

2019-2020-2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**AUTONOMOUS SANCTIONS AMENDMENT (MAGNITSKY-STYLE AND OTHER
THEMATIC SANCTIONS) BILL 2021**

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Foreign Affairs, Senator the Honourable Marise Payne)

THIS EXPLANATORY MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED.

AUTONOMOUS SANCTIONS AMENDMENT (MAGNITSKY-STYLE AND OTHER THEMATIC SANCTIONS) BILL 2021

OUTLINE

1. The Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021 (the Bill) will amend the *Autonomous Sanctions Act 2011* (the Act) to set out new thematic categories of conduct to which autonomous sanctions can be applied. The Bill makes clear that autonomous sanctions regimes, established under the *Autonomous Sanctions Regulations 2011* (the Regulations), can be either country-specific or thematic. The Bill also sets out the decision-making process for imposing targeted financial sanctions and travel bans on persons and entities under thematic sanctions regimes.
2. Autonomous sanctions are punitive measures, not involving the use of armed force, which a government imposes as a matter of foreign policy. They are highly targeted and intended to limit the adverse consequences of the situation of international concern and to influence and penalise those responsible for giving rise to the situations while minimising, to the extent possible, the impact on the general population.
3. They are called ‘autonomous’ sanctions to distinguish them from sanctions applied under international obligations arising from United Nations Security Council (UNSC) decisions. Autonomous sanctions may be used in situations which are not covered by UNSC sanctions or to supplement sanctions imposed by the UNSC. To date, Australia’s autonomous sanctions have been administered primarily via country-based sanctions regimes.
4. The measures included in the Bill implement key aspects of the Government’s response (tabled 5 August 2021) to the Joint Standing Committee on Foreign Affairs, Defence and Trade’s (JSCFADT’s) report on its inquiry into the use of sanctions to target human rights abuses, *‘Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?’*.
5. The Bill modernises Australia’s autonomous sanctions legislation by creating a framework to facilitate the establishment of new thematic sanctions regimes to enable Australia to respond flexibly and swiftly to a range of situations of international concern. The expansion of thematic autonomous sanctions regimes will provide Australia with an additional foreign policy tool that can be used to define, defend and demonstrate our values, and protect the international rules-based order.
6. The Bill provides for a review of operation of these amendments by the Joint Standing Committee on Foreign Affairs, Defence and Trade that must commence as soon as possible after the end of 3 years of the amendments provided for in this Bill coming into operation. The Committee must prepare a written report of the review which must be tabled in each House of Parliament.
7. The Bill inserts a new objects clause into the Act which sets out a non-exhaustive list of matters autonomous sanctions may address. The effect of this new clause is to expressly ensure that sanctions regimes established under the Regulations can be either country-specific or thematic. Without limiting what autonomous sanctions may address, country-specific sanctions may address matters of international concern in relation to one or more particular foreign countries, while thematic sanctions may address the proliferation of weapons of mass destruction; threats to international peace and security; malicious cyber activity; serious

violations or serious abuses of human rights; activities undermining good governance or the rule of law, including serious corruption; and serious violations of international humanitarian law.

8. Australia's existing country-specific sanctions regimes already involve a number of the 'themes' that will be introduced under this framework—including the proliferation of weapons of mass destruction, threats to international peace and security, and human rights abuses as they apply to particular country regimes. This Bill, however, will enable Australia to establish new thematic regimes that will not be restricted in their operation to any particular country. Should a person or entity meet the required listing criteria under a thematic regime, they can be sanctioned regardless of where the relevant conduct occurred.

9. While the JSCFADT's report focused on the introduction of human rights and corruption thematic sanctions, the new objects clause sets out a broader range of themes that sanctions may address, including activities undermining the rule of law and good governance, malicious cyber activity, and serious violations of international humanitarian law. The list is non-exhaustive and illustrative, and indicates the kinds of new thematic sanctions regimes that could subsequently be established under regulations. Identifying these categories of thematic sanctions in the objects clause will also bring us into line with key likeminded partners including the United States, the United Kingdom and Canada, all of which are increasingly using thematic sanctions to respond flexibly to issues of international concern, regardless of geographic location.

10. In expanding Australia's autonomous sanctions framework to include the ability to establish new thematic sanctions regimes, the Bill establishes specific decision-making processes for thematic sanctions listings. When making a thematic sanctions listing decision, the Minister for Foreign Affairs must consult and obtain the agreement in writing of the Attorney-General, as First Law Officer of the Commonwealth. The Minister for Foreign Affairs must also consult with such other Ministers as the Minister considers appropriate. While sanctions decisions are primarily based on foreign policy considerations, this decision-making process reflects the Attorney-General's portfolio responsibilities for thematic sanction subject matter such as human rights, corruption and international law. It also ensures that other Ministers with policy equities or interests relevant to the situation of international concern are consulted. Such provisions ensure that thematic listing decisions take account of all relevant foreign policy and other national interest considerations.

11. Consultation on the development of measures to be included in the Bill, including in the context of finalising the Government response to the JSCFADT report, has been undertaken with appropriate Commonwealth agencies including the Attorney-General's Department; the Departments of Defence, Finance, Home Affairs, and the Prime Minister and Cabinet; and the Treasury, as well as their relevant portfolio agencies. The proposed amendments set out in the Bill would not alter the existing regulatory framework that is set out in the Act. As such, the reforms will only have a minor regulatory impact (OBPR reference ID 43941).

FINANCIAL IMPACT

12. The establishment and administration of the new thematic regime will have an ongoing financial impact. Decisions about resourcing will be made by the Government.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

13. The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The full statement of compatibility with human rights for the Bill is included in this Explanatory Memorandum (**Attachment A**).

AUTONOMOUS SANCTIONS AMENDMENT (MAGNITSKY-STYLE AND OTHER THEMATIC SANCTIONS) BILL 2021

NOTES ON CLAUSES

Clause 1 Short title

14. Clause 1 provides for the short title of the Act to be the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* (the Act). The title of the Act acknowledges the significance of Sergei Magnitsky's injustice as the inspiration for the global Magnitsky movement.

Clause 2 Commencement

15. Subclause 2(1) provides for the commencement of the whole of the Act on the day after it receives Royal Assent.

16. Subclause 2(2) specifies that information in column 3 of the table at subclause 2(1) is not a part of the Act, and information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 Schedules

17. Clause 3 provides that legislation specified in a Schedule to the Act is amended or repealed as set out in the applicable items of the Schedule concerned, and any other item in a Schedule has effect according to its terms.

Clause 4 Review of operation of amendments

18. Clause 4 provides that the Joint Standing Committee on Foreign Affairs, Defence and Trade must commence review of the operation of the amendments made by this Act as soon as possible after the end of 3 years after this Act commences. The Committee must prepare a written report of the review and table the report in each House of the Parliament.

SCHEDULE 1—AMENDMENTS

Autonomous Sanctions Act 2011

Item 1

19. Item 1 amends the heading to section 3 of the Act to reflect that this provision sets out the objects of the Act. It is common drafting practice to have an objects clause to indicate the intended purpose of legislation and this is in line with the Government Response to the JSCFADT report.

Item 2

20. Item 2 is a technical amendment to reflect that item 4 introduces new subsections into section 3 of the Act.

Item 3

21. Item 3 amends section 3 of the Act to reflect a change in drafting terminology to refer to the ‘objects’ rather than ‘purposes’ of the Act.

Item 4

22. The purpose of item 4 is to make clear that autonomous sanctions can be country-based or thematic in nature.

23. Without limiting what autonomous sanctions may address, proposed subsection 3(2) provides that autonomous sanctions may address matters of international concern in relation to one or more particular countries. Also without limiting what autonomous sanctions may address, proposed subsection 3(3) provides that autonomous sanctions may address the proliferation of weapons of mass destruction; threats to international peace and security; malicious cyber activity; serious violations or serious abuses of human rights; activities that undermine good governance or the rule of law, including serious corruption; or serious violations of international humanitarian law.

Item 5

24. Item 5 is a consequential amendment to items 1 to 3 above and reflects that subsection 3 of the Act now refers to the objects of the Act rather than its main purposes.

Item 6

25. Item 6 introduces three new subsections to the specific regulation-making power set out in section 10 of the Act. Section 10 of the Act sets out the types of sanction measures that may be provided for by regulation, including the proscription of persons or entities (for specified purposes or more generally). Further, before the Governor-General makes regulations imposing sanctions, section 10 requires that the Minister for Foreign Affairs must be satisfied that the proposed regulations will facilitate the conduct of Australia’s relations with other countries or with entities or persons outside of Australia or will otherwise deal with matters, things or relationships outside Australia.

26. The effect of proposed subsection 10(4) is that, in relation to thematic sanctions, the Minister for Foreign Affairs must obtain the agreement of the Attorney-General in writing and must consult other Ministers as appropriate before designating a person or entity for the purpose of imposing targeted financial sanctions, or declaring a person for the purpose of imposing a travel ban. The requirement to consult the Attorney-General was recommended in the JSCFADT report and ensures that sanctions listings are necessary, consistent with the proposed reformed legislative framework and with the Attorney-General’s role as First Law Officer of the Commonwealth. As thematic sanctions are not country-specific, the requirement for broader ministerial consultation ensures that thematic sanctions decisions accord with broader government policy, and take account of all relevant foreign policy and other national interest considerations. In contrast, in relation to country-specific sanctions, there is no comparable consultation requirement before the Minister for Foreign Affairs designates a person or entity or declares a person. This is because broader government equities are considered at the time a country-specific sanctions regime is established, as such regulations are established to address specific, often temporal, situations of concern as they arise in relation to a specific country. By contrast, the additional consultation requirement is

appropriate for thematic sanctions listings pursuant to the Regulations, as they give standing authority to list in response to a range of international situations of concern, as they arise.

27. Similarly, the effect of proposed subsection 10(5) is that, in relation to thematic sanctions, the Minister for Foreign Affairs must also obtain the agreement of the Attorney-General in writing and must consult other Ministers as appropriate before making a legislative instrument under the Regulations that continues or revokes a designation or declaration.

28. Proposed subsection 10(6) provides that, where the Regulations give the Minister for Foreign Affairs the power to make a legislative instrument—such as when designating a person or entity for the purpose of imposing targeted financial sanctions, or declaring a person for the purpose of imposing a travel ban, or continuing or revoking such a designation or declaration—this power cannot be delegated to another person. This reflects existing government policy and recognises that decisions that have the potential to impact Australia's foreign policy should be exercised by the Minister personally.

Item 7

29. Item 7 provides that the agreement and consultation requirements for thematic sanction designations or declarations that will be inserted into the Act under proposed item 6 only applies to legislative instruments made on or after the commencement of this provision of the Bill. This means that the continuation of a proliferation of weapons of mass destruction listing ahead of its three-year automatic expiry provided for by the Regulations will be subject to the proposed agreement and consultation requirements set out in item 6. This process will also apply to the revocation of such a listing.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

AUTONOMOUS SANCTIONS AMENDMENT (MAGNITSKY-STYLE AND OTHER THEMATIC SANCTIONS) BILL 2021

1. The Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. The Bill will amend the Autonomous Sanctions Act 2011 (the Act) to set out new thematic categories of conduct to which autonomous sanctions can be applied. The Bill makes clear that autonomous sanctions regimes, established under the Autonomous Sanctions Regulations 2011 (the Regulations), can be either country-specific or thematic. The Bill also sets out the decision-making process for imposing targeted financial sanctions and travel bans on persons and entities under thematic sanctions regimes.

3. Autonomous sanctions are punitive measures, not involving the use of armed force, which a government imposes as a matter of foreign policy. They are highly targeted and intended to limit the adverse consequences of the situation of international concern and to influence and penalise those responsible for giving rise to the situations while minimising, to the extent possible, the impact on the general population.

4. They are called ‘autonomous’ sanctions to distinguish them from sanctions applied under international obligations arising from United Nations Security Council (UNSC) decisions. Autonomous sanctions may be used in situations which are not covered by UNSC sanctions or to supplement sanctions imposed by the UNSC. To date, Australia’s autonomous sanctions have been administered primarily via country-based sanctions regimes.

5. The measures included in the Bill implement key aspects of the Government’s response (tabled 5 August 2021) to the Joint Standing Committee on Foreign Affairs, Defence and Trade’s (JSCFADT’s) report on its inquiry into the use of sanctions to target human rights abuses, ‘*Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?*’.

