

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 161, 2015**

Issued by the Authority of the Minister for Foreign Affairs

*Charter of the United Nations Act 1945*

*Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*

*Charter of the United Nations (Sanctions-Iraq) Regulations 2008*

The purpose of the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015* (the **Amendment Regulation**) is to amend the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008* in order to implement Resolution 2199 (2015) of the United Nations Security Council (UNSC).

Section 6 of the *Charter of the United Nations Act 1945* (the **Act**) provides that the Governor-General may make regulations for, and in relation to, giving effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the **Charter**) which Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Amendment Regulation gives effect in Australia to sanctions obligations arising from UNSC resolution 2199 (2015). Resolution 2199 (2015) concerning Syria and Iraq was adopted under Chapter VII of the Charter on 12 February 2015 and the measures are binding on Australia pursuant to Article 25 of the Charter. Paragraph 17 requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011.

The term ‘illegally removed’ is drawn directly from the terms of UNSCR 2199 (2015) and as such, Australia is under an international obligation to implement the terms of the UNSCR into Australian law. We consider that the term ‘illegally removed’ refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Iraqi, or international law.

The Regulations criminalise the present trade in illegally removed cultural property rather than their past removal and an offence does not arise unless a direction is issued. The Regulations do not change the status of legally removed property and only apply where no good title has been obtained by the fact that the goods were illegally removed.

The Amendment Regulation creates a strict liability offence, which is appropriate as the offence is only triggered if a person does not comply with the written directions regarding illegally removed cultural property issued by the Secretary of the Department of Foreign Affairs and Trade. There is no offence if no directions are issued. A person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put ‘on notice’ by the issuing of that direction

to return the item. As a result they have received sufficient notice of their obligations under the Regulations and have the opportunity to avoid unintentional contravention. It would be therefore unnecessary to impose a requirement to prove the individual's intention not to comply with the notice.

Further, strict liability is appropriate for these offences as the offences are not punishable by imprisonment, the offences are punishable only by a fine of below 60 penalty units and because a requirement to prove fault would reduce the effectiveness of the enforcement regime in deterring the trade in illegally removed Syrian and Iraqi cultural property. Honest and reasonable mistake of fact is available as a defence to strict liability offences under s9.2 of the Criminal Code.

The Amendment Regulation gives effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

No public consultation was undertaken in relation to the Amendment Regulation, as it implements Australia's international legal obligations arising from decisions of the UNSC.

Resolution 2199 (2015) was adopted under Article 41 of Chapter VII of the Charter and the measures are binding on Australia pursuant to Article 25 of that Charter. The relevant UNSC resolution can be found on the UN website ([www.un.org](http://www.un.org)).

Details of the Amendment Regulation are set out in the Attachment.

## **Statement of Compatibility with Human Rights**

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

*Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*

*Charter of the United Nations (Sanctions-Iraq) Regulations 2008*

The *Charter of the United Nations (Sanctions-Iraq) Regulations 2015* (the Amendment Regulation) 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 Amendment Regulation gives effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Amendment Regulation gives effect to paragraph 17 of resolution 2199 (2015) in relation to Iraq, by broadening the definition of ‘illegally removed cultural property’ in the *Charter of the United Nations (Iraq) Regulations 2008* to align with resolution 2199.

The Amendment Regulation engages human rights by assisting with international efforts to deprive terrorist organisations such as Da’esh/Islamic State/ISIL/ISIS from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property.

This Legislative Instrument is compatible with human rights because it advances the protection of human rights in Iraq.

## ATTACHMENT

### Details of *Charter of the United Nations Legislation (Sanctions—Iraq) Amendment Regulation 2015*

#### Section 1 – Name of Regulation

Section 1 would provide that the name of the regulation is the *Charter of the United Nations Legislation Amendment (Sanctions—Iraq) Regulation 2015*.

#### Section 2 – Commencement

Section 2 would provide that the regulation commences the day after the end of the period of 28 days beginning on the day the instrument is registered.

#### Section 3 – Authority

Section 3 would provide that the regulation is made under the *Charter of the United Nations Act 1945*.

#### Section 4 – Schedule(s)

Section 4 would provide that each instrument that is specified in a Schedule to the regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

#### Schedule 1 – Amendments

#### *Charter of the United Nations (Sanctions – Iraq) Regulations 2008*

#### **Item [1] – Regulation 4, insert new definition**

Item [1] would insert the text ‘*Arts Department* means the Department administered by the Minister administering the *Protection of Moveable Cultural Heritage Act 1986*.

#### **Item [2] – Regulation 4 (definition of *illegally removed cultural property*)**

Item [2] would repeal the definition and substitute ‘*illegally removed cultural property* means an item of: (a) Iraqi cultural property; or (b) archaeological, historical, cultural, rare scientific, or religious, importance; that has been illegally removed from Iraq on or after 6 August 1990.’

#### **Item [3] – After paragraph 9(1)(a), insert new subparagraph**

Item [3] would insert a new subparagraph (aa) ‘the Secretary of the Arts Department; or’.

#### **Item [4] – Subregulation 9(2) repeal the note and substitute new note**

Item [4] would repeal the note and substitute ‘Note: If notified about an item under subregulation (1) the Departments and police will work together to determine whether

the item is illegally removed cultural property. If satisfied it is, the Department will arrange for its eventual safe return to an appropriate institution in Iraq.’

**Item [5] – At the end of regulation 9, add a new section**

Item [5] would add a new section ‘(3) A person commits an offence of strict liability if: (a) arrangements referred to in subregulation (2) applies to the person; and (b) the person fails to comply with the arrangements. Penalty: 50 penalty units’.

**Item [6] – Paragraph 10(3)(b), repeals the paragraph and substitutes a new paragraph**

Item [6] would repeal Paragraph 10(3)(b) and would substitute it with a new paragraph ‘(b) the other body corporate or entity contravenes subregulation (1)’.

**Item [7] – At the end of Part 2, add a new section**

Item [7] would add a new section ‘12A Compensation for acquisition of property’ which would stipulate that (1) if the operation of that Part would result in the acquisition of property otherwise than on just terms, the Commonwealth would be liable to pay a reasonable amount of compensation and (2) if no agreement is reached, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.