

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Islamic State West Africa Province) Regulations 2023

The purpose of the *Criminal Code (Terrorist Organisation – Islamic State West Africa Province) Regulations 2023* (the Regulations) is to specify the organisation known as 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 Act 1995* (the Criminal Code).

Section 5 of the Criminal Code provides that the Governor-General may make regulations prescribing matters required or permitted by the Criminal Code to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Criminal Code.

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 **AFP 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. Subsection 100.1(1) provides that, for Part 5.3 of the Criminal Code, the **AFP Minister** is the Minister administering the *Australian Federal Police Act 1979*. Under the Administrative Arrangements Order made by the Governor-General on 23 June 2022, and which commenced on 1 July 2022, this is the Attorney-General.

The AFP Minister is satisfied on reasonable grounds that the organisation Islamic State West Africa Province is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. In coming to this position, the AFP Minister has taken into consideration unclassified information provided by the relevant agencies (the Statement of Reasons at [Attachment C](#)).

Effect of the instrument

Division 102 of Part 5.3 of the Criminal Code sets out the following offences relating to terrorist organisations:

- Directing the activities of a terrorist organisation
- 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 enable the offence provisions in Division 102 of 5.3 of the Criminal Code to continue to apply in relation to conduct relating to Islamic State West Africa Province.

The Regulations repeal the *Criminal Code (Terrorist Organisation – Islamic State West Africa Province) Regulations 2020*, which would otherwise cease to have effect on 1 July 2023 by operation of subsection 102.1(3) of the Criminal Code. Making new regulations ensures that the organisation Islamic State West Africa Province continues to be specified for the purposes of paragraph (b) of the definition of ***terrorist organisation***.

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

The Regulations commence on 1 July 2023. 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 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 this Statement is at [Attachment A](#).

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

Consultation

The Intergovernmental Agreement on Counter-Terrorism Laws (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 paragraph (b) of the definition of ***terrorist organisation*** in subsection 102.1(1) of the Criminal Code. The IGA provides that if a majority of 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 Attorney-General wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the States and Territories. A majority of States and Territories did not object to the making of the Regulations within the timeframe nominated by the AFP Minister.

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 AFP Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation. The Attorney-General wrote to the Leader of the Opposition, enclosing the information upon which he was satisfied that Islamic State West Africa Province meets the legislative requirements for listing.

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 2023

This Disallowable 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 Disallowable Legislative Instrument

The *Criminal Code (Terrorist Organisation—Islamic State West Africa Province) Regulations 2023* (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 Honourable Mark Dreyfus KC MP

Attorney-General

ATTACHMENT B

Details of the *Criminal Code (Terrorist Organisation – Islamic State West Africa Province) Regulations 2023*

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 2023*.

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 2023.
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 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 – Schedules

7. This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule has effect according to its terms.
8. Schedule 1 to the Regulations would repeal the whole of the *Criminal Code (Terrorist Organisation—Islamic State West Africa) Regulations 2020*.

Section 5 – Terrorist organisation—Islamic State West Africa Province

9. 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.
10. 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.

11. 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
- (b) Islamic State of Iraq and Syria – West Africa
- (c) Islamic State of Iraq and the Levant – West Africa
- (d) Wilayat Gharb Afriqiyah

Schedule 1— Repeals

12. Clause 1 of Schedule 1 would repeal the *Criminal Code (Terrorist Organisation—Islamic State West Africa) Regulations 2020* (the Current Regulations).

13. The Current Regulations specify Islamic State West Africa Province as a terrorist organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, commencing on 1 July 2020. Pursuant to subsection 102.1(3) of the *Criminal Code*, 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. Clause 1 of Schedule 1 ensures there is no duplication where the proposed Regulations are made before the Current Regulations cease to have effect.

Statement of Reasons – Islamic State West Africa Province

<p>Listing Islamic State West Africa Province as a terrorist organisation under Division 102 of the Criminal Code Act 1995</p>
<p>This Statement of Reasons is based on publicly available information about Islamic State West Africa Province. To the Australian Government’s knowledge, this information is accurate, reliable and has been corroborated by classified information where available.</p>
<p>Known aliases</p> <p>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</p>
<p>Legislative basis for listing a terrorist organisation</p> <p>Division 102 of the Criminal Code Act 1995 (the Criminal Code) provides that for an organisation to be listed as a terrorist organisation, the AFP Minister must be satisfied on reasonable grounds that the organisation:</p> <ul style="list-style-type: none">a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; orb) advocates the doing of a terrorist act. <p>For the purposes of listing a terrorist organisation under the Criminal Code, subsection 102.1(20) of the Criminal Code describes the doing of a terrorist act as including the doing of a specific terrorist act, the doing of more than one terrorist act and the doing of a terrorist act, even if a terrorist act does not occur.</p>
<p>Background to this listing</p> <p>ISWAP was first listed as a terrorist organisation on 1 July 2020. Prior to this date, ISWAP was included as an alias of listed terrorist group Boko Haram on 1 July 2017.</p> <p>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.</p>
<p>Details of the organisation</p> <p>ISWAP is a Sunni Islamic extremist group with a sphere of operations that encompass north-eastern Nigeria and the southern Lake Chad Basin, Nigeria’s northern border regions with Niger and Cameroon. Over the past two years, ISWAP activity has increasingly extended south into southern Nigeria.</p> <p>ISWAP adheres to the extreme Salafi interpretation of Islam which views all who fail to adhere to their beliefs as apostates and infidels. As such, ISWAP has made a point of</p>

