



February 13, 2020
Committee Secretary
Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

Submission by Human Rights Watch to the Australian Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade on the Inquiry into a Framework for Autonomous Sanctions Under Australian Law to Target Human Rights Abuses

In recent years, several countries that actively promote human rights as part of their foreign policy have passed legislation that authorizes targeted sanctions, including visa bans and asset freezes, against individuals implicated in serious human rights violations. Targeted sanctions are an appropriate and useful foreign policy tool to press for accountability for serious abuses, and to raise the cost of human rights violations, by denying abusers both entry to and assets in foreign countries where they seek to travel or do business. They are specific, targeting individuals rather than entire governments for abusive and unlawful behavior.

The United States has led in this effort through the Global Magnitsky Human Rights Accountability Act (US Global Magnitsky Act), which came into force in 2016 and focuses on serious human rights abuses and corruption.¹ Canada, Estonia, Latvia, Lithuania, Kosovo and the United Kingdom have followed suit. The European Union is in the process of developing a Global EU Human Rights Sanctions Regime.²

This submission examines the experience of Global Magnitsky-style laws based on Human Rights Watch's experience in different countries and whether a Global Magnitsky-style law would benefit Australia. In our view, the Australian government should join other governments and pass such a

¹ Global Magnitsky Human Rights Accountability Act, S.284, 2016, <https://www.congress.gov/bill/114th-congress/senate-bill/284>.

² Laurence Norman, "EU Moves Closer to Creating a US-Style Magnitsky Act," *The Wall Street Journal*, December 9, 2019, (accessed February 12, 2020) <https://www.wsj.com/articles/eu-moves-closer-to-creating-u-s-style-magnitsky-act-11575922594/>.

law, specifically making human rights and corruption criteria in applying targeted sanctions. This law will create a more transparent process in applying sanctions and give the Australian government more options in dealing with human rights violators. This will send a strong message to rights-violating leaders everywhere that there are far-reaching consequences for their actions.

Current Australian framework insufficient

Currently, Australia applies sanctions in two ways. First, sanctions as a result of United Nations Security Council resolutions that Australia is obligated to implement as a member state of the United Nations.³ Second, Australia has an autonomous sanctions regime under the Autonomous Sanctions Act 2011 (the Autonomous Act) and the Autonomous Sanctions Regulations 2011 (the Autonomous Regulations).

The Autonomous Act has a very broad definition of what constitutes an “autonomous sanction”:

[A]utonomous sanction means a sanction that:

- (a) is intended to influence, directly or indirectly, one or more of the following in accordance with Australian Government policy:
 - (i) a foreign government entity;
 - (ii) a member of a foreign government entity;
 - (iii) another person or entity outside Australia; or
- (b) involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by a person or entity described in subparagraph (a)(i), (ii) or (iii) in action outside Australia that is contrary to Australian Government policy.

What is “contrary to Australian government policy” is not defined in the law or the regulations. However, the explanatory memo to the bill defines sanctions as “measures not involving the use of armed force” imposed “in situations of international concern” including “the grave repression of the human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed

³ Australian Government, Department of Foreign Affairs and Trade, “Australia and Sanctions: About Sanctions,” undated, <https://dfat.gov.au/international-relations/security/sanctions/Pages/about-sanctions.aspx#intro> (accessed February 12, 2020).

conflict.”⁴ There is a publicly available consolidated list of all individuals and entities who have been individually targeted with sanctions.⁵

While this law allows the Australian government to apply sanctions on human rights grounds, this has occurred in exceptional cases only concerning Myanmar, Syria, and Zimbabwe. The way in which autonomous sanctions are determined is complicated, ad hoc, opaque and difficult to navigate. There is no civil society engagement in the process. Named individuals in some international tribunals and UN reports are listed, but others are not. It is unclear how the Australian government determines who will be sanctioned and therefore these sanctions have less impact in imposing a cost for serious human rights violations.

Experience of other jurisdictions regarding Global Magnitsky legislation

United States

The US Global Magnitsky law borrows its name from the late Sergei Magnitsky, a Russian whistleblower. Magnitsky, a tax advisor in Moscow, had alleged that various government officials were involved in a massive scheme that defrauded the Russian government of US\$230 million in taxes. Russian authorities arrested Magnitsky in November 2008. He suffered ill-treatment in jail and died in pre-trial custody almost a year later, following acute pancreatitis and other serious medical problems for which the authorities denied him medical treatment.⁶ In 2012, the US Congress passed a limited Magnitsky Act that imposed sanctions on a list of Russian officials believed to be responsible for serious human rights violations, freezing any US assets they held, and banning them from entry into the US.⁷ By 2016, Congress built on the original Russian-focused Magnitsky law and enacted the Global Magnitsky Act.

The Global Magnitsky Human Rights Accountability Act authorizes the president to block or revoke the visas of certain “foreign persons” (both individuals and entities) or to impose property sanctions on them. People can be sanctioned (a) if they are responsible for or acted as an agent for someone responsible for “extrajudicial killings, torture, or other gross violations of

⁴ Autonomous Sanctions Bill 2010, *The Parliament of the Commonwealth of Australia*, 2010, <https://www.legislation.gov.au/Details/C2010B00168/Revised%20Explanatory%20Memorandum/Text>.

