Magnitsky Act Submission: Geoffrey Robertson AO QC

Human Rights Subcommittee, Joint Standing Committee on Foreign Affairs, Defence and Trade

1. I am an Australian barrister and former United Nations Appeal Judge, now based in London where I am founder and head of Doughty Street Chambers, a large human rights practice. I served as the first President of the UN war crimes court in Sierra Leone and was a "distinguished jurist" member of the UN's Internal Justice Council. I am a Master of the Middle Temple, a visiting professor at the New College of Humanities, and author of "Crimes Against Humanity: the Struggle for Global Justice" (Penguin/Random House, now in its 4th edition). In 2011 I received the New York Bar Association award for distinction in international law and affairs, and in 2018 was made a member of the Order of Australia for my work in international human rights.

2. My interest in Magnitsky laws began in 2011/12 when I represented Bill Browder in a defamation action brought in respect of his efforts to publicise the crimes which led to the death of Sergei Magnitsky. Since then I have collaborated with Bill in successful efforts to have Magnitsky laws passed in other jurisdictions and by the European Union and wrote a chapter in the book *"Why Europe needs a Magnitsky Law: Should the EU follow the US?"* (2013). I set out my argument for Australia adopting a Magnitsky law in my autobiography *"Rather His Own Man – In Court with Tyrants, Tarts and Troublemakers"* (Vintage, 2018, p423-5) and in greater detail in an article written with Chris Rummery, *"Why Australia needs a Magnitsky law"* in the *Australian Quarterly* (Vol 89 issue 4, Oct-Dec 2018). Both are annexed, and I would be happy to expand upon them in oral submissions.

3. May I first respectfully note that this inquiry, into "Whether Australia should enact legislation comparable to the United States Magnitsky Act 2012" has an inappropriate, or at least outdated, term of reference. The 2012 act was embryonic and unnecessarily limited (to Russia only, for example) and was supplemented by the 2016 Global Human Rights Accountability Act, which applied world-wide and included perpetrators of large-scale corruption. Moreover, improved versions have since been passed, for example in Canada in 2017, several European countries and in the Sanctions Act (UK, 2019). I would submit that the Committee is entitled – indeed logically bound – to examine these non-US and post 2012 initiatives rather than confine itself to consideration of the 2012 legislation. The language of the reference, ie "comparable to", permits it to make comparisons with later and better Magnitsky laws in deciding which legislative regime would be appropriate for Australia.

4. It will be apparent from my writing on this subject that I envision Magnitsky laws in some ways as more extensive than those which have been presently enacted, and in certain procedural questions as more limited. There has as yet been little communication between those responsible for listing and enforcement, and the design of these laws has not required those who administer them to be independent of the executive. They are at an early stage, and in my view Australia should not only have a Magnitsky law, but take this opportunity to have the best Magnitsky law.

5. For reasons given in my writing, I believe an effective Magnitsky law should apply to 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.

6. Existing laws generally pivot on decisions made by executive government rather than by independent tribunals, and lack elements of procedural fairness (such as availing listed individuals with an adequate opportunity to have their name removed from the list). This injustice must be addressed – and redressed – in any Australian law. This criticism applies to the *Autonomous Sanctions Act* of 2011, as the Joint Committee has pointed out in the past (see A.Q article, p23-6).

7. I welcome the decision of Parliament to consider the appropriateness Magnitsky laws for Australia. Deterrence of human rights abusers by prosecution and prison is faltering and the International Criminal Court has been undermined by the hostility of current US policy, and the antipathy of Russia and China, as indeed has the work of the Human Rights Committee of the UN. The emergence of Magnitsky laws does offer some hope of deterrence through sanctions rather than gaol sentences. I recommend that the Subcommittee read an article *"Sanctions – Financial Carpet-Bombing"* in *The Economist* of 30 November (p41-2) which assesses positively the recent extensive US use of the Global Magnitsky Act (it might consider calling Steve Mnuchin and others mentioned as witnesses).

