

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Boko Haram) Regulations 2023

The purpose of the *Criminal Code (Terrorist Organisation – Boko Haram) Regulations 2023* (the Regulations) is to specify the organisation known as Boko Haram 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 Boko Haram 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 Boko Haram.

The Regulations repeal the *Criminal Code (Terrorist Organisation – Boko Haram) 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 Boko Haram 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 Boko Haram 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 – Boko Haram) 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—Boko Haram) Regulations 2023* (the Regulations) specify Boko Haram 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 Boko Haram as 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 Boko Haram.

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 Boko Haram as a listed terrorist organisation.

Terrorist organisations, including Boko Haram, 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 Boko Haram. 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 Boko Haram.

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 Boko Haram, 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 they take 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 – Boko Haram) Regulations 2023*

Section 1 – Name

1. This section would provide that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation—Boko Haram) 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 proposed Regulations, 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 in their entirety on 1 July 2023.
4. The note to subsection 2(1) would clarify that the table only relates to the provisions of the proposed Regulations as originally made, and will not be amended to deal with any subsequent amendments to the instrument.
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 the proposed Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule would have effect according to its terms.
8. Schedule 1 to the Regulations would repeal the whole of the *Criminal Code (Terrorist Organisation—Boko Haram) Regulations 2020*.

Section 5 – Terrorist organisation—Boko Haram

9. Subsection 5(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 Boko Haram is specified.
10. The effect of specifying Boko Haram 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 Boko Haram.

11. Subsection 5(2) would provide a list of names that Boko Haram is also known as:
 - a) Group of the Followers of the Prophet for Propagation and Holy Struggle
 - b) Jama'at Ahl al-Sunna lil-Da'awa wal-Jihad;
 - c) Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad
 - d) Nigerian Mujahideen
 - e) Nigerian Taliban
 - f) People Committed to the Propagation of the Prophet's Teachings and Jihad
 - g) Western Education is Forbidden
 - h) Yusuffiya Movement
 - i) Yusuffiya Sect

Schedule 1 — Repeals

12. Clause 1 of Schedule 1 repeals the *Criminal Code (Terrorist Organisation—Boko Haram) Regulations 2020* (the Current Regulations).
13. The Repealed Regulations specify Boko Haram 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 Regulations are made before the current Regulations cease to have effect.

Statement of Reasons – Boko Haram

<p>Listing Boko Haram 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 Boko Haram. 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>Group of the Followers of the Prophet for Propagation and Holy Struggle; Jama’at Ahl al-Sunna lil-Da’awa wal-Jihad; Jama’atu Ahlis Sunna Lidda’awati Wal-Jihad; Nigerian Mujahideen; Nigerian Taliban; People Committed to the Propagation of the Prophet’s Teachings and Jihad; Western Education is Forbidden; Yusuffiya Movement; Yusuffiya Sect.</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>The Australian Government first proscribed Boko Haram as a terrorist organisation under the Criminal Code on 1 July 2014. Boko Haram was re-listed on 1 July 2017 and 1 July 2020.</p> <p>Boko Haram pledged allegiance to, and was accepted as a branch of, Islamic State in March 2015 and renamed itself as Islamic State West Africa Province (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 (JAS).</p>
<p>Details of the organisation</p> <p>Boko Haram is a Sunni Islamic extremist group with a sphere of operations that encompass the Northern Nigerian Sambisa Forest and the Mandara mountains on the Nigeria-Cameroon border.</p>

Boko Haram (“Western education is forbidden”) adheres to the extreme Salafi interpretation of Islam which views all who fail to adhere to their beliefs as apostates and infidel. As such, ISWAP has made a point of targeting non-adherents, often promoting sectarian violence and indiscriminate executions resulting in several thousand deaths over the past ten years. ISWAP rejects existing national borders and opposes elected governments, seeking to remove them through violence.

Boko Haram was initially formed as a non-violent religious movement in 1995. It was constituted by small bands of mainly young, middle-class Nigerians in the northern, Muslim-dominated states of Nigeria. Boko Haram began its violent activities in December 2003, initiating unrest in northern Nigeria that prompted an extensive security force response. Since July 2010, Boko Haram adopted a much more active and violent approach to advance its goals, undertaking frequent attacks against civilian and military targets.

Leadership

Abubakar Shekau assumed leadership of Boko Haram in July 2010 and declared allegiance to Islamic State in March 2015, changing the group’s formal name from Jama’atu Ahlis Sunna Lidda’awati Wal-Jihad to Islamic State in West Africa Province (ISWAP). However, Islamic State leadership nominated Abu Musab al-Barnawi as Boko Haram’s leader in August 2016 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.

Shekau reverted to using the group name Jama’atu Ahlis Sunna Lidda’awati Wal-Jihad (also known as Boko Haram), and commanded a faction of loyalists operating separately to those remaining in Islamic State in West Africa. On 19 May 2021, ISWAP launched an assault into Sambisa Forest, Boko Haram's traditional stronghold, and encircled Shekau. Shekau was subsequently killed on 21 May 2021.

Shortly following Shekau’s death, Bakura Sahalaba, a prominent Islamic judge was appointed iman of Boko Haram, while Ibrahim Bakura Doro, one of Shekau’s key supporters following the split from ISWAP, took up the role as operational leader of the organisation. This ambiguous dual leadership structure continued until March 2022 when Bakura Doro had Sahalaba executed and replaced him as iman under the pseudonym Abu Umaymah.

Membership

Boko Haram’s total membership was estimated at around 1500 at the time of Shekau’s death, with members originating chiefly from north eastern Nigeria and neighbouring regions. Following the demise of their leader, authorities in Nigeria and Cameroon have reported an increase in the number of Boko Haram militants surrendering to government and military forces. In addition, many former Boko Haram commanders have been reported to have defected to ISWAP.

Recruitment and funding

Boko Haram exploits poor economic and social conditions in north eastern Nigeria and neighbouring regions to attract members. Recruits are drawn by Boko Haram's ability to provide economic prospects for its members and to avoid persecution by the group.

Recruits also join Boko Haram through coercion from the group or pressure from associates and family members. The group bolsters its recruited numbers through kidnappings, forcing captives to serve the group. Some captives, including women and children, are forced to conduct attacks, including suicide bombings.

Boko Haram funds itself primarily through criminal activities such as arms and human trafficking, extortion, bank robberies, looting and kidnap-for-ransom operations. The current state of financial ties with Islamic State or other terrorist groups is unclear.

Links to other groups

The current state of Boko Haram's links with Islamic State remains uncertain. Although Shekau did not publicly rescind his pledge of allegiance to Islamic State, following his removal as leader, he conspicuously failed to renew his pledge on the death of Islamic State 'Caliph' al-Baghdadi in October 2019. Further, Islamic State was credited as having directed the attack that led to Shekau's death in 2021.

Boko Haram had historical ties with al-Qa'ida in the Lands of the Islamic Maghreb and al-Shabaab but these are no longer current due to Boko Haram's more recent alignment with Islamic State. Since Shekau's death in May 2021, Boko Haram has persisted in the 'factional' conflict against ISWAP, with reports of conflict as recently as January 2023.

Terrorist activity

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

Boko Haram has engaged in terrorist attacks and kidnappings against a wide range of targets in Nigeria and neighbouring countries. Recent attacks that can be reliably attributed to Boko Haram include:

- 18 January 2023: Boko Haram abducted eight farmers and killed one person in Makilwe village, Borno state, Nigeria.
- 26 December 2022: Boko Haram militants attacked and killed 17 herders guarding cattle near Airamne village in Mafa district, Nigeria.
- 11 December 2022: Boko Haram militants killed seven civilians during attacks on Fougoh village and Fourkoulom camp for internally displaced persons.
- 24 May 2022: Boko Haram militants launched an attack in Rann village in Borno State, Nigeria, killing over 50 people.
- 24 February 2021: Boko Haram militants killed 10 people during a rocket attack in Maiduguri, Nigeria.
- 23 March 2020: Boko Haram militants staged an attack on Chadian troops station at a base in Bohoma, killing 98 Chadian soldiers.

On the basis of these examples, Boko Haram 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 Boko Haram 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

Boko Haram was listed by the United Kingdom in July 2013, the United States in November 2013, Canada in December 2013 and New Zealand in March 2014. The ISIL (Da'esh) and Al-Qaida United Nations Security Council Committee listed Boko Haram as an entity subject to sanctions in the ISIL (Da'esh) and Al-Qaida Sanctions List on 22 May 2014.

Engagement in peace or mediation processes

Since it was last listed, Boko Haram has not participated in peace or mediation processes with the Governments of Nigeria, Niger, Cameroon or Chad.

Conclusion

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