AUSTRALIAN CENTRE FOR INTERNATIONAL JUSTICE

Inquiry into an Australian Human Rights Sanctions Regime

Submission to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade

28 February 2020

About the Australian Centre for International Justice

The Australian Centre for International Justice is an independent and not-for-profit legal centre working to develop Australia's domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code and employs strategies to combat the impunity of the perpetrators to seek justice, redress and accountability for the survivors of these crimes.

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1 Introduction

1. The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade's (the **Committee**) Inquiry into whether Australia should enact legislation to use targeted sanctions to address human rights abuses (the **Inquiry**).

About the ACIJ

2. The ACIJ was established primarily to develop and encourage Australia's domestic investigations and prosecutions of egregious violations of human rights which amount to the international crimes offences in the Commonwealth Criminal Code, namely: torture, war crimes, crimes against humanity and genocide. This is sometimes referred to as 'universal jurisdiction', the principle through which nation States can prosecute perpetrators of international crimes regardless of the territory on which they were committed.

3. The ACIJ represents victims of atrocity crimes and works with victims and survivor communities and organisations in Australia and abroad. We develop legal strategies to target the perpetrators of grave crimes to hold them accountable.

Primary focus of submission

4. The ACIJ's work focuses primarily on criminal justice and accountability. This submission thus focuses on ensuring any introduction of an Australian human rights sanctions regime considers any possible consequences and impediments to prosecution and achieving international criminal justice. The ACIJ supports the Inquiry and the proposal for a human rights sanctions regime in an effort to strengthen, promote and enforce international human rights and international justice.

5. The ACIJ welcomes any further opportunity to provide additional commentary or supplementary submissions to the Committee if it would assist its Inquiry.

Recommendations

This submission argues for a new legislative sanctions framework and makes the following recommendations.

Recommendation 1

Decisions to impose sanctions should ensure consultation with relevant government agencies and departments to consider whether conduct alleged amounts to an extraterritorial criminal offence against the Commonwealth in Chapter 8 of the Criminal Code and to determine whether prosecution is more likely and appropriate in the circumstance.

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Legislation should specify a clear route and process for contribution and submission of information from civil society and non-government organisations.

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2 The need for a human rights sanctions regime

6. The ACIJ supports this Inquiry and in principal the introduction of a new legislative framework that promotes and strengthens human rights globally with the tools to impose targeted sanctions and visa restrictions and other like measures on foreign actors involved in human rights violations and acts of significant corruption. We believe it would strengthen Australia's capacity to respond to human rights violations globally and target those persons involved in acts of significant corruption and severe breaches of human rights.

7. The introduction of an Australian human rights sanctions regime represents a unique opportunity for Australia to protect and promote human rights globally, particularly in the Asia-Pacific region.

8. It would also address significant gaps in enforcing accountability for human rights where other measures for accountability are not available.

9. In addition, it recognises that atrocity crimes, and other crimes of an international nature, such as illegal arms trade, terrorism, drug trafficking, money laundering, and corruption, are increasingly interconnected and require concerted efforts from authorities and law enforcement agencies to hold those abusers accountable by using tools that will impact on their ability to enjoy their illicit gains and restrict their freedom of movement and travel. It is acknowledged that those engaging in these crimes invest their savings in foreign banks, properties and other financial institutions, they travel abroad, send their children to private foreign schools and their family to be treated in foreign hospitals.[1] Imposing targeted sanctions against these individuals can act as a powerful deterrent and demonstrate there will be repercussions through visa bans and freezing of assets.

