New South Wales
Council for Civil Liberties

# NSWCCL SUBMISSION

# THE 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

21 February 2020

**About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

**Contact NSW Council for Civil Liberties**

http://www.nswccl.org.au
office@nswccl.org.au
Street address: Level 5, 175 Liverpool St, Sydney, NSW 2000, Australia
Phone: 02 8090 2952

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Recommendation: That the Autonomous Sanctions Act (Cth) be amended to allow for proper targeting of gross human rights abuses and corruption. This should be accompanied by appropriate checks and balances as described in these submissions such as the availability of judicial review for sanctions decisions and access to information on which the decisions are based. ..... 21

**Inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade into whether Australia should examine the use of targeted sanctions to address human rights abuses (the *Inquiry*).**

## Introduction

The Australian government is currently considering legislative change to facilitate targeted sanctions to address human rights abuses.

This category of legislation was first introduced in the United States as the *Sergei Magnitsky Accountability Act* in 2012. Since then Canada, the United Kingdom, Estonia, Lithuania, Latvia and Kosovo have also passed such 'Magnitsky laws'. These laws are not harmonised and take varying forms. Nonetheless, there are two overarching themes: first, the main activities targeted by Magnitsky laws are gross human rights abuses and corruption; and second, the associated sanctions mechanisms are travel bans and freezing of assets as well as restricting commercial opportunities. In general, the laws have been perceived as successful in promoting recognition of internationally recognised human rights.

The rationale behind Magnitsky legislation is to ensure that those who perpetrate gross human rights abuses will not be immune from international consequences. In turn, the laws aim to deter those who would seek to carry out such abuses, especially when there may be difficulties in implementing sanctions at a governmental level. These difficulties may arise due to political barriers to implementing state level sanctions or the lack of efficacy of state level sanctions in altering the conduct of particular individuals. State level sanctions are something of a blunt instrument, potentially harming all citizens of the state, while Magnitsky style sanctions are more targeted.
In this submission we address each of the terms of reference for the Inquiry below.

## Summary

1. The NSWCCL supports the introduction of a Magnitsky law in Australia as a mechanism to combat gross human rights abuses and corruption.
2. Autonomous sanctions are an effective way to address gross human rights abuses.
3. While Australia arguably has the capacity at present for targeted sanctions to address human rights abuses, legislative change would facilitate this use and should increase the likelihood that such sanctions will be utilised.
4. The most appropriate way to introduce a Magnitsky law in Australia is by way of amendment to the *Autonomous Sanctions Act 2011* (Cth).
5. If such a law is introduced, appropriate safeguards should be implemented to protect individuals. These should include clear criteria for sanctions decisions, availability of judicial

review of the decisions and access to reasons for the decisions and information on which the decisions are based.

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

### Overview of Australia's existing sanctions regime

While there are other legislative avenues available to the Commonwealth,[1] Australia's autonomous sanctions regime, comprised of the *Autonomous Sanctions Act 2011* (Cth) (***ASA***) and the *Autonomous Sanctions Regulations 2011* (Cth) (***ASR***), is the primary mechanism by which Australia imposes sanctions beyond those required by resolutions of the United Nations Security Council (***UNSC***).

The ASA was designed with the specific purpose of strengthening Australia's autonomous sanctions regime by 'allowing greater flexibility in the range of measures Australia can implement'.[2] It achieves this flexibility by enabling sanctions to be applied by the Minister for Foreign Affairs (the ***Minister***) by way of legislative instrument, rather than by amendment of the Act itself. This, in theory, enables the Government to respond to situations of international concern as they arise.[3] The ASA details general principles for imposing sanctions, offences relating to sanctions and procedures for enforcing regulations made under the ASA including the granting of injunctions. The sanctions themselves: what they are and to whom they relate, are set out in the ASR.

### Shortcomings of Australia's existing sanctions regime

The ASA has been subject to criticism for two primary reasons.

The first is that the discretion provided to the Minister is too broad, and secondly, that the laws have not been appropriately utilised, demonstrating the need to introduce Magnitsky-style provisions.

As noted above, the Minister is the sole decision-maker when it comes to applying a sanction. Even prior to its adoption, the ASA was criticised in the Senate for its lack of procedural safeguards in the exercise of proscriptive powers against individuals or entities.[4] Given the lack of a clear review process to challenge such a decision, there is a risk that human rights might be infringed[5] where a sanction is

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[1] See, for example, *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).
[2] Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth).
[3] Ibid.
[4] Senate Foreign Affairs, Defence and Trade Legislation Committee, *Report of Inquiry into Autonomous Sanctions Bill 2010* [Provisions] (March 2011), [3.3].
[5] Stephen Tully, 'Australia's autonomous sanctions regime: Problems and prospects'(2013) *Australian Journal of Administrative Law* 20, 165.

incorrectly applied to an individual, especially given the scope of sanctions made available under the ASA.[6] For example, where assets are frozen the relevant individual may be unable to pay for basic amenities, or where a travel ban inhibits the right to freedom of movement.

The second criticism is that the ASA has not been genuinely used as a tool to combat human rights abuses, but 'is only being pointed towards easy targets with no likely connection to Australia.'[7] The criticism points to the cumbersome process for levying sanctions against individuals as a reason for this.

Currently the ASR allows the Minister to impose sanctions against certain foreign individuals. These individuals may be divided into two types:

1. those whom the Minister is satisfied have engaged in certain specific prescribed activities in relation to certain specific prescribed countries as set out in a table under Regulation 6(1) of the ASR (the ***Tabled Individuals***); or

2. those whom the Minister is satisfied have contributed to the proliferation of weapons of mass destruction.[8]

In either case, the Minister may by legislative instrument:

(a) designate the relevant individual as a 'designated person or entity'. This designation provides the basis for sanctions against the individual's assets and triggers prohibitions against certain dealings with the individual; and/or

(b) declare that individual under the ASR to prevent them from travelling to, entering or remaining in Australia.

Unless an individual happens to be caught under a pre-existing prescribed category under Regulation 6(1) as a Tabled Individual or has contributed to the proliferation of weapons of mass destruction, they will not be caught by the ASR and the Minister will not be able to impose sanctions against them by way of a legislative instrument.

Instead in these circumstances the Minister will first have to seek an amendment to the ASR. In the past the Minister has typically done this by seeking an amendment to the table in Regulation 6(1) of

[6] See the types of sanctions in s 10(1).
[7] Geoffrey Robertson and Chris Rummery, 'Why Australia needs a Magnitsky Law' (2018) *Australian Quarterly*, 24.
[8] *Autonomous Sanctions Regulations 2011* (Cth), reg 6.

the ASR and then passing another legislative instrument which specifically names the individuals to be sanctioned.

This double process is a cumbersome mechanism for sanctioning individuals. This is because the Regulation 6(1) mechanism is primarily intended to apply sanctions against individuals in relation to breaches by **states**, and not against individuals for their personal acts. It requires sanctions to be linked to a specified country.

The ASA/ASR regime in Australia has only imposed sanctions on a limited number of individuals for the express purpose of sanctioning human rights violations.[9] By comparison, the US Global Magnitsky Act has been more extensively utilised.

Australia's existing regime does not have the broad reach of Magnitsky-style acts. Australia's existing sanctions regime is primarily intended to target nation-states, while Magnitsky-style laws focus on individuals personally responsible for human rights abuses. These targeted sanctions are more likely to reduce the suffering of a general population caused by state-based embargoes. Setting out Magnitsky-style purposes in legislation should also encourage the Australian Government to use them for this purpose and to do so more frequently.

These shortcomings in Australia's existing sanctions regime could be rectified by the introduction of a Magnitsky-style individual sanctions regime. The NSWCCL believes such a proposal would strengthen mechanisms available to the Australian Government to combat human rights abuses. The NSWCCL considers that this proposal could be integrated into Australia's existing sanctions regime, as discussed at Section E below.

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

Below is a summary of three other tools (beyond autonomous sanctions imposed under the ASA) which are used by Australia to advance human rights internationally.

### Involvement in multi-lateral institutions: UN sanctions

Under Chapter VII of the United Nations Charter, the UNSC can decide upon sanction regimes to maintain or restore international peace and security.[10] Security Council sanctions have taken a number of different forms in pursuit of a variety of goals, including for human rights protection.[11] Sanctions

[9] Geoffrey Robertson and Chris Rummery, 'Why Australia needs a Magnitsky Law' (2018) *Australian Quarterly*, 24.
[10] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII.
[11] United Nations Security Council, *Sanctions* <https://www.un.org/securitycouncil/sanctions/information>.

regimes require the support of the Australian Government to enforce them by way of legislative enactment.

An example of sanctions imposed by the Australian Government directed at promoting human rights is the implementation of the UNSC sanctions regime against the Central African Republic (***CAR***). The UNSC adopted resolution 2127 (2013) which imposed sanctions in response to widespread human rights abuses by armed groups in March 2012. In response, Australia passed the *Charter of the United Nations (Sanctions–Central African Republic) Regulation 2014* (Cth), which provided for an arms embargo, service restrictions and targeted financial sanctions and travel bans against more than 59 named individuals and entities.[12] However, the passing of UN sanctions requires the approval of a majority of UNSC member states without a veto from any of the five permanent members.[13] It follows that Australia cannot rely on these sanctions to promote its human rights agenda unilaterally.

**Development assistance and humanitarian support**

In 2014, the Australian Government introduced the aid policy '*Australian aid: promoting prosperity, reducing poverty, enhancing stability*' and the aid performance framework, '*Making Performance Count: enhancing the accountability and effectiveness of Australian aid*'. Under this policy, the Australian Government works with partner countries to advance and protect human rights through development assistance and humanitarian support.[14] However, it has been suggested that the performance of the aid program worsened between 2013 and 2015 due to budget cuts and a loss of expertise in the aid program,[15] and the Development Policy Centre has noted that the results of a stakeholder survey showed that senior staff from Australian NGOs and aid contracting firms perceived that funding predictability, transparency, communications and strategic clarity of the aid program had declined in recent years.[16] Furthermore, while the provision (or withdrawal) of foreign aid can be used as a tool of foreign policy it is less effective at targeting, and deterring, the conduct of particular individuals.

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[12] *Charter of the United Nations (Sanctions – Central African Republic) Regulation 2014* (Cth).
[13] Council on Foreign Relations, *What Are Economic Sanctions?* <https://www.cfr.org/backgrounder/what-are-economic-sanctions#chapter-title-0-3>.
[14] Department of Foreign Affairs and Trade, *Australian aid: promoting prosperity, reducing poverty, enhancing stability* (June 2014).
[15] Terence Wood et al, 'Gauging Change in Australian Aid: Stakeholder Perceptions of the Government Aid Program' (2016) *Asia & the Pacific Policy Studies* 4(2) 237, 238.
[16] Terence Wood et al, 'Australian Aid Five Years On The 2018 Australian Aid Stakeholder Survey, Development Policy Centre' <http://devpolicy.org/Stakeholder-Survey/2018AustralianAidStakeholderSurvey.pdf>.

**Modern Slavery Act 2018 (Cth)**

The *Modern Slavery Act 2018* (Cth) is a recent piece of Commonwealth legislation that aims to ensure human rights concerns are placed at the forefront of corporate social responsibility.[17] The Modern Slavery Act requires more than 3,000 businesses and other entities to publish annual statements on actions to address modern slavery in their operations and supply chains on a Government-administered public register.[18] However, while reputational pressure will encourage companies to comply with these reporting requirements, the Act does not impose any penalties for failure to do so, nor does it require any specific action to combat modern slavery.

**C. 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**

**Advantages**

Targeted sanctions are intended to focus the impact associated with national sanctions directly on individuals responsible for human rights abuse, while minimising the collateral damage on the broader population and economy.[19] Growing emphasis on holding individuals in power to account for the unlawful actions of states has led to increasing support for their use in ensuring accountability for those responsible for committing human rights abuse.[20]

These sanctions deny legitimacy to political leaders, military officials, and their supporters who commit human rights abuses.[21] Travel bans create personal discomfort to targeted individuals who cannot take advantage of social and economic opportunities abroad and are prevented from carrying out official visits to strengthen their domestic positions. Asset freezing also disrupts the routines of targeted individuals, as well as undermines their operational capacity so as to hinder targeted activities.[22]

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[17] *Modern Slavery Act 2018* (Cth).
[18] Ben Debney, 'Reflections on the Australian Modern Slavery Act and Beyond' (2019) <https://www.business-humanrights.org/en/about-us/blog/reflections-on-the-australian-modern-slavery-act-and-beyond>.
[19] Gary C. Hufbauer & Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' *Symposium: Sanctions Reform - Evaluating the Economic Weapon in Asia and the World* (2000) <https://www.piie.com/commentary/speeches-papers/targeted-sanctions-policy-alternative>.
[20] Ibid.
[21] Gary C. Hufbauer & Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' *Symposium: Sanctions Reform - Evaluating the Economic Weapon in Asia and the World* (2000) <https://www.piie.com/commentary/speeches-papers/targeted-sanctions-policy-alternative>.
[22] Francesco Giumelli, 'Bringing Effectiveness into the Debate' (2010) *Central European Journal of International and Security Studies* 81, 95-96.

These sanctions can also have a signalling effect, indicating to both domestic and international audiences Australia's strong condemnation of human rights abusing conduct.[23]

**Disadvantages**

Targeted sanctions have been suggested to have limited effectiveness due to the administrative challenges involved in their enforcement. In respect of travel bans, false passports and visas may allow targeted individuals to circumvent the sanctions. Also, it can be difficult to identify the appropriate group or individuals that should be targeted. For this, extensive knowledge of the country, the individuals, and official power structures is required to enforce effective individual travel bans.[24]
The primary challenge to the effectiveness of asset freezing is the identification of funds belonging to the individuals targeted. Once individuals' funds have been identified, expediency in implementing the sanctions is critical to preventing the transferring of assets to offshore banking centres.[25] Such speed is not easily reconciled with the need to build consensus amongst members of international multilateral institutions, but would be more readily achieved if a minister could make an executive decision under a Magnitsky-style act.

**D. Any relevant experience of other jurisdictions, including the United States regarding their Global Magnitsky Human Rights Accountability Act (2016)**

To date, the United States, Canada, the United Kingdom, Estonia, Lithuania, Latvia and Kosovo have passed Magnitsky-style legislation. We outline below relevant experience from some of these jurisdictions.

**The United States**

Two key pieces of legislation in the United States that implement Magnitsky laws are the *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act* (***US Magnitsky Act***) and the *Global Magnitsky Human Rights Accountability Act* (***US Global Magnitsky Act***).

The US Magnitsky Act

In 2012, the United States passed the US Magnitsky Act. The US Magnitsky Act is limited in scope, concerning only human rights violations in Russia. The law compels the President to submit a list of people whom the President determines, based on 'credible information', to be responsible for the detention, abuse or death of Sergei Magnitsky; or are responsible for extrajudicial killings, torture, or

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[23] Ibid.
[24] Gary C. Hufbauer & Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' *Symposium: Sanctions Reform - Evaluating the Economic Weapon in Asia and the World* (2000) <https://www.piie.com/commentary/speeches-papers/targeted-sanctions-policy-alternative>.
[25] Ibid.

other 'gross violations of internationally recognised human rights' committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation or to obtain, exercise, defend or promote internationally recognised human rights and freedoms in Russia.[26]

The most recent invocation of the US Magnitsky Act was in May 2019, when the State Department submitted a list of six persons involved in extrajudicial killings and the torture of LGBTI persons in the Republic of Chechnya, bringing the total number of sanctioned persons under the Act to date to 55 (comprising 54 individuals and one organisation).[27]

In 2017, the Helsinki Commission undertook an assessment of the accomplishments and challenges of the US Magnitsky Act.[28] It was generally agreed that the passing of the US Magnitsky Act was a significant achievement and that it has been an effective tool in promoting the United States' human rights agenda. The Hon. Chris Smith, Co-Chairman, and Commissioner the Hon Steven Cohen both noted that one measure of the Act's success is the reaction it has provoked from the Russian Government. This has included: a retaliatory refusal to grant visas to certain United States' officials; Vladimir Putin's lobbying efforts to have the US Magnitsky Act revoked and the sponsor of the Act, Bill Browder, extradited to Russia for prosecution; and the strong opposition mounted to the introduction of the subsequent US Global Magnitsky Act. The Russian response suggests that the sanctions are having a noticeable impact upon foreign actors.

The principal challenges identified by the witnesses before the Commission are sustaining sanctions action over time, and the problem of individuals avoiding the sanctions regime by hiding assets behind shell corporations or family members.

The US Global Magnitsky Act

The US Global Magnitsky Act was signed into law in 2016. This Act has application beyond Russian nationals, to cover persons worldwide who engage in human rights abuses or corruption.

In its original form, the US Global Magnitsky Act allows (but does not compel) the President to impose two kinds of sanctions: financial sanctions to freeze sanctioned persons' property interests in the United States and immigration sanctions to ban entry into the United States. Sanctions may be applied

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[26] Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act Sec 404.
[27] US Department of State, Press Statement, 'Implementation of the Sergei Magnitsky Rule of Law Accountability Act', (May 16 2019) <https://www.state.gov/implementation-of-the-sergei-magnitsky-rule-of-law-accountability-act/>.
[28] Joint House and Senate Hearing, 115 Congress, US Government Publishing Office, 'The Magnitsky Act at Five Years: Assessing Accomplishments and Challenges', (14 December 2017) <https://www.ft.com/content/f5cf57b4-ef3d-3e9f-bcc2-3da8d8dfa526>.

to foreign persons (defined to include individuals and entities) who have engaged in extrajudicial killings, torture or other gross violations of internationally recognised human rights against persons who seek to expose illegal activity carried out by government officials or who seek to obtain, exercise, defend or promote internationally recognised human rights and freedoms.

In 2017, President Trump signed Executive Order 13818, which further expanded the remit of the Act.[29] The requirement of 'gross violations of internationally recognised human rights' was expanded to 'serious human rights abuse' and the alternative requirement of 'significant acts of corruption' was expanded to 'corruption'. In addition, the requirement that the victims of human rights abuses be working to expose illegal government activity or to defend human rights was not included.

Accordingly, the Executive Order allows the United States to act against a broader range of persons in connection with a wider range of human rights violations and acts of corruption The Executive Order permits the imposition of sanctions on *any* persons that have 'materially assisted' in the commission of serious human rights abuses or corruption, meaning that American citizens could have their assets frozen under the US Global Magnitsky Act. US persons are also prohibited from engaging in transactions with blocked persons without authorisation and any entity owned directly or indirectly, by a designated person with a 50 percent or greater interest is now itself considered to be a blocked person.[30]

The practical effect of the Executive Order was to declare foreign human rights abuses and corruption a national emergency and to delegate the implementation of the US Global Magnitsky Act to the Secretary of State and the Secretary of the Treasury, in consultation with the Attorney General.[31] These members of the executive are empowered to determine whether a person has committed or assisted in the commission of serious human rights abuses or corruption. Under the US Global Magnitsky Act, 'credible evidence' is required to impose sanctions and information provided by congressional committees, other countries, and nongovernmental organisations must be considered.[32] Although the US Global Magnitsky Act is a standalone piece of legislation, the Executive Order invokes the *International Emergency Economic Powers Act* to increase the powers of the Secretary of the Treasury in the implementation of US Global Magnitsky Act sanctions.[33]

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[29] Executive Order 13818 of December 20, 2017, 'Blocking the Property of Persons Involved in Serious Human Rights Abuses and Corruption', Federal Register vol. 82, no. 246 <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag_eo.pdf>.
[30] United States Treasury, 'FAQ: Global Magnitsky Sanctions', 21 December 2017, <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/12212017_glomag_faqs.pdf>.
[31] Ibid.
[32] *Global Magnitsky Act*, s 1263.
[33] Executive Order 13818, s 8.

Persons who have been designated may appeal to the Office of Foreign Assets Control (***OFAC***) for removal from the Global Magnitsky Sanctions list.[34] Persons must send a written request to OFAC with a detailed description of why they should be removed. If a person's request for removal is denied, there is no limit on the number of times a person can appeal to the OFAC. Although a person wishing to challenge a decision by the Secretary of the Treasury to block their assets could appeal to the courts, judicial review in an area touching upon national security tends to be 'extremely deferential.'[35] It is argued that, decisions made by the Secretary of State to deny or revoke permission to enter the United States are not subject to judicial review.[36]

As with the US Magnitsky Act, unless it is 'vital' that the information be classified, the list of designated persons under the US Global Magnitsky Act is made publicly available and published in the Federal Register.[37] This not only allows the list to have a 'name and shame' function,[38] it also enables compliance with the requirement that United States persons avoid dealing with sanctioned persons' assets. Most recently, in December 2019, the United States sanctioned 68 individuals and entities in connection with corruption in Cambodia, Latvia, and Serbia.[39]

Overall, the US Global Magnitsky Act is perceived as being successful in combatting human rights abuses and corruption abroad.[40] One specific example of the Act's utility in addressing human rights abuses is its use to sanction 17 Saudi Arabians and 1 Israeli in connection with the extrajudicial killing of Jamal Khashoggi.[41] This demonstrates that it is possible to use the US Global Magnitsky Act to target culpable individuals with sanctions even when they are nationals of a country that is considered a close ally of the US, and where, for *realpolitik* reasons, the US may be unwilling or unable to take action against an allied state itself. The Khashoggi case was also an example of Congress using its

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[34] US Department of the Treasury, 'Filing a Petition for Removal from an OFAC List', <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx>.
[35] Centre for the Advancement of Public Integrity, 'Implementation of the Global Magnitsky Act' (20 September 2018) <https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/magnitsky_wcn_final.pdf>.
[36] Ibid.
[37] Global Magnitsky Act, s 1264.
[38] Ben Greenacre, 'Magnitsky acts and the future of accountability for violations of international human rights law: An interview with Bill Browder', Universal Rights Group (20 April 2019) <https://www.universal-rights.org/blog/magnitsky-acts-the-future-of-accountability-for-violations-of-international-human-rights-law-an-interview-with-bill-browder/>.
[39] US Department of State, Media Note, 'Global Magnitsky Program Designations for Corruption and Serious Human Rights Abuse' (10 December 2019) https://www.state.gov/global-magnitsky-program-designations-for-corruption-and-serious-human-rights-abuse/.
[40] Freedom House, 'US: Organizations Urge Congress to Increase Global Magnitsky Funding' (28 March 2019) <https://freedomhouse.org/article/us-organizations-urge-congress-increase-global-magnitsky-funding>.
[41] Ben Greenacre, 'Magnitsky acts and the future of accountability for violations of international human rights law: An interview with Bill Browder', Universal Rights Group, (20 April 2019) <https://www.universal-rights.org/blog/magnitsky-acts-the-future-of-accountability-for-violations-of-international-human-rights-law-an-interview-with-bill-browder/>.

power to recommend action under the US Global Magnitsky Act: the sanctions determination process was initiated by the chairperson and ranking member of the Senate Foreign Relations Committee providing information to the President.[42]

Commentators have pointed to two main challenges in the implementation of the US Global Magnitsky Act. First, the limited availability of review of decisions to sanction is concerning from a civil liberties perspective. In the discussion in the EU concerning potential implementation of similar legislation, the Dutch Minister of Foreign Affairs expressed particular concern that decisions to list individuals and entities should be based on transparent criteria to guarantee thorough judicial review and redress rights, as the US Global Magnitsky Act would not meet the requirements of the EU Charter of Fundamental Rights or the European Convention on Human Rights.[43]

Second, although human rights groups have welcomed the United States Government's bipartisan support for, and active enforcement of, the US Global Magnitsky Act to date,[44] there is concern that the number of people sanctioned remains relatively low when compared to the hundreds of entities that have been submitted for consideration. 40 organisations signed an open letter to the Government in March 2019 calling for Congress to increase funding by US$1 million for implementation of the US Global Magnitsky Act so that a greater number of potential cases can be reviewed.[45] That being said, the organisations also celebrated the Act's 'remarkable success'.

**Canada**

In 2017, the Canadian Government enacted the *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law) (***Canadian Act***). The Canadian Act empowers the Governor in Council to make orders concerning the prohibition of dealing with, and the freezing or seizure of, assets of foreign nationals who are 'responsible for, or complicit in' certain human rights abuses or acts of corruption.[46]

The human rights abuses captured are extrajudicial killings, torture or other 'gross violations of internationally recognised human rights' committed against individuals in any foreign state who seek

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[42] United States Senate Committee on Foreign Relations, 'Corker, Menendez, Graham, Leahy Letter Triggers Global Magnitsky Investigation into Disappearance of Jamal Khashoggi' (10 October 2018) <https://www.foreign.senate.gov/press/chair/release/corker-menendez-graham-leahy-letter-triggers-global-magnitsky-investigation-into-disappearance-of-jamal-khashoggi?>.

[43] Nienke van der Have, 'The Proposed EU Human Rights Sanctions Regime', *Security and Human Rights* (January 2020) <https://brill.com/view/journals/shrs/aop/article-10.1163-18750230-02901009/article-10.1163-18750230-02901009.xml>; Christina Eckes, 'EU sanctions regime cannot be an 'EU Magnitsky Act', *EU Observer* (24 May 2019) <https://euobserver.com/opinion/144968>.

[44] Kelly Swanson, 'NGOS welcome impact of Global Magnitsky Act', Global Investigations Review (19 February 2019) <https://euobserver.com/opinion/144968>.

[45] Freedom House, 'US: Organizations Urge Congress to Increase Global Magnitsky Funding', (28 March 2019) <https://freedomhouse.org/article/us-organizations-urge-congress-increase-global-magnitsky-funding>.

