

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Home Affairs

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulations 2019*

The purpose of the *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulations 2019* (the Regulations) is to specify Abu Sayyaf Group for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.<sup>1</sup> Abu Sayyaf Group is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016*, which is repealed by the Regulations.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 Abu Sayyaf Group 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

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<sup>1</sup> 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 Abu Sayyaf Group. Regulations specifying Abu Sayyaf Group as a terrorist organisation have been in effect since 2002.

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 Abu Sayyaf Group 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—Abu Sayyaf Group) Regulations 2019* (the Regulations) specifies Abu Sayyaf Group 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 Abu Sayyaf Group 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 Abu Sayyaf Group.

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 Abu Sayyaf Group.

Terrorist organisations, including Abu Sayyaf Group, 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 Abu Sayyaf Group. 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 Abu Sayyaf Group.

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 Abu Sayyaf Group, 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) of 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—Abu Sayyaf Group) Regulations 2019***

**Section 1 – Name**

This section would provide that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulations 2019*

**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—Abu Sayyaf Group) 2016*.

**Section 5 – Terrorist organisation—Abu Sayyaf Group**

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 Abu Sayyaf is specified.

Subsection (2) would provide that Abu Sayyaf is also known by the following names:

- a) Abou Sayaf Armed Band
- b) Abou Sayyef Group
- c) Abu Sayaff Group
- d) Al-Harakat Al-Aslamiya

- e) Al-Harakat Al-Islamiyya
- f) Al-Harakat-ul Al-Islamiyya
- g) Al-Harakatul-Islamia
- h) Mujahideen Commando Freedom Fighters

#### Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016* is repealed.

The *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016* specifies Abu Sayyaf 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

<b>STATEMENT OF REASONS FOR ABU SAYYAF GROUP</b>	
<p>Also known as: Abou Sayaf Armed Band; Abou Sayyef Group; Abu Sayaff Group; Al-Harakat Al-Aslamiya; Al-Harakat Al-Islamiyya; Al-Harakat-ul Al-Islamiyya; Al-Harakatul-Islamia; Mujahideen Commando Freedom Fighters</p>	
<p>This statement is based on publicly available information about the Abu Sayyaf Group (ASG). To the Australian Government’s knowledge, this information is accurate, reliable and has been corroborated by classified information.</p>	
<b>1.</b>	<p><b>Basis for listing a terrorist organisation</b></p> <p>Division 102 of the <i>Criminal Code</i> 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:</p> <ul style="list-style-type: none"><li>a) is directly or indirectly engaged in, preparing, planning, or assisting in or fostering the doing of a terrorist act; or</li><li>b) advocates the doing of a terrorist act.</li></ul> <p>For the purposes of listing a terrorist organisation under the <i>Criminal Code</i>, 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.</p>
<b>2.</b>	<p><b>Background to this listing</b></p> <p>The Australian Government first proscribed the Abu Sayyaf Group (ASG) as a terrorist organisation under the <i>Criminal Code</i> with effect from 14 November 2002. The Abu Sayyaf Group was re-listed on 5 November 2004, 3 November 2006, 1 November 2008, 29 October 2010, 12 July 2013 and 28 June 2016.</p>
<b>3.</b>	<p><b>Terrorist activity of the organisation</b></p> <p><u>Objectives</u></p> <p>ASG’s objective, clearly articulated in propaganda and public messaging, is to create an independent Islamic state in Mindanao including the Sulu Archipelago. The group undertakes attacks, including kidnappings, to finance these ideological objectives. Elements of ASG have also pledged allegiance to the Islamic State (IS). Westerners—including Australians—feature among the broad range of kidnap targets.</p> <p><u>Directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts</u></p> <p>ASG has extensive operational reach and it plans and conducts terrorist attacks and kidnappings against a wide range of targets, including Philippine security forces and foreign interests in areas including Mindanao, Basilan, Tawi Tawi, Jolo, Palawan, Davao and Malaysia’s Sabah State.</p> <p>Significant recent attacks either claimed by, or reliably attributed to, ASG include the following:</p> <ul style="list-style-type: none"><li>• On 9 February 2019, ASG members shot and killed a logger in Lauso town in Basilan</li></ul>

Province for being unable to say the first of seven verses of the Qur'an.

- On 17 November 2018, ASG killed five Armed Forces of the Philippines soldiers during a rescue of kidnap victims on the island of Jolo, Sulu.
- In late January 2018, ASG members ambushed a private vehicle in Patikul killing two people and injuring four others.
- In late January 2018, ASG attacked and killed two government workers and injured two others in Lamitan, Basilan Province. On 21 August 2017, ASG killed nine and injured 10 civilians in Tubigan village, Maluso, Basilan in an attempt to divert military pressure from its operations bases. During this attack ASG also burned four houses and a health centre.
- In April 2017, 11 ASG members attempted to conduct a kidnapping and attack in the tourist location of Bohol. During fighting four members of Philippine security services were killed.
- In early February 2017, a driver/bodyguard of a town mayor and a Scout Ranger were wounded in separate roadside explosions perpetrated by ASG in a village in Tuburan, Basilan on the same day.
- On 18 December 2016, an 18 year old vendor was wounded after an improvised explosive device went off in the village of Sabong, Lamitan City which according to police was planted by members of the Abu Sayyaf Group.
- In mid-August 2016, ASG killed 15 Philippine soldiers and wounded 12 others while the soldiers were attempting to rescue a number of kidnap hostages on Jolo Island.

ASG kidnappings in the past few years have to a large degree been motivated by financial gain rather than purely political, religious or ideological purposes – but the proceeds of these attacks are used to support ASG's operations. ASG typically targets Westerners and other wealthy foreign nationals, as well as local politicians, business people, and civilians. Funding obtained through ransom is especially important for sustaining ASG's capacity to resist pressure from the Armed Forces of the Philippines counter-insurgency operations. Ransoms obtained in these kidnappings are assessed to be used in pursuit of their ideological objectives financing resources and their ability to operate and control these areas. Kidnappings attributed to ASG since its re-listing by the Australian Government as a terrorist organisation on 28 June 2016 include:

- On 11 September 2018, ASG kidnapped two Indonesian fisherman from the Sabah waters off Semporna.
- On 20 October 2016, ASG kidnapped the Korean captain and some of the Filipino crew of MV Dongbang Giant 2.
- In early November 2016, ASG kidnapped a German citizen from his yacht in the Sulu Archipelago. On 11 November 2016, ASG kidnapped six Vietnamese nationals, including the ship's captain, from MV Royal 16 sailing near Sibago Island, Basilan.
- In May and June 2016, ASG beheaded two Canadian hostages they kidnapped in 2015 when their ransom was not paid.

ASG has been linked to numerous large-scale attacks over the past decade, including the 27 February 2004 bombing of the Superferry 14 in Manila harbour, killing 114 people, and the 14 February 2005 coordinated bombings in the cities of Makati, Davao, and General Santos, killing 11 people.

#### Advocating the doing of terrorist acts

ASG has publicly advocated the doing of terrorist attacks. ASG's adaptation of Islamic State tactics in publicly promoting its operational activities—including kidnappings, bombings and beheadings—may have the effect of advocating for, or encouraging others to engage in, terrorist acts.

- Throughout 2016 ASG used ISIL tactics, flags and propaganda in publicly available ransom and proof of life videos for Canadian nationals. These tactics were then subsequently used in a 2017 ransom video for a German national.
- On 27 February 2017, ASG released a video on Telegram of the beheading of the German national kidnapped in November 2016 after the ransom deadline passed.
- On 18 November 2018, pro-ISIL ASG elements used ISIL's media entity, Amaq, and released a propaganda video of ASG purportedly engaged in a shoot-out with Philippine military and included the beheading of a Philippine soldier.

#### **4. Details of the organisation**

ASG was founded in 1991 as a separatist militant Islamist movement by Filipino national Abdurajak Janjalani. ASG operates in the southern Philippines region of Mindanao, primarily on the islands of Jolo and Basilan in the Sulu archipelago.

##### Leadership

Since the deaths of several leaders in 2006 and 2007, including former ASG Emir Khadaffy Janjalani, ASG's leadership structure has been fragmented, comprising loosely-affiliated sub-groups rather than a formal hierarchy. However, a number of key individuals possess extensive experience and lead their own independent operations, including Radullan Sahiron, Hatib Hajan Sawadjaan, Furuji Indama and Yasser Igasan.

##### Membership

ASG has approximately 300 personnel but can likely draw on a much larger base of individuals in the Sulu archipelago motivated by the prospect of financial dividends stemming from kidnapping operations. Most members are native to western Mindanao and the Sulu archipelago. However, ASG has periodically provided refuge and utilised the skills of foreign jihadists, including anti-Western jihadists who were involved in the 2002 Bali bombings.

##### Recruitment and funding

ASG recruits young Muslims from poor areas of western Mindanao and the Sulu archipelago. ASG views kidnap-for-ransom and extortion ventures as profitable operational tactics. Kidnappings, in particular, have been a trademark of ASG since its creation and represent the main funding mechanism for the group. ASG has received funds from other Islamist organisations in the past—including al-Qa'ida and Jemaah Islamiyah—and continues to receive funds from foreign benefactors. ASG also receives support from the local population.

##### Links to other terrorist organisations

Elements of ASG have pledged allegiance to Islamic State. ASG has associated with other terrorist

organisations since its founding, including al-Qa'ida and Jemaah Islamiyah. Recently, elements of the ASG have been associated with the Islamic State East Asia, a proscribed extremist group looking to form a South East Asian Islamic State province. ASG elements were reported in media to be involved in bombing attacks against a Philippines military post near Lamitan township in the Sulu Archipelago on 31 July 2018 and against a Catholic Cathedral in the city of Jolo on 27 January 2019; however we judge these attacks were committed by the Islamic State East Asia.

#### Links to Australia

Australians are not directly involved in the organisation.

#### Threats to Australian interests

Westerners—including Australians—feature among the broad range of kidnap targets, primarily due to their potential ransom value.

- In early November 2015, security forces foiled a planned ASG kidnapping targeting an Australian family in Agusan del Sur, north-eastern Mindanao.
- On 5 December 2011, Australian national Warren Richard Rodwell was kidnapped from his residence in Ipil, western Mindanao. ASG claimed in a January 2013 in a proof-of-life video of Mr Rodwell his ransom would finance future operations. Mr Rodwell was released by his captors in March 2013.

#### Listed by the United Nations or like-minded countries

The United Nations Security Council ISIL (Da'esh) and al-Qaida Sanctions Committee (formerly the United Nations Security Council Al-Qaida Sanctions Committee) has designated ASG for targeted financial sanctions and an arms embargo since 6 October 2001. It is listed as a proscribed terrorist organisation by the governments of Canada, New Zealand, the United Kingdom and the United States of America.

#### Engagement in peace or mediation processes

ASG is not involved in any peace or mediation process.

### **5. Conclusion**

On the basis of the above information, ASIO assesses that Abu Sayyaf Group is 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, ASG is known to have committed or threatened actions that:

- a) cause, or could cause, death, serious harm to persons, serious damage to property, endanger 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 ASG's political, religious or ideological causes;

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|  | <ul style="list-style-type: none"><li>d) are done with the intention of intimidating the government of one or more foreign countries; and</li><li>e) are done with the intention of intimidating the public or sections of the public.</li></ul> |
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