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

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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 AO 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 AO 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 AO 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 Robertson AO 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 AO 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 AO 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 AO 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 AO 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.