targeting non-adherents, often promoting sectarian violence and indiscriminate executions resulting in many deaths over the past ten years. ISWAP rejects existing national borders and opposes elected governments, seeking to remove them through violence.

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. Nigeria is the most populous country in Africa and will overtake the US as the third most populous country in the world by 2050. It also has the continent's largest GDP and plays a key role in regional peacekeeping efforts. ISWAP presents one of the greatest security threats to Nigeria, and by association a potential threat to stability across Africa.

Leadership

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 (aka Habib Yusuf). According to media reporting, Abu Musab al-Barnawi was deposed in March 2019 with Abdullah Ibn Umar al-Barnawi (aka Ba Idrisa) assuming leadership. Following internal disputes within ISWAP, Ba Idrisa was succeeded by Lawan Abubaka (aka Ba Lawan) until early 2021 when Abu Musab al-Barnawi was reinstated as leader of ISWAP. Abu Musab al-Barnawi held the leadership until August 2021 when he was reportedly wounded following an engagement with Boko Haram fighters under the direction of Ibrahim Bakura Doro.

Membership

ISWAP's total membership is estimated at around 5000 fighters, with members originating chiefly from north eastern Nigeria and neighbouring regions.

Recruitment and funding

ISWAP exploits poor economic and social conditions in north eastern Nigeria and neighbouring 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.

Following the death of Shekau in May 2021, ISWAP opened negotiations with Shekau's commanders, bringing several Boko Haram fighting groups operating in the Sambisa forest into its ranks.

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.

Links to other groups

ISWAP is an officially recognised affiliate of, and ideologically aligned with, Islamic State. After the 2016 split between ISWAP and Boko Haram, ISIS had initially directed ISWAP to avoid attacking Boko Haram. This stance changed in 2021 following the reinstatement of Abu Musab al-Barnawi and subsequent attack on Shekau. In a recording made in June 2021, al-Barnawi credited ISIS as having directed the attack on Shekau.

Terrorist activity

Directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act

ISWAP can be reliably attributed to commission of the following terrorist activity:

- 29 December 2022: A car bomb explosion that killed four people in the Okene Local Government Area of Kogi State, Nigeria.
- 19 November 2022: A late night attack on the northern Nigerian town of Malam Fatori. The following dawn, ISWAP attempted an assault on the nearby military base. After being repulsed, militants went on a killing and looting spree within the town. Nine Nigerian military, two police officers and several dozen civilians were killed.
- 30 July 2022: An attack in the Federal Capital Territory, targeting a Nigerian Army checkpoint near Zuma Rock and wounding 20 soldiers.
- On 6 July 2022: An attack against a prison in Abuja, allowing 600 of the 994 inmates to escape.
- 5 June 2022: An attack on a Catholic Church during mass in Owo, Nigeria, which killed at least 40 people. In August 2022, Nigerian security forces arrested six individuals over the attack, including ISWAP members Idris Abdulmalik Omeiza (aka Bin Malike), Momoh Otohu Abubakar, Aliyu Yusuf Itopa and Auwal Ishaq Onimisi.
- 20 April 2022: An attack where three people were killed and 30 injured during an explosion at a market in Nigeria's Taraba state.
- 21 March 2021: An attack by gunmen that killed 137 civilians in three coordinated attacks in the Tahoua region, Nigeria. ISWAP claimed to be targeting pro-government militia members.
- 2 January 2021: Gunmen on motorbikes killed around 70 civilians and wounded 17 others in the village of Tchombangou, Nigeria.

On the basis of these examples, ISWAP is assessed to have directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.

Other considerations

Links to Australia and threats to Australian interests

There are no corroborated links between ISWAP and Australian individuals or interests

since the group was re-listed in 2020.

Boko Haram has not made statements specifically threatening Australians or Australian interests; however, the group has issued statements threatening Westerners and Western interests in general.

Listings by likeminded countries or the United Nations

The United States designated ISWAP as a foreign terrorist organisation in February 2018. New Zealand designated ISWAP as a terrorist organisation in February 2020. Canada listed ISWAP as a terrorist entity in February 2021.

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.

Engagement in peace or mediation processes

ISWAP is not known to have engaged in any peace or mediation process.

Conclusion

On the basis of the information above, the Australian Government assesses that the organisation known as Islamic State West Africa Province is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts.