



# Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012

SUPPLEMENTARY SUBMISSION TO JOINT  
STANDING COMMITTEE ON FOREIGN  
AFFAIRS, DEFENCE AND TRADE

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## **ACKNOWLEDGEMENTS**

Save the Children Australia acknowledges Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of the land on which we work. We pay our respect to their Elders past, present and emerging.

This supplementary submission was prepared by Simon Henderson, Head of Policy, Beatrice Fiate, Humanitarian Policy Advisor, and Dr Amrita Malhi, Senior Adviser: Geopolitics & Development Economics. For further information, please contact [simon.henderson@savethechildren.org.au](mailto:simon.henderson@savethechildren.org.au) or [beatrice.fiate@savethechildren.org.au](mailto:beatrice.fiate@savethechildren.org.au).

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## Introduction

On 31 March 2020, Simon Henderson, Head of Policy, Save the Children, appeared before the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (**the Joint Standing Committee**) in relation to the inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses (**the Inquiry**). In the course of the hearing, Save the Children undertook to take several matters on notice. This supplementary submission provides responses for the benefit of the Committee.

## Questions on Notice

### Question 1: Retrospective operation of Magnitsky style legislation

Committee member Senator the Hon Eric Abetz, inquired whether Save the Children supported Magnitsky style legislation being retrospective in operation. This would allow designations to be made for sanctionable activity that has happened prior to enactment of a Magnitsky style law.<sup>1</sup>

In evaluating the merits of any legislation, Save the Children supports analysis that is consistent with Australia's international human rights law obligations, especially under the Convention on the Rights of the Child, and rule of law principles. With respect to rule of law principles, Save the Children is of the view the law must be readily known and available, and certain and clear.<sup>2</sup> People must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. As such, legislative provisions should generally not be retrospective.

However, Save the Children is of the view that there will be extraordinary cases where this principle should not be followed. One domestic example of where this has taken place with respect to children's rights has been legislative reforms to ensure that justice is accessible for survivors of child sexual abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation report,<sup>3</sup> recommended all state and territory governments to ensure that limitation periods were removed with retrospective effect, regardless of whether or not a claim was subject to a limitation period in the past. This led to a series of retrospective legislative measures, such as the *Limitation Amendment (Child Abuse) Act 2016* (NSW), which Save the Children supports.

In the same context, Save the Children is of the view that there will be situations where egregious conduct whether through violations of international human rights law, international humanitarian law or corruption, should not go unpunished. For example, if legislation was not deemed to be retrospective, then sanctions could not be applied towards many human rights perpetrators in Syria, including those who have ordered the use of chemical weapons and attacks on schools, which have been widely documented.<sup>4</sup> As Save the Children noted in our

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<sup>1</sup> Evidence to Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, 31 March 2020, 8 (Senator the Hon Eric Abetz).

<sup>2</sup> Law Council of Australia, 'Policy Statement: Rule of Law Principles', March 2011. Available at: <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

<sup>3</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, 'Redress and Civil Litigation Report', September 2015. Available at: [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_redress\\_and\\_civil\\_litigation.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf).

<sup>4</sup> Brooks, J., Erickson, T.B., Kayden, S. et al. Responding to chemical weapons violations in Syria: legal, health, and humanitarian recommendations. *Confl Health* 12, 12 (2018). <https://doi.org/10.1186/s13031-018-0143-3>.

submission,<sup>5</sup> perpetrators of violations of child rights often have little reason to fear being held to account for their actions. Even when perpetrators of violations of international laws have their crimes made public and receive international condemnation for them, most do not face any real political, economic or legal consequences for their behaviour. Measures taken through international court processes are likely to be lengthy, if they are able to progress at all due to state-based objections.

As such, should a Magnitsky style law be introduced domestically for actions undertaken in overseas jurisdictions, Save the Children is supportive of such measures being applied retrospectively. In doing so, the law should ensure that appropriate safeguards are put in place, as noted in our submission.<sup>6</sup> This includes; detailed legislative criteria for the exercise of the Minister's power, according procedural fairness, such as outlining the reasons for the decision, access to merits and judicial review, and other legislative safeguards, including independent oversight and review of designations.

**Recommendation 1:** The development of a standalone International Human Rights (Magnitsky Sanctions) Act should be drafted in such a way that it applies retrospectively. Considering the application of retrospective legislation, appropriate legislative safeguards should be put in place, including, but not limited to:

- defined legislative terms, including “gross violations of human rights”, “serious violations of international humanitarian law” and “acts of significant corruption” included as independent sanctionable activities;
- detailed legislative criteria for the exercise of the Minister's power;
- appropriately defined thresholds or standards of proof to apply sanctions;
- access to merits and judicial review;
- annual reporting the Parliament;
- oversight and regular review by independent bodies, including additional parliamentary scrutiny; and
- three-year legislation post-implementation review.

## Question 2: Role of ASEAN and PIF as regional forums in promoting human rights

Committee member the Hon Kevin Andrews MP inquired how Australia would engage with Association of Asian South East Nations (**ASEAN**) and the Pacific Island Forum (**PIF**) as part of a process of us moving towards an improved autonomous sanctions regime.

In its original submission, Save the Children highlighted some of the limitations of ASEAN and the PIF as regional institutions to promote and defend human rights.<sup>7</sup> As a supplement to the previously advanced arguments, an overview of the existing regional tools to defend human rights and the relationship between Australia and those regional bodies will highlight the

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<sup>5</sup> Save the Children, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012', 21 February 2020. Available at: [https://www.savethechildren.org.au/getmedia/ed6c9486-1242-4061-937b-604b2f99ff54/save-the-children-magnitsky-act-submission-\(february-2020\).pdf.aspx](https://www.savethechildren.org.au/getmedia/ed6c9486-1242-4061-937b-604b2f99ff54/save-the-children-magnitsky-act-submission-(february-2020).pdf.aspx).

<sup>6</sup> Ibid, p13-14. See also, Law Council of Australia, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012', 4 March 2020. Available at: <https://www.lawcouncil.asn.au/docs/5151703b-566d-ea11-9404-005056be13b5/3778%20-%20Use%20of%20Targeted%20sanctions%20to%20address%20human%20rights%20abuses.pdf>.

<sup>7</sup> Ibid n5, p16.

added value of adopting a Magnitsky style sanctions regime, as a complementary tool to promote and defend human rights in South East Asia and in the Pacific.

### Association of Asian South East Nations

ASEAN's main body of human rights cooperation, the ASEAN Intergovernmental Commission on Human Rights (AICHR),<sup>8</sup> is relatively young, created in 2009 with the aim of increasing governments' cooperation on human rights. This was followed by the ASEAN Human Rights Declaration (AHRD) in 2012.<sup>9</sup> Although ASEAN states have in-principle shown interest in improving regional cooperation on human rights with the establishment of the AICHR and the AHRD, the human rights environment in many parts of South East Asia has deteriorated in recent years, with limited unity shown in response. For example, ASEAN has not acted on concerns repeatedly raised by the United Nations Special Rapporteur on the human rights situation in Cambodia.<sup>10</sup> According to the Special Rapporteur, "the human rights situation in Cambodia remains dominated by the repression of political rights", with more than 200 cases of harassment and judicial action against members or supporters of the outlawed Cambodia National Rescue Party 2019.<sup>11</sup> The Special Rapporteur has called on the Cambodian government to respect its international human rights obligations, including ensuring that civil society organisations can work freely.<sup>12</sup> ASEAN members have supported measures restricting travel of opposition figures. Notably, Prime Minister Mahathir Mohamad of Malaysia has referred to human rights situation in Cambodia in stating that "we aren't interested in the internal affairs of any country."<sup>13</sup>

Additionally, the alleged genocide committed against the Rohingya community in Myanmar in 2017, and continued human rights abuses, has highlighted further challenges of using ASEAN in defending and promoting human rights.<sup>14</sup> Accountability for human rights abuses<sup>15</sup> against the Rohingya community in Rakhine State has seen some progression outside of ASEAN, following the decision of the International Court of Justice to impose provisional measures on Myanmar to prevent any acts that could violate the Genocide Convention in January 2020.<sup>16</sup> However, within ASEAN, with Myanmar being a member and no other organisational accountability mechanism in place, little has happened.<sup>17</sup>

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<sup>8</sup> ASEAN intergovernmental Commission on human rights, <https://humanrightsinasean.info/mechanism/asean-intergovernmental-commission-on-human-rights/>.

<sup>9</sup> ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the AHRD, 2012 [https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)

<sup>10</sup> Human Rights Council, 'Situation of human rights in Cambodia: Report of the Special Rapporteur on the situation of human rights in Cambodia', 27 August 2019, A/HRC/42/60. Available at: <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/KHIndex.aspx>. United Nations News, 'UN human rights expert alarmed at rise in Cambodia arrests', 8 November 2019. Available at: <https://news.un.org/en/story/2019/11/1050971>.

<sup>11</sup> Ibid.

<sup>12</sup> United Nations Office of the High Commissioner for Human Rights, 'Cambodia: UN expert concerned at escalating tensions and crackdown', 8 November 2019. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25260&LangID=E>.

<sup>13</sup> New York Times, 'With a Smile, Southeast Asian Nations Protect and Authoritarian', 7 November 2019. Available at: <https://www.nytimes.com/2019/11/07/world/asia/cambodia-hun-sen-mu-sochua.html>.

<sup>14</sup> UN News, 'UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar', 11 September 2017. Available at: <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>.

<sup>15</sup> Office of the High Commissioner for Human Rights, 'UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide', 23 July 2019. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E>.