⁵ Australian Government, Department of Foreign Affairs and Trade, “Australia and Sanctions: Consolidated List,” updated February 6, 2020, <https://dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx> (accessed February 12, 2020).

⁶ “Why you Should Read the European Court Ruling on Magnitsky,” Human Rights Watch news release, August 27, 2019, <https://www.hrw.org/news/2019/08/27/why-you-should-read-european-court-ruling-magnitsky>.

⁷ “The US Global Magnitsky Act: Questions and Answers,” Human Rights Watch news release, September 13, 2017 <https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act>.

internationally recognized human rights,” or (b) if they are government officials or senior associates of government officials complicit in “acts of significant corruption.”⁸

President Donald Trump has since issued Executive Order 13818, “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.”⁹ The executive order is broader than the Global Magnitsky Act by covering “serious human rights abuse” and “corruption.”

The Global Magnitsky Act allows the US assistant secretary of state for democracy, human rights, and labor, in consultation with other State Department officials, to submit recommendations to the secretary of state of people or entities to be sanctioned. Various congressional committees and individual members of Congress can also submit names to the administration. Civil society groups may also suggest names to the State Department. Under the law, in determining whether to impose sanctions, the administration shall also review “credible information obtained by other countries or nongovernmental organizations that monitor human rights violations.”¹⁰ US officials have said the law has strengthened their relationships with civil society, and information from nongovernmental organizations is also used to inform diplomatic actions. In practice, the decision about whether to carry out the sanctions is made jointly by the State and Treasury Departments.

The US has sanctioned at least 199 individuals and entities from a wide range of countries under the Global Magnitsky Act. When invoked, the act sends a strong message that the US will not tolerate human rights violations, filling an important gap in the sanctions toolkit by preserving the flexibility to target individual rights abusers without broadly punishing the country’s population. The law promotes respect for human rights by imposing significant punishments on targeted persons or entities to motivate them or other similar government actors to change their practices, refrain from future abusive behavior, or engage in reforms. Any person or entity listed who holds property under US jurisdiction has those assets seized, while any finances held in US dollar denominations, even in a non-US bank, will face severe difficulties in accessing or transferring those funds through the international banking system. Persons listed are also barred from travel in or through the United States and its territory. In practice, because of high levels of corporate compliance, people and entities listed are unable to utilize a broad range of financial services or lending. According to US officials, the sanctions have resulted in foreign governments taking concrete actions against human rights abuses and corruption including initiating investigations, abusive officials being removed from positions of power, and assets stripped from individuals or entities named.

⁸ Global Magnitsky Human Rights Accountability Act.

⁹ Executive Order Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, Presidential Action – Executive Order 13818, December 21, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-persons-involved-serious-human-rights-abuse-corruption/>.

¹⁰ Global Magnitsky Human Rights Accountability Act.

Canada

In 2017, the Canadian government adopted the Justice for Victims of Corrupt Foreign Officials Act. This allows the Canadian government to impose targeted sanctions on foreign nationals who are complicit in gross human rights violations or significant corruption. The law has been a useful mechanism to sanction perpetrators from Russia, Venezuela, South Sudan, Syria, and Myanmar, among others.¹¹

For instance, by April 2019, the Canadian government listed 113 individuals from Venezuela under the Justice for Victims of Corrupt Foreign Officials Act, including Venezuelan President Nicolas Maduro and 42 other high-level government officials.¹² The Canadian government noted that since January 2010, “the Maduro regime has increased the persecution and repression of its political opponents and the Venezuelan people. Their oppressive actions include preventing relief supplies from entering Venezuela; the widespread arrests of hundreds of anti-regime protestors; censorship and suppression of freedom of expression; the use of the co-opted judiciary to pursue political leaders and civilians who exercise their civil and political rights; and the extrajudicial killing of dozens of people during protests against the Maduro regime.”¹³

In Canada, targeted sanctions are viewed as a positive and effective foreign policy tool to specifically target human rights abusers. Monitoring the enforcement of these sanctions in Canada is challenging, as there are limited resources devoted to the sanctions regime.

Other jurisdictions

Kosovo, Latvia, and Lithuania all have their own versions of the Global Magnitsky law.

The UK is developing its own mechanisms inspired by the US Global Magnitsky Act as part of its wider sanctions architecture. In 2017, the UK Parliament passed the Criminal Finances Act, amending the 2002 Proceeds of Crime Act 2002, to expand the definition of “unlawful conduct” to include gross human rights violations (defined as torture or ill-treatment). This power is in force. In 2018, the UK Parliament approved the Sanctions and Anti-Money Laundering Act 2018, which includes gross human rights violations (again defined as torture or ill-treatment) as a ground for

¹¹ Government of Canada, “Consolidated Canadian Autonomous Sanctions List,” last updated January 29, 2020, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng (accessed February 12, 2020).