10. Individual human rights sanctions will hold human rights abusers and corrupt actors accountable, disrupt their networks, and assist in deterring future behaviour. Perpetrators of grave crimes enjoy impunity even when they are subject to international and public condemnation. However, that impunity begins to erode when those responsible are faced with legal or financial consequences for their behaviour. Bill Browder who leads the global Magnitsky movement states simply, that disrupting

[1] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 19-27, 23.

abusers' safety of money has a profound impact on their psychology.[2] A strong proponent of a broader human rights sanctions regime, Geoffrey Robertson QC provides some strong examples and states: "Those from Sri Lanka who were responsible for the Tamil genocide, those judges in Hong Kong who are now breaching international law by repunishing pro-democracy demonstrators. We shouldn't allow these people in, and we shouldn't allow them to put their children in our best private schools, or put their money in our banks, or put their parents in our hospitals."[3]

11. A human rights sanctions regime can contribute to promoting and protecting human rights through the general articulation of human rights norms. It also generates deterrence and prevention. More importantly, it provides an avenue for victims and victims' communities to pursue avenues for accountability and justice, particularly where other avenues are blocked or unavailable.

Background to Magnitsky laws

12. The proposal to adopt a broader human rights sanctions regime in Australia stems from a global movement to adopt Magnitsky style laws similar to that of the United States. In 2012, the US adopted the *Magnitsky Act*[4] and imposed sanctions (including asset freezes, travel bans and other financial restrictions) against those persons responsible for the detention, torture and death of Sergei Magnitsky, a tax accountant who was detained, tortured and subsequently died in prison, after exposing a significant tax fraud scheme being misappropriated by government officials working with organised crime.[5] These sanctions currently target 50 Russian officials. In 2016, the US adopted the *Global Magnitsky Human Rights and Accountability Act*[6] (the **US Global Magnitsky Act**) which broadened the scope of those who may be targeted for sanctions by the US government and included 'serious cases of human rights abuse and significant corruption.' It has so far been applied to approximately 200 individuals and entities.[7] Similar legislation has

[2] Ibid.

[3] Steve Cannane, 'Australia Should Pass Magnitsky Act to Target Putin's Cronies, Businessman Bill Browder Says' (20 February 2018) *ABC 7.30*, <https://www.abc.net.au/news/2018-02-20/australia-should-introduce-magnitsky-act-aimed-at-putins-cronies/9464060>.

[4] *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012,* Pub L No 112-208 USC 2434.

[5] See, Aryeh Neier, 'Almost a Decade After His Death, Sergei Magnitsky Gets a Measure of Justice', *Open Society Justice Initiative*, 27 August 2019 <www.justiceinitiative.org/voices/almost-a-decade-after-his-death-sergei-magnitsky-gets-a-measure-of-justice>.

[6] *Global Magnitsky Human Rights and Accountability Act 2016,* Pub L No 114-328, 22 USC 2656.

[7] Mengqi Sun, 'U.S. Targets More Alleged Human Rights Abusers', *The Wall Street Journal* (31 December 2019) <www.wsj.com/articles/u-s-targets-more-alleged-human-rights-abusers-11577830885>.

been introduced in the UK,[8] Canada[9] and several countries in Europe.[10] The European Union announced it is considering adopting a stronger human rights sanctions regime in response.[11]

13. In December 2018, then Member of Parliament, the Hon Michael Danby introduced a private members bill[12] (the **2018 Bill**) to legislate Magnitsky style sanctions laws in Australia. It lapsed when Parliament was dissolved for the 2019 federal election. Although it was a step in the right direction, the 2018 Bill lacked sufficient detail and did not provide any clear understanding of the processes involved.

3 Current Australian sanctions regimes

14. The underlying basis for imposing sanctions is that they can be an effective means of responding to issues of global concern which stop short of the use of armed force. Although the term 'sanctions' is not defined expressly in the United Nations Charter, sanctions as a mechanism for responding to issues of international concern are derived from 'Article 41 measures.' Article 41 provides for 'measures not involving the use of armed force,' and may include a 'complete or partial interruption of economic relations.'

15. Australia currently implements two sanctions regimes:

- the United Nations Security Council's sanctions regime, which Australia is obliged to implement as a matter of international law; and
- Australia's own autonomous sanctions which are implemented as a matter of Australian foreign policy and can be supplementary to, or independent of any UN Security Council sanctions.

