Law Council
OF AUSTRALIA

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

Joint Standing Committee on Foreign Affairs, Defence and Trade

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales, the Law Society of South Australia, its National Human Rights Committee, National Criminal Law Committee and its Migration Law Committee of its Federal Litigation and Dispute Resolution Section in the development of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (**the JSCFADT**) regarding its inquiry into the use of targeted sanctions to address human rights abuses (**Inquiry**).
2. The Law Council considers Australia's use of sanctions to apply pressure to individuals to end the repression of human rights to be a legitimate objective for the purposes of international human rights law. However, it stresses that any sanctions regime, which may be applied to individuals in the absence of a criminal conviction following a fair trial, must be accompanied by effective safeguards to ensure that any limitation on human rights is proportionate to this objective.
3. The Law Council is concerned that the existing autonomous sanctions regime lacks significant safeguards which would ensure that it is reasonable, necessary and proportionate. The regime should be amended to address these concerns. With respect to safeguards for the designation of persons and entities, and declaration of persons, under the regime, the Law Council recommends that:
    - before making a designation or declaration, the Minister should be required to be 'satisfied on reasonable grounds' of the relevant criteria;
    - the Minister should also have regard to detailed legislative criteria before making such a decision, including the purposes of the regime and the likely effects on the person or entity, taking into account less intrusive alternatives;
    - such a decision should be initially imposed on an interim basis only, with the Minister providing the relevant person/entity with a statement of reasons and inviting the person to make submissions before a 'permanent' (three year) decision is made. A statement of reasons should also be provided with respect to 'permanent' decisions;
    - such decisions should be subject to merits review, and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**AD(JR) Act**);
    - such decisions should be reviewed promptly where new evidence arises. The designated or declared person/entity should be invited to make prior submissions with respect to all such reviews;
    - the Minister should regularly report to Parliament regarding such decisions;
    - oversight and regular review of such decisions by an independent body should occur;
    - access to funds to meet basic expenses, and social security payments to family members, should be assured; and
    - measures be adopted to avoid declaring persons where this would breach Australia's non-refoulement obligations.
4. While the above recommendations focus on the regime's specific provisions which enable designations and declarations, the Law Council recommends that consideration should also be given to conducting a broader review of the autonomous sanctions regime, and to ensuring that its safeguards are contained in primary legislation.
5. The Law Council recognises that the Inquiry is particularly interested in whether Australia should follow the example of international jurisdictions which have adopted

Magnitsky laws.[1] Such laws enable sanctions with respect to foreign persons who are responsible for gross violations of internationally recognised human rights and significant acts of corruption.

6. In this context, the Law Council highlights that Australia's existing autonomous sanctions regime may extend to sanctions concerning gross human rights abuses by foreign individuals. However, concerns exist that the regime has not been used in practice to address gross human rights abuses in practice. It is also less clear that the regime currently extends to instances of serious corruption.

7. One available option to the Australian Government to address these concerns would be to amend the autonomous sanctions regime to explicitly extend to gross human rights violations and serious corruption, at the same time as implementing the above recommendations for additional safeguards. However, a potential disadvantage of this approach is that it remains tied to considerations of broader foreign policy objectives and Australia's relationships with other states, rather than offering a more targeted focus on the actions of the specific individual.

8. The alternative approach is to pursue a separate Magnitsky Act. While this approach may increase legislative complexity in this area, it may also be less concerned with the role of the state, and therefore be more effectively evoked to address individual instances of gross human rights abuses and serious corruption.

9. If a separate Magnitsky Act were to be pursued, the Law Council recommends that it must include safeguards to protect against potential Executive overreach, including:

    - clearly defined legislative terms, such as 'gross human rights violations' (by reference to international human rights law standards) and 'serious corruption';
    - appropriately defined thresholds or standards of proof;
    - detailed legislative criteria to which decision makers must have regard in making sanctions, including whether the sanction is proportionate to the likely effects on the person, taking into account other, less intrusive alternatives;
    - access to basic living expenses, including social security payments for family members, preserved;
    - measures to avoid breaching Australia's non-refoulement obligations;
    - procedural fairness guarantees, including statements of reasons and the opportunity to make submissions before final sanctions are applied;
    - access to independent merits review and statutory judicial review of key administrative decisions concerning sanctions;
    - consideration given to a process by which the Minister must apply to a court to make or confirm sanctions;
    - regular review by the Minister of sanctions orders made, including automatic review where new evidence arises, and providing individuals with the right to request revocation;
    - regular Ministerial reporting to Parliament regarding sanctions made;
    - oversight and regular review by an independent body; and
    - a three-year independent review post-implementation.

[1] Such as the United States, which has the *Global Magnitsky Human Rights Accountability Act* (2016). Other examples are discussed below.

Introduction

10. The protection and promotion of human rights is a major strategic priority for the Law Council as outlined in its Strategic Plan.[2] It is committed to the domestic implementation of international human rights in Australia through law and policy.[3]

11. This submission addresses the Inquiry's Terms of Reference:

- the framework for autonomous sanctions under Australian law, in particular the *Autonomous Sanctions Act 2011* (Cth) (**AS Act**) and the *Autonomous Sanctions Regulations 2011* (Cth) (**AS Regulations**);
- the use of sanctions alongside other tools by which Australia promotes human rights internationally;
- 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;
- any relevant experience of other jurisdictions, including the US regarding its *Global Magnitsky Human Rights Accountability Act* (2016)[4] (**the US Magnitsky Act**); and
- the advisability of introducing a new thematic regulation within our existing Autonomous Sanctions Regime for human rights abuses.

12. This submission has particular regard to recent developments, including the US Magnitsky Act,[5] as well as similar legislation passed by Canada[6] and the United Kingdom (**UK**)[7] (together, **Magnitsky Laws**). Paragraph 92 contains an overview of countries which have passed such laws. These laws are fundamentally concerned with enabling sanctions with respect to foreign persons responsible for gross violations of internationally recognised human rights and significant acts of corruption.[8]

13. The push to strengthen national legal frameworks to combat impunity for human rights abuses, follows the death of whistleblower Sergei Magnitsky, a Russian lawyer who died in a Moscow prison in 2009, following his revelation of a large tax fraud scheme perpetrated by Russian officials.[9] More recently, there has been increasing interest in the US Magnitsky Act following the decision of the US to impose sanctions under it on seventeen Saudi Arabian individuals for serious human rights abuse resulting from their roles in the killing of Jamal Khashoggi.[10]

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[2] Law Council of Australia (**Law Council**), 'Strategic Plan 2015-2020', <https://www.lawcouncil.asn.au/docs/0e2e6ac5-2eb5-e611-80d2-005056be66b1/Strategic_plan_A3.pdf>.
[3] Law Council, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (2017) <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>.
[4] *Global Magnitsky Human Rights Accountability Act* 22 USC 2656 §§ 1261-1265 (2016).
[5] Ibid.
[6] Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) SC 2017, c 21.
[7] *Sanctions and Anti-Money Laundering Act 2018* (UK).
[8] See eg, Morgan Ortagus, 'Implementation of the Sergei Magnitsky Rule of Law Accountability Act' (Press Statement, US Department of State, 16 May 2019).
[9] Ibid.
[10] Michael Pompeo, 'Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi' (Press Statement, US Department of State, 15 November 2019).

14. Relevant to the current inquiry, the Hon Michael Danby MP tabled a private member's bill in the Australian Parliament in 2018, the International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018 (Cth) (**the Bill**). The Bill proposed to enable the Governor-General on the advice of the Minister for Foreign Affairs (**the Minister**) to target foreign persons engaged in gross violations of human rights and corruption with immigration, financial and trade sanctions.[11] However, the Bill lapsed when Parliament was dissolved prior to the 2019 federal election.

Australian Context

The framework for autonomous sanctions under Australian law

15. Australia currently has two types of sanctions regimes which are administered by the Department of Foreign Affairs and Trade (**DFAT**). Sanctions which are available under these regimes are measures not involving the use of force, including restrictions on the export or supply of goods; restrictions on the export or provision of services, restrictions on commercial activities, targeted financial sanctions and travel bans.[12]

16. These two regimes are as follows.

- ***United Nations (UN) Security Council sanctions*** – Australia must impose as a member of the UN.[13] These are primarily implemented through the *Charter of the United Nations Act 1945* (Cth) (**UN Charter Act**) and its regulations. UN Security Council sanctions can include arms embargoes, travel sanctions, financial restrictions, civil aviation restrictions and import/export bans of certain commodities. Sanctions may also include downgrading or suspension of diplomatic ties.[14]
- ***Australia's autonomous sanctions*** – imposed through the AS Act, together with the AS Regulations (collectively, Australia's autonomous sanctions regime). These may supplement the UN Security Council sanctions regime, or be separate from them.

17. It is an offence to contravene a sanctions law under each regime.[15] Both regimes have extraterritorial effect.[16] This means that an Australia citizen or Australian incorporated entity may contravene a sanctions law even if acting outside of

[11] Commonwealth, *Parliamentary Debates,* House of Representatives, 3 December 2018, 12151 (Michael Danby MP).
[12] Australian Government Department of Foreign Affairs and Trade, 'About Sanctions' (undated).
[13] *Charter of the United Nations* art 25.
[14] Ibid art 41.
[15] AS Act s 16 and UN Charter Act s 27. In particular, the Autonomous Sanctions (Sanction Law) Declaration 2012, made under AS Act s 6, specifies AS Regulations 12, 12A, 13, 13A, 14, 15 and 16 as 'sanctions laws'. These regulations concern prohibitions relating to sanctioned supply, sanctioned import, sanctioned services, commercial activity, dealing with designated persons or entities, dealing with controlled assets and sanctioned vessels. Similarly, the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008, made under section 2B(1) of the UN Charter Act, sets out UN sanction enforcement laws. This includes sections 20 (dealing with freezable assets) and 21 (giving an asset to a proscribed person or entity) of the UN Charter Act.
[16] Section 15.1 of the *Criminal Code Act 1995* (Cth) (Extended geographical jurisdiction—category A) applies to an offence under section 16 of the AS Act (See ss 12(2), 12A(2), 13(2), 13A(2), 14(2), 15(2) and 16(2) of the AS Regulations). Similarly, section 15.1 of the *Criminal Code Act 1995* (Cth) applies to an offence under section 27 of the UN Charter Act (See eg, ss 20(4) and 21(3) of the *Charter of the United Nations Act 1945* (Cth).

Australia.[17] Any person or entity regardless of nationality or place of incorporation will contravene a sanctions law if the conduct occurs in Australia or on board an Australian aircraft or ship.[18]

18. The significance of this is that the Australia's sanctions regime may prohibit Australian citizens or entities outside of Australia from providing sanctioned goods or services, or dealing with designated persons or entities.

Autonomous Sanctions Act

19. The AS Act provides a framework for the implementation of autonomous sanctions by the Australian Government. When introduced, its Explanatory Memorandum described autonomous sanctions as:

> *… punitive measures not involving the use of armed force which a government imposes as a matter of foreign policy – as opposed to an international obligation under a UN Security Council decision – in situations of international concern.*[19]

Such situations were intended to include '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'.[20]

20. The main purposes of the AS Act are to:

    a) provide for autonomous sanctions;

    b) provide for enforcement of autonomous sanctions (whether applied under this Act or another law of the Commonwealth); and

    c) facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions (whether applied under this Act or another law of the Commonwealth).[21]

21. The sanctions are 'autonomous' in the sense that the decision to impose such sanctions does not arise pursuant to an international obligation under a UN Security Council decision. As such, any measure imposed may supplement any other pre-existing UN Security Council imposed sanctions, or may stand alone. They offer Australia a significant tool in addition to the UN Security Council sanction regime, which can be limited in making resolutions given permanent members' right of veto.[22]

22. An autonomous sanction is defined under section 4 as 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; or

        iii. another person or entity outside Australia; or

[17] *Criminal Code Act 1995* (Cth) s 15.1(1)(c).
[18] Ibid s 15.1(1)(a).
[19] Explanatory Memorandum, Autonomous Sanctions Bill 2010, 1.
[20] Ibid.
[21] AS Act s 3.
[22] *Charter of the United Nations* art 27.

b) involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by a person or entity…in action outside Australia that is contrary to Australian Government policy.[23]

23. Autonomous sanctions are therefore, by definition, geared towards influencing outcomes which are in accordance with Australian Government policy.

24. Subsection 10(1) of the AS Act provides for regulations to be made in relation to the following considerations:

a) proscription of persons or entities (for specified purposes, or more generally);

b) restriction or prevention of uses of, dealings with, and making available of, assets;

c) restriction or prevention of the supply, sale or transfer of goods or services;

d) restriction or prevention of the procurement of goods or services;

e) provision for indemnities for acting in compliance or purported compliance with the regulations; and

f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b).

25. Subsection 10(2) of the AS Act states that before regulations are made for the purposes of subsection 10(1), the Minister must be satisfied that the proposed regulations:

a) will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or

b) will otherwise deal with matters, things or relationships outside Australia.

26. The Explanatory Memorandum with respect to clause 10 clarifies that the intention of clause 10 regulation making power is to give 'the Government the necessary flexibility to apply new, or amend existing, autonomous sanctions measures in response to international developments, which can change rapidly'.[24]

Autonomous Sanctions Regulations

27. The AS Regulations most relevantly set out the countries and activities for which a person or entity can be designated,[25] or a person declared.[26] Section 10 of the AS Act, read in conjunction with regulation 6 of the AS Regulations, essentially requires the Minister to undertake a two-step process.

[23] AS Act s 4.
[24] Explanatory Memorandum, Autonomous Sanctions Bill 2010, 4.
[25] Under regulation 3, a 'designated person or entity' means a person or entity that has been designated under paragraph 6(1)(a) or (2)(a) of the AS Regulations.
[26] A person may be declared under paragraph 6(1)(b) or (2)(b) AS Regulations for the purpose of preventing the person from travelling to, entering or remaining in Australia.

28. The Minister must first amend the AS Regulations through a legislative instrument to identify the targeted country and activities for which a person or entity can be designated, or a person declared.

29. Pursuant to regulation 6(1), the Minister must then pass a second legislative instrument in order to designate a specific person or entity.[27] Under regulation 14, it is an offence to directly or indirectly make assets available to, or for the benefit of, a designated person or entity.[28]

30. The Minister can also declare a person for the purpose of preventing them from travelling to, entering or remaining in Australia.[29]

31. Regulation 6 specifies certain countries, persons and entities, in relation to which the Minister can make such legislative instruments. By way of example, these currently include:

    - Democratic People's Republic of Korea – persons or entities associated with its weapons of mass destruction or missiles programs; or assisting in the violation of certain UN Security Council resolutions;[30]
    - Former Federal Republic of Yugoslavia – persons indicted by the International Criminal Tribunal or for offences within its jurisdiction;[31]
    - Libya – persons who are close associates of the former Qadhafi regime, entities under the control of Qadhafi's family, or who have assisted in the violation of certain UN Security Council resolutions;[32]
    - Syria – a person or entity who the Minister is satisfied is providing support to the Syrian regime, or is responsible for human rights abuses in Syria, including the use of violence against civilians and the commission of other abuses;[33] and
    - Zimbabwe – a person or entity that the Minister is satisfied is engaged in, or has engaged in, activities that seriously undermine democracy, respect for human rights and the rule of law.[34]

32. The Minister may further designate a controlled asset (which is an asset owned or controlled by a designated person or entity) as a designated asset.[35]

33. The AS Regulations also currently provide for sanctions of countries, parts of countries, persons, entities (variously) with respect to:

    - 'sanctioned supply': that is, supply, sale or transfer of designated goods – eg, for Myanmar, arms or related materiel;[36]

[27] AS Regulations reg 6.
[28] Ibid reg 14.
[29] Ibid reg 6(1)(b).
[30] Ibid reg 6 item 1.
[31] Ibid reg 6 item 2.
[32] Ibid reg 6 item 5.
[33] Ibid reg 6 item 7.
[34] Ibid reg 6 item 8.
[35] Ibid regs 3, 7,
[36] Ibid reg 4.

- ‘sanctioned imports’: import, purchase or transport of designated goods – eg, for Syria, crude oil, petroleum and petrochemical products;[37]
- ‘sanctioned services’: the provision to a person of certain technical assistance, advice or training, or financial services, or another service – eg, for Zimbabwe, this includes a military activity and the manufacture of certain goods;[38] and
- ‘sanctioned commercial activities’: the acquisition of certain interests, establishing/participating in certain joint ventures, granting of financial loans or credits[39] – eg, for Russia, this extends to the purchase or sale of bonds, equity, transferable securities, money market instruments by specified entities.[40]

34. The Minister may also, by legislative instrument, designate vessels as sanctioned vessels.[41]

Critique of current framework

Limitations with respect to human rights abuses

35. As discussed above, an autonomous sanction is defined as intended to influence a foreign government, person or entity, by reference to what is ‘in accordance with Australian Government policy’, or alternatively, to prohibit conduct that facilitates actions which are ‘contrary to Australian Government policy’.[42]

36. Similarly, the regulation making power in the AS Act depends upon the Minister being satisfied that the proposed regulations will (inter alia) ‘facilitate the conduct of Australia’s relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.’[43]

37. Having regard to the intention in the Explanatory Memorandum that the AS Act address ‘the grave repression of the human rights or democratic freedoms of a population by a government,’[44] situations involving gross human rights abuses would frequently come within the scope of this definition and relevant power. Such situations are likely to relate to the conduct of Australia’s relations with other countries, persons, matters, or relationships, outside of Australia. It may be difficult to imagine a matter of such international concern that would not relate to this scope of subjects. On this basis, there may be adequate scope within the AS Act for the imposition of sanctions to address matters that would explicitly come within the scope of Magnitsky Laws (eg, gross violations of internationally recognised human rights).

38. On the other hand, the current framework contains no requirement that human rights issues will be considered, and is oblique on how they are considered in practice.

[37] Ibid reg 4A.
[38] Ibid reg 5.
[39] Ibid reg 5A.
[40] Ibid reg 5B.
[41] Ibid reg 8.
[42] AS Act s 4.
[43] Ibid s 10(2).
[44] Explanatory Memorandum, 1.

There is no mention in the AS Act of human rights violations as a basis for making autonomous sanctions, and scant reflection in the AS Regulations.

39. As discussed, the AS Regulations have twice specifically identified human rights abuses as a factor with respect to the designation or declaration of persons or entities:

- who are responsible for human rights abuses in Syria, including the use of violence against civilians, and the commission of other abuses;[45] and
- who have engaged in 'activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe'.[46]

40. Otherwise, human rights are not referenced in the AS Regulations. While they may be at the heart of policy decisions which have led to sanctions being made, this is unclear and there is currently no trigger or specific guidance for policymakers to ensure that this criterion is considered.

41. It is also possible that taking action on human rights violations may also be considered to be contrary to Australian Government policy. This is particularly the case with respect to violations by powerful persons in States on which Australia depends to achieve broader economic, trade or foreign policy outcomes. Individuals may also be involved in gross human rights violations which are localised in scale, or are far removed from Australia's key foreign policy interests. As such, they may not be considered to meet the relevant definition and thresholds above.

42. The Law Council further notes that despite the potentially wide scope of the AS Act, Australia has implemented targeted sanctions with respect to designated persons and entities from the following countries: the Democratic People's Republic of Korea (North Korea),[47] Iran,[48] Libya,[49] the Former Federal Republic of Yugoslavia,[50] Myanmar,[51] Ukraine,[52] Syria[53] and Zimbabwe.[54]

43. With reference to this usage of the AS Act powers, Robertson and Rummery have argued that:

> *So at present the… [AS Act] cannot be used to target individuals involved in the shooting down of MH17 or in human rights abuses occurring in the Asia-Pacific, such as the extra-judicial killings in the Philippines or the high-level corruption in Malaysia. It is only being pointed towards easy targets with no*

[45] AS Regulations reg 6 item 7.
[46] Ibid reg 6 item 8.
[47] *Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) List 2012* made under sub regulation 6(1) of the AS Regulations.
[48] *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) List 2012* made under sub regulation 6(1) of the AS Regulations.
[49] *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Libya) List 2012* made under sub regulation 6(1) of the AS Regulations.
[50] *Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012* made under sub regulation 6(1) of the AS Regulations.
[51] *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* made under sub regulation 6(1) of the AS Regulations.
[52] *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014* made under sub regulation 6(1) of the AS Regulations.
[53] *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Syria) List 2012* made under sub regulation 6(1) of the AS Regulations.
[54] *Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Zimbabwe) List 2012* made under sub regulation 6(1) of the AS Regulations.

likely connection to Australia. It is not genuinely being used as a tool to combat human rights abuse.[55]

Corruption

44. The Law Council further notes that Magnitsky Laws are also directed to targeted sanctions against foreign individuals who engage in significant corruption, in addition to gross human rights violations.