8. There may be a question about whether the name "Magnitsky" should appear in the title of any law adopted by Australia. It does in the US and appears in brackets in Canada: *The Justice for Victims of Corrupt Foreign Officials (Sergei Magnitsky law)*. In the UK we have a *"Magnitsky Amendment"* to existing legislation but other countries have not mentioned the name. On one hand it is doubtful the word has meaning to most Australians or is relevant to a law which does not specifically target Russia, but on the other hand it is a reference to a particular case which provides an example for its use and connects it as a 'brand' with an international movement against human rights violations. Of course it would honour the sacrifice of the original victim but also reference Magnitsky acts in other democracies and the name is gaining recognition, at least among journalists, politicians, and diplomats. Merely to have a 'Sanctions Act' would not distinguish Magnitsky measures, which are targeted sanctions, with those imposed on foreign governments in respect of trade, or by the UN. Of course it is my hope that this measure will come to have a special characteristic, namely a finding by a quasi-judicial body that a particular individual or company is, on the balance of probabilities, guilty of unconscionable human rights abuse or egregious corruption. It is designed to name, blame and shame those who cannot otherwise be punished for serious crime, and to keep them, their beneficiaries and their money out of Australia.

9. I would be happy to expand on this evidence in writing or at an oral hearing. I have lived, for the purposes of my work, mainly abroad for the last half-century: never has Australia had so much sympathetic and appreciative international attention as in the past two months as the world has watched the fight against bushfires. It strikes me that this would be a good time to take a lead and show the world that Australians are concerned about other people facing danger and want to do their best to deter other kinds threats. We should not merely adopt an old Magnitsky law but should enact the most advanced of all Magnitsky laws.

Geoffrey Robertson AO QC

26th January 2020

IMAGE: Sergei Magnitsky – the murdered lawyer for whom Magnitsky laws are named.

Why Australia needs a Magnitsky Law

The Helsinki Summit between US President Trump and Russian President Vladimir Putin represented a nadir in US foreign policy, with Trump preferring to believe Putin rather than his own intelligence services over claims Russia subverted the 2016 US General Election. As if this act of diplomatic humiliation wasn't bad enough, Putin also singled out an American-British human rights activist he asked be surrendered to Russian authorities, in return for allowing the FBI to interrogate those Russians under indictment by Special Counsel Robert Mueller.

ARTICLE BY: **GEOFFREY ROBERTSON QC AND CHRIS RUMMERY**

What could possibly have provoked a Russian President to single out an individual during such a high-level diplomatic meeting? The same President who has been accused of green-lighting the poisoning of a former Russian double agent on British sovereign soil, of ignoring international condemnation for his annexing of Crimea, and who has shown a blatant disregard for accepting any culpability for the shooting down of flight MH17?

Magnitsky laws are national, not international, laws passed by sovereign parliaments to allow the government to apply targeted sanctions on any individual involved in a human rights violation.

The answer lies in the global Magnitsky movement that has its genesis at the turn of the century in Putin's Russia, at a time when Putin was cementing his power. The global Magnitsky movement – orchestrated by Bill Browder, American financier and author of the book *Red Notice* – is giving human rights the teeth to bite, rather than gnash, by preventing those people accused of human rights abuses and serious acts of corruption from enjoying the fruits of their ill-gotten gains. Its first targets have been Putin's cronies and, as an early measure of the movement's success, Putin's hatred of Browder was evident as he used the Helsinki Summit to call for the American's extradition.

Magnitsky laws are national, not international, laws passed by sovereign parliaments to allow the government to apply targeted sanctions on any individual involved in a human rights violation, from senior officials to low-level officers, from judges to policemen, and even non-government actors such as CEOs and contractors. These sanctions take the form of asset freezes for funds held in banks and other financial institutions, as well as bans on visas for entering the country. Putin sought Trump's help to silence Browder because Magnitsky laws are being passed in Western countries around the world (although not yet in Australia) – and are beginning to engender

fear amongst Russian profiteers from corruption and human rights abuses.