[46] *Justice for Victims of Corrupt Foreign Officials Act* (Canada), s 4.

to expose illegal activity carried out by foreign public officials or to obtain, exercise, defend or promote internationally recognised human rights and freedoms. Foreign nationals who act as agents of a foreign state in carrying out such human rights abuses or who 'materially assist' in ordering, controlling or otherwise directing acts of corruption are also liable to be sanctioned.[47]

Persons in Canada and Canadian-incorporated entities are prohibited from dealing in any property of a designated foreign national, and from facilitating any financial transaction, providing financial services, acquiring financial services or making available any property for the benefit of a designated foreign national without a permit from the Minister of Foreign Affairs.[48]

To make an order, the Governor in Council must be 'of the opinion' that a foreign national is responsible for, or complicit in, gross human rights abuses or corruption.[49]

A foreign national who is sanctioned under the Canadian Act may apply in writing to the Minister of Foreign Affairs to have the sanction repealed.[50] The Minister of Foreign Affairs must make a decision on the application within 90 days and must give notice of a decision to reject the application. If an application is rejected, a foreign national may re-apply to the Minister of Foreign Affairs if there has been a material change in the applicant's circumstances.

The names of sanctioned individuals are published in a schedule to the accompanying Regulations to the Canadian Act.[51] 70 foreign persons have been sanctioned to date; most recently, Canada sanctioned 17 Saudi Arabian nationals who in the opinion of the Governor in Council were responsible for or complicit in the torture and extrajudicial killing of Jamal Khashoggi.[52]

Although praised as a symbolic commitment to the furtherance of international justice,[53] some critics contend that the Canadian Government has lagged behind in the use and enforcement of the Act.[54]

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[47] Ibid s 4(2).
[48] Ibid s 4(3).
[49] Ibid s 4(1).
[50] Ibid s 8.
[51] *Justice for Victims of Corrupt Foreign Officials Regulations* (Canada), Sch 1.
[52] Government of Canada, News release, 'Canada imposes sanctions on individuals linked to the murder of Jamal Khashoggi', (29 November 2018) <https://www.canada.ca/en/global-affairs/news/2018/11/canada-imposes-sanctions-on-individuals-linked-to-murder-of-jamal-khashoggi.html>.
[53] Irwin Cotler, Joint House and Senate Hearing, 115 Congress, US Government Publishing Office, 'The Magnitsky Act at Five Years: Assessing Accomplishments and Challenges', (14 December 2017) <https://www.ft.com/content/f5cf57b4-ef3d-3e9f-bcc2-3da8d8dfa526>.
[54] Marcus Kolga, 'Canada diminished by failing to enforce Magnitsky law', *iPolitics* (23 June 2018) <https://ipolitics.ca/2018/06/23/canada-failing-to-enforce-magnitsky-law/>.

Canada's announcement in its 2018 budget that it is allocating $22.2 million over five years to develop its sanctions policy may help to redress this concern.[55]

**United Kingdom**

Between 2017 and 2018, the UK implemented Magnitsky-style legislation by way of amendments to two existing laws. The *Criminal Finances Act 2017* amended the *Proceeds of Crime Act 2002* (***POCA***) to expand the definition of 'unlawful conduct' to include gross human rights abuse or violation. 'Gross human rights violation' was included as a reason for imposing sanctions on a person or entity in the *Sanctions and anti-Money Laundering Act 2018* (***SAMLA***) (amending the pre-existing Sanctions and Anti-Money Laundering Bill).[56] The SAMLA was passed by the House of Commons in 2018, but the Magnitsky provision is not yet in force. In August 2019, the UK Foreign Secretary stated that, after Brexit, the Magnitsky provision would be implemented, and it was confirmed in October 2019 that an implementing statutory instrument has been drafted.[57]

'Gross human rights abuse or violation' is defined in both UK Magnitsky amendments as 'the torture, or cruel, inhuman or degrading treatment or punishment, of a person' on the grounds that that person has sought to expose illegal activity by a public official or has sought to obtain, exercise, defend or promote human rights. The violation must be carried out by a public official or by a person acting with the acquiescence of a public official. So, the scope of conduct covered by the UK Magnitsky amendments is relatively narrow.

Decisions on Magnitsky sanctions under the SAMLA will be made by the Secretary of State or the Treasury.[58] Decision-makers must have reasonable grounds to suspect that a person is an 'involved person' and must consider that designation is appropriate having regard to the purpose of the Act and the likely effects of designation on the person.[59] A sanctioned person may request that the Minister vary or cancel the designation and, if unsuccessful, may apply to the High Court or Court of Session (as applicable) for review.[60]

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[55] Andrea Charron and Christina Aliu, 'Canada's growing challenges with economic sanctions', The Conversation (17 September 2018), <http://theconversation.com/canadas-growing-challenges-with-economic-sanctions-103265>.
[56] Ben Smith and Joanna Dawson, House of Commons Briefing Paper, 'Magnitsky legislation', (16 July 2018)<https://researchbriefings.files.parliament.uk/documents/CBP-8374/CBP-8374.pdf>.
[57] House of Lords Briefing, 'Debate on the Queen's Speech: Days 1 and 2 Exiting the European Union, Trade, Foreign Affairs and Defence', (15 and 16 October 2019)<https://researchbriefings.files.parliament.uk/documents/LLN-2019-0126/LLN-2019-0126.pdf>.
[58] SAMLA, s 1(9).
[59] Ibid s 11(2).
[60] Ibid s 38.