16. The Autonomous *Sanctions Act 2011* (Cth), together with the Autonomous Sanctions Regulations 2011 (Cth) authorise the Minister for Foreign Affairs and Trade to impose autonomous sanctions to 'facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia'.[13] The Act is the enabling

[8] *Sanctions and Anti-Money Laundering Act 2018* (UK).

[9] *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017 c 21.

[10] These include: Estonia, Lithuania, Latvia, Gibraltar, Kosovo.

[11] *European Parliament Resolution 2019/2580 (RSP) of 14 March 2019, on a European Human Rights Violations Sanctions Regime* <www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html>.

[12] *International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018*.

[13] *Autonomous Sanctions Act 2011* (Cth) s 10(2).

legislation that allows the Minister to create new sanctions regimes under the regulations through which individuals and entities can be the target of sanctions.

17. The types of sanctions measures that can be imposed include:

- targeted financial sanctions and asset freezes;
- visa restrictions and travel bans; and
- trade and commercial sanctions.

Human rights not a sufficient focus of current regime

18. The protection of human rights in not listed as a purpose of the current autonomous sanctions legislation.[14] There is simply no reference to human rights in the Autonomous Sanctions Act. The definition of 'autonomous sanction' in the Act makes reference only to the purpose of sanctions which are to influence actions that are contrary to Australian Government Policy.[15] Only the Explanatory Memorandum to the Bill introducing the Act in 2011 provides for consideration that sanctions can be imposed for 'the grave repression of human rights or democratic freedoms.'[16] The number of times in which the objective of imposing sanctions for these purposes has only been used in a small number of cases. It is argued that the autonomous sanctions regime is not being used genuinely to combat human rights abuse.[17]

19. Regulation 6 of Autonomous Sanctions Regulations 2011 relates to the designation of persons or entities for the purposes of s 10(1) of the Act. Of the nine countries listed, the purpose of protecting human rights is mentioned in relation to Zimbabwe and Syria only. It also includes a sanctions regime targeting persons associated with the former Milosevic regime or those indicted or suspected of committing war crimes and other international crimes during the Balkan wars in the early 1990s. In relation to Syria it includes, a person or entity that the Minister for Foreign Affairs is satisfied is responsible for human rights abuses in Syria, including the use of violence against civilians; and the commission of other abuses. In relation to 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.

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[14] *Autonomous Sanctions Act 2011* (Cth) s 3.

[15] *Autonomous Sanctions Act 2011* (Cth) s 4.

[16] Explanatory Memorandum to the *Autonomous Sanctions Bill 2010.*

[17] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 19-27, 25.

20. In 2019 the Minister imposed targeted financial sanctions and travel bans on members of the Myanmar military[18] (**Tatmadaw**) in response to the release of the full report[19] of the UN Fact-Finding Mission (FFM) on Myanmar which documented serious human rights violations and international humanitarian law violations against ethnic minorities in Myanmar including atrocity crimes against the Rohingya minority. Of the six top generals of the Tatmadaw that the FFM urged States to impose targeted sanctions against, Australia only listed four of those individuals, and included another Brigadier-General not identified in the FFM's report. The US, Canada and other European countries did not refrain from designating the Commander-in-Chief and the Deputy Commander-in-Chief of the Tatmadaw for targeted sanctions, whilst Australia did not. This represents the arbitrary nature of the Australian designations process and raises the question of whether Australia's failure to include the top two Tatmadaw generals had the impact Australia believes it did.

21. It may be that the other specified sanctions designations in the list of autonomous sanctions regimes imposed by the Department of Foreign Affairs also have the intended purpose of punishing those responsible for human rights violations. However if this is the case, it cannot be readily observed because it is not stated and it requires further research to identify the reasons for the designation. The inconsistency of framing the imposition of sanctions around the protection of human rights further brings the autonomous sanctions regime's effectiveness and appropriateness in protecting human rights into question because it fails to capitalise on the impact of imposing sanctions to promote and protect human rights.

