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. 3) Instrument 2023

The purpose of the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 3) Instrument 2023 (the 2023 Instrument) is to list eight persons and one entity 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 sanctions framework 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)) and can be freely accessed and used by members of the public.

Consideration of human rights

The 2023 Instrument advances human rights by preventing and suppressing terrorist acts, ensuring that the persons and entity 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 2023 Instrument

The effect of the 2023 Instrument is that the persons and entity 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 persons and entity met the listing criteria set out in subregulation 20(1) of the Dealing with Assets Regulations. That is, that they are a person or entity mentioned in paragraph 1(c) of UNSCR 1373.

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

- prohibit persons or entities 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 or entities 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 (paragraph 15A(6)(c)).

On this occasion, the Minister decided to make a new listing under section 15 of the Act to enable the listed person 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 2023 Instrument are set out in <u>Attachment B</u>.

The 2023 Instrument is exempt from sunsetting under table item 1 of regulation 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 on the basis that the instrument's sole or primary purpose is to give effect to an international obligation of Australia.

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

Consultation

The measures imposed through this 2023 Instrument were subject to thorough vetting by Australian Government agencies as well as consultation with relevant international partners.

ATTACHMENT A

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. 3) Instrument 2023

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. 3) Instrument 2023 (the 2023 Instrument) is to list eight persons and one entity 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 sanctions framework 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)) and can be freely accessed and used by members of the public.

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 2023 Instrument is addressed by reference to each of the human rights engaged below.

Human rights implications

The 2023 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.

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

The 2023 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 2023 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 the 2023 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 (paragraph 15A(6)(c)).

The measures in the 2023 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'.[1]

The 2023 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

[1] 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. Any interference with the right to privacy created by the operation of the 2023 Instrument is not arbitrary or unlawful and, therefore, is consistent with Australia’s obligations under Article 17 of the ICCPR.

Conclusion

The 2023 Instrument is compatible with human rights because counter-terrorism financing sanctions which prevent and suppress terrorism financing promote the rights to life, freedom of thought, conscience and religion, and freedom from national, racial or religious hatred. To the extent that it may limit human rights, such limitations are reasonable, necessary and proportionate.

ATTACHMENT B

Details of the Charter of the United Nations (Listed Persons and Entities) Amendment (No. 3) Instrument 2023

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. 3) Instrument 2023 (the 2023 Instrument).

Section 2 – Commencement

This section provides for a commencement date of 18 November 2023. This commencement date reflects the urgency of listing the persons and entity mentioned in Schedule 1, given the ongoing Israel-Hamas conflict and the need to impose sanctions against persons and entities engaged in terrorist acts within the conflict.

Section 3 - Authority

This section provides that the 2023 Instrument is made under section 15 of the *Charter of the United Nations Act 1945* (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 one entity to Schedule 1 of the Principal Instrument.

This entity is listed for counter-terrorism financing sanctions on the basis that the Minister is satisfied on reasonable grounds that they are an entity mentioned in paragraph 1(c) of UNSCR 1373. That is, they are: an entity owned or controlled by persons who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity acting on behalf of, or at the direction of, such entities; or an entity acting on behalf of, or at the direction of, a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts.

Item 2 – In the appropriate position in clause 1 of Schedule 2 (table)
Schedule 2 of the Charter of the United Nations (Listed Persons and Entities) Instrument 2022 (the Principal Instrument) sets out persons that, by operation of section 6 of the Principal

Instrument, are listed by the Minister for Foreign Affairs (the Minister) for counter-terrorism financing sanctions.

This Item adds eight persons to Schedule 2 of the Principal Instrument.

These persons are 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; persons acting on behalf of, or at the direction of, such persons; or persons acting on behalf of, or at the direction of, entities which are owned or controlled, directly or indirectly, by persons who commit, attempt to commit, or participate in or facilitate the commission of, terrorist acts.