

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

*Criminal Code (Terrorist Organisation—Islamic State West Africa Province)
Regulations 2020*

The purpose of the *Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2020* (the Regulations) is to specify Islamic State West Africa Province for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹

Section 5 of the *Criminal Code Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Schedule to the Act sets out the *Criminal Code*, which prescribes offences against humanity and related offences, and dangers to the community and national infrastructure.

Paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code* provides that regulations can specify organisations for the purposes of the definition of ‘terrorist organisation’.

Subsection 102.1(2) of the *Criminal Code* provides that before the Governor-General makes regulations specifying an organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or advocates the doing of a terrorist act.

The Minister for Home Affairs is satisfied on reasonable grounds that Islamic State West Africa Province is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. In coming to this position, the Minister for Home Affairs has taken into consideration unclassified information (Statement of Reasons) provided by the Australian Security Intelligence Organisation ([Attachment C](#)).

Effect of the instrument

Division 102 of the *Criminal Code* sets out the following offences relating to terrorist organisations:

- directing the activities of a terrorist organisation

¹ A ‘terrorist organisation’ is defined in subsection 102.1(1) of the *Criminal Code* as:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph.

- being a member of a terrorist organisation
- recruiting persons to a terrorist organisation
- receiving training from, providing training to or participating in training with a terrorist organisation
- getting funds to, from or for a terrorist organisation
- providing support to a terrorist organisation, and
- associating with a terrorist organisation.

The Regulations ensure that the offences in Division 102 of the *Criminal Code* apply to conduct relating to Islamic State West Africa Province.

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

The Regulations commence on 1 July 2020. Subsection 102.1(3) of the *Criminal Code* provides that regulations for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ cease to have effect on the third anniversary of the day on which they take effect.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

Further details of the Regulations are set out in [Attachment B](#).

Consultation

The Department of Home Affairs sought the advice of the AGS in relation to the unclassified information (Statement of Reasons) provided by the Australian Security Intelligence Organisation.

Subsection 102.1(2A) of the *Criminal Code* provides that before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation. The Minister for Home Affairs wrote to the Leader of the Opposition enclosing the information upon which he was satisfied that Islamic State West Africa Province met the legislative criteria for listing.

The *Intergovernmental Agreement on Counter-Terrorism Laws* (June 2004) (the IGA) requires that the Commonwealth Government consult with the governments of the states and territories prior to making regulations specifying an organisation for the purposes of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*. The IGA provides that if a majority of the states and territories object to the making of such a regulation within a timeframe nominated by the Commonwealth, and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

The Minister for Home Affairs wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the states and territories. A majority of the states and territories did not object to the making of the Regulations within the timeframe nominated by the Minister.

Statement of Compatibility with Human Rights

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

Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2020

This Disallowable 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 *Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2020* (the Regulations) specify Islamic State West Africa Province for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.

The object of the Regulations is to identify that Islamic State West Africa Province is a terrorist organisation under Australian law, and put the organisation and members of the public on notice of that fact. Notification is important to help people avoid engaging in activities which might constitute an offence under Division 102 of the *Criminal Code* in relation to Islamic State West Africa Province.

The Regulations, which are part of Australia’s terrorist organisation listing regime, support the application of the offences in Division 102 of the *Criminal Code*, the object of which is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. In particular, the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Islamic State West Africa Province as a listed terrorist organisation.

Terrorist organisations, including Islamic State West Africa Province, present a threat to the security of Australia and often seek to harm Australians and our democratic institutions. The statutory definition of a ‘terrorist organisation’ requires that an organisation directly or indirectly engages in, prepares, plans, assists in or fosters the doing of a terrorist act or, in relation to a listed terrorist organisation, that the organisation advocates the doing of a terrorist act.

Human rights implications

The Regulations promote the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR):

- the inherent right to life in Article 6.

The Regulations limit the following human rights contained in the ICCPR:

- the right to freedom of expression in Article 19, and
- the right to freedom of association in Article 22.

The inherent right to life in Article 6

Article 6 of the ICCPR provides that countries have a duty to take appropriate steps to protect the right to life and to investigate arbitrary or unlawful killings and punish offenders. The Regulations, and the terrorist organisation listing regime more broadly, ensure that the offence provisions in Division 102 of the *Criminal Code* apply to certain conduct in relation to listed terrorist organisations. These offence provisions operate to penalise conduct that presents a significant risk to life, both in Australia and overseas, and, in conjunction with the terrorist organisation listing regime, also act as a deterrent to that conduct. Deterring the conduct, and thereby preventing the risk to life, promotes the inherent right to life expressed in Article 6 of the ICCPR.

