EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence

Defence Act 1903

Defence (Non-relevant foreign country) Determination 2024

The instrument is made under subsection 115(3) of the *Defence Act 1903* (the Act). The instrument commences on the day after the instrument is registered on the Federal Register of Legislation and is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Purpose

Part IXAA of the Act regulates the work that former defence staff members may perform and the training that other Australian citizens or permanent residents of Australia, who are not former defence staff members, may provide.

Under Part IXAA, former defence staff members, known as foreign work restricted individuals, are restricted from performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country if the person does not hold a permit, called a foreign work authorisation (FWA), for the work and no other exception applies. Engaging in this conduct without such a permit is an offence with a penalty of 20 years' imprisonment.

Similarly, Australian citizens or permanent residents of Australia (other than foreign work restricted individuals) are restricted from providing training to, or on behalf of, a military organisation, or government body, of a relevant foreign country that relates to material on Part 1 of the *Defence and Strategic Goods List*, or otherwise relating to military tactics, techniques or procedures if the person does not hold an FWA. Engaging in this conduct without an FWA is also an offence under Part IXAA, with a penalty of 20 years imprisonment.

The purpose of this instrument is to specify countries that are not a relevant foreign country (as defined in section 113 of the Act), in order to ensure that the offence provisions in Part IXAA of the Act do not apply to individuals performing work for, or providing training to, military organisations or government bodies of foreign countries that are determined to be low-risk.

Details of the instrument

Details of the instrument are set out in **Attachment A**.

Consultation

The Office of Impact Analysis was consulted in relation to this instrument and confirmed that an impact analysis was not required for this instrument (OIA24-07448).

Parliamentary scrutiny

The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement provides that the instrument is compatible with human rights because it promotes the protection of human rights, and to the extent that it may limit human rights, those limitations are necessary, reasonable and proportionate. The Statement is included at **Attachment B**.

The instrument is made by the Honourable Richard Marles, Minister for Defence, in accordance with the requirements of subsection 115(3) of the Act.

Attachment A

Details of the *Defence (Non-relevant foreign country) Determination 2024*

Section 1 Name

This section provides that the name of the instrument is the *Defence (Non-relevant foreign country) Determination 2024*.

Section 2 Commencement

This section provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 Authority

This section provides that the instrument is made under subsection 115(3) of the *Defence Act 1903* (the Act).

Section 4 Countries that are not relevant foreign countries

Part IXAA of the Act contains two offences—section 115A regulates the performance of work by former defence staff members and section 115B regulates the provision of military style training by Australian citizens and permanent residents of Australia (other than defence staff members, as they are already captured by the offence in section 115A). A common element of these offences is that the work or training must be performed for or provided to, or on behalf of, a relevant foreign country. Section 113 of the Act defines a relevant foreign country to mean a foreign country, other than a country specified in a legislative instrument made by the Minister under subsection 115(3) of the Act and in force. This provision enables the Minister to determine that a foreign country is not a relevant foreign country, by including that country in such an instrument.

Where a country is specified in a legislative instrument as not being a relevant foreign country, the effect is that the offence provisions in Part IXAA of the Act do not apply to an individual performing work for, or providing training to, or on behalf of that country. Section 4 of the instrument provides that each of the following countries is not a relevant foreign country, for the purposes of the definition of relevant foreign country in section 113 of the Act:

- Canada;
- New Zealand;
- United Kingdom; and
- United States of America.

This means that an individual will not commit an offence under Part IXAA of the Act if they perform work for, or provide military-style training to, or on behalf of any of the countries listed above, as they

are not a relevant foreign country within the scope of the offence provisions in subsections 115A(1) and 115B(1) of the Act.

Additionally, this means that an individual does not need to apply for a foreign work authorisation to perform work for, or provide training to, or on behalf of any of these countries, as the offence provisions of Part IXAA do not apply to these countries.

Attachment B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence (Non-relevant foreign country) Determination 2024

This 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 of the Instrument

Part IXAA of the *Defence Act 1903* (the Act) regulates the work that former defence staff members may perform and the training that Australian citizens or permanent residents of Australia, who are not former defence staff members, may provide.

Under Part IXAA, former defence staff members, known as foreign work restricted individuals, are restricted from performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country if the person does not hold a permit, called a foreign work authorisation (FWA), for the work and no other exception applies. Engaging in this conduct without such a permit is an offence with a penalty of 20 years' imprisonment.

Similarly, Australian citizens or permanent residents of Australia (other than foreign work restricted individuals) are restricted from providing training to, or on behalf of, a military organisation, or government body, of a relevant foreign country that relates to material on Part 1 of the Defence and Strategic Goods List, or otherwise relating to military tactics, techniques or procedures if the person does not hold an FWA. Engaging in this conduct without an FWA is also an offence under Part IXAA, with a penalty of 20 years' imprisonment.

The purpose of this instrument is to specify countries that are not a relevant foreign country (as defined in section 113 of the Act), in order to ensure that the offence provisions in Part IXAA of the Act do not apply to individuals performing work for, or providing training to, military organisations or government bodies of foreign countries that are determined to be low-risk.

Human rights implications

This Disallowable Legislative Instrument engages the following right:

- the right to work in Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to work

Article 6(1) of the ICESCR recognises the right to work, including the right of individuals to take the opportunity to gain their living by work which they freely choose or accept, and requires appropriate steps to be taken to safeguard this right.

The measures of the instrument positively engage the right to work as set out in Article 6(1) of the ICESCR. This is because the instrument has the effect of specifying certain countries that are not a relevant foreign country, as defined in section 113 of the Act. The effect of excluding the countries listed in section 4 of the instrument from that definition is that an individual who performs work for,

or provides training to, or on behalf of any of those countries is excluded from the scope of the offence provisions set out under subsection 115A(1) or 115B(1) of the Act. This is because each of the countries listed in the instrument are not a relevant foreign country (within the meaning given by section 113 of the Act). Therefore work performed for, and training provided to, these countries is not subject to the regulatory framework contained in Part IXAA of the Act.

Additionally, this means that an individual is not required to apply for, hold or comply with a foreign work authorisation to perform such work for, or provide such training to, or on behalf of, a military organisation, or government body, of these countries. Collectively, these factors all contribute to enhancing the right of work for an individual.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.