Bill Browder is used to such attention: "in my mind, the fact that Putin keeps bringing up my name publicly shows how rattled he is by the Magnitsky Act and how powerful a tool it is. It is very unusual for Putin to acknowledge his enemies, but in my case he started the personal attacks shortly after the US Magnitsky Act was passed and has continued repeatedly after the passage of each new country's Magnitsky Act".

This is a bad time for international criminal law: a pole-axed United Nations Security Council will not send for trial in the Hague any human rights violator (even Assad) who has "big 5" support, Trump in Helsinki did not even bother to request the arrest of the Polonium and Novichok poisoners or the soldiers who shot down MH17 (with the loss of 38 Australian lives) or to question the invasion of Ukraine. At a time when international criminal law is silent (except in respect of friendless states and their statesmen) Magnitsky laws show how national law can step up to the plate.

The Australian Government boasts that it is a champion of human rights and anti-corruption in the Asia-Pacific, but if it is serious about its role as a human rights guardian in the region, then it is time to put a Magnitsky law on the Commonwealth statute book.

Sergei Magnitsky was a lawyer in Moscow who blew the whistle on high-level Russian officials who had scammed companies… **He was tortured and eventually died.**

The Global Magnitsky Movement

Sergei Magnitsky was a lawyer in Moscow who blew the whistle on high-level Russian officials who had scammed companies owned by his client, Bill Browder, to the tune of USD $230 million. For this whistleblowing, Magnitsky was immediately arrested by the police he had complained about, and thrown into prison where tame judges ordered him to remain for a year without bail, despite serious illness. He was tortured and eventually died at the hands of middle-ranking officials of Putin's corrupt State apparatus, officials who send the spoils of their profiteering abroad to banks in Switzerland and Cyprus.

Bill Browder (ironically, the grandson of Earl Browder, the famous leader of the Communist party in the US between the world wars) has since devoted his assets and his time to promoting local laws that punish human rights abusers, named in memory of Magnitsky, his lawyer killed for his loyalty to both his country and his client. His first success came in 2012, when Obama approved the *Sergei Magnitsky Rule of Law Accountability Act*,

IMAGE: US Financier and Magnitsky Law advocate, Bill Browder.

The virtue of Magnitsky laws is that they are exercises of State sovereignty, and do not rely on international law, treaties or arrangements.

IMAGE: © futureatlas.com-Flickr

which froze the assets and prohibited visas to 18 Russian officials (including 2 judges) who had been involved in Magnitsky's inhumane treatment.

In 2016 this law was widened by *The Global Magnitsky Human Rights Accountability Act*, which applies worldwide and not just to Russia, as well as to those who have engaged in serious corrupt practices. Its asset freezes and visa bans have continued under the Trump administration, sanctioning 58 people last year.

As Browder says, "the Global Magnitsky Act appears to be a very powerful tool because dictators and their governments have traditionally never faced any consequences for their bad deeds, but all of a sudden find themselves financially isolated and publicly shamed".

The best way for the UK to reduce Putin's support from oligarch friends is to **stop them enrolling their children at Eton.**

The virtue of Magnitsky laws is that they are exercises of State sovereignty, and do not rely on international law, treaties or arrangements. In 2017 Canada passed a more advanced version (*The Justice for Victims of Corrupt Foreign Officials Act*) that additionally placed reporting obligations on banks and other financial institutions, and prohibited all dealings by Canadian companies with listed individuals, on pain of prosecution. European countries are following the US and Canadian lead. The UK – after the Salisbury poisoning – amended its *Sanctions Bill* to enable the recovery of assets held in Britain by foreign human rights abusers.

Why are Magnitsky laws likely to be effective? Simply, because the foreign abusers they target do not, for the most part, want to keep their profits at home. They want to stash their cash in safe Western banks, use the money to holiday and play the casinos in the West, and to send their children to private schools and universities and their parents to the better-equipped hospitals in Europe and the USA. As Boris Nemtsov, Putin's courageous political opponent pointed out before his assassination in 2015, the best way for the UK to reduce Putin's support from oligarch friends is to stop them enrolling their children at Eton.

