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JUSTICE

The Hon Kevin Andrews MP
Chair
Human Rights Sub-Committee
Joint Standing Committee on Foreign Affairs, Defence and Trade

Additional Information provided to the Inquiry into an Australian Human Rights Sanctions Regime

Thank you for the opportunity to appear before the Human Rights Sub-Committee of the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (the **Sub-Committee**) in relation to the Inquiry into whether Australia should enact legislation to use targeted sanctions to address human rights abuses (**Inquiry**). In the course of the hearing, the Australian Centre for International Justice (**ACIJ**) took questions on notice. This supplementary submission responds to those questions and provides information relating to other developments relevant to our primary submission.

Questions on notice

The Sub-Committee enquired on the recommendation made by the ACIJ and many other submitters, that decisions to designate a person or entity are subject to review. There was concern that this might place a burden on Australia's legal system. The ACIJ responded that review rights are nonetheless fundamental to the principle of procedural fairness, and agreed to consider the impacts on legal systems in other jurisdictions as a result of the introduction of human rights sanctions regimes.

The Canadian model does not provide the right to seek merits review of the kind envisaged by the ACIJ, and as reflected in the submission of the Law Council of Australia.¹ In the Canadian model, review rights for individuals are very limited and controlled by the Minister for Foreign Affairs.² Persons affected by sanctions designations may apply in writing to the Minister for Foreign Affairs to have the sanction repealed. If an application is rejected, a foreign national may reapply to the Minister of Foreign Affairs if there has been a material change in the applicant's circumstances.³

The number of individuals whom are currently subject to sanctions designations under the Canadian law are 70.⁴ There is no information to indicate whether those individuals have sought to have themselves removed. It is not possible therefore to measure any adverse impact on the Canadian legal system.

The UK's legislative model, the *Sanctions and Anti-Money Laundering Act 2018*, goes further than any other human rights sanctions model in the provision of review rights. Persons may request the Minister vary or revoke their designation,⁵ and if unsuccessful, may apply for judicial review.⁶ The first sanctions measures have only recently been introduced in the UK under this law, and it is not possible to measure any adverse impact on the UK's legal system.

¹ Law Council of Australia, Submission 99 to Joint Committee on Foreign Affairs, Defence and Trade, Inquiry Into Whether Australia Should Enact Legislation to Use Targeted Sanctions to Address Human Rights Abuses (4 March 2020) 35.

² *Justice for Victims of Corrupt Foreign Officials Act* (2017) s 8.

³ *Justice for Victims of Corrupt Foreign Officials Act* (2017) s 8(3).

⁴ *Justice for Victims of Corrupt Foreign Officials Act Regulations (Sor/2017-233)* Schedule, s 1.

⁵ *Sanctions and Anti-Money Laundering Act 2018* (UK), s 23.

⁶ *Sanctions and Anti-Money Laundering Act 2018* (UK), s 38(1).

The Chair also enquired that “under some UN sanctions, for example, engagement with people is not allowed. If a similar sort of offence were committed, on what basis should we be engaging with people who are considered to be undesirable to engage with? We need to balance that judicial fairness of a merits review with some practical considerations as well.”

Those persons targeted for sanctions by the UN Security Council, would be sanctioned through the appropriated UN Security Council sanctions regime which Australia is obliged to implement as a matter of international law. Australia’s autonomous sanctions regime might supplement UN Security Council measures. The UK’s legislative model includes a provision relevant to an applicant being able to request the Secretary of State, use their best endeavours to secure the person’s removal from the UN list.⁷ This question might be better addressed by the Department of Foreign Affairs and Trade.

Law and policy coherence

In our submission we brought to the Sub-Committee’s attention recommendations made to an Australian Law Reform Commission (**ARLC**) inquiry regarding the sufficiency of Australia’s criminal law in responding to challenges presented by investigating and prosecuting extraterritorial offences.⁸ The ARLC has since released its report and has agreed with those recommendations that the Australian Government should undertake further inquiry into the investigation and prosecution of transnational crime, and to consider the creation of a specialised extraterritorial crimes investigation unit.⁹

Our principle recommendation for any new legislative human rights sanctions framework is:

decisions to impose sanctions should ensure consultation with relevant government agencies and departments to consider whether conduct alleged amounts to an extraterritorial criminal offence against the Commonwealth in Chapter 8 of the Criminal Code and to determine whether prosecution is more likely and appropriate in the circumstance.

Conduct which might amount to extraterritorial criminal offences against the Commonwealth in the Criminal Code, include international crimes and other serious offences against humanity such as: war crimes, genocide, crimes against humanity and torture, which are severe breaches of human rights. The criminal prosecution of perpetrators of these serious crimes should be the primary objective in any effort being undertaken to combat the impunity of these perpetrators, and as already outlined in our submission,¹⁰ are part of Australia’s obligations under international law. Sanctions as a tool for holding human rights violators accountable should supplement these primary efforts and be used in consultation with relevant agencies and departments in Australia.

⁷ *Sanctions and Anti-Money Laundering Act 2018* (UK), s 25.

⁸ Submissions made to the Australian Law Reform Commission Inquiry into Corporate Criminal Responsibility, see also, *Corporate Criminal Responsibility: Discussion Paper* (DP 87, 2019) 112 [1.40].

⁹ Australian Law Reform Commission, *Final Report, Corporate Criminal Responsibility, ALRC Report 136* (April 2020).

¹⁰ Australian Centre for International Justice, Submission 87 to Joint Committee on Foreign Affairs, Defence and Trade, Inquiry Into Whether Australia Should Enact Legislation to Use Targeted Sanctions to Address Human Rights Abuses (4 March 2020) 12 [30]-[36].