

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Charter of the United Nations Act 1945

*Charter of the United Nations (Sanctions–South Sudan) Amendment
(2019 Measures No. 1) Regulations 2019*

The *Charter of the United Nations Act 1945* (the Act) provides legislative approval for the Charter of the United Nations (the Charter) in Australian law. Section 6 of the Act provides that the Governor-General may make regulations to give effect to decisions of the United Nations Security Council (UNSC) under Chapter VII of the Charter that Article 25 of the Charter requires Australia to carry out, insofar as those decisions require Australia to apply measures not involving the use of armed force.

The *Charter of the United Nations (Sanctions–South Sudan) Amendment (2019 Measures No. 1) Regulations 2019* (the Regulations) amend the *Charter of the United Nations (Sanctions–South Sudan) Regulation 2015* (the Principal Regulations) to implement UNSC Resolution 2428 (2018) (UNSCR 2428) to impose an arms embargo in relation to South Sudan, consistent with Australia's international obligations.

The preamble to UNSCR 2428 notes that the Security Council was acting under Chapter VII of the Charter. Decisions of the Security Council contained in UNSCR 2428 are therefore binding on Australia.

UNSCR 2428 was adopted on 13 July 2018 in the context of continued hostilities and violations of the Agreement on the Resolution of the Conflict of the Republic of South Sudan (ARCSS), the Agreement on the Cessation of Hostilities, Protection of Civilians and Humanitarian Access (ACOH) and the Khartoum Declaration. It requires all Member States to implement an arms embargo in relation to South Sudan.

The Principal Regulations implement Australia's obligations under UNSCR 2206 (2015) (as subsequently renewed by UNSCRs 2271 (2016), 2280 (2016), 2290 (2016) and 2353 (2017)) to impose targeted financial sanctions in relation to persons or entities designated by the South Sudan Sanctions Committee.

The Regulations amend the principal Regulations to implement the decision of the UNSC in paragraph 4 of UNSCR 2428 to impose an arms embargo in relation to South Sudan. Paragraph 4 of UNSCR 2428 requires Australia to prevent the direct or indirect supply, sale or transfer to South Sudan of arms or related materiel, by an Australian or from Australian territory. It also requires Australia to prevent the provision to South Sudan, by an Australian or from Australian territory, of technical assistance, training, financial or other assistance, related to military activities, or the provision, maintenance or use of arms or related materiel, including the provision of armed mercenary personnel whether or not originating in Australian territory. Paragraph 5 of UNSCR 2428 outlines several narrow exemptions to the arms embargo allowing provision of otherwise sanctioned goods and services in a limited range of circumstances.

The Regulations provide in subsection 4B(2) that strict liability applies to the circumstance where the making of the sanctioned supply is not authorised by a permit. The proposed Regulations would provide in subsection 4D(2) that strict liability applies to the circumstance where the provision of the sanctioned service is not authorised by a permit. The application of strict liability to this element of the prohibitions in subsections 4B(2) and 4D(2) means that the prosecution will only need to prove that a permit does not exist. The defendant will not be able to argue that the conduct has been permitted in some other way, for example through a statement by the Minister which could be taken as de facto authorisation to engage in conduct that is prohibited under the Act.

The Regulations provide that the defendant bears the evidential burden in relation to a permit granted by a foreign country for a supply, sale or transfer in or from a foreign country (subsection 4B(7)) and in relation to a permit granted by a foreign country for a service provided in a foreign country (subsection 4D(7)). The shifting of the evidentiary burden to the defendant in subsections 4B(7) and 4D(7) is justified on the basis that foreign permits granted to the defendant would be peculiarly within the defendant's knowledge.

Subsection 6(3) of the Act provides that, despite subsection 14(2) of the *Legislation Act 2003*, regulations made for the purposes of subsection 6(1) of the Act may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time, or as existing from time to time.

Subsection 7(2) of the Regulations incorporates the *Charter of the United Nations (Dealing with Assets) Regulations 2008* by reference. The reference to these regulations is "as in force from time to time" because the *Charter of the United Nations (Dealing with Assets) Regulations 2008* is a Commonwealth disallowable legislative instrument (and so is permitted by section 14 of the *Legislation Act 2003* to be incorporated as in force from time to time), and section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments are taken to be references to those instruments as in force from time to time. The *Charter of the United Nations (Dealing with Assets) Regulations 2008* is readily and freely available to the public on the Federal Register of Legislation website.

