

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 129, 2015**

Issued by the authority of the Attorney-General

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015*

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 Code (the Criminal Code).

Division 102 of the Criminal Code sets out the offences in relation to terrorist organisations, which are: directing the activities of a terrorist organisation; being a member of a terrorist organisation; recruiting for a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; and associating with a terrorist organisation.

Section 102.9 of the Criminal Code provides that section 15.4 (extended geographical jurisdiction—category D) applies to an offence against Division 102 of the Criminal Code. The effect of section 15.4 is that offences in Division 102 of the Criminal Code apply to conduct (or the results of such conduct) constituting the alleged offence whether or not the conduct (or the results of such conduct) occur in Australia.

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

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (paragraph 102.1(1)(a)); or
- an organisation that is specified by the regulations for the purposes of this paragraph (paragraph 102.1(1)(b)).

Subsection 102.1(20) of the Criminal Code provides that a reference to the doing of a terrorist act includes a reference to the doing of a terrorist act, even if a terrorist act does not occur; a reference to the doing of a specific terrorist act; and a reference to the doing of more than one terrorist act.

The purpose of the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015* (the Regulation) is to specify Al-Shabaab, also known as Al-Shabaab Al-Islam; Al-Shabaab al-Islamiya; Al-Shabaab Al-Jihaad; Al-Shabab; Ash-shabaab; Harakat al-Shabaab al-Mujahideen; Harakat Shabab Al-Mujahidin; Harakatul Shabaab al-Mujaahidiin; Hisb’ul Shabaab; Hizbul Shabaab; Mujaahidiin Youth Movement; Mujahideen Youth Movement; Mujahidin Al-Shabaab Movement; Mujahidin Youth Movement; Shabaab; The Popular Resistance Movement in the Land of the Two Migrations; The Unity of Islamic Youth; The Youth; Ugus; Young Mujahideen Movement; and Young Mujahideen Movement in Somalia, Youth Wing, for the purpose of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Criminal Code.

The Regulation enables the offence provisions in Division 102 of the Criminal Code to apply to persons with links to Al-Shabaab. Details of the Regulation are set out in [Attachment A](#).

Subsection 102.1(2) 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 a ‘terrorist organisation’ in this section, 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.

In determining whether the Minister is 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 takes into consideration an unclassified Statement of Reasons prepared by the Australian Security Intelligence Organisation (ASIO), in consultation with the Department of Foreign Affairs and Trade (DFAT), and advice from the Australian Government Solicitor (AGS). The Statement of Reasons in respect of Al-Shabaab is at [Attachment B](#).

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.

Prior to making the Regulation, consultations were held with DFAT, ASIO and AGS. In addition, the Attorney-General wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the States and Territories. The Attorney-General also offered the Leader of the Opposition a briefing in relation to the proposed re-listings.

The Regulation repeals existing Regulation 4X of the *Criminal Code Regulations 2002* which specifies Al-Shabaab, for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. The repeal of existing Regulation 4X ensured that there is no duplication, if the new Regulation was made before the existing Regulation ceased to have effect.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments. 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.

## Statement of Compatibility with Human Rights

### *Overview*

The *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015* (the Regulation) makes it an offence under Division 102 of the Criminal Code, to direct the activities, become a member of, recruit for, train, receive or participate in training, get funds to, from or for Al-Shabaab, and provide support to or associate with, Al-Shabaab.

The offence of association with a terrorist organisation in subsection 102.8 of the Criminal Code is limited in its application to an organisation that is a listed organisation under Criminal Code Regulations. The offence does not apply if the association is with a close family member, or takes place in the course of practising a religion in a place used for public religious worship, or the association is for the purpose of providing humanitarian aid or for the purpose of providing legal advice or legal representation.

The object of the Regulation is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia.

### *Human rights implications*

This instrument engages the following rights:

- Article 6
- Article 19 and
- Article 22.

The Regulation will engage the inherent right to life expressed in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

The object of the Regulation also engages Article 19 and Article 22 of the ICCPR. Whilst Article 19 protects the right to freedom of expression, this right may be subject to restrictions which include protecting national security. The right to freedom of association in Article 22 of the ICCPR protects the right to form and join associations to pursue common goals, such as political parties. Article 22(2) provides that freedom of association may be subject to restrictions imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Whilst the Regulation may limit the right to freedom of association with Al-Shabaab, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Al-Shabaab 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, as detailed in the Statement of Reasons ([Attachment B](#)).

The Criminal Code offences in Division 102 applying to terrorist organisations do not target any specific religious or ethnic group and are designed to promote security and protect all members of the community from the threat of terrorism, regardless of national or ethnic origins or religious beliefs.

The information in the Statement of Reasons (Attachment B) supports the Attorney-General's decision made on reasonable grounds, that Al-Shabaab satisfies the criteria for listing as a terrorist organisation under subsection 102.1(2) of the Code.

There are safeguards and accountability mechanisms in the Criminal Code requiring prior consultation and enabling review of the Regulation specifying Al-Shabaab as a terrorist organisation. These measures include the following:

- the Commonwealth must consult with the States and Territories in accordance with the *Inter-Governmental Agreement on Counter-Terrorism Laws* of 25 June 2004, and the Regulation may only be made if a majority of the States and Territories do not object to the Regulation within a reasonable time;
- 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 Regulation;
- under subsection 102.1(3) the Criminal Code, the Regulation 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 regulation listing the organisation ceases 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 Regulation 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 Regulation within the applicable disallowance period, which is 15 sitting days after the regulation was laid before that House, as provided for in subsection 102.1A(4) of the Criminal Code.

### ***Conclusion***

The Regulation is compatible with human rights because it advances the protection of human rights, and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

**Details of the Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015**

**Section 1 – Name**

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015*.

**Section 2 – Commencement**

This section provides that the Regulation commences on the day after it is registered.

**Section 3 – Authority**

This section provides that the Regulation is made under the *Criminal Code*.

**Section 4 – Schedules**

This schedule amends the *Criminal Code Regulations 2002*.

**Section 5 – Terrorist organisation—Al-Shabaab**

Subsection (1) provides that for paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Al-Shabaab is specified.

Subsection (2) provides that Al-Shabaab is also known by the following names:

- (a) Al-Shabaab Al-Islam;
- (b) Al-Shabaab al-Islamiya;
- (c) Al-Shabaab Al-Jihaad;
- (d) Al-Shabab;
- (e) Ash-shabaab;
- (f) Harakat al-Shabaab al-Mujahideen;
- (g) Harakat Shabab Al-Mujahidin;
- (h) Harakatul Shabaab al-Mujaahidiin;
- (i) Hisb’ul Shabaab;
- (j) Hizbul Shabaab;
- (k) Mujaahidiin Youth Movement;
- (l) Mujahideen Youth Movement;
- (m) Mujahidin Al-Shabaab Movement;
- (n) Mujahidin Youth Movement;
- (o) Shabaab;
- (p) The Popular Resistance Movement in the Land of the Two Migrations;
- (q) The Unity of Islamic Youth;
- (r) The Youth;
- (s) Ugus;
- (t) Young Mujahideen Movement; and
- (u) Young Mujahideen Movement in Somalia, Youth Wing.

## Schedule 1—Amendments

Schedule 1 provides that regulation 4X of the *Criminal Code Regulations 2002* is repealed. Regulation 4X is the current regulation listing Al-Shabaab as a terrorist organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. This clause ensured that there was no duplication if the new Regulation was made before the current Regulation ceased to have effect.

**Al-Shabaab**

(Also known as: Al-Shabaab Al-Islaam; Al-Shabaab al-Islamiya; Al-Shabaab Al-Jihaad; Al-Shabab; Ash-shabaab; Harakat al-Shabaab al-Mujahideen; Harakat Shabab Al Mujahidin; Harakatul Shabaab al-Mujaahidiin; Hizbul Shabaab; Hisb'ul Shabaab; Mujahideen Youth Movement; Mujahidin Al-Shabaab Movement; Mujaahidiin Youth Movement; Mujahidin Youth Movement; Shabaab; The Popular Resistance Movement in the Land of the Two Migrations; The Unity of Islamic Youth; Ugus; The Youth; Young Mujahideen Movement; Young Mujahideen Movement in Somalia, Youth Wing)

This statement is based on publicly available details about al-Shabaab. To the Australian Government's knowledge, these details are accurate and reliable and have been corroborated by classified information.

**Basis for listing a terrorist organisation**

Division 102 of the *Criminal Code Act 1995* (Criminal Code) provides that for an organisation to be listed as a terrorist organisation, the Attorney-General 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; or
- (b) advocates the doing of a terrorist act.

**Details of the organisation**

*Background*

Al-Shabaab, or 'the youth', is the name generally applied to the Somali militant group which was formerly the most prominent of the militia groups comprising the militant wing of the Council of Islamic Courts (CIC). The Somali Transitional Federal Government and Ethiopian forces ousted the CIC in December 2006.

Al-Shabaab established itself as the leading insurgent group operating in Somalia and, following the withdrawal of Ethiopian forces in January 2009, al-Shabaab controlled the majority of the country. The intervention of Kenyan and Ethiopian forces from 2011 drove al-Shabaab from Mogadishu and much of southern and central Somalia. Following its displacement and a pledge of allegiance to al-Qa'ida in February 2012, al-Shabaab shifted from conventional military tactics and governance to using guerrilla operations against domestic and foreign security forces and the Federal Government of Somalia (FGS). Al-Shabaab has also exhibited the intent and capability to undertake mass casualty terrorist attacks on targets outside Somalia.

*Objectives*

Al-Shabaab's primary objective is the establishment of an Islamic state in Somalia based on Islamic law and the elimination of foreign 'infidel' influence. This 'Islamic Emirate of Somalia' would include Somalia, Somaliland, Puntland, north-eastern Kenya, and the Ogaden

region of Ethiopia and Djibouti. In pursuit of this objective, al-Shabaab has waged a violent insurgency and conducted terrorist attacks against the FGS and foreign forces contributing to the African Union Mission in Somalia (AMISOM).

Al-Shabaab has also undertaken mass casualty attacks on targets outside Somalia with a focus on Kenyan interests in retaliation for its intervention since 2011. Al-Shabaab has publicly stated that they are 'at war with Kenya'.

Additionally, al-Shabaab promotes al-Qa'ida's global jihadist ideology, and public announcements from the group have shown increasing support for transnational ambitions.

### **Leadership and membership**

Al-Shabaab has a central command and control structure, which has thus far allowed the group to effectively utilise its attack capabilities, however, factional disputes and infighting between al-Shabaab's senior commanders over strategy and ideology have been widely reported. The group is currently led by Sheikh Ahmed Umar (also known as Ahmed Diriye), who took over as the leader of the group following the September 2014 death of long-time emir Ahmad Abdi Aw Muhammad Godane.

Al-Shabaab encompasses a number of elements, ranging from those focused solely on the domestic insurgency in Somalia to elements that support al-Qa'ida's global jihadist ideology. Estimates of al-Shabaab fighters vary from 3 000 to as high as 9 000, with most members being ethnic Somalis. Al-Shabaab has long recruited members from Kenya; however, a small number of al-Shabaab fighters are from other countries including Australia, the United States and Canada.

Al-Shabaab's propaganda continues to develop, with the group's media campaign increasing in sophistication. Al-Shabaab maintains various Twitter accounts and has posted increasingly sophisticated videos online. Domestically, al-Shabaab continues to spread its message through Radio al-Analus in Somalia.

### **Terrorist activity of the organisation**

*Directly or indirectly engaged in the doing of terrorist acts; and directly or indirectly preparing and/or planning terrorist acts*

Al-Shabaab has prepared, planned and conducted attacks frequently since the beginning of 2007 against Somali Government interests in Somalia and against targets in Kenya and Ethiopia. It has consistently targeted AMISOM forces using mortar attacks, rocket-propelled grenades and firearms. Following al-Shabaab's pledge of allegiance to al-Qa'ida, elements of al-Shabaab have also adopted tactics used by Islamist extremists in Afghanistan and Iraq including vehicle-borne improvised explosive devices (VBIEDs), roadside bombs, suicide attacks, kidnappings, and beheadings. Al-Qa'ida's influence has also contributed to al-Shabaab targeting Western interests in neighbouring countries such as Kenya, Ethiopia and Djibouti.

Significant attacks for which responsibility has been claimed by or reliably attributed to al-Shabaab since it was last proscribed include:



- On 20 April 2015, seven people, including four UNICEF employees were killed after an al-Shabaab bomb attack on their car in Garowe, Puntland in Somalia's north. Al-Shabaab warned of further attacks on United Nations personnel operating in Somalia.
- On 2 April 2015, at least 147 people were killed in an al-Shabaab attack on Garissa University College in Garissa, Kenya. Muslims and non-Muslims reportedly were separated during the attack. The attack and subsequent siege lasted for 15 hours. Al-Shabaab claimed responsibility, warning of more attacks unless Kenya withdrew its troops from Somalia.
- On 26 December 2014, three African Union soldiers were killed in an al-Shabaab attack on the AMISOM base at Mogadishu International Airport.
- On 2 December 2014, at least 36 civilians were killed in a small arms attack by al-Shabaab militants on a stone quarry in Mandera County, Kenya. Muslims and non-Muslims were reportedly separated during the attack.
- On 22 November 2014, al-Shabaab militants killed 28 non-Muslim travellers after hijacking a bus in Mandera County, Kenya. The militants released Muslim passengers unharmed.
- On 24 May 2014, an al-Shabaab suicide bombing at the La Chaumiere restaurant in Djibouti City, Djibouti killed 3 and injured 15. While the restaurant was well known to be frequented by Westerners, none were killed in this attack.
- On 16 June 2014, at least 48 people were killed when al-Shabaab militants attacked the Kenyan town of Mpeketoni. The gunmen attacked a police station and crowds watching the 2014 FIFA World Cup at several local hotels.
- On 21 September 2013, 63 people were killed and over 175 injured in an al-Shabaab attack on the Westgate Mall shopping centre in Nairobi, Kenya. The attackers used guns and grenades in an attack that lasted over 36 hours. Al-Shabaab claimed responsibility via Twitter indicating the attack was in retaliation for the continued presence of Kenyan forces in Somalia. One Australian, Ross Langdon, was killed in the attack.
- On 14 April 2013, 30 people were killed and over 30 injured during an al-Shabaab attack on Mogadishu's Supreme Court complex. Al-Shabaab attackers used guns and exploded a VBIED near first responders and onlookers. Later that day, al-Shabaab attacked a Turkish Non Government Organisation vehicle with a VBIED in Mogadishu, killing two Turkish aid workers and other civilians.

### *Advocating the doing of terrorist acts*

Al-Shabaab members have publicly advocated terrorist attacks in order to further the group's objectives:

- On 4 April 2015, an al-Shabaab spokesperson issued a statement warning the Kenyan government and public to prepare for more bloodshed in retaliation to the oppression of Muslims and the occupation of Muslim lands. “No amount of precaution or safety measures will be able to guarantee your safety, thwart another attack or prevent another bloodbath from occurring in your cities.”
- On 21 February 2015, al-Shabaab released an English-language video on Twitter calling for Muslims to attack Westfield shopping malls in the United States, Canada and the United Kingdom. “If just a handful of mujahideen fighters could bring Kenya to a standstill for nearly a week, then imagine what a dedicated mujahideen in the West could do to the American or Jewish-owned shopping centers across the world”.
- On 20 January 2015, al-Shabaab released a statement on jihadi forums praising the 7 January 2015 attack on *Charlie Hebdo* offices in Paris, and called for Muslims in Europe to launch similar attacks.

### **Conclusion**

On the basis of the above information, ASIO assesses al-Shabaab continues to directly and/or indirectly engage in, preparing, planning, assisting in, fostering or advocating the doing of terrorist acts.

In the course of pursuing its objectives, al-Shabaab is known to have committed or threatened actions that:

- cause serious damage to property or the death of persons, or endanger a person's life or create a serious risk to a person's safety;
- are intended to have those effects;
- are done with the intention of advancing al-Shabaab's political, religious or ideological causes;
- are done with the intention of coercing, or influencing by intimidation, the government of one or more foreign countries; and
- are done with the intention of creating a serious risk to the safety of sections of the public globally.

### **Other relevant information**

#### *Links with other groups*

Al-Shabaab primarily is linked to al-Qa'ida—a proscribed terrorist group—through leadership contacts and training. While al-Shabaab likely still largely operates independently, al-Qa'ida senior leadership previously has endorsed some al-Shabaab activities. On 9 February 2012, a public statement by al-Shabaab leader Mukhtar Abu al-Zubair included a pledge of allegiance to al-Qa'ida and in a reciprocal message al-Qa'ida leader Ayman al-Zawahiri announced that al-Shabaab had joined al-Qa'ida. On 6 September 2014, al-Shabaab officially reiterated its pledge of allegiance to al-Zawahiri and Al-Qa'ida.

### *Links to Australia*

In late 2011, al-Shabaab-linked Australian citizens Saney Edow Aweys and Nayef El Sayed were both found guilty by a Supreme Court jury of conspiring to do acts in preparation for a terrorist act contrary to Section 11.5 and 101.6(1) of the Criminal Code.

### *Level of participation in peace negotiations/political dialogue*

Al-Shabaab does not participate in the Somali political system, despite AMISOM appeals to the group to disarm and join the Somali peace process.

### *Other designations*

Al-Shabaab was listed as a proscribed terrorist organisation by the governments of the United States in March 2008, New Zealand in February 2010, Canada in November 2010, United Kingdom in May 2010 and by the European Union in April 2010.

### *Support for the United Nations listing*

The Minister for Foreign Affairs listed al-Shabaab on the Consolidated List from 21 August 2009 under the *Charter of the United Nations Act 1945* (UN Charter Act), pursuant to Australia's obligations under UNSC resolution 1373 (2001) and UNSC resolution 751 (Somalia and Eritrea).