

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

INTRODUCTION

The catalyst for an increasingly popular movement amongst countries with a concern for the rule of law, respect for human rights and the implementation of means such as the use of targeted individual sanctions to address gross human rights abuses by named abusers, originated in Russia and was the wrongful arrest, imprisonment, torture in custody and ultimately the murder by prison guards of Sergei Magnitsky, an unassuming tax lawyer based in Moscow.

In 2007 Magnitsky was engaged by William Browder, an American born British citizen, founder and CEO of Hermitage Capital Management, based in Moscow. After some success in exposing financial fraud and corruption in Russia, Browder fell foul of President Putin and in 2005 was expelled from the country on the grounds of being a “threat to national security”. Magnitsky’s task was to unravel official but incorrect claims of tax evasion against Hermitage and some of its companies.

Whilst living back in London, Browder maintained his staff and office in Moscow and Hermitage continued its work leaving no funds in Russia but keeping empty investment holding companies in place. In 2008, a “Russian raider attack” resulted in one of Hermitage’s companies being stolen by way of the theft of the Company’s original seals, certificates of ownership and registration files. Russian raider attacks are not uncommon and involve corrupt police officers fabricating criminal cases, corrupt judges approving the seizure of assets, and organised criminals on hand to deal with anyone who stands in their way. The Magnitsky case followed the script.

Magnitsky had reported the fraud and the criminals who had carried it out were the ones appointed to investigate it. As it transpired, the “raiders” used the stolen companies to get a refund on the \$230 million dollars Browder had paid in tax the last year he was operating from Moscow. The money was paid to the “raiders” the day after they made their application and was the largest tax refund in Russian history. After following up on the issues involved in the theft, Sergei Magnitsky was arrested. He endured torture and degrading treatment throughout his ordeal and at 37 years of age, died in custody 51 weeks after his arrest, leaving a wife, two sons and a mother.

To seek some sort of justice and to honour the life and integrity of Sergei Magnitsky, Browder became a full-time human rights activist, the first product of which was the US Magnitsky Act. He continues this work and President Putin continues to get the Act repealed and Browder in Moscow...

TERMS OF REFERENCE

The Committee shall examine the use of targeted sanctions to address gross human rights abuses. The Committee shall have particular regard to:

1. The framework for autonomous sanctions under Australian law, in particular the Autonomous Sanctions Act 2011 (Cth) and the Autonomous Sanctions Regulations 2011 (Cth)

Under the terms of the Autonomous Sanctions Act (ASA) and the Autonomous Sanctions Regulations, Australia imposes autonomous sanctions where UN member states have contravened their international obligations, and, in addition, imposes sanctions, also called autonomous, in support of Australia's own foreign policies. Questions arise around whether these sanctioning powers would be sufficiently flexible for an expanded function of the ASA and the way in which the passage of a Magnitsky-style Act would broaden the tools available to government.

The ASA allows the Minister for Foreign Affairs to impose sanctions including targeted financial sanctions on foreign individuals "in situations of international concern". It does not expressly permit sanctions to be imposed for cases of serious corruption like the Global Magnitsky Act in the US. It does allow travel bans and money freezes in respect of situations of international concern, which can include the "grave repression of human rights". However, in order to sanction an individual, the Minister first needs to amend the ASA regulations by way of a legislative instrument identifying the target country and the reason for its national's designation which might include human rights violations but not corruption. Another legislative instrument may be needed depending on a decision that may follow. In the case of targeted sanctions to address gross human rights abuses, it is the individual who is the target. Unlike in the ASA there is no "target" country.

The ASA, S14, Injunctions, seems to offer wide scope for variations which would not be the objective of a Magnitsky-like Act.

- (7) The power to grant or vary an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage in such conduct, and
 - (b) whether or not the person has previously engaged in such conduct.

There is no doubt that the passage of a Magnitsky-style Act, described by QC Geoffrey Robertson as "one of the most important developments in human rights" would broaden the tools available to government, but not necessarily by siting it within the Autonomous Sanctions Act.

2. The use of sanctions alongside other tools by which Australia promotes human rights internationally

Human rights atrocities are evils and the Universal Declaration enjoins us to condemn them. Australia does so because as a democratic nation that believes in and practices the rule of law, we understand that breaches of international law must, when they happen, be universally condemned by every state that takes its universal obligations seriously.

Australia is party to the seven Core International Human Rights Treaties and also a party to six Optimal Protocols.

Treaties, protocols, and also obligations imposed by means of law such as the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008, make plain our values and are important to a country that should strive to take its national and international obligations seriously.

National measures such as foreign interference laws, bans on foreign political donations and increased resources and enhanced powers for Australian security agencies are other measures more recently introduced.

In addition to those mentioned above, and as already mentioned, the Autonomous Sanctions Act 2011 and the Autonomous Regulations 2011 are other tools by which Australia promotes human rights internationally.

The use of targeted individual sanctions has, since the introduction of the first Magnitsky Act in 2012 in the US, become an increasingly popular measure in countries where the rule of law prevails. By joining those countries, Australia would fill a geographic void and become the first country in the Asia Pacific region to enact such legislation. Given the ever-increasing interest in such legislation it is likely that other countries in the region would follow.

3. 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

Australia has an often proud history of being at the forefront of international human rights action and respect for and involvement in United Nations work such as the Universal Declaration of Human Rights. An act designed around targeted sanctions as an instrument of foreign policy to combat human rights abuses and abusers would sit comfortably beside treaties, obligations, protocols and laws already in place in Australia.

Perhaps the greatest advantage to victims of a Magnitsky-type act is that by targeting individuals only and thus ending unjust collective punishment, victims and the country as a whole are not punished. Murdered Russian human rights campaigner and former politician Boris Nemtsov, described the first Magnitsky Act as “a most Russian law for Russians”.

The more countries that enact a Magnitsky Law, the more effective it becomes against gross human rights abuse and abusers who are often well practiced international money launderers. When there is no place to do business, no place to launder money in overseas real estate or by the purchase of yachts and planes, no place to send children to elite overseas schools, seek

medical treatment in the best hospitals overseas or enjoy holidays abroad, the rewards for human rights abuses including gross theft at home, will diminish.

Effective law would place duties on banks to disclose the accounts of named and barred people and hopefully enable the state to confiscate the money, ill gotten gains, rather than merely freeze them.

The real power of sanctions targeting individual human rights abusers lies in the fact that like-minded democracies can act together imposing visa bans and freezing the assets of sanctioned individuals. If only a handful do so, these abusers know they will be able to shop around until they find a safe haven for their ill-gotten gains.

As “one of the most important developments in human rights” it would be hard to argue against a law that targets and sanctions individuals who are gross human rights abusers by denying them visas and freezing their assets perhaps forcing them (when enough countries have joined in acting to mitigate the rewards of engaging in human rights abuses) to live in their own economically starved countries that they have emaciated. The act would thwart the flight of capital, estimated in the case of Russia to be \$35 billion p.a.

The success of Magnitsky-type acts is indicated by an increasing number of countries enacting such legislation. They include three of the 5Eye countries; Canada, United States, United Kingdom, Estonia, Lithuania, Latvia, Kosovo, and Gibraltar. The European Union (EU) has begun the preparatory work for a global sanctions regime to address serious human rights violations and Ukraine, South Africa, Sweden and other countries are at the preliminary stage of discussions. Opportunities for sharing information and lists and evaluation of progress and blocks to it could be a valuable cooperative process and product.

The first Magnitsky Act signed into law in the USA, had as its most strident critic, the President of Russia, Vladimir Putin. It is widely said that its overturning, and presumably the overturning of any such legislation world-wide, is his prime policy objective. This surely suggests that such an act would be an invaluable tool for Australia to promote human rights internationally.

4.

5. The advisability of introducing a new thematic regulation within our existing Autonomous Sanctions Regime for human rights abuses

The introduction of a new thematic regulation within our existing Autonomous Sanctions Regime for human rights abusers would not be the most effective way to identify and take action against such individuals. If one thematic regulation were introduced, others would follow, leading to a crowded landscape. A new and separate Act would make monitoring, evaluating and reviewing progress and all aspects of administering the act easier and more effective.

In addition to its powers to sanction human rights abusers a Magnitsky like legislation would provide invaluable transparency and accountability in the public domain both nationally and internationally.

By publicly exposing the names of human rights abusers, these individuals become pariahs among the international community and their crimes are documented in the public sphere. Widespread publicity and personal consequences offer a strong deterrent effect, signalling to other individuals working anywhere in the world that their crimes have or will have consequences.

Compliance with a separate act would be facilitated for Australian businesses and companies because, as noted by law firm Allens, many companies assess their sanctions risk profiles primarily with reference to the countries in which they operate. If Australia adopts a worldwide human rights sanctions regime, companies may need to refresh their sanctions compliance programmes to account for the fact that sanctions risk may materialise anywhere in the world, including in countries that are not sanctioned.

Furthermore, as also noted by Allens, the possible adoption of a Magnitsky law in Australia demonstrates the interconnectedness of anti-corruption, anti-money laundering, business and human rights, sanctions and other compliance issues, and underlines the importance of businesses integrating the various components of their compliance systems.

Without consequences, human rights violators cannot be trusted not to violate human rights again and again. Most act because they do not fear retribution. Officials in authoritarian regimes must know that their crimes, whether on behalf of or protected by their superiors, are not immune from international consequences. A Magnitsky-like Act would hold all gross human rights perpetrators accountable for their actions. The Nuremberg defence would not apply.

The corruption, criminality and human rights abuses characteristic of authoritarian powers should concern all Australians who value universal freedoms. But they also impose a direct threat to our national interest, values and sovereignty.

Our sovereignty and democratic institutions must be preserved against the threat of rising authoritarian states. The implementation of a Magnitsky-style act which would enhance the ability to impose sanctions on state and non-state perpetrators of human rights violators.

Recommendations

1. That Australia enact and implement a law resembling the US Global Magnitsky Human Rights Accountability Act.
2. That this law should be separate from the Autonomous Sanctions Act and Autonomous Regulations while complementing the Act and Regulations.