Magnitsky laws do not at this stage go that far, but campaigners believe they should. Of 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. A Magnitsky law cannot affect heads of state or diplomats who enjoy immunity, but it may deter the 'train drivers to Auschwitz' who are tempted to use their profits from corruption and human rights abuses to pay for access to Western hospitals and schools that are better than in their home counties, where these amenities have been downgraded as a result of their own corruption.

Putin's call at Helsinki for Bill Browder's head betrayed his fear of the Magnitsky movement. When the first law was introduced by Obama in 2012, Putin's puerile response was to stop American families from adopting Russian orphans. Then, more logically, he introduced his own Magnitsky law, which targeted American officials involved in Guantanamo Bay, although they had no assets in Russian banks and Dick Cheney is unlikely to want to holiday in the Kremlin.

Should Australia have a Magnitsky law?

Australia is a financial hub in the Asia-Pacific region, envied for the stability of our banks and the quality of our hospitals and schools. Our cultural and financial infrastructures should not be made available to those who abuse human rights, whether they are mass murderers of Tamils or Rohingya, or corrupt Malaysian politicians or Chinese officials involved in oppressing democracy advocates, human rights lawyers and Falun Gong members.

"It's crucial that there aren't huge geographic gaps in the legislation", Browder says. "Right now, the US, UK and Canada have Magnitsky Acts among English speaking countries, but Australia doesn't. If that continues, it will create an incentive for bad actors to keep their money in Australia to avoid sanctions, which would be an unfortunate outcome".

Australia should be part of a global movement insisting that foreign crooks stay in the country their corruption has emaciated. Some of our near neighbours suffer from top-level corruption (see, until recently, the Malaysian Prime Minister). Australia, like any other sovereign nation, has power to sanction foreign miscreants.

The *Charter of the United Nations Act 1945* (Cth), a Doc Evatt initiative back in 1945, gives force to any sanction imposed by the UN Security Council, and is applied automatically to those it designates – usually for supplying or financing arms to pariah regimes. But it only applies to the limited number of persons listed by the U.N.

A wider sanctions regime is provided by the *Autonomous Sanctions Act of 2011* (Cth) (the ASA), which allows the Minister for Foreign Affairs to impose sanctions (including targeted financial sanctions) on foreign individuals 'in situations of international concern.' It does not expressly permit sanctions to be imposed for cases of serious corruption, like the *Global Magnitsky Act* in the US. It does allow travel bans and money freezes in respect of situations of international concern, which can include the "grave repression of human rights."

However, in order to sanction an individual, the Minister first needs to amend the ASA regulations by way of

The US, UK and Canada have Magnitsky Acts among English speaking countries, but Australia doesn't. If that continues, it will **create an incentive for bad actors to keep their money in Australia to avoid sanctions.**

IMAGE: © www.tOrange.biz-Flickr

a legislative instrument, identifying the target country and the reasons for its national's designation, which might include human rights violations but not corruption. The Minister must then pass another legislature instrument if they decides to designate the particular individual under the ASA regulations. This procedure is both clumsy and repetitive.

Australia's record in using these sanctions is pathetic under Ministers from both parties. For example, Julie Bishop only named two countries whose nationals she was prepared to sanction for human rights abuses – Syria and Zimbabwe, and Australia has only imposed sanctions on seventeen individuals, all of them Syrian commanders or intelligence officers in the Assad regime.

So at present the ASA cannot be used to target individuals involved in the shooting down of MH17 or in human rights abuses occurring in the Asia-Pacific, such as the extra-judicial killings in the Philippines or the high-level corruption in Malaysia. In other words the ASA is only being pointed towards easy targets with no likely connection to Australia. It is not genuinely being used as a tool to combat human rights abuse.

The ASA is not fit for purpose, if its purpose is to deter corruption (which it does not expressly tackle) or deter human rights abusers, for which it is rarely used. Ironically, it is a stark example of legislation which itself abuses human rights, because it gives the Minister absolute discretion to designate people without proof that they are involved in repression and gives them no chance of contesting the merits of that designation through any transparent process.