6. The Bill modernises Australia’s autonomous sanctions legislation by creating a framework to facilitate the establishment of new thematic sanctions regimes to enable Australia to respond flexibly and swiftly to a range of situations of international concern. The expansion of thematic autonomous sanctions regimes will provide Australia with an additional foreign policy tool that can be used to define, defend and demonstrate our values, and protect the international rules-based order.

7. The Bill inserts a new objects clause into the Act which sets out a non-exhaustive list of matters autonomous sanctions may address. The effect of this new clause is to expressly ensure that sanctions regimes established under the Regulations can be either country-specific

or thematic. Without limiting what autonomous sanctions may address, country-specific sanctions may address matters of international concern in relation to one or more particular foreign countries, while thematic sanctions may address the proliferation of weapons of mass destruction; threats to international peace and security; malicious cyber activity; serious violations or serious abuses of human rights; activities undermining good governance or the rule of law, including serious corruption; and serious violations of international humanitarian law.

8. Australia's existing country-specific sanctions regimes already involve a number of the 'themes' that will be introduced under this framework— including the proliferation of weapons of mass destruction, threats to international peace and security, and human rights abuses. This Bill, however, will enable Australia to establish thematic regimes that will not be restricted in their operation to any particular country. This means that, should a person or entity meet the required listing criteria under a thematic regime, they can be sanctioned regardless of where the relevant conduct occurred.

9. While the JSCFADT's report focused on the introduction of human rights and corruption thematic sanctions, the new objects clause sets out a broader range of themes that sanctions may address, including activities undermining the rule of law and good governance, malicious cyber activity, and serious violations of international humanitarian law. The list is non-exhaustive and illustrative, and indicates the kinds of thematic sanctions regimes that could subsequently be established under regulations. Identifying these categories of thematic sanctions in the objects clause will also bring us into line with key likeminded partners including the United States, the United Kingdom and Canada, all of which are increasingly using thematic sanctions to respond flexibly to issues of international concern, regardless of geographic location.

10. In expanding Australia's autonomous sanctions framework to include the ability to establish new thematic sanctions regimes, the Bill establishes specific decision-making processes for thematic sanctions listings. When making a thematic sanctions listing decision, the Minister for Foreign Affairs must consult and obtain the agreement of the Attorney-General in writing, as First Law Officer of the Commonwealth. The Minister for Foreign Affairs must also consult with such Ministers as the Minister considers appropriate. This decision-making process will ensure that listings decisions take account of all relevant foreign policy and other national interest considerations.

Human rights implications

11. Australia has a proud history of protecting and promoting human rights globally, and implementation of the Bill will expand the range of tools available to the Government to respond to situations of international concern involving serious human rights violations and abuses.

12. Australia can, and already does, impose autonomous sanctions in response to situations of international concern within its existing country-based sanctions and existing thematic sanctions in relation to the proliferation of weapons of mass destruction. The expansion of the autonomous sanctions framework to include new thematic sanctions will build on this existing approach and enhance the Government's ability to respond rapidly to such situations, including to respond to serious violations and serious abuses of human rights.

13. The reforms do not change the overarching operation of the Act. Once these reforms are in force, the Government will be able to introduce new thematic sanctions regimes via amendments to the Regulations. The Government intends to establish thematic regimes under the Regulations to enable the Minister for Foreign Affairs to impose sanctions on persons and entities in response to serious violations or serious abuses of human rights, serious corruption and significant malicious cyber activity. The amendments to the Regulations will be accompanied by a separate Statement of Compatibility with Human Rights, which will address rights that are generally relevant to listings. Each legislative instrument making listings will also be accompanied by a separate Statement of Compatibility, which will address rights that are relevant to those particular listings.

14. Accordingly, the Bill itself does not engage any of the applicable rights or freedoms.

15. The Government recognises the importance of safeguarding our economy from the proceeds of the most egregious human rights violations and abuses. The amendments in the Bill provide the framework for Government to establish thematic sanctions regimes by regulation, and explicitly contemplate the use of thematic sanctions to respond to serious violations or serious abuses of human rights.

Conclusion

16. This Bill is compatible with human rights as the measures in the Bill do not raise any human rights issues.