<sup>16</sup> Application of the Convention on the prevention and punishment of the crime of genocide (The Gambia vs. Myanmar, International Court of Justice, 23 January 2020. Available at: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-02-00-EN.pdf>

<sup>17</sup> Kasit Piromya, The Diplomat, 'ASEAN Must Do More to Help the Rohingyas', 9 March 2020. Available at: <https://thediplomat.com/2020/03/asean-must-do-more-to-help-the-rohingyas/>.

ASEAN is composed of states that have different political regimes, ranging from authoritarian to democratic. This created difficulties even as the AICHR was being established.<sup>18</sup> AICHR was given limited authority in the protection and promotion of human rights in ASEAN member countries.<sup>19</sup> ASEAN's fundamental principles of non-intervention, respect for sovereignty, overt deference towards the promotion of national security and consensus in decision making<sup>20</sup> have also limited the AICHR's effectiveness.

This can partly be explained by the AICHR's design whereby states nominate their member representatives, who, as national government appointees, can end up protecting their governments instead of addressing human rights violations on individuals. In practice, when a country is chairing the Commission, thus driving the agenda, potential human rights abuses in that country are not considered. For example, while Singapore was chair of the AICHR in 2018, the government vowed to play an active role in defending human rights in the Southeast Asia region.<sup>21</sup> However, the position was not used as an opportunity to address its internal human rights concerns, such as freedom of expression, death penalty and LGBTI rights.<sup>22</sup> Moreover, the principle of non-intervention often prompts states to hold back on any criticism of other members on human rights abuses. The AICHR does not have an investigatory mechanism, with its activities largely focused on human rights consciousness-raising, often instigated by relevant national human rights commissioners. This is valuable and has the potential to strengthen human rights awareness across ASEAN states. Nevertheless, the AICHR lacks the capacity to enforce human rights compliance, or even to increase the cost of non-compliance.

The language in the AHRD is another limitation to its effectiveness. While the AHRD indicates that all human rights are universal, it qualifies this statement by supporting the differentiation of human rights on grounds of regional or national particularities.<sup>23</sup> Principle 7 of the AHRD<sup>24</sup> states that:

*"[T]he realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."*

This distinguishes the AHRD from international human rights treaties, including the Universal Declaration on Human Rights. Further, the AHRD also refers to national law, security, and morality as reasons for restricting human rights. While this is not unique in international human rights law,<sup>25</sup> it is frequently relied upon as a defence towards actions that infringe on human rights protections, such as with the treatment of the Rohingya in Myanmar.<sup>26</sup>

<sup>18</sup> HARA, Abubakar Eby. The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR). *Rev. bras. polit. int.* [online]. 2019, vol.62, n.1 - [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0034-73292019000100211&lng=en&nrm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292019000100211&lng=en&nrm=iso). Epub July 29, 2019. ISSN 0034-7329. <https://doi.org/10.1590/0034-7329201900111>.

<sup>19</sup> Ibid.

<sup>20</sup> Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24 February 1976. Available at:

[www.asean.org/?static\\_post=treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3](http://www.asean.org/?static_post=treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3).

<sup>21</sup> Chachavalpong Pavin, The Diplomat, 'Is Promoting Human Rights in ASEAN an Impossible Task', 19 January 2018. Available at: <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>.

<sup>22</sup> Amnesty International, Singapore country report, 2019. Available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24187&LangID=E>

<sup>23</sup> BUI, H. The ASEAN Human Rights System: A Critical Analysis. *Asian Journal of Comparative Law*, 11(1), (2016) 111-140.

<https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/asean-human-rights-system-a-critical-analysis/095F2F8A32A544F1AE6A2D89328F1E/core-reader>.

<sup>24</sup> ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the AHRD, 2012. Available at:

[https://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf)

<sup>25</sup> See for example, Article 19(3)(b) of the International Covenant on Civil and Political Rights.

<sup>26</sup> The Guardian, 'Myanmar military exonerates itself in report on atrocities against Rohingya', 14 November 2017. Available at:

<https://www.theguardian.com/world/2017/nov/14/myanmar-military-exonerates-itself-in-report-on-atrocities-against-rohingya>. For additional discussion on ASEAN human rights system, see: BUI, H. The ASEAN Human Rights System: A Critical Analysis. *Asian Journal of Comparative Law*, 11(1), (2016) 111-140. <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/asean-human-rights-system-a-critical-analysis/095F2F8A32A544F1AE6A2D89328F1E/core-reader>.

The European Union, the African Union and the Organisation of American States all have human rights courts in contrast to ASEAN. In the case of Africa and the Americas, these courts co-exist with regional commissions. The courts have the power to render legally binding decisions that can be enforced on a member state and all allow for individuals to appear against member states before third party adjudication.<sup>27</sup> In the case of the Americas, the Inter American Commission on Human Rights' role is to monitor and promote activities – including submit cases to the Court while the Court issues binding decisions to protect the rights in danger. Africa initially had only a Commission, but in 1998 a decision was taken to supplement the Commission with the African Human Rights Court.<sup>28</sup> While there has been some progression in institutional human rights development, ASEAN has still yet to establish a regional human rights court.

There are a range of factors that account for the differences between ASEAN and other regional systems. This submission is not to provide an explanation of the reasoning behind those differences. However, Save the Children is of the view that the discrepancies in regional protection systems for promoting human rights in South East Asia, make it even more incumbent upon Australia, as a regional power and a strong advocate of protecting and promoting human rights internationally, to look to other mechanisms, including a Magnitsky style targeted sanctions regime.

### **Pacific Islands Forum**

In contrast to ASEAN, PIF does not have a dedicated institution or declaration dedicated to the promotion and protection of human rights. However, human rights are mentioned as being part of the core values of PIF, as stated in the Biketawa Declaration:

*“...belief in the liberty of the individual under the law, equal rights for all citizens regardless of gender, race, colour, creed or political belief” and “upholding democratic processes and institutions which reflect national and local circumstances, including the peaceful transfer of power”<sup>29</sup>*

As such, human rights may be discussed in policy dialogues between states or can figure on the agenda of annual PIF meetings, reuniting all heads of governments. The Declaration of Biketawa relies on several tools to promote its values, such as utilising election observers.<sup>30</sup> Apart from the Biketawa Declaration, the promotion of human rights has been reinforced in the leaders vision published by the PIF Secretariat which include ‘the full observance of democratic values, and its defence and promotion of human rights’.<sup>31</sup>

Despite these commitments, examples of explicit cooperation on human rights within PIF are limited. The first obstacle is the structure and governance of the PIF itself. PIF does not have an institutionalised mechanism to cooperate on human rights nor does it have a human rights court, in contrast to other regional models previously cited. Second, similarly to ASEAN, PIF has a mixed record in being used as a platform for member states to respond to human rights issues. For example, while the coup in Fiji in 2006 did lead to suspension from PIF in 2009, no such action was taken following the coup in Fiji in 1987. The third obstacle is the complexity of

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<sup>27</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Article 3. Available at: [https://au.int/sites/default/files/treaties/36393-treaty-0019\\_-\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_establishment\\_of\\_an\\_african\\_court\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf). See also Article 29, Rules of procedure of the Inter-American Court of Human Rights. Available at: [https://www.oas.org/xxxivga/english/reference\\_docs/Reglamento\\_CorteIDH.pdf](https://www.oas.org/xxxivga/english/reference_docs/Reglamento_CorteIDH.pdf).

<sup>28</sup> HEYNS, Christof; PADILLA, David and ZWAAK, Leo. A schematic comparison of regional human rights systems: an update. Sur, Rev. int. direitos human. 2006, vol.3, n.4 pp.160-169. Available at: <http://dx.doi.org/10.1590/S1806-64452006000100010>

<sup>29</sup> Pacific Forum Secretariat, Biketawa declaration, 2000. Available at: <http://www.forumsec.org/biketawa-declaration/>

<sup>30</sup> Pacific Islands Forum Secretariat, 'Pacific Islands Forum to Observe the 2020 Vanuatu General Election', 11 March 2020. Available at: <https://www.forumsec.org/pacific-islands-forum-to-observe-the-2020-vanuatu-general-election/>.

<sup>31</sup> Stephanie Lawson, 'Australia, New Zealand and the Pacific Islands Forum: a critical review', Commonwealth & Comparative Politics, 55:2, 214-235. Available at: <https://doi.org/10.1080/14662043.2017.1280205>.



the relationship between Australia and the PIF. Australia and New Zealand are often accused in media statements and other platform of pursuing a neo-colonialist agenda in the region,<sup>32</sup> making it challenging at times to cooperate with some states. For example, Fiji has previously called for Australia or New Zealand to be removed as members of PIF.<sup>33</sup>

Despite these obstacles, increased cooperation on human rights within PIF is still possible. PIF's commitment to good governance and democracy<sup>34</sup> is linked to the human rights agenda. PIF's engagement on electorate observations demonstrates that the Forum is not only focused on enhancing economic partnerships, but also has a political agenda – however tenuous the way to move forward that agenda might be. In the case of the coup in Fiji in 2006, Australia and New Zealand applied sanctions from 2009 to 2014 in response to the military junta's refusal to organise elections. This was done alongside PIF suspending Fiji's membership.<sup>35</sup> The argument used by PIF at the time was to give a clear signal to the region that it disapproved of the removal of a lawfully elected government.<sup>36</sup> This example highlights how sanctions can potentially be combined with a multilateral response.

In another example highlight how PIF may be used to advance the promotion of human rights, in 2019 the question of human rights in West Papua was on the agenda of the annual PIF meeting. Civil society representatives advocated for PIF leaders to call on Indonesia to allow access for the United Nations High Commissioner for Human Rights in West Papua, following United Nations experts' reports of human rights abuses.<sup>37</sup> A resolution was passed supporting such a measure in the communique,<sup>38</sup> including an evidence-based, informed report on the situation before the next Pacific Islands Forum Leaders meeting in 2020. However, there is still no regional mechanism to monitor or report on progress in between meetings.

### **Using Magnitsky style law as part of Australia's engagement with PIF and ASEAN**

Save the Children considers that adopting a Magnitsky style law would give Australia an additional tool to meaningfully engage on human rights both in South East Asia and in the Pacific, while complementing activities the government pursues as a dialogue partner of ASEAN and a member of PIF. As the Foreign Policy White Paper of 2017 highlights, one of Australia's objectives is to contribute to an increasingly 'prosperous, outwardly focused, stable and resilient South East Asia'<sup>39</sup>. Similar objectives are contained in the 'Pacific Step-Up'.<sup>40</sup> Having Magnitsky style measures could assist in disincentivising human rights abuses in the region, supporting such objectives.

An appropriately framed Magnitsky style law, with clear sanctionable criteria based on international human rights law and international humanitarian law, would also help to further the human rights agenda, to which both ASEAN and PIF members have declared commitment. Acknowledging the challenges and limitations of the AHRD and Biketawa Declaration, it would provide an alternative accountability avenue in the region where such mechanisms are lacking. Additionally, with the increasing spread of Magnitsky style laws internationally, there is

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<sup>32</sup> Ibid

<sup>33</sup> Isaac Devison, NZ Herald, 'Fiji wants NZ ousted from Pacific forum, or China let in', 7 April 2015. Available at: [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11428607](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11428607)

<sup>34</sup> Pacific Forum Secretariat, Governance Section. Available at: <https://www.forumsec.org/governance/>

<sup>35</sup> Wadan Narsey, 'Bainimara and the Pacific Islands Forum: a storm in a calm ocean', 11 November 2014. Available at: <https://devpolicy.org/bainimarama-and-the-pacific-islands-forum-a-storm-in-a-calm-ocean-20141111/>

<sup>36</sup> Ibid

<sup>37</sup> Office of the High Commissioner for Human Rights, 'Indonesia: UN experts condemn racism and police violence against Papuans, and use of snake against arrested boy', 21 February 2019. Available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24187&LangID=E>

<sup>38</sup> Fiftieth Pacific Island Forum Communiqué, 13-16 August 2019. Available at: <https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>

<sup>39</sup> Australian Foreign Policy White Paper, 2017. Available at: <https://www.dfat.gov.au/sites/default/files/2017-foreign-policy-white-paper.pdf>

<sup>40</sup> Department of Foreign Affairs and Trade, 'Pacific Step-up', 2019. Available at: <https://www.dfat.gov.au/geo/pacific/Pages/the-pacific>

potential for Australia's adoption to assist in paving the way for the development of regional human rights monitoring mechanisms as a response.

### Question 3: Effectiveness of Canada's Magnitsky model

Committee member the Hon Kevin Andrews MP inquired on civil society perspectives of parliamentary oversight under the Canadian Magnitsky model. This included, how the review process works, annual reporting and any other related matters.

The Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) S.C. 2017, c. 21 (**the Canadian Act**) is the primary piece of legislation. The system is discretionary, enabling the Minister for Foreign Affairs to list individuals, based on the advice of officials. The Canadian Act does not include a role for the legislative branch in triggering consideration of specific sanctions. However, it does provide some review and reporting processes, as outlined in further detail below. There are several differences between the Canadian Act and legislation in the United Kingdom and United States with respect to parliamentary oversight and review mechanisms. Some provisions are not of a sufficiently high standard, such as the reporting process, while there are other measures which should be considered for the proposed Australian International Human Rights (Magnitsky Sanctions) Act, such as post-implementation legislative review. Save the Children reiterates the views provided in the hearing on 31 March 2020, that the Australian Parliament should be looking to create a best practice model, which includes the most suitable measures from legislation in a variety of foreign jurisdictions.

#### Reviewing legislation under Canada's Magnitsky Model

The process of reviewing legislation is outlined in section 16(1):

*“Review*

*16 (1) Within five years after the day on which this section comes into force, a comprehensive review of the provisions and operation of this Act and of the Special Economic Measures Act must be undertaken by the committees of the Senate and of the House of Commons that are designated or established by each House for that purpose.”*

Given the increasing importance and evolving nature of sanctions, noting rapid legislative development internationally, a parliamentary committee review process would be valuable to monitor the effectiveness of any new Magnitsky style laws in Australia. In this sense it is noted that section 16(1) of the Act picked up on recommendations by the Standing Committee on Foreign Affairs and International Development of the Canadian Parliament ahead of passage,<sup>41</sup> which states:

*“The Government of Canada should amend the Special Economic Measures Act and the Freezing Assets of Corrupt Foreign Officials Act to require a mandatory legislative review of the Acts by a parliamentary committee within 5 years of the amendments becoming law.”*

Save the Children is supportive of a mandated review process for the proposed International Human Rights (Magnitsky Sanctions) Act by an appropriate parliamentary committee, such as the Parliamentary Joint Committee on Human Rights, but is of the view that a review period of five years is too long. Save the Children supports the review process being three years,

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<sup>41</sup> See recommendation 11, Standing Committee on Foreign Affairs and International Development, 'A Coherent and Effective Approach to Canada's Sanctions Regimes: Sergei Magnitsky and Beyond', April 2017. Available at: <https://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP8852462/faaerp07/faaerp07-e.pdf>.

consistent with the recommendations of the Law Council of Australia.<sup>42</sup> This would provide greater opportunity to review the effectiveness of the legislation and identify any required amendments. Additionally, it would acknowledge the rapid pace of legislative developments in this space internationally. For example, it is noted that the United States moved from the Magnitsky Act 2012 to the Global Magnitsky Human Rights Accountability Act 2016, in only a few years.

**Recommendation 2:** The proposed International Human Rights (Magnitsky Sanctions) Act should be reviewed by an appropriate committee of the Parliament, such as the Parliamentary Joint Committee on Human Rights, three years post-implementation.

### Reporting of legislation under Canada's Magnitsky Model

The process of reporting on reviews is outlined in Section 16(2):

*“Report*

*(2) The committees referred to in subsection (1) must, within a year after a review is undertaken under that subsection or within any further time that may be authorized by the Senate or the House of Commons, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committees recommend.”*

The reporting process outlined in Section 16(2) is not a general annual reporting process on the operation of the Canadian Act. Instead, it is pursuant to Section 16(1) in requiring a report on the comprehensive review of the provisions and operation of the Canadian Act. While it is a positive measure, it is distinct from annual reporting mechanisms available under the Global Magnitsky Human Rights Accountability Act 2016 in the United States. Save the Children is of the view that in mandating a review process there should be a requirement for a report to be provided after the review, and that the time frame should be shorter - set to six months. This would enable any proposed amendments to be more quickly implemented following recommendations received.

**Recommendation 3:** The Government should be required to issue a report within six months following the three-year post-implementation review.

### Review of designated foreign nationals under Canada's Magnitsky Model

Reviews of designations by parliamentary committees are outlined in Section 16(3):

*“Review*

*(3) Committees of the Senate and the House of Commons that are designated or established by each House for that purpose may conduct a review concerning the foreign nationals who are the subject of an order or regulation made under this Act and submit a report to the appropriate House together with their recommendations as to whether those foreign nationals should remain, or no longer be, the subject of that order or regulation.”*

This provides the ability for Committees of the Senate and the House of Commons to review designated foreign nationals and submit a report with their recommendations as to whether

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<sup>42</sup> Law Council of Australia, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into whether Australia should enact legislation comparable to the United States Magnitsky Act 2012', 4 March 2020. Available at: <https://www.lawcouncil.asn.au/docs/5151703b-566d-ea11-9404-005056be13b5/3778%20-%20Use%20of%20Targeted%20sanctions%20to%20address%20human%20rights%20abuses.pdf>.

those foreign nationals should remain subject to orders. This process is valuable in complementing other oversight mechanisms with respect to ministerial discretion, as noted in Save the Children's submission.<sup>43</sup> Save the Children recommends its inclusion in the development of a Magnitsky style law. However, Save the Children understands from the Raoul Wallenberg Centre for Human Rights, a Montreal based civil society organisation, that this provision has not yet been used, nor have there been calls for it to be used to date.

**Recommendation 4:** A relevant committee of the Parliament should be enabled to send a report to the relevant Minister together with their recommendations as to whether those foreign nationals should remain, or no longer be, the subject of that order or regulation.

### Wallenberg All-party Human Rights Caucus

Acknowledging some of the gaps in parliamentary oversight, and to increase awareness and adoption of the Canadian Act, the Raoul Wallenberg Centre for Human Rights helped establish the Wallenberg All-party Human Rights Caucus (**the Caucus**).<sup>44</sup> This consists of parliamentarians from all parties and informally lobbies the Canadian government on Magnitsky matters. Save the Children has been advised by the Raoul Wallenberg Centre for Human Rights that this includes:

- endorsing and submitting stakeholder reports and evidence;
- spearheading parliamentary resolutions;
- delivering parliamentary speeches and petitions; and
- arranging for more substantive formal investigations and studies before relevant Parliamentary standing Committees.

Its operation may be considered somewhat akin to a more robust Parliamentary Friendship Group in the Australian Parliament. The degree of oversight and pressure able to be exerted by the Caucus is limited as it is not enshrined in the law, again similar to an Australian Parliamentary Friendship Group. While the Caucus has been a strong supporter of engagement on the Canadian Act, Save the Children does not recommend that a similar approach is adopted in Australia as a form of parliamentary oversight given its limitations.

### Parliamentary Oversight Gaps in Canada's Magnitsky Model

There are three main areas in the Canadian Act which are lacking in terms of parliamentary oversight:

- annual reports provided to parliament;
- mandating responses to reports from parliamentary committees; and
- outlining specific roles for civil society.

#### *Annual reporting process*

As noted above, the Canadian Act does not contain an annual reporting mechanism. This was recommended by the Standing Committee on Foreign Affairs and International Development of the Canadian Parliament ahead of passage:<sup>45</sup>

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<sup>43</sup> Ibid n5, p13-14.

<sup>44</sup> See for example, Raoul Wallenberg Centre for Human Rights, 'Historic Global Magnitsky Legislation Passes Unanimously', 31 March 2018. Available at: <https://www.raoulwallenbergcentre.org/newsfeed/2018/3/31/raoul-wallenberg-commemorative-day-63g7h-pf9k8>.

<sup>45</sup> See recommendation 10, Standing Committee on Foreign Affairs and International Development, 'A Coherent and Effective Approach to Canada's Sanctions Regimes: Sergei Magnitsky and Beyond', April 2017. Available at: <https://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP8852462/faaerp07/faaerp07-e.pdf>.

*“The Government of Canada should amend the Special Economic Measures Act to require the production of an annual report by the Minister of Foreign Affairs, to be tabled in each House of Parliament within six months of the fiscal year end, which would detail the objectives of all orders and regulations made pursuant to that Act and actions taken for their implementation.”*

However, despite this recommendation, such a reporting process was not introduced into the Canadian Act. It is noted that in the United States Pursuant to Section 1264 of the Global Magnitsky Human Rights Accountability Act of 2016 (Pub. L. 114-328, Title XII, Subtitle F), and in accordance with Executive Order 13818, “Executive Order Blocking the Property of Persons Involved in Serious Human Rights” that:<sup>46</sup>

- (a) The President shall submit to the appropriate congressional committees, in accordance with subsection (b), a report that includes-*
- (1) a list of each foreign person with respect to which the President imposes sanctions pursuant to section 1263 during the year preceding the submission of the report;*
  - (2) a description of the type of sanctions imposed with respect to each such person;*
  - (3) the number of foreign persons with respect to which the President*
    - (A) imposed sanctions under section 1263(a) during that year; and*
    - (B) terminated sanctions under section 1263(g) during that year;*
  - (4) the dates on which such sanctions were imposed or terminated, as the case may be;*
  - (5) the reasons for imposing or terminating such sanctions; and*
  - (6) a description of the efforts of the President to encourage the governments of other countries to impose sanctions that are similar to the sanctions authorized by section 1263.*
- (b) Dates for Submission.*
- (1) Initial report.--The President shall submit the initial report under subsection (a) not later than 120 days after the date of the enactment of this Act.*
  - (2) Subsequent reports.—*
    - (A) In general.--The President shall submit a subsequent report under subsection (a) on December 10, or the first day thereafter on which both Houses of Congress are in session, of—*
      - (i) the calendar year in which the initial report is submitted if the initial report is submitted before December 10 of that calendar year; and*
      - (ii) each calendar year thereafter.*
    - (B) Congressional statement.--Congress notes that December 10 of each calendar year has been recognized in the United States and internationally since 1950 as “Human Rights Day”.*

Section 1264 continues on to provide further information on the form of the report, including the ability for certain information to be provided in a classified annex, as well as availability, enabling the unclassified portion of the report to be made publicly available. Save the Children supports the development of a more comprehensive reporting process akin to the model contained in the United States legislation, requiring an annual report, which prescribes the format and outlines dates for submission. Further to evidence provided at the 31 March 2020 hearing, Save the Children supports reporting that details the reasons for imposing the sanctions, as per the United States model, but additionally refers to the applicable

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<sup>46</sup> Sections 1261-1265, Subtitle F, Public Law 114-328, of the FY17 National Defense Authorization Act. Available at: <https://www.govinfo.gov/content/pkg/PLAW-114publ328/html/PLAW-114publ328.htm>.

international human rights law and international humanitarian law provisions, where relevant.

**Recommendation 5:** The proposed International Human Rights (Magnitsky Sanctions) Act should include an annual reporting requirement for the Australian government to the appropriate parliamentary committee. The reporting process should be based upon in the Global Magnitsky Human Rights Accountability Act of 2016 (United States), while incorporating clear guidance on the reasons for imposing sanctions, such as the applicable international human rights law and international humanitarian law provisions, where relevant.

*Mandating responses to reports from parliamentary committees*

The Canadian Act does not have a requirement for annual reports, as noted above, but also does not include a provision requiring the Minister to consider and respond to reports or submissions from parliamentary committees. Information received from the Raoul Wallenberg Centre for Human Rights has identified this as a substantial deficiency.

Save the Children recommends additional parliamentary committee oversight that would include an ability to prepare reports regarding Magnitsky implementation as well as receive a response to such reports from the Minister. It is not proposed that the relevant committee would be given the responsibility to decide designations itself, but nonetheless their value and ability to support the Commonwealth department’s work, likely to rest mostly within the Department of Foreign Affairs and Trade (DFAT), should be incorporated into the Australian model. Save the Children considers that the Joint Standing Committee on Foreign Affairs, Defence and Trade would likely be well placed to undertake such work, noting that its resolution of appointment refers to its role in inquiring into and reporting on matters relating to foreign affairs, defence and trade.<sup>47</sup> Additionally, it is noted that the Human Rights Subcommittee of the Joint Standing Committee frequently meets with civil society organisations, including Save the Children, on specific human rights matters. To strengthen and clarify this role, in addition to any legislative reform, it may also be helpful to consider amending the Joint Standing Committee’s resolution of appointment to refer to their responsibility with respect to reporting and review of Magnitsky style legislation.

Furthermore, Save the Children supports additional oversight to ensure that all reports prepared by the relevant parliamentary committee on Magnitsky measures requires a government response within a set time period. It is proposed that this time period would be no more than three months and laid out in legislation. Such an approach would be somewhat similar to functions held by the Petitions Committee of the Parliament of the United Kingdom, whereby the Petitions Committee may undertake investigation and prepare a report following a petition and subsequently provide recommendations to government. The government is expected to respond within 90 days, consistent with standing order 209.<sup>48</sup> To avoid a situation whereby responses by the government become bureaucratic form, additional details outlining the format of the government response should also be contained in the legislation. While this

<sup>47</sup> Parliament of Australia, ‘Resolution of Appointment’, July 2019. Available at:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Resolution](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Resolution).

<sup>48</sup> For further information, see ‘Parliament of the United Kingdom, ‘Commons Select Committee: Actions on Petitions’, 2020.

Available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/petitions-committee/petitions-information/>. Additionally, see Parliament of Australia, House of Representatives Standing Committee on Petitions, ‘Your voice can change our future: inquiry into the future petitioning of the house’, February 2019. Available at:

[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024237/toc\\_pdf/Yourvoicecanchangeourfuture.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024237/toc_pdf/Yourvoicecanchangeourfuture.pdf;fileType=application%2Fpdf). Another somewhat analogous example, albeit not within parliamentary committees, is through the tabling of reports by independent statutory authorities and the government’s response. For example, in New Zealand, the government has an obligation to respond within the parliament to reports of the New Zealand Law Commission within 120 days if they do not accept the recommendations issued.

would involve additional resource commitments for DFAT (or any other relevant department) to respond, in Save the Children's view it is necessary to ensure that appropriate parliamentary oversight is provided towards the implementation of a Magnitsky style law.

**Recommendation 6:** The Joint Standing Committee on Foreign Affairs, Defence and Trade, or other appropriate committee, should be given the ability to prepare reports regarding Magnitsky implementation for the relevant Minister. All such reports should require a government response, utilising an appropriate format, within three months. Such requirements should be included in the proposed International Human Rights (Magnitsky Sanctions) Act.

**Recommendation 7:** Additional resources should be provided to the Department of Foreign Affairs and Trade to ensure that responses can be provided to parliamentary reports within three months. This should be part of additional resourcing provided to support agencies involved in sanctions implementation and enforcement, especially the Department of Foreign Affairs and Trade, following the enactment of the proposed International Human Rights (Magnitsky Sanctions) Act.

#### *Outlining specific roles for civil society*

A primary aim for the establishment for any new Magnitsky style law should be to strengthen the engagement of civil society organisations. With regard to the Canadian Act, Save the Children has been advised by the Raoul Wallenberg Centre for Human Rights that the system is relatively opaque, with limited role for civil society. In practice, designations are discretionary, falling on the Minister of Foreign Affairs to list individuals, based on the advice of staff in Global Affairs Canada, who are understaffed, underfunded and under pressure from a variety of other foreign policy priorities. However, there is no specific role provided in Section 16 of the Canadian Act for civil society contributions as part of parliamentary oversight.

Noting the gaps in the Canadian Act and Save the Children's comments in our submission with respect to civil society engagement,<sup>49</sup> Save the Children is of the view that civil society engagement should also be incorporated into parliamentary oversight processes. This could include requiring the relevant committee, possibly the Joint Standing Committee, to consider credible information provided by civil society organisations in the preparation of any reports. This could again be incorporated into the Magnitsky style laws. It would provide additional opportunities for civil society organisations to work closely with the parliament to fill potential information gaps and strengthen the presentation of information provided to the relevant department and subsequently the Minister.

**Recommendation 8:** The role of civil society in contributing to reports prepared by the Joint Standing Committee on Foreign Affairs, Defence and Trade, or other appropriate committee, should be specifically included in the International Human Rights (Magnitsky Sanctions) Act.

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<sup>49</sup> Ibid n5, p12-13.