

4.29 Ms Dianne Tipping, Chair of the Board of Directors for the Export Council of Australia, discussed issues associated with the introduction of Magnitsky-style sanctions as they relate to Small and Medium Enterprises, noting that approaches to dealing with potential human rights abusers is not something that would be routinely addressed in a business plan. Ms Tipping suggested that there is a lack of appreciation for the potentially perilous implications for businesses from dealing with human rights abusers. She noted that once they were made aware they would respond accordingly, as they have in the case of increasing awareness of the modern slavery and bribery and corruption rules.[19]

4.30 Other evidence identified potential benefits to businesses from the introduction of Magnitsky-style sanctions, including observation from The International Federation of Human Rights:

> …individual sanctions could [also] safeguard Australian business interests and their capacity to operate in Cambodia by protecting Australian companies from liability that might arise from their involvement in operations with individuals or companies known to be corrupt or responsible for human rights abuses. This would bolster due diligence undertakings and provide security for Australian businesses that may otherwise fail to meet relevant international standards.[20]

4.31 The Sub-committee also heard of the risks for existing businesses that may have links to human rights abuses. The Victoria HongKongers Association alleged that businesses operating in Australia had links to human rights abuse and corruption in Hong Kong. These include Hong Kong's MTR, which also owns Metro Trains Melbourne Pty Ltd and Metro Trains Sydney Pty Ltd; and construction company CIMC which acquired John Holland and Leighton Australia.[21]

4.32 The Falun Dafa Association raised concerns associated with the criteria for Significant Investor Visas and Premium Investor Visas, alleging that there are relaxed requirements, a strong skew towards Chinese nationals, a lack of scrutiny regarding ethical concerns over the source of funds used, and a high risk of fraud.[22]

18 Ms Louise McGrath, Head of Industry Development and Policy, Australian Industry Group, *Committee Hansard*, Canberra, 1 October 2020, p. 2.

19 Ms Dianne Tipping, Chair, Export Council of Australia, *Committee Hansard*, Canberra, 1 October 2020, pp. 2 – 3.

20 International Federation for Human Rights, *Submission 127*, p. 2.

21 Victoria HongKongers Association, *Supplementary Submission 32.1*, p. 5.

22 Falun Dafa Association, *Submission 6*, pp. 20-21.

Safeguards

4.33 Many submitters and witnesses who raised concerns about a targeted sanctions regime also recommended safeguards to mitigate or prevent those risks. The proposed safeguards are discussed below.

Appeal and review

4.34 Evidence emphasised that targeted sanctions legislation should include safeguards that are consistent with upholding human rights. It was argued that a sanctions regime should not inadvertently infringe human rights by, for example, failing to provide a mechanism for appeal.[23]

4.35 Commenting on different jurisdictions' targeted sanctions legislation, Ms Janice Le noted that the US legislation doesn't allow for alleged perpetrators to seek judicial review, whereas the Canadian and UK legislation does offer this protection. Ms Le stated:

> **...**if they are wrongfully designated, they have the right to seek review to get themselves unlisted from the designation list and from the sanctions imposed against them. That is important because, if we are denying their opportunity for judicial review, we are denying their basic human rights, in terms of having access to the judicial system**.**[24]

4.36 Ms Pauline Wright, Law Council of Australia, described the importance of safeguards:

> … adequate safeguards must be implemented to ensure a fair and transparent process that's compatible with human rights and which ensures that sanctions may be applied only where a sufficient degree of moral culpability is clearly established.[25]

4.37 In their appearance at a public hearing, the Law Council of Australia recommended the following safeguards:

- clearly defined legislative terms such as 'serious human right violations' and 'serious corruption' by reference to international human rights law standards
- appropriately defined thresholds for decisions to make sanctions
- detailed legislative criteria to which decision-makers must have regard

23 Mr Kara-Murza, *Committee Hansard,* Canberra, 15 May 2020, p.6; Professor Rosalind Croucher, President, Australian Human Rights Council, *Committee Hansard*, Canberra, 17 June 2020, p. 1.

24 Ms Janice Le, Human Rights Network Australia, *Committee Hansard*, Canberra, 28 April, 2020, p. 5.

25 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 7.

- a process which explicitly sets out procedural fairness guarantees, including statements of reasons and the opportunity to make submissions before final sanctions are applied;
- access to independent merits review and statutory judicial review;
- regular review by the minister, with automatic review when new evidence arises;
- providing individuals with the right to request revocation;
- regular ministerial reporting to parliament regarding sanctions made and any revocations;
- official oversight and regular review by an independent body;
- specific safeguards to address the question of vulnerable individuals;
- access to basic living expenses; and measures to avoid breaching Australia's non-refoulement obligation
- a criterion of proportionality.[26]

Procedural fairness / due process

4.38 The Sub-committee heard evidence that the sanctions process should afford procedural fairness. This should include an opportunity for a sanctioned person or potentially sanctioned person to hear the case against them and have a right of reply or review.

4.39 Ms Amal Clooney highlighted the importance of procedural fairness, arguing:

> one of the elements of the due process requirements should be that individuals have the opportunity to challenge designations as being arbitrary… they should have the opportunity to show that humanitarian exemptions might be needed and also that they meet the criteria for delisting.[27]

Independent decision maker

4.40 The Australian Centre for International Justice commented on the importance of an independent oversight body in implementing targeted sanctions legislation for a variety of reasons including 'to help depoliticise' the process.[28]

26 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra, 15 June 2020, page 7.

27 Ms Amal Clooney, *Committee Hansard*, Canberra, 15 May 2020, p. 13.

28 Australian Centre for International Justice, *Submission 87,* p. 17.

Transparency in decision making

4.41 The Department of Foreign Affairs and Trade suggested the need for 'public diplomacy factors' to be considered in establishing a thematic human rights-based sanctions regime in Australia. DFAT argued that it was important to establish:

> …clear and consistent administrative processes to manage proposals for new listings to ensure the regime operates consistently and in line with its objectives over the long term … [and] be accompanied by an effective public diplomacy strategy to clearly communicate its limits and objectives, both domestically and internationally … avoiding any undue adverse impact that new or proposed listings could cause to Australia's international relations and ability to influence sensitive situations of international concern in which sanctions may not be an effective tool.[29]

In-principle opposition

4.42 Evidence received during the inquiry was overwhelmingly in support of the introduction of targeted sanctions. However, some submissions expressed opposition to sanctions regimes generally, the introduction of targeted sanctions,[30] and to the global Magnitsky-legislation movement.[31]

4.43 The Citizens Party expressed their opposition to sanctions generally, describing them as a cynical geopolitical weapon, and quoting purportedly a memo by the US State Department stating the United Sates pursues human rights issues with adversaries, not allies. The Citizen's Party submission states that it is:

> hypocritical when those nations know we have our own human rights failings, including our appalling treatment of refugees … persecution of government whistleblowers ... and failure to defend the rights of an Australian citizen, Julian Assange, just because he has exposed war crimes committed by our US ally.[32]

4.44 The submission received from Ms Lucy Komisar detailed her dispute of Mr Bill Browder's testimony covering the version of events that led to the death of Sergei Magnitsky. Ms Komisar's submission documents her arguments against Mr Browder's testimony, and states that the US

29 Department of Foreign Affairs and Trade, *Submission 63*, p. 8.

30 Mr Tony Kevin, *Submission 145*, pp. 2-3; NKHumanitarian, *Submission 118*, p. 1; Mr Robert Heron, *Submission 13*, p. 1.

31 Lucy Komisar, *Submission 110*; Australian Citizens Party, Submission 100, p. 1.

32 The Citizens Party, *Submission 100*, p. 2.

Magnitsky Act is designed to support a foreign policy that is hostile to Russia. Ms Komisar advocates that Australia should not introduce targeted human rights sanctions to align with the global Magnitsky movement.[33]

4.45 The Sub-committee noted submissions and some correspondence that disagreed with the circumstances surrounding Mr Sergei Magnitsky's death. Although this was the trigger for the initial Magnitsky legislation in the United States, the circumstances of Mr Magnitsky's death were not part of the Sub-committee's terms of reference. Unlike the evidence from Mr Browder, the Sub-committee did not find these submissions helpful in deciding whether or not to recommend the introduction of a targeted sanctions regime.

Committee Comment

4.46 The Sub-committee recognises the importance of thorough consideration of relevant concerns that have been raised throughout this inquiry.

4.47 Some of the concerns raised, for example the need for procedural fairness, should be addressed prescriptively in targeted sanctions legislation. Other concerns, such as ensuring that targets subjected to asset freezes will be able to meet their basic living expenses, could be dealt with in regulations or in guidelines for implementation.

4.48 The Sub-committee accepts that at the time of writing there is limited concrete evidence of the success of targeted, Magnitsky-style sanctions against human rights abuse perpetrators, and perpetrators of corruption. It is also clear from the evidence received that the deterrent factor is important, and that it may remain difficult to prove the deterrent value of targeted sanctions.

4.49 The Sub-committee considers that the concerns identified can be mitigated, and, consistent with the weight of evidence received during this inquiry, that concerns are outweighed by potential benefits of joining the global Magnitsky movement through the introduction of targeted sanctions legislation to address human rights abuse and corruption.

4.50 Comprehensive safeguards, and an individualised approach to implementing sanctions, will be vital to the success of a targeted sanctions regime in Australia. More detailed recommendations are included in Chapter 7.

33 Ms Lucy Komisar, *Submission 110*.

4.51 The Sub-committee recognises the importance of upholding human rights as fundamental to any targeted sanctions regime.

4.52 In addition to the comprehensive suite of safeguards, the Sub-committee recognises that in some cases, the Minister will require discretion in decision making to ensure full consideration of Australia's best interests in the implementation of targeted sanctions.

4.53 The Sub-committee is grateful for the extensive engagement of Australian and global experts in the field of human rights law and targeted sanctions. The evidence received from highly respected witnesses and submitters included recommendations for constructive and comprehensive safeguards to ensure that any Australian targeted sanctions legislation would incorporate learnings from experiences in other jurisdictions.

5

How a targeted sanctions regime could work in Australia

5.1 The Sub-committee has considered evidence on the details of how a targeted sanctions regime in Australia could work, including the features and requirements that could form part of a new regime. These include the scope and threshold of the regime, a suitable process for nominating sanctions targets, who would be responsible for decision-making and implementation, and how decisions would be reviewed.

Definitions

5.2 The definitions used in targeted sanctions legislation affect the applicability and scope of the sanctions. The Sub-committee considers that Australian targeted sanctions legislation should be consistent with other relevant Australian legislation, and also align with international targeted sanctions.

5.3 While there is some guidance on these terms within international human rights law, the definitions in legislation should be explicit and unambiguous.

Definition of human rights

5.4 A number of witnesses described the need to clearly define and identify thresholds of human rights abuse, in line with Australian and international human rights law standards.[1] Throughout the inquiry, various terms were used in relation to defining the thresholds of human

1 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 7; Mr Dauod Wahabzada, *Submission 82*, p. 3.

rights abuse and corruption to which Australian Magnitsky-style legislation could apply – 'serious', 'gross', 'egregious'.

5.5 Senator the Hon Marise Payne, Minister for Foreign Affairs, noted that in Australian domestic law, the terms 'serious', 'gross' and 'egregious' are not found in connection to the concept of 'human rights' or 'human rights abuse', and that if those terms were to be used in a new global human rights sanctions regime they would be subject to the ordinary rules of statutory interpretation. Senator Payne expressed the view of the Department of Foreign Affairs and Trade (DFAT) that a qualifier such as 'serious' or 'egregious' should be incorporated to increase the threshold for applying sanctions, as a foreign policy tool used to target the most concerning behaviour.[2]

5.6 Mr Geoffrey Robertson OAM QC recommended that a preamble to the legislation could help to define the intent and scope of the legislation. Mr Robertson argued that 'by explaining the motivation, purpose and any other considerations behind the enactment, it can guide the interpretation of clauses where the statutory language is unclear or ambiguous'.[3]

5.7 Evidence to the inquiry included significant discussion on the definition and thresholds that would trigger a targeted sanctions listing. DFAT highlighted their preference for a higher threshold, on the basis that it 'would narrow the range of circumstances in which the power could be exercised … [which would be] appropriate if the purpose of the regime were to target only the most egregious behavior… consistent with the 2017 Foreign Policy White Paper which refers to sanctions being used in circumstances where there are gross human rights abuses'.[4]

5.8 DFAT noted that a lower threshold would expand the circumstances in which sanctions could be imposed, including situations where other responses could be more appropriate. Further, the scope of a human-rights targeted sanctions regime would define potential targets - such as whether sanctions could apply only to those 'responsible' for certain human rights abuses or violations, as distinct from applying to those 'complicit in, assisting or supportive of' abuses or violations - a broader scope, consistent with the US Global Magnitsky Act 2012.[5]

5.9 The Australian Centre for International Justice advocated for a broader legislative framework, to address serious violations of international

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2 Senator the Hon. Marise Payne, Minister for Foreign Affairs, Department of Foreign Affairs and Trade, *Supplementary Submission 63.3*, p. 3.

3 Mr Geoffrey Robertson OAM QC, *Committee Hansard*, Canberra, 15 May 2020, pp. 40-41.

4 Department of Foreign Affairs and Trade, *Submission 63*, p. 7.

5 Department of Foreign Affairs and Trade, *Submission 63*, p. 8.

human rights law and international humanitarian law and acts of significant corruption.[6]

5.10 The Human Rights Network of Australia (HRNA) noted that a vague definition of 'gross or grave violations' of internationally recognised human rights could result in a difficult and unpredictable process to determine unlawful conduct. The HRNA expanded on this point, stating that the 'definition of grave or gross human rights violations should include extrajudicial killings, torture or cruel or degrading treatment or punishment or other gross violations of internationally recognised human rights'.[7]

5.11 This approach was also promoted by the Victoria HongKongers Association, who suggested that new legislation should incorporate definitions of human rights abuse and related acts in line with United Nations' articles and declarations.[8]

5.12 The Australian Lawyers for Human Rights recommended 'following and adopting the scope and approach of the US and Canadian Magnitsky legislation'.[9]

Special consideration of media freedoms

5.13 Evidence received throughout this inquiry indicated a need for targeted sanctions regimes to consider concerns relating to certain groups, including human rights defenders and journalists.[10]

5.14 The High Level Panel of Experts on Media Freedom Report on the Use of Targeted Sanctions to Protect Journalists identified that around the world, journalists are currently subjected to human rights abuses including:

- Killing, torture, abduction and physical abuse
- Arbitrary arrest, detention and imprisonment
- Libel, lawsuits, threats, doxing [identifying and targeting] sources
- On-line harassment, surveillance
- Systemic restrictions on media.[11]

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6 Australian Centre for International Justice, *Submission 87*, p. 18.

7 Human Rights Network of Australia, *Submission 19*, p. 4.

8 Victoria HongKongers Association, *Submission 32.1*, pp. 3-4.

9 Australian Lawyers for Human Rights, *Submission 33*, p. 4.

10 Mostly from: Independent High Level Panel of Experts on Media Freedom *Submission 34*, Attachment 3: Report on the Use of Targeted Sanctions to Protect Journalists. Also *Submissions 82, 101 and 112* that urge targeted sanctions that are broad enough to cover police physically targeting journalists in Hong Kong.

