13 May 2020

Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Members of the Joint Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses

I would like to thank the Joint Standing Committee for the opportunity to appear at the public hearing into the use of targeted sanctions to address human rights abuses on 28 April 2020. I write to respond to the issue raised by Senator Abetz concerning the standard of proof applicable to the human rights violators or corrupt officials to have their names removed from the designation list.

Standard of Proof – reverse onus

In legal proceedings, the accused has the right to a fair trial, and impartial hearing which includes the presumption of innocence and the burden is on the prosecutor to prove guilt beyond reasonable doubt in criminal proceedings and balance of probabilities in civil proceedings.

However, some legislations contain reverse onus provision and shift the burden of proof to the accused. The Attorney-General's Department indicated that a reverse onus provision would not constitute a violation of the presumption of innocence under international human rights law, provided that the legislation is not unreasonable in the circumstances and maintains the rights of the accused. The reasonable circumstance may be that the nature of the offence makes it difficult for the prosecution to prove each element or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.[1]

The Parliamentary Joint Committee on Human Rights' guidance stated that "reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective"[2].

Legislations in Australia that permit the reverse onus provision:

In taxation cases, an officer of the corporation to provide as evidence of innocence includes that the person did not aid, abet, counsel or procure the act or omission of the corporation concerned and was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.[3] Practically, a director would be in a significant position to be able to adduce evidence that shows they were not involved in the company's offending than explicitly require the prosecution to establish their involvement.[4]

[1] https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Presumptionofinnocence.aspx
[2] Parliamentary Joint Committee on Human Rights, Guidance Note 2: Offence provisions civil penalties and human rights, page 2.
[3] Section 8Y (a) and (2) (b), *Taxation Administration Act 1953*.
[4] Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127), at page 323

The *Criminal Code Act 1995* (Cth) provides that the burden of proof to be imposed on the accused is evidential burden unless the law specifies otherwise. Section 13.4 of the Act stated that a burden of proof that law imposes on the defendant is a legal burden if and only if the law expressly specifies that the burden of proof in relation to the matter in question is a legal burden, or requires the defendant to prove the matter or creates a presumption that the matter exists unless the contrary is proved.[5] Section 13.5 of the Act, stated that a legal burden of proof on the defendant must be discharged on the balance of probabilities.

The same concept applies under the *Proceeds of Crime Act*, where the burden of proving that a person's wealth is not derived or realised, directly or indirectly, from one or more of the offences lies on the person.[6]

Common law:

The International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) promote for the protection of the presumption of innocence.[7] However, in *Minister for Immigration and Indigenous Affairs v B*, Justice Kirby stated that when "the will of the Parliament of Australia is expressed in clear terms and are constitutionally valid, the requirements of international law cannot be given effect by a court such as this. The court cannot invoke international law to override clear and valid provisions of Australian national law".[8]

In *Williamson v Ah On*[9], the Court stated that the Parliament of the Commonwealth has the power under sec. 51 (xxvii.) and (xxxix.) of the Constitution to prescribe what evidence shall be received and upon which party the burden of proof shall lie.[10]

It is therefore reasonable and not a violation of the violator or corrupt official's rights to presumption of innocence that the reverse onus provision applies to them and that they must provide evidence to remove their names from the designation list. The standard of proof to apply is the one permitted by legislation and common law in civil proceedings.

Test for removal of perpetrators from the sanction list

In the United States, to be removed from the designation list, the designated shall provide evidence that establishes that an insufficient basis exists from the listing or that the circumstances resulting in the listing no longer apply. Some examples include a positive change in behaviour, the death of a designated person or the designation was based on mistaken identity.[11] The applicable evidentiary standard for proceedings is proof by a preponderance of reliable, probative, and substantial evidence.[12] Canada also allows for the designated person to apply for the removal of their names from the sanction list; however, it does not state the standard of evidence required by the designated person.

[5] *Criminal Code Act 1995* (Cth)
[6] Section 179E(3) of the *Proceeds of Crime Act 2002* (Cth)
[7] Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)
[8] *Minister for Immigration and Indigenous Affairs v B* (2004) 219 CLR 365, para 171.
[9] (1926) 39 CLR 95
[10] *Williamson v Ah On* (1926) 39 CLR 95.
[11] https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx
[12] Money and Finance: Treasury Code of Federal Regulations, §501.732 Evidence

The test to apply in civil proceedings was established in the *Briginshaw v Briginshaw*[13] case and often referred to as the *Briginshaw* test. The High Court found that serious allegations should be accepted more cautiously, considering "the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description and the gravity of the consequences flowing from a particular finding". The standard of proof requires an assessment on the balance of probabilities, that is, whether the issue has been proved to the reasonable satisfaction of the Tribunal. "Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved."[14] Taking into consideration the nature of the allegation and the likely consequences which will follow should the facts be accepted.

WCH v Mental Health Tribunal (Human Rights), the Member of the Tribunal was required to stand in the shoes of the Mental Health Tribunal to decide that the Member considered correct and preferable and neither of the party in the proceeding bears the onus of proving its case.[15] The case referred to the test in *Briginshaw v Briginshaw*[16] , and the standard requires the Tribunal be persuaded that a fact in issue exists. The Tribunal must consider the seriousness of the matter and the gravity of the consequences from a particular finding and determine whether the issue has been proven to its reasonable satisfaction.[17]

The Court, in the *Briginshaw* case, stated that the common law had not established the third standard of proof; the two standards are beyond reasonable doubt in criminal proceedings and balance of probabilities in civil proceedings. The *Briginshaw* test requires an assessment on the balance of probabilities and issue to be proved to the reasonable satisfaction of the decision-maker in cases involving serious allegations.