The right to freedom of expression in Article 19

Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression. However, Article 19(3) provides that freedom of expression may be limited if it is necessary to achieve a legitimate purpose, including for the protection of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right to freedom of expression to the extent that persons are prohibited from directing the activities of, recruiting for, providing support to or associating with terrorist organisations, including Islamic State West Africa Province. The restrictions on freedom of expression are justified on the basis that such conduct could jeopardise the security of Australia, the personal safety of its population and its national interests and the restrictions are reasonable, necessary and proportionate to the objective of protecting Australia's national security.

The right to freedom of association in Article 22

Article 22 of the ICCPR protects the right of all persons to group together voluntarily for a common goal and to form and join an organisation. Article 22(2) provides that this right may be limited for the purpose of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right of freedom of association to prevent people engaging with and participating in terrorist organisations, in this instance Islamic State West Africa Province.

The offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* is limited in its application to an organisation that is a listed terrorist organisation under the definition of ‘terrorist organisation’ in paragraph 102.1(1)(b) of the *Criminal Code*. The offence does not apply if the association is with a close family member and relates to a matter of family or domestic concern, or takes place in the course of practicing a religion in a place used for public religious worship, or the association is only for the purpose of providing humanitarian aid or only for the purpose of providing legal advice or legal representation.

Due to the severity of the danger posed by terrorist organisations, it is reasonable, necessary and proportionate to limit the right of individuals who, by their association with a terrorist organisation, pose a threat to Australians.

General safeguards and accountability mechanisms

Whilst the Regulations may limit the right to freedom of expression and the right to freedom of association with Islamic State West Africa Province, the Regulations are subject to the safeguards outlined below. The limits on these rights are reasonable, necessary and proportionate, and are in the interests of public safety and national security, after taking into consideration the direct and indirect terrorist activities of the organisation, which threaten human life.

The *Criminal Code* provides safeguards and accountability mechanisms requiring prior consultation and enabling review of the Regulations, including the following:

- the Commonwealth must consult with the states and territories in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws* of 25 June 2004, and the Regulations may only be made if a majority of the states and territories do not object to the Regulations within a reasonable time specified by the Commonwealth
- under subsection 102.1(2A) of the *Criminal Code* the Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed Regulations
- under subsection 102.1(3) the *Criminal Code*, the Regulations will cease to have effect on the third anniversary of the day on which it takes effect
- subsection 102.1(4) of the *Criminal Code* provides that if the Minister ceases to be satisfied of the criteria necessary for listing an organisation under subsection 102.1(2) of the *Criminal Code*, the Minister must make a declaration to that effect by written notice published in the Gazette, with the effect of the Minister’s declaration that the Regulations listing the organisation cease to have effect and the organisation is de-listed as a terrorist organisation under Division 102 of the *Criminal Code*
- subsection 102.1(17) of the *Criminal Code* provides that an individual or an organisation may make a de-listing application to the Minister

- the Regulations may be reviewed by the Parliamentary Joint Committee on Intelligence and Security under section 102.1A of the *Criminal Code*, and
- both Houses of Parliament may disallow the Regulations within 15 sitting days after the Regulations are laid before that House, as provided for in section 42 of the *Legislation Act 2003* and noting that this period may be extended by operation of subsection 102.1A(4) of the *Criminal Code* if the Parliamentary Joint Committee on Intelligence and Security reviews the Regulations.

Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights. To the extent that the terrorist organisation listing regime, of which the Regulations are part, may also limit human rights, those limitations are for a legitimate purpose and are reasonable, necessary and proportionate.

The Hon Peter Dutton MP
Minister for Home Affairs

Details of the *Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2020*

Section 1 – Name

1. This section would provide that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2020*.

Section 2 – Commencement

2. This section would provide for the commencement of each provision in the proposed Regulations, as set out in the table.
3. Subsection 2(1) would provide that each provision in the instrument, as specified in column 1 of the table, commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 would provide that the proposed Regulations commence on 1 July 2020.
4. The note to subsection 2(1) clarifies that the table only relates to the provisions of this instrument as originally made, and will not be amended to deal with any subsequent amendments to the proposed Regulations.
5. Subsection 2(2) would provide that the information in column 3 of the table is not part of the the proposed Regulations. It is designed to assist readers of the proposed Regulations.

Section 3 – Authority

6. This section would provide that the proposed Regulations are made under the *Criminal Code Act 1995*.

Section 4 – Terrorist organisation—Islamic State West Africa Province

7. Subsection 4(1) would provide that, for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Islamic State West Africa Province is specified.
8. The effect of specifying Islamic State West Africa Province as a terrorist organisation would be to ensure that offences in Subdivision B of Division 102 of the *Criminal Code* that relate to terrorist organisations are able to operate, where the appropriate elements are satisfied, in relation to conduct in connection with Islamic State West Africa Province.
9. Subsection 4(2) would provide a list of names that Islamic State West Africa Province is also known as, namely:
 - (a) Islamic State in West Africa (paragraph (a));
 - (b) Islamic State of Iraq and Syria – West Africa (paragraph (b));
 - (c) Islamic State of Iraq and the Levant – West Africa (paragraph (c));
 - (d) Wilayat Gharb Afriqiyah (paragraph (d)).

ATTACHMENT C

STATEMENT OF REASONS FOR ISLAMIC STATE WEST AFRICA PROVINCE (ISWAP)	
Also known as: Islamic State in West Africa; Islamic State of Iraq and the Levant - West Africa; Islamic State of Iraq and Syria - West Africa; Wilayat Gharb Afriqiyah	
This statement is based on publicly available information about Islamic State West Africa Province (ISWAP). To the Australian Government's knowledge, this information is accurate, reliable and has been corroborated by classified information.	
1.	Basis for listing a terrorist organisation Division 102 of the <i>Criminal Code Act 1995</i> provides that for an organisation to be listed as a terrorist organisation, the AFP Minister must be satisfied on reasonable grounds that the organisation: a) is directly or indirectly engaged in, preparing, planning, or assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).
2.	Background to this listing The first listing of ISWAP for proscription purposes was on 1 July 2017 as Islamic State in West Africa, an alias of listed terrorist group Boko Haram. Boko Haram pledged allegiance to, and was accepted as a branch of, Islamic State in March 2015 and renamed itself as ISWAP. A dispute over the leadership of ISWAP in August 2016 resulted in the emergence of two factions of the group. One faction continued to operate as ISWAP and another faction reverted to the use of Boko Haram's formal name Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad. Although Boko Haram has not officially split from ISWAP, the groups are assessed to operate independently.
3.	Terrorist activity of the organisation (legislative requirements for listing) ISWAP follows an extreme interpretation of Islam which is anti-Western, promotes sectarian violence and targets as infidels and apostates those who do not agree with this interpretation. ISWAP rejects existing national borders and opposes elected governments, seeking to remove them through violence if necessary. <u>Objectives</u> ISWAP's primary objective is the establishment of an Islamic state under Shariah law in Nigeria. Its secondary objective is the wider imposition of Islamic rule beyond Nigeria. ISWAP is a recognised branch of listed terrorist group Islamic State and its objectives are consistent with those of Islamic State. ISWAP has undertaken the following to advance its ideology and achieve its objectives: <u>Directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts</u>

