

Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Instruments made under the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945*

Purpose	Expand or apply the operation of the sanctions regime by designating or declaring that a person is subject to the sanctions regime
Portfolio	Foreign Affairs
Authorising legislation	<i>Autonomous Sanctions Act 2011</i> and <i>Charter of the United Nations Act 1945</i>
Rights	Privacy; fair hearing; protection of the family; equality and non-discrimination; adequate standard of living; freedom of movement; non-refoulement (see Appendix 2)
Previous reports	<i>Sixth Report of 2013; Seventh Report of 2013; Tenth Report of 2013; Twenty-eighth Report of the 44th Parliament; Thirty-third Report of the 44th Parliament</i>

Background

2.3 A number of instruments made under the *Autonomous Sanctions Act 2011* (Autonomous Sanctions Act) and the *Charter of the United Nations Act 1945* (Charter of the United Nations Act) have been previously examined by the committee.¹

1 See list contained in Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015). See also, *Thirty-third Report of the 44th Parliament* (2 February 2016). Previous instruments examined include, for example, Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 [F2013L00477]; Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) [F2013L00791]; Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1) [F2013L00789]; Charter of the United Nations (Sanctions – the Taliban) Regulation 2013 [F2013L00787]; and Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013 (No. 2) [F2013L00857].

2.4 This report considers a number of new instruments made under these Acts.²

2.5 The Autonomous Sanctions Act provides the power for the government to impose broad sanctions to facilitate the conduct of Australia's external affairs (the autonomous sanctions regime). Sanctions can be imposed under the autonomous sanctions regime if the Minister for Foreign Affairs (the minister) is satisfied that doing so will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia, or will otherwise deal with matters, things or relationships outside Australia.³ The Autonomous Sanctions Regulations 2011 set out the countries and activities for which a person or entity can be designated.⁴

2.6 The Charter of the United Nations Act, in conjunction with various instruments made under that Act,⁵ gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations Security Council by Australia (the UN Charter sanctions regime). Under the UN Charter sanctions regime, as established under Australian law, there are two methods by which a person can be designated:

- automatic designation by the UN Security Council Committee; and
- listing by the minister if he or she is satisfied that the person is a person mentioned in UN Security Council resolution 1373.⁶

2.7 Sanctions under both the autonomous sanctions regime and the UN Charter sanctions regime (together referred to as the sanctions regimes) can:

- designate or list persons or entities for a particular country with the effect that the assets of the designated person or entity are frozen, and declare that a person is prevented from travelling to, entering or remaining in Australia; and

2 These are the Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 1) [F2016L00047]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 2) [F2016L00117]; Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 [F2016L00799]; Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 3) [F2016L01100]; and Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181].

3 See subsection 10(2) of the *Autonomous Sanctions Act 2011*.

4 As at 24 August 2016, the countries listed were the Democratic People's Republic of Korea; the former Federal Republic of Yugoslavia; Iran; Libya; Myanmar; Syria; Zimbabwe; and Ukraine (see section 6 of the *Autonomous Sanctions Regulations 2011*).

5 See, in particular, the *Charter of the United Nations (Dealing with Assets) Regulations 2008* [F2014C00689].

6 See, *Charter of the United Nations (Dealing with Assets) Regulations 2008* [F2014C00689] section 20.

- restrict or prevent the supply, sale or transfer or procurement of goods or services.

2.8 As at 15 August 2016, 3684 individuals and 1629 entities were subject to targeted financial sanctions or travel bans under both sanctions regimes (534 individuals under the autonomous sanctions regime and 3150 under the UN Charter regime). The Consolidated List of individuals subject to sanctions currently includes the names of 25 Australian citizens.⁷

2.9 As the Autonomous Sanctions Act and the Charter of the United Nations Act were legislated prior to the establishment of this parliamentary joint committee, the sanctions regimes were not subject to a human rights compatibility assessment by the minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁸

2.10 An initial human rights analysis of some of the instruments made under the sanctions regimes is contained in the *Sixth Report of 2013*, *Seventh Report of 2013* and *Tenth Report of 2013*.⁹ A further detailed analysis of instruments made under the sanctions regimes is contained in the *Twenty-eighth Report of the 44th Parliament*,¹⁰ and *Thirty-third Report of the 44th Parliament*.¹¹ This analysis stated that, as the instruments under consideration expand or apply the operation of the sanctions regimes by designating or declaring that a person is subject to the sanctions regimes, or by amending the regimes themselves, it was necessary to assess the compatibility of the Autonomous Sanctions Act and the Charter of the United Nations Act under which these instruments are made.

2.11 In the *Twenty-eighth Report of the 44th Parliament*, the committee sought detailed information from the minister as to the compatibility of the sanctions regimes with human rights. The minister's response was published in the *Thirty-third Report of the 44th Parliament* and the committee sought a further response from the minister.

7 See Department of Foreign Affairs and Trade, 'Consolidated List', available at: <http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx>.

8 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-sixth Report of the 44th Parliament* (16 March 2016).

9 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013); *Seventh Report of 2013* (5 June 2013); and *Tenth Report of 2013* (26 June 2013).

10 Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015).

11 Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016).

2.12 The minister's response to the committee's further inquiries was received on 21 March 2016. The response is discussed below and is reproduced in full at Appendix 3.

'Freezing' of designated person's assets

2.13 Under both sanctions regimes, the effect of a designation is that it is an offence for a person to make an asset directly or indirectly available to, or for the benefit of, a designated person.¹² A person's assets are therefore effectively 'frozen' as a result of being designated.

2.14 The designation of a person under the sanctions regimes is a significant incursion into a person's right to personal autonomy in one's private life (within the right to privacy).¹³

2.15 The committee has accepted that the use of international sanctions regimes to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law. It has expressed concerns that the sanctions regimes may not be regarded as proportionate to their stated objective, in particular because of a lack of effective safeguards to ensure that the regimes, given their serious effects on those subject to asset freezing, are not applied in error or in a manner which is overly broad in the individual circumstances. The lack of safeguards detailed in the committee's initial analysis included that:

- the designation or declaration under the autonomous sanctions regime can be solely on the basis that the minister is 'satisfied' of a number of broadly defined matters;¹⁴
- the minister can make the designation or declaration without hearing from the affected person before the decision is made;
- there is no requirement that reasons be made available to the affected person as to why they have been designated or declared;¹⁵

12 Section 14 of the Autonomous Sanctions Regulations 2011 and section 21 of the *Charter of the United Nations Act 1945*.

13 The right to privacy is impacted by the automatic designation of a person by the UN Security Council, as Australia is bound by the UN Charter to implement UN Security Council decisions. See article 2(2) and article 41 of the Charter of the United Nations 1945. See, discussion of relevant case law at [2.38].

14 See examples in the committee's previous analysis at paragraph [1.114] of the *Twenty-eighth Report of the 44th Parliament* and section 6 of the Autonomous Sanctions Regulations 2011.

15 The minister has clarified that reasons are required upon request by a person aggrieved by a designation or declaration, pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977*, see discussion at [2.27].

- no guidance is available under the Acts or regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person;
- 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;
- once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends;
- 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;
- there is no provision for merits review before a court or tribunal of the minister's decision;
- there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister;
- the minister has unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses; and
- there is no requirement that in making a designation or declaration the minister must take into account whether doing so would be proportionate to the anticipated effect on an individual's private and family life.

2.16 Accordingly, the committee sought the advice of the minister as to how the designation of a person under the autonomous sanctions regime and the ministerial designation process under the UN Charter sanctions regime impose proportionate limitations on the right to privacy, having regard to the matters set out at paragraph [2.15], and in particular, whether there are adequate safeguards to protect individuals potentially subject to designation.

