

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018

The purpose of the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018* (the Regulations) is to specify Al-Shabaab for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹ Al-Shabaab is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015*, which is repealed by the Regulations. Details of the Regulations are set out in [Attachment A](#).

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*.

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 Al-Shabaab 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 an unclassified Statement of Reasons provided by the Director-General of Security, as well as advice from the Australian Government Solicitor (AGS). The Statement of Reasons is at [Attachment B](#).

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* continue to apply to conduct relating to Al-Shabaab. Regulations specifying Al-Shabaab as a terrorist organisation have been in effect since 2009.

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

The Regulations commence on the day after it is registered. 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.

Consultation

The unclassified Statement of Reasons was prepared by the National Threat Assessment Centre in the Australian Security Intelligence Organisation, in consultation with the Department of Foreign Affairs and Trade and the Department of Home Affairs (Home Affairs). Home Affairs also sought the advice of the AGS to inform the decision of the Minister for Home Affairs.

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 Al-Shabaab 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 time frame 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 time frame nominated by the Minister.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018* (the Regulations) specifies Al-Shabaab 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 Al-Shabaab 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 Al-Shabaab.

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 Regulations provide that the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Al-Shabaab.

Terrorist organisations, including Al-Shabaab, 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 these bodies directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act which includes the causing of serious harm to persons or death and serious damage to property (refer to [Attachment B](#) for details).

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 Al-Shabaab. 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 Al-Shabaab.

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 Al-Shabaab, 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 the applicable disallowance period, which is 15 sitting days after the Regulations are laid before that House, as provided for in subsection 102.1A(4) of the *Criminal Code*.

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 achieve a legitimate purpose and are reasonable, necessary and proportionate.

Details of the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018*

Section 1 – Name

This section would provide that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulations 2018*.

Section 2 – Commencement

This section would provide for the commencement of each paragraph in the instrument, as set out in the table.

Subsection (1) would provide that each provision in the instrument 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 Regulations commence the day after the instrument is registered.

The note to subsection (1) would clarify that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) would provide that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of these Regulations. Column 3 is empty at the time of making the instrument.

Section 3 – Authority

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

Section 4 – Schedules

This section would provide each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedule has effect according to its terms. Schedule 1 to the instrument would repeal the whole of the *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015*.

Section 5 – Terrorist organisation — Al-Shabaab

Subsection (1) would provide 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) would provide 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;
- (u) Young Mujahideen Movement in Somalia;
- (v) Youth Wing

Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015* is repealed.

The *Criminal Code (Terrorist Organisation—Al-Shabaab) Regulation 2015* specifies 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 *Criminal Code*. The proposed clause would ensure there is no duplication where the new Regulations are made before the current Regulation ceases to have effect.

ATTACHMENT B

STATEMENT OF REASONS FOR 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; 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 information about al-Shabaab. 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 *Criminal Code* provides that for an organisation to be listed as a terrorist organisation, the Minister for Home Affairs 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.

For the purposes of listing a terrorist organisation under the Criminal Code, the doing of a terrorist act includes 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.

2. Background to this listing

The Australian Government first proscribed al-Shabaab as a terrorist organisation under the *Criminal Code* on 22 August 2009. It was relisted on 18 August 2012 and 11 August 2015.

3. Terrorist activity of the organisation

Objectives

Al-Shabaab's primary objective is the establishment of an Islamist state in the Horn of Africa based on Sharia law and the elimination of secular and foreign influence, including through violent means. On 9 February 2012, al-Shabaab pledged its allegiance to proscribed terrorist organisation al-Qa'ida.

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

Al-Shabaab continues to conduct attacks in Somalia to achieve its aims. It primarily targets Somali Government interests and African Union Mission in Somalia (AMISOM) forces, using mortars, rocket-propelled grenades, improvised explosive devices (IEDs) and firearms. Al-Shabaab previously attacked Western interests in neighbouring countries including Kenya and Djibouti. In 2013 al-Shabaab attacked the Westgate shopping mall in Nairobi killing a number of Western citizens, including an Australian.

Recent examples of terrorist attacks and actions for which Al-Shabaab is responsible, or can be

reliably held responsible since it was last proscribed, include:

- 11 January 2018: a mortar attack against the Presidential Palace in Mogadishu, killing at least one security guard.
- 14 October 2017: a vehicle-borne improvised explosive device (VBIED) at an intersection in Mogadishu killing at least 500 people.
- 11 September 2017: an attack against an army base in Balad Hawo, Somalia using IEDs and gunfire, killing at least 10 soldiers.
- 3 August 2017: a gunfire attack on a bus carrying passengers in Lamu, Kenya, casualty numbers are unknown.
- 8 June 2017: an armed attack against Af Urur military base in Puntland, Somalia killing at least 60 people, including civilians.
- 24 May 2017: two separate roadside bombings in Kenya that killed eight Kenyan security officers.
- 13 March 2017: a VBIED at the Weheliye Hotel in Mogadishu, killing at least six people.
- 27 January 2017: an attack against a Kenyan military base in Kulbiyow, Somalia with casualties of 67 soldiers and looting of weapons and military vehicles.
- 1 June 2016: an armed attack against the Ambassador Hotel in Mogadishu, Somalia killing at least 15 people.
- 2 February 2016: an IED attack against Daallo Airline flight D3159 shortly after it departed Mogadishu International Airport, injuring two passengers.
- 15 January 2016: an armed attack against a Kenyan military base in the El Adde region of Somalia, killing between 60 and 100 people.
- 1 November 2015: an IED and armed attack against the Sahafi Hotel in Mogadishu, killing at least nine people.

Advocating the doing of terrorist acts

Since al-Shabaab was last listed, it has continued to advocate the doing of terrorist attacks, including:

- In July and August 2017, al-Shabaab released a series of at least six videos in which foreign fighters from Uganda, Kenya, Canada and Tanzania threaten America, and called on potential recruits to join al-Shabaab and to kill Kenyan soldiers, civilians and police.
- On 22 May 2017, a propaganda video from an al-Shabaab spokesman speaking at the graduation ceremony of al-Shabaab fighters in Somalia called on the fighters to ‘conquer’ Kenya and threatened Uganda, Burundi, Tanzania and Somalia. The spokesperson called on recruits to ‘eliminate all other systems of governance’ and to ‘wage war’.
- On 1 January 2016, al-Shabaab released an English-language propaganda video encouraging Americans to travel to Somalia to fight for the group.

4. Details of the organisation

Al-Shabaab was the most prominent of the militia groups comprising the militant wing of the Council of Islamic Courts (CIC), a group of Sharia courts who united to form a rival administration, before the Somali Transitional Federal Government and Ethiopian forces ousted the CIC in December 2006. Al-Shabaab subsequently established itself as the leading insurgent group operating in Somalia. Following withdrawal of Ethiopian forces in January 2009, al-Shabaab controlled the majority of Somalia. From 2011, the intervention of Kenyan and Ethiopian forces forced al-Shabaab from Mogadishu, and much of southern and central Somalia. The group currently controls some

territory in southern Somalia, although this is fluid and frequently changes, depending on AMISOM counter-terrorism activity and troop movements.

Leadership

Al-Shabaab has a centralised command structure and is currently led by Sheikh Ahmed Umar (also known as Ahmed Diriye), who took over as leader following the September 2014 death of long-time emir Ahmad Abdi Aw Muhammad Godane.

Membership

Al-Shabaab members range from those focused on the domestic insurgency in Somalia to elements that support al-Qa'ida's global jihadist ideology. Al-Shabaab fighter strength estimates vary from 3 000 to as high as 9 000, with most members being ethnic Somalis. Al-Shabaab members are chiefly from Somalia and Kenya; however, a small number of al-Shabaab fighters are from other countries, including Western nations.

Recruitment and funding

Al-Shabaab recruits widely within Somali society, as well as from the diaspora using propaganda campaigns, often in video format. Al-Shabaab has posted increasingly sophisticated videos online, including videos with English subtitles – most via its al-Kata'ib Media platform. Domestically, al-Shabaab continues to spread its message through Radio al-Andalus in Somalia.

Al-Shabaab derives some of its finances from taxing communities in areas it controls, and private fundraising undertaken by supporters outside Somalia. Al-Shabaab also demands protection money from Somalia-based businesses, and conducts its own business activities trading in and taxing revenue from locally available resources.

Links to other terrorist organisations

Al-Shabaab is an officially recognised affiliate of, and ideologically aligned with, proscribed terrorist group al-Qa'ida. On 9 February 2012, a publicly released video by al-Shabaab leader Mukhtar Abu al-Zubair pledged al-Shabaab's allegiance to al-Qa'ida. In a reciprocal message in the same video al-Qa'ida leader Ayman al-Zawahiri announced al-Shabaab had joined al-Qa'ida. On 6 September 2014, al-Shabaab officially reiterated its allegiance to al-Zawahiri and Al-Qa'ida. While al-Shabaab largely operates independently, al-Qa'ida senior leadership has previously supported some al-Shabaab activities.

Links to Australia

In September 2013, Australian-British dual citizen Ross Langdon was killed during an al-Shabaab attack on a shopping complex in Nairobi, Kenya. In late 2011, al-Shabaab-linked Australian citizens Wissam Fattal, Saney Edow Aweys and Nayef El Sayed were found guilty in the Victorian Supreme Court of conspiring to do acts in preparation for a terrorist act contrary to Section 11.5 and 101.6(1) of the Criminal Code.

Threats to Australian interests

Al-Shabaab has not made statements specifically threatening Australians or Australian interests. However, al-Shabaab has issued statements threatening Westerners and Western interests and has attacked locations known to be popular with Westerners, including shopping malls and cafes. Australians are a visible Western presence who reside, work and/or travel in regions where al-Shabaab may operate, particularly in Kenya. There are also a number of publicly-listed Australian

mining companies and other business interests in these regions.

Listed by the United Nations or like-minded countries

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 March 2010, United Kingdom in May 2010 and by the European Union in April 2010.

Australia lists al-Shabaab for counter-terrorism financial sanctions under UNSC resolution 1373 (2001) and in accordance with its listing by the UNSC through resolution 751 (2001) concerning Somalia and Eritrea.

Engagement in peace or mediation processes

Since it was last listed, al-Shabaab is not known to have participated in peace or mediation processes despite Federal Government of Somalia and AMISOM appeals to the group to disarm and join the Somali peace process.

5. Conclusion

On the basis of the above information, ASIO assesses that al-Shabaab continues to be directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts or advocates the doing of terrorist acts.

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

- 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 al-Shabaab's 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.