The UK maintains a policy of not publishing a visa ban list, so it will not be possible to know how many individuals have been sanctioned under the SAMLA.[61]

**Estonia**

Estonia was the first country to follow the United States in passing Magnitsky legislation. In December 2016, Estonia amended its *Obligation to Leave and Prohibition on Entry Act* to ban those deemed guilty of human rights abuses from entering Estonia.[62]

The Ministry of the Interior may prohibit the entry of a foreign person if there is 'information or a good reason to believe that the alien has participated or contributed to violation of human rights in a foreign state, which has resulted in the death or serious injury of a person, the unfounded conviction of a person in an offence inspired by political motives or other serious consequences.'[63] A prohibition on entry may be contested in court proceedings within 30 days of its communication.[64]

Although the Ministry of the Interior has yet to formally use its powers under the Estonian Magnitsky amendment, in March 2018, the Estonian Government announced an entry ban on 49 individuals, principally in connection with the death of Sergei Magnitsky.[65]

**Lithuania**

In November 2017, the Lithuanian parliament unanimously passed an Amendment to the Law on the Legal Status of Aliens to allow the imposition of visa bans on foreigners involved in criminal acts of corruption or money laundering, or human rights violations.[66]

The Minister of the Interior, at the proposal of the Foreign Minister, may ban a foreigner from entering Lithuania for up to five years if:

a) there are 'serious grounds for believing' that the person has committed a 'serious or grave crime' against a person in a foreign state thus violating universal human rights and freedoms;
b) the person has committed a criminal act of a corrupt nature or with indications of money laundering;
c) the person has 'instigated or otherwise participated' in committing such criminal acts; or

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[61] Ben Smith and Joanna Dawson, House of Commons Briefing Paper, 'Magnitsky legislation' (16 July 2018) 17, <https://researchbriefings.files.parliament.uk/documents/CBP-8374/CBP-8374.pdf>.
[62] Andrew Rettman, 'Estonia joins US in passing Magnitsky law', *EU Observer* (9 December 2016) <https://euobserver.com/foreign/136217>.
[63] *Obligation to Leave and Prohibition on Entry Act*, s 29(6).
[64] Ibid s 33(3).
[65] Dario Cavegn, 'Magnitsky list to take effect in Estonia on Tuesday', *ERR News* (3 April 2018) <https://news.err.ee/693542/magnitsky-list-to-take-effect-in-estonia-on-tuesday>.
[66] The Baltic Times, 'Lithuanian parliament passes 'Magnitsky act' (16 November 2017) <https://www.baltictimes.com/lithuanian_parliament_passes__magnitsky_act_/>.

d) for any of the above reasons, the alien is placed on a list of foreigners denied entry to an EU, EFTA or NATO member state.[67]

In January 2018, Lithuania banned 49 Russians from entering the country under its Magnitsky amendment for alleged involvement in human rights abuses and corruption.[68]

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

### Australia should incorporate Magnitsky-style targeted sanctions into its existing regime

Throughout this submission, the NSWCCL has made clear its support for the introduction of Magnitsky-style legislation in Australia. Given that a new thematic regulation for human rights abuses would serve substantially similar aims as Australia's existing autonomous sanctions regime, it is preferable to use the current legislative framework as a basis for introducing any Magnitsky-style laws, subject to the safeguards recommended below.

The ASA, in its existing form, empowers the Minister to implement a broad range of sanctions against individuals, which include those contemplated by Magnitsky-style laws in other jurisdictions. These include, for example, restrictions on an individual's ability to deal with their own property.[69] On this basis, the NSWCCL recommends that the most logical approach would be to amend the ASA to allow the Minister (subject to the procedural safeguards set out below) to impose sanctions where she or he is satisfied that such a sanction would be a deterrent to gross violations of human rights and corruption or would otherwise promote compliance with international human rights law.

This could be achieved, for example, by way of amendment to section 10 of the ASA, such that it empowers the Minister to make sanctions regulations relating specifically to human rights abuses and corruption. As stated above, section 10 of the ASA currently provides that the Minister may make sanctions regulations which 'will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia' or 'otherwise deal with matters, things or relationships outside Australia'. In contrast, section 3 of the US Global Magnitsky Act allows the United States President to impose sanctions on a foreign person who, based on credible evidence, is determined to be 'responsible for extrajudicial killings, torture, or other gross violations of internationally recognised

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[67] Republic of Lithuania Law Amending Article 133 of law No IX-2206 on the Legal Status of Aliens, Article 133.
[68] Radio Free Europe, 'Lithuania Bars Kadyrov, 48 Other Russians Under Magnitsky Law' (16 January 2018) <https://www.rferl.org/a/lithuania-bars-kadyrov-other-prominent-russians-under-new-magnitsky-law/28977709.html>.
[69] See, for example, *Justice for Victims of Corrupt Foreign Officials Act* (Canada), s 4.

human rights committed against individuals in any foreign country' who seek to expose government corruption or promote human rights. While section 10 of the ASA clearly provides scope for combatting human rights contraventions in which states are complicit,[70] there is scope for Australia's existing autonomous sanctions regime to be amended to expressly empower the Minister to combat human rights contraventions and corruption by imposing sanctions when it is not clear that a state is complicit.

Although there may be some benefits to enacting standalone legislation, including greater certainty of protection, heightened visibility, and the consequential effect of raising public awareness, these advantages are outweighed by the disadvantages of creating a separate act. The advantage of amending an existing act is that it reduces any uncertainty as to how the new provisions will interact with other legislation and avoids confusion created by having two separate regimes that deal with similar powers.

**Including corruption**

Corruption is a global problem. It undermines the human rights of citizens and erodes the legal, moral, and ethical fabric of society. As noted above the US Magnitsky laws and other foreign Magnitsky laws provide for the imposition of sanctions to combat corruption, as well as gross human rights abuses. For example, the United States recently imposed targeted sanctions against Cambodian officials complicit in large-scale illegal logging, citing the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, and bribery.[71]

It is unclear from the Terms of Reference whether the Joint Standing Committee is considering using targeted sanctions to address corruption in addition to more direct human rights abuses.

NSWCCL recommends that it does. This would supplement: (i) Commonwealth measures that address corruption by criminalising foreign bribery by Australian persons and companies (*Criminal Code 1995* (Cth) section 70.2); and (ii) the Bill proposing significant amendments to Commonwealth foreign bribery laws currently before the Senate (Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019).

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[70] See Items 7 and 8 of reg 6 of the ASR which impose sanctions against persons and entities involved in human rights abuses in Syria and Zimbabwe, respectively.

[71] See, U.S Department of the Treasury, 'Treasury Sanctions Corruption and Material Support Networks' (9 December 2019) <https://home.treasury.gov/news/press-releases/sm849>.

**Importance of procedural safeguards**

The NSWCCL recommends that if Magnitsky-style provisions were to be introduced within Australia's existing sanctions regime, the parliament take the opportunity to improve the safeguards available to individuals who may be the target of these sanctions. The benefits are twofold:

(i) to ensure that the legislation does not have the unintended effect of unfairly inhibiting the human rights of those who may have been incorrectly identified as having committed a human rights contravention; and

(ii) to improve transparency and redress rights to those targeted.

The global move towards targeted sanctions has placed the global sanctions regime in a more individualised frame. This shift in focus highlights the importance of sanctions regimes which respect the presumption of innocence, allow the potential for listings to be reviewed and challenged and for individuals or entities to be delisted if appropriate.[72]

If Australia were to introduce Magnitsky-style legislation, any decision to 'blacklist' a person or organisation should, be subject to judicial review. For example, under the Canadian Act, a blacklisted individual or company is able to make an appeal in writing to the Minister to cease being the subject of the order or regulation.[73] The Minister then has 90 days to decide whether there are reasonable grounds to recommend to the Governor in Council that the order or regulation be amended or repealed.[74] The Canadian Act also requires the Canadian Parliament and the Senate to review the blacklist of foreign nationals annually.[75]

The legislative change should also ensure that:

(a) there will be clearly articulated criteria and thresholds on which sanctions decisions must based;

(b) reasons for sanctions decisions and evidence on which those decisions are based will be accessible where possible; and

[72] Christopher Roberts, 'From Discretion To Law: Rights-Based Concerns And The Evolution Of International Sanctions' (2018) 44 *Brooklyn International Journal of Law* 200.
[73] *Justice for Victims of Corrupt Foreign Officials Act* (Canada), s 8(1).
[74] Ibid s 8(3).
[75] Ibid s 16.

(c) any person challenging a blacklisting order will have access to the information on which the blacklisting decision was made. For example, Regulation 25 of the ASR should be considered and if necessary clarified to ensure that the right to seek judicial review is not an empty one.

Further, the ASA currently gives the Minister absolute discretion to designate individuals, without proof that they are involved in repression. The NSWCCL recommends that, if the ASA is to be amended, the parliament introduces provisions to act as checks and balances on the Minister's power to designate individuals, to ensure this power is not applied arbitrarily or in error. Such an amendment would bring Australia's sanctions legislation into line with other jurisdictions which have introduced Magnitsky-style legislation. For example, as discussed above, in the United States, the Global Magnitsky Act requires 'credible evidence'[76] of human rights abuse or corruption to support the imposition of sanctions on a foreign entity.

**Recommendation: That the Autonomous Sanctions Act (Cth) be amended to allow for proper targeting of gross human rights abuses and corruption. This should be accompanied by appropriate checks and balances as described in these submissions such as clear criteria for sanctions decisions, availability of judicial review of the decisions and access to reasons for the decisions and information on which the decisions are based.**

NSW Council for Civil Liberties acknowledges with thanks the generous assistance of Allens, Sydney, in the drafting of this submission.

We thank you for the opportunity to make this submission.

Yours faithfully,

[redacted]

Michelle Falstein
Secretary, NSW Council for Civil Liberties

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[76] Global Magnitsky Act, s 3(a).

## Contacts in relation to this submission

Ms Michelle Falstein

Mob: [redacted]

Email: [redacted]

Pauline Wright

Mob: [redacted]

Email: [redacted]