



26 August 2021

Senator the Hon Marise Payne
Minister for Foreign Affairs
Parliament House
CANBERRA ACT 2600

Via email: foreign.minister@dfat.gov.au

CC: legislation@dfat.gov.au

Dear Minister,

Charter of the United Nations Listings

Thank you for your response of 6 August 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) in relation to the above instruments. The committee considered your response at its private meeting on 25 August 2021.

The committee acknowledges your advice that legislative instruments made under Part 4 of the *Charter of the United Nations Act 1945* (the Act) are subject to disallowance, and that your department will prepare replacement explanatory statements for the listings instruments to remove reference to the instruments not being subject to disallowance.

The committee also acknowledges your clarification in relation to the difference in wording used in the explanatory statements to the listings instruments.

The committee has further considered the listings instruments in light of your advice and the terms of the Charter of the United Nations Amendment Bill 2021 (the bill), which was introduced into the House of Representatives on 11 August 2021. Following this consideration, the committee has resolved to seek your further advice about the matters outlined below.

Compliance with Legislation Act 2003—registration of instruments

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. These include the requirements prescribed by the *Legislation Act 2003* (Legislation Act) with regard to the registration of legislative instruments.

The committee acknowledges that, if passed, the bill will confirm the application and enforceability of listings made under subsection 15(1) or 15(3) of the Act since 2001. However, noting the importance of the counter-terrorism financial sanctions regime, the committee remains deeply concerned about the significant delay in registering the listings instruments and the impact this may have on the validity of any action that has been taken under the instruments prior to their registration on the Federal Register of Legislation on 26 May 2021.

The importance and significance of appropriate parliamentary scrutiny of this matter is underscored by the fact that a number of parliamentary committees are pursuing the matter, including the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights.

In light of the above, the committee would appreciate your advice as to when and how your department became aware that it would be necessary to register the listing instruments on the Federal Register of Legislation to ensure their enforceability.

Adequacy of explanatory materials

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

Following the consideration outlined above, the committee has identified two further matters of concern in relation to the explanatory statements accompanying the listings instruments.

First, the committee notes that the explanatory statements make only brief reference to the impact of the instruments on human rights.

Noting this, the committee's view is that the explanatory statements do not adequately detail or assess the compatibility of each instrument with human rights. In this respect, the Parliamentary Joint Committee on Human Rights provides the following guidance to departments and other legislation proponents in its 'Guidance note 1 – drafting statements of compatibility':

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.¹

Secondly, the committee notes that the Charter of the United Nations Amendment Bill 2021 (the bill) is intended to confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to the listings instruments that were not registered on the Federal Register of Legislation at the time of their making. In doing so, the bill appears to override subsection 12(2) of the *Legislation Act 2003* (Legislation Act), which provides that legislative instruments which commence before the instrument is registered are taken not to retrospectively apply to a person if the person's rights would be affected so as to disadvantage the person; or if liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.

This matter is not addressed in the explanatory statements as they were prepared prior to the introduction of the bill and therefore it appears that, if the bill is passed, the statements will incorrectly refer to the application of subsection 12(2) of the Legislation Act to the instruments.

1 Available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

In light of the above, the committee would appreciate your advice as to:

- **whether the explanatory statements can be amended to provide more robust statements of compatibility with human rights; and**
- **whether the explanatory statements can be amended to clarify the impact of the Charter of the United Nations Amendment Bill 2021 on the operation of the instruments.**

As advised in my letter of 12 August 2021, in accordance with the committee's usual practice, the committee gave a notice of motion to disallow the listings instruments on 24 August 2021, to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **9 September 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website. If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your ongoing assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation