

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulations 2019

The purpose of the *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulations 2019* (the Regulations) is to specify Islamic State in Libya for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹ Islamic State in Libya is currently specified for this purpose by the *Criminal Code (Terrorist Organisation— Islamic State in Libya) Regulation 2016*, which is repealed by the Regulations.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*, which prescribes offences against humanity and related offences, and dangers to the community and national infrastructure.

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 Islamic State in Libya 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 Islamic State in Libya. Regulations specifying Islamic State in Libya as a terrorist organisation have been in effect since 2016.

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

The Regulations commence on 29 November 2019. 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 Islamic State in Libya 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 timeframe 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 timeframe nominated by the Minister.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulations 2019* (the Regulations) specifies Islamic State in Libya 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 Islamic State in Libya 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 Islamic State in Libya.

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 Islamic State in Libya.

Terrorist organisations, including Islamic State in Libya, 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 Islamic State in Libya. The restrictions on freedom of expression are justified on the basis that such conduct could jeopardise the security of Australia, the personal safety of its population and its national interests and the restrictions are reasonable, necessary and proportionate to the objective of protecting Australia's national security.

The right to freedom of association in Article 22

Article 22 of the ICCPR protects the right of all persons to group together voluntarily for a common goal and to form and join an organisation. Article 22(2) provides that this right may be limited for the purpose of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right of freedom of association to prevent people engaging with and participating in terrorist organisations, in this instance Islamic State in Libya.

The offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* is limited in its application to an organisation that is a listed terrorist organisation under the definition of 'terrorist organisation' in paragraph 102.1(1)(b) of the *Criminal Code*. The offence does not apply if the association is with a close family member and relates to a matter of family or domestic concern, or takes place in the course of practicing a religion in a place used for public religious worship, or the association is only for the purpose of providing humanitarian aid or only for the purpose of providing legal advice or legal representation.

Due to the severity of the danger posed by terrorist organisations, it is reasonable, necessary and proportionate to limit the right of individuals who, by their association with a terrorist organisation, pose a threat to Australians.

General safeguards and accountability mechanisms

Whilst the Regulations may limit the right to freedom of expression and the right to freedom of association with Islamic State in Libya, 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—Islamic State in Libya) Regulations 2019*

Section 1 – Name

1. This section provides that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulations 2019*.

Section 2 – Commencement

2. This section provides for the commencement of each paragraph in the instrument, as set out in the table.
3. Subsection 2(1) provides that each provision in the instrument, as specified in column 1 of the table, commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 provide that the Regulations commence on 29 November 2019.
4. The note to subsection 2(1) clarifies that the table only relates to the provisions of this instrument as originally made, and will not be amended to deal with any subsequent amendments to the instrument.
5. Subsection 2(2) provides that the 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 version of these Regulations.

Section 3 – Authority

6. This section provides that the Regulations are made under the *Criminal Code Act 1995*.

Section 4 – Schedules

7. This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule has effect according to its terms.
8. Schedule 1 to the Regulations repeals the whole of the *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulations 2016*.

Section 5 – Terrorist organisation—Islamic State - Libya

9. Subsection 5(1) provides that for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Islamic State in Libya is specified.

10. The effect of specifying Islamic State in Libya as a terrorist organisation is to ensure that offences in Subdivision B of Division 102 of the *Criminal Code* that relate to terrorist organisations are able to operate, where the appropriate elements are satisfied, in relation to conduct in connection with Islamic State in Libya.
11. Subsection 5(2) provides a list of names that Islamic State in Libya is also known as:
 - (a) Islamic State-Libya;
 - (b) Islamic State of Iraq and al-Sham in Libya;
 - (c) Islamic State of Iraq and al-Sham-Libya;
 - (d) Islamic State of Iraq and Syria in Libya;
 - (e) Islamic State of Iraq and Syria-Libya;
 - (f) Islamic State of Iraq and the Levant in Libya;
 - (g) Islamic State of Iraq and the Levant-Libya;
 - (h) Wilayat al-Tarabulus
 - (i) Wilayat Barqa;
 - (j) Wilayat Barqah;
 - (k) Wilayat Fezzan;
 - (l) Wilayat Tarablus;
 - (m) Wilayat Tripolitania.

Schedule 1 — Repeals

12. Clause 1 of Schedule 1 repeals the *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulation 2016*.
13. The *Criminal Code (Terrorist Organisation—Islamic State in Libya) Regulation 2016* specifies Islamic State - Libya 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*. Clause 1 of Schedule 1 ensures there is no duplication where the new Regulations are made before the current Regulation ceases to have effect.

ATTACHMENT B

STATEMENT OF REASONS FOR ISLAMIC STATE IN LIBYA

Also known as: **Islamic State–Libya; Islamic State of Iraq and the Levant–Libya; Islamic State of Iraq and the Levant in Libya; Islamic State of Iraq and al-Sham in Libya; Islamic State of Iraq and al-Sham–Libya; Islamic State of Iraq and Syria in Libya; Islamic State of Iraq and Syria–Libya; Wilayat Barqa; Wilayat Barqah; Wilayat Fezzan; Wilayat Tripolitania; Wilayat Tarablus; Wilayat al-Tarabulus**

This statement is based on publicly available information about Islamic State in Libya. 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 Act 1995* provides that for an organisation to be listed as a terrorist organisation, the AFP Minister 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 (whether or not a terrorist act has occurred or will occur); or
- b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

2. Background to this listing

The Australian Government first proscribed Islamic State in Libya (IS-Libya) as a terrorist organisation under the *Criminal Code* on 29 November 2016.

3. Terrorist activity of the organisation (legislative requirements for listing)

IS-Libya is an officially recognised Islamic State affiliate adhering to Islamic State’s global jihadist ideology and following an extreme interpretation of Islam which is anti-Western, promotes sectarian violence and violently targets those who do not agree with its interpretation. IS-Libya seeks to assist IS in its goal of creating an Islamic caliphate.

Objectives

IS-Libya shares Islamic State’s goals of consolidating territory under its control and expanding its territorial gains within Libya. The group’s stated aim is for Libya to be the ‘vanguard of the Caliphate’. IS-Libya has made public its aims to establish three Islamic State provinces in Libya—Barqah, Fezzan and Tripolitania—and remove the United Nations-backed transitional Government of National Accord.

IS-Libya has undertaken the following to advance its ideology and achieve its objectives:

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

IS-Libya has engaged in terrorist attacks and kidnappings against a wide range of targets in North Africa. Attacks for which IS-Libya has claimed responsibility and is assessed to have undertaken include:

- 10 April 2019: IS-Libya attacked the town of Fuqaha in central Libya killing the head of the

town's council and a security guard.

- 28 October 2018: IS-Libya killed at least five people and kidnapped 10 policemen in the town of Fuqaha.
- 11 September 2018: IS-Libya attacked the National Oil Corporation in Tripoli, killing two staff members.
- 2 May 2018: IS-Libya attacked the High National Election Commission office in Tripoli, killing 16 people.
- 23 August 2017: IS-Libya attacked a Libyan National Army checkpoint in the al-Jufra region, beheading nine military personnel and two civilians.

Advocating the doing of terrorist acts

IS-Libya has publicly advocated the doing of terrorist attacks in order to further its objectives including through online propaganda designed to radicalise and inspire susceptible individuals to undertake attacks. Public statements in which IS-Libya has advocated terrorist attacks include:

- 4 July 2018: IS-Libya directly urged the doing of a terrorist act by releasing a video entitled 'The Point of Death' declaring its intent to establish a Caliphate in Libya and urging its fighters to attack United States (US) and foreign interests.
- 26 March 2016: IS-Libya directly urged the doing of a terrorist act by releasing a video urging its supporters to conduct attacks similar to the March 2016 terrorist attacks in Brussels in other countries that attack IS branches.

4. Details of the organisation

IS-Libya was formed in Derna by local returnees from Syria, many of whom had fought as part of the Islamic State-affiliated Battar Brigade. These returnees, who established the Islamic Youth Shura Council in Derna in 2014, received an Islamic State delegation in September 2014 and subsequently pledged allegiance to Islamic State leader Abu Bakr al-Baghdadi. In November 2014, al-Baghdadi announced that he had accepted the oath of allegiance from Islamic Shura Youth Council and created the IS-Libya 'branch'. Al-Baghdadi declared three wilayats or provinces: Barqa (eastern Libya) with Derna as its headquarters; Tarablus (Tripoli) with Sirte as its headquarters; and Fezzan (southern Libya). Following the fall of Sirte to government forces in late 2016, and other losses, IS-Libya retreated into the desert areas of central Libya where it re-built its fighting forces. In December 2018 IS-Libya recommenced attacks in major population centres.

Leadership

IS leadership in Syria and Iraq appointed close aides of Islamic State leader Abu Bakr al-Baghdadi to lead IS-Libya. IS-Libya was led by Iraqi national Abu Nabil until November 2015, when he was killed in a US airstrike. Following his death, IS-Libya has been led by Abdul Qadr al-Najdi.

Membership

IS-Libya's membership is variously estimated between 500 and 4000. The majority of its members are foreigners emanating predominantly from North African and sub-Saharan African countries; with many from Tunisia and Sudan.

Recruitment and funding

IS-Libya uses domestic issues to recruit Libyans who felt aggrieved and marginalised in post-Gaddafi Libya. The group encourages defectors from armed Libyan groups and has paid fighters to join the group. IS-Libya has also recruited Muslims through calls to fulfil their obligation of

immigration to the lands of Islam and by paying foreign fighters.

IS-Libya is largely self-funded through black-market activities, including taxation of smugglers, and also receives some of funding from Islamic State in Syria and Iraq through emissaries. Other funding sources include extortion, kidnapping for ransom, armed robbery, smuggling and selling antiquities.

Links to other terrorist organisations

IS-Libya remains an affiliate of, and ideologically aligned with, Islamic State and has received support and guidance from Islamic State senior leadership.

Links to Australia

There are no known links between IS-Libya and Australia.

Threats to Australian interests

IS-Libya has not made statements specifically threatening Australians or Australian interests. However, IS-Libya has issued statements threatening Westerners and Western interests in general.

- 4 July 2018: The IS-Libya video entitled 'The Point of Death' called on its fighters to attack the US and its allies, who it characterised as adversaries to the establishment of a Caliphate in Libya.

Listed by the United Nations or like-minded countries

IS-Libya was designated as foreign terrorist organisation by the US State Department in May 2016.

Engagement in peace or mediation processes

IS-Libya has not participated in peace talks with the Libyan Government and did not participate in United Nations-brokered negotiations to form a national unity government in Libya.

5. Conclusion

On the basis of the above information, ASIO assesses that IS-Libya is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts or advocates the doing of terrorist acts, involving threats to human life and serious damage to property.

In the course of pursuing its objectives, IS-Libya 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 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.