45. It is unclear whether the AS Act and AS Regulations would extend to the making of sanctions for this purpose.[56] Neither expressly refers to corruption.[57] It was also not raised in the Explanatory Memorandum, or second reading speech when the legislation was introduced.

Emphasis on State

46. It has been argued that Magnitsky Laws differ from traditional sanctions regimes in that they are specifically focused on the role of the individual with respect to human rights abuses, rather than that of the State.[58] This may be seen as a relevant delineating factor with respect to the AS Act. While there is scope to designate or specific persons or entities, or declare a person, the relevant country is listed as the initial point of reference.[59] As such, a political decision to list the State publicly in this manner must first be taken. This may limit the making of decisions in practice.

Lack of safeguards

47. In addition to its limited utilisation as a response to human rights abuses and possible lack of application to significant corruption, the AS Act has drawn criticism for the absolute power it confers on the Minister, combined with the lack of effective safeguards to ensure that any limitation on human rights engaged by the imposition of sanctions is justified and a proportionate response.[60]

48. As the AS Act was legislated prior to the establishment of the Parliamentary Joint Committee on Human Rights (**PJCHR**), the Act was not subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). However, the Committee has since considered the compatibility of the AS Act in the context of its analysis of instruments made under the AS Act, and has raised significant concerns in this regard.

49. The PJCHR notes that the designation of a person pursuant to the AS Act is a significant incursion into a person's right to autonomy in one's private life.[61] Given the serious effects on those subject to asset freezing, it has found that the sanctions

[55] Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 24.
[56] Ibid.
[57] See discussion by Robertson and Rummery, Ibid, 23.
[58] Marc Limon, Universal Rights Group, *Time for a 'Universal Magnitsky Act?'* (2018) <https://www.universal-rights.org/blog/time-for-a-universal-magnitsky-act/>.
[59] Eg AS Regulations reg 6.
[60] See eg, Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 24.
[61] PJCHR, Parliament of Australia, *Instruments made under the Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945* (Report 9 of 2016, Chapter 2) 44 [2.14].

regime may not be proportionate to its stated objective because of a lack of effective safeguards to ensure that the regimes are not applied in error or in a manner which is overly broad in the individual circumstances.[62]

50. The lack of safeguards detailed in the PJCHR's analysis include the following:

a) the designation or declaration under the autonomous sanctions regime can be based solely on the basis that the Minister is 'satisfied' of a number of broadly defined matters;

b) the Minister can make the designation or declaration without hearing from the affected person before the decision is made;

c) there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;

d) no guidance is available under the AS Act or AS Regulations or any other publicly available document setting out the basis on which the Minister decides to designate or declare a person;

e) once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new evidence comes to light, the designation or declaration be reviewed before the three year period ends;

f) a designated or declared person will only have their application for revocation considered once a year—if an application for review has been made within the year, the Minister is not required to consider it;

g) there is no provision for merits review of the Minister's decision; and

h) there is no requirement that in making a designation or declaration the Minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life.[63]

51. A number of these concerns are discussed below in the context of proposed amendments to Australia's autonomous sanctions regime.

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

Diplomatic engagement

52. The current mechanisms for Australia's promotion of human rights outside its borders are primarily soft diplomacy, international development, bilateral and multilateral advocacy, and engagement with civil society. The Australian Government's 2017 Foreign Policy White Paper (**White Paper**) states that Australia is 'a determined advocate of liberal institutions, universal values and human rights'.[64]

[62] Ibid.
[63] Ibid.
[64] Australian Government, *Foreign Policy White Paper* (2017) 32.

53. Strengthening human rights and other norms of acceptable behaviour is listed in the White Paper as one of Australia's priorities in the international system, in part because '[s]ocieties that protect human rights and gender equality are much more likely to be productive and stable'.[65] The White Paper states that as a member of the UN Human Rights Council for the 2018-2020 term, Australia will:

    a) advance the rights of women and girls;

    b) promote good governance, democratic institutions and freedoms of expression, association, religion and belief;

    c) promote the rights of people with disabilities;

    d) advance human rights for indigenous peoples around the globe;

    e) promote national human rights institutions and capacity building; and

    f) advocate [for] the global abolition of the death penalty.[66]

54. The Law Council is aware that significant efforts have been invested by the Australian Government, particularly DFAT, to pursue these important objectives since the White Paper was developed. However, it is not well placed to comment on their overall effectiveness.

Migration Act – Character Test provisions

55. The *Migration Act 1958* (Cth) (**Migration Act**) includes broad powers to cancel or refuse the visa of a person on 'character grounds'.[67] These extend to persons who have engaged in significant corruption, or human rights abuses. This section discusses the character test as it has been reported as a relevant consideration with respect to a possible Magnitsky Act.[68] However, it is important to emphasise that the Law Council does not consider the character test powers to form a 'human rights tool', due to its significant and longstanding concerns about the existing regime's overly broad scope and lack of safeguards, including to protect against long-term detention.

56. The 'character test' is set out in subsection 501(6). A non-citizen does not pass the 'character test' for a wide range of reasons including:

    a) the Minister for Home Affairs reasonably suspects that the person has been or is involved in conduct constituting the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;[69]

    b) having regard to the person's past and present criminal conduct, and/or their past and present general conduct, the person is 'not of good character';[70] or

[65] Ibid.
[66] Ibid, 89.
[67] *Migration Act 1958* (Cth), s 501(1), (2) and (3).
[68] Ben Doherty, 'Australia urged to pass Magnitsky human rights law or risk becoming haven for dirty money', *The Guardian* (online), 20 February 2020.
[69] *Migration Act 1958* (Cth) s 501(6)(ba).
[70] Ibid, s 501(6)(c).

c) the person has, in Australia or a foreign country, been charged with certain offences of serious international concern.[71]

57. Following the assessment of whether a person passes the character test:

a) the Minister (or a delegate) may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test;[72]

b) the Minister (or a delegate) may cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test, and the person does not satisfy the Minister that the person passes the character test;[73] and

c) under subsection 501(3), the Minister (not a delegate) may either refuse to grant a visa, or cancel a visa, if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.[74]

58. The Ministerial Direction provides that in considering whether a person is not of good character under subsection 501(6) of the Migration Act, in particular with regard to a person's past and present criminal and/or general conduct,[75] consideration may be given to whether the person has been involved in activities indicating contempt or disregard for the law or for human rights.[76]

59. While there is no express mention of corruption, the Law Council considers that this would be a relevant factor in light of the primary considerations for decision makers set out in the Ministerial Direction. These include the protection of the Australian community from criminal and other serious conduct, and expectations of the Australian community.[77] The Law Council submits that corruption is contrary to the interests and expectations of the Australian community and therefore falls within the relevant considerations to be taken into account by decision makers when determining whether to exercise their discretion to cancel or refuse a non-citizen's visa under section 501.

60. Between 2018/19 financial years, there were 943 visa cancellations and 268 application refusals on 'character grounds'.[78] However, it is unclear whether these were related to instances of gross human rights abuses, or serious corruption, occurring outside Australia. The JSCFADT may wish to enquire into this issue with the Department of Home Affairs.

61. As noted, the current character test powers could be used to prevent individuals from entering or remaining in Australia who have engaged in gross violations of human rights or serious corruption abroad. There are limitations however, in that the

[71] Genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime otherwise of serious international concern: ibid, s 501(6)(f).
[72] Ibid, s 501(1).
[73] Ibid, s 501(2).
[74] Ibid, s 501(3).
[75] See Ibid s 501(6)(c)(i) and (ii).
[76] Ministerial Direction No 79- Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA, Annex A, 5.2(2)(a).
[77] Ibid, ss 9 and 11.
[78] The Australian Government, *Visa statistics* (Web page) https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.

migration character test regime applies to prevent a person entering or remaining in Australia. It does not extend to dealing with their assets.

62. Additionally, some commentators suggest that a Magnitsky Act should extend to close relatives of human rights abusers, for example through barring children and parents from entering the country.[79] This raises particular questions of fairness. However, it is worth noting that the character test regime is restricted in its scope.

63. The character test applies with respect to the person who is seeking, or holds the visa. With the possible exception of paragraph 501(6)(b), it does not apply to prevent eg, children of a person who has committed grievous human rights abuses from entering or remaining in Australia.

64. Paragraph 501(6)(b) applies where the Minister reasonably suspects that the person has had an association with a group, organisation or person which/who has been, or is involved in, criminal conduct. However, the Ministerial Direction requires that for the association provision to apply, the delegate must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself sufficient.[80]

65. As flagged above, in previous submissions, the Law Council has noted that the breadth of the current character test powers raises significant concern, as well as the low cancellation thresholds and insufficient safeguards involved.[81] In particular, the Law Council is aware of specific instances in which individuals have remained in long term detention who have not been charged or convicted of any crimes but who have failed the character test. Due to these and broader concerns,[82] it considers that there is an urgent need for the entire character test regime to be reviewed.

Proceeds of Crime Act

66. Proceeds of crime legislation operates in all Australian jurisdictions.[83] Federally, the *Proceeds of Crime Act 2002* (Cth) (**POC Act**) is the principal legislation for the confiscation of criminal assets. The POC Act provides for forfeiture of property[84] and interim orders for freezing[85] and restraining[86] property pending final orders.

67. The POC Act provides for both conviction based and, in certain circumstances, non-conviction based confiscation of assets (orders for the forfeiture of assets), including

[79] Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 23.
[80] Ministerial Direction No 79, Annex A s 3(5).
[81] See eg, Law Council of Australia, Submission No 82 to the Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes* (17 February 2017) 5-6 and Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019* (14 August 2019).
[82] For example, decision makers, both delegates and the Minister, have also had difficulty understanding how to assess 'non-refoulement' despite it being a consideration when determining whether or not to cancel or refuse a visa under the character test.
[83] *Crimes (Confiscation of Profits) Act 1985* (NSW), *Crimes (Confiscation of Profits) Act 1986* (Vic)*, Crimes (Confiscation of Profits) Act 1989* (Qld), *Crimes (Confiscation of Profits) Act 1986* (SA), *Crimes (Confiscation of Profits) Act 1988* (WA), *Crimes (Confiscation of Profits) Act 1988* (Tas), *Crimes (Forfeiture of Proceeds) Act 1988* (NT) and *Proceeds of Crime Act 1991* (ACT).
[84] POC Act, Part 2-2.
[85] Ibid Part 2-1A.
[86] Ibid Part 2-1.

where the court is satisfied that the property is proceeds of a relevant offence.[87] With non-conviction based confiscation, property must first be subject to a restraining order for at least six months before the forfeiture order can be made[88] and a finding of the court need not be based on a finding that a particular person committed any offence, or as to the commission of a particular offence.[89]

68. For the above purposes, relevant offences include:

> *foreign indictable offences – conduct that constituted an offence against a law of a foreign country and if the conduct had occurred in Australia at the time of assessment, the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment.*[90]

69. Relevantly, this includes, for example:

- offences against humanity and related offences under Chapter 8 of the *Criminal Code Act 1995* (Cth) (genocide, crimes against humanity, war crimes);
- trafficking in persons offences under Division 271 of the *Criminal Code Act 1995* (Cth); and
- serious offences against the person such of murder and rape under state and territory criminal laws.[91]

Accordingly, the Law Council submits that a variety of human rights violations may fall within the scope of offences of concern to the POC Act.

70. The POC Act has extraterritorial application. Under section 13, the POC Act generally applies to acts, matters and things outside Australia, whether or not in or over a foreign country, and all persons, irrespective of their nationality or citizenship.[92] In addition, section 329 of the POC Act provides that property is proceeds or an instrument of an offence whether the property is situated within or outside of Australia.

71. A key difference between the POC Act provisions described above and the US Magnitsky Act is that the Magnitsky Act is concerned with targeting the assets of individuals generally, as opposed to the assets which are suspected of being the proceeds of, or an instrument of a foreign indictable offence. The effect of this is that, under the US Magnitsky Act, the assets of individuals who have committed human rights violations can be seized without there being a demonstrated nexus between specific assets and any human rights abuse. One of the shortcomings of the POC Act in attempting to control assets of human rights abusers is that there is often no obvious financial benefit derived from violations of human rights. Another difference is that the relevant POC processes are determined by a court, rather than the Minister.

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[87] POC Act s 49, which refers to the property being proceeds of an indictable offence, a foreign indictable offence, an indictable offence of Commonwealth concern, an instrument of a serious offence. The court can also make such an order eg where satisfied that a person' has engaged in a serious offence (section 47), where a person is convicted of an indictable offence (section 48).
[88] Ibid s 49(1)(b).
[89] Ibid s 49(2).
[90] Ibid s 337A.
[91] Eg, *Crimes Act 1900* (NSW), s 19A (murder).
[92] Unless the contrary intention appears: section 13.

72. The Law Council understands that the POC Act has been used as part of international efforts to restrain assets generated from crime. By way of example, on request from the Chinese Ministry of Public Service, the Australian Federal Police restrained assets in Australia allegedly linked to money illegally raised by Chinese nationals in China through the defrauding of investors.[93] Although the Law Council acknowledges the importance of international collaboration, this use does not address the situation contemplated by the Magnitsky Act, namely to hold foreign nationals responsible for violations of internationally recognised human rights in a foreign country, including when authorities in that country are unable or unwilling to conduct a thorough, independent and objective investigation of the violations.

73. The Law Council is unaware of specific instances in which the POC Act has been used to freeze, restrain or confiscate the assets of individuals who have engaged in gross violations of human rights or serious corruption outside Australia. The JSCFADT may wish to enquire into this issue with the Attorney-General's Department or Australian Federal Police.

Anti-Money Laundering Regime

74. Australia's Anti-Money Laundering and Counter-Terrorism (**AML/CTF**) regime targets money-laundering through a complicated scheme of overlapping legislation that assist investigative agencies in their detection of such offences, by requiring private entities to report certain threshold activities and information to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**). AUSTRAC is the government financial intelligence agency responsible for regulating the AML/CTF regime.

75. The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (**the AML/CTF Act**) is the primary legislation underpinning the AML/CTF regime.[94] At present, the AML/CTF Act is directed toward reporting entities[95] engaged in the *financial sector, gambling sector, bullion dealers and businesses that provide* particular designated services[96] that have a sufficient geographical link to Australia. [97]

76. The regime directly responds to the recommendations of the Financial Action Task Force (**FATF**)[98], an independent inter-governmental body established by the G-7

[93] The Australian Federal Police, 'AFP operation targets Chinese nationals allegedly laundering proceeds of crime, $8.5m in assets seized' (Web page) <https://www.afp.gov.au/news-media/media-releases/afp-operation-targets-chinese-nationals-allegedly-laundering-proceeds>.
[94] The *Financial Transaction Reports Act 1988* (Cth), which operates alongside the AML/CTF Act and imposes obligations to report cash transactions that are not subject to the AML/CTF Act. The Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) is delegated legislation that permits AUSTRAC to, among other things, prescribe in Rules procedures, actions and controls that must be implemented and observed by entities subject to the regime. Other relevant federal legislation includes the *Criminal Code Act 1995* (Cth), the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Cth), the *Australian Transaction Reports and Analysis Centre Industry Contribution (Collection) Act 2011* (Cth) and a series of Industry Contribution Ministerial Determinations from AUSTRAC.
[95] *Reporting entities* is defined under section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.*
[96] Table 1 (section 6, AML/CTF Act) prescribes which financial services activities are *designated services* under the AML/CTF Act.
[97] See: AUSTRAC, 'Who and what we regulate: designated services and reporting entities', (February 2020), available online: https://www.austrac.gov.au/business/new-austrac-start-here/designated-services-what-we-regulate#geographical.
[98] Parliament of Australia, *2004-2006 Anti-Money Laundering and Counter- Terrorism Financing Bill 2006; Replacement Explanatory Memoranda* page 15 available at https://www.legislation.gov.au/Details/C2006B00175/Download

Group in 1989 to address concerns about money laundering in the illicit drug trade. FATF currently has 38 members[99] including Australia, the United States, the United Kingdom, Canada, China and New Zealand.[100]

77. The regime is not directed towards the automatic sanctioning of known human rights abusers, or the like, although it does provide for the serving of injunctions on persons or entities transacting in a manner that contravenes the Act.[101]

78. Rather, as noted above, the regime is designed to assist regulators and law enforcement agencies detect and gather evidence about such crimes by:

- imposing internal management, systems and procedures obligations on financial institutions and other regulated entities which are intended to 'harden' those institutions and entities against the risk that they may become the agents of criminal abuse, primarily money-laundering and terrorism financing;[102]
- imposing customer and beneficial ownership identity verification requirements;[103]
- imposing information collection and reporting obligations on financial institutions and other regulated entities, which are intended to provide actionable financial intelligence to AUSTRAC;[104] and
- establishing a set of ancillary obligations and relationships between AUSTRAC and the financial institutions and other entities regulated under the regime which require registration, annual reporting, lodgement of financial statements and enable the collection and auditing of information.

79. It should be noted that a core element of an AML/CTF risk management program (Part B) is to validate identities, by collecting and verifying customer and beneficial owner information, which assists AUSTRAC with identifying the sources of funds.

80. Accordingly, while this regime may not provide for the direct sanction of individuals known to have committed human rights violations, it may nevertheless assist authorities

[99] And two observing countries.
[100] The FATF is the key organisation driving AML/CTF regulation globally, through its development and promotion of global standards. FATF originally drew up forty recommendations in 1990, which have been revised numerous times over the years. The most recent version was adopted on 16 February 2012 and, significantly, expanded the scope from the laundering of drug money to address terrorism. These Recommendations are accompanied by Interpretative Notes and a Glossary, which collectively are known as the FATF 'Standards'. FATF conducts periodic reviews of the Members' regulatory responses to these Recommendations and Standards, the most recent of which for Australia was in November 2018: see- FATF Anti-Money Laundering and Counter-Terrorist Financing Measures 3rd enhanced Follow-up Report &Technical Compliance Re-Rating: Australia (November 2018). Available online: http://www.fatf-gafi.org/media/fatf/documents/reports/fur/FUR-Australia-2018.pdf
[101] See Division 6 of the AML/CTF Act.
[102] This is referred to as an AML/CTF program Part A.
[103] This is referred to as an AML/CTF program Part B.
[104] This information includes:
- creation of data sets about the customers of financial and other institutions and their transactions, based upon independently verified identity and beneficial ownership ('know your client') information;
- reporting customer and transaction data to AUSTRAC, which aggregates and analyses the data so received to produce a range of reports for use by revenue, law enforcement, national security and other government agencies; and
- requiring financial and other entities to monitor customers and transactions, with a view to identifying "suspicious matters" to be reported to AUSTRAC.

with identifying the sources and locations of suspicious funds, and the parties involved with the transfer and use of such funds. This regime therefore has the potential to assist authorities in identifying individuals and sources/destinations of known individual's wealth, such that sanctions can be imposed through other legislation and instruments.

Modern Slavery Act

81. Australia has also passed the *Modern Slavery Act 2018* (Cth) (**MSA**) which has a central objective of combating modern slavery in the supply chains of goods and services.[105] The MSA requires entities with an annual consolidated revenue of more than $100 million that are based, or operating, within Australia to report the risks of modern slavery within their operations and supply chains and take actions to address the identified risks.[106] The MSA is given extraterritorial effect by section 10.

82. The commitment under the MSA by the Australian Government to also comply with the modern slavery reporting requirements is a world first initiative.[107] This will require the preparation of annual statements about modern slavery risks in government procurement and investments. This will send an important signal about the gravity of modern slavery issues and, along with the reporting entity requirements above, is likely to indirectly drive human rights outcomes.

83. However, a key limitation is that the MSA does not include a penalty regime for reporting entities which do not comply with its requirements,[108] let alone individuals within supply chains who profit from modern slavery. It is also limited in that modern slavery forms a subset, albeit an important one, of gross human rights violations.

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

84. While the first national Magnitsky law, a precursor to the current US Magnitsky Act, was passed in 2012,[109] targeted sanctions — selective penalties devised to put pressure on specific groups or individuals and avoid the unintended suffering caused by general embargoes — have a longer history.

85. Targeted sanctions were first introduced by the UN in 1992 to pressure the Libyan leadership in the wake of the Pan Am and UTA attacks.[110] Since then, the concept has gained traction in international affairs as a tool lying 'between words and war'.[111]

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[105] Parliament of Australia, Parliamentary Debates, House of Representatives, 28 June 2018, 6755 (Alex Hawke MP).
[106] *Modern Slavery Act 2018* (Cth) s 3.
[107] Abigail McGregor, JP Wood and Greg Vickery, 'Modern Slavery Reporting for Commonwealth Procurement'. Norton Rose online publication, May 2018.
[108] As discussed in Law Council of Australia, *Modern Slavery Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Committee, 24 July 2018.
[109] *Sergei Magnitsky Rule of Law Accountability Act of 2012*, 22 USC § 5811.
[110] Thomas J. Biersteker, 'Targeted sanctions and individual human rights' (Winter 2009-10) *International Journal* 100.
[111] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2009), Brookings Institution Press, 114.

86. Targeted sanctions are applied, among other reasons, for violations of human rights norms[112] and actions constituting a threat to international peace and security.[113]

Advantages

87. Thomas J. Biersetker, a Professor of International Relations at the Graduate Institute Geneva, has argued that an advantage of targeted sanctions is that 'in contrast to comprehensive sanctions, [they] can be applied gradually, combined with positive incentives, and relaxed more readily'.[114]

88. In addition, as argued by Gareth Evans, former Australian Foreign Minister and President of the International Crisis Group, if used effectively, 'targeted sanctions should avoid the unintended consequences of comprehensive economic sanctions and focus sanctions on the pressure points of the regime, group or individual to be sanctioned'.[115] In this regard, targeted sanctions can be used to avoid the devastating consequences of the comprehensive embargo on trade with Iraq imposed by the UN Security Council in 1990.[116]

89. Arne Tostensen and Beate Bull have outlined a two-part argument in favour of targeted sanctions as follows:

> *First, they more effectively target and penalise — via arms embargoes, financial sanctions, and travel restrictions — the political elites espousing policies and committing actions deemed reprehensible by the international community. Second, smart [targeted] sanctions protect vulnerable social groups (for example, children, women, and the elderly) from so-called collateral damage by exempting specified commodities (such as food and medical supplies) from the embargo.*[117]

90. The International Corporate Accountability Roundtable (a civil society organisation) has made the following comments outlining the role and purpose of the Magnitsky Act in the US context:

> *Sanctions against human rights abusers have historically been more challenging to implement due to the difficulty in obtaining sufficient information to legally support such cases, and a perception by some in the U.S. government that sanction designations of those involved in atrocities are ineffective. As a result, the number of persons sanctioned for human rights abuses is markedly lower compared to those designated for their role in terrorism, nuclear proliferation, or the narcotics trade. In addition, resources are prioritized for sanctions programs responding to what are seen as presenting more of a clear and present danger to the United States, such as Iran and North Korea, than for those considered ideological in nature and less threatening to U.S. national security.*

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[112] Thomas Biersteker et al., 'Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report', (2009), *Watson Institute for International Studies* 1.
[113] Peter Wallensteen et al., 'Making Targeted Sanctions: Effective Guidelines for the Implementation of UN Policy Options' (2003) *Uppsala University Department of Peace and Conflict Research*, 9.
[114] Thomas J. Biersteker, 'Targeted sanctions and individual human rights', (Winter 2009-10) *International Journal* 100.
[115] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2009), Brookings Institution Press, 114.
[116] SC Res 661, UN Doc. S/RES/661 (6 August 1990). See eg, Francesco Giumelli, 'Understanding United Nations targeted sanctions: an empirical analysis' (2015) 91(6) *International Affairs*, 1351, 1352.
[117] Arne Tostensen and Beate Bull, 'Are Smart Sanctions Feasible?' (2002) 54(3) *World Politics* 373, 373-4.

Differing from country-specific human rights sanctions, the Global Magnitsky sanctions program has a transnational mandate, covering foreign persons anywhere outside of the United States involved in serious human rights abuse. The Global Magnitsky sanctions provides a unique opportunity for the U.S. government to pursue designations globally where specific sanctions authorities for a particular country do not exist, including prospectively in countries where other foreign policy interests limit the US's broader engagement on human rights concerns.[118]

91. In 2018, Robertson and Rummery argued that, the virtue of Magnitsky Acts is that they are exercises of State sovereignty, and do not rely on international law, treaties or arrangements.[119] They consider that Magnitsky laws are likely to be effective in Australia because:

Foreign abusers do not — for the most part — want to keep their profits at home. They want to stash their cash in safe Western Banks [and] use the money to holiday and play in the West…

Australia is a financial hub in the Asia-Pacific region, envied for the stability of our banks and the quality of our hospitals and schools. Our cultural and financial infrastructures should not be made available to those who abuse human rights, whether they are mass murderers of Tamils or Rohingya, or corrupt Malaysian politicians or Chinese officials involved in oppressing democracy advocates, human rights lawyers and Falun Gong members.[120]

92. These authors further argue that a Magnitsky Act in Australia would 'not affect heads of states or diplomats who enjoy immunity, but it may deter the 'train drivers to Auschwitz' who are tempted to use their profits from corruption and human rights abuses to pay for access to Western hospitals and schools.[121]

93. They also cite Bill Browder, an American financier, who orchestrated the global Magnitsky movement, who argues that:

It is crucial that there aren't huge geographic gaps in the legislation… Right now, the US, UK and Canada have Magnitsky Acts among English speaking countries but Australia doesn't. If that continues, it will create an incentive for bad actors to keep their money in Australia to avoid sanctions, which would be an unfortunate outcome.[122]

Disadvantages

94. In relation to the UN targeted sanctions regime,[123] concerns have been voiced about the lack of safeguards for those who end up on designated lists. The concerns have largely related to the lack of procedural rights associated with counter-terrorism

[118] International Corporate Accountability Roundtable, *US Sanction Regimes and Human Rights Accountability Strategies* (2018) 8, 22 <https://enoughproject.org/wp-content/uploads/2018/06/ToolsofTrade_Enough_ICAR_June2018.pdf>.
[119] Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 22.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] The UN's listing, or sanctions regime, commenced in 1999 with the UN Security Council's passage of Resolution 1267.

sanctioning in the wake of September 2011 attacks.[124] In this context the Law Council has previously raised concerns regarding the lack of procedural fairness afforded to entities that are proscribed or listed; the absence of transparency; the broad discretion that is provided to the Executive; and the absence of effective safeguards (such as judicial review) of listing decisions.[125]

95. Similar concerns have been raised in relation to Magnitsky-style laws. Analysing the AS Act, Robertson and Rummery argue that 'a law designed to protect and promote human rights should not itself be procedurally in breach of them'.[126] Such an approach, if replicated in an Australian Magnitsky Act, would be a pyrrhic victory.

96. A further disadvantage of targeted sanctions, often linked to their lack of due process (or in Australia, procedural fairness), is the potential for them to be compromised by their political nature. Robert Berschinski of Human Rights First has noted in relation to the US sanctions regime that the US government is less likely to sanction someone with a senior role for fear of upsetting relations with another country.[127] The Centre for the Advancement of Public Integrity, based at Columbia Law School, noted in 2018 that 'human rights groups have criticised the Trump administration for failing to impose sufficient sanctions under the Magnitsky Act on persons from countries allied with the United States'.[128] The administration retains the discretion to implement sanctions and may avoid doing so where it is politically convenient.[129] It has been noted that in the context of the Magnitsky Act 'many individuals suggested by civil society groups have not been included with no reasoning or justification provided.'[130]

97. The rise of Bitcoin and cryptocurrencies represent another challenge to targeted financial sanctions. Bill Browder noted this during a 2017 review of the Magnitsky Act conducted by the US Commission on Security and Cooperation in Europe:

> *As of now, the Magnitsky sanctions are highly effective because once a person is on the Magnitsky list, they become pariahs in the international financial system. The moment a person's name hits the U.S. Treasury sanctions list, no bank in the world wants to do business with that person to avoid being in violation of U.S. sanctions. Unfortunately, Bitcoin and other anonymous cryptocurrencies allow people to bypass the financial system and conduct financial business anonymously.*[131]

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[124] George Lopez, *Enforcing Human Rights Through Economic Sanctions* (The Oxford Handbook of International Law, 2013) 784-6.
[125] See discussion in Law Council, Anti-terrorism Reform Project (October 2013) <https://www.lawcouncil.asn.au/docs/7247484f-0639-e711-93fb-005056be13b5/Anti-Terrorism%20Reform%20Project%20-%20Oct%202013%20Update.pdf> 72.
[126] Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 25.
[127] Kelly Swanson, `NGOs welcome impact of Global Magnitsky Act' (19 February 2019) *Global Investigations Review*.
[128] Centre for the Advancement of Public Integrity, 'Implementation of the Global Magnitsky Act: What Comes Next?' (20 September 2018).
[129] International Corporate Accountability Roundtable, *US Sanction Regimes and Human Rights Accountability Strategies* (2018) 8 <https://enoughproject.org/wp-content/uploads/2018/06/ToolsofTrade_Enough_ICAR_June2018.pdf> 22.
[130] Ibid.
[131] Commission on Security and Cooperation in Europe, The Magnitsky Act at Five Years: Assessing Accomplishments and Challenges, 115th Congress, 1st session, 14 December 2017, 40.

98. In 2011, Daniel Drezner provided an extensive evaluation of targeted sanctions.[132] On the one hand, he found that targeted sanctioning has minimal internal and external political consequences for the sanctioning State as 'they are billed as minimising humanitarian and human rights concerns'.[133] On the other hand, he concluded that although targeted sanctions are more humane in their effect on wider society they are less effective than traditional embargoes and financial sanctions.[134]

99. In a 2013 report, the Targeted Sanctions Consortium (**TSC**) - comprised of over 50 scholars and policy practitioners worldwide - considered the effectiveness of UN targeted sanctions which are used to address a broad range of threats to international peace and security. The TSC assessed the sanctions against objectives of coercing a change in behaviour, constraining proscribed activities, and signalling and/or stigmatising targets about international norms. The TSC found that targeted sanctions achieved at least one of these objectives 22 per cent of the time.[135]

100. Beyond this, the findings suggested that targeted sanctions also had numerous unintended consequences. The study found that targeted sanctions led to an increase in corruption and criminality 69 per cent of the time, strengthened authoritarian rule 54 per cent of the time, diverted resources 44 per cent of the time and importantly, 39 per cent of the sanctions studied evidenced negative humanitarian consequences.[136]

International examples

Relevant experience of other jurisdictions, including the United States regarding their Global Magnitsky Human Rights Accountability Act (2016)

101. To date the US,[137] Canada,[138] Estonia,[139] Lithuania,[140] Latvia,[141] Kosovo,[142] the UK[143] and Gibraltar[144] have passed Magnitsky-style laws. In addition, the European Union is preparing to adopt a human rights violations sanctions regime.[145] Of the existing laws, the US Magnitsky Act is the best-known — and arguably the most influential.

United States

102. The US Magnitsky Act authorises the President of the United States to block or revoke visas of, or to impose property sanctions (freezing orders) on, foreign persons

[132] Daniel Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' (2011) 13(1) *International Studies Review* 96.
[133] Ibid, 104.
[134] Ibid, 100-102.
[135] Thomas Biersteker et al, 'The Effectiveness of United Nations Targeted Sanctions: Consortium' (Report, Targeted Sanctions Consortium, November 2013), 8.
[136] Ibid.
[137] *Global Magnitsky Human Rights Accountability Act of 2016* (formerly Sergei Magnitsky Rule of Law Accountability Act of 2012).
[138] Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) SC 2017, c 21.
[139] Act on Amendments to the Obligation to Leave and Prohibition on Entry Act (262 SE).
[140] Law on the Legal Position of Foreign Affairs No IX- 2206.
[141] By Parliamentary Resolution 2018.
[142] *Global Magnitsky Law on Human Rights 2020*.
[143] *Sanctions and Anti-Money Laundering Act 2018* (UK).
[144] 'Magnitsky Amendment' to the *Proceeds of Crime Act 2015.*
[145] European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)).

(foreign individuals or entities). Sanctions may be imposed if the President determines, based on credible evidence that a foreign person is:

a) responsible for, or acted as an agent for someone responsible for extrajudicial killings, torture, or other gross violations of internationally recognised human rights against individuals in any foreign country who seek:

- to expose illegal activity carried out by government officials; or
- to obtain, exercise, defend, or promote internationally recognized human rights and freedoms; or

b) a government official, or a senior associate of such official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption (or has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such activity).[146]

103. This provision has been expanded from 'gross violations of internationally recognised human rights' to 'serious human rights abuse' and 'significant acts of corruption' to 'corruption'.[147]

104. Under Executive Order 13818, the President delegates authority to the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney-General to determine individuals to be sanctioned.[148]

105. The US Magnitsky Act lists certain considerations in determining whether to impose sanctions. This includes credible information obtained by other countries and nongovernmental organisations that monitor violations of human rights.[149]

106. Recently, the US has sanctioned the First Vice President of South Sudan, Taban Deng Gai (Deng), for his involvement in serious human rights abuse,[150] a general from Myanmar,[151] and 17 Saudis for having a role in the killing of Jamal Khashoggi.[152]

107. While the Law Council is not able to identify any rigorous evidence about the efficacy of the US Magnitsky Act or its 2012 predecessor, it is aware of testimony by Browder stating that:

> *When Mikhail Khodorkovsky, the oligarch who crossed Putin and who was imprisoned for nearly ten years, was released in 2014, he told me that after the Magnitsky Act passed there was a noticeable improvement in the treatment of prisoners. The guards were all terrified of being added to the Magnitsky list themselves.*

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[146] *Global Magnitsky Human Rights Accountability Act* 22 USC 2656 § 1263 (2016).
[147] President Donald Trump, Executive Order 13818 'Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption' (20 December 2017).
[148] Ibid 1(a)(ii).
[149] *Global Magnitsky Human Rights Accountability Act* 22 USC 2656 § 1263 (2016).
[150] US Department of the Treasury, 'Treasury Sanctions South Sudanese First Vice President for Role in Serious Human Rights Abuse' (Media Release, 8 January 2020) <https://home.treasury.gov/index.php/news/press-releases/sm869>.
[151] US Department of the Treasury, 'Designations Build on International Efforts to Hold Accountable Persons Responsible for Serious Human Rights Abuses in Burma' (Media Release, 17 August 2018) <https://home.treasury.gov/news/press-releases/sm460>.
[152] US Department of the Treasury, 'Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi' (Media Release, 15 November 2018) <https://home.treasury.gov/news/press-releases/sm547>.

Russian judges are equally scared of being added to the Magnitsky list. Not a month goes by without a headline from the Russian courts where Sergei Magnitsky's name is mentioned as other victims highlight their own abuse.[153]

Canada

108. In 2017, the Canadian Government passed the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*[154] (**Canadian SML**), which allows the Governor in Council to make orders or regulations with respect to the activities of foreign nationals (an individual who is not a Canadian citizen or a permanent resident of Canada),[155] who in the opinion of the Governor in Council:

    a) is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognised human rights committed against individuals in any foreign state who seek:

        i. to expose illegal activity carried out by foreign public officials;[156] or

        ii. to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections;[157]

    b) acts as an agent of or on behalf of a foreign state in a matter relating to an activity described in paragraph (a);[158] or

    c) is a foreign public official or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption (or has materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, such activity).[159]

109. Orders or regulations may be made with respect to the restriction or prohibition of the following activities:

    a) the dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the foreign national;

    b) the entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a);

    c) the provision by any person in Canada or Canadian outside Canada of financial services or any other services to, for the benefit of or on the direction or order of the foreign national;

    d) the acquisition by any person in Canada or Canadian outside Canada of financial services or any other services for the benefit of or on the direction or order of the foreign national; and

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[153] Commission on Security and Cooperation in Europe, *The Magnitsky Act at Five Years: Assessing Accomplishments and Challenges* (United States Joint House and Senate Hearing, 115 Congress, 14 December 2017).
[154] SC 2017, c-21.
[155] Ibid s 2.
[156] Ibid s 4(2)(a)(i).
[157] Ibid s 4(2)(a)(ii).
[158] Ibid s 4(2)(b).
[159] Ibid s 4(2)(c) and (d).

e) the making available by any person in Canada or Canadian outside Canada of any property, wherever situated, to the foreign national or to a person acting on behalf of the foreign national.[160]

The Schedule to the Justice for Victims of Corrupt Foreign Officials Regulations lists sanctioned foreign nationals.[161] Listed individuals are also inadmissible to Canada under the *Immigration and Refugee Protection Act.*[162]

110. The Canadian SML imposes a positive obligation on a number of entities, including banks and companies, to monitor whether they are in possession or control of property subject to an order or regulation under the SML.[163]

111. In addition, the Governor in Council may by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the foreign national's property situated in Canada.[164]

112. The Canadian SML also makes related amendments to the *Special Economic Measures Act*[165] to expand the grounds upon which sanctions can be imposed in relation to a foreign state to include gross and systematic human rights violations that have been committed in a foreign state.[166] Under the *Special Economic Measures Act* the Governor in Council can also cause to be seized, frozen or sequestrated any property of a foreign state where a government official of that state, or an associate, is involved acts of significant corruption.[167] It appears that one key difference between the Canadian SML, and the sanctions regime under the *Special Economic Measures Act*, is that the SML specifically authorises the government to make orders or regulations in relation to a foreign national.[168] The *Special Economic Measures Act*, while it includes the ability to target foreign nationals, has a primary focus on sanctions being made against a foreign state.[169]

United Kingdom

113. In the UK, two pieces of legislation, the *Proceeds of Crime Act 2002* (UK), as amended in 2017, and the *Sanctions and Anti-Money Laundering Act 2018* (UK) (**UK Sanctions Act**) include provisions inspired by the US Magnitsky Act.

114. In addition, the UK Home Secretary and immigration officials are empowered to refuse a person permission to enter the UK, or revoke permission already granted, for reasons related to their character, conduct or associations.[170] In April 2014, the Home Office Parliamentary Under-Secretary of State confirmed the Government's powers to exclude individuals or revoke visas can be used in response to human rights abuses.[171]

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[160] Ibid s 4(3).
[161] SOR/2017-233.
[162] SC 2001, c-27 s 35(1)(e).
[163] SC 2017, c-21 s 6.
[164] Ibid s 4(1)(b).
[165] SC 1992, c-17.
[166] SC 2017, c-21 s 17.
[167] SC 1992, c-17 ss 4(1), 4(1.1)(d).
[168] SC 2017, c-21 s 4(1)(a).
[169] SC 1992, c-17, s 4.
[170] Melanie Gower, 'Visa bans': Powers to refuse or revoke immigration permission for reasons of character, conduct or associations', *Commons briefing papers SN7035,* 25 November 2014.
[171] United Kingdom, *Parliamentary debates*, House of Commons, 2 April 2014 c299WH.

115. The *Proceeds of Crime Act 2002* (UK) enables the civil recovery of property if it represents the proceeds of or (in some cases) is intended for use in unlawful conduct.[172] The definition of 'unlawful conduct' was broadened by the *Criminal Finances Act 2017* (UK) to include a 'gross human rights abuse or violation'.[173]

116. The UK Sanctions Act provides the power to impose sanctions on a designated person on a variety of grounds. Relevant grounds include to provide accountability for or be a deterrent to gross violations of human rights,[174] and to promote respect for the rule of law and good governance.[175] The types of sanctions that may be imposed include financial sanctions (the restriction or prevention of uses of, dealings with, and making available of, assets to designated persons)[176] and immigration sanctions.[177]

117. The UK Sanctions Act has a framework which is similar to that of the AS Act. Both pieces of legislation utilise regulations as a means of implementing sanctions. As originally proposed, the UK Sanctions Act did not make explicit reference to imposing sanctions in response to gross violations of human rights. Prior to its passage, the bill was subsequently amended to provide that the Minister can make regulations to provide accountability for or be a deterrent to gross violations of human rights.[178]

118. Although the UK Sanctions Act received Royal Assent on 23 May 2018, the UK has continued to rely on the European Union sanctions regime.[179] As set out in the Withdrawal Agreement that the UK agreed with the European Union on 17 October 2019, European Union sanctions will continue to apply in the UK until 31 December 2020.[180]

119. After 11pm on 31 December 2020, the UK's new sanctions regime will come into force. The UK Foreign Secretary has recently stated that:

> *…we look to Canada which has been at the forefront of developing the Magnitsky-style mode of human rights sanctions, which are imposed against those responsible for the very worst human rights abuses. These sanctions are a powerful new tool to hold the world's killers and torturers to account and keep human rights abuses and their blood money out of our respective countries.*
>
> *Once we leave the EU, the UK will establish our own human rights sanctions regime, inspired very much by the Canadian model. And we look forward to collaborating with Canada on human rights sanctions and ultimately above all, to defend the values that our 2 countries share.* [181]

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[172] *Proceeds of Crime Act 2002* (UK) s 240.
[173] Ibid s 241A.
[174] UK Sanctions Act s 1(2)(f).
[175] Ibid s 1(2)(i).
[176] Ibid s 3.
[177] Ibid s 4.
[178] It was inserted in clause 1, page 2 during the Bill's Third Reading before the House of Commons: Sanctions and Anti-Money Laundering Bill, 24 April 2018 <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0176/amend/sanctions_rm_rep_0424.pdf>.
[179] UK Foreign and Policy Office, 'Guidance: Sanctions Policy after 31 December 2020' (31 January 2020) <https://www.gov.uk/government/publications/sanctions-policy-after-31-december-2020/sanctions-policy-after-31-december-2020>.
[180] Ibid.
[181] Dominic Raab, UK Foreign Secretary, (Press conference with the Canadian Foreign Minister, 9 January 2020) <https://www.gov.uk/government/speeches/foreign-secretary-speech-uk-canada>.

