Appendix 3

Correspondence

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

The Hon Philip Ruddock MP
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
CANBERRA ACT 2600

Dear /Philip Chair

Thank you for your 2 February 2016 letter regarding instruments made under the *Autonomous Sanctions Act 2011* and *Charter of the United Nations Act 1945*. The attached document responds to the questions raised by the Parliamentary Joint Committee on Human Rights in their 2 February 2016 report.

I continue to be satisfied that Australia's implementation of United Nations Security Council sanctions and autonomous sanctions are proportionate to the objectives of each regime and include adequate safeguards.

I trust the attached information will assist you in concluding your consideration of the instruments made under the Autonomous Sanctions Act and the Charter of the United Nations Act.

Yours sincerely

Julie Bishop
21 MAR 2016

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Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report (2 February 2016)

Overarching issues

United Nations Security Council resolution 1373 (UNSCR 1373), is as binding under international law as other United Nations Security Council (UNSC) sanctions regimes. The criteria for designation of persons and entities are set out in UNSCR 1373. The exemptions to the targeted financial sanctions have been enumerated in resolution 1452. The distinction between UNSCR 1373 and other UNSC sanctions regimes is that UNSCR 1373 has been interpreted internationally as requiring each member state to maintain their own lists of designated persons and entities, as opposed to a centralised list maintained by the UNSC or its committees.

This interpretation is borne out by Standards of the Financial Action Task Force (FATF)[1]. The FATF and the global network of FATF-Style Regional Bodies enjoy nearly universal membership. The FATF is recognised as the international standard setter for combating money laundering, the financing of terrorism and the financing of the illicit proliferation of weapons of mass destruction. FATF Recommendation 6 sets the international standard for implementation of targeted financial sanctions to combat terrorism, including UNSCR 1373. The responses below will therefore refer to the FATF Standards and the 2015 FATF Mutual Evaluation of Australia[2]. The 2015 Mutual Evaluation of Australia found Australia to be fully compliant with the FATF Recommendations related to sanctions, including those elements related to due process.

It is important to note that the imposition of sanctions measures against designated persons and entities is a *preventive measure* not to be confused with penalties imposed following criminal or civil proceedings. As the Interpretive Note to FATF Recommendation 6 states: '[m]easures under Recommendation 6 may complement criminal proceedings against a designated person or entity...but are not conditional upon the existence of such proceedings'.

Requests for advice from the Committee

The Committee asked how the designation of a person is a proportionate limitation on the right to privacy, having regard to the matters set out at paragraph [1.87] and whether there are adequate safeguards to protect individuals potentially subject to designation.

The matters set out in paragraph 1.87 are addressed below.

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[1] Including the FATF's Forty Recommendations and the FATF Methodology for Assessing Compliance. The FATF Recommendations and Methodology are publicly available at http://www.fatf-gafi.org/

[2] The FATF Mutual Evaluation Report for Australia is publicly available at http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf

'The designation or declaration under the autonomous sanctions regime can be based solely on the basis that the Minister is 'satisfied' of a number of broadly defined matters'

The Minister's decision to designate or declare persons under the *Autonomous Sanctions Regulations 2011* is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law. The decision must therefore satisfy the usual legal requirements including that such decisions not take into account irrelevant considerations or fail to take into account relevant considerations, or be so unreasonable that no reasonable person could have made the decision.

'The Minister can make the designation or declaration without hearing from the affected person before the decision is made'

A decision maker is bound by the rules of natural justice in making any decision to declare or designate a person. The degree to which procedural fairness is afforded depends upon balancing natural justice against the effective operation of the legislation.

Hearing from an affected person before designating or declaring them could defeat the very purpose of imposing targeted financial sanctions, and therefore also the intention of Parliament in imposing or authorising such measures. Providing prior notice to a person or entity that they are being considered for targeted financial sanctions would effectively 'tip off' the person and could lead to any assets they had in Australia being moved off-shore before the targeted financial sanctions took effect.

The inherent risks of undermining targeted financial sanctions measures by providing an opportunity to be heard before a decision is made have been recognised internationally as evidenced by the FATF Methodology which state that: '[t]he competent authority(ies) should have legal authorities and procedures or mechanisms to...operate ex parte against a person or entity who has been identified and whose (proposal for) designation is being considered'[3].

'There is no requirement that reasons be made available to the affected person as to why they have been designated or declared'

This is incorrect. Section 13 of the ADJR Act requires the provision, upon request by a person aggrieved by the decision, of a 'statement in writing...giving the reasons for [a] decision'.

'No guidance is available under the Act or regulations or any other publicly available document setting out the basis on which the Minister decides to designate or declare a person'

The criteria for designation and declaration for autonomous sanctions are set out in section 6 of the Autonomous Sanctions Regulations. The criteria for listing under Part 4 of the Charter of the United Nations Act are set out in s. 20 if the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Dealing with Assets Regulations).