¹² Government of Canada, “Canadian Sanctions Related to Venezuela,” January 14, 2020, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/venezuela.aspx?lang=eng (accessed February 12, 2020).

¹³ Ibid.

imposing sanctions on a person or entity and allows for travel bans on individuals engaged in gross human rights violations. As an EU member state, the UK participated in the EU general sanctions regime, so the introduction of UK specific individual sanctions under the 2018 Act did not take effect when the legislation was passed in 2018. Now that the UK has left the EU, it is expected that the UK government will enact secondary legislation establishing the UK mechanism for individual sanctions. That secondary legislation had yet to be published at time of writing.

In December 2019, EU foreign ministers agreed to advance EU legislation establishing a Global EU Human Rights Sanctions Regime that should be ready for adoption by EU member states in early 2020. While the EU has already imposed numerous targeted sanctions against individuals and entities linked to country-specific sanctions regimes, the new regime will enable the EU to be more flexible in responding to serious violations of international human rights and international humanitarian law wherever they occur.¹⁴

Effectiveness of targeted sanctions

Targeted sanctions are not perfect, and should not be a substitute for other action, but they can be a useful and appropriate foreign policy tool. If an individual in another country commits serious human rights abuses, yet pays no price for that abuse, it is perfectly reasonable for the Australian government to say that it will not allow them to travel to Australia or put their money in Australian banks. Australia should not be rolling out the welcome mat for human rights abusers. This is not a sanction against entire governments, but specific individuals who have credibly been implicated in serious human rights violations, and entities that provide revenues to them.

The Australian government has previously stated that it does not need a Magnitsky Act because it already has an autonomous sanctions regime and a “character” test as part of its visa laws. The same could have been said of the US or Canada pre-Magnitsky. Australia’s current autonomous sanctions regime is opaque, ad hoc, and does not require the government to examine human rights concerns – there is also no clear process for parliamentarians or nongovernmental organizations to submit information on human rights violators to the government for an individual to be sanctioned. There are “character tests” under the current Australian visa system that provide broad reasons why Australia could reject someone on human rights grounds. Yet the reasons for such a rejection are never made clear to the individual or the public and so this is of limited value.

A specific law would create a clear, transparent process for members of parliament and civil society to present information to the Australian government. It compels the foreign ministry to closely examine serious cases of human rights abuse.

¹⁴ Norman, “EU Moves Closer to Creating a US-Style Magnitsky Act,” *The Wall Street Journal*.

In the current foreign policy dynamic, the Australian government has limited tools at its disposal on human rights. It has important trade and security relationships with governments in the Asia-Pacific, yet has been unwilling to add human rights conditionality clauses to trade agreements, as other governments such as the US and the EU regularly do. The Australian government generally prefers quiet advocacy rather than making public statements on human rights concerns in other countries, so there are few ways the Australian government can press for tangible human rights improvements, besides providing financial support to human rights projects.

Australia's geographical position also means travel restrictions and asset freezes imposed by Australia will have greater impact on abusers from nearby countries who seek to visit Australia. Southeast Asian government officials with abusive human rights records visit Australia for myriad reasons – tourism, shopping, medical care, to visit relatives or because they own property here. It will shame and embarrass abusive officials if they are banned from traveling to Australia on human rights grounds, and this raises the cost of committing human rights violations such as if they cannot attend their child's graduation at an Australian university because they are on a sanctions list.

Globally the human rights regime is changing and for an increasing number of Western governments, Magnitsky-style laws are a useful tool. The US, Canada, and UK are close allies of Australia and have already moved in this direction. Australia should not lag behind. It is important to note that the effectiveness of each of these countries' laws is enhanced when their governments work together: information about potential abusers can easily be shared between countries. And a single listing, say in the EU, is not as powerful as when an abusive person is sanctioned through North America, Europe, and beyond, soon finding that even in a financial hub that doesn't have sanctions—such as Singapore—no banks will want to work with them, lend to them, or provide financial services. In this way, sanctions across multiple jurisdictions close down the space for people who commit abuses and imposes a very real cost on their actions.

Magnitsky-style laws have been criticized for their selective application – governments may be inconsistent in applying the law to officials from certain countries based on political reasons. While this is an issue, it can be addressed by having clear and transparent criteria for applying the sanctions. Magnitsky-style laws also need to ensure that individuals named can review the basis for their being listed and have clear criteria for their removal from the list, as once an individual is sanctioned it can be difficult for them to be removed.

A Magnitsky-style law should not be a substitute for other action on human rights. And the Australian government should continue to engage with foreign governments and press foreign governments to address impunity for human rights violations. These sanctions send a clear signal

that human rights abuses will not be tolerated by Australia, even if there is impunity in their home country for these crimes. They provide a clear incentive to foreign governments to improve their own accountability mechanisms.¹⁵ By cooperating with countries on Global Magnitsky-style investigations, foreign leaders can show that they will not tolerate human rights abusers in their own countries.¹⁶ Australia too should be part of that process.

¹⁵ “The US Global Magnitsky Act: Questions and Answers,” Human Rights Watch news release, September 13, 2017 <https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act>.

¹⁶ Ibid.