Subsections 4B(6)(b)(iii) and 4D(b)(iii) incorporate by reference UNSCR 2428 and any other relevant resolutions. UNSC Resolutions do not operate in the same manner as Acts and legislative instruments. That is, subsequent resolutions in respect of a matter or issue do not always state that they are amending or replacing previous resolutions on that matter or issue. Rather, the resolutions need to be read in conjunction with one another.

UNSC Resolutions, including those referred to in the Regulations, can be found on the United Nations website.

The Act does not provide for merits review. Accordingly, decisions by the Minister for Foreign Affairs under the Regulations will not be subject to merits review. The

Act has the legitimate objective of giving domestic effect to UNSC resolutions and providing a foreign policy mechanism for the Australian Government to address situations of international concern. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign policy and national security considerations involved, as well as the potentially sensitive nature of the evidence relied on in reaching those decisions. Where the UNSC has resolved that there will be limitations on engagement with a sanctioned regime, Australia, as a member of the United Nations, must comply with these international obligations. While merits review is unavailable for a decision by the Minister under the Regulations, an applicant can still seek judicial review of a decision.

No public consultation was undertaken in relation to the Regulations under section 17 of the *Legislation Act 2003* because the instrument implements Australia's international legal obligations arising from decisions of the UNSC. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanction laws implementing UNSC sanctions.

Details of the Regulations are set out in Attachment A.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purpose of the *Legislation Act 2003*.

The Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required when implementing a decision of the UNSC concerning sanctions (OBPR reference: 21407).

The Regulations are 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* as set out in Attachment B.

Authority: Section 6 of the
*Charter of the United
Nations Act 1945*

ATTACHMENT A

Details of the Charter of the United Nations (Sanctions–South Sudan) Amendment (2019 Measures No. 1) Regulations 2019

Section 1 – Name

Section 1 provides that the title of the instrument is the *Charter of the United Nations (Sanctions–South Sudan) Amendment (2019 Measures No. 1) Regulations 2019*.

Section 2 – Commencement

Section 2 provides that all provisions of the instrument commence the day after the instrument is registered.

Section 3 – Authority

Section 3 provides that the instrument is made under the *Charter of the United Nations Act 1945*.

Section 4 – Schedule

Section 4 establishes that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms.

Schedule 1 – Amendments

Charter of the United Nations (Sanctions–South Sudan) Regulation 2015

Item 1

Item 1 inserts a note in section 4 after the heading to define ‘asset’ and ‘UN sanctions enforcement law’ in accordance with the Act.

Item 2

Item 2 inserts in section 4 the definitions for ‘arms or related materiel’, ‘Australian aircraft’, ‘Australian ship’, ‘authorised service’, and ‘authorised supply’.

Item 3

Item 3 amends the definition of ‘designated person or entity’ to include persons or entities to whom the measures mentioned in paragraph 12 of Resolution 2206 apply under a decision of the Security Council.

Item 4

Item 4 inserts in section 4 definitions for ‘paramilitary equipment’, ‘protective clothing’, ‘Resolution 2428’, ‘sanctioned service’, and ‘sanctioned supply’.

Item 5

Item 5 inserts in section 4A a definition for ‘sanctioned supply’.

Item 6

Item 6 repeals the ‘note’ under the heading ‘Part 2 – UN sanction enforcement laws’.

Item 7

Item 7 inserts sections 4B and 4C relating to the making of sanctioned supply and sections 4D and 4E relating to the provision of a sanctioned service.

Section 4B prohibits the making of a sanctioned supply without authorisation. Section 4B defines ‘authorised supply’ as a sanctioned supply authorised by a permit issued under section 4C or, if the supply takes place in a foreign country, by a permit properly issued by that country in accordance with its obligations under UNSCR 2428 and any other relevant resolutions. Section 4B has been specified by the Minister for Foreign Affairs in the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* as a ‘UN sanction enforcement law’ pursuant to section 2B of the *Charter of the United Nations Act* (the Act). This has the effect of making a contravention of section 4B an offence under section 27 of the Act.

Section 4B provides that section 15.1 of the *Criminal Code* (extended geographical jurisdiction – Category A) applies to an offence under section 27 of the Act that relates to a contravention of section 4B, thus giving the offence extraterritorial operation. In addition, the prohibition in section 4B also applies to a person, whether or not in Australia, and whether or not an Australian citizen, who uses the services of an Australian ship or an Australian aircraft to make an unauthorised supply. The prohibition in section 4B applies also to a body corporate in relation to an unauthorised supply made by another body corporate or entity, wherever incorporated or situated, over which the first body corporate has effective control.