2.17 In addition, as noted above there is no provision for merits review before a court or tribunal of the minister's decision under the sanctions regimes. The previous human rights analysis of the sanctions regimes therefore noted that the designation and declaration process under the sanctions regimes limits the right to a fair hearing because it does not provide effective access to an independent and impartial court or tribunal.

2.18 The committee therefore sought the specific advice from the minister as to how the process of ministerial designation or declaration under the sanctions regimes is a proportionate limitation on the right to a fair hearing, and in particular

how, in the absence of merits review, there are adequate safeguards to protect the right to a fair hearing.

2.19 Noting the potential negative impact of sanctions on family members, the committee also sought the specific advice of the minister as to how the declaration process is a proportionate limitation on the right to the protection of the family and, in particular, whether there are adequate safeguards in place to protect this right.

Minister's response

2.20 The minister's response addresses each of the matters set out above at paragraph [2.15].

2.21 In relation to the decision to designate or declare a person under the autonomous sanctions regime, the minister's response states that the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and under common law. This is the one safeguard available under general law, and does secure the minimum requirement that the minister act in accordance with the legislation.

2.22 However, the effectiveness of judicial review as a safeguard within the sanctions regimes relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to designate or declare someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms.¹⁶ It is noted that this formulation limits the scope to challenge such a decision on the basis of there being an error in law (as opposed to an error on the merits) under the ADJR Act or at common law.

2.23 The committee's previous analysis drew attention to the unavailability of merits review, which would allow for review of the substantive decision to designate or declare someone. The potential availability of judicial review is unlikely to be sufficient, in and of itself, to ensure the proportionality of the autonomous sanctions regime. The minister states that the availability of judicial review is a sufficient safeguard against 'false positives' and is consistent with international standards.¹⁷ However, the committee is required to assess the compatibility of legislation against international human rights law rather than other standards. As the committee has

16 For example, under the autonomous sanctions regime a person can be designated or declared by the minister on a number of grounds relating to whether the minister is subjectively satisfied the person is or has been involved in certain activities. These include, for example, that a person is a supporter of the former regime of Slobodan Milosevic; is a close associate of the former Qadhafi regime in Libya (or an immediate family member); is providing support to the Syrian regime; is responsible for human rights abuses in Syria; has engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe; or is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

17 See Financial Action Task Force (FATA) Methodology.

explained previously, judicial review will generally be insufficient, in and of itself, for human rights purposes and in particular the right to a fair hearing.¹⁸

2.24 In relation to making a designation or declaration without hearing from the affected person, the minister states that this may be necessary to ensure the effectiveness of the regime. In particular, the minister states that:

...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.

2.25 The Financial Action Task Force (FATF) Methodology, referred to by the minister, states that authorities should have to seek designation *ex parte* for this reason. While it is a valid concern to avoid the dispersal of assets before financial sanctions are able to take effect, this problem is well known to the law. One mechanism to address this concern is to freeze assets on an interim basis, until complete information is available including from the affected person, to assess whether a freezing order ought to be made. This would allow the minister to proceed to freeze assets initially in an *ex parte* fashion, while respecting the right to a fair hearing.

2.26 It should be noted that, in the absence of any provision for hearing prior to an order being made, the process for challenging a designation or declaration after a decision has been made becomes particularly important to the operation of the scheme. Again, the unavailability of merits review raises concerns in this regard.

2.27 In relation to reasons being available to a designated or declared person, the minister's response clarifies that section 13 of the ADJR Act applies to the regime to require the provision of reasons for a decision, on request, of an aggrieved person. The provision of reasons is likely to be an important mechanism to enable an individual to challenge a declaration or designation and, accordingly, an important factor in assessing the proportionality of the sanctions regimes.