The Commonwealth Parliament's Joint Committee on Human Rights has consistently criticised the Act since its inception in 2011, drawing

IMAGE: © Alexei Kouprianov-Flickr

The ASA is not fit for purpose, if its purpose is to deter corruption (which it does not expressly tackle) or deter human rights abusers, for which it is rarely used.

attention to the Minister's overweening discretionary powers and to the unfairness of the process and the lack of appeal rights. It has recommended that the Act be amended to incorporate some of the protections available in the UK Sanctions Act.

It goes without saying that a law designed to protect and promote human rights should not itself be procedurally in breach of them. In order to be permissible under international human rights law, sanctions laws must seek to achieve a legitimate objective and be reasonable, necessary and *proportionate* in achieving that objective.

There is no doubt that the use of sanctions regimes, in an effort to apply pressure to governments and individuals in order to name, shame and blame human rights violators and corrupt foreigners is a legitimate objective for the purposes of international human rights law. However, the ASA cannot be regarded as *proportionate*, because it lacks effective safeguards to ensure that designation of particular individuals is not applied arbitrarily or in error, as well as the fact there is no right of a review of the designation on its merits. Unlike the United Kingdom, which reviewed all the designations made under its *Terrorism Sanctions Act* and strengthened its safeguards, the Commonwealth government has never conducted a review into the ASA to ascertain whether its designations are proportionate and therefore in line with international human rights standards.

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. The Department of Foreign Affairs and Trade has said that it collates a range of evidence and information to inform the Minister's decision-making under the ASA, however it refuses to release such information despite multiple requests by the Committee, as well as requests under the Commonwealth FOI laws.

No publicly available document exists in relation to what criteria and evidence are used when making a designation.

The effect of a designation can have significant impact on the rights of the designated individual, and of family members. The effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, an individual. This could result in close family members who live with a designated person not being able to access their own funds as result of a freeze on their assets. Also, a person who is declared under the ASA may also have their visa cancelled pursuant to the *Migration Regulations 1994* (Cth). This could impact on the right to protection of the family, which ensures that families are not arbitrarily separated from one another, something which is not an arcane reality, with 11 Australian nationals currently being named on the sanctions list.

IMAGE: © Kremlin

An Australian Magnitsky Act

The ASA represents what Gillian Triggs, former President of the Australian Human Rights Commission, has been warning about for some time, namely, a creeping expansion of non-compellable and non-reviewable discretions of Commonwealth Ministers. Then Foreign Minister, Julie Bishop stated that she had no intention of introducing legislation into the Australian Parliament that would mirror or resemble the United States' *Global Magnitsky Act*.

Certainly, any Australian Magnitsky law should depart from some other Magnitsky legislation, such as in the US, which allows the US President to sanction individuals on merely the basis of 'credible evidence' from the US State Department and the international NGOs. It is wrong that a decision to designate an individual should be at the discretion of the Executive, whether a US President or Australian Minister.

An Australian Magnitsky law should be one which respects the doctrine of the separation of powers between government, parliament and the judiciary, as well as common law rights and the international human rights regime which Australia has signed up to. Orders for sanctions on individuals should be made either by an independent quasi-judicial body, or by an independent Federal judge, after considering applications from the relevant Minister, government departments and intelligence agencies, as well as information from NGOs and affected parties and (if secrecy is not initially required) from targets themselves.

There is no doubt that in order to achieve the objective of preventing human rights abusers from enjoying their ill-gotten gains, sanctions regimes need to be flexible and applied in an effective and timely manner. The independent tribunal or Federal judge empowered to order the sanctions would hear and determine matters on their merits in a transparent process, with the target entitled to take part in proceedings should they wish to do so (at least via Skype or a local lawyer) and to put their case and their evidence before either a tribunal or a Federal judge.

This model would be able to sanction individuals designated by Magnitsky laws or tribunals in other jurisdictions such as Europe, the UK, Canada and the US, and the hope is that, in time, a master list of human rights abusers would be built up, abusers effectively banished from exploiting opportunities in the democracies of the world. This will, of course, take time, and the Australian model would not automatically sanction a target of the US *Global Magnitsky Act* without affording a fair and transparent process.