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[3] Refer to criterion 6.3 of the FATF Methodology.

'There is no report to Parliament setting out the basis on which persons have been declared or designated and what assets, or the amount of assets that have been frozen'

The Government complies with the requirements established by Parliament in the Autonomous Sanctions Act and the Charter of the United Nations Act. These do not include a requirement to report to Parliament on the basis for declarations or designations. The public disclosure of assets frozen and/or the amount of assets frozen could risk undermining the effective administration of both Acts. Given the small number of designated persons with known connections to Australia, it could be easy to surmise, even from aggregated data, whose assets had been frozen. Public disclosure of such information could prejudice investigations by law enforcement authorities.

'Once the decision is made to designate or declare a person, **[it]** ***remains in force for three years...There is no requirement that if circumstances change or new evidence comes to light that the designation or declaration will be reviewed before the three year period ends'***

The automatic ceasing of designations and declarations after three years, unless declared to continue in effect, ensures that all designations and declarations are reviewed at appropriate intervals. Designations may only be declared to continue where a person or entity continues to meet the criteria for designation. Designations and declarations may be reviewed at any time, including where circumstances change or new evidence comes to light.

Furthermore, under the Autonomous Sanctions Act and the Charter of the United Nations Act a person can request revocation of their designation or declaration in the event of changed circumstances or new evidence.

'A designated or declared person will only have their application for revocation considered once a year–if an application for review has been made within the year, the Minister is not required to consider it'

Subsection 11(3) of the Autonomous Sanctions Regulations and subsection 17(3) of the Charter of the United Nations Act are intended to ensure that the Minister is not required to consider repeated, vexatious revocation requests. While the Minister is not required to consider an application made for revocation within one year of an earlier application, it is not correct to say that 'a designated or declared person will only have their application for revocation considered once a year'. The Minister can choose to consider any number of revocation requests.

'There is no merits review before a court or tribunal of the Minister's decision'

This is correct. Nevertheless, the procedures for requesting revocation of designations and declarations, the availability of judicial review under the ADJR Act, and the safeguards against 'false positives' in section 41 of the Dealing with Assets Regulations are consistent with international standards for according due process to designated or declared persons and entities[4].

[4] Refer to criterion 6.6 of the FATF Methodology. Australia was assessed in 2015 to be fully compliant with Recommendation 6.

'There is no requirement to consider whether applying ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the Minister'

As noted above, the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law.

'The Minister has unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses'

The discretion to impose conditions on permits is appropriate as the personal circumstances of each designated person or entity are unique. If it were not possible to make a permit subject to conditions tailored to a particular case, the risks of granting an unconditional permit could in some cases weigh against the granting of a permit at all.

The imposition of conditions are an appropriate way to manage the risks associated with designated persons accessing assets, in terms of protecting the community and in providing legal protection and clarity for *bona fide* third parties holding frozen assets, such as Australian banks.

'There is no requirement that in making a designation or declaration the Minister needs to take into account whether in doing so, it would be proportionate to the anticipated effect on an individual's private and family life'

As noted above, the obligation to impose targeted financial sanctions against persons and entities associated with terrorist acts, in accordance with UNSCR 1373, is a binding obligation under international law. Australia implements this obligation under Part 4 of the Charter of the United Nations Act. The impact on an individual's private or family life is not a relevant consideration for a decision to designate a person for their association with terrorist acts. The possibility of such impacts has, however, been addressed through the exemptions to targeted financial sanctions established in UNSC resolution 1452 (2002).

Australia fully implements these exemptions in s. 22 of the Charter of the United Nations Act and Part 3 of the Dealing with Assets Regulations. The power to grant permits under Part 4 of the Autonomous Sanctions Regulations closely mirrors the exemptions established by the United Nations Security Council for its sanctions regimes. These provisions allow for adverse impacts on family members and *bona fide* third parties to be mitigated.

Other requests for advice

With respect to the Committee's request for advice in relation to the rights to equality and non-discrimination, as outlined above, the designation and declaration criteria set out in the Dealing with Assets Regulations and the Autonomous Sanctions Regulations do not refer to personal attributes such as race, sex or religion. It would not be appropriate for the Minister to take such matters into consideration when designating or declaring an individual or entity.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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Dear Chair

Thank you for the letter of 16 March 2016 seeking my advice on the human rights compatibility of the *Charter of the United Nations (Sanctions - Iran) Document List Amendment 2016* [F2016L00116] (List) considered in the Thirty-Sixth Report of the 44th Parliament of the Parliamentary Joint Committee on Human Rights.

I note that the List has now been replaced by section 6 of the *Charter of the United Nations (Sanctions – Iran) Regulation 2016* (Iran Regulation 2016). I also note that the Iran Regulation 2016 replaced the *Charter of the United Nations (Sanctions – Iran) Regulations 2008*. This response will address the provisions currently in force given that those related to 'export sanctioned goods' in the Iran Regulation 2016 are not materially different from the earlier provisions.

I note also that the definition of 'import sanctioned goods' has now been narrowed under section 7 of the Iran Regulation 2016 to 'arms and related matériel' and therefore now falls outside the scope of the Committee's request for information.

For the reasons set out in the attached information, I am satisfied that the offences of dealing with export sanctioned goods under the *Charter of the United Nations Act 1945* and the Iran Regulation 2016 are compatible with human rights. The Iran Regulation 2016 does not limit a defendant's rights under Article 14 of the *International Covenant on Civil and Political Rights*. The Iran Regulation 2016 also achieves a range of legitimate objectives, including supporting United Nations Security Council resolution 2231 and the Joint Comprehensive Plan of Action nuclear agreement between Iran and the P5 plus Germany. The offences in the Iran Regulation 2016 are precise, reasonable and proportionate.

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I trust the attached information will assist the Committee in its further consideration of the issues raised in its Report.

Yours sincerely

Julie Bishop

28 SEP 2016

Annex

Are the proposed changes aimed at achieving a legitimate objective?

Yes. Section 6 of the *Charter of the United Nations (Sanctions – Iran) Regulation 2016* (Iran Regulation 2016) is aimed at achieving a range of legitimate objectives, principal among which are:

- implementing Australia's obligations under international law, specifically United Nations Security Council resolution 2231;
- supporting the United Nations Security Council endorsed Joint Comprehensive Plan of Action (JCPOA) nuclear agreement, which constrains Iran's nuclear program, and provides verifiable assurances to the international community that Iran's nuclear activities will remain exclusively peaceful; and
- protecting Australians and those outside Australia from the threat of nuclear proliferation.

Are the offence provisions sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law?

The laws do not limit a defendant's human rights referred to in Article 14 of the International Covenant on Civil and Political Rights. A defendant has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law in accordance with the guarantees in Article 14(1) and enjoys the minimum guarantees provided by Articles 14(2)-(7) and 15. In the absence of a limitation placed on those rights the quality of law test referred to by the Committee does not apply.

That said, the offences are precise in their application. Subsection 6 of the Iran Regulation 2016 defines 'export sanctioned goods'. Paragraph 6(1)(a) to (c) include all goods set out in the following documents:

- International Atomic Energy Agency Information Circular, INFCIRC/254/Rev.12/Part 1;
- International Atomic Energy Agency Information Circular, INFCIRC/254/Rev.9/Part 2; and
- United Nations Security Council document S/2015/546.

The Committee queries whether the first two documents referred to above contain 'specific descriptions of particular goods that are prohibited'. It is true, as the Committee noted, that these documents contain guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software, and related technology. However, we note that the annexes to INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2 also contain lists of specific goods.

The Committee has also stated that the reference to the documents above 'appears inconsistent with the Commonwealth Guide to Framing Offence Provisions', specifically that '[i]t is normally desirable for the content of an offence to be clear from the offence provision itself...'. It should be noted, however, that the Guide further states that:

'Offence content should also only be delegated from an Act to an instrument where there is a demonstrated need to do so. For example, it may be appropriate to delegate offence content where:

- 'the relevant content involves a level of detail that is not appropriate for an Act...
- 'prescription by legislative instrument is necessary because of the changing nature of the subject matter...
- 'the relevant content involves material of such a technical nature that it is not appropriate to deal with it in the Act ..., or
- 'elements of the offence are to be determined by reference to treaties or conventions, in order to comply with Australia's obligations under international law or for consistency with international practice....'

Each of these exceptions applies in the case of defining the range of nuclear and nuclear-related dual use goods that fall within the definition of 'export sanctioned good' for the purposes of the Iran Regulation 2016.

The exception for offences determined by reference to treaties or conventions is particularly pertinent. Resolution 2231 explicitly refers to the list of documents cited in section 6 of the Iran Regulation 2016, see paragraphs 2 and 4 of Annex B to the Resolution. Incorporation of these international documents into definition of 'export sanctioned goods' ensures that Australia complies with its international obligations. It also provides certainty and a level playing field for businesses seeking to comply with Australian law by ensuring consistency with international practice.

Is the limitation a reasonable and proportionate measure to achieve the stated objective, including that there are sufficient safeguards in place and the measure is no more rights restrictive than necessary to achieve that objective?

Yes. The limitations imposed by the Iran Regulation 2016 are reasonable and proportionate to the objectives outlined above. They reproduce into Australian law as exactly as possible Australia's international obligations with respect to restricting certain exports to Iran.