2.28 The previous human rights analysis of the sanctions regimes noted that no guidance is available under the Acts, regulations or any other publicly available document setting out the basis on which the minister decides to designate or declare a person. The minister's response points to the principal legislative provisions and does not fully engage with the committee's concerns as set out in its analysis, which

18 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.116] to [1.123].

is that those legislative provisions do not set out the basis on which the minister may decide to designate or declare a person.¹⁹

2.29 For example, the minister's response notes that the criteria for listing under Part 4 of the Charter of the United Nations Act are set out in section 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 (Asset Regulation). Section 20 of the Asset Regulation states that the minister must list a person or entity if the minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1(c) of Resolution 1373.²⁰ However, UN Security Council resolution 1373 paragraph 1(c) does not list individuals; rather, it requires states to freeze the funds or assets of anyone who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts, or anyone who acts on behalf of, or at the direction of, such a person.²¹ As such, the reference to the UN Security Resolution 1373 is to a broad criterion for listing, and does not provide specific guidance on the threshold at which an individual may be declared by the minister and on what particular basis. This lack of clarity raises concerns as to whether the regime represents the least rights restrictive way of achieving its objective as the scope of the law is not made evident to those who may fall within the criterion for listing and who may seek in good faith to comply with the law.

2.30 In relation to the absence of reports 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 minister's response states that the public disclosure of assets frozen and/or the amount of assets frozen could risk undermining the administration of the sanctions regimes. The minister's response states that the small number of designated persons with known connections to Australia means that it may be easy to identify, even from aggregated data, whose assets had been frozen. However, the Department of Foreign Affairs publishes on its website a Consolidated List of all persons and entities who are subject to targeted

19 See, Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) [1.114.], [1.133]

20 As at 2 September 2015, the list of countries from which people have been designated by the UN Security Council are the Central African Republic; Côte d'Ivoire; Democratic People's Republic of Korea; Democratic Republic of the Congo; Eritrea; Iran; Iraq; Lebanon; Liberia; Somalia; South Sudan; Sudan; and Yemen. Also listed are individuals said to be involved with Al-Qaida; the Taliban; and Libyan Arab Jamahiriya, as well as anyone the UN Security Council lists under Resolution 1373. As such these instruments implement Australia's international obligations under the UN Charter with respect to decisions by the UN Security Council.

21 See section 15 of the *Charter of the United Nations Act 1945*, s 20 of the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689] and resolution 1373 of the UN Security Council.

financial sanctions or travel bans under the sanctions regimes.²² It is therefore difficult to accept the minister's justification for the lack of reporting to Parliament, as information identifying declared or designated persons is already publically available.

2.31 Accordingly, information provided by the minister does not appear to justify why reporting to Parliament on the basis on which persons have been declared or designated, and assets frozen, would not be an appropriate safeguard to protect the human rights of individuals subject to the sanctions regimes. The absence of such a safeguard therefore impacts upon the proportionality of the sanctions regimes.

2.32 The previous human rights analysis of the sanctions regimes noted that once the decision is made to designate or declare a person, the designation or declaration remains in force for three years and may be continued after that time. There is no requirement that if circumstances change or new evidence comes to light the designation or declaration will be reviewed before the three year period ends. In response, the minister states that designations and declarations may be reviewed at any time. The minister also notes that the sanctions regimes allows a person to request revocation of their designation or declaration in the event of changed circumstances or new evidence. While this is true, without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may continue to be subject to sanctions for an extended period notwithstanding that designation or declaration may no longer be required.

2.33 The previous human rights analysis of the sanctions regimes noted that 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. The minister's response states that section 11(3) of the Autonomous Sanctions Regulations and section 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. The response states that, 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', because the minister can choose to consider any number of revocation requests. While this may be true, the concern with the current formulation is that the minister is not *required* to consider such an application for revocation even in circumstances where new or compelling evidence has come to light. That is, the provision gives the minister a discretion that is broader than merely preventing vexatious applications and may affect meritorious applications for revocation.

22 See Department of Foreign Affairs and Trade, 'Consolidated List', available at: <http://dfat.gov.au/international-relations/security/sanctions/pages/consolidated-list.aspx>.

2.34 The previous human rights analysis of the sanctions regimes noted there is no requirement to consider whether applying the ordinary criminal law to a person would be more appropriate than freezing the person's assets on the decision of the minister. The minister's response notes that the imposition of targeted financial sanctions is considered, internationally, to be a preventive measure that operates in parallel to complement the criminal law. While this can be accepted, it is unclear when and in what circumstances complementary 'targeted financial' action will be taken to be needed. Without further guidance there appears to be a risk that such action may not be the least restrictive of human rights in every case, in particular, that an easier administrative mechanism will be used in preference to the criminal law, with its attendant safeguards.

2.35 The previous human rights analysis of the sanctions regimes noted that the need for a person subject to a designation or declaration to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life. For example, it could mean that a person whose assets are frozen would need to apply to the minister whenever they require funds to purchase medicines, travel or meet other basic expenses. In relation to the unrestricted power to impose conditions on a permit to access funds to meet basic expenses, the minister notes that the discretion to impose conditions on permits is appropriate as the personal circumstances of each designated person or entity are unique. However, it is clearly possible to provide for a permit to access funds that is tailored to individual circumstances, without conferring such an unlimited discretion on the minister to impose conditions on a permit to allow access to funds. A discretion that is overly broad may itself be incompatible with human rights.²³ In this case, there is no requirement that the conditions only be applied by the minister where strictly necessary. As such, the broad discretion to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective.

2.36 The previous human rights analysis of the sanctions regimes noted that there is no requirement that, in making a designation or declaration, the minister must take into account whether it would be proportionate to the anticipated effect on an individual's private and family life. The minister's response states that the obligation to impose targeted financial sanctions against persons and entities associated with terrorist acts, in accordance with UN Security Council Resolution 1373, is a binding obligation under international law; and that Australia implements this obligation under Part 4 of the Charter of the United Nations Act. The minister's response argues that 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.

23 See, *Hasan and Chaush v Bulgaria* (2000) ECHR (Application no. 30985/96) (26 October 2000), [84].

2.37 However, while it is acknowledged that Australia has obligations under UN Security Council Resolution 1373, this response does not address the potential scope and discretion for the minister to apply the UN Charter sanctions regime in respect of persons who are not specifically listed in UN Security Council Resolution 1373. It also fails to acknowledge that Australia has additional obligations under international law with respect to an individual's right to privacy and the right to protection of the family. In this respect, while there may be serious impacts on a listed, designated or declared person's family, the minister has not identified any safeguards in relation to family members. The absence of consideration of such matters is a further indication that the sanctions regimes may not be a proportionate limit on human rights.

2.38 The recent European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.²⁴ This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights. The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This new case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances. As designation occurs automatically under the UN Charter sanctions regime in such a situation,²⁵ there is no process for challenging a designation. Accordingly, based on this new case law, the current Australian model appears to be incompatible with the right to a fair hearing.

2.39 It is also noted that, in terms of comparative models, the United Kingdom (UK) has implemented its obligations in a manner that incorporates a number of safeguards not present in the Australian sanctions regimes, including:

- challenges to designations made by the executive can be made by way of full merits appeal rather than solely by way of judicial review;²⁶
- quarterly reports must be made by the executive on the operation of the regime;²⁷

24 ECHR (Application no. 5809/08) (21 June 2016).

25 Under the UN Charter sanctions regime, a person specifically listed in a UNSC resolution will be subject to designation under Australian law without there being any process under Australian law to challenge that designation. That is, the minister does not have any discretion in these circumstances.

26 See section 26 of *Terrorist Asset-Freezing etc. Act 2010* (UK) (TFA 2010).

27 See section 30 of TFA 2010.

- an Independent Reviewer of Terrorism Legislation reviews each designation and has unrestricted access to relevant documents, government personnel, the police and intelligence agencies;²⁸
- the executive provides a 'Designation Policy Statement' to Parliament setting out the factors used when deciding whether to designate a person;
- an Asset-Freezing Review sub-group annually reviews all existing designations, or earlier if new evidence comes to light or there is a significant change in circumstances, and the executive invites each designated person to respond to whether they should remain designated;²⁹
- the prohibition on making funds available does not apply to social security benefits paid to family members of a designated person (even if the payment is made in respect of a designated person);³⁰ and
- when the executive is considering designating a person, operational partners are consulted, including the police, to determine whether there are options available other than designation—for example, prosecution or forfeiture of assets—to ensure that there is not a less rights restrictive alternative to achieve the objective.³¹

2.40 These kinds of safeguards in the UK asset-freezing regime are highly relevant indicia that there are more proportionate methods of achieving the legitimate objective of the Australian sanctions regimes. As noted above, a measure that limits human rights needs to be the least rights restrictive way of achieving the legitimate objective in order to be proportionate. Moreover, the absence of effective safeguards risks the arbitrary imposition of serious restrictions on individuals and their families, in circumstances where the measure, despite its laudable objective, ought not be applied.

28 See David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 1.3.

29 See section 4 of TAFE 2010; David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: December 2010 to September 2011)* (December 2011) para 6.5; and *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 3.4.

30 See subs 16(3) of TAFE 2010.

31 David Anderson QC, Independent Reviewer of Terrorism Legislation, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010 (Review Period: Year to 16 September 2013)* (December 2013) para 3.2.

Committee response

2.41 The committee thanks the minister for her response and has concluded its examination of this issue.

2.42 However, noting the significant human rights concerns identified in the human rights assessment of the sanctions regimes, the committee draws these matters to the attention of the Parliament; and recommends that consideration be given to the following measures, several of which have been implemented in relation to the comparable regime in the United Kingdom, to ensure the compatibility of the regimes with human rights:

- the provision of publically available guidance in legislation setting out in detail the basis on which the minister decides to designate or declare a person;
- regular reports to Parliament in relation to the regimes including the basis on which persons have been declared or designated and what assets, or the amount of assets, that have been frozen;
- provision for merits review before a court or tribunal of the minister's decision to designate or declare a person;
- provision of merits review before a court or tribunal of an automatic designation where an individual is specifically listed by the UN Security Council Committee;
- regular periodic reviews of designations and declarations;
- automatic reconsideration of a designation or declaration if new evidence or information comes to light;
- limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;
- review of individual designations and declarations by the Independent National Security Legislation Monitor;
- provision that any prohibition on making funds available does not apply to social security payments to family members of a designated person (to protect those family members); and
- consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

Designations or declarations in relation to specified countries

2.43 The autonomous sanctions regime allows the minister to make a designation or declaration in relation to persons involved in some way with (currently) eight specified countries. The automatic designation under the UN Charter sanctions regime also lists a number of countries from which people have been designated.

2.44 The previous human rights analysis of the sanction regimes considered that the designation of persons in relation to specified countries limits the right to equality and non-discrimination. The committee therefore sought the advice of the minister as to how the designation or declaration of a person under the autonomous sanctions regime is a proportionate limitation on the right to equality and non-discrimination and, in particular, whether there are adequate safeguards in place to protect this right.

Minister's response

2.45 The minister's response states the regime does not refer to personal attributes such as race, sex or religion; and further notes that it would not be appropriate for the minister to take such matters into consideration when designating or declaring an individual or entity.

2.46 This is correct, however, the prohibited grounds of discrimination under international human rights law also include national origin.³² Moreover, unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure).

2.47 The previous human rights analysis of the sanctions regimes acknowledged that the sanctions regimes did not require a person to be a national of a particular country and that the sanctions regimes did not directly discriminate against a person on the basis of their nationality. However, it raised concerns that it appears likely that nationals of listed countries are more likely to be considered to be 'associated with' or work for a specified government or regime than those from other nationalities. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.

2.48 A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect discrimination. However, the minister's response does not engage with this point. It may be that the choice of countries, and the process by which individuals are identified for the potential designation, provide sufficient justification; however without being provided with this information from the minister, the committee is unable to reach this conclusion.

Committee response

2.49 The committee thanks the minister for her response and has concluded its examination of this issue.

32 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

2.50 However, the committee draws to the attention of the minister the requirements for the preparation of statements and responses set out in the committee's *Guidance Note 1* including its expectation that further information from the minister address the committee's specific requests (in this case queries raised in relation to indirect discrimination).

Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116]

Purpose	Amends the Charter of the United Nations (Sanctions—Iran) Document List 2014, which lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, Iran
Portfolio	Foreign Affairs
Authorising legislation	<i>Charter of the United Nations Act 1945</i>
Last day to disallow	7 November 2016
Right	Fair trial (see Appendix 2)
Previous report	<i>Thirty-sixth Report of the 44th Parliament</i>

Background

2.51 The committee previously examined the Charter of the United Nations (Sanctions—Iran) Document List 2014 (Iran List) in its *Thirty-sixth Report of the 44th Parliament*. This report entry considers this and other related instruments made under the *Charter of the United Nations Act 1945*.¹

2.52 The minister's response to the committee's inquiries was received on 4 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

2.53 The minister advised that the Iran List was no longer in force, and that it had been replaced by section 6 of the Charter of the United Nations (Sanctions—Iran) Regulation 2016 (2016 Iran Sanctions Regulations). The 2016 Iran Sanctions Regulations, introduced on 30 August 2016, also replace the Charter of the United Nations (Sanctions—Iran) Regulations 2008 (2008 Iran Sanctions Regulations). The minister noted that the current provisions in respect of export sanctioned goods are not materially different to the provisions in the 2008 Iran Sanctions Regulations.

Offences of dealing with export and import sanctioned goods

2.54 The previous human rights assessment of the Iran List set out that the proposed criminal offence, arising as a breach of certain regulations addressing the supply of export sanctioned goods and the importation of import sanctioned goods in the 2008 Iran Sanctions Regulations, engaged and may have limited the right to a

1 Namely the Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181] and the United Nations (Sanctions—Iran) (Export Sanctioned Goods) List Determination 2016 [F2016L01208], which lists the export sanctioned goods as determined by the minister pursuant to subregulation 6(2) of the Regulation.

fair trial. This was based on an assessment that the definition of 'export sanctioned goods', by reference to goods mentioned in the five listed documents at Schedule 1, Part 1, lacked a clear legal basis. The 2008 Iran Sanctions Regulations defined 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument. The documents that were specified by the minister in the instrument took various forms, including letters and information circulars, rather than setting a clear and comprehensible list of goods that would meet the drafting standards for the framing of an offence.

2.55 Section 6 of the 2016 Iran Sanctions Regulations refers to three of those five documents in the Iran List. It also goes further than the Iran List to specify certain goods and materials, including goods that the minister is satisfied may contribute to the development of nuclear weapon delivery systems.

Minister's response

2.56 The committee's previous report raised concerns regarding the compatibility of the measure with the right to a fair trial, and specifically, the quality of law test, which means 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 committee sought the minister's advice as to whether the offences were drafted in a sufficiently precise manner to ensure a fair trial for the purposes of international human rights law, as well as advice as to the proportionality of the measures more generally.

2.57 The minister responded to the committee's questions in respect of the Iran List (now replaced by section 6 of the 2016 Iran Sanctions Regulations), stating that section 6 of the 2016 Iran Sanctions Regulations is aimed at achieving a range of legitimate objectives, such as implementing Australia's obligations under United Nations (UN) Security Council resolution 2231. It is acknowledged that Australia has certain obligations under UN Security Council Resolutions, and the objectives stated by the minister appear to satisfy the requirement of a legitimate objective under international human rights law.

2.58 In relation to the issue of whether the offence provisions are sufficiently precise to satisfy a requirement that a measure limiting rights is prescribed by law, the minister stated that she did not consider that section 6 of the 2016 Iran Regulations limits a defendant's right to a fair trial. Nonetheless, the minister's response later stated that the limitation on the right is reasonable and proportionate insofar as the measures reproduce into domestic law Australia's international obligations as exactly as possible.

2.59 Further, the minister stated that the offences are precise in their application on the basis that 'export sanctioned goods' are defined in the 2016 Iran Sanctions Regulations and include all goods set out in two International Atomic Energy Agency

Information Circulars and in a UN Security Council document containing a missile technology control regime list.² The minister noted that these documents contain annexures listing specific goods. On this basis, the minister contended that the annexures are a sufficient source of information for persons potentially subject to the offence provisions.

2.60 The minister's response also discussed the *Commonwealth Guide to Framing Offence Provisions*,³ and referred to the exceptions to the principle that the content of an offence should only be delegated from an Act to an instrument where there is a demonstrated need to do so. The minister's response concluded that all of these exceptions apply to section 6 of the 2016 Iran Sanctions Regulations.

2.61 In order to be sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law, and as set out in the human rights analysis of the Iran List in the *Thirty-sixth Report of the 44th Parliament*, measures limiting rights must be precise enough so that persons potentially subject to the offence provisions are aware of the consequences of their actions.⁴

2.62 Subsection 6(1) of the 2016 Iran Sanctions Regulations defines 'export sanctioned goods' by listing three of the five documents that appeared in the Iran List, as well as specifying other goods and material which did not appear in the Iran List.

2.63 The other goods and materials specified at subsection 6(1) are a new addition and are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law. This is because the type and category of goods and materials are listed in some detail, thereby ensuring that the measures are sufficiently certain and accessible to people whose rights may be infringed by the measure.

2.64 However, insofar as subsection 6(1) of the 2016 Iran Sanctions Regulations resembles the original Iran List by referring to three of the five documents in the Iran List, the human rights concerns with the limitation on the right to a fair trial remain. As stated in the human rights analysis in respect of the Iran List, persons potentially subject to the offence provisions under the 2016 Iran Sanctions Regulations may be

2 See INFCIRC/254/Part 1; referred to in the minister's letter as INFCIRC/254/Rev. 12/Part 1, a 13 November 2013 document, but in the 2016 Iran Sanctions Regulations as 'in force from time to time'. See also INFCIRC/254/Part 2; referred to in the minister's letter as INFCIRC/254/Rev. 9/Part 2, a 13 November 2013 document, but in the 2016 Iran Sanctions Regulations as 'in force from time to time'. See also S/2015/546, a 16 July 2015 UN Security Council document.

3 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).

4 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

unable to determine, with sufficient precision, particular items that are export sanctioned goods for the purposes of these regulations.⁵ The right to a fair trial is therefore engaged, and there does not appear to be sufficient justification for the limitation imposed on this right.

Committee response

2.65 The committee thanks the minister for her response and has concluded its examination of the issue.

2.66 The committee notes that the Charter of the United Nations (Sanctions-Iran) (Export Sanctioned Goods) List Determination 2016 lists further export sanctioned goods to the Iran List which are sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law.

2.67 However, the committee observes that the preceding legal analysis indicates that the reference to the prohibition on the supply and importation of export sanctioned goods as including goods listed in International Atomic Energy Agency Information Circulars and a UN Security Council document containing a missile technology control regime list, may be insufficiently precise and lack a clear legal basis. Accordingly, the offences of dealing with export and import sanctioned goods engage and limit the right to a fair trial and may not meet the quality of law test.

2.68 Noting the human rights concerns identified in the preceding legal analysis in relation to the instrument, the committee draws the human rights implications of the instrument to the attention of the Parliament.

Mr Ian Goodenough MP

Chair

5 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 12.