120. The Government is currently preparing new regulations under the UK Sanctions Act and will issue public guidance once these regulations are published.

Options for reform

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

Amendments to AS Act

121. One option which is available to the Australian Government is to amend the AS Act, which as noted above, does provide for the imposition of sanctions in relation to situations of international concern. Although there is overlap between the objectives and subject matter of the AS Act and those of the Magnitsky Laws, as discussed above, there are also gaps which should be addressed.

122. At the same time, it is essential to take the opportunity to address the broader shortcomings of the AS Act, particularly the PJCHR's concerns identified above with respect to the designation or declarations of persons or entities. A number of amendments are proposed below with a view to introducing key safeguards in respect of these decisions.

123. Decisions to designate a person or entity, or declare a person, constitute exceptional intrusions on personal liberty. The safeguards discussed below (which are made absent findings of criminal guilt before a court) remain exceptional and well justified. As such, these safeguards should not be contained in subordinate legislation, but elevated and protected in the primary legislation. The recommendations regarding safeguards reflect that they should be contained in the AS Act, rather than the AS Regulations. However, this may require some overall restructuring of the legislation. It is noted that the UK Sanctions Act contains key safeguards in the primary legislation,[182] rather than any subordinate legislation.

124. The discussion below focuses on the designation or declaration of a person or entity under the AS regime.[183] Within the time available, the Law Council has not been in a position to review its sanctions powers more generally. However, it recognises that many of the safeguards which are identified above (thresholds, legislative criteria for decision making, procedural fairness, merits and judicial review, regular independent review, reporting to Parliament), should also be considered with respect to the remainder of the sanction powers under the AS Act and Regulations and their specific exercise – in particular those restricting or preventing the use etc of assets.[184] In this regard, the Law Council recommends that a more significant review of the AS Act and Regulations is needed.

[182] Eg, *Sanctions and Anti-Money Laundering Act 2018* (UK) ss 23, 24.
[183] AS Act s 10(1)(a), AS Regulations s 6.
[184] AS Act s 10(1)(b).

Recommendations

- **Key safeguards which apply to the exercise and application of autonomous sanctions powers should be contained in the AS Act rather than the AS Regulations.**
- **In addition to the recommendations below regarding safeguards for the designation and declaration of persons and entities, a more significant review of the AS Act and Regulations should be conducted to consider whether equivalent safeguards should be adopted for the remaining sanction powers under the regime.**

Gross violations of human rights and serious corruption

125. As noted above, there appears to be adequate scope within the AS Act for the imposition of sanctions which address many gross violations of internationally recognised human rights. However, for avoidance of doubt, the Law Council considers that the AS Act could be amended to make specific reference to this criterion. As noted, a similar approach was adopted in the UK Sanctions Act, which explicitly provides that the Minister can make regulations to provide accountability for or be a deterrent to gross violations of human rights.

126. At the same time, the existing ambiguity over whether the AS Act extends to serious corruption could be explicitly addressed.

127. For example, subsection 10(2) could refer to 'will prevent or respond to gross violations of internationally recognised human rights or serious corruption' as an alternative test for the Minister's regulation-making power, in addition to the existing tests in paragraphs 10(2)(a) and 10(2)(b).

128. An important safeguard will be the careful legislative drafting to define the meaning of 'gross violations of internationally recognised human rights' and 'serious corruption' in the AS Act, to aid decision makers and provide clarity on these thresholds. These terms should not be left to policy. Any framework must be consistent with international human rights standards where guidance exists for many of the relevant terms.

129. It is noted that the definition of 'autonomous sanction' in section 4 of the AS Act, which defines an autonomous sanction by reference to whether it influences outcomes in accordance with, or prohibits actions contrary to, Australian Government policy, would remain. This definition may continue to limit the circumstances in which the Minister makes regulations for the above purposes. However, the Law Council recognises that it also upholds the 'autonomous' aspect of this sanctions regime.

Recommendation

- **Consideration be given to amending the AS Act to enable the Minister to make regulations for the express purposes of preventing or responding to gross violations of internationally human rights or serious corruption. These terms should be carefully defined in accordance with international human rights standards.**

Enlivening the Power

130. Presently under regulation 6 of the AS Regulations, before the Minister makes a legislative instrument which designates a specific person or entity (with the effect that another person must not make assets available to them under regulation 14), or declares a person for travel ban purposes, the Minister only need be 'satisfied' of the relevant, broadly defined criteria. This concern was raised by the PJCHR.[185]

131. The Law Council suggests this is a relatively low threshold to meet, and potentially open to a level of subjectivity, as opposed to the higher, and more objective threshold of 'reasonably satisfied' or 'reasonable grounds to suspect', the latter which finds expression in the UK Sanctions Act.[186]

132. The Law Council suggests that the legislation could be amended so that the Minister is required to meet the higher, more objective threshold of 'satisfied on reasonable grounds'. This is the threshold imposed by the AS Regulations on the Minister in respect to declaring that a designation of a 'controlled asset' continues to have effect.[187] The reasons for these differing thresholds is not apparent.

133. No further guidance is given in the AS Act or AS Regulations as to how the Minister is to make that decision.

134. In this regard, the PJCHR has recommended the provision of publicly available guidance in legislation setting out the basis on which the Minister decides to designate or declare a person.[188] It has further recommended that the Minister should take into account whether such a designation or declaration would be proportionate to the anticipated effect on an individual's private and family life.[189] This would require that the Minister have regard to other, less intrusive means of achieving the objective sought.

135. The UK Sanctions Act relevantly provides that the Minister must not make a designation unless the Minister considers that the designation of that person is appropriate, having regard to the purpose of the relevant regulations, and the likely significant effects of the designation on that person.[190] Such factors should be included in the legislative guidance or criteria referred to above.

Recommendation

- **Before a specific person or entity is designated, or a person is declared, the Minister should be legislatively required to:**
  - **be 'satisfied on reasonable grounds' of the criteria specified; and**
  - **have regard to detailed legislative criteria, including the purposes of the AS Act, and whether a designation or declaration is proportionate to the likely effects on the person or entity, taking into account other, less intrusive means of achieving the objectives sought.**

[185] PJCHR, Report 6 of 2018 (26 June 2018) 110 [2.240]; PJCHR, Twenty-eighth report of the 44th Parliament (17 September 2015), 25 [1.102], 30 [1.114].
[186] UK Sanctions Act ss 11(2)(a), 12(5)(a).
[187] AS Regulations reg 9(4)(c).
[188] PJCHR, Report 9 of 2016 (22 November 2016) 53 [2.42].
[189] Ibid 50 [2.35, 2.42].
[190] UK Sanctions Act ss 11(2)(b), 12(5)(b).

Procedural fairness

136. An adherence to international human rights law,[191] and common law principles of procedural fairness,[192] require that a person be given notice about a decision to interfere with their rights, and invited to make submissions to the relevant decision maker. The AS sanctions regime does not adhere to this principle.

137. While AS Regulations provide for the Minister to revoke a designation or declaration, including on application by the designated person or entity,[193] the lack of a requirement to provide reasons or supporting material may affect this right in practice.

138. The rationale for the above omissions is perhaps understandable; to provide advance notice to a person would afford that person an opportunity to remove or conceal his or her assets, or otherwise undertake action aimed at frustrating the subject of an impending designation or declaration and the sanctions regime.

139. The Law Council considers there to be less restrictive measures available. A more appropriate and adapted means of dealing with this situation would be to make provision for the Minister to issue a designation or declaration with interim effect. Once issued, the Minister could give the person notice that the Minister intends to issue a permanent designation or declaration (in the sense that such designation or declaration would potentially remain in operation for a period of up to three years),[194] the reason/s and material that support making that designation or declaration, and invite the person to respond/make submissions or representations.[195] This is the approach that has been adopted with respect to the confiscation of proceeds of crime, noting that the latter scheme is determined through the court system, rather than by the Minister.[196] There are no obvious reasons why such an approach cannot similarly be adopted in this situation.[197]

140. A decision to make or extend a designation or declaration should be accompanied by a statement of reasons. This is the approach taken in the UK Sanctions Act.[198]

141. Reasons for decision are necessary in order to give substance to the rights of review; to seek revocation by the Minister, or to pursue judicial review. A person cannot meaningfully make an application to the Minister seeking revocation of a designation or declaration, or apply for judicial review, if they do not know the reasons for the decision.

[191] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS171 (entered into force 23 March 1976), art 14(1).
[192] *Kioa v West* (1985) 159 CLR 550.
[193] AS Regulations reg 10(2)-(4).
[194] Ibid reg 9(1)–(2).
[195] See eg, PJCHR, Parliament of Australia, *Various instruments made under the Autonomous Sanctions Act 2011* (Report 6 of 2018, Chapter 2) 2.242.
[196] See above discussion at [61]-[64], [69] of the operation of the *Proceeds of Crime Act 2002* (Cth).
[197] PJCHR, Parliament of Australia, Tenth Report of 2013 (June 2013) 15-16 [3.16].
[198] *Sanctions and Anti-Money Laundering Act 2018* (UK) s 11(7).

Recommendations

- **A decision to designate a person or entity, or declare a person, should be initially imposed on an interim basis only, with the Minister then giving the person or entity notice of the intent to issue a 'permanent' designation or declaration, a statement of reasons, and inviting them to make submissions before such a decision is made.**
- **A statement of reasons should also be provided regarding decisions to 'permanently' designate or declare persons/entities, and to extend a designation or declaration.**

Merits and judicial review

142. The Law Council is also concerned that the AS Act does not make provision for merits review of decisions to apply sanctions made by regulation under subclause 10(1). It refers in this regard to the Administrative Review Council's (**ARC's**) remarks that:

> *As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test.*[199]

143. The ARC has relevantly indicated that preliminary decisions may be unsuitable for review, as well as policy decisions of a high political content (including those affecting Australia's relations with other countries).[200] However, the latter exception relates to decisions regarding issues of 'the highest consequence to the Government' and should be rarely applied. Given the very direct impact of a designation or declaration on a specific individual, the Law Council suggests that these decisions should be subject to merits review, particularly 'permanent' designations or declarations.

144. To protect against the overuse of misuse of Executive power, it is also important that decisions made under the AS Act are subject to judicial oversight. Notwithstanding that judicial review is available, there remains some uncertainty as to justiciability of the decision to make a designation or declaration.[201] The effectiveness of judicial review as remedy is also reduced to the extent that the Minister is not required to be 'reasonably' satisfied of precise matters on which the declaration or designation is made (as discussed above).[202]

145. The right to judicial review pursuant to the AD(JR) Act should be explicitly stated. This is also consistent with the approach adopted in the UK Sanctions Act.[203]

[199] Administrative Review Council, Commonwealth of Australia, 'What decisions should be subject to merits review?' (1999), [2.1].
[200] Ibid, [4.3], [4.22]-[4.23].
[201] Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Autonomous Sanctions Bill 2010 [Provisions] (March 2011) 12-13 [3.24].
[202] See eg, PJCHR, Parliament of Australia, Twenty-Eight Report of the 44th Parliament (17 September 2015) 31-32 [1.123].
[203] UK Sanctions Act ss 38, 39.

Recommendation

- **The Minister's decision to designate a person or entity, or declare a person, should be subject to merits review, and judicial review pursuant to the AD(JR) Act.**

Review and reporting

146. Regulation 9 of the AS Regulations provides that designations and declarations of persons and entities will automatically sunset after three years,[204] unless the Minister declares that it will continue to have effect.[205]

147. While AS Regulations provide for the Minister to revoke a designation or declaration, including on application by the designated person or entity,[206] an application for revocation can only occur once per year.[207]

148. There should also be regular independent oversight and review of individual designations and declarations. Consideration should be given to the body which is best placed to fulfil this role, such as the Parliamentary Joint Committee on Intelligence and Security.

149. The Law Council also suggests that consideration be given to requiring the Minister to review a designation or declaration in light of any new evidence, or change in circumstances, which throws doubt on its continuing appropriateness. The intrusive nature of a designation or declaration means that there should be no delay before a review occurs.

150. As part of any review initiated at the Minister's discretion or where new evidence becomes available, the Minister should be required to invite the affected person or entity to make submissions.

151. The Law Council also agrees with the PJCHR that overall transparency would be assisted if the Minister were required to regularly report to Parliament setting out the basis on which persons have been declared or designated and what assets, or amount of assets, have been frozen.[208]

Recommendation

- **Legislative safeguards should provide that:**
  - **oversight and regular review of designations and declarations of persons and entities by an independent body;**
  - **such decisions will be reviewed as soon as practicable by the Minister where relevant new evidence arises;**
  - **with respect to all reviews of such decisions, including those arising at the Minister's discretion, the designated or declared person or entity will be invited to make prior submissions; and**

[204] AS Regulations reg 9(1)-(2).
[205] Ibid reg 9(3).
[206] bid reg 10(1)-(3).
[207] bid reg 11(3).
[208] PJCHR, *Parliamentary Scrutiny Report*, Report No 9 of 2016, 22 November 2016, 53 [2.42].

- **the Minister must regularly report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen.**

Other safeguards

152. The Law Council further supports the following PJCHR recommendations to:

a) place limits on the power of the Minister to impose conditions on a permit for access of funds[209] to meet basic expenses, as the current power is broad and does not require that any conditions are strictly necessary;[210] and

b) provide that any prohibition on making funds available does not apply to social security payments to family members of a designated person, to protect those family members.[211]

153. Additionally, it notes that Australia has non-refoulement obligations under the Refugee Convention,[212] the International Covenant on Civil and Political Rights[213] and the Convention Against Torture.[214] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm.

154. Any decision to make a declaration which has the effect of revoking the visa of a person potentially conflicts with the obligation of non-refoulement. The discretionary power of the Minister to waive the operation of the declaration on the grounds of national interest, or humanitarian grounds, is an insufficient protection.[215]

Recommendation

- **Legislative safeguards should:**
  - **impose limits on the power of the Minister to impose conditions on a permit for access of funds[216] to meet basic expenses;**
  - **ensure that any prohibition on making funds available does not apply to social security payments to family members of a designated person, to protect those family members; and**
  - **ensure that a person may not be declared for the purpose of preventing their travel to, entry or stay in Australia if to do so would breach Australia's international obligations concerning non-refoulement.**

[209] AS Regulations, reg 20.
[210] PJCHR, *Parliamentary Scrutiny Report*, Report No 9 of 2016, 22 November 2016, 50 [2.35], 53 [2.42].
[211] Ibid, 53 [2.42].
[212] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, (entered into force 22 April 1954) (**Refugee Convention**), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 33(1).
[213] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6 and 7.
[214] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**) art 3.
[215] AS Regulations reg 19(3); PJCHR, Parliament of Australia, Human rights scrutiny report: Report 6 of 2018 (26 June 2018) 115 [2.256].
[216] AS Regulations reg 20.

A Magnitsky Act

155. As an alternative to introducing specific powers within the AS Act and AS Regulations to enable sanctions of foreign persons responsible for gross violations of internationally recognised human rights and significant acts of corruption, the Australian Government may wish to consider the development of a separate Magnitsky Act.

156. While there may be overlap and some confusion due to having three sanctions regimes in place, there may be advantages in that a Magnitsky Act would be more visible than an amended AS regime in expressly filling a gap in the broader international framework of Magnitsky Laws. Australia would be more emphatically joining a growing international movement of countries tackling human rights abuses and serious corruption through explicitly targeted domestic legislation which strengthens its overall legislative framework on these issues.

157. Further, the purposes of the AS Act are broader than those of a Magnitsky Act. The two pieces of legislation may, in fact, complement one another. Whereas the AS Act is focused on conduct which is contrary to Australian Government policy and therefore harmful to Australia's interests as the basis for a sanction, a Magnitsky Act would be more targeted in its focus on the conduct of the individual at large, with respect to their involvement in gross human rights abuses or serious corruption. It is less concerned with the role of the State. This may mean that it can be more effectively evoked in an agile manner.

158. However, the introduction of a Magnitsky Act also raises further concerns about the potential for unchecked Executive powers, again with respect to individuals who may not have been tried or convicted in a criminal court. If this option is pursued, it would be critical to ensure that there are adequate legislative oversights and safeguards built into the measures to avoid Executive overreach.

159. The Law Council would recommend similar safeguards as are recommended above, including:

- carefully defined legislative terms, including of terms such as 'gross human rights violations' and 'serious corruption';
- procedural fairness guarantees. Again, this may involve interim sanctions being applied, with a statement of reasons and supporting material being provided to the person affected, who is then invited to make submissions before any final sanctions are applied. The Law Council suggests that the Minister's decisions should be subject to confirmation as discussed below;
- appropriately defined thresholds or standards of proof required for decisions to be made to apply sanctions against individuals;
- detailed legislative criteria to which decision makers must have regard in making sanctions, including the purposes of the Magnitsky Act, and whether a sanction is proportionate to the likely effects on the person, taking into account other, less intrusive means of achieving the objectives sought;
- access to basic living expenses, including social security payments for family members;

- measures to avoid breaching Australia's non-refoulement obligations with respect to bans on visiting or remaining in Australia;[217]
- appropriate confirmation and review powers:
    - access to independent merits review and statutory judicial review under the AD(JR) Act of key administrative decisions taken with respect to sanctions;
    - an important option here is that decisions to make sanctions must be confirmed by a court, which must be satisfied that the legal criteria are met. This could occur through a process similar to that applied to the issuance of control orders (interim and final) under the *Criminal Code Act 1995* (Cth).[218] An affected person must have the right to be heard by the court as part of this process, and the right to appeal;
- regular review of sanctions orders, including automatic review where relevant new evidence arises, and providing the right to affected individuals to request revocation;
- oversight and regular review by an independent body;
- regular Ministerial reporting to Parliament on the numbers and kinds of sanctions made under the Act, the basis for these sanctions and any reviews and revocations made; and
- a three-year independent review post-implementation of the new Magnitsky Act.

160. The Law Council also suggests that it would be desirable to ensure that civil society is able to make applications to the Minister to have particular cases considered for the purposes of making possible sanctions. This may be a more appropriate feature in a Magnitsky Act, compared to an amended AS regime, as foreign policy interests would be less of a consideration or underlying objective. Civil society organisations with global links on human rights matters may be particularly well placed to raise specific individuals and situations for the Minister's consideration.

161. If a Magnitsky Act is pursued instead of amending the AS Act to provide explicitly for gross human rights abuses and serious corruption, the Law Council considers that the AS Act and AS Regulations should nevertheless be amended to address concerns about their lack of safeguards, as recommended above.

Recommendations

- **If the option to implement a Magnitsky Act in Australia is pursued, it should include key safeguards including:**
    - **defined key legislative terms such as 'gross human rights violations', by reference to international human rights law standards, and 'serious corruption';**

[217] The Law Council recognises that there are some limitations to Australia's obligations in this context, such as under the Refugee Convention at article 33(2). The extent which these may apply in the circumstances to any individual would need to be carefully considered. However, the protection against principle of non-refoulement under international human rights law is absolute in situations where there is a real risk of torture: CAT art 3(1).
[218] *Criminal Code Act* 1995(Cth), Div 104.

- **appropriately defined thresholds or standards of proof required to be established for decisions to make sanctions;**
- **detailed legislative criteria to which decision makers must have regard in making sanctions, including the Act's purposes, and whether the sanction is proportionate to the likely effects on the person, taking into account other, less intrusive alternatives;**
- **access to basic living expenses, including social security payments for family members, preserved;**
- **careful consideration of any interactions with Australia's non-refoulement obligations, with a view to respecting those obligations;**
- **procedural fairness guarantees including statements of reasons and the opportunity to make submissions before final sanctions are applied;**
- **access to independent merits review and statutory judicial review of key administrative decisions concerning sanctions under the Act;**
- **consideration should be given to a court oversight process by which the Minister must apply to a court to make or confirm sanctions;**
- **oversight and regular review by an independent body;**
- **regular review of sanctions orders, including automatic review where relevant new evidence arises, and providing the right to affected individuals to request revocation;**
- **regular Ministerial reporting to Parliament regarding sanctions made under the Act and any revocations; and**
- **a three-year independent review post-implementation of the new Magnitsky Act.**

- **If a separate Magnitsky Act is pursued, the AS Act and AS Regulations should nevertheless be amended to address concerns regarding the need for improved safeguards, as recommended above.**