

Part 2

**Legislative instruments registered
with FRLI 20 April – 17 May 2013**

The committee has sought further information in relation to the following legislative instruments

Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1)

FRLI: F2013L00791

Portfolio: Foreign Affairs

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2013 (No. 1)

FRLI: F2013L00789

Portfolio: Foreign Affairs

Charter of the United Nations (Sanctions - the Taliban) Regulation 2013

FRLI: F2013L00787

Portfolio: Foreign Affairs

Summary of committee view

2.1 The committee seeks further information as to whether the strict liability provisions in these instruments are consistent with the right to be presumed innocent and whether freezing a designated person's assets is compatible with the right to privacy.

Overview

2.2 These instruments seek to amend a number of instruments made under the *Charter of the United Nations Act 1945* to give effect to decisions made by the United Nations Security Council under Chapter VII of the Charter of the United Nations. These give effect to:

- sanctions obligations in relation to Al-Qaida and the Taliban, with these instruments splitting these into two separate Regulations;
- new sanctions in relation to Libyan Arab Jamahiriya and the repealing of sanctions in relation to Sierra Leone;
- changes to the arms embargoes in relation to Somalia and Eritrea;
- removal of certain exemptions in relation to Sudan;
- removal of the prohibition on the import of rough diamonds from Côte d'Ivoire for certain scientific research purposes;

- imposition of strict liability for offences across the regulations that is 'not authorised by a permit'; and
- specification of certain provisions to be a 'UN sanction enforcement law'.

Compatibility with human rights

2.3 All three instruments are accompanied by self-contained statements of compatibility that state that the instruments are compatible with human rights, as they do not make any substantial changes to existing law or are procedural amendments. The only reference to human rights being engaged is in relation to the Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1), which states:

This Legislative Instrument engages human rights to the extent that it provides for supplies of protective clothing and equipment to be supplied to UN personnel in peacekeeping operations in Somalia and Eritrea and ensures that any imports of rough diamonds comply with the Kimberly Process.

This Legislative Instrument is compatible with human rights because it advances the protection of human rights in Somalia, Eritrea and Côte d'Ivoire.¹

2.4 The committee notes, as it has done previously, that reliance on a measure being substantially the same as existing law, is not sufficient justification as to whether a measure is compatible with human rights, as it may be that there are human rights concerns with the existing law. The statements of compatibility to legislation that amends, incorporates or restates existing law needs to consider the human rights implications of any amendments and the existing legislation where relevant.

Right to be presumed innocent

2.5 The committee notes that a number of the provisions of the Charter of the United Nations Legislation Amendment Regulation 2013 (No. 1) and the Charter of the United Nations (Sanctions-the Taliban) Regulation 2013 apply strict liability to offences. As strict liability offences allow for the imposition of criminal liability without the need to prove fault, the committee notes that all strict liability offences engage the presumption of innocence in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR). The committee notes that strict liability offences will not necessarily violate the presumption of innocence provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective

1 Statement of compatibility, p. 2.

criteria, and (iii) proportionate to the aim to be achieved. However, as these provisions have not been explained in the statement of compatibility the committee is unable to assess whether these are consistent with article 14(2) of the ICCPR.

2.6 The committee intends to write to the Minister for Foreign Affairs to ask whether the strict liability provisions in these instruments are consistent with the right to be presumed innocent.

Right to privacy

2.7 The Charter of the United Nations (Sanctions-the Taliban) Regulation 2013 prohibits a person from making an asset available to a designated person or entity unless the Minister has authorised this by permit, in effect freezing a person's assets. A 'designated person or entity' is defined as the Taliban or anyone designated by the UN Security Council or Committee of the Council. As the committee has previously commented,² freezing an individual's assets engages the right to privacy under article 17 of the ICCPR. Denying a person use of their own personal assets – and requiring a Ministerial permit to access assets to use for basic expenses – appears to limit the right to privacy given the potential impact on an individual's personal life.

2.8 The right to privacy may be limited but any limitation must be in accordance with law, seek to achieve a legitimate objective, have a rational connection to that objective and be proportionate to that objective. It is not clear to the committee whether the designation of person by the Security Council or Committee would be sufficiently prescribed to be 'in accordance with law'. International human rights jurisprudence has established that 'law' in this context means not only that there must be a domestic rule adopted as part of the standard legislative process (or an accepted rule of the common law), but that the law or rule in question must satisfy the 'quality of law' test. This means that it must be sufficiently precise so as to provide an indication in advance to a person whose rights are to be affected by the law of the circumstances under which, and the extent to which, the person may be affected. It also requires that adequate safeguards exist to prevent abuse. In particular, it is unclear to the committee what review rights (if any) are available to a person who has been designated under this process, both at the national and international level.

2.9 The committee intends to write to the Minister for Foreign Affairs to seek further information as to how this instrument is compatible with the right to privacy and how designation by the Security Council or Committee can properly be determined to be 'in accordance with law'.

2 In relation to the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Zimbabwe) Amendment List 2013, in its *Sixth Report of 2013*, p. 135.