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 Ms 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.