THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Mr Cattle,

Inquiry into a framework for autonomous sanctions under Australian law to target human rights abuses

Thank you for the opportunity to provide input to the Law Council's submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into a framework for autonomous sanctions under Australian law to target human rights abuses ("the Inquiry").

As you may be aware, on 5 August 2019, the Law Society hosted a Thought Leadership panel titled 'A Magnitsky Act for Australia – Human Rights Bombshell or Frankenstein's Monster?' featuring Emeritus Professor Graeme Gill, Senator Kimberley Kitching, Jeremy Moller and Pauline Wright. The Law Society is pleased to be able to continue its contribution to consideration of this important issue in Australia.

The Law Society's Human Rights Committee has contributed to this submission, which addresses each of the Inquiry's terms of reference.

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

Australia currently applies two types of sanctions. The first of these are United Nations Security Council sanctions, which Australia must impose as a member of the UN. These are primarily implemented through the *Charter of the United Nations Act 1945* (Cth) and its regulations. The second type are autonomous sanctions, which are imposed through the *Autonomous Sanctions Act 2011* (Cth) ("ASA") and the Autonomous Sanctions Regulations 2011 (Cth) ("AS Regulations").

The explanatory memorandum that accompanied the ASA 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 United Nations Security Council decision – in situations of international concern".[1] Such situations include the

[1] Explanatory Memorandum, Autonomous Sanctions Bill 2010.

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.[2]

Autonomous sanctions as applied under the ASA are intended to achieve three objectives:

> (a) to limit the adverse consequences of the situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding that are enabling the pursuit of programs of proliferation concern);
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> (b) to seek to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
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> (c) to penalise those responsible (for example, by denying access to international travel or to the international financial system).[3]

Section 10(1) of the ASA provides for regulations to be made in relation to the following considerations.

> (a) proscription of persons or entities;
> (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;
> (f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b) [4]

Section 10(2) of the ASA states that before the Governor-General makes regulations for the purposes of subsection (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.

The operation of s 10 requires the Foreign Affairs Minister to undertake a two-step process in order to sanction an individual. The Minister must first amend the AS Regulations through a legislative instrument which identifies the targeted country and the reasons behind its designation. The Minister must then pass a second legislative instrument in order to sanction a specific individual under the ASA regulations.[5]

Despite the potentially wide scope of the ASA, autonomous sanctions have only been applied on citizens from North Korea, Iran, Libya, the Former Federal Republic of Yugoslavia, Myanmar, Russia, Ukraine, Syria and Zimbabwe. The current consolidated list of sanctioned individuals refers to only 17 people, all of whom are from Syria, who have been sanctioned under the ASA regime specifically for human rights abuses.[6] With reference to this usage of the ASA powers, Geoffrey Robertson QC and Chris Rummery have argued that "the ASA is

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[2] Ibid.
[3] Ibid.
[4] *Autonomous Sanctions Act 2011* (Cth) s 10(1).
[5] Geoffrey Robertson and Chris Rummery, 'Why Australia Needs a Magnitsky Law' (2018) 89(4) *Australian Quarterly* 19, 24.
[6] Australian Government Department of Foreign Affairs and Trade, *Australia and Sanctions: Consolidated List* (7 January 2020) <https://dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx>

only being pointed towards easy targets with no likely connection to Australia. It is not genuinely being used as a tool to combat human rights abuse."

In addition to its limited utilisation as a response to human rights abuses, the ASA has drawn criticism for the absolute power it confers to the Minister, combined with the lack of requirement for proof of sanctionable conduct and the inability for decisions to be contested through a transparent merits review process.[7] The ASA also does not expressly permit the Minister for Foreign Affairs to impose sanctions on the basis of serious corruption.[8]

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

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 "we are… a determined advocate of liberal institutions, universal values and human rights." Strengthening human rights and other norms of acceptable behavior 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".[9] The White Paper states that as a member of the United Nations Human Rights Council for the 2018–2020 term, Australia will:

- Advance the rights of women and girls
- promote good governance, democratic institutions and freedoms of expression, association, religion and belief
- promote the rights of people with disabilities
- advance human rights for indigenous peoples around the globe
- promote national human rights institutions and capacity building, and
- advocate [for] the global abolition of the death penalty.[10]

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.[11] The MSA requires entities with an annual revenue of more than $100 million that are based or operate within Australia to report the risks of modern slavery within their operations and supply chains and take actions to address the identified risks.[12] The Act is given extra-territorial effect by section 10.

3. The advantages and disadvantages of the use of human rights sanctions, including the effectiveness of sanctions as an instrument of foreign policy to combat human rights abuses

While the first national Magnitsky law was passed in 2012, so-called 'smart' or 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. Smart sanctions were first introduced by the UN in 1992 to pressure the Libyan leadership in the wake of the Pan Am and UTA attacks.[13] Since then, the concept has gained traction in

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[7] Robertson and Rummery, above n 5, 24-5.
[8] Ibid 23.
[9] Australian Government, *Foreign Policy White Paper* (2017), 32.
[10] Australian Government, *Foreign Policy White Paper* (2017) 89.
[11] Parliament of Australia, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6755 (Alex Hawke MP).
[12] Modern Slavery Act 2018 (Cth) s 10.
[13] Thomas J. Biersteker, 'Targeted sanctions and individual human rights', (Winter 2009-10), *International Journal*, 100.

international affairs as a tool lying "between words and war".[14] Smart sanctions are applied, among other reasons, for violations of human rights norms[15] and actions constituting a threat to international peace and security.[16]

Advantages of smart sanctions to combat human rights abuses

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." Gareth Evans, former President of International Crisis Group, wrote in his 2009 book *The Responsibility to Protect* that 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."[17]

Arne Tostensen and Beate Bull have outlined a two-part argument in favour of smart sanctions as follows:[18]

> First, they more effectively target and penalize – via arms embargoes, financial sanctions, and travel restrictions – the political elites espousing policies and committing actions deemed reprehensible by the international community. Second, smart 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.

From the perspective of Australia and other developed nations, smart sanctions can serve as leverage for the pursuit of foreign policy and to address international human rights abuses. In a 2018 article for *Australian Quarterly* Robertson and Rummery argued that:

> 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.
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> ...
>
> 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.[19]

Disadvantages of smart sanctions to combat human rights abuses

In relation to the UN smart sanctions regime, concerns have been voiced about the lack of safeguards for those who end up on designated lists. The concerns largely centre on the lack of procedural rights associated with counter-terrorism sanctioning in the wake of the

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[14] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2009), Brookings Institution Press, 114.
[15] Thomas Biersteker et al., 'Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report', (2009), Watson Institute for International Studies,1.
[16] 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.
[17] Gareth Evans, above n 14, 114.
[18] Arne Tostensen and Beate Bull, 'Are Smart Sanctions Feasible?' (2002) 54(3) *World Politics* 373, 373-4.
[19] Robertson and Rummery, above n 5, 23.

September 11 attacks.[20] The procedure for listing and de-listing the sanctioning of suspected terrorists was not subject to review, involved numerous closed door procedures, and was criticised by legal scholars and human rights groups as disregarding the human rights the UN was pursuing.[21] Similar concerns have been raised in relation to national Magnitsky-style laws. Robertson and Rummery argue that "a law designed to protect and promote human rights should not itself be procedurally in breach of them."[22]

A further disadvantage of smart sanctions, often linked to their lack of due process, 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.[23] The Centre for the Advancement of Public Integrity, based at Columbia Law School, noted in 2018 that "human rights groups have criticized the Trump administration for failing to impose sufficient sanctions on persons from countries allied with the United States."[24]

The rise of Bitcoin and cryptocurrencies represent another challenge to targeted financial sanctions. Bill Browder, who has championed Magnitsky-style laws in various jurisdictions, noted this during a 2017 review of the US Magnitsky regime.

> 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.[25]

Daniel Drezner's 2011 article "Sanctions Sometimes Smart: Targeted Sanctions in Theory in Practice" provided an extensive evaluation of the successes and shortcomings of smart sanctions. On the one hand, Drezner found that smart sanctioning has minimal internal and external political consequences for the sanctioning State as "they are billed as minimising humanitarian and human rights concerns".[26] On the other hand, Drezner concluded that although targeted sanctions are more humane in their effect on wider society they are less effective than traditional embargoes and financial sanctions.[27]

In a 2013 report, the Targeted Sanctions Consortium ("TSC") – comprised of over 50 scholars and policy practitioners worldwide – reached similar conclusions to Drezner regarding the effectiveness of UN targeted sanctions. The TSC assessed the effectiveness of UN targeted sanctions against objectives of coercing a change in behaviour, constraining proscribed activities, and signaling and/or stigmatising targets about international norms.[28] The TSC found that targeted sanctions achieved at least one of these objectives 22% of the time.[29]

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[20] George Lopez, *Enforcing Human Rights Through Economic Sanctions* (The Oxford Handbook of International Law, 2013) 784-6.
[21] International Commission of Jurists, '*Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Report, 2009) 24-5.
[22] Robertson and Rummery, above n 5, 25.
[23] Kelly Swanson, 'NGOs welcome impact of Global Magnitsky Act' (19 February 2019) *Global Investigations Review*.
[24] Centre for the Advancement of Public Integrity, 'Implementation of the Global Magnitsky Act: What Comes Next?' (20 September 2018).
[25] 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 (Bill Browder).
[26] Daniel Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' (2011) 13(1) *International Studies Review* 96, 104.
[27] Ibid 100-2.
[28] Thomas Biersteker et al, 'The Effectiveness of United Nations Targeted Sanctions: Consortium' (Report, Targeted Sanctions Consortium, November 2013) 10.
[29] Ibid 8.