The *Briginshaw* test was codified in Section 140 of the *Evidence Act 199*5 (Cth). In civil proceedings, that standard of proof is the balance of probabilities, taking into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding, and the gravity of the matters alleged. Any question of fact to be decided by a court is on the balance of probabilities[18] , and there is no requirement that the accused is convicted of an offence.

The activities the designated person has committed may be a criminal offence; however, the sanctions imposed relates to the freezing or confiscation of assets and barring of entry are a civil matter. Therefore, standard to apply for the removal of a designated person is the balance of probabilities. However, due to the seriousness of the offences in case of gross or grave human rights violations and corruption, the designated person shall bear the onus of proof. The most appropriate standard is the *Briginshaw* test; that is, the designated person must prove by reasonable satisfaction or persuasion that the facts in dispute are more likely than not to exist.

The designated person bears the burden of proof as permitted in Australian's legislation and common law and the reverse onus will not violate the presumption of innocence.

<u>Standard of Proof to designate a person or entity</u>

I have also considered the evidence to be submitted by the person or organisation putting through submissions to designate a person when considering the issue raised by Senator Abetz and believe

[13] *Briginshaw v Briginshaw* (1938) 60 CLR 336
[14] *Briginshaw v Briginshaw* (1938) 60 CLR 336
[15] *WCH v Mental Health Tribunal (Human Rights) (Amended)* [2016] VCAT 199
[16] *Briginshaw v Briginshaw* (1938) 60 CLR 336
[17] *WCH v Mental Health Tribunal (Human Rights) (Amended)* [2016] VCAT 199, para 20
[18] Section 317 (2) of the *Proceeds of Crime Act 2002* (Cth)

that the threshold is on a reasonable belief based on credible information. The US and Canada do not have guidelines on the evidence required to build a case for designation. A Non-Government Organisation in the US, Human Rights First, has taken the lead in coordinating the efforts of over 200 local, national, and international NGOs, to advocate for robust implementation of the Act through training, equipping, and guiding to build credible case files. There is no specific guideline from the US government for evidence required to establish a case, and Human Rights First has established a guideline to build a case file based on reasonable basis of belief. [19]

In Australia, there is legislation that requires mandatory reporting or notification notice of offence on the ground of reasonable belief. All States and Territories in Australia have enacted mandatory reporting laws to report on cases of child abuse if a person has a reasonable belief that a child is at risk or that an adult had abused a child. The National Boards and the Australian Health Practitioner Regulation Agency require for making a mandatory notification about a practitioner to prevent the public from being placed at risk of harm. The notifier must form a reasonable belief and should be based on personal knowledge of reasonably trustworthy facts or circumstances.[20]

In *Nitschke v Medical Board of Australia*[21], in considering the necessity of taking immediate action against a practitioner, the standard examined by the Court was on reasonable belief. That is, the fact or facts directly in issue concerning a practitioner's conduct, performance or health do not have to be proven on the balance of probabilities however there must be proven objective circumstance sufficient to justify the belief.[22]

In *George v Rockett*[23], the case involved an issuing of a search warrant, and the issuing Justice is satisfied that there are reasonable grounds for the suspicion and belief. The Court stated that "the facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value."[24] The High Court held that a reasonable belief requires the existence of facts which are sufficient to induce the belief in a reasonable person.

In conclusion, although the act or omission of the accused is criminal in nature, sanctions imposed relates to the freezing or confiscation of assets and barring of entry are a civil matter. The sanctioning state is able to issue sanctions to the accused on a balance of probabilities, and this must be more than mere suspicion and must be of probative value for the following reasons:

- Access to information limits
- Limit to search warrants in international jurisdiction
- Accused has a right of response

The accused must bear the burden of proof on the balance of probabilities to be removed from the designation list for the following reasons:

- Evidence has been hidden by the accused, and it is more practical for the accused to prove a fact than the prosecutor to disprove it
- The accused would be in a significant position to be able to adduce evidence that shows they were not involved in the offence than for the prosecutor to establish their involvement
- The offence is peculiarly within the knowledge of the accused

[19] https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf
[20] https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Guidelines-for-mandatory-notifications.aspx
[21] *Nitschke v Medical Board of Australia* [2015] NTSC 39
[22] *Nitschke v Medical Board of Australia* [2015] NTSC 39 at 34.
[23] (1990) 170 CLR 104
[24] *George v Rockett* (1990) 170 CLR 104 at 115.

Recommendations:

To avoid doubts, a sanction regime shall:

1. Clearly state who shall bear the burden of proof. The will of the Parliament of Australia shall be expressed in clear terms so that the element of reverse onus provision does not contravene or violate Australia's international obligations.

2. The standard of proof is the test established in the *Briginshaw* case. In maintaining fairness to the designated person, the legal burden shall be lesser, and a designated person is required to prove their case on the balance of probabilities.

In light of the above observations, I hope that the Joint Standing Committee on Foreign Affairs, Defence and Trade takes into consideration the standard of proof in the *Briginshaw* test where the designated person requests for the removal from the designation list when providing the Committee's response to the inquiry.

Yours sincerely,

[redacted]

Janice Le