

## **Explanatory Statement**

Issued by the Authority of the Minister for Foreign Affairs

### *Charter of the United Nations Act 1945*

#### Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022

The purpose of the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 (the Instrument) is to list one person and 13 entities for counter-terrorism financing sanctions under Part 4 of the *Charter of the United Nations Act 1945* (the Act).

The Act provides legislative approval for the Charter of the United Nations (the Charter) in Australian law. Part 4 of the Act gives effect to United Nations Security Council (UNSC) decisions made under Chapter VII of the Charter that relate to terrorism and dealing with assets in relation to terrorists. Australia is required under Article 25 of the Charter to carry out such UNSC decisions, insofar as those decisions require Australia to apply measures not involving the use of armed force.

The Act makes provision for, among other things, the listing of persons or entities involved in the commission of terrorist acts. This regime implements Australia's international obligation to cooperate on the prevention of terrorist financing.

Section 15 of the Act, read in conjunction with subregulation 20(1) of the Charter of the United Nations (Dealing with Assets) Regulations 2008 (Dealing with Assets Regulations), obliges the Minister for Foreign Affairs (the Minister) to list a person or entity for targeted financial sanctions, if the Minister is satisfied on reasonable grounds they are a person or entity mentioned in paragraph 1(c) of UNSC Resolution 1373 (2001) (UNSCR 1373). That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

UNSCR 1373 is published on the following website ([www.undocs.org/S/RES/1373\(2001\)](http://www.undocs.org/S/RES/1373(2001))) and can be freely accessed and used by members of the public.

### *Consideration of human rights*

The Instrument advances human rights by preventing and suppressing terrorist acts, ensuring that the person and entities listed are denied access to assets that could be used to carry out or facilitate terrorist acts. Australia complies with its obligations under international human rights laws, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

A Statement of Compatibility with human rights is at Attachment A.

### *Effect of the Instrument*

The effect of the Instrument is that the person and entities set out in Schedule 1 of the Instrument are subject to targeted financial sanctions under section 15 of the Act. The listings were made under section 15 of the Act on the basis that the Minister was satisfied the person and entities meet the listing criteria set out in subregulation 20(1) of the Dealing with Assets Regulations. That is, the person is a person mentioned in paragraph 1(c) of UNSCR 1373.

The effect of targeted financial sanctions under the Act is to:

- prohibit persons from using or dealing with assets owned or controlled by a listed person or entity unless the Minister has granted a sanctions permit authorising them to do so;
- prohibit persons from making an asset available directly or indirectly to a listed person or entity unless the Minister has granted a sanctions permit authorising them to do so.

Listings under section 15 of the Act cease to have effect after three years (subsection 15A(1) of the Act), unless the Minister declares that a listing continues to have effect (subsection 15A(2) of the Act). Rather than make such a declaration, the Minister may alternatively make a new listing that is the same in substance as another listing (subparagraph 15A(6)(c)).

On this occasion, the Minister decided to make a new listing under section 15 of the Act to enable the listing of the one person and 13 entities to be included in a single compilation instrument of listed persons and entities under Part 4 of the Act. While listings under Part 4 of the Act have historically appeared across multiple instruments, the Department of Foreign Affairs and Trade (DFAT) intends to consolidate listings under Part 4 of the Act into one instrument over time. This will assist the public in accessing information on listings under Part 4 of the Act.

Listings may be revoked under section 16 of the Act at the Minister's own instigation or on application by the listed person or entity.

Further details of the Instrument are set out in [Attachment B](#).

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required for listing instruments of this nature (OBPR reference: OBPR22-01748).

### *Consultation*

The measures imposed through this Instrument were subject to thorough vetting by Australian Government agencies as well as consultation with relevant international partners.

In accordance with standard practice, DFAT also invited submissions from listed persons and entities or an authorised representative relevant to the Minister's consideration of their listing under Part 4 of the Act. The invitation was posted on the DFAT website. The consultation period opened on 22 June 2022 and closed at 5.00pm AEST on 20 July 2022. No submissions were received.

**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 (Listed Persons and Entities) Amendment (No. 2) Instrument 2022**

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 Legislative Instrument**

The purpose of the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 (the Instrument) is to list one person and 13 entities for counter-terrorism financing sanctions under Part 4 of the *Charter of the United Nations Act 1945* (the Act).

The Act provides legislative approval for the Charter of the United Nations (the Charter) in Australian law. Part 4 of the Act gives effect to United Nations Security Council (UNSC) decisions made under Chapter VII of the Charter that relate to terrorism and dealing with assets in relation to terrorists. Australia is required under Article 25 of the Charter to carry out such UNSC decisions, insofar as those decisions require Australia to apply measures not involving the use of armed force.

The Act makes provision for, among other things, the listing of persons or entities involved in the commission of terrorist acts. This regime implements Australia's international obligation to cooperate on the prevention of terrorist financing.