Those sanctioned under the Australian model – a decision which could severely affect their money and their movements – should have a right to appeal, and to apply subsequently for removal from the list. The standard of proof the tribunal should apply is the "balance of probabilities" test (guilt being "more likely than not") rather than listing persons merely on the strength of suspicion or rumour. On the other hand, it should not be necessary to prove guilt "beyond reasonable doubt" – a difficult test to apply in relation to foreign suspects, especially if their offences are being covered up by their governments.

This points to another precondition for the application of Magnitsky procedures, namely that the listed suspects should not be the subject of genuine proceedings in their own countries. The need for international sanctions in the case of Magnitsky was

The ASA represents what Gillian Triggs…has been warning about for some time, namely, **a creeping expansion of non-compellable and non-reviewable discretions of Commonwealth Ministers.**

IMAGE: © www.tOrange.biz -Flickr

If all advanced democracies... adopted such laws and pooled information and target lists, the pleasures available to the cruel and the corrupt would be considerably diminished.

because the Russian state had taken no action to investigate and prosecute those responsible for his death, or against those officials responsible for the massive tax fraud that he exposed.

The Interior Ministry and its law enforcement officials were bent on covering up the crimes committed by their colleagues, and they went so far, as part of that cover-up, to prosecute Sergei Magnitsky posthumously, in order to pretend that their original persecution of him had legal justification. This was despite the fact that independent bodies in Russia, such as the President's Human Rights Council, had demanded action against those responsible for Magnitsky's death. It would be inappropriate to invoke Magnitsky procedures at a time when the State in question was undertaking proper inquiries or had already begun prosecutions. Such action would be perceived as putting pressure on prosecutors and infringing the suspect's rights to a presumption of innocence.

It is important that an Australian Magnitsky law be used as a genuine force for change in the Asia-Pacific region, rather than simply reflecting the diplomatic policies of the government of the day. It could pressure governments where gross violations of human rights and corruption have occurred, and which are still said to be occurring. It could target the middle-men who permit the extra-judicial killings on behalf of Duterte, or the naval and army commanders responsible for shelling Tamils seeking shelter in the No Fire Zone at the end of the Sri Lankan Civil War in 2009.

A Magnitsky law used effectively could ensure that none of the USD 1 billion allegedly funnelled by disgraced Malaysian PM Najib Razak and his cronies from a state-owned investment firm ends up in Australian financial institutions. Such a law would truly honour the memory of Sergei Magnitsky, a man who never wavered in the face of torture and inhumane treatment and who fearlessly sought to bring those responsible for Russia's biggest ever tax fraud to justice.

At a time when international criminal law is faltering, the global justice movement should look to local Magnitsky laws as a means of naming, blaming and shaming human rights violators. If all advanced democracies, with desired banks, schools and hospitals, adopted such laws and pooled information and target lists, the pleasures available to the cruel and the corrupt would be considerably diminished. They will not be put in prison, but they will not be able to spend their profits as and where they wish, nor travel the world with impunity. They may then come to recognise that violating human rights is a game not worth the candle. AQ

AUTHOR:

Geoffrey Robertson AO QC is founder and head of Doughty Street Chambers, Europe's largest human rights practice. He is a former UN Appeals judge, and a Master of the Middle Temple. His latest book is an autobiography, *Rather His Own Man*. (Knopf). PHOTO: © Elizabeth Allnutt.

AUTHOR:

Chris Rummery is an Education Consultant with the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Chris has worked for three National Human Rights Institutions since 2011, including the Australian Human Rights Commission. He has worked with the NHRI in Mongolia, helping build capacity to deliver its mandate of protecting and promoting human rights. Chris also worked for two years with the Samoan Ombudsman to deliver human rights reports to government and the UN, as well as provided training to staff and civil society with regards to Samoa's obligations under international law.

@RummeryChris LINKEDIN.COM/IN/CHRIS-RUMMERY