Section 4B provides that a defendant charged with contravening a UN sanction enforcement law under section 27 of the Act in relation to conduct prohibited by section 4B must establish that a permit was in fact granted by a foreign government in relation to the sanctioned supply in or from a foreign country. In all other respects, for the purpose of section 4B, the evidentiary burden remains with the prosecution.

Section 4C provides that the Minister for Foreign Affairs may, on application, and subject to conditions specified in the section, grant a person a permit authorising the making of a sanctioned supply. A permit may be granted if the sanctioned supply is:

- intended solely for the support of United Nations personnel;
- non-military equipment intended solely for humanitarian or protective use (notified in advance to the Committee established pursuant to UNSCR 2428 (the Committee));
- protective clothing temporarily exported to South Sudan for the personal use of United Nations personnel, representatives of the media, humanitarian or development workers, or an associated person;
- to be temporarily exported to South Sudan by the forces of a State taking action in accordance with international law to facilitate the protection or evacuation of its nationals and those for whom it has consular responsibility in South Sudan (notified in advance to the Committee);
- to be made in support of the African Union Regional Task Force and is intended solely for regional operations to counter the Lord’s Resistance Army (notified in advance to the Committee);

- made solely in support of the implementation of the terms of the peace agreement (within the meaning of UNSCR 2428) (approved in advance by the Committee); or
- a sale or supply of ‘arms or related materiel’ (approved in advance by the Committee).

Section 4D prohibits the provision of a sanctioned service without authorisation. Section 4D defines ‘authorised service’ as a sanctioned service authorised by a permit issued under section 4E or, if the supply takes place in a foreign country, by a permit properly issued by that country in accordance with its obligations under UNSCR 2428 and any other relevant resolutions. Section 4D has been specified by the Minister for Foreign Affairs in the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* as a ‘UN sanction enforcement law’ pursuant to section 2B of the *Charter of the United Nations Act* (the Act). This has the effect of making a contravention of section 4D an offence under section 27 of the Act.

Section 4D provides that section 15.1 of the Criminal Code applies to an offence under section 27 of the Act that relates to a contravention of section 4D, thus giving the offence extraterritorial operation. In addition, the prohibition in section 4D also applies to a person, whether or not in Australia, and whether or not an Australian citizen, who uses the services of an Australian ship or an Australian aircraft to make an unauthorised supply. Similarly, the prohibition in section 4D applies to a body corporate in relation to an unauthorised supply made by another body corporate or entity, wherever incorporated or situated, over which the first body corporate has effective control.

Section 4D also provides that a defendant charged with contravening a UN sanction enforcement law under section 27 of the Act in relation to conduct prohibited by section 4D must establish that a permit was in fact granted by a foreign government in relation to the sanctioned supply in or from a foreign country. In other respects, for the purpose of section 4D, the evidentiary burden remains with the prosecution.

Section 4D provides that the Minister for Foreign Affairs may, on application, and subject to conditions specified in the section, grant a person a permit authorising the provision of a sanctioned service if the sanctioned service is:

- training or assistance intended solely for the support of United Nations personnel;
- technical assistance or training related to non-lethal military equipment intended solely for humanitarian or protective use (notified in advance to the Committee);
- technical training or assistance provided in support of the African Union Regional Task Force and intended solely for regional operations to counter the Lord’s Resistance Army (notified in advance to the Committee);
- technical training or assistance provided solely in support of the implementation of the terms of the peace agreement (within the meaning of UNSCR 2428) (approved in advance by the Committee); or
- provision of other assistance or personnel (approved in advance by the Committee).

Item 8

Item 8 amends subsection 7(1) to clarify that applications for permits for assets and controlled assets must be in writing.

Item 9

Item 9 amends subsection 7(2) to simplify the language and reference to the *Charter of the United Nations (Dealing with Assets) Regulations 2008*.

Item 10

Item 10 amends subsection 7(9) to specify that the permit must be in writing and given to the applicant. It also amends the note to subsection 7(9) to provide further clarity on section 13 of the Act as regards permits granted under section 7.

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 (Sanctions–South Sudan) Amendment (2019 Measures No. 1) Regulations 2019 (the Regulations)

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

The Regulations amend the *Charter of the United Nations (Sanctions–South Sudan) Regulation 2015* (the principal Regulations) to implement the decision of the United Nations Security Council (UNSC) in Resolution 2428 (UNSCR 2428) to impose an arms embargo in relation to South Sudan.

UNSCR 2428 was adopted on 13 July 2018 in the context of continued hostilities and violations of the Agreement on the Resolution of the Conflict of the Republic of South Sudan (ARCSS), the Agreement on the Cessation of Hostilities, Protection of Civilians and Humanitarian Access (ACOH) and the Khartoum Declaration. It requires all Member States to implement an arms embargo in relation to South Sudan. UNSCR 2428 is a decision under Chapter VII of the *Charter of the United Nations* (the Charter), and Australia is required to carry it out pursuant to Article 25 of the Charter.

Consistent with UNSCR 2428, the Regulations prohibit the direct or indirect supply of ‘arms or related materiel’ to South Sudan, subject to the following exceptions:

- a supply intended solely for the support of United Nations personnel;
- a supply of non-military equipment intended solely for humanitarian or protective use (notified in advance to the Committee established pursuant to UNSCR 2428 (the Committee));
- a supply of protective clothing temporarily exported to South Sudan for the personal use of United Nations personnel, representatives of the media, humanitarian or development workers, or an associated person;
- a supply to be temporarily exported to South Sudan by the forces of a State taking action in accordance with international law to facilitate the protection or evacuation of its nationals and those for whom it has consular responsibility in South Sudan (notified in advance to the Committee);
- a supply to be made in support of the African Union Regional Task Force and is intended solely for regional operations to counter the Lord’s Resistance Army (notified in advance to the Committee);

- a supply made solely in support of the implementation of the terms of the peace agreement (within the meaning of UNSCR 2428) (approved in advance by the Committee); or
- a supply that is a sale or supply of ‘arms or related materiel’ (approved in advance by the Committee).

Consistent with UNSCR 2428, the Regulations also prohibit the provision of technical assistance training, financial or other assistance related to military activities, or the provision, maintenance or use of ‘arms or related materiel’, and includes the provision to South Sudan of armed mercenary personnel whether or not originating in Australia, subject to the following exceptions:

- training or assistance intended solely for the support of United Nations personnel;
- technical assistance or training related to non-lethal military equipment intended solely for humanitarian or protective use (notified in advance to the Committee);
- technical training or assistance provided in support of the African Union Regional Task Force and intended solely for regional operations to counter the Lord’s Resistance Army (notified in advance to the Committee);
- technical training or assistance provided solely in support of the implementation of the terms of the peace agreement (within the meaning of UNSCR 2428) (approved in advance by the Committee); or
- provision of other assistance or personnel (approved in advance by the Committee).

Human rights compatibility

The objective of UNSCR 2428 is to respond to the failure of South Sudan’s leaders to bring an end to the internal political and military hostilities and violations of various peace agreements (ARCSS, ACOH and the Khartoum Declaration), which have resulted in widespread human suffering including loss of life, food insecurity, displacement, loss of property and human rights violations and abuses.

The Regulations implement a binding decision of the UNSC pursuant to Chapter VII of the Charter, which Australia is required as a matter of international law to implement.

The Regulations, which implement UNSCR 2428 into Australian law, advance human rights by ensuring that certain activities which may hinder the peace process and human rights in South Sudan (specifically, the supply of arms or related materiel or the provision of related services) are subject to UNSC sanction measures.

The Parliamentary Joint Committee on Human Rights (Committee) has accepted the use of sanctions 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. However, it has emphasised that Australia’s sanctions regimes should be proportionate to their stated objective.

The Regulations engage the following human rights:

- the right to security of the person and freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to a fair trial and fair hearing in Article 14 of the ICCPR.

Right to security of the person and freedom from arbitrary detention

Article 9 of the ICCPR protects the right to liberty, including the right not to be arbitrarily detained. The notion of arbitrariness incorporates elements of inappropriateness, injustice and lack of predictability.

Report

The PJCHR has previously expressed the view that regulations which are specified as ‘UN sanctions enforcement laws’ under the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* may engage and limit the right to liberty, because they may result in a penalty of imprisonment for a person.

In its Report No. 11 of 2017, the PJCHR noted that Australia’s human rights obligations require that interferences with a person’s human rights must have a clear basis in law, meaning 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 PJCHR further noted that measures limiting the right to liberty must be sufficiently precise such that people who would potentially be subject to them are aware of the consequences of their actions.

Permissible limitations

The Regulations introduce prohibitions in subsections 4B(2) and 4D(2) that, respectively, prohibit the making of a sanctioned supply or the provision of a sanctioned service. Because subsections 4B(2) and 4D(2) are specified as a ‘UN sanction enforcement law’ under the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* (the Declaration), contravening these prohibitions may, under Part 5 of the *Charter of the United Nations Act 1945* (the Act), result in a penalty of imprisonment and, accordingly, engage the right to liberty.

The Government considers that any limitation on human rights that may arise as a consequence of these prohibitions constituting a UN sanction enforcement law is permissible and consistent with Australia’s obligations under international human rights law.

The new prohibitions under subsections 4B(2) and 4D(2) are clearly defined in the Regulations which are available on the Federal Register of Legislation (<https://www.legislation.gov.au/Home>). With respect to subsection 4B(2), the definition of a ‘sanctioned supply’ is set out in section 4A of the Regulations and is limited to the supply, sale or transfer of ‘arms or related materiel’ to another person which directly or indirectly results in the supply, sale or transfer of the ‘arms or related materiel’ to South Sudan. With respect to subsection 4D(2), the definition of a ‘sanctioned service’ is set out in section 4 of the Regulations and is limited to:

- the provision to South Sudan of technical assistance, training, financial or other assistance, related to military activities, or the provision, maintenance or use of any arms or related materiel; and
- includes the provision to South Sudan of armed mercenary personnel whether or not originating in Australia.

The Regulations delineate the application of the prohibitions to ensure the prohibitions can be readily understood. The Regulations have the legitimate aim of responding to the widespread human suffering caused by the failure of South Sudan’s leaders to bring an end to internal political and military hostilities.

The Government considers the additional prohibitions introduced in subsections 4B(2) and 4D(2) are a reasonable, necessary and proportionate means of achieving the legitimate objective of the Regulations, and implementing a binding decision of the UNSC.

Right to a fair trial and fair hearing: presumption of innocence

Article 14(1) of the ICCPR protects the right to a fair trial and a fair hearing. The right concerns procedural fairness, and applies where rights and obligations, such as personal property and other private rights, are to be determined. Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

Report

The PJCHR has previously expressed the view, with respect to sanctions designations or declarations made under Australian sanctions law that are not subject to merits review, that Article 14 of the ICCPR is engaged in so far as they limit the avenues available to challenge the decision. The PJCHR *Guidance Note 2: Offence provisions, civil penalties and human rights* notes that, as strict liability offences allow for the imposition of criminal liability without the need to prove fault, strict liability offences interact with the presumption of innocence in Article 14(2) of the ICCPR.

Permissible limitations

With respect to the right to a fair hearing, the Government’s position is that any limitation on the access to merits review is justified. The Regulations have the legitimate objective of responding to the failure of South Sudan’s leaders to bring an end to the hostilities in South Sudan, which have resulted in widespread human suffering.

The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign policy and national security considerations involved, as well as the fact that the Regulations implement a binding decision of the UNSC. Further, judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976*.

With respect to the presumption of innocence, the PJCHR Guidance Note acknowledges that a strict liability offence will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The Regulations provide in subsections 4B(2) and 4D(2) that strict liability applies, respectively, to the circumstance where the making of the sanctioned supply is not authorised by a permit or where the provision of the sanctioned service is not authorised by a permit. The application of strict liability to this element of the prohibitions in 4B(2) and 4D(2) means that the prosecution will only need to prove that a permit does not exist. The defendant will not be able to argue that the conduct has been permitted in some other way, for example through a statement by the Minister which could be taken as *de facto* authorisation to engage in conduct that is prohibited under the Act.

The position of the Government is that the Regulations are consistent with Article 14 as the strict liability is reasonably targeted to achieve the legitimate purpose of preventing a spurious defence that a statement of the Minister could be taken as *de facto* authorisation to engage in conduct that is prohibited under the *Charter of the United Nations Act 1945*, in addition to the overarching objectives of the UNSC arms embargo for South Sudan.

The Regulations provide that the defendant bears the evidential burden in relation to a permit granted by a foreign country for a supply, sale or transfer in or from a foreign country (subsection 4B(7)) and in relation to a permit granted by a foreign country for a service provided in a foreign country (subsection 4D(7)).

The shifting of the evidentiary burden to the defendant in subsections 4B(7) and 4D(7) is justified on the basis that foreign permits granted to the defendant would be peculiarly within the defendant's knowledge.

Conclusion

In expanding sanctions in relation to South Sudan, the Regulations have the legitimate aim of demonstrating the international community's condemnation of the continued hostilities and violation of human rights and peace agreements in relation to South Sudan. Accordingly, the Government considers that the Regulations are compatible with human rights because they promote the protection of human rights and implement a binding decision of the UNSC, which Australia is required as a matter of international law to implement. To the extent it may limit human rights, the Government considers the measures are reasonable, necessary and proportionate.