Section 15 of the Act, read in conjunction with subregulation 20(1) of the Charter of the United Nations (Dealing with Assets) Regulations 2008 (Dealing with Assets Regulations), obliges the Minister for Foreign Affairs (the Minister) to list a person or entity for targeted financial sanctions if the Minister is satisfied on reasonable grounds they are a person or entity mentioned in paragraph 1(c) of UNSC Resolution 1373 (2001) (UNSCR 1373). That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

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Under section 17 of the Act, a listed person or entity, or their authorised representative, may apply in writing to the Minister at any time to have the listing revoked.

The human rights compatibility of the Instrument is addressed by reference to each of the human rights engaged below.

**Human rights implications**

This Instrument engages the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

- the right to life (Article 6 of the ICCPR);

- the right to freedom of thought, conscience and religion (Article 18 of the ICCPR);
- the right to freedom from the advocacy of national, racial or religious hatred (Article 20 of the ICCPR);
- the right to self-determination, including to freely dispose of natural wealth and resources (Article 1 of the ICCPR and Article 1 of the ICESCR);
- the right to an adequate standard of living (Article 11(1) of the ICESCR); and
- the right to privacy (Article 17 of the ICCPR).

It is well accepted that international human rights law obligations are owed to individuals only, and are not owed to non-natural persons, such as bodies corporate or bodies politic. This statement considers the extent to which the measures in Part 4 of the Act impact on the human rights of individuals located in Australia. In this context, it is noted that the person listed for counter-terrorism financing sanctions has not been in Australia at any time during their listing.

*The right to life; to freedom of thought, conscience and religion; and to freedom from the advocacy of national, racial or religious hatred*

The Instrument promotes the right to life; to freedom of thought, conscience and religion; and to freedom from the advocacy of national, racial or religious hatred.

The Instrument's effect is the prevention and suppression of terrorist acts. Counter-terrorism financing sanctions imposed in this Instrument will ensure that the person listed is denied access to assets that could be used to carry out or facilitate terrorist acts which may take lives, promote a particular thought, conscience or religion through acts of violence (thereby limiting the rights of others) or advocate for national, racial or religious hatred.

Counter-terrorism financing sanctions therefore promote human rights by reducing the threat of terrorist acts.

*The right to self-determination, including to freely dispose of natural wealth and resources*

Article 1 of the ICCPR and Article 1 of the ICESCR provide a right to self-determination, including to freely dispose of natural wealth, resources, and assets.

The effect of counter-terrorism financing sanctions is that members of the public are unable to provide assets to those listed for targeted financial sanctions under section 15 of the Act. It also means that a person (including listed persons) who holds an asset owned or controlled by a listed person is unable to use, or deal with, that asset.

The objective of this Instrument is to give effect to Australia's international obligation to suppress terrorist financing. The imposition of targeted counter-terrorism financing sanctions through the listing of persons and entities which participate in or facilitate terrorist acts helps achieve this objective by denying such persons or entities the financial means to undertake terrorist activities.

Listed persons and entities may apply for their designation to be revoked under section 17 of the Act. The application must set out the circumstances relied upon to justify the application. To assist with an application, the Department of Foreign Affairs and Trade will provide a listed person or entity, or their authorised representative, with an unclassified statement of reasons for the listing, upon written request.

Australia's counter-terrorism financing sanctions listings are also subject to periodic review. Listings under section 15 of the Act cease to have effect after three years (subsection 15A(1) of the Act), unless the Minister declares that a listing continues to have effect (subsection 15A(2) of the Act).

Rather than make such a declaration, the Minister may alternatively make a new listing that is the same in substance as another listing (subparagraph 15A(6)(c)).

The measures in the Instrument which may limit a right to self-determination are reasonable, necessary and proportionate in achieving the objective of suppressing terrorism financing, and complying with Australia's international obligations.

#### *The right to an adequate standard of living*

The right to an adequate standard of living is contained in Article 11(1) of ICESCR and requires States to ensure the availability and accessibility of the resources that are essential to the realisation of the right: namely, food, water, and housing. Article 4 of the ICESCR provides that this right may be subject to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. To be consistent with the ICESCR, limitations must be proportionate.

Any limitation on the enjoyment of Article 11(1) of the ICESCR, to the extent that it occurs, is justified. Under subsections 22(3) and 22(3A) of the Act the Minister may, on their own initiative, authorise an asset to be made available to a listed person, or authorise a 'freezable asset' (including an asset owned by a listed person) to be used or dealt with in a specified way.

Under subsections 22(3) and 22(3A) of the Act, and regulations 30 and 31 of the Dealing with Assets Regulations, the Minister may also, upon application by a listed person, authorise the use or dealing with a listed person's assets where the use or dealing is a 'basic expense dealing', a 'contractual dealing' or an 'extraordinary expense dealing'. These dealings may also be authorised by the Minister on their own initiative. This would enable a listed person to access and pay for basic resources including food, housing, and medical treatment. Such authorisations reflect the permitted dealings in relation to listed persons and their assets that are allowed under UNSC Resolution 1452, which cover things such as food, rent or mortgage, medicine, legal fees and utilities.

In the event that a listed person had family members in Australia who may be indirectly adversely affected by a person's listing, such consequences could be mitigated by the Minister authorising dealings between them and the listed person.

This process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1) of ICESCR.

#### *The right to privacy*

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. The use of the term 'arbitrary' in the ICCPR means that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the individual circumstances. Arbitrariness connotes elements of injustice, unpredictability, unreasonableness, capriciousness and 'unproportionality'.<sup>1</sup>

The Instrument is not an unlawful interference with an individual's right to privacy as the listings were made under section 15 of the Act which provides that the Minister must list a person or entity if satisfied on reasonable grounds that they are a person or entity mentioned in paragraph 1(c) of UNSCR 1373. That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

The listings also do not represent an arbitrary interference with an individual's right to privacy. An interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in

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<sup>1</sup> Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993) 178.

the individual circumstances. In listing a person under section 15 of the Act for counter-terrorism financing sanctions, the Minister uses predictable, publicly available criteria that has been set by the UNSC and which is reflected in legislation.

Accordingly, counter-terrorism financing sanctions imposed by the Minister through the listing of specific persons under section 15 of the Act are reasonable, necessary and proportionate to the international obligation to prevent the financing of terrorists and terrorist entities. Therefore, any interference with the right to privacy created by the operation of the Instrument is not arbitrary or unlawful and, therefore, is consistent with Australia's obligations under Article 17 of the ICCPR.

## **Conclusion**

The Instrument is compatible with human rights because counter-terrorism financing sanctions which prevent and suppress terrorism financing promotes the right to life, to freedom of thought, conscience and religion, and to freedom from the advocacy of national, racial or religious hatred. To the extent that it may limit human rights, such limitations are reasonable, necessary and proportionate.

**Details of the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022**

**Section 1 – Name**

This section provides that the title of the instrument is the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 (the Instrument).

**Section 2 – Commencement**

This section provides for a commencement date of 16 September 2022. This commencement date ensures the continuous listing of the person and entities mentioned in Schedule 1, whose listings would otherwise cease to have effect on the third anniversary of the day on which the listing took effect under subsection 15A(1) of the *Charter of the United Nations Act 1945* (the Act).

**Section 3 - Authority**

This section provides that the Instrument is made under section 15 of the Act.

**Section 4 - Schedules**

This section provides that each instrument that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

**Schedule 1 – Amendments**

***Charter of the United Nations (Listed Persons and Entities) Instrument 2022***

Item 1 – In the appropriate position in clause 1 of Schedule 1 (table)

Schedule 1 of the Charter of the United Nations (Listed Persons and Entities) Instrument 2022 (the Principal Instrument) sets out entities that, by operation of section 5 of the Principal Instrument, are listed by the Minister for Foreign Affairs (the Minister) for counter-terrorism financing sanctions.

This item adds 13 entities to Schedule 1 of the Principal Instrument. Babbar Khalsa and the International Sikh Youth Federation are Sikh secessionist entities. Continuity IRA and Real IRA are Irish republican paramilitary entities. Liberation Tigers of Tamil Eelam is a Tamil separatist militant group. The Loyalist Volunteer Force, Orange Volunteers, Red Hand Defenders and Ulster Defence Association are Irish loyalist paramilitary entities. The New People's Army / Communist Party of the Philippines is an entity seeking to create a communist state within the Philippines. Hamas and Palestinian Islamic Jihad are violent extremist entities. The Kurdistan Workers' Party seek the creation of an independent Kurdish state.

These entities are listed for counter-terrorism financing sanctions on the basis that the Minister is satisfied on reasonable grounds that they are entities mentioned in paragraph 1(c) of UNSC Resolution 1373 (2001) (UNSCR 1373). That is, they are entities owned or controlled by persons who commit, attempt to commit, or participate in or facilitate the commission of, terrorist acts; entities acting on behalf of, or at the direction of persons who commit, attempt to commit, or participate in or facilitate the commission of, terrorist acts; or entities acting on behalf of, or at the direction of an

entity owned or controlled by persons who commit, attempt to commit, or participate in or facilitate the commission of, terrorist acts.

Item 2 – In the appropriate position in clause 1 of Schedule 2 (table)

Schedule 2 of the Principal Instrument sets out persons that, by operation of section 6 of the Principal Instrument, are listed by the Minister for counter-terrorism financing sanctions.

This item adds one person to Schedule 2 of the Principal Instrument, Jose Maria Sison, the founder of the New People's Army / Communist Party of the Philippines. This person is listed for counter-terrorism financing sanctions on the basis that the Minister is satisfied on reasonable grounds that they are a person mentioned in paragraph 1(c) of UNSCR 1373. That is, a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts.