

Suggested elements for a Bill

- 6.1 After careful review of the evidence presented to this inquiry, the Human Rights Sub-committee has concluded that Australia should have stand-alone legislation that would empower the Australian Government to sanction persons and entities responsible for serious violations of human rights and acts of significant corruption.
- 6.2 At the invitation of the Chair, Mr Geoffrey Robertson AO QC prepared and submitted to the Sub-Committee a draft *International Human Rights (Global Magnitsky) Bill 2020*. The text of this document is reproduced in full at Appendix D.
- 6.3 Through this document, and earlier evidence, Mr Robertson has made a substantial contribution to this inquiry, allowing the Sub-committee to benefit from his globally recognised expertise and experience in this field.
- 6.4 The inclusion of Mr Robertson's document in this report is a useful starting point. The Sub-committee believes it is an indication of the range of matters that could be considered in drafting an Australian Magnitsky targeted sanctions regime.
- 6.5 The Sub-Committee is grateful to Mr Robertson for his contribution to advancing consideration of this important human rights issue.

A summary of the Robertson document

- 6.6 Mr Robertson's document provides considerable insight into how future legislation may be drafted. The following summary seeks to highlight some of the key areas of the document. Where relevant the Sub-committee notes its agreement or disagreement with the document.

Preamble

- 6.7 The Robertson document has a long preamble that discusses human rights at length. This form of long preamble may be somewhat unusual however, Mr Robertson points out that this sort of preamble is often included when the subject concerns human rights and can be found in international human rights treaties.¹
- 6.8 The Sub-committee concurs that a substantive preamble would assist interpretation of the purposes and intentions underlying the legislation.

Crimes against the International Criminal Court

- 6.9 The Sub-committee notes the inclusion in the Robertson draft of a reference of Division 268 of the Criminal Code – crimes against the administration of the International Criminal Court (ICC).
- 6.10 The Human Rights Sub-committee considers this provision would have to be considered carefully in the context of both Australia’s strong support for the ICC, and Australia’s relations with states that are not parties to the Rome Statute of the ICC, and that consequently have not accepted obligations to cooperate with and support the proceedings of the Court.

Definitions

- 6.11 Definitions are central to the effective targeted sanctions legislation. A lack of a clear definition may lead to confusion and inconsistency in approach, however, a narrow definition may fail to cover all the possible circumstances in which human rights abuses and significant corruption may occur.
- 6.12 The Robertson document refers to ‘grave human rights abuses’ and ‘serious corruption’. The objects of the document refer to deterring ‘gross violations or human rights’ and ‘significant corruption’.
- 6.13 The Robertson document is specific with its definitions. ‘Internationally recognised human rights and fundamental freedoms’ are defined as having the same meaning as in section 3 of the *Australian Human Rights Commission Act 1986*, for example.²

1 Mr Geoffrey Robertson AO QC, *Committee Hansard*, Canberra, 15 May 2020, p. 40-41.

2 Section 3 of the Human Rights Commission Act defines human rights as the rights and freedoms recognised in the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child; the Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons, and other rights declared or recognised by international instruments.

- 6.14 The references in the Robertson document to the Criminal Code ACT 1995 clarify what human rights violations are covered by the Robertson document. The inclusion of references to genocide, crimes against humanity, war crimes and slavery and slavery-like offences is consistent with the document's object of deterring 'grave' or 'gross' human rights abuses.³
- 6.15 The Robertson document provides that the person is a human rights violator, if, in the opinion of the Minister, the person is responsible for or engages in a violation of human rights; facilitates, incites, promotes or supports that human rights violation; consents to or acquiesces in that violation, conceals evidence of that violation, provides financial or other support.⁴
- 6.16 Similarly the Robertson document broadly defines 'significant corruption' to have occurred 'when, in the Minister's opinion, a person commits, plans to commit or participates in the commission of corruption, having regard to its impact, the amounts involved, the person's influence or position of authority or the complicity of the government of the State concerned.'
- 6.17 The Human Rights Sub-committee notes that the scope is broad and includes the perpetrators of human rights violations, as well as those who would assist them, and those who cover up such activities which could include beneficiaries or dependents. The Sub-committee agrees that the scope for defining human rights violators needs to be broad to be effective.
- 6.18 A comprehensive listing of the dimensions of corrupt conduct is included in the document. However, it is left to the judgment of the Minister as to what is 'significant' corruption – having regard to its impact, amounts involved, the position of the persons involved and/or State complicity.

3 Subdivision 268J sets out crimes inter alia including perjury; falsifying, destroying or concealing evidence; deceiving, corrupting or threatening witnesses or interpreters; perverting the course of justice, or corrupting court officials, Subdivision 268J also includes offences including preventing the attendance of witnesses in ICC proceedings, preventing production of things in evidence, reprisals against witnesses (including causing any detriment to another person who was a witness in an ICC proceeding); and reprisals against officials of the International Criminal Court (including causing or threatening any detriment to an official of the ICC because of anything done or believed to have been done for the purposes of a proceeding before the Court.

4 Section 7 The definition also includes persons who are 'responsible for investigation or prosecution of the violation and intentionally or recklessly fails to fulfil that responsibility' or a person who contravenes or assists with the contravention of the asset freezing provisions of the proposed legislation.

Magnitsky conduct

- 6.19 The Robertson document introduces the term 'Magnitsky conduct'. The use of this term puts Mr Sergei Magnitsky's name at the heart of the legislation. This term is defined as conduct that involves violation of human rights and significant corruption. The document further states that Magnitsky conduct:
- ...may also involve harm or threats of harm (whether physical, financial or other harm, including to family, friends or business associates) to persons that might attempt to or expose Magnitsky conduct, or who obtain, exercise, defend or promote internationally recognised human rights and fundamental freedoms.
- 6.20 Magnitsky conduct also covers the persecution of human rights activities and organisations. It covers actions that, for example, include threats of harm against certain persons that would not necessarily fall within the terms of the definition of human rights violation.⁵
- 6.21 The Sub-committee considers that extending the legislation to this conduct would target not only human rights violators and those engaged in serious corruption, but also those who act to cover up such activities.
- 6.22 The Sub-committee considers the legislation should use the concept and name of 'Magnitsky Conduct'.

Application to citizens

- 6.23 The Robertson document imposes geographical differences between Australian and non-Australian persons (as defined). Magnitsky conduct by Australians can only occur outside Australia, where Magnitsky conduct by non-Australians can occur anywhere.
- 6.24 The Sub-committee does not agree that targeted sanctions should apply to Australian citizens, noting that citizens are already subject to Australian laws including relevant criminal laws.

Designation of persons

- 6.25 A Bill modelled on the Robertson document would empower the Minister to designate persons if satisfied that the person is or has been involved in Magnitsky conduct. The Minister may further designate 'associates'. This defined as persons 'owned or controlled directly or indirectly by a person
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⁵ See Sections 6 and 7.

who is or has been involved in Magnitsky conduct or is acting on behalf of or at the direction of a person who is or has been so involved or is a member of, or associated with, a person who is or has been so involved.’ Family members and relatives are not explicitly covered by this definition.

- 6.26 As noted in Chapter 5, the Sub-committee is of the view that a targeted sanctions regime should include the option for sanctions to be applied to family members and other direct beneficiaries of sanctioned individuals.
- 6.27 The Robertson document provides that a decision to designate a person would be made by the Minister. The Robertson document makes no reference to the information that the Minister may rely upon in deciding to designate a person.

Statement of reasons

- 6.28 The Robertson document provides that in informing a person of their designation, the Minister must include a statement of reasons including ‘a brief statement of the matters the Minister knows, or has reasonable grounds to suspect’, but the Minister may exclude information that if disclosed would be harmful to national security, interfere with law enforcement investigations, disclose a confidential informant or whistleblower or be contrary to the interests of justice (see Sections 18 (4) and (5) if the Robertson document). The Minister must also make the designation public, subject to similar exclusions.
- 6.29 The Sub-committee supports the provision of a ‘statement of reasons’ for persons being designated.

Retrospectivity

- 6.30 It should be noted that under the provisions of the Robertson document, persons may be designated for both current and past Magnitsky conduct. There is no time limit on past Magnitsky conduct, so the scope of the legislation would be retrospective. The Sub-committee concurs with this approach.

Request for designation

- 6.31 Section 19(1) of the Robertson document provides a ‘right’ to request the Minister designate a person for Magnitsky conduct. A person who might exercise a right to request a designation would be ‘any person whose interests are affected by alleged Magnitsky conduct’. The scope here is quite broad – requests could be made to the Minister by anyone who claims to be ‘affected’ by alleged Magnitsky conduct.

- 6.32 Section 19(2) of the Robertson document provides that designation of a person may be requested by an organisation or association that has for at least two years been engaged in activity anywhere ‘for the protection and promotion of international human rights and fundamental freedoms’, and ‘at the time of its proposal its objects or purposes include protection and promotion of international human rights and fundamental freedoms.’ The Minister would not have to act in response to a request for designation, but must consider such requests.
- 6.33 The scope of this provision would potentially cover well known international human rights organisations such as Amnesty International and Human Rights Watch. It could also cover national human rights organisations in other countries including Human Rights Commissions and non-governmental organisations engaged in relation to human rights matters.
- 6.34 The Robertson document does not include any specific role for members of the Australian Parliament or Parliamentary Committees in making requests to the Minister for designation of persons.
- 6.35 The Sub-committee considers that anyone should be able to request the minister to impose sanctions. However the Sub-committee recommends the establishment of an independent advisory body to provide a transparent pathway for nominations, as discussed in Chapter 5.

The right of review

- 6.36 The Robertson document provides for a right of review and requires the Minister to appoint an independent person to conduct a review of a designation of a person involved in Magnitsky conduct. Criteria are specified for the appointment of the independent person and conduct of a review process.
- 6.37 The Robertson document provides that the appointments of an independent person to conduct a review would be subject to regulations, including in relation to conflict of interest avoidance.
- 6.38 The Sub-committee does not agree with an independent review on the merits and recommends that the Minister conduct reviews on request.

Dealing with assets

- 6.39 The Robertson document includes provisions for dealing with assets of a designated person or making funds or assets available to them.
- 6.40 There are exemptions to freezing of assets including provision for basic needs, including legal services, extraordinary expenses, diplomatic missions, and humanitarian assistance activity.

- 6.41 The Robertson document discusses in bracketed text a range of issues arising from freezing assets, including relationship with proceeds of crime laws, but specific provisions have not been developed. The possibility that assets may need to be held and managed by the Commonwealth is also discussed.
- 6.42 The Robertson document refers to the new legislation into the financial surveillance reporting requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.
- 6.43 This is a necessary measure. The Sub-committee would encourage the Government to consider what other machinery may be required for the identification of frozen assets and enforcement of prohibitions in dealing with such assets.

Immigration

- 6.44 The Robertson document contemplates, but does not set out measures to prohibit the entry of designated persons into Australia as well as changes to the visa/residency status of persons already in Australia. While the Minister responsible for the administration of the Migration Act 1958 already has extensive powers in this regard, it may be necessary to amend the legislation.
- 6.45 The Robertson document envisages parliamentary oversight by the Joint Standing Committee on Foreign Affairs, Defence and Trade. The Document provides that the Minister must table an annual report in Parliament. The section does not specify what information must be included in the annual report.
- 6.46 The Sub-committee supports the requirement for an annual report by the Minister to Parliament.
- 6.47 The Robertson document envisages independent review of the legislation to be undertaken by an independent person appointed by the Minister three years after the commencement of the Act. A report is to be tabled in Parliament within 15 sitting days after its receipt by the Minister.

Comment

- 6.48 The Robertson document illustrates some of the issues involved in the drafting of new targeted sanctions legislation. Mr Robertson has provided a considerable service to the Parliament in providing his draft to the Sub-committee. His text should serve as a valuable catalyst for action and assist in drafting new legislation for consideration by the Parliament.