11 Independent High Level Panel of Experts on Media Freedom, *Submission 34 Exhibit: Report on the Use of Targeted Sanctions to Protect Journalists*, February 2020, p.5.

5.15 A targeted sanctions regime should apply consistently in a variety of circumstances, and most of the human rights abuses listed above would trigger the consideration of targeted sanctions. However some of the primary ways journalists are targeted (particularly those using the legal system such as arrest, detention and lawsuits) are less likely to trigger sanctions in existing sanctions regimes, even when they constitute human rights abuses.

5.16 Systemic restrictions such as internet shut downs or coercive regulation may be in a grey area unless expressly addressed.

5.17 The preamble should specify that targeted sanctions would be applicable in instances of human rights abuse or corruption in cases where human rights advocates, aid workers and journalists are impacted.

5.18 The targeted sanctions regime should be should also be broad enough to encompass the principal ways in which media freedom is abused, including:

- Not limiting the victim class to only whistle-blowers or those promoting human rights
- Including non-state actors, companies as well as natural persons, and secondary persons (i.e those who are 'responsible', 'complicit' or 'provide material assistance')
- Expressly stating that unjust imprisonment of a journalist meets the threshold for sanctions
- Expressly covering systemic shut down of media freedoms e.g. coercive regulation, internet shut down
- Thresholds of 'serious human rights abuses' rather than 'gross violations of human rights'
- Requiring the sanction regime to be interpreted in accordance with international human rights law and international humanitarian law.

5.19 Freedom of expression underpins a liberal democracy; freedom of the press supports transparency of government information and enables the people's right to know about government decisions and actions. Absence of media freedom facilitates additional human rights abuses. The Sub-committee recognises that media freedom is critical for the protection of everyone's human rights.

Committee comment

5.20 The Sub-committee considers that the definition of human rights should be broad, in order to capture the greatest number of potential abuses. Given that the Sub-committee is recommending that the decision maker should have a broad discretion as to whether or not to impose sanctions,

the Sub-committee is not concerned that a broad definition will necessarily force sanctions to be applied. The Sub-committee considers that the definition in the legislation should be simply 'serious human rights abuses' with further guidance set out in the preamble.

5.21 The Sub-committee also considers that the preamble should state that systematic extrajudicial actions that intend to limit media freedom can be considered human rights abuses.

Imposing sanctions for corruption

5.22 Corruption constitutes one of the major obstacles to the effective protection of human rights.[12] Members of groups exposed to marginalisation and discrimination may suffer first and suffer disproportionately from corruption.[13]

5.23 Transparency International defines corruption as 'the abuse of entrusted power for private gain'.[14] Corruption can have the effect of compounding the existing difficulties that are already experienced by members of such groups in accessing public goods and services as well as access to justice.[15]

5.24 Corruption, in other words, may further aggravate the existing human rights violations that are experienced by members of these groups.[16] Moreover, corruption undermines a State's ability to mobilise resources for the delivery of services essential for the realisation of economic, social and cultural rights.[17]

5.25 The connection between corruption and human rights abuses, and role for a new sanctions regime to target both offences, was raised throughout this

[12] United Nations Office on Drugs and Crime. June 2020. 'Overview of the corruption-human rights nexus'. Accessed 16 September 2020.

[13] United Nations Office on Drugs and Crime. June 2020. 'Overview of the corruption-human rights nexus'. Accessed 16 September 2020.

[14] Transparency International, *www.transparency.org,* accessed 9 September 2020.

[15] United Nations Office on Drugs and Crime. June 2020. 'Overview of the corruption-human rights nexus'. Accessed 16 September 2020.

[16] United Nations Office on Drugs and Crime. June 2020. 'Overview of the corruption-human rights nexus'. Accessed 16 September 2020.

[17] United Nations Office on Drugs and Crime. June 2020. 'Overview of the corruption-human rights nexus'. Accessed 16 September 2020.

inquiry. The Sub-committee considered a suitable threshold for corruption - with suggestions including 'gross', 'serious' or 'systematic'.[18]

5.26 The Australian Law Council's submission recommended clearly defined legislative terms, including for 'serious corruption'.[19] Other submissions supported a definition consistent with USA and Canadian legislation to avoid definitional ambiguities.[20]

5.27 Human Rights First reflected on the value of including corruption in a targeted sanctions regime:

> …in our experience, inclusion of corruption alongside human rights as a sanctions prong provides the US government significant authority to designate not only those who maintain power through repression, but also the key financial backers who sustain and benefit from abusive rule… Many of the world's most abusive tyrants commit human rights abuses as a means to maintain power for personal gain ... Corruption undermines essential aspects of democratic governance and allows for unaccountable power and instability to flourish.[21]

Committee comment

5.28 The use of public assets for private gain is a serious threat to human rights. The Sub-committee considers that the range of conduct which can be sanctioned under targeted sanctions legislation should expressly include serious corruption.

Scope of sanctions – people and conduct

5.29 Having put in place a definition of conduct that could give rise to sanctions, the legislation should then define the people to whom sanctions could apply, and the circumstances in which sanctionable conduct could occur.

Family members

5.30 In relation to who should be targeted, Mr Robertson recommended not only human rights abuse and corruption perpetrators, but also their

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18 Law Council of Australia, *Submission 99*, p. 32; Department of Foreign Affairs and Trade, *Submission 63*, p. 7; Save the Children, *Submission 47*, p. 4.

19 Australian Law Council, *Submission 99*, p. 6.

20 Mr Dauod Wahabbzada, *Submission 82*, pp. 7-8.

21 Human Rights First, *Submission 17*, p. 3.

beneficiaries and in some cases corporations, directors and major shareholders. He expanded upon this, stating that:

> …families of human rights violators - parents they pay to send abroad for hospital treatment and children they wish to send to expensive private schools and universities. If Australia's law were to encompass grand-scale corruption, then it ought to apply to corporations as well as to individuals, not only by permitting listing of directors and major shareholders, but enabling companies themselves to be removed from registers and prohibited from trading.[22]

5.31 Human Rights Watch addressed whether family members of targets should also be sanctioned, recommending that this be an option, but applied on a case-by-case basis:

> …if there is evidence to suggest that family members may be benefiting from the corruption or human rights abuse, then it would make sense to add them to the sanctions list. But in other cases, a family member may not be benefiting from the corruption, and may even be estranged from the abusive member, and it would effectively be a form of collective punishment to also punish those family members.[23]

5.32 The International Commission of Jurists Australia (ICJA) shared their view that:

> …children or other relatives should not be permitted to benefit from known corrupt conduct of the parent or relative… assets of the child or other family member should be liable to forfeiture or other appropriate order if the source of the funds can be shown to be the perpetrator.[24]

5.33 The ICJA acknowledged recommended that such cases be considered on a case-by-case basis, noting that judicial oversight is required in these circumstances, to consider complex factual and legal factors such as the age of the child at the time of asset acquisition and intention of the parent in acquiring the asset.[25]

5.34 Senator the Hon. Marise Payne, Minister for Foreign Affairs, stated that the particular circumstances of individual cases would determine whether it is appropriate to extend sanctions to the family of a designated person.

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22 Mr Geoffrey Robertson OAM QC, *Submission 1*, p. 1.

23 Human Rights Watch, *Submission 12.1 Answers to QoN*, p. 1.

24 International Commission of Jurists Australia, *Submission 95.1 Answers to QoN*, pp. 1 – 2.

25 International Commission of Jurists Australia, *Submission 95.1 Answers to QoN*, p. 2.

DFAT also noted that extending targeted financial sanctions to a family member may:

> …influence the behaviour of, or deter, a primary actor [and] … ensure that sanctioned individuals are not able to easily circumvent Australian sanctions … however these objectives must be weighed against the human rights of the secondary target and must be necessary and proportionate to the regime's intent and be reasonable in each circumstance.[26]

5.35 By way of comparison with other sanctions regimes, Senator Payne, Minister for Foreign Affairs advised the Sub-committee that:

> Australia's autonomous sanctions regimes for Libya and Myanmar, as set out in the Autonomous Sanctions Regulations 2011 (the Regulations), allow for the listing of immediate family members of persons meeting other criteria set out in regulation 6 of the Regulations for targeted financial sanctions and travel bans. Section 3 of the Regulations defines an 'immediate family member' of a person to mean:
>
> (a) a spouse of the person; or
>
> (b) an adult child of the person; or
>
> (c) a spouse of an adult child of the person; or
>
> (d) a parent of the person; or
>
> (e) a brother, sister, step brother or step sister of the person; or
>
> (f) a spouse of a brother, sister, step brother or step sister of the person.[27]

Committee comment

5.36 The Sub-committee considers that sanctions should be able to be applied to family members of human rights abusers. The Sub-committee agrees with the evidence heard from diaspora communities that preventing family members from benefiting from human rights abuses or corruption will act as an effective deterrent.

Associated entities

5.37 The ability to apply sanctions to assets owned by associated entities will ensure that sanctions cannot be avoided by complex or opaque financial

26 Senator the Hon. Marise Payne, Minister for Foreign Affairs, Department of Foreign Affairs and Trade, *Supplementary Submission 63.3 Answers to Questions on Notice*, p. 4.

27 Senator the Hon. Marise Payne, Minister for Foreign Affairs, Department of Foreign Affairs and Trade, *Supplementary Submission 63.3 Answers to Questions on Notice*, p. 2.

arrangements, or by using corporate structures. This is particularly important in cases of significant corruption, which are often obscured through complex investment arrangements and asset ownership structures.

5.38 The Law Council of Australia's submission describes the inclusion of 'entities' in other Australian legislation and regulations, including the *Autonomous Sanctions Act 2011* (Cth) and *Autonomous Sanctions Regulations* 2011 (Cth), Australia's Anti-Money Laundering and Counter-Terrorism regime and the *Modern Slavery Act 2018* (Cth).[28]

5.39 Submissions from the Progressive Lawyers Group (Hong Kong), Avaaz Foundation, Save the Children and Human Rights Network of Australia expressed their support for a Magnitsky-style targeted sanctions regime to apply to both individuals and entities.[29]

5.40 Chapter 3 of this report describes the Global Magnitsky sanctions landscape, with references to numerous schemes that apply to 'entities' as well as natural persons.

Committee comment

5.41 In the interests of taking a comprehensive and coordinated approach to implementing a targeted sanctions regime, the Sub-committee considers that sanctions should be able to be applied to:

- all entities, including natural persons, corporate entities and both state and non-state organisations; and
- broadly-defined associated entities, including both those owned and controlled by the humans rights abuser and any organisations who may benefit from the sanctionable conduct.

Should sanctions targets include Australian citizens?

5.42 During the course of this inquiry, the Sub-committee received evidence describing situations where potential sanctions targets are Australian citizens or dual citizens. This prompted consideration of whether targeted sanctions legislation should be enacted in a way that would make it applicable to Australian citizens.

5.43 Senator Payne, Minister for Foreign Affairs advised the Sub-committee that:

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28 Law Council of Australia, *Submission 99*, pp. 7 -12.

29 Progressive Lawyers Group (Hong Kong), *Submission 112*, p. 9; Avaaz Foundation, *Submission 126*, p. 2; Save the Children, *Submission 47*, p. 4; Human Rights Network of Australia, *Submission 19*, p. 4

> …there is nothing in Australia's current sanctions framework that prevents sanctions being imposed on Australian citizens … the Government would take a range of legal and practical considerations into account before imposing targeted financial sanctions on an Australian citizen, including whether they are located offshore, any implications for domestic criminal process, and the impact on that person's human rights. Australia has not, to date, sanctioned an individual within its territorial jurisdiction … Any statutory provisions concerning the application of a global human rights regime to persons or entities with Australia would need to be carefully drafted to ensure there is a sufficient connection to the relevant Commonwealth head of power.[30]

5.44 Professor Croucher, President of the Australian Human Rights Commission, indicated that very serious consideration would need to be given in relation to whether targeted sanctions should also be applicable to Australian citizens. Specifically, Professor Croucher suggested that before including Australian citizens as potential sanctions targets, a review should be undertaken to establish the extent to which Magnitsky-style conduct is already covered by Australian law. Professor Croucher noted particular concerns in relation to a situation where a person's human rights are compromised if sanctioning resulted in the removal of Australian citizenship.[31]

5.45 Dr Elizabeth Biok, Secretary General of the International Commission of Jurists Australia considered that the legislation could be applicable to Australian citizens in instances where they have committee human rights violations in their home country, and later become an Australian citizen. Dr Biok suggested that potential sanctioning of Australian citizens under such circumstances should be considered individually.[32]

Committee comment

5.46 The Sub-committee considers that Australian citizens who are involved with human rights abuses and acts of corruption, as defined in any future Magnitsky-style targeted sanctions Act, should to the extent possible, be subjected to consequences consistent with those that could be applied to non-citizens.

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30 Department of Foreign Affairs and Trade, *Supplementary Submission 63.3 Answers to QoN*, p. 3.

31 Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 17 June 2020, p. 3.

32 Dr Elizabeth Biok, Secretary General, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 6.

5.47 However the Sub-committee notes concerns about applying sanctions to Australian citizens who live in Australia. The Sub-committee considers that action against Australian citizens may be best achieved through existing (or updated) domestic legislation such as those covering proceeds of crime and modern slavery. If the system to identify sanctions targets identifies Australian citizens, they should be referred to Australian authorities for application of relevant domestic laws. If at a three yearly review it is found that identified Australian citizens have not faced consequences, the matter should be re-examined. The Sub-committee acknowledges that the most effective means of achieving this outcome is a matter for more detailed consideration as legislation is developed.

Should targeted sanctions be retrospective?

5.48 Senator Payne, Minister for Foreign Affairs addressed whether Magnitsky-style targeted sanctions should be retrospective, and noted that Australia's autonomous sanctions are applied prospectively, some historical conduct is captured. Further Minister Payne stated her view that it is likely the Government would wish to maintain the option of capturing historical cases.[33]

5.49 Mr Geoffrey OAM QC supports a retrospective application of targeted sanctions legislation, stating 'It's not a criminal law. If it cannot be retrospective, no-one goes to jail. Corruption and human rights abuses are wrong at any time; they were wrong 10 years ago and even 20 years ago. They are known to be wrong whenever or wherever they occur.'[34]

5.50 Save the Children identified that although in principle legislation should not be retrospective, targeted sanctions to address human rights abuses present a different situation, noting

> …if legislation was not deemed to be retrospective, then sanctions could not be applied towards many human rights perpetrators in Syria including those who have ordered the use of chemical weapons and attacks on schools … Measures taken through international court processes are likely to be lengthy, if they are able to progress at all due to state-based objections … As such, should a Magnitsky style law be introduced domestically for actions undertaken in overseas jurisdictions, Save the Children is

33 Senator the Hon. Marise Payne, Minister for Foreign Affairs, Department of Foreign Affairs and Trade, *Supplementary Submission 63.3*, p. 5.

