



Australian Government
Department of Foreign Affairs and Trade



JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

**INQUIRY INTO THE USE OF TARGETED SANCTIONS TO ADDRESS HUMAN RIGHTS
ABUSES.**

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE SUBMISSION

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I. INTRODUCTION

1. The Department of Foreign Affairs and Trade (DFAT) welcomes the opportunity to provide the Joint Standing Committee on Foreign Affairs, Defence and Trade (the Committee) with this submission as part of the Committee's inquiry into the use of targeted sanctions to address human rights abuses.
2. The Terms of Reference for the inquiry state that the Committee shall examine the use of targeted sanctions to address gross human rights abuses, and that the Committee shall have particular regard to:
 - The framework for autonomous sanctions under Australian law, in particular the Autonomous Sanctions Act 2011 (Cth) and the Autonomous Sanctions Regulations 2011 (Cth);
 - The use of sanctions alongside other tools by which Australia promotes human rights internationally;
 - The advantages and disadvantages of the use of human rights sanctions, including the effectiveness of sanctions as an instrument of foreign policy to combat human rights abuses;
 - Any relevant experience of other jurisdictions, including the US regarding their Global Magnitsky Human Rights Accountability Act (2016);
 - The advisability of introducing a new thematic regulation within our existing Autonomous Sanctions Regime for human rights abuses.
3. The Minister for Foreign Affairs has a clear and longstanding role realising Australia's commitment to advance human rights globally. This includes conducting constructive bilateral and regional dialogue on human rights, engaging in the multilateral human rights system, and promoting and protecting human rights through development assistance and humanitarian support.
4. The Minister for Foreign Affairs is also responsible for deciding on the application of sanctions in response to situations of grave international concern. This includes, in specified circumstances, the power to issue permits authorising activity that would otherwise be sanctioned.
5. DFAT supports the Minister in this role by implementing and administering United Nations Security Council sanctions and Australia's autonomous sanctions. As Australia's sanctions regulator, DFAT provides public guidance on sanctions, processes applications for sanctions permits, works across government to monitor compliance with sanctions obligations, and takes corrective and enforcement action in cases of non-compliance.
6. This submission provides an overview of Australia's autonomous sanctions framework, the use of sanctions as a human rights tool, and the key issues to consider relating to the introduction of a thematic human rights-based sanctions regime.
7. At least six other jurisdictions have introduced, or stated their intention to introduce, a Magnitsky-style, human rights-based sanctions regime. [Attachment A](#) provides an overview of the key elements of the regimes of Canada, the United Kingdom, and the United States, as comparator jurisdictions.
8. Should Government decide to pursue a Magnitsky-style, thematic human rights-based sanctions regime, this could be done through an amendment to the Autonomous Sanctions Regulations 2011 within the existing sanctions framework. Alternatively, a new, standalone Act could be used to establish such a regime. Both options would have significant resource implications.
9. DFAT supports the introduction of a thematic human rights-based regime through an amendment to the Autonomous Sanctions Regulations 2011 and would welcome the opportunity to provide advice on how this can be achieved.

II. AUSTRALIA'S AUTONOMOUS SANCTIONS FRAMEWORK

10. Sanctions are measures not involving the use of armed force that are imposed in response to situations of international concern. Sanctions are a foreign policy tool aimed at delivering foreign policy goals.

11. Australia implements two types of sanctions:

- United Nations Security Council (UNSC) sanctions, which Australia must impose as a Member State of the United Nations and which are binding as a matter of international law. These are imposed under the *Charter of the United Nations Act 1945* (Cth).
- Australian autonomous sanctions, which are imposed as a matter of Australian foreign policy. These are imposed under the *Autonomous Sanctions Act 2011* (Cth) (the Act).

Australia's autonomous sanctions framework

12. Australia's autonomous sanctions framework is set out in the Act and the Autonomous Sanctions Regulations 2011 (the Regulations). Autonomous sanctions measures imposed under this framework include:

- restrictions on trade in goods and services;
- restrictions on engaging in certain commercial activities;
- travel bans, which mean declared persons are unable to travel to Australia without authorisation; and
- targeted financial sanctions, which mean designated persons and entities are unable to access assets they have in Australia, or receive assets from persons or entities in Australia without authorisation.

13. To date, Australia has established autonomous sanctions regimes by reference to specific countries, rather than on thematic grounds. Australia has established regimes in relation to the Democratic People's Republic of Korea, Iran, Libya, Myanmar, Russia/Ukraine, Syria, Zimbabwe and the Former Federal Republic of Yugoslavia.

14. Under Australia's existing framework, the Minister for Foreign Affairs may, by legislative instrument, list persons or entities for targeted financial sanctions and travel bans where the Minister is satisfied that the person or entity meets a range of criteria (regulation 6). While the current criteria for imposing sanctions are generally framed by reference to specific countries (see the table at regulation 6(1)), this does not need to be the case. For example, existing regulation 6(2) allows for a person or entity to be listed if they are contributing to the proliferation of weapons of mass destruction without a requirement that the conduct in question be connected to a particular country.

15. Within the current autonomous sanctions framework, Australia could establish thematic sanctions regimes, such as a human rights-based regime, where the regime is not tied to a particular country. Such a regime could comprise targeted financial sanctions and travel bans which could be directed against individuals or entities designated or declared on human rights grounds. This submission outlines two ways to establish a thematic human rights-based regime: (1) by way of new, standalone legislation, or (2) through incorporation into the existing autonomous sanctions framework, by way of an amendment to the Regulations. DFAT considers the latter approach to be the most efficient and effective (see Part IV below).

Australia's current use of sanctions on human rights grounds

16. Although Australia has not established a Magnitsky-style thematic human rights-based sanctions regime, within Australia's country-based sanctions framework Australia can, and already does, provide for

individuals to be listed for targeted financial sanctions and travel bans specifically on the basis of human rights abuses. Australia has already done this in respect of two country-based regimes, notably the autonomous sanctions regimes for Syria and Zimbabwe. In relation to Syria, this applies where a person or entity is responsible for human rights abuses in Syria, including the use of violence against civilians, and the commission of other abuses. In relation to Zimbabwe, this applies where a person or entity is or has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe.

17. Human rights may also be a relevant consideration in making listings under other existing autonomous sanctions regimes. For example, Australia's Myanmar sanctions regime enables the Minister for Foreign Affairs to designate officers who hold a specified position or rank in the Myanmar military. While this criterion is focused on position rather than conduct, the Minister is able to take into account the involvement of such individuals in human rights abuses or violations in deciding whether or not to impose sanctions on that individual.

III. USE OF SANCTIONS AS A HUMAN RIGHTS TOOL

Rationale for the use of sanctions in the human rights context

18. In a foreign policy context, sanctions signify a public condemnation of behaviour and seek to:

- limit the adverse consequences of a situation of international concern;
- influence those responsible for a situation of international concern to modify their behaviour; and
- penalise and deter those responsible.

19. Sanctions are one of the tools available in Australia's 'toolbox' of measures to support its commitment to advance and protect human rights globally, as outlined in the 2017 Foreign Policy White Paper. The ability to impose sanctions on human rights grounds enables Australia to take quick, decisive action to signal its concern in response to egregious or systematic human rights abuses. Having access to a broad suite of tools, including sanctions, enables a scaled and calibrated response to situations of international concern, by reference to effectiveness in achieving positive human rights outcomes and bilateral and regional equities.

20. Whether sanctions are the most appropriate mechanism for responding to a situation of international concern will depend on the particular circumstances. In some cases, different measures may be more appropriate or have more significant impact. Other tools include: making bilateral representations; working with countries to advance and protect human rights through development assistance, humanitarian support and technical cooperation programs; making recommendations through the UN Human Rights Council Universal Periodic Review process; making national statements, or leading or supporting joint statements or resolutions in the Human Rights Council or other United Nations fora; and reducing certain forms of bilateral engagement (e.g. senior political contact or military exercises). Such tools can be deployed in combination as part of a broader strategy, and their effectiveness may only become apparent over a longer term.

21. While sanctions are an important tool for responding to situations of international concern, it is important to ensure that they are not imposed in a way that undermines Australia's relations with other countries such that Australia does not have the ability to influence and effect positive change. For example, in some circumstances the imposition of sanctions may make it more difficult for Australia to achieve its human rights objectives by limiting avenues of engagement on human rights issues.

22. The use of sanctions should be targeted, appropriately scaled, and be based on Australia's national interest, taking into account a broad array of relevant considerations. These include:

- the severity of the conduct;
- Australia's international reputation as a strong supporter of human rights;
- the expected human rights outcomes, relative to the efficacy of other available measures;
- the possible secondary impacts (economic and political) in the relevant country and region; and
- the impact on Australia's economic, security or other interests, including Australia's ability to influence and effect positive change in the long term.

23. Given these considerations, it would be desirable for any thematic human rights-based sanctions regime to have a clear objective and well-defined decision-making parameters, including in relation to both the designation of individuals and entities, and in issuing permits to deal with designated persons and entities. This would assist in ensuring that sanctions are imposed appropriately and effectively, and are not used as Australia's default response to human rights abuses.

IV. IMPLEMENTATION OF A HUMAN RIGHTS-BASED SANCTIONS REGIME

24. Relevant considerations in establishing a thematic human rights-based sanctions regime in Australia are set out below. These include:

- developing the appropriate legislative framework: either through incorporating the regime into the existing autonomous sanctions framework or developing a new Act;
- setting the appropriate threshold and scope for the regime, which would determine the circumstances in which the new human rights-based sanctions could be applied; and
- administration and public diplomacy factors.

Developing the appropriate legislative framework

Incorporation into the autonomous sanctions framework

25. A thematic human rights-based sanctions regime could most simply and effectively be implemented by amending the Regulations. A human rights criterion could be added to existing regulation 6, which would allow for the designation of individuals and entities for targeted financial sanctions, and individuals for travel bans, based on human rights grounds.

26. Consistent with the current process for imposing targeted sanctions under regulation 6, a new human rights criterion could be added to empower the Minister for Foreign Affairs to designate by legislative instrument targeted financial sanctions and declare travel bans in relation to individuals or entities that meet the criterion. Once in force, sanctions could be imposed on individuals or entities which satisfy the human rights criterion, when decided by the Minister for Foreign Affairs. In contrast to what is currently required, there would be no requirement to amend the Regulations to establish a new country regime or amend an existing country regime, in order to be able to impose sanctions on human rights grounds. Therefore, human rights-based sanctions could be imposed more quickly.

27. Under this approach, the numerous powers, protections and miscellaneous matters provided for in the existing autonomous sanctions framework would then apply in relation to the human rights-based regime, including:

- the requirement for DFAT to maintain a Consolidated List of all designated persons and entities;
- the powers with respect to obtaining information and protections from self-incrimination;
- the power for the Minister to grant permits to deal with designated persons and entities; and
- provisions relating to enforcement, including injunctions, offences and the sharing of information between Government agencies.

28. From the perspective of accessibility to the Australian public of Australian sanctions obligations and for the purposes of administrative efficiency, incorporating a human rights-based sanctions regime into the existing framework would mean that Australia's autonomous sanctions remain within one framework and operate coherently.

29. Using the existing autonomous sanctions framework would also mean that the flexibility around the imposition of targeted financial sanctions and travel bans that currently exists in that framework would exist for the new human rights-based regime. That is, the imposition of sanctions would not be automatic upon a person or entity meeting the relevant criterion. Rather, the Minister for Foreign Affairs would continue to have the discretion to decide whether the imposition of sanctions would be appropriate and consistent with Australia's national interest, in light of all relevant factors.

30. Should Government decide to pursue a Magnitsky-style, thematic human rights-based sanctions regime, a straightforward means of implementation would be through an amendment to the Regulations within the existing sanctions framework. This process would involve adding the new human rights criterion through an amendment regulation made by the Governor-General, on recommendation by the Minister for Foreign Affairs, at a meeting of the Federal Executive Council. Such an amendment regulation would be tabled and be subject to parliamentary disallowance, consistent with the requirements of the *Legislation Act 2003*. This would be the most efficient and effective means of implementing a human rights-based sanctions regime in Australia, but also allow for parliamentary scrutiny of the new criterion.

New legislative framework

31. An alternative would be the establishment of a standalone, human rights-based sanctions Act separate from the existing autonomous sanctions framework.

Threshold and scope

Threshold

32. In considering a possible new human rights-based sanctions regime, consideration would need to be given to the purpose and objective of the regime in setting the appropriate threshold for the application of human rights-based sanctions. The 'threshold' would set the severity of the conduct that would be the trigger for such a regime.

33. A higher threshold would narrow the range of circumstances in which the power could be exercised, and would be appropriate if the purpose of the regime were to target only the most egregious behaviour. This would be consistent with the 2017 Foreign Policy White Paper, which specifically refers to sanctions being used to advance human rights, particularly in circumstances where there are *gross* human rights abuses. A lower threshold would expand the range of circumstances in which sanctions may be imposed, which may lead to expectations that human rights-based sanctions could be imposed in a broader range of circumstances, including where other responses could be more appropriate.

34. For example, a higher threshold could require that the abuse or violation be gross or systemic, reflecting the approach taken in Canada's *Special Economic Measures Act* (1992). A lower threshold could provide that sanctions may be applied in respect of *any* human rights abuse.

Scope

35. The scope of any human rights-based sanctions regime should also reflect the objectives of that regime. For example, a human rights-based criterion could allow for the imposition of sanctions against those responsible for human rights abuses or violations directed against whistleblowers and human rights defenders. The protection of human rights defenders is a strong focus of Australia's agenda in the UN Human Rights Council. This would reflect the approach taken in the US' Global Magnitsky Act 2012, and Canada's *Justice for Victims of Corrupt Foreign Officials Act* (2017), which both specifically target human rights abuses against those groups.

36. Alternatively, a human rights-based regime could allow for the imposition of sanctions against those responsible for human rights abuses or violations directed against *any* person or group (for example, against particular minorities, not only against whistleblowers or human rights defenders), reflecting the approach taken under US Executive Order 13818 and the UK's *Sanctions and Anti-Money Laundering Act 2018*. This would substantially broaden the scope of those who could potentially be subject to sanctions under the new regime.

37. A further question in determining the scope of a human rights-based sanctions regime is who it is seeking to target. For example, a human rights-based criterion could provide for the imposition of sanctions only against those *responsible for* certain human rights abuses or violations. Alternatively, it could also apply

against those *complicit in, assisting or supportive of* such abuses or violations, which would reflect the approach taken in the US' Global Magnitsky Act 2012.

Administration and public diplomacy

38. A new human rights-based sanctions regime would require the establishment of 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. It would also need to be accompanied by an effective public diplomacy strategy to clearly communicate its limits and objectives, both domestically and internationally. This would assist in 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.

39. The establishment and administration of a new human rights-based sanctions regime would have substantial resource implications, including in collecting and analysing the information required to develop and inform potential new listings. There would be likely resource implications for DFAT as well as other agencies involved in sanctions implementation and enforcement, such as the ABF, AFP and AUSTRAC. It may also have implications for state, territory and local governments. The extent of the resource implications would be affected by the threshold and scope of the regime, whether a standalone Act was required, and the extent to which it was perceived to be readily available as a tool within the range of tools available to respond to human rights issues.

Attachment A

Human rights sanctions regimes in other jurisdictions¹

Jurisdiction	Key elements of regime
Canada	<p><i>Justice for Victims of Corrupt Foreign Officials Act (2017)</i></p> <ul style="list-style-type: none"> • Allows for sanctions against foreign nationals responsible for, or complicit in, extrajudicial killings, torture, or other gross violations of internationally recognized human rights against: (i) whistleblowers and (ii) human rights defenders. It also targets foreign nationals responsible for or complicit in acts of significant corruption. <p><i>Special Economic Measures Act (1992)</i></p> <ul style="list-style-type: none"> • Allows the imposition of sanctions against a foreign state or national in circumstances where; amongst others, (i) gross and systematic human rights violations have been committed [high threshold], and (ii) a foreign national is responsible for or complicit in acts of significant corruption. • Does <i>not</i> only target those who persecute whistleblowers and human rights defenders.
United Kingdom	<p><i>Sanctions and Anti-Money Laundering Act 2018</i></p> <ul style="list-style-type: none"> • Enables the making of regulations imposing sanctions to provide for accountability for or be a deterrent to gross violations of human rights, or otherwise promote (i) compliance with international human rights law, or (ii) respect for human rights.
United States	<p><i>Sergei Magnitsky Rule of Law Accountability Act of 2012 (2012 Magnitsky Act)</i></p> <ul style="list-style-type: none"> • Targets persons for gross violations of internationally recognised human rights in Russia. <p><i>Global Magnitsky Human Rights Accountability Act (2016) (Global Magnitsky Act)</i></p> <ul style="list-style-type: none"> • Gives the 2012 Magnitsky Act global application. • Targets those responsible for serious corruption or gross human rights abuses against specific persons (i.e. whistleblowers and human rights defenders). <p><i>Executive Order 13818 (20 December 2017):</i></p> <ul style="list-style-type: none"> • Allows for sanctions against any person determined (among other criteria): <ul style="list-style-type: none"> ○ to be responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse; or ○ a current or former government official who is responsible for or complicit in, or has directly or indirectly engaged in, corruption.

¹ Please note this is a high-level summary only and does not reflect the complexities of each regime.