

EXPLANATORY STATEMENT

Charter of the United Nations Act 1945

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2021 (No. 1)

The purpose of the *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2021 (No. 1)* (the Amendment Declaration) is to make a consequential amendment to the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* (the Declaration) to reflect the making of the *Charter of the United Nations Legislation Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

Subsections 27(1) and (5) of the *Charter of the United Nations Act 1945* (the Act) provide, respectively, that individuals and bodies corporate commit an offence if they engage in conduct that contravenes a UN sanction enforcement law. The term ‘UN sanction enforcement law’ is defined in section 2 of the Act to mean a provision that is specified in an instrument under subsection 2B(1) of the Act. Section 2B provides that the Minister may, by legislative instrument, specify a provision of a law of the Commonwealth to be a UN sanction enforcement law to the extent that the provision gives effect to decisions that the United Nations Security Council has made under Chapter VII of the *Charter of the United Nations* (Charter), which Australia is required to carry out pursuant to Article 25 of the Charter.

The Declaration gives effect to certain provisions of the United Nations Security Council Resolutions (UNSCR) 2507 (2020) and UNSCR 2536 (2020) for the Central African Republic; UNSCR 2293 (2016) as renewed by UNSCR 2478 (2019) and UNSCR 2528 (2020) for the Democratic Republic of Congo; UNSCR 2551 (2020) for Somalia and UNSCR 2253 for ISIL, Da’esh and Al-Qaida. Through Item 1 of Schedule 1 of the Declaration, the Minister substituted the existing Schedule 1 of the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* with a replacement Schedule 1. The replacement Schedule 1 specifies the provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to subsection 2B(1) of the Act for the purposes of section 27 and related provisions of the Act. The substituted Schedule includes references to all of the provisions of the Regulations that are declared to be UN sanction enforcement laws. Specifically, it updates the permit granting provisions for the *Charter of the United Nations (Sanctions— Central African Republic) Regulation 2014*, the *Charter of the United Nations (Sanctions— Democratic Republic of the Congo) Regulations 2008* and the *Charter of the United Nations (Sanctions—Somalia) Regulations 2008* as well as extending the sanctions measures imposed under the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008*. It also updates the reference to the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008* with the *Charter of the United Nations (Sanctions—ISIL (Da’esh), and Al-Qaida) Regulations 2008*. This ensures that the name of the Regulations is accurately reflected in the Declaration following amendments to give effect to United Nations Security Council Resolution (UNSCR) 2253. The amendments to the Regulations mean that measures previously imposed by the UNSC also apply to members of the Islamic State of Iraq and the Levant (ISIL, also known as Da’esh). The preamble to UNSCR 2253 notes that the Security Council was acting under Chapter VII of the Charter.

No public consultation was undertaken pursuant to section 17 of the *Legislation Act 2003* before this instrument was made as it represents a minor amendment. In addition, the instrument implements Australia's international legal obligations arising from a decision of the United Nations Security Council.

The Declaration is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as set out in Attachment A.

Authority: Section 6 of the
*Charter of the United
Nations Act 1945*

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 (UN Sanction Enforcement Law) Amendment Declaration 2021 No.1 (the Declaration)

This legislative instrument 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 Declaration

The *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2021 (No. 1)* (the Declaration) makes a consequential amendment to the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* to reflect the making of the *Charter of the United Nations Legislation Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations). This has the effect that the following sections are declared as ‘UN sanction enforcement laws’, meaning that contravening these prohibitions may, pursuant to section 27 of the *Charter of the United Nations Act 1945*, result in a penalty of imprisonment:

- Section 8, 10, 11A and 11B in the *Charter of the United Nations (Sanctions—Central African Republic) Regulation 2014*
- Section 8, 9, 10 and 11 in the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008*
- Section 8, 10, 12 and 13 in the *Charter of the United Nations (Sanctions—Democratic Republic of the Congo) Regulations 2008*
- Section 8, 10, 12, 13, 14 and 15A of the *Charter of the United Nations (Sanctions—Somalia) Regulations 2008*

Human rights compatibility

The Declaration ensures that persons and entities who breach the United Nations Security Council (UNSC) arms embargo, imposed under UNSC Resolution 2507 and UNCR 2536 for the Central African Republic, UNSCR 2293, 2478 and 2528 for the Democratic Republic of Congo, UNSCR 2551 for Somalia and UNSCR 2253 for ISIL (Da’esh and Al-Qaida) will be subject to UNSC sanctions measures.

The Declaration advances human rights by ensuring that certain activities which may hinder the peace process and human rights in the Central African Republic, the Democratic Republic of Congo, ISIL (Da’esh and Al-Qaida) and Somalia (including the supply of arms or related materiel or the provision of related services) are subject to UNSC sanction measures. The Declaration also advances human rights by extending measures previously imposed by the UNSC to apply to members of the Islamic State of Iraq and the Levant (ISIL, also known as Da’esh) thereby continuing

the fight against terrorism and promoting the protection of human rights and international peace.

The Parliamentary Joint Committee on Human Rights (PJCHR) has accepted that the use of sanctions to apply pressure to regimes and individuals with the objective of ending the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. However, it has emphasised that Australia's sanctions regimes should be proportionate to their stated objective.

The Regulations, insofar as they relate to the Declaration, engage the following human rights:

- the right to security of the person and freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to a fair trial and fair hearing in Article 14 of the ICCPR.

Right to security of the person and freedom from arbitrary detention

Article 9 of the ICCPR protects the right to liberty, including the right not to be arbitrarily detained. The notion of arbitrariness incorporates elements of inappropriateness, injustice and lack of predictability.

Report

The PJCHR has previously expressed the view that regulations which are specified as 'UN sanctions enforcement laws' under the Declaration may engage and limit the right to liberty, because they may result in a penalty of imprisonment for a person.

In its Report No. 11 of 2017, the PJCHR noted that Australia's human rights obligations require that interferences with a person's human rights must have a clear basis in law, meaning that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. The PJCHR further noted that measures limiting the right to liberty must be sufficiently precise such that people who would potentially be subject to them are aware of the consequences of their actions.

Permissible limitations

The Regulations introduce prohibitions that, respectively, prohibit the making of a sanctioned supply or the provision of a sanctioned service. Because these prohibitions are specified as a 'UN sanction enforcement law' under the Declaration, contravening these prohibitions may, under Part 5 of the *Charter of the United Nations Act 1945* (the Act), result in a penalty of imprisonment and, accordingly, engage the right to liberty.

The Government considers that any limitation on human rights that may arise as a consequence of these prohibitions constituting a UN sanction enforcement law is permissible and consistent with Australia's obligations under international human rights law.

The new prohibitions are clearly defined in the Regulations which are available on the Federal Register of Legislation (<https://www.legislation.gov.au/Home>).

The Regulations delineate the application of the prohibitions to ensure the prohibitions can be readily understood. The Regulations have the legitimate aim of responding to the widespread human suffering caused by the failure of the leaders of the Central African Republic, the Democratic Republic of Congo, and Somalia to bring an end to internal political and military hostilities. The Regulations, in particular those relevant to ISIL (Da'esh and Al-Qaida) also have the legitimate aim of extending measures previously imposed by the UNSC to also apply to members of the Islamic State of Iraq and the Levant (ISIL, also known as Da'esh) thereby continuing the fight against terrorism and promoting international peace and security.

The position of the Government is that the prohibitions in the Regulations, specified as a 'UN sanction enforcement law' under the Declaration, are a reasonable, necessary and proportionate means of achieving the legitimate objective of the Regulations, and implementing a binding decision of the UNSC.

Right to a fair trial and fair hearing: presumption of innocence

Article 14(1) of the ICCPR protects the right to a fair trial and a fair hearing. The right concerns procedural fairness, and applies where rights and obligations, such as personal property and other private rights, are to be determined. Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

Report

The PJCHR has previously expressed the view, with respect to sanctions designations or declarations made under Australian sanctions law that are not subject to merits review, that Article 14 of the ICCPR is engaged in so far as they limit the avenues available to challenge the decision. The PJCHR *Guidance Note 2: Offence provisions, civil penalties and human rights* notes that, as strict liability offences allow for the imposition of criminal liability without the need to prove fault, strict liability offences interact with the presumption of innocence in Article 14(2) of the ICCPR.

Permissible limitations

With respect to the right to a fair hearing, the Government's position is that any limitation on the access to merits review is justified. The Regulations and Declaration have the legitimate objective of responding to the failure of Central African Republic, the Democratic Republic of Congo and Somalia leaders to bring an end to the hostilities in their respective countries, which have resulted in widespread human suffering.

The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved. Further, judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976*.

With respect to the presumption of innocence, the PJCHR Guidance Note acknowledges that a strict liability offence will not necessarily be inconsistent with

the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The Regulations provide that strict liability applies, respectively, to the circumstance where the making of the sanctioned supply is not authorised by a permit or where the provision of the sanctioned service is not authorised by a permit. The application of strict liability to this element of the prohibitions means that the prosecution will only need to prove that a permit does not exist. The defendant will not be able to argue that the conduct has been permitted in some other way, for example through a statement by the Minister which could be taken as de facto authorisation to engage in conduct that is prohibited under the Act.

The position of the Government is that the Regulations and Declaration are consistent with Article 14 as the strict liability in the Regulations is reasonably targeted to achieve the legitimate purpose of preventing a spurious defence that a statement of the Minister could be taken as de facto authorisation to engage in conduct that is prohibited under the *Charter of the United Nations Act 1945*, in addition to the overarching objectives of the UNSC arms embargo for the Central African Republic, the Democratic Republic of Congo and Somalia.

The Regulations provide that the defendant bears the evidential burden in relation to a permit granted by a foreign country for a supply, sale or transfer in or from a foreign country and in relation to a permit granted by a foreign country for a service provided in a foreign country.

The shifting of the evidentiary burden to the defendant in the Regulations is justified on the basis that foreign permits granted to the defendant would be peculiarly within the defendant's knowledge.

Conclusion

In expanding sanctions in relation to the Central African Republic, Somalia, the Democratic Republic of Congo and ISIL (Da'esh and Al-Qaida), the Regulations have the legitimate aim of demonstrating the international community's condemnation of the continued hostilities and violation of human rights in the Central African Republic, Somalia and the Democratic Republic of Congo. The Regulations also have the legitimate aim of extending measures previously imposed by the UNSC to also apply to members of the Islamic State of Iraq and the Levant (ISIL, also known as Da'esh) thereby continuing the fight against terrorism and promoting international peace and security. Accordingly, the Government considers that the Regulations are compatible with human rights because they promote the protection of human rights and implement binding decisions of the UNSC, which Australia is required as a matter of international law to implement. To the extent it may limit human rights, the Government considers the measures are reasonable, necessary and proportionate.