22. A new and separate sanctions legislative framework based primarily on protecting human rights is therefore paramount if the intended purpose of a human rights sanctions regime is to be effective in achieving this commitment.

23. Section 10(2) of the *Autonomous Sanctions Act 2011* provides that, before the Governor General makes regulations applying sanctions, the Minister must be satisfied that the proposed regulations would facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or otherwise deal with matters, things or relationships outside Australia.

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[18] Department of Foreign Affairs and Trade, *Sanctions Regime, Myanmar* <https://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/myanmar.aspx>.

[19] OHCHR, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, HRC, 39th sess, Agenda Item 4, UN Doc A/HRC/39/CRP.2 (17 September 2018).

24. The subjective state of mind of satisfaction of the Minister as a precondition to the exercise of power means it is a politically driven exercise, rather than one based on objective criteria. The breadth of this ministerial discretion also makes the process opaque, open to abuse, and difficult to challenge, as Roberston and Rummer observe:

> It is also difficult to ascertain what information the Minister bases their decisions on when making designations under the ASA. No publicly available document exists in relation to what criteria and evidence are used when making a designation (other than what is listed in the regulations), nor is such information forthcoming.[20]

25. Consequently, Australia's autonomous sanctions are a reflection of its foreign policy and of the policies of the government of the day. This gives rise to inconsistent and selective application of sanctions, particularly where there are economic, trade and military relationships to consider. It also exposes the regime to the charge of double standards and impacts on the sanctions regime's credibility and effectiveness.

Other concerns about the autonomous sanctions regime

26. Stephen Tully points out that because the decision to impose sanctions is a question for the executive as a foreign policy matter, it is likely to be a non-justiciable political decision and not amiable to judicial review (though at the time of writing this was unrested). [21] In addition, although the intention is for such determinations to balance several factors, including: Australia's national interests, the gravity of the situation, the actions of other states, and judgments as to which measures would be effective and proportionate, and for autonomous sanctions to be implemented consistently with Australia's international obligations, the 'national interest' aspect suggests that sanctions may also be suspended consistent with Australia's foreign policy objectives.[22]

27. The use of regulations and legislative instruments if inevitable, should allow for flexibility and speed. The real concern however appears to be that human rights is not the focus of the autonomous sanctions regime and is not included in the purpose of the current legislation, and has been applied minimally in practice. A new and separate sanctions legislative framework focusing on human rights which provides clear guidelines for the designation process will address this problem.

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[20] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 25.

[21] Stephen Tully, 'Australia's Autonomous Sanctions Regime: Problems and Prospects' (2013) 20 *Australian Journal of Administrative Law* 149, 161.

[22] Ibid 161.

Parliamentary oversight

28. The reliance on legislative instruments was justified in the introduction of the Act. When the Foreign Affairs, Defence and Trade Legislation Committee reviewed the Autonomous Sanction Bill 2010 in 2011, it recommended that a regulation-making power is necessary for autonomous sanctions to be applied with the requisite speed and flexibility to respond effectively to situations of international concern.[23] It was justified in light of concerns from submissions from the public that it was an inappropriate delegation of executive power. The Foreign Affairs, Defence and Trade Legislation Committee in noting this concern of overreach of executive power, suggested there is 'sufficient Parliamentary scrutiny' because the legislative instruments are disallowable instruments.[24]

29. This raises the question of whether there has been sufficient scrutiny to address these concerns in the decade of the autonomous sanctions regime's operation, as issues regarding the process and its opaqueness, the lack of transparency and broader concerns about lack of procedural fairness rights means that there is no effective oversight or scrutiny of the regime. In addition it has been argued that it is 'clumsy and repetitive'.[25] An independent body, office, or committee should be established to address this concern and is further discussed below in in the third recommendation.