Beyond this, the findings suggested that the targeted sanctions also had numerous unintended consequences. The study found that targeted sanctions led to an increase in corruption and criminality 69% of the time, strengthened authoritarian rule 54% of the time, diverted resources 44% of the time and importantly, 39% of the sanctions studied evidenced negative humanitarian consequences.[30]

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

To date, the United States, Canada, Estonia, Lithuania, Latvia, Kosovo and the United Kingdom have passed Magnitsky-style laws, while the parliaments of Ukraine, South Africa, and Gibraltar are considering similar legislation. The EU is also conducting preparatory work towards a Magnitsky-style sanctions regime to address serious human rights violations. Of the existing laws, the US *Global Magnitsky Human Rights Accountability Act 2016*[31] ("Global Magnitsky Act") is the best-known – and arguably the most influential. The Global Magnitsky Act authorises the US President to block or revoke visas or impose property sanctions (freezing orders) of foreign entities and individuals on two grounds. An individual may be sanctioned (a) if they are responsible for or acted as an agent for someone responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights, or (b) if they are government officials or senior associates of government officials complicit in acts of significant corruption.[32] This provision has been expanded by Executive Order 13818 from "gross violations of internationally recognised human rights" to "serious human rights abuse" and "significant acts of corruption" to "corruption".

The Global Magnitsky Act and Executive Order 13818 allow the US government to sanction any foreign person, determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General to be responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse. The United States has sanctioned an array of individuals including heads of criminal organisations, a general from Myanmar, and 17 Saudis in the wake of the Khashoggi killing.

The Law Society was not able to identify any rigorous evidence about the efficacy of the Global Magnitsky Act or its precursor, the *Sergei Magnitsky Rule of Law Accountability Act 2012*, though anecdotal data exists. In testimony to the Commission on Security and Cooperation in Europe in 2017, Browder stated:

> 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.
>
> 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.[33]

In 2017 the Canadian government passed the *Justice for Victims of Corrupt Foreign Officials Act* ("Canadian Act") which allows the Governor in Council to (a) make any orders or regulations with respect to the restriction or prohibition of any of the activities in relation to a foreign national that the Governor in Council considers necessary; and (b) by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the foreign

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[30] Ibid 17.
[31] Pub L No 114-328 § 130 Stat 2533.
[32] Ibid s 2304(d).
[33] Commission on Security and Cooperation in Europe, above n 25, 38.

national's property situated in Canada.[34] The Governor in Council must be of the opinion that any of the circumstances described in subsection (2) has occurred. This includes, *inter alia*:

> (a) a foreign national is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek
>
> (i) to expose illegal activity carried out by foreign public officials, 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;

Notably, the Canadian Act has a much higher degree of specificity as to what engages it compared to the Global Magnitsky Act. The Canadian Act also imposes a positive obligation on a number of entities, including banks and companies, to monitor whether it is in possession or control of property subject to an order or regulation under the Act.[35]

In the United Kingdom, no specific Magnitsky Act has been enacted. However, a number of amendments were made under the *Criminal Finances Act 2017* (UK) to expand the definition of unlawful conduct to include "gross human rights abuses".[36] 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.[37] In April 2014, the Home Office Parliamentary Under Secretary of State confirmed that Government powers to exclude individuals or revoke visas can be used in response to human rights abuses.[38]

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

As noted at section 1 above, there are inadequacies with Australia's current autonomous sanctions regime which may limit the efficacy of a new thematic regulation for human rights abuses. As an alternative, the Government may wish to consider the development of a separate Magnitsky-style law.

If the Government of Australia does introduce a new Magnitsky-style law, it should address the inadequacies in the current regime by providing for due process, transparency, and merits review of any sanctions decisions made. It should also provide a role for appropriate NGOs, as is the case in the Global Magnitsky Act, which directs the government in determining who to sanction to consider "credible information obtained by other countries and non-governmental organizations that monitor violations of human rights."

One benefit of Australia adopting a new Magnitsky-style law would be to "close a geographic gap in the [Magnitsky] legislation", in the words of Browder.[39] By following a similar legislative framework to the laws currently enacted in the US, UK and Canada, Australia would reduce the likelihood of human rights abusers being tempted to travel to the country and use it as a 'safe haven' for their assets, in order to avoid the sanctions imposed by other Western countries.[40] This would help address concerns raised by Transparency International that

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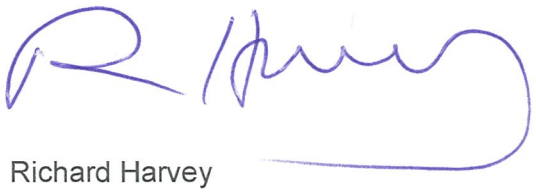
[34] SC 2017, c C-21 s 4(1).
[35] Ibid s 6.
[36] *Criminal Finances Act* (UK) s 13.
[37] Melanie Gower, "Visa bans': Powers to refuse or revoke immigration permission for reasons of character, conduct or associations', *Commons Briefing papers SN07035*, 25 November 2014.
[38] United Kingdom, *Parliamentary debates*, House of Commons, 2 April 2014 c299WH.
[39] Robertson and Rummery, above n 5, 23.
[40] Ibid.

politically-linked individuals from countries including Russia and South Sudan are laundering money through the Australian property market.[41]

Thank you for the opportunity to provide input on this topic. Should you have any questions or require further information, please contact Andrew Small, Acting Principal Policy Lawyer on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President

[41] Connie Agius, 'Stash pad: How criminals are laundering their dirty cash in Australian real estate' (18 February 2018), *ABC Radio: Background Briefing*.