34 Mr Geoffrey Robertson OAM QC, *Committee Hansard*, Canberra, 15 May 2020, p. 41.

> supportive of such measures being applied retrospectively … [subject to] appropriate safeguards.[35]

Committee Comment

5.51 The Sub-committee has considered evidence in regards to whether a targeted sanctions regime should be applied retrospectively. Targeted sanctions legislation works to not only deter future actions, but also limit the ability of sanctions targets to enjoy the proceeds of human rights abuse and corruption. It is therefore likely to apply in many cases where abuse and corruption has already occurred. Targeted sanctions should therefore be able to be imposed as a result of conduct that occurred before the commencement of the legislation.

Nomination process

5.52 An important part of the targeted sanctions regime will be the process for identifying and nominating sanctions targets. Potential targets could be identified by Executive Government, an independent committee or panel, or civil society groups.

5.53 Dr Elizabeth Biok addressed the issue of who should be able to nominate targets, strongly recommending that the role should remain within the DFAT, not the immigration portfolio, suggesting:

> [DFAT] has the expertise and the resources to establish a separate body which can be the monitoring body and the body which can then work through the mechanisms of applying this Act.[36]

5.54 Dr Biok elaborated that nominations should be received from Australian organisations (supported by information that may come from overseas networks) and subject to a screening process.[37]

5.55 The International Bar Association Human Rights Institute's Report on the Use of Targeted Sanctions to Protect Journalists proposes that:

> …states should provide a role for an expert committee that is independent of the executive branch of government in determining targets for sanctions [and] an independent mechanism in a human rights sanctions regime may not be best placed to determine when to impose, or remove, sanctions and the

35 Save the Children, *Supplementary Submission 47.1Answer to QoN*, pp 4 - 5.

36 Dr Elizabeth Biok, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 3.

37 Dr Elizabeth Biok, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 3.

> targeting sequence that creates the best incentives for a positive outcome. An independent expert group can, however, be very helpful in recommending suitable targets for sanction based on objective criteria in line with international law.[38]

5.56 Mr Geoffrey Robertson OAM QC advocated that a best practice approach would see Australian targeted sanctions administered through:

> …a fair system, independent to some extent of the minister, for deciding who to designate. This shouldn't be left to DFAT and the minister. It could take the form … of an application by DFAT to a federal judge or, perhaps better, to an expert tribunal ... Applications would be made not only by DFAT but also by NGOs presenting evidence to prove that an individual or a company has been complicit in grave human rights abuses or serious corruption. Of course, the individual or company who was Magnitsky-ed or designated would be entitled to apply subsequently to be delisted. The tribunal decision would take the form of a recommendation to the minister, who would have the final say; there may be national security implications or diplomatic immunity questions. So the minister would have the final say, but he or she would be subject to questioning in parliament and would have to front up to a parliamentary committee every year. That would ensure democratic accountability and transparency, and would be an advance on Magnitsky laws elsewhere in the world.[39]

Committee Comment

5.57 The Sub-committee considers that there should be an established and transparent pathway for organisations to nominate a person for sanctionable conduct.

5.58 The Sub-committee recommends that an independent advisory body be created to receive nominations, consider them and make recommendations to the Minister for a decision. This would provide a degree of public confidence in the process of nomination, and allow representations from those people and organisations directly affected.

5.59 The structure and composition of this body would be the subject of further consultation, however the Sub-committee considers it should include the ability to conduct its inquiry in public and to publish reasons for its decision. It is also important that recommendations by the independent

38 High Level Panel of Experts on Media Freedom, International Bar Association Human Rights Institute, *Submission 34, Report on the Use of Targeted Sanctions to Protect Journalists*, p. 74.

39 Mr Geoffrey Robertson OAM QC, *Committee Hansard*, Canberra, 15 May 2020, p. 41.

advisory body must be considered by the Minister and that the Minister must give reasons for any decision not to adopt a recommendation by the advisory body.

5.60 The Minister would still be able to receive and consider nominations from any other source, including from other jurisdictions as discussed in the following section. The Minister would also be able to impose sanctions without a recommendation by the advisory body.

Information sharing

5.61 Evidence to the inquiry highlighted benefits that would arise from sharing information with other jurisdictions and organisations, and engaging with a variety of sources to receive advice and evidence on targeted individuals.[40]

5.62 Ms Jennifer Cavenagh from the Department of Foreign Affairs and Trade, said that there is already considerable cooperation with other countries on sanctions, with 'active information sharing and information exchange' adding that the introduction of a global human rights regime would 'simply expand the amount of information that we share now'.[41]

5.63 Other witnesses described benefits that would arise from receiving information from civil society and advocacy groups, from within Australia and internationally, they are often informed by extensive local networks and may be tracking activities or be alerted by people close to the activity in real-time. They could be a great help in gathering evidence on sanctions targets. Save the Children Australia recommended that a new standalone Act should include 'mandated civil society consultation on the development of sanctions'.[42]

5.64 Information from jurisdictions with comparable targeted sanctions legislation could inform the nomination process. Jurisdictions that have introduced targeted sanctions legislation have described a part of their motivation as wanting to act locally to contribute to global efforts.[43]

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40 Human Rights Network of Australia, *Submission 19*, p. 6; Anne Webb, *Submission 7*, p. 4; Safeguard Defenders, *Submission 20*, p. 1; The Sentry, *Submission 30*, p. 13.

41 Ms Jennifer Cavenagh, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 17 June 2020, p. 12.

42 Save the Children Australia, *Submission 47*, p. 4.

43 Lord Ahmad of Wimbledon, UK Minister of State for South Asia and the Commonwealth, Prime Minister's Special Representative on Preventing Sexual Violence in Conflict, *Submission 120*, p. 2; Norwegian Helsinki Committee, *Submission 22*, p. 13; US Helsinki Commission, *Submission 10*, p. 1.

Committee Comment

5.65 The Sub-committee is satisfied that the implementation of a targeted sanctions regime to address human rights abuse and corruption should incorporate processes that ensure Australian authorities work with other jurisdictions that have enacted similar sanctions regimes. This approach is likely to strengthen the outcomes of implementing targeted sanctions legislation, by reducing the opportunity for perpetrators to export financial gains and enjoy the financial benefits of human rights abuses or corruption.

Decision making

Decision maker

5.66 Submissions and evidence to the inquiry mostly suggested that decision making and the imposition of sanctions would be the responsibility of the Minister for Foreign Affairs.[44]

5.67 Evidence to the inquiry also suggested that there would be an important role for decision-making to be informed by consultation with other government departments, interest groups and stakeholders.

5.68 The designation of targeted sanctions and implementation of travel bans and asset seizure or freezing would require input and coordination with other agencies and organisations including Department of Treasury, the Australian Federal Police, Australian Border Force and AUSTRAC.[45]

5.69 Some submitters and witnesses discussed a role for the Independent National Security Legislation Monitor to review individual designations and declarations. The Australian Human Rights Commission supported this mechanism for review,[46] however Ms Cavenagh from the Department of Foreign Affairs and Trade stated that there would be 'advantages and disadvantages [depending on] the extent to which you consider the sanctions to be a national security measure'.[47]

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44 Australian Human Rights Commission, *Submission 21*; Law Council of Australia, *Submission 99*, p. 1.

45 Department of Foreign Affairs and Trade, *Submission 63*, p. 8.

46 Australian Human Rights Commission, *Submission 21*, p. 8.

47 Ms Jennifer Cavenagh, Department of Foreign Affairs and Trade, *Committee Hansard,* Canberra 17 June, p. 10.

Committee Comment

5.70 The Sub-committee notes the sensitive balance of considerations to be taken into account when deciding to impose sanctions, and considers that the Minister for Foreign Affairs is the appropriate decision maker.

5.71 However the Sub-committee considers that the legislation should include a requirement for consultation with the Attorney-General to ensure that questions of implementation are addressed prior to the decision.

Required evidence

5.72 One issue that arose in the inquiry was whether the legislation should include a defined list of considerations for the decision maker to address when deciding whether to impose sanctions. These considerations could be either mandatory or discretionary, and could include community representations, international sanctions, Australia's foreign relations and the legislation's guiding values.

5.73 The Law Council of Australia recommended that if a separate Magnitsky Act were to be pursued, safeguards to protect against potential Executive overreach should include:

> …detailed legislative criteria to which decision makers must have regard in making sanctions, including whether the sanction is proportionate to the likely effects on the person, taking into account other, less intrusive alternatives.[48]

5.74 Mr Stephen Keim of the Law Council of Australia addressed the factors that a decision-maker should take into account. Firstly, whether there have been serious human rights violations. Secondly, evidentiary standards of being 'satisfied on reasonable grounds', and thirdly, proportionality. He also noted 'With regard to Australian citizens … there are obviously concerns with regard to statelessness, and an Australian citizen … obviously can't be prevented from coming back to Australia'.[49]

5.75 Matters that need to be addressed as part of a pre-decision process largely relate to ensuring due-process and procedural fairness. Chapter 4 discusses in detail the recommended safeguards and considerations to ensure a fair process.

Committee Comment

5.76 The Sub-committee recognises the importance of safeguards, however does not consider that including express considerations in the legislation

48 Law Council of Australia, *Submission 99*, p. 6.

49 Mr Stephen Keim, SC, National Human Rights Committee Member, Law Council of Australia, *Committee Hansard,* Canberra, 15 June 2020, p. 9.

is necessary. As discussed in Chapter 4, the Sub-committee recommends that the legislation include: an opportunity for potential sanctions targets to make a right of reply, an independent advisory body for nominations, and a process for review of decisions.

5.77 The Sub-committee considers that the decision maker should have broad discretion to decide whether or not to impose sanctions. Further, the Minister's decision is non-compellable, and refusal by the Minister to sanction a person is non-justiciable.

5.78 In order to provide more flexibility in the decision process, the Sub-committee suggests that the concept of a 'watch list' be introduced into the legislation. This would apply where the evidence on sanctions targets is substantial but either not sufficient to meet required thresholds or there are other considerations which would prevent the application of sanctions. A watch list would provide a deterrent, and alert potential targets that they may be sanctioned if further evidence comes to light or if further sanctionable conduct occurs.

Burden of proof

5.79 In relation to evidentiary standards, the civil standard of 'balance of probabilities' was identified as the preferred approach by a number of expert witnesses from the field of human rights law.[50] The Sub-committee supports this approach.

Transparency

5.80 The Sub-committee considered evidence on whether to publicly report and keep a public register of decisions in relation to sanctioning individuals, including the reasons for sanctions being imposed.

A published register of sanctioned individuals

5.81 The importance of transparency in decision making associated with targeted Magnitsky-style sanctions was frequently raised in the evidence received. Recommendations included a requirement for the Executive Government to report regularly to Parliament, and to maintain a

50 Professor Rosalind Croucher, President, Australian Human Rights Commission, *Committee Hansard*, Canberra, 17 June 2020, p. 5; Rt Hon. David Neuberger of Abbotsbury, Chair, High Level Panel of Legal Experts on Media Freedom, *Committee Hansard*, Canberra, 15 May 2020, p. 29; Dr Elizabeth Biok, Secretary General, International Commission of Jurists Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 5.

published list of sanctioned individuals, including reasons for their listing.[51]

5.82 The Committee heard that sanctions regimes can be an effective deterrent to human rights abuses. This deterrent effect is increased when sanctioned individuals are publicly named with a detailed description of the reasons for the sanctions.[52]

5.83 Ms Janice Le from the Human Rights Network of Australia spoke to this point, stating:

> If we publish the names of violators … that will show our firm position and will also let their colleagues know that we're watching what they're doing and that we're not punishing them but making them accountable for their actions. In that way, it will act as a deterrent for their colleagues from taking future actions of violation or corruption.[53]

5.84 Dr Elizabeth Biok also described the benefits of transparency in decision making and making details of listings publicly available in her comment:

> …it will be a pure deterrent, because part of the act will be to name and shame persons, and that will … address the issue of political impunity. It will also be a very strong tool in education, in that it will educate the Australian community and the community across our region that human rights violations will not be accepted. It will also allow for education for what are the human rights norms that should be upheld.[54]

5.85 Dr Lester, Sr Healy & Dr O'Leary, in their submission, stated that targeted human rights sanctions would '…provide a 'name-and-shame' mechanism that exposes tainted individuals, business dealings and supply chains.'[55]

5.86 Ms Anne Webb addressed the benefits of making public the names of sanctions targets in her submission, stating:

> By publicly exposing the names of human rights abusers, these individuals become pariahs among the international community and their crimes are documented in the public sphere. Widespread publicity and personal consequences offer a strong deterrent

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51 Law Council of Australia, *Submission 99*, p. 5; Australian Human Rights Commission, *Submission 21*, p. 4; Save the Children, *Submission 47*, p. 4.

52 Most notably advocated by Mr Geoffrey Robertson OAM QC, *Submission 1*, p. 2.

53 Ms Janice Le, Human Rights Network of Australia, *Committee Hansard*, Canberra, 28 April 2020, p. 4.

54 Dr Elizabeth Biok, Secretary General, International Jurists Commission Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 3.

55 Dr Eve Lester, Sr Joan Healy and Dr Moira O'Leary, *Submission 129*, p. 2.

> effect, signalling to other individuals working anywhere in the world that their crimes have or will have consequences.[56]

Committee Comment

5.87 The Sub-committee agrees that a significant value of targeted sanctions legislation is the deterrent effect arising from the consequences of making public the identity of sanctioned individuals and their conduct. The Sub-committee therefore recommends that the legislation include a public register with the names of those sanctioned and the reasons for the sanctions.

5.88 Implementation of the sanctions will also be easier if the sanctions are public and widely known. Restricting access to international financial systems and travel is fundamental to the premise of Magnitsky-style targeted sanctions.

5.89 In addition, the Sub-committee supports the view that the Minister responsible for nominating sanctions targets should encourage visibility of the process and outcomes through regular (annual) reporting to the Parliament advising who has been sanctioned, the reasons, and any other relevant details.

5.90 The Sub-committee recognises that decisions may involve matters of national security, criminal investigations or international relations. The legislation should therefore include limited exemptions from disclosure on the public register or from the report to Parliament.

Review

5.91 Chapter 4 discussed the importance of safeguards to ensure a fair and effective sanctions scheme. One of the safeguards identified was for sanctioned individuals to have access to appeal and review decisions regarding their listing.

5.92 Sanctions reviews could occur through Ministerial decision, through a merits review process at the request of a sanctioned individual, or in response to a requirement for periodic review or parliamentary oversight function.

56 Ms Anne Webb, *Submission 7*, p. 5.

Ministerial discretion

5.93 Limited evidence was received on the topic of giving the Minister the power to review a sanctions listing at any time and for any reason. The Sub-committee notes that this exists in all international sanctions regimes (see Chapter 3).

Full merits review

5.94 Access to a full merits review process was identified in Chapter 4 as a potential safeguard for a Magnitsky-style targeted sanctions regime. While other jurisdictions take different approaches to this matter (see Chapter 3), there is an argument that this protection of human rights should be extended to sanctioned individuals and organisations.