	<p>ISWAP has engaged in terrorist attacks and kidnappings against a wide range of targets in Nigeria and neighbouring countries. Attacks for which ISWAP can be reliably held responsible include:</p> <ul style="list-style-type: none"> • 26 December 2019: ISWAP kidnapped and executed 11 Christians in retaliation for the killing of senior Islamic State figures. • 13 December 2019: ISWAP executed four Nigerian humanitarian workers kidnapped in July 2019. • 18 November 2018: ISWAP attacked a military base in Metele, Nigeria, killing over 40 Nigerian soldiers. • 30 August 2018: ISWAP killed around 30 Nigerian soldiers in an attack against a military base in Zari, Nigeria. <p><u>Advocating the doing of terrorist acts</u></p> <p>ISWAP has publicly advocated the doing of terrorist attacks in order to further its objectives. Public statements in which ISWAP has advocated terrorist attacks include:</p> <ul style="list-style-type: none"> • 15 January 2019: ISWAP issued a video showing fighters calling for Muslims to migrate and conduct jihad in its self-proclaimed state, a likely reference to violent terrorist attacks on behalf of the group given ISWAP conducts regular terrorist attacks and kidnappings against a wide range of targets in Nigeria and neighbouring countries.
<p>4.</p>	<p>Details of the organisation</p> <p>ISWAP developed as a faction of listed terrorist organisation Boko Haram, formally named Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad. In March 2015, Boko Haram leader Abubakar Shekau's pledge of allegiance to Islamic State was accepted and the group commenced operations under the name ISWAP. In August 2016, Islamic State leadership replaced Shekau with Abu Musab al-Barnawi as ISWAP's leader following apparent internal dissatisfaction with Shekau's leadership. Shekau disputed this decision and rejected al-Barnawi as the new leader, resulting in the development of two factions, one under al-Barnawi and one under Shekau. The faction loyal to al-Barnawi continues to operate under the name ISWAP and remains closely allied to Islamic State. The faction under Shekau reverted to operating under the name Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad and is also known as Boko Haram. ISWAP is active in north eastern Nigeria, the Lake Chad region and border regions of Niger and Cameroon.</p> <p><u>Leadership</u></p> <p>The leadership of ISWAP has been subject to change and the identity of any incumbent leader is uncertain. Abubakar Shekau was the first leader when ISWAP commenced operations under that name in March 2015. In August 2016, Islamic State leadership publicly replaced Shekau with Abu Musab al-Barnawi. According to media reporting, Abdullah Ibn Umar al-Barnawi assumed the leadership in March 2019, followed by Ba Lawan in February 2020.</p> <p><u>Membership</u></p> <p>ISWAP's total membership is estimated to be between 3500 and 5000, with members originating chiefly from north eastern Nigeria and neighbouring regions.</p> <p><u>Recruitment and funding</u></p> <p>ISWAP exploits poor economic and social conditions in north eastern Nigeria and neighbouring</p>

	<p>regions to attract members. ISWAP provides protection from attacks by Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad and some relief from counter-terrorism measures implemented by Nigerian authorities. Recruits are also drawn by ISWAP's proselytisation, its ability to provide social services, and the economic prospects for its members.</p> <p>ISWAP funds itself through activities such as taxation and extortion of locals, raids, and kidnap-for-ransom operations. The current state of financial ties with Islamic State or other terrorist groups is unclear.</p> <p><u>Links to other terrorist organisations</u></p> <p>ISWAP is an officially recognised affiliate of, and ideologically aligned with, Islamic State.</p> <p><u>Links to Australia</u></p> <p>There are no known links between ISWAP and Australia.</p> <p><u>Threats to Australian interests</u></p> <p>ISWAP has not made statements specifically threatening Australians or Australian interests; however, the group has issued statements threatening Westerners and Western interests in general.</p> <p><u>Listed by the United Nations or like-minded countries</u></p> <p>The United States designated ISWAP as a foreign terrorist organisation in February 2018. As of November 2018, Canada referenced ISWAP as a faction of listed terrorist group Boko Haram. The United Nations Security Council ISIL (Da'esh) and Al-Qaida Committee listed ISWAP as an entity subject to sanctions in the ISIL (Da'esh) and Al-Qaida Sanctions List in February 2020. New Zealand designated ISWAP as a terrorist organisation in February 2020.</p> <p><u>Engagement in peace or mediation processes</u></p> <p>Since it was last listed as an alias of terrorist group Boko Haram, ISWAP has not participated in peace or mediation processes with the Governments of Nigeria, Niger, Cameroon or Chad.</p>
5.	<p>Conclusion</p> <p>On the basis of the above information, ASIO assesses that ISWAP is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts or advocates the doing of terrorist acts, involving threats to human life and serious damage to property.</p> <p>In the course of pursuing its objectives, ISWAP is known to have committed or threatened actions that:</p> <ul style="list-style-type: none"> a) cause, or could cause, death, serious harm to persons, serious damage to property, endangered life (other than the life of the person taking the action), or create a serious risk to the health or safety of the public or a section of the public; b) are intended to have those effects; c) are done with the intention of advancing political, religious or ideological causes; d) are done with the intention of intimidating the government of one or more foreign countries; and e) are done with the intention of intimidating the public or sections of the public.