4 Prioritise prosecution

Recommendation 1

Decisions to impose sanctions should ensure consultation with relevant government agencies and departments to consider whether conduct alleged amounts to an extraterritorial criminal offence against the Commonwealth in Chapter 8 of the Criminal Code and to determine whether prosecution is more likely and appropriate in the circumstance.

30. Under international law, States have obligations to prosecute and punish those who engage in the commission of international or grave crimes. They also have a duty to

[23] Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, *Autonomous Sanctions Bill 2010 [Provisions]* (2011) 15.

[24] Ibid, 23.

[25] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 19-27, 25.

prevent the commission of these crimes.[26] Encouraging effective investigations and prosecutions is therefore paramount in enforcing this obligation which is said to carry the status of *erga omnes*[27] legal obligations, further emphasising that the obligation to prosecute, in an architecture of accountability, should be prioritised, where possible, over other accountability tools, such as imposing sanctions measures.

31. In its resolution calling for an individual sanctions regime the European Parliament emphasised "that the criminal prosecution of the perpetrators of gross human rights violations should remain the primary objective of all efforts undertaken by the EU and its Member States to combat impunity."[28]

32. Sanctions are a tool to holding human rights violators accountable. They are not a substitute, but can augment or sometimes precede individual criminal responsibility. The ACIJ recognises however that prosecutions are not likely in all circumstances particularly where there is difficulty in obtaining evidence to the standard required in a court of law, and where necessary, prospects of success are low in extradition proceedings.

33. There are numerous situations where there are no immediate prospects that alleged perpetrators might be prosecuted in either the courts of the territory of the State where the crimes were committed; at international tribunals such as the International Criminal Court (for lack of jurisdiction); in *ad-hoc* or regional tribunals; or in the domestic courts of nations under the principle of universal jurisdiction. As a result, perpetrators of these crimes enjoy impunity and often continue to commit grave crimes. It is in these circumstances where targeted sanctions can be a powerful and transformative tool in an architecture of accountability.

Universal jurisdiction and Australia's obligations to investigate and prosecute

34. Australia has international obligations to investigate and prosecute allegations of international crimes. These obligations arise out of number of treaties Australia has ratified. They are found in principles of customary international law,[29] the four *Geneva*

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[26] See for example, *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), art.1.

[27] See, Cherif Bassiouni, 'International Crimes: Jus Cogens And Obligatio Erga Omnes', (1996) 59(4) *Law and Contemporary Problems* 63-74.

[28] *European Parliament Resolution 2019/2580 (RSP) of 14 March 2019, on a European Human Rights Violations Sanctions Regime* <www.europarl.europa.eu/doceo/document/TA-8-2019-0215_EN.html> [12].

[29] For example, see International Committee of the Red Cross, *Customary International Humanitarian Law: Volume 1: Rules*, 2005, rule 158. See also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 60th sess, UN Doc A/RES/60/147 (16 December 2005).

Conventions[30] the *Convention against Torture,*[31] the *Genocide Convention*,[32] and the *Rome Statute of the International Criminal Court* (**Rome Statute**).[33] Australia is obligated to prosecute a person where there is a reasonable belief that the person has committed war crimes or other serious offences against humanity. These obligations reflect Australia's inclusion of these grave crimes as indictable offences in the Commonwealth Criminal Code.[34] In addition, Australia acknowledges that it takes these obligations seriously[35] and any sanctions legislation which might affect these obligations needs to be considered to ensure there is legal and policy coherence.

35. The preamble to the Rome Statute affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.' Further the Rome Statute recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' To this end, the Rome Statute emphasised that the International Criminal Court is complementary to national criminal jurisdictions.

36. Australia's legislative framework for international crimes allows for absolute universality, meaning there is no requirement for a territorial or personality link. Extended geographical jurisdiction therefore applies to the offences of genocide, war crimes, crimes against humanity and torture.[36]

Decision to commence prosecutions

37. Decisions on commencing prosecutions are made by the Commonwealth Director of Public Prosecutions (**CDPP**) in accordance with the prosecution policy of the

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[30] Citing here just one of the four: *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146.

[31] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 7. See also, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal*), (Judgment), [2012] ICJ Rep, 422, 443, [50].

[32] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

[33] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

[34] See for example, Divisions 268 and 274 of *Criminal Code*.

[35] Permanent Mission of Australia to the United Nations *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction*, 3 May 2016.

[36] See ss 268.117(1), 274.2(5) and 15.4 of the *Criminal Code*.

Commonwealth[37] and with the subsequent consent of the Attorney-General.[38] The CDPP must be satisfied that there is sufficient evidence to prosecute the case and that the prosecution would be in the public interest. It would be imprudent to assume that in every circumstance, investigations and prosecutions are possible.

38. There are a myriad number of difficulties and challenges for investigative and prosecutorial authorities. They include the complexity surrounding the collection of evidence, the sufficiency of that evidence to withstand rules of evidence and procedure in court, the likelihood of the presence of the alleged perpetrator for trial or the likelihood of successful extradition proceedings.

39. There are however circumstances where these challenges and difficulties can be overcome and are attainable. Therefore, in these circumstances, imposing sanctions such as visa travel bans on perpetrators who might be of interest to Australian investigators and prosecutors, will directly impede prosecution. Therefore, any sanctions decision-making process adopted, should consult with relevant Australian departments and agencies, such as the Australian Federal Police, the CDPP and the Attorney-General's Department, to consider whether the circumstances would favour prosecution, therefore deciding against imposing some or all sanctions measures, such as visa travel bans.

40. In the event that prosecutions are determined to be unlikely, sanctions regimes can provide avenues for accountability where prosecutions are not likely, they can 'step up to the plate.'[39]

41. We bring to the Committee's attention that there are recommendations being made separately to other inquiries reviewing the sufficiency of Australia's criminal law in responding to challenges presented by investigating and prosecuting extraterritorial offences. Recommendations to support a further inquiry into criminal investigative processes – to address some of the challenges raised above – and to effectively

[37] In accordance with the with the CDPP's prosecution policy see, Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process,* (Third edition, September 2014).

[38] See s 286.121 and s 274.3 of the *Criminal Code*.

[39] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 19-27, 21.

resource and encourage the investigation and prosecution of extraterritorial offences have been made.[40]

5 Ensure contribution of civil society

Recommendation 2

Legislation should specify a clear route and process for contribution and submission of information from civil society and non-governmental organisations.

42. The US Global Magnitsky process values input from non-governmental organisations and allows for their contribution. Section 1263(c) of the *Global Magnitsky Human Rights and* Accountability *Act* provides that in determining whether to impose sanctions, the President shall consider:

> credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights.

43. This has led to non-governmental organisations coordinating efforts to document cases from around the world that meet the requirements of the Global Magnitsky Act. Non-governmental organisations are providing essential evidence and information in the form of dossiers and sanctions files to assist US authorities in making decisions on designation of individuals for sanctions.[41]

44. Any Australian human rights sanctions regime should include similar avenue for direct input from non-governmental organisations. Non-governmental organisations are recognised for their invaluable fact-finding and methodological research techniques. They are credible and provide authorities with direct access to witnesses, victims and other useful evidence and information required for their assessment.

[40] Submissions made to the Australian Law Reform Commission Inquiry into Corporate Criminal Responsibility, see also, *Corporate Criminal Responsibility: Discussion Paper* (DP 87, 2019) 112 [1.40].

[41] Julian Pecquet, 'Magnitsky Law Spawns Cottage Industry of Sanctions Lobbying' (30 January 2020) *Al Monitor*, <https://www.al-monitor.com/pulse/originals/2020/01/magnitsky-sanctioned-lobbying-hire-cottage-industry.html#ixzz6CzQeGo6C>.

6 Independent committee

Recommendation 3

The Australian Government consider establishing a committee independent of the executive to provide monitoring, recommendations, guidance and expertise to the Minister in sanctions decisions.

45. An independent office or committee would alleviate some of the significant concerns raised about the current autonomous sanctions regime, including the issues relating to broad reach of the regime, inconsistent application, ensuring respect for private rights and liberties and access to procedural fairness. More so however, an independent body of the executive branch is necessary to overcome any concerns about inappropriate delegation of power.

46. An independent body such as the role occupied by the Independent Security Legislation Monitor, should be formed to play a role in the process. It can monitor aspects of the decision-making process, provide recommendations, guidance and expertise to the Minister, DFAT and the Australian Sanctions Office.

47. This body or committee would also have a process of considering applications from civil society and it would assist in making the process more transparent and increase accountability.

48. An independent committee would also help depoliticise the process.

7 Scope of violations

Recommendation 4

Legislation should ensure that the scope of conduct covers serious violations of international human rights law and violations of international humanitarian law and acts of significant corruption.

49. The 2018 Bill stated that the effects of sanctions measures would be "to provide accountability for gross violations of human rights or significant corruption" and to

"otherwise promote compliance with international human rights law or respect for human rights."[42]

50. The US Global Magnitsky Act considers 'serious human rights abuses' and 'corruption' as conduct to be considered for sanctions, and this has proven to be flexible and not restrictive. The Canadian legislation *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* in subsection 4(2) provides that the circumstances where a foreign national can be the subject of sanctions include those persons responsible for: 'extrajudicial killings, torture or other gross violations of internationally recognised human rights.' This is more restrictive, and in addition 'gross human rights violations' can be difficult to define.[43]

51. A new legislative framework that seeks to protect human rights should not be restrictive and should include serious violations of international human rights law and international humanitarian law and acts of significant corruption.

8 Ensure human rights safeguards

Recommendation 5

Legislation should ensure human rights safeguards such as the right to seek merits review.

52. The Parliamentary Joint Committee on Human Rights has in the past raised concerns[44] that the current autonomous sanctions regime may not be compatible with human rights.

53. For any legislation to be permissible under international human rights law it must meet safeguards to protect human rights and to prevent arbitrariness and error. It must ensure that powers are exercised only in appropriate circumstances. This is particularly so for legislation which claims to promote and protect human rights. To be permissible the measures must seek a legitimate objective and be reasonably necessary and proportionate to achieving that objective. This means that appropriate safeguards should be in place to ensure that any limitation on human rights engaged (such as the rights to privacy; a fair hearing; protection of the family; freedom of movement) by the

[42] *International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018,* cl 7.

[43] Nienke van der Have, 'The Proposed EU Human Rights Sanctions Regime' (2019) 30 *Security and Human Rights,* (2019) 1-16, 11.

[44] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 6* (2018).

imposition of sanctions are justified and proportionate to the individual circumstances the sanctions are seeking to address.

54. Those designated for sanctions must be afforded the right to a fair hearing including the right to be presented with the factual basis for their designation (where possible); the right to challenge the decision of a sanctions designation and seek merits review of the decision.

9 Inclusion of non-state actors

Recommendation 6

Legislation should include non-state actors as persons that may be the target of sanctions.

55. The 2018 Bill intended to include the definition of 'foreign person,' as found in s 4 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth):

> ***foreign person*** means:
> (a) an individual not ordinarily resident in Australia; or
> (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
> (c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
> (d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
> (e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
> (f) a foreign government; or
> (g) any other person, or any other person that meets the conditions, prescribed by the regulations.

56. This definition is broad enough to include that non-state actors, including natural persons and entities such as companies, be included for targeted sanctions measures. This same position is available in the US.[45] It is reflective that violations of human rights and acts of significant corruption is not exclusive to just governments and public officials but includes non-state actors such as corporations.

[45] *Global Magnitsky Human Rights and Accountability Act 2016,* Pub L No 114-328, 22 USC 2656, s 1261(1).

10 Inclusion of immediate family members

Recommendation 7

Legislation should include immediate family members in the proscription of sanctions against targeted individuals.

57. This proposal raises the question of whether the sanctions measures against an individual should be extended to include immediate family members. Travel bans and visa restrictions that also impact on immediate family members creates significant social pressure in the social circles of human rights abusers and corrupt actors.

58. Robertson and Currey argue that human rights violators want to send their children to private schools and universities and their parents to the better-equipped hospitals in the West, arguing "[o]f course, normally we try not to visit the sins of the fathers upon their children, but in the case of corrupt and brutal officials, who have committed criminal acts in order to benefit their families, barring their children and their parents as well from entering our countries seems fair enough."[46]

59. The ACIJ considers that this proposal would be reasonable in particular circumstances and where it would impose measures such as visa travel bans or asset freezes. This should be applied flexibly on a case by case basis and consider compelling circumstances for waivers and exemptions.

60. Australia's current autonomous sanctions regime does impose sanctions on immediate family members to be included in the scope of those targeted so this would not be a novel approach.

61. The US government does have legislation which denies visa permits to immediate family members for human rights violations or financial corruption, for example, s 7031(c) of the *Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019*[47] provides:

> Officials of foreign governments and their immediate family members about whom the Secretary of State has credible information have been involved in significant

[46] Geoffrey Robertson QC and Chris Rummery, (2018) 'Why Australia Needs a Magnitsky Law' *AQ: Australian Quarterly, 89*(4), 19-27, 23.

[47] *Department of State, Foreign Operations, and Related Programs Appropriations Act 2019,* Pub L 116-6; 8 USC. 1182

> corruption, including corruption related to the extraction of natural resources, or a gross violation of human rights shall be ineligible for entry into the United States.

62. This was most recently used against Sri Lankan Army Chief, General Shavendra Silva and his immediate family, where the US cited his alleged involvement in war crimes during the final stages of the Sri Lankan civil war.[48]

63. While the US Global Magnitsky legislation itself does not extend sanctions measures to immediate family members and is directed to those who directly or indirectly engage in acts of corruption or human rights abuse, the above State appropriations legislation does and works to complement the totality of the United States' active sanctions programs. It also allows for direct filings from non-governmental organisations to be considered.

64. Australia's current autonomous sanctions regime does allow for immediate family members of designated persons to be declared as persons for the purpose of preventing them from travelling to, entering or remaining in Australia.

65. Immediate family member is defined in regulation 3 of the Autonomous Sanctions Regulations 2011 as:

> (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.

66. The current sanctions regimes that considers immediate family members according to regulation 6 appears for the moment to cover designated persons from Libya and Myanmar. In relation to Libya it covers those persons who is an immediate family member that the Minister is satisfied is a close associate of the former Qadhafi regime; or that the Minister is satisfied has assisted or is assisting in the violation of relevant UN Security Council Resolutions. In relation to Myanmar it covers immediate family members of those persons who are:

> (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.

[48] Maria Abi-Habib and Dharisha Bastians 'US Bars Sri Lankan Army Chief Accused of War Crimes' *The New York Times* (15 February 2020) <https://www.nytimes.com/2020/02/15/world/asia/sri-lanka-us-sanctions.html>.

(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.

67. It is assumed that these 'immediate family members' are persons that are subject to immigration-related sanctions only, although it is not clear. It is also unclear how this is operationalised in practice, whether those persons are listed on the Consolidated List[49] of individuals subject to sanctions, or whether a separate list is provided to the Department of Home Affairs for monitoring.

[49] Department of Foreign Affairs and Trade, *Australia and Sanctions Consolidated List*, (26 February 2020) Australian Government <https://www.dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx>.