5.95 The Australian Human Rights Commission proposed that any Magnitsky legislation in Australia should incorporate a merits review process, stating that 'all decisions by the executive to impose sanctions upon individuals should be subject to merits review conducted by an independent tribunal'.[57]

5.96 This was supported by Dr Elizabeth Biok who supported a mechanism for merits review, for example through a dedicated area within Administrative Appeals Tribunal.[58] Ms Nandagopal from the Australian Human Rights Commission also advocated for a merits review function to be fulfilled by the Administrative Appeals Tribunal, noting 'the AAT, particularly the security appeals division, is well placed and would be an appropriate body to conduct reviews dealing with sensitive matters'.[59]

Automatic review

5.97 As detailed in Chapter 3, targeted sanctions regimes in the United States, Canada and United Kingdom vary in their requirements for reviewing and reporting on decisions to apply (or de-list) targeted sanctions.

5.98 Some submissions recommended a safeguard of regular reviews of all sanctions listings. This could include reporting the result of those reviews to Parliament.

5.99 Save the Children advocated for a mandated three-yearly review process, by an appropriate parliamentary committee, and for the Government to be required to issue a report within six months following the review. Save the

57 Australian Human Rights Commission, *Submission 21*, p. 15.

58 Dr Elizabeth Biok, Secretary General, International Commission of Jurists Australia, *Committee Hansard,* Canberra, 15 June 2020, p. 3.

59 Ms Prabha Nandagopal, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, Canberra, 17 June 2020, p. 2.

Children also recommended that a relevant parliamentary committee should be enabled to report to the Minister on whether sanctions targets should remain or no longer be the subject of an order or regulation.[60]

5.100 The Law Council of Australia's submission recommended that sanctions should initially be imposed on an interim basis, with the Minister to provide the target with a statement of reasons, and invitation to respond. If a subsequent 'permanent' (three year) decision follows, it should be accompanied with a statement of reasons.[61]

5.101 Ms Pauline Wright, President of the Law Council of Australia noted the United Kingdom's approach where the Secretary of State is required to report to parliament every 12 months, and stated that the Law Council of Australia would support:

> … more regular reviews of whether sanctions or orders remain appropriate, including automatic review where relevant new evidence might arise, and providing the right to affected individuals to request revocation. The current autonomous sanctions regulation provides that designations and declarations automatically sunset after three years and an application for revocation can only occur once per year. But we would suggest that more regular reviews take place 12-monthly and certainly upon new evidence coming to light.[62]

Committee Comment

5.102 The Sub-committee considers that an Australian targeted sanctions regime should lead global best practice in ensuring fairness and providing safeguards for individuals.

5.103 However the Sub-committee considers that the legislation should not include a full merits review by an independent body. Relevantly, sanctions are not a criminal process and do not affect a person's rights. The Sub-committee considers that its proposals for an independent advisory body prior to the decision, and for regular reporting to Parliament, will provide sufficient oversight.

5.104 The legislation should include a right for a sanctioned person to request a review of the Minister's decision, and should oblige the Minister to conduct a review on request. It may be appropriate for the regulations to

60 Save the Children, *Submission 47.1*, pp. 11-13.

61 Law Council of Australia, *Submission 99*, p. 5.

62 Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra, 15 June 2020, p. 9.

give further detail on how that review should be conducted and provide some limitations of the number or frequency of review requests.

5.105 As a general principle, the Sub-committee is of the view that the Minister should have a broad discretion to remove or vary sanctions. The Sub-committee notes that transparency in decision making is the preferred approach, and recommends that decisions to remove or vary sanctions are also included in a public register, with reasons for the decision.

5.106 The Sub-committee also notes the importance of any new legislation being reviewed for effectiveness after an initial period of implementation, and recommends that the targeted sanctions regime is reviewed three years from commencement.

The sanctions

5.107 The inquiry has also considered the nature of sanctions that would be imposed. Evidence to the inquiry supported two main groups of sanctions: travel restrictions, and asset or financial restrictions.

5.108 The first would involve restricting access to Australia. Sanctioned individuals and their associates - potentially including family members - would have their ability to enter Australia removed through a visa ban or cancellation.

5.109 Restricting access of sanctioned individuals to visit or relocate to Australia is an outcome that is strongly supported by Australian diaspora groups. The Sub-committee heard concerns arising from interaction with human rights abuse perpetrators from their country of origin in Australia (as discussed in Chapter 2). Australia's current migration system allows for entry refusals on a range of grounds,[63] so this action could be accommodated within the scope of the current system.

5.110 In addition, targeted sanctions would involve financial restrictions. The regime would enable the Australian government to freeze assets in Australia. Sanctioned individuals would also lose access to Australian financial institutions and be unable to complete any financial transactions within Australia.

5.111 The combination of banning entry into Australia, and blocking access to assets would also restrict access to Australian services including healthcare and education.

63 Australian Border Force, https://www.abf.gov.au/entering-and-leaving-australia/crossing-the-border/overview, accessed 27 October 2020.

5.112 This approach would be largely consistent with Australia's existing autonomous sanctions regime (described in Chapter 2), and the Magnitsky-style regimes in comparable jurisdictions (for full details and extensive comparisons refer to Chapter 3).

5.113 In addition to the direct consequences outlined above, the targeted sanctions regime would publish the names and reason for sanctions listings, which the Sub-committee anticipates will create a flow on deterrent effect.

Imposition of sanctions - implementation

5.114 The inquiry did not generate a significant amount of evidence on the topic of implementation of a new human rights targeted sanctions regime. The DFAT submission suggested that if incorporated into the autonomous sanctions framework, a thematic human rights-based sanctions regime could be implemented consistently with the current process for imposing targeted sanctions.

5.115 The Sub-Committee acknowledges that implementing a new Magnitsky-style targeted sanctions regime will require additional dedicated resources. Visa bans and cancellations should be relatively straightforward, and are largely within the control of the federal government. However the imposition of financial restrictions will require government to work closely with the private sector. The Sub-committee recommends that existing processes are used as far as possible to avoid duplication and to reduce the burden on businesses.

Further considerations - Targeted Sanctions regime administration, public diplomacy and communication

5.116 The DFAT submission discussed the need for a new human rights sanctions regime to be based on clear and consistent administrative processes to manage proposals for new listings, as a way of ensuring the regime is implemented consistently and in line with its objectives.[64]

5.117 DFAT's submission also noted the need for a public diplomacy strategy to clearly communicate limits and objectives, domestically and internationally. A public diplomacy strategy could be used to assist with keeping the Australian business community informed and provide

64 Department of Foreign Affairs and Trade, *Submission 63*, p. 8.

guidance on how businesses can meet their obligations in terms of avoiding or managing their dealings with sanctions targets, and demonstrate their efforts to do so (refer to discussion in Chapter 4).

5.118 Effective implementation of a Magnitsky-style targeted sanctions regime is also likely to require significant, dedicated resourcing within the Department of Foreign Affairs as the agency with primary responsibility for implementation. Dedicated resourcing requirements will also be required within departments that would be required to collaborate with the Department of Foreign Affairs to enable effective implementation, such as the Attorney General's Department, Department of Home Affairs and agencies such as the Australian Federal Police.

6

Suggested elements for a Bill

6.1 After careful review of the evidence presented to this inquiry, the Human Rights Sub-committee has concluded that Australia should have stand-alone legislation that would empower the Australian Government to sanction persons and entities responsible for serious violations of human rights and acts of significant corruption.

6.2 At the invitation of the Chair, Mr Geoffrey Robertson OAM QC prepared and submitted to the Sub-Committee a draft *International Human Rights (Global Magnitsky) Bill 2020*. The text of this document is reproduced in full at Appendix D.

6.3 Through this document, and earlier evidence, Mr Robertson has made a substantial contribution to this inquiry, allowing the Sub-committee to benefit from his globally recognised expertise and experience in this field.

6.4 The inclusion of Mr Robertson's document in this report is a useful starting point. The Sub-committee believes it is an indication of the range of matters that could be considered in drafting an Australian Magnitsky targeted sanctions regime.

6.5 The Sub-Committee is grateful to Mr Robertson for his contribution to advancing consideration of this important human rights issue.

A summary of the Robertson document

6.6 Mr Robertson's document provides considerable insight into how future legislation may be drafted. The following summary seeks to highlight some of the key areas of the document. Where relevant the Sub-committee notes its agreement or disagreement with the document.

Preamble

6.7 The Robertson document has a long preamble that discusses human rights at length. This form of long preamble may be somewhat unusual however, Mr Robertson points out that this sort of preamble is often included when the subject concerns human rights and can be found in international human rights treaties.[1]

6.8 The Sub-committee concurs that a substantive preamble would assist interpretation of the purposes and intentions underlying the legislation.

Crimes against the International Criminal Court

6.9 The Sub-committee notes the inclusion in the Robertson draft of a reference of Division 268 of the Criminal Code – crimes against the administration of the International Criminal Court (ICC).

6.10 The Human Rights Sub-committee considers this provision would have to be considered carefully in the context of both Australia's strong support for the ICC, and Australia's relations with states that are not parties to the Rome Statute of the ICC, and that consequently have not accepted obligations to cooperate with and support the proceedings of the Court.

Definitions

6.11 Definitions are central to the effective targeted sanctions legislation. A lack of a clear definition may lead to confusion and inconsistency in approach, however, a narrow definition may fail to cover all the possible circumstances in which human rights abuses and significant corruption may occur.

6.12 The Robertson document refers to 'grave human rights abuses' and 'serious corruption'. The objects of the document refer to deterring 'gross violations or human rights' and 'significant corruption'.

6.13 The Robertson document is specific with its definitions. 'Internationally recognised human rights and fundamental freedoms' are defined as having the same meaning as in section 3 of the *Australian Human Rights Commission Act 1986,* for example.[2]

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1 Mr Geoffrey Robertson OAM QC, *Committee Hansard*, Canberra, 15 May 2020, p. 40-41.

2 Section 3 of the Human Rights Commission Act defines human rights as the rights and freedoms recognised in the International Covenant on Civil and Political Rights, the Declaration on of the Rights of the Child; the Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons, and other rights declared or recognised by international instruments.

6.14 The references in the Robertson document to the Criminal Code ACT 1995 clarify what human rights violations are covered by the Robertson document. The inclusion of references to genocide, crimes against humanity, war crimes and slavery and slavery-like offences is consistent with the document's object of deterring 'grave' or 'gross' human rights abuses.[3]

6.15 The Robertson document provides that the person is a human rights violator, if, in the opinion of the Minister, the person is responsible for or engages in a violation of human rights; facilitates, incites, promotes or supports that human rights violation; consents to or acquiesces in that violation, conceals evidence of that violation, provides financial or other support.[4]

6.16 Similarly the Robertson document broadly defines 'significant corruption' to have occurred 'when, in the Minister's opinion, a person commits, plans to commit or participates in the commission of corruption, having regard to its impact, the amounts involved, the person's influence or position of authority or the complicity of the government of the State concerned.'

6.17 The Human Rights Sub-committee notes that the scope is broad and includes the perpetrators of human rights violations, as well as those who would assist them, and those who cover up such activities which could include beneficiaries or dependents. The Sub-committee agrees that the scope for defining human rights violators needs to be broad to be effective.

6.18 A comprehensive listing of the dimensions of corrupt conduct is included in the document. However, it is left to the judgment of the Minister as to what is 'significant' corruption – having regard to its impact, amounts involved, the position of the persons involved and/or State complicity.

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3 Subdivision 268J sets out crimes inter alia including perjury; falsifying , destroying or concealing evidence; deceiving, corrupting or threatening witnesses or interpreters; perverting the course of justice, or corrupting court officials, Subdivision 268J also includes offences including preventing the attendance of witnesses in ICC proceedings , preventing production of things in evidence, reprisals against witnesses (including causing any detriment to another person who was a witness in an ICC proceeding); and reprisals against officials of the International Criminal Court (including causing or threatening any detriment to an official of the ICC because of anything done or believed to have been done for the purposes of a proceeding before the Court.

4 Section 7 The definition also includes persons who are 'responsible for investigation or prosecution of the violation and intentionally or recklessly fails to fulfil that responsibility' or a person who contravenes or assists with the contravention of the asset freezing provisions of the proposed legislation.

Magnitsky conduct

6.19 The Robertson document introduces the term 'Magnitsky conduct'. The use of this term puts Mr Sergei Magnitsky's name at the heart of the legislation. This term is defined as conduct that involves violation of human rights and significant corruption. The document further states that Magnitsky conduct:

> …may also involve harm or threats of harm (whether physical, financial or other harm, including to family, friends or business associates) to persons that might attempt to or expose Magnitsky conduct, or who obtain, exercise, defend or promote internationally recognised human rights and fundamental freedoms.

6.20 Magnitsky conduct also covers the persecution of human rights activities and organisations. It covers actions that, for example, include threats of harm against certain persons that would not necessarily fall within the terms of the definition of human rights violation.[5]

6.21 The Sub-committee considers that extending the legislation to this conduct would target not only human rights violators and those engaged in serious corruption, but also those who act to cover up such activities.

6.22 The Sub-committee considers the legislation should use the concept and name of 'Magnitsky Conduct'.

Application to citizens

6.23 The Robertson document imposes geographical differences between Australian and non-Australian persons (as defined). Magnitsky conduct by Australians can only occur outside Australia, where Magnitsky conduct by non-Australians can occur anywhere.

6.24 The Sub-committee does not agree that targeted sanctions should apply to Australian citizens, noting that citizens are already subject to Australian laws including relevant criminal laws.

Designation of persons

6.25 A Bill modelled on the Robertson document would empower the Minister to designate persons if satisfied that the person is or has been involved in Magnitsky conduct. The Minister may further designate 'associates'. This defined as persons 'owned or controlled directly or indirectly by a person

5 See Sections 6 and 7.

who is or has been involved in Magnitsky conduct or is acting on behalf of or at the direction of a person who is or has been so involved or is a member of, or associated with, a person who is or has been so involved.' Family members and relatives are not explicitly covered by this definition.

6.26 As noted in Chapter 5, the Sub-committee is of the view that a targeted sanctions regime should include the option for sanctions to be applied to family members and other direct beneficiaries of sanctioned individuals.

6.27 The Robertson document provides that a decision to designate a person would be made by the Minister. The Robertson document makes no reference to the information that the Minister may rely upon in deciding to designate a person.

Statement of reasons

6.28 The Robertson document provides that in informing a person of their designation, the Minister must include a statement of reasons including 'a brief statement of the matters the Minister knows, or has reasonable grounds to suspect', but the Minister may exclude information that if disclosed would be harmful to national security, interfere with law enforcement investigations, disclose a confidential informant or whistle-blower or be contrary to the interests of justice (see Sections 18 (4) and (5) if the Robertson document). The Minister must also make the designation public, subject to similar exclusions.

6.29 The Sub-committee supports the provision of a 'statement of reasons' for persons being designated.

Retrospectivity

6.30 It should be noted that under the provisions of the Robertson document, persons may be designated for both current and past Magnitsky conduct. There is no time limit on past Magnitsky conduct, so the scope of the legislation would be retrospective. The Sub-committee concurs with this approach.

Request for designation

6.31 Section 19(1) of the Robertson document provides a 'right' to request the Minister designate a person for Magnitsky conduct. A person who might exercise a right to request a designation would be 'any person whose interests are affected by alleged Magnitsky conduct'. The scope here is quite broad – requests could be made to the Minister by anyone who claims to be 'affected' by alleged Magnitsky conduct.

