EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2020

The purpose of the Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2020 (the Regulations) is to specify Islamic State Khorasan Province for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.[[1]](#footnote-1) Islamic State Khorasan Province is currently specified for this purpose by the Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2017, which are repealed by the Regulations.

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 Khorasan Province is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. In coming to this position, the Minister for Home Affairs has taken into consideration unclassified information (Statement of Reasons) provided by the Department of Home Affairs (Attachment C).

### 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
* 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 Khorasan Province. Regulations specifying Islamic State Khorasan Province as a terrorist organisation have been in effect since 2017.

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

The Regulations commence on 3 November 2020. Subsection 102.1(3) of the *Criminal Code* provides that regulations for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ cease to have effect on the third anniversary of the day on which they take effect.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment A.

Further details of the Regulations are set out in Attachment B.

### Consultation

The Department of Home Affairs sought the advice of the Australian Government Solicitor (AGS) in relation to the unclassified information (Statement of Reasons).

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 Khorasan Province 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.

# ATTACHMENT A

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Criminal Code (Terrorist Organisation—*Islamic State Khorasan Province*) Regulations 2020***

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## Overview

The *Criminal Code (Terrorist Organisation—*Islamic State Khorasan Province*) Regulations 2020* (the Regulations) specify Islamic State Khorasan Province 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 Khorasan Province 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 Khorasan Province.

The Regulations, which are part of Australia’s terrorist organisation listing regime, support the application of the offences in Division 102 of the *Criminal Code*, the object of which is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. In particular, the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Islamic State Khorasan Province as a listed terrorist organisation.

Terrorist organisations, including Islamic State Khorasan Province, present a threat to the security of Australia and often seek to harm Australians and our democratic institutions. The statutory definition of a ‘terrorist organisation’ requires that an organisation directly or indirectly engages in, prepares, plans, assists in or fosters the doing of a terrorist act or, in relation