6.32 Section 19(2) of the Robertson document provides that designation of a person may be requested by an organisation or association that has for at least two years been engaged in activity anywhere 'for the protection and promotion of international human rights and fundamental freedoms', and 'at the time of its proposal its objects or purposes include protection and promotion of international human rights and fundamental freedoms.' The Minister would not have to act in response to a request for designation, but must consider such requests.

6.33 The scope of this provision would potentially cover well known international human rights organisations such as Amnesty International and Human Rights Watch. It could also cover national human rights organisations in other countries including Human Rights Commissions and non-governmental organisations engaged in relation to human rights matters.

6.34 The Robertson document does not include any specific role for members of the Australian Parliament or Parliamentary Committees in making requests to the Minister for designation of persons.

6.35 The Sub-committee considers that anyone should be able to request the minister to impose sanctions. However the Sub-committee recommends the establishment of an independent advisory body to provide a transparent pathway for nominations, as discussed in Chapter 5.

The right of review

6.36 The Robertson document provides for a right of review and requires the Minister to appoint an independent person to conduct a review of a designation of a person involved in Magnitsky conduct. Criteria are specified for the appointment of the independent person and conduct of a review process.

6.37 The Robertson document provides that the appointments of an independent person to conduct a review would be subject to regulations, including in relation to conflict of interest avoidance.

6.38 The Sub-committee does not agree with an independent review on the merits and recommends that the Minister conduct reviews on request.

Dealing with assets

6.39 The Robertson document includes provisions for dealing with assets of a designated person or making funds or assets available to them.

6.40 There are exemptions to freezing of assets including provision for basic needs, including legal services, extraordinary expenses, diplomatic missions, and humanitarian assistance activity.

6.41 The Robertson document discusses in bracketed text a range of issues arising from freezing assets, including relationship with proceeds of crime laws, but specific provisions have not been developed. The possibility that assets may need to be held and managed by the Commonwealth is also discussed.

6.42 The Robertson document refers to the new legislation into the financial surveillance reporting requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

6.43 This is a necessary measure. The Sub-committee would encourage the Government to consider what other machinery may be required for the identification of frozen assets and enforcement of prohibitions in dealing with such assets.

Immigration

6.44 The Robertson document contemplates, but does not set out measures to prohibit the entry of designated persons into Australia as well as changes to the visa/residency status of persons already in Australia. While the Minister responsible for the administration of the Migration Act 1958 already has extensive powers in this regard, it may be necessary to amend the legislation.

6.45 The Robertson document envisages parliamentary oversight by the Joint Standing Committee on Foreign Affairs, Defence and Trade. The Document provides that the Minister must table an annual report in Parliament. The section does not specify what information must be included in the annual report.

6.46 The Sub-committee supports the requirement for an annual report by the Minister to Parliament.

6.47 The Robertson document envisages independent review of the legislation to be undertaken by an independent person appointed by the Minister three years after the commencement of the Act. A report is to be tabled in Parliament within 15 sitting days after its receipt by the Minister.

Comment

6.48 The Robertson document illustrates some of the issues involved in the drafting of new targeted sanctions legislation. Mr Robertson has provided a considerable service to the Parliament in providing his draft to the Sub-committee. His text should serve as a valuable catalyst for action and assist in drafting new legislation for consideration by the Parliament.

7

General principles and recommendations

7.1 Taking into account the evidence presented in the course of the inquiry including from world-leading experts in the field of human rights law, the Sub-committee's own independent research, discussion of relevant issues in this report, and careful consideration of Mr Robertson's document, a draft *International Human Rights (Global Magnitsky) Bill 20*20, the Sub-committee has agreed on a range of general principles that should be applied to guide the drafting.

7.2 The principles are as follows:

- The definition of sanctionable conduct should be broad, and cover human rights abuses, serious corruption and conduct that impinges on media freedom.
- There should be safeguards for individuals who may be sanctioned, including a right of reply and appeal process.
- The decision maker should have a broad and unfettered ability to apply, remove or vary sanctions.
- Nominations for sanctions can be made by anyone; however an independent advisory body should be created to allow a transparent pathway to the decision maker.
- The definition of who can be sanctioned should be broad, including family members, associated entities and corporate entities.
- The process should be as transparent as possible, with a public register of decisions, an annual report to Parliament, and review by the JSCFADT.

7.3 The Human Rights Sub-committee is firmly of the view that new, stand-alone targeted sanctions legislation will significantly strengthen Australian and broader international efforts to deter gross human rights violations and significant corruptions worldwide. These twin evils must

be confronted at every opportunity and strong new targeted sanctions legislation will provide Australian Governments with new weapons to do just that. The Australian Government and the Australian Parliament should move without delay.

Recommendations

Recommendation 1

The Sub-committee recommends that the Australian Government enact stand alone targeted sanctions legislation to address human rights violations and corruption, similar to the United States' *Magnitsky Act 2012*.

Definition of human rights (refer paragraph 5.4)

Recommendation 2

The Sub-committee recommends that the legislation should include a preamble, which would set out the broad purposes and general principles of the Act.

Recommendation 3

The Sub-committee recommends that the range of conduct that may be sanctioned should include serious human rights abuse and serious corruption.

Recommendation 4

The Sub-committee recommends that the new targeted sanctions legislation should apply to 'serious human rights abuses' with further guidance on thresholds and applicable conduct provided in the preamble.

Special consideration (refer paragraph 5.13)

Recommendation 5

The Sub-committee recommends that the preamble acknowledge the importance of maintaining journalist and human rights defenders' human rights and expressly state that systematic extrajudicial actions that intend to limit media freedom can be considered human rights abuses.

Scope of sanctions (refer paragraph 5.29)

Recommendation 6

The Sub-committee recommends that the legislation should name the range of conduct which can be sanctioned as 'Magnitsky conduct'.

Recommendation 7

The Sub-committee recommends that sanctions should be applicable to the immediate family and direct beneficiaries of human rights abusers.

Recommendation 8

The Sub-committee recommends that sanctions be applicable to all entities, including natural persons, corporate entities and both state and non-state organisations.

Recommendation 9

The Sub-committee recommends that sanctions be applicable to associated entities, broadly defined.

Australian citizens (refer paragraph 5.42)

Recommendation 10

The Sub-committee recommends that the new targeted sanctions legislation should not apply to Australian citizens because they are subject to legislation with similar, if not stronger, consequences. This issue should be re-examined as part of the 3-yearly review.

Retrospectivity (refer paragraph 5.48)

Recommendation 11

The Sub-committee recommends that the new targeted sanctions legislation be applicable to conduct that has occurred prior to enactment of the legislation.

Nomination process (refer paragraph 5.52)

Recommendation 12

The Sub-committee recommends that an independent advisory body be constituted to receive nominations for sanctions targets, consider them and make recommendations to the decision maker.

Recommendation 13

The Sub-committee recommends that the structure of the independent advisory body should be set out in regulations, and should include the ability to conduct its inquiry in public.

Recommendation 14

The Sub-committee recommends that the new legislation should require the decision maker to consider recommendations by the advisory body and give reasons for any decision not to adopt a recommendation by the advisory body.

Recommendation 15

The Sub-committee recommends that the decision maker should be able to receive nominations from any source.

Information sharing (refer paragraph 5.61)

Recommendation 16

The Sub-committee recommends that the legislation, or regulations under the legislation, set out processes to allow Australian authorities to work with other jurisdictions and their sanctions regimes.

Decision making (refer paragraph 5.66)

Recommendation 17

The Sub-committee recommends that the Minister for Foreign Affairs be the decision maker.

Recommendation 18

The Sub-committee recommends that the Minister for Foreign Affairs should be required to consult with the Attorney-General before making a decision.

Recommendation 19

The Sub-committee recommends that the legislation include a requirement to give the targeted person a right of reply, and a requirement for the Minister to consider this, before imposing sanctions.

Recommendation 20

The Sub-committee recommends that the Minister for Foreign Affairs should have broad discretion as to whether or not to impose sanctions. This would include the ability to remove or vary sanctions.

Recommendation 21

The Sub-committee recommends that the legislation allow for a 'watch list' of people being considered for sanctioning. Inclusion on a watch list should be for a fixed time period, after which a person must either be sanctioned or removed from the list. The watch list should be public.

Burden of proof (refer paragraph 5.79)

Recommendation 22

The Sub-committee recommends that the evidentiary standard for a decision should be the balance of probabilities.

Transparency (refer paragraph 5.80)

Recommendation 23

The Sub-committee recommends that the legislation require the publication of the names of sanctioned people and the reasons for their listing. This includes all decisions to remove or vary sanctions.

Recommendation 24

The Sub-committee recommends that the legislation require the Foreign Minister to publish an annual report to Parliament advising of sanctions.

Recommendation 25

The Sub-committee recommends that the Foreign Minister's annual report into the sanctions should stand referred to the JSCFADT for inquiry.

Recommendation 26

The Sub-committee recommends that there be limited exemptions from including information on the public register, watch list or annual report for reasons of national security or criminal investigations.

Review (refer paragraph 5.91)

Recommendation 27

The Sub-committee recommends that the legislation include a right for a sanctioned person to request a review of decision. The Minister should be required to conduct a review on request, although the regulations may limit the obligation to conduct reviews.

Recommendation 28

The Sub-committee recommends that targeted sanctions legislation be reviewed by the government three years after commencement.

The Sanctions (refer paragraph 5.107)

Recommendation 29

The Sub-committee recommends that the sanctions include visa / travel restrictions, limit access to assets, and restrict access to Australia's financial systems.

Recommendation 30

The Sub-committee recommends that the sanctions, to the extent possible, be implemented using existing processes and legislative schemes.

Recommendation 31

The Sub-committee recommends that the new sanctions regime be accompanied by a public diplomacy strategy to provide guidance to those affected, including Australian businesses.

Recommendation 32

The Sub-committee recommends that the Department of Foreign Affairs and Trade should be given additional resources to implement the sanctions regime. Other departments required to contribute to implementation should also be allocated dedicated resourcing for the task.

Recommendation 33

The Sub-committee recommends that the long title of the legislation should include 'Magnitsky' to emphasise links with the Global Magnitsky movement.

Senator the Hon David Fawcett

Chair, Joint Standing Committee on Foreign Affairs, Defence and Trade

December 2020

Hon Kevin Andrews MP

Chair, Human Rights Sub-committee of the JSCFADT

December 2020

A

Appendix A – List of Submissions

1 Mr Geoffrey Robertson OAM QC
2 Boat People S.O.S.
3 Joseph Chen
4 Mr William Browder, Hermitage Capital Management
4.1 Supplementary to submission
4.2 Supplementary to submission
5 Latvian Federation of Australia and New Zealand
6 Falun Dafa Association of Australia Inc
6.1 Supplementary to submission 6
6.2 Supplementary to submission 6
7 Anne Webb
7.1 Supplementary to submission 7
7.2 Supplementary to submission 7
8 Glen McNamara
9 Uyghur Association of Victoria
10 U.S. Helsinki Commission / U.S. Congress
11 Dr Kevin Carrico
12 Human Rights Watch
12.1 Supplementary to submission 12
13 Mr Robert Heron
14 Name Withheld
15 Ms Carol Baulch
16 Mr Moi Odubasa
17 Human Rights First

18 Mr Drew Pavlou

19 Human Rights Network of Australia

19.1 Supplementary to submission 19

20 Safeguard Defenders

Attachment 1

21 Australian Human Rights Commission

22 Norwegian Helsinki Committee

23 Gus Borowski

24 Free Russia Foundation

25 Ma'di Community Council of Australia Inc. (MCCA)

26 Mrs Saulitis Kristine, World Federation of Free Latvians

27 Presbyterian Church of Victoria

28 Allens

29 Confidential

30 The Sentry

31 Sjoerd Wiemer Sjoerdsma, Parliament of the Kingdom of the Netherlands

32 Victoria HongKongers Association

32.1 Supplementary to submission 32

33 Australian Lawyers for Human Rights

34 The High Level Panel of Legal Experts on Media Freedom

Attachment 1, Attachment 2 and Attachment 3

35 Tibet Information Office

36 Central & Eastern European Council in Canada

37 Fight for Freedom Stand with Hong Kong

39 Name Withheld

40 International Religious Freedom Roundtable

41 Hong Kong Confederation of Trade Unions

42 Federation for a Democratic China (FDC)

43 Australian Supporters of Democracy in Iran

44 Name Withheld

45 Name Withheld

46 NSW Council for Civil Liberties

47 Save the Children Australia

47.1 Supplementary to submission 47

48 Mr Benjamin Cronshaw
49 Kampuchea Krom Cultural Centre of NSW Inc
50 Andrew Wong
51 Netherlands, Ministry of Foreign Affairs
52 Name Withheld
53 Name Withheld
54 Name Withheld
55 Name Withheld
56 Name Withheld
57 Name Withheld
Attachment 1 and Attachment 2
58 Confidential
59 Name Withheld
60 Name Withheld
61 Name Withheld
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63 Australian Department of Foreign Affairs and Trade
63.1 Supplementary to submission 63
63.2 Supplementary to submission 63
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64 Mr Gordon Ramsay MLA, ACT Government Attorney-General
65 Name Withheld
66 Name Withheld
67 Name Withheld
68 Name Withheld
69 Name Withheld
70 Name Withheld
70.1 Supplementary to submission 70
Attachment 1 and Attachment 2
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72 Mr Greg Hogan
73 Cambodian Action Group
74 Cambodian Australian Federation
75 Ministry of Foreign Affairs of the Republic of Lithuania

76 Confidential

77 Uniting Church in Australia Synod of Victoria and Tasmania

78 Lawrence Lau

79 Livia Leung

80 United States Department of State

81 Confidential

82 Mr Dauod Wahabzada

83 Name Withheld

84 Ms Tonya Stevens

85 Josephite Justice Network

86 Australia Tibet Council

87 Australian Centre for International Justice

87.1 Supplementary to submission 87

88 East Turkistan Australian Association

89 Vladimir Kara-Murza

90 L Yim

91 Kenneth So

92 Veronica Chow

93 Chloe Lokman

94 Leung Derek

95 International Commission of Jurists Australia

95.1 Supplementary to submission 95

96 Confidential

97 Hong Kong Universal Periodic Review Coalition

98 ETAC

99 Law Council of Australia

99.1 Supplementary to submission 99

100 Australian Citizens Party

Response from Mr William Browder

101 Demosisto

102 Commission on Security and Cooperation in Europe (U.S. Helsinki Commission)

103 Mr Keith Chan

104 Cambodia National Rescue Party (CNRP)

105 Islamic Council of Victoria (IVC)

106 Mr Meng Heang` Tak

107 Name Withheld

108 Name Withheld

109 Government of Canada

110 Ms Lucy Komisar

110.1 Mr Browder response

111 Open Dialogue Foundation

112 Progressive Lawyers

113 Center for International Law

114 Hong Kong Watch

115 Joint Baltic American National Committee Inc

116 Campaign for Uyghurs

117 ETYC

118 NKhumanitarian

119 Senator Ben Cardin

120 Lord (Tariq) Ahmad of Wimbledon, Foreign and Commonwealth Office, Department for International Development

121 Mr Hong Lim

122 Viet Labor Movement

123 Buddhist Monks Human Rights Council

124 Mr Sabit Ruzehaji

125 Australian Muslim Advocacy Network

126 Avaaz

127 FIDH - International Federation for Human Rights

128 Victorian Gay and Lesbian Rights Lobby

129 Confidential

130 China Policy Centre

131 Australian Red Cross

132 Mr Patrick Walsh

133 Mr Hamish Oliver Perrett

134 World Organization to Investigate the Persecution of Falun Gong

135 Association of Chinese Human Rights and Democracy (Australia)

136 Xin Chen

137 Kent Luo

138 Yenglin Chen

139 Ms Jia Zhen Qi

140 Xiaogang Zhang

141 Jun Meng

142 Zhen Yang

143 Michelle Li

144 Shelley Jiang

145 Tony Kevin

145.1 Supplementary to submission 145

146 Jon O'Brien

147 Anna Parsons

148 Lebanon Abroad

149 Uyghur Human Rights Project

150 Mr Stephen Cho

151 Senator Leila M. de Lima

152 Australians for Kurdistan

153 Hogan Lovells International LLP

154 Garry Kasparov

155 Forum of Australian Services for Survivors of Torture and Trauma (FASSTT)

156 Estonia Ministry of Foreign Affairs

157 Name Withheld

158 World Organization to Investigate the Persecution of Falun Gong (WOIPFG)

159 Ms Janice Le

160 Bureau of Economic Affairs, US Dept of State

161 The Tahrir Institute For Middle East Policy

162 Lan Huynh

163 Shelly Ren

B

Appendix B – List of Public Hearings

Tuesday 31 March 2020
Committee Room 1R4, Parliament House, Canberra

- *Human Rights Watch*
  Ms Elaine Pearson, Australia Director
- *Save the Children Australia*
  Mr Simon Henderson, Head of Policy
- *Australian Centre for International Justice*
  Ms Rawan Arraf, Director
- *Mr Meng Heang Tak, MP*
- *Cambodian Australian Federation*
  Mr Hong Lim, President
- *Cambodian Association of Victoria*
  Mr Youhorn Chea, President
- *Cambodia National Rescue Party (CNRP)*
  Mr Hemara In, President
- *Kampuchea Krom Cultural Centre of NSW Inc*
  Mr Sawathey Ek, Founder and spokesperson

Tuesday 28 April 2020
Committee Room 1R4, Parliament House, Canberra - Teleconference

- *VOICE Australia, Human Rights Network of Australia*
  Ms Janice Le, Representative

Thursday, 30 April 2020
Committee Room 1R4, Parliament House, Canberra - Teleconference

- *Uyghur Association of Victoria*
  Mr Alim Osman, President
- *Victoria HongKongers Association and Australia Hong-Kong Link*
  Mr Simon Ho, Co-President
  Mr Chi To Mok, Committee Member
- *Australia-Hong Kong Link*
  Miss Wing Hei Ng, Committee Member
  Mr Long Cheung Tsui, Committee Member

Friday, 15 May 2020
Committee Room 1R4, Parliament House, Canberra - Videoconference

- *Free Russia Foundation*
  Mr Vladimir Kara-Murza, Vice President
- *High Level Panel of Legal Experts on Media Freedom*
  Ms Amal Clooney, Deputy Chair
- *Raoul Wallenberg Centre for Human Rights*
  Professor Irwin Cotler
- *High Level Panel of Legal Experts on Media Freedom*
  Rt Hon. Lord Neuberger, Chair
- *Hermitage Capital Management*
  Mr William Browder, Head of the Global Magnitsky Justice Campaign
- *Doughty Street Chambers*
  Mr Geoffrey Robertson OAM QC

Monday, 15 June 2020
Committee Room 2R1, Parliament House, Canberra - Videoconference

- *International Commission of Jurists Australia*
  Dr Elizabeth Biok, Secretary General
- *Law Council of Australia*
  Ms Pauline Wright, President
  Ms Leonie Campbell, Deputy Director of Policy
  Mr Stephen Keim SC, National Human Rights Committee Member

Wednesday, 17 June 2020
Committee Room 2R1, Parliament House, Canberra – Videoconference

- *Australian Human Rights Commission*
  Ms Rosalind Croucher, President
  Ms Prabha Nandagopal, Senior Lawyer
- *Australian Department of Foreign Affairs and Trade*
  Mr Simon Newnham, First Assistant Secretary, Chief Legal Officer
  Ms Emily Roper, Acting Assistant Secretary
  Ms Jennifer Cavenagh, Director

Thursday, 25 June 2020
Committee Room 1R4, Parliament House, Canberra – Teleconference

- *Human Rights Foundation*
  Mr Garry Kasparov
- Mr Tony Kevin

Thursday, 1 October 2020
Committee Room 1R4, Parliament House, Canberra – Teleconference

- *Export Council of Australia*
  Ms Dianne Tipping, Chair, Board of Directors
- *Australian Industry Group*
  Ms Louise McGrath, Head, Industry Development and Policy

C

Appendix C – Proceeds of Crime Act 2002 (UK) s241A

241A Gross human rights abuse or violation

1. Conduct constitutes the commission of a gross human rights abuse or violation if each of the following three conditions is met.
2. The first condition is that—
   a. the conduct constitutes the torture of a person who has sought—
      i. to expose illegal activity carried out by a public official or a person acting in an official capacity, or
      ii. to obtain, exercise, defend or promote human rights and fundamental freedoms, or
      iii. the conduct otherwise involves the cruel, inhuman or degrading treatment or punishment of such a person.
3. The second condition is that the conduct is carried out in consequence of that person having sought to do anything falling within subsection (2)(a)(i) or (ii).
4. The third condition is that the conduct is carried out—
   a. by a public official, or a person acting in an official capacity, in the performance or purported performance of his or her official duties, or
   b. by a person not falling within paragraph (a) at the instigation or with the consent or acquiescence—
      i. of a public official, or
      ii. of a person acting in an official capacity, who in instigating the conduct, or in consenting to or acquiescing in

it, is acting in the performance or purported performance of his or her official duties.

5. Conduct is connected with the commission of a gross human rights abuse or violation if it is conduct by a person that involves—
   a. acting as an agent for another in connection with activities relating to conduct constituting the commission of a gross human rights abuse or violation,
   b. directing, or sponsoring, such activities,
   c. profiting from such activities, or
   d. materially assisting such activities.
6. Conduct that involves the intentional infliction of severe pain or suffering on another person is conduct that constitutes torture for the purposes of subsection (2)(a).
7. It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or omission.
8. The cases in which a person materially assists activities for the purposes of subsection (5)(d) include those where the person—
   a. provides goods or services in support of the carrying out of the activities, or
   b. otherwise provides any financial or technological support in connection with their carrying out.

D

Appendix D – The Robertson document

The following document was received from Mr Geoffrey Robertson OAM, QC.

2020

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

International Human Rights (Global Magnitsky Law) Bill 2020

No. , 2020

*(**insert name**)*

A Bill for an Act to provide for the taking of restrictive measure against foreign persons complicit in grave human rights abuses or in serious corruption

Contents

A Bill for an Act to provide for the taking of restrictive measures against foreign persons complicit in grave human rights abuses or in serious corruption

Preamble

An act to provide for the taking of restrictive measures against foreign nationals complicit in grave human rights abuses or in serious corruption.

PARLIAMENT

Conscious of its democratic duty to uphold, protect and advance the hard-won liberties of the Australian people, in a nation bound by the rule of law and by covenants which confirm their commitment to international justice and to human rights,

Mindful in particular of the Universal Declaration of Human Rights, in the drafting and promulgation of which Australia played an important role, and of all the treaties our nation has ratified to assert the dignity of the individual, in Australian and throughout the world,

Respectful of the Anzac tradition of willingness to fight for freedom, internationally and in our region, against any power that threatens democracy and individual liberty, exemplified by Australia's courageous response to the United Nation's request to protect the people of East Timor in 1999, when more powerful member states quailed,

Recalling the sacrifices made by this country during the struggle against fascism in order to secure for the peoples of the world the war aim declared by President Roosevelt, namely the four freedoms - freedom of speech and religion and freedom from want and fear,

Proud of how these freedoms have been nurtured and embellished by the vigilance of generations of Australians so they have become fundamental to our values as a people, but

Regretful that they have been jeopardised elsewhere in the world by persons and corporations who have engaged in and profited from grave human rights abuses and from acts of serious corruption and who are not likely to be punished or otherwise sanctioned for their crimes.

Determined that any such person or associates should not be allowed to enter Australia or to spend here their ill-gotten gains, either by residence or by transfer of funds through banks or financial institutions, and nor should they or their families enjoy our educational, medical or tourist facilities, and

Believing that targeted sanctions of this kind will, especially if replicated by sanctions imposed under the Magnitsky laws of allied nations, serve as a measure of retribution for reprehensible acts and will deter others from attempting such acts in the future, and

Cognisant, moreover, that the imposition of a sanctions regime against proven perpetrators of human rights abuses will serve both to symbolise and to celebrate Australia's continuing commitment to the cause of global justice, as well as providing comfort to those members of our ethnic communities who fear that they, or their families still abroad, may suffer reprisals for exercising their freedom of speech.

Whereas this statute, to reflect its connection with targeted sanction laws passed by our allies, namely the US, UK, Canada and members of the European Union, enshrines the name of Sergei Magnitsky, a Moscow accountant who uncovered a massive fraud committed by tax officials and law enforcement agents of the Russian state, and in revenge was imprisoned without trial and without bail, which was denied by craven judges, and who was tortured and killed in jail without any subsequent investigation and without accountability for those responsible either for the corruption he exposed or for the death he suffered.

Whereas this statute also pays tribute to the many Australians who have made a contribution to the advancement of human rights here and abroad, including as examples

- *Reverend John Dunmore Lang*, who first alerted the British Parliament to the massacres and mistreatment of indigenous peoples,
- *Andrew Inglis Clarke*, Tasmanian Attorney General and judge, the founding father who at Federation advocated for human rights,
- *Faith Bandler*, who led the campaign at the 1967 referendum to remove racist clauses from the Australian Constitution,
- *Dr HV Evatt*, whose legal genius infused the Charter of the United Nations and who, as president of its General Assembly, promulgated the Universal Declaration of Human Rights,
- *Jessie Street*, Australian delegate to the post-war the Peace Conferences who was an influential advocate for women's rights.

Accepting the need for a human rights law to provide fair process, this Act allows a reasonable opportunity for those who are sanctioned to show why they were not complicit in criminal acts attributed to them, in which case they will be entitled to have their names removed from the list and,

Hopeful that this advanced Magnitsky law will lead to links with the sanctions systems adopted by other parliamentary peoples and will enable the identification and ostracism of those whose behaviour is beyond the pale of democratic society.

Resolved, therefore, to declare by this statute the Australian people's abomination of serious corruption and of crimes against humanity, and to provide sanctions targeted against foreign nationals and entities which can be proven to be complicit in them.

The Parliament of Australia enacts-

Part 1—Preliminary

1 Short title

This Act may be cited as the *International Human Rights (Global Magnitsky Law) Act 2020*.

2 Commencement

(1) This Act commences on the day after this Act receives the Royal Assent.

3 Simplified outline of this Act

To be provided.

4 Definitions

In this Act:

asset means-

(a) an asset of any kind (including, to avoid doubt, funds) or property of any kind, including a legal or equitable estate or interest in real or personal property, a contingent or prospective interest in property, property whether tangible or intangible, moveable or immoveable, however acquired,; and

(b) a legal document or instrument in any form including electronic or digital, evidence of title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, stored value cards, derivatives, debit cards, drafts and letters of credit; and

(c) digital currency as defined in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AMLCTF Act).

asset freezing provisions see Part 4.

associate is a person designated by the Minister under section 16.

Australia, when used in a geographical sense, includes the external Territories.

Australian person is an Australian citizen or permanent resident.

conduct includes omissions and failures to act.

Corruption – see Schedule 1.

Criminal Code is the Schedule to the *Criminal Code Act 1995*.

financial and other services has the same meaning as designated services in section 6 (excluding subsection (6)) of the *AMLCTF Act*.

financial institution includes the provider of financial and other services.

foreign person has the same meaning as in the *Foreign Acquisitions and Take-overs Act 1975*.

human rights violator - see section 7

independent person – see section 21.

internationally recognised human rights and fundamental freedoms has the same meaning as human rights in section 3 of the *Australian Human Rights Commission Act 1986*.

Magnitsky conduct – see section 9

other assets means assets other than funds.

owned or controlled directly or indirectly - see section 11.

person see section 10.

significant corruption - see section 8

violation of human rights - see section 6

5 Objects

The objects of this Act are to deter gross violations of human rights and significant corruption by foreign persons outside Australia by designating and naming perpetrators, preventing entry to Australia by perpetrators and their associates and freezing the assets of perpetrators and their associates.

6 Violation of human rights

(a) A violation of human rights is conduct that would be a breach of Divisions 268 (genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court), 270 (slavery and slavery-like offences) or 274 (torture) if the conduct occurred in Australia or partly in Australia.

(b) To avoid any doubt, a violation of human rights includes weaponizing, microbial or other biological agents, toxins and chemicals to cause harm to persons or induce terror in populations.

7 Human rights violator

A person is a human rights violator if, in the opinion of the Minister –

(a) the person is responsible for or engages in a violation of human rights;

(b) the person facilitates, incites, promotes or provides support for that violation;

(c) the person consents to or acquiesces in that violation;

(d) the person, whether or not in an official capacity, knows of or reasonably suspects that violation, is in a position to discourage or stop it, but fails to do so;

(e) the person conceals evidence of the violation;

(f) the person provides financial and other services, or makes available assets, goods or technology, knowing or having reasonable cause to suspect that those financial and other

services, assets, goods or technology will or may contribute to that violation or to a similar violation;

(g) the person provides financial and other services or makes available assets, goods or technology to a violator;

(h) the person profits financially or obtains any other benefit from a violation of human rights;

(i) the person is responsible for investigation or prosecution of the violation and intentionally or recklessly fails to fulfill that responsibility; or

(j) the person contravenes or assists with the contravention of the asset freezing provisions in Part 3 of this Act.

8 Significant corruption

Significant corruption occurs when, in the Minister's opinion, a person commits, plans to commit or participates in the commission of corruption, having regard to its impact, the amounts involved, the person's influence or position of authority or the complicity of the government of the State concerned.

9 Magnitsky conduct

(a) Magnitsky conduct involves a violation of human rights by a human rights violator or significant corruption, or both.

(b) Magnitsky conduct may also involve harm or threats of harm (whether physical, financial or other harm, including to family, friends or business associates) to persons that attempt to or expose Magnitsky conduct, or who obtain, exercise, defend or promote internationally recognised human rights and fundamental freedoms.

10 Extended meaning of person

Person has the same meaning as in section 2C of the *Acts Interpretation Act 1901* and also includes trusts, partnerships, receivers, liquidators, administrators, executors and legal institutions.

11 Owned or controlled directly or indirectly

(1) A person who is not an individual (C) is owned or controlled directly or indirectly by another person (P) if either of the following two conditions are met (or both are met).

(2) The first condition is that P-

(a) holds directly or indirectly more than 50% of the shares in C,

(b) holds directly or indirectly more than 50% of the voting rights in C, or

(c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C.

(3) Schedule 2 contains provisions applying for the purpose of interpreting subsection (2).

(4) The second condition is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes.

12 Geographical limitation

Magnitsky conduct must be carried out –

(a) outside Australia by any person; or

(b) in Australia by a person who is not an Australian person.

13 Act binds the Crown

This Act binds the Crown in each of its capacities.

14 Application of this Act

(1) This Act extends to every external territory.

(2) This Act applies both within and outside Australia.

(3) This Act applies to Magnitsky conduct even if it existed or was carried on or completed before the commencement of the Act.

(4) This Act applies to assets even if they were created or obtained before the commencement of the Act.

Part 2—Power to Designate Persons

15 Minister may designate persons

The Minister may designate a person if satisfied that the person is or has been involved in Magnitsky conduct.

16 Associates may be designated

The Minister may also designate a person that is owned or controlled directly or indirectly by a person who is or has been involved in Magnitsky conduct or is acting on behalf of or at the direction of a person who is or has been so involved or is a member of, or associated with, a person who is or has been so involved.

17 Minister may vary or revoke the designation

(1) The Minister may at any time vary or revoke the designation.

(2) The Minister must revoke the designation if the Minister is no longer of the opinion that the designated person is or has been involved in Magnitsky conduct.

(3) The Minister must also revoke the designation if of the opinion that the associate is no longer involved as set out in section 16.

18 Notification and publicity of designation

(1) The Minister must without delay take such steps as are reasonably practicable to inform the designated person of the designation, variation or revocation.

(2) The information given under subsection (1) where a designation is made must include a statement of reasons.

(3) A statement of reasons means a brief statement of the matters that the Minister knows, or has reasonable grounds to suspect, in relation to the designated person which have led the Minister to make the designation.

(4) Information may be excluded from the statement of reasons if the Minister considers that disclosure may—

(a) damage national security or international relations

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(5) The Minister must also take steps to publicise the designation, variation or revocation, and in the case of a designation the statement of reasons.

(6) However, the Minister may decline to publicise the decision if the Minister believes that the designated person is an individual under the age of 18 or that disclosure would—

(a) damage national security or international relations

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(7) The Minister must, if it becomes the case that none of the conditions for excluding publicity are now met, take such steps as are reasonably practicable to inform the designated person and to publicise generally the designation and the statement of reasons relating to it.

19 Right to request designation

(1) Any person whose interests are affected by alleged Magnitsky conduct may propose to the Minister that a person and others involved in the conduct or the person's associate be designated (a proposal).

(2) An organisation or association (whether incorporated or not) may also make a proposal if at any time in the two years before it does so it has engaged in a series of activities anywhere for the protection and promotion of international human rights and fundamental freedoms and at the time of the proposal its objects or purposes include protection or promotion of international human rights and fundamental freedoms.

(3) The proposal must be in writing and be accompanied by the information and documents required by the regulations.

(4) Any such proposal must be considered and determined by the Minister.

(5) However, the Minister may decline to consider and determine a proposal which has in substance already been considered and determined by the Minister, where no credible and relevant new information has been provided or is available to the Minister.

(6) Any other person, organisation or association may make a proposal, but the Minister may without reasons decline to consider it.

Part 3—Right of Review

20 Right to request review of designation

(1) A designated person may request the Minister to review the designation or variation decision.

(2) The request must be made in writing and be accompanied by the information and documents required by the regulations.

(3) The Minister must review the decision if requested. However, if a second or subsequent request is made to review the decision, the Minister may decide not to review the decision unless credible and relevant new information is provided or is otherwise available to the Minister.

21 Independent review

(1) In undertaking the review, the Minister must appoint an independent person to conduct a review of the designation and report to the Minister, and the Minister must then consider the independent person's report before making a decision on the review.

(2) The Minister may appoint an independent person for a particular review or for reviews generally.

(3) The independent person must be a person with training or experience in any one of the following—

(a) the protection or promotion of international human rights and fundamental freedoms;

(b) the investigation or prosecution of serious crimes;

(c) the investigation of significant corruption;

(d) judicial office.

(4) The person appointed must not be currently serving in an Australian judicial office.

(5) Regulations may be made for the terms and conditions of appointment and remuneration of the independent person, including the avoidance of conflicts of interest.

(6) The independent person is not subject to the direction or control of the Minister or any other Government official in conducting the review or reporting to the Minister but must comply, as far as possible, with time limits and other procedures imposed by the regulations.

22 Procedures for the independent review

(1) The independent person is to publicise the review as required by the regulations, unless the person is of the opinion that any of the circumstances in s 18(6) exist. If that opinion changes during the review, the person is to publicise the review.

(2) The independent person is to afford the designated person and anyone who made a proposal under section 19 in relation to that or a related designation notice of the review and its subject matter and a reasonable opportunity to participate in it, in accordance with the regulations.

(3) Any other person whose interests are or have been affected by alleged Magnitsky conduct by the designated person and any association or organisation that meets the description in section 19(2) above but did not make a proposal may also participate.

(4) The independent person may accept information in any form and from any source and is not obliged to disclose it to the designated person or anyone else if the independent person believes that disclosure—

(a) would damage the interests of national security or relations with other nations or international organisations, or

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(5) If the independent person decides to conduct a hearing, the person has all the rights, powers and immunities of a Royal Commissioner as if appointed under the *Royal Commissions Act 1902*.

(6) In that case, Part 4 of the Act applies to the independent person as if he was a Royal Commission prescribed by the regulations under section 6OAB of the Act.

23 Outcome of the independent review

(1) To avoid doubt, the Minister is not obliged to implement any recommendation of the independent person but must consider the report in deciding whether to allow the review and vary or revoke the designation. The Minister may but is not obliged to consider any other information when doing so and is not obliged to afford the designated person or any other person the opportunity to make further submissions after receipt of the independent person's report.

(2) The report must be made available to the designated person and any other person who participated in the independent person's inquiry, and made public, subject to the exclusion of any material that the Minister believes should not be disclosed on any of the grounds in section 18(6).

(3) The Minister's decision with reasons, is to be notified to the participants in the review and made public, subject to the exclusion of any material that the Minister believes should not be disclosed on any of the grounds in section 18(6).

Part 4—Asset Freeze

24 Asset-freeze in relation to designated persons

(1) A person (P) must not deal with assets owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such assets.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of subsection (1) a person deals with funds if the person—

(a) uses, alters, moves, transfers or allows access to the funds

(b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or

(c) makes any other change, including portfolio management, that would enable use of the funds.

(4) For the purposes of subsection (1) assets that are owned, held or controlled by a person include, in particular, a reference to—

(a) exchanging the assets for funds, goods or services, or

(b) using the assets in exchange for funds, goods or services (whether by pledging them as security or otherwise).

(5) The reference in subsection (1) to assets that are owned, held or controlled by a person includes, in particular, a reference to—

(a) assets in which the person has any legal or equitable interest, regardless of whether the interest is held jointly with any other person and regardless of whether any other person holds an interest in the assets;

(b) any tangible property (other than real property), or bearer security, that is comprised in the assets and is in the possession of the person.

(6) For the purpose of subsection (1) assets are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly by the designated person.

(7) For the avoidance of doubt, the reference in subsection (1) to a designated person includes P if P is a designated person.

25 Making funds available to designated persons

(1) A person (P) must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) The reference in subsection (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly by the designated person.

26 Making funds available for benefit of designated person

(1) A person (P) must not make funds available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of this subsection—

(a) funds are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, and

(b) "financial benefit" includes the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible.

27 Making other assets available to designated persons

(1) A person (P) must not make other assets available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect—

(a) that P is making the other assets so available, and

(b) that the designated person would be likely to exchange the other assets for, or use them in exchange for, funds, goods or services.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) The reference in subsection (1) to making other assets available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly by the designated person.

28 Making other assets available for benefit of designated persons

(1) A person (P) must not make other assets available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the other assets so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of subsection (1)—

(a) other assets are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, and

(b) "financial benefit" includes the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible.

29 Circumventing prohibitions

(1) A person must not intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly)—

(a) to circumvent any of the prohibitions in ss 24-28, or

(b) to enable or facilitate the contravention of any such prohibition.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

30 Exceptions from prohibitions

(1) The prohibition in section 24 (asset-freeze in relation to designated persons) is not contravened by an independent person (P) transferring to another person a legal or equitable interest in assets where, immediately before the transfer, the interest—

(a) is held by P, and

(b) is not held jointly with the designated person.

(2) In subsection (1) "independent person" means a person who—

(a) is not the designated person, and

(b) is not owned or controlled directly or indirectly by the designated person.

(3) The prohibitions in sections 24 to 26 (asset-freeze in relation to, and making funds available to, or for the benefit of, designated persons) are not contravened by an institution providing financial and other services crediting a frozen account with interest or other earnings due on the account.

(4) The prohibitions in sections 25 and 26 (making funds available to, or for the benefit of, designated persons) are not contravened by an institution providing financial and other services crediting a frozen account where it receives funds transferred to that institution for crediting to that account.

(5) The prohibitions in sections 25 and 26 are not contravened by the transfer of funds to an institution for crediting to an account held or controlled (directly or indirectly) by a designated person, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person.

31 Exception for acts done for purposes of national security or prevention of serious crime

(1) Where an act would, in the absence of this section be prohibited by this Part, that prohibition does not apply to the act if the act is one which the Minister has determined would be in the interests of—

(a) national security, or

(b) the prevention or detection of serious crime in Australia or elsewhere.

(2) The Minister must make the determination in writing, and may vary or revoke it at any time.

32 Exceptions for which consent is necessary

(1) The prohibitions in sections 24 to 28 (asset-freeze etc) do not apply to anything done with the consent of the Minister for the purposes set out in Schedule 3.

(2) A designated person or anyone else whose interests are affected by the asset freeze may apply in writing in accordance with the regulations for consent.

(3) A consent—

(a) must specify the acts authorised by it;

(b) may be general or may authorise acts by a particular person or persons of a particular description

(c) may—

(i) contain conditions;

(ii) be of indefinite duration or a defined duration.

(4) The consent may be varied, revoked or suspended at any time.

(5) If so, the Minister must give written notice to that person of the issue, variation, revocation or suspension of the consent.

(6) The Minister must take such steps as are considered appropriate to publicise the issue, variation, revocation or suspension of the consent.

33 Freezing order to enable financial institution to meet government imposed liabilities

A freezing order relating to an account with a financial institution does not prevent the institution from allowing a withdrawal from the account to enable the institution to meet its liabilities to a government or government agency imposed by or under a written law of the Commonwealth, a State or a Territory.

34 Relationship with Probate Laws

[Upon death, the property of the deceased is transferred by operation of law to an administrator *ad litem* or an executor appointed under the will of the deceased. Transfers of title would be potentially prohibited by the freezing provisions. It would not be necessary to interfere with these laws and actions if the legal personal representative were deemed to hold the property according to the same freezing prohibition as obtained during the life of the deceased. In Australia laws of succession are prescribed by State or Territory law. This does not create a constitutional problem (it is solved by section 109).]

35 Insolvency

[In Australia, insolvency is indirectly defined in both the *Bankruptcy Act* and the *Corporations Act* as an inability to pay debts as and when they fall due. However, insolvency can be created as a means of avoiding obligations. For example, the majority of secured or unsecured creditors may be relatives or associates of a company controller and vote for an administrator or liquidator that is expected to comply with the wishes of the (former) controller. Insolvent companies frequently enter schemes

arrangement which often cause the transfer of corporation property or the creation of additional interests by the issue of shares or rights. Changes of control can readily be effected through such schemes. Insolvency involves a statutory transfer of assets to a trustee in bankruptcy or an administrator or liquidator. The administrator does not displace the board of directors which may continue, but usually has the power to control the affairs of the company in place of the board. These processes need to be affected by the freezing laws if the obligation not to deal with assets is transferred to the new controller or owner of the asset.

Inevitably, this will also involve consideration of joint interests where one co-holder is "innocent". In the case of a company controlled by a designated person, there may be (and usually are) minority shareholders. A significant question which must be resolved is whether, upon freezing the shares of the designated person, another person such as a statutory trustee may exercise the rights attached to the shares. If the shares are frozen, that should mean that the designated person may no longer exercise any their rights.]

36 Systems of Title Registration

[Title to land is secured by registration, even if there is another person who is the true owner of the land. It is only in cases of fraud (which is difficult to prove) that the registered title holder's registered interest is void. Even statutory invalidity of the transfer to the registered holder will not interfere with that person's legal title to the property. There are other schemes for securities over personal property which also depend for priority and title upon registration – see eg *Personal Property Securities Act 2009*. Many assets that are used in a business context are subject to such securities, and in some cases the security holder will be a designated person. If the owner of the underlying asset or the owner of the registered security is a designated person, that should appear on any relevant register.]

37 Contracts and other corporate assets

[Where a contract of loan is frozen, who is to make the payments of interest and principal under the contract? In complex business arrangements, there are often cross-securities, guarantees and debt covenants which are satisfied from several funds from different sectors of an overall business enterprise. Once an asset becomes frozen, that may

well cause the collapse of the busines enterprise and reduce or remove the value of the frozen asset. What if the conditions of contracts of loan or guarantee precipitate an event of default upon the making of a freezing order?

Development loans are usually given where there are multiple assets, and a schedule of repayment is dependent on the subdivision of each asset and the sale of its subdivided parts. What effect will a freezing order have upon such an enterprise?

It may be necessary for there to be an ability for the designated person or a Commonwealth trustee to carry on the business so as not to destroy the value of the asset. The extent to which the Commonwealth would be prepared by itself or through an agent such as an administrator to conduct the designated person's business affairs must be considered.]

38 Relationship with Proceeds of Crime Laws

[The Commonwealth has two Proceeds of Crime Acts which makes this area unnecessarily complicated. The 2002 Act deals with unexplained wealth orders and other matters of interest to the States and Territories. It purports to be a national scheme. If it is not, the earlier Proceeds of Crime Act will operate. These Acts are highly judicialized and, generally speaking, freezing or confiscation orders cannot be made without judicial warrant. A Magnitsky law is an entirely different scheme. It does not confiscate the frozen asset and, generally speaking, the Magnitsky laws have not been developed so that the frozen asset is controlled by a third party. Nor is a designation of a person dependent upon conviction or charge for any criminal offence. Generally speaking, such a person will be a foreign national and Australia may not be able to secure evidence admissible in criminal proceedings to charge or convict such a person of an extra-territorial crime. It is partly in answer to the inadequacy of such laws that the Magnitsky scheme has developed. However, in the course of the administration of the Magnitsky law, admissible evidence may be obtained which would found a confiscation order under the *Proceeds of Crime Act*. There should be a power for the Minister (and perhaps the independent person) to provide that evidence to an appropriate investigator or prosecutor, either in Australia or in a foreign country.]

39 Anti-Money Laundering Laws

[A better but much more complex system for tracking assets and imposing obligations on financial and other institutions that facilitate holding, transfer or sale of assets is the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. Importantly, it extends to gaming venues and other obscure places where funds have been secreted, and of course deals with international transfers of funds which is of particular significance in the case of assets held by foreign persons.

There are several possible entry points where its provisions (and administration) can be harnessed to identify, track and prohibit transfer of assets belonging to designated persons. Several such points are identified in Part 7 below, and amendments to the Act have been proposed. However, a complete analysis of the necessary changes has not been attempted.

The alternative course is to create some parallel system of tracking, reporting and enforcement, but without appropriate administration and regulation such a system would be unnecessarily complex and expensive. It would be much better to use an existing regulator with proven capacity to administer a funds tracking system.]

40 Security Interests

[As has already been noted, many assets are subject to securities. The extent of the control of the security holder of the asset is dependent upon both statute and contract. The value of securities over circulating assets will vary from day to day. Systems of registration of security interests are not always mandatory, but competing registration affords a priority where there is a competing as well as the position of the security holder, who will often be an innocent third party (e.g. a bank mortgage). A statutory trustee for the frozen assets may have a role here.]

41 State and Territory Laws

[Other systems of title registration under State or Territory laws should be considered. For example, in the mining area, exploration licences and mining leases are subject to detailed regulation and generally speaking, changes of ownership can only be undertaken with the consent of the relevant Minister or agency administering the laws. Security interest may

also be registered. Obligations are imposed on holders, such as environmental restoration during or at the conclusion of a particular project. Problems have arisen recently where the holder of the mining interest has become insolvent. The liquidator of Live Energy Ltd disclaimed onerous property, which was held to include liabilities under State environmental and mining laws: *Longley v Chief Executive, Department of Environment and Heritage Projection* [2018] 3 Qd R 459. The extent to which the Commonwealth may become liable as a putative holder of the frozen asset must also be considered. Section 109 of the Constitution will enable valid Commonwealth laws to override State laws but consideration must be given to the interrelationship with State or Territory mining laws in particular.]

Part 5—Immigration

Part 7—Miscellaneous

42 Oversight by Parliament

This Act is subject to the oversight of the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade.

43 Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after the third anniversary of the commencement of the Act.

(2) The persons who undertake such a review must give the Minister a written report of the review.

(3) The Minister must cause a copy of the report to be tabled in each House of Parliament within 15 sitting days of that House after its receipt by the Minister.

44 Amendment to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AMLCTF Act

(1) Insert after section 36(1)(v) of the AMLCTF Act—

"(vi) a breach of sections 24-28 of the International Human Rights (Global Magnitsky Law) Act 2021"

(2) Insert after section 41(1)(f)(iii) of the Act—

"(iiia) may be relevant to a designated person or an associate under the International Human Rights (Global Magnitsky Law) Act 2021"

(3) Insert after section 48(2)(c)(ii) of the Act—

"(iii) proceedings under the International Human Rights (Global Magnitsky Law) Act 2021"

(4) Insert after section 49(1)(g)—

"or

(h) the Minister or an independent person, acting under the International Human Rights (Global Magnitsky Law) Act 2021;"

45 Amendment to the Administrative Decisions (Judicial Review) Act 1976

(1) Schedule 2 to the Administrative Decisions (Judicial Review) Act 1976 is amended by inserting where appropriate

"decisions under the International Human rights (Global Magnitsky Law) Act 2010"

46 Annual Reports

(1) The Minister must cause a report to be prepared for each calendar year (including the year in which this section commences) about the implementation of this Act.

(2) The report must be—

(a) started as soon as practicable after the end of the calendar year for which it is prepared; and

(b) completed by 1 April of the calendar year in which it was started.

(3) The Minister must cause copies of the report to be tabled in each House of Parliament within 15 sitting days of that House after the completion of the report.

47 Delegation

(1) The Minister may, be writing, delegate all or any of the Minister's powers and functions under this Act except those in or arising under Part 2 of the Act, to an SES employee, or acting SES employee, in the Department.

(2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Minister.

48 Penalties for Offences

[Offences have been created in the Bill, largely for failing to report suspicious transactions or breaching the freeze provisions. Consideration must be given to the penalty for each offence and whether the procedural provisions relating to the offences should be cross referenced to another law which contains similar offences for financial crimes.]

49 Digital Format

[any documents or other information referred to in the Act or regulations should be able to be stored and retrieved in digital form. A boiler plate provision to that affect should be inserted here.]

50 Public Register

[A public register of decisions, reasons and reports should be created, again in digital format. A useful precedent is the Modern Slavery Statements Register created by sections 18-19 of the *Modern Slavery Act 2018*.]

51 Immunities from Suit

[The Minister, his or her officials, the independent person (when not acting as a Royal Commissioner) and persons making proposals and other informants should be immune from suit for civil liability, especially for defamation, and perhaps for any liability when acting in good faith. The Commonwealth has numerous different versions of immunities in most of its laws and an appropriate precedent should be selected. To make the proposal regime effective, it will be essential to protect from liability persons and organisations making proposals for designation. It will be particularly important to protect from liability persons providing information to the Minister or the independent person for defamation and injurious falsehood. There should be absolute privilege for media reporting of designations under this Act and the reasons therefore.]

52 Regulation-Making Power

[Throughout the Bill there are provisions for regulations, but in accordance with the best Commonwealth practice, the regulations deal only with procedural matters and do not create offences or substantive obligations. This is quite different to the UK, Canadian and US practice in this field, where whole schemes of sanctions laws are contained in regulations. As well, the *Autonomous Sanctions Act 2011* is only brought into effect by regulation, and the substantive provisions of the Act are contained, in the main, in the regulation. The regulation-making power should be in the usual "necessary or convenient" form but also specify particular matters of procedure that should be covered.]

Schedule 1—Corruption

The following conduct is corruption—

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(c) the promise, offering or giving to an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, or in order to obtain or retain business or other undue advantage in relation to the conduct of international business;

(d) the solicitation or acceptance by an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(e) the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position;

(f) the promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the original instigator of the act or for any other person;

(g) the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or

herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage;

(h) the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of applicable laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity;

(i) illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income;

(j) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(k) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(l) embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position;

(m) conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(n) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(o) the concealment or continued retention of property when the person involved knows that such property is the result of significant corruption;

(p) the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to deter another person from disclosing acts of significant corruption to any person, official, investigator, journalist or to the public, or to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of significant corruption;

(q) the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of significant corruption;

(r) participation in any capacity such as an accomplice, assistant or instigator in significant corruption,

(s) any attempt to commit significant corruption;

(t) the planning or preparation for significant corruption,

(u) fault is in every case an element of significant corruption. It has the same meaning as in ss 5.1-5.5 of the *Criminal Code*. It may be informed from objective factual circumstances.

(v) In this Schedule—

Public official mean:

(i) any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;

(ii) any other person who performs a public function, including for a public agency or public enterprise, or

(iii) any other person defined as "public official" in the law of the place where the person resides or works.

Official of a public international organisation means an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation

Schedule 2—Rules for Interpretation of Section 10(2)

Application of Schedule

1. (1) The rules set out in the following paragraphs of this Schedule apply for the purpose of interpreting Section 10(2).

(2) They also apply for the purpose of interpreting this Schedule.

Joint Interests

2. If two or more persons each hold a share or right jointly, each of them is treated as holding that share or right.

Joint arrangements

3. (1) If shares or rights held by a person and shares or rights held by another person are the subject of a joint arrangement between those persons, each of them is treated as holding the combined shares or rights of both of them.

(2) A "joint arrangement" is an arrangement between the holders of shares or rights that they will exercise all or substantially all the rights conferred by their respective shares or rights jointly in a way that is pre-determined by the arrangement.

(3) "Arrangement" has the meaning given by paragraph 12.

Calculating shareholdings

4. (1) In relation to a person that has a share capital, a reference to holding "more than 50% of the shares" in that person is to holding shares comprised in the issued share capital of that person of a nominal value exceeding (in aggregate) 50% of that share capital.

(2) In relation to a person who does not have a share capital—

(a) a reference to holding shares in that person is to holding a right or rights to share in the capital or, as the case may be, profits of that person;

(b) a reference to holding "more than 50% of the shares" in that person is to holding a right or rights to share in more than 50% of the capital or, as the case may be, profits of that person.

Voting rights

5. (1) A reference to the voting rights in a person is to the rights conferred on shareholders in respect of their shares (or, in the case of a person not having a share capital, on members) to vote at general meetings of the person on all or substantially all matters.

(2) In relation to a person that does not have general meetings at which matters are decided by the exercise of voting rights—

(a) a reference to holding voting rights in the person is to be read as a reference to holding rights in relation to the person that are equivalent to those of a person entitled to exercise voting rights in a company;

(b) a reference to holding "more than 50% of the voting rights" in the person is to be read as a reference to holding the right under the constitution of the person to block changes to the overall policy of the person or to the terms of its constitution.

6. In applying section 10(2) and this Schedule, the voting rights in a person are to be reduced by any rights held by the person itself.

Rights to appoint or remove members of the board

7. A reference to the right to appoint or remove a majority of the board of directors of a person is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all or substantially all matters.

8. A reference to a board of directors, in the case of a person who does not have such a board, is to be read as a reference to the equivalent management body of that person.

Shares or rights held indirectly

9. (1) A person holds a share indirectly if the person has a majority stake in another person and that other person—

(a) holds the share in question, or

(b) is part of a chain of persons—

(i) each of whom (other than the last) has a majority stake in the person immediately below it in the chain, and

(ii) the last of whom holds the share.

(2) A person holds a right indirectly if the person has a majority stake in another person and that other person—

(a) holds that right, or

(b) is part of a chain of persons—

(i) each of whom (other than the last) has a majority stake in the person immediately below it in the chain, and

(ii) the last of whom holds that right.

(3) For these purposes, a person (A) has a majority stake in another person (B) if—

(a) A holds a majority of the voting rights in B,

(b) A is a member of B and has the right to appoint or remove a majority of the board of directors of B,

(c) A is a member of B and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in B, or

(d) A has the capacity to exercise or actually exercises dominant influence or control over B.

(4) In determining whether A has this capacity—

(a) the practical influence that A can exert rather than the rights that it can enforce, is the issue to be considered, and

(b) any practice or pattern of behaviour affecting B's financial or operating policies is to be taken into account even if it involves a breach of B's constitution, international rules, and an agreement, a breach of trustor of the law.

(5) In the application of this paragraph to the right to appoint or remove a majority of the board of directors, a person (A) is to be treated as having the right to appoint a director if—

(a) any person's appointment as director follows necessarily from that person's appointment as director of A, or

(b) the directorship is held by A itself.

Shares held by nominees

10. A share held by a person as nominee for another is to be treated as held by the other (and not by the nominee).

Rights treated as held by person who controls their exercise

11. (1) Where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact hold the right, unless that person also controls it).

(2) A person controls a right if, by virtue of any arrangement between that person and others, the right is exercisable only—

(a) by that person,

(b) in accordance with that person's directions or instructions, or

(c) with that person's consent or concurrence.

Arrangement

12. **Arrangement** includes—

(a) any scheme, agreement, promise, undertaking or understanding, whether express or implied and whether or not it is or is intended to be legally enforceable,

(b) any convention, custom or practice of any kind, and

(c) any arrangement even if in breach of the constitution or rules of a person or in breach of any agreement, trust or the law.

Rights exercisable only in certain circumstances etc.

13. (1) Rights that are exercisable only in certain circumstances are to be taken into account only—

(a) when the circumstances have arisen, and for so long as they continue to obtain, or

(b) when the circumstances are within the control of the person having the rights.

(2) But rights that are exercisable by an administrator, receiver or by creditors while a person is subject to insolvency proceedings are not to be taken into account while the person is subject to those proceedings.

(3) Insolvency proceedings includes proceedings under the insolvency law of another country during which a person's assets and affairs are subject to the control or supervision of a third party or creditor.

(4) Rights that are normally exercisable but are temporarily incapable of exercise are to continue to be taken into account.

Rights attached to shares held by way of security

14. Rights attached to shares held by way of security provided by a person are to be treated for the purposes of this Schedule as held by that person—

(a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with that person's instructions, and

(b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in that person's interests.

Schedule 3—Exceptions to assets freeze

Basic needs

(1) To enable the basic needs of a designated person, or (in the case of an individual) any dependent family member of such a person, to be met.

(2) In the case of an individual, in sub-paragraph (I) "basic needs" includes-

(a) medical needs;

(b) needs for-

(i) food;

(ii) payment of insurance premiums;

(iii) payment of tax;

(iv) rent or mortgage payments;

(v) utility payments.

(3) In the case of a person other than an individual, in sub-paragraph (I) "basic needs" includes needs for—

(a) payment of insurance premiums;

(b) payment of reasonable fees for the provision of property management services;

(c) payment of remuneration, allowances or pensions of employees;

(d) payment of tax;

(e) rent or mortgage payments;

(f) utility payments.

(4) In subparagraph (1)—

"dependent" means financially dependent;

"family member" includes—

(a) the wife, husband or civil partner of the designated person;

(b) any parent or other ascendant of the designated person;

(c) any child or other descendant of the designated person;

(d) any person who is a brother or sister of the designated person , or a child or other descendent of such a person.

Legal services

(5) To enable the payment of-

(a) reasonable professional fees for the provision of legal services, or

(b) reasonable expenses associated with the provision of legal services.

Maintenance of frozen funds and other assets

(6) To enable the payment of—

(a) reasonable fees, or

(b) reasonable service charges.

arising from the routine holding or maintenance of frozen funds or other assets.

Extraordinary expenses

(7) To enable an extraordinary expense of a designated person to be met.

Pre-existing judicial decision etc.

(8) To enable, by the use of a designated person's frozen funds or other assets implantation or satisfaction (in whole or in part) of a judicial, administrative or arbitral decision or lien, provided that

(a) the funds or other assets so used are the subject of the decision or lien.

(b) the decision or lien—

(i) was made or established before the date on which a proposal was made the person became a designated person or the date on which the person was designated, whichever is earlier; and

(ii) is enforceable I Australia, and

(c) the use of the frozen funds or other assets does not directly or indirectly benefit any other designated person.

Extraordinary situation

(9) To enable anything to be done to deal with an extraordinary situation.

Prior obligations

(10) To enable, by the use of a designated person's frozen funds or other assets, the satisfaction of an obligation of that person (whether arising under a contract, other agreement for otherwise), provided that—

(a) the obligation arose before the date on which a proposal was made that the person became a designated person or the person was designated ????, and 'no payments are made to another designated person, whether directly or indirectly.

Diplomatic missions etc

(11) To enable anything to be done in order that the functions of a diplomatic mission or consular post, or of an international organisation enjoying immunities in accordance with international law, may be carried out.

(12) In this paragraph—

"consular post" has the same meaning as in the Vienna Convention on Consular Relations done at Vienna on 24 April 1963, and any

reference to the functions of a consular post is to be read in accordance with that Convention;

"diplomatic mission" and any reference to the functions of a diplomatic mission are to be read in accordance with the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961.

Humanitarian assistance activity

(13) To enable anything to be done in connection with the performance of any humanitarian assistance activity.

(14) In sub-paragraph (I), "humanitarian assistance activity" includes the work of international and non-governmental organisations carrying out relief activities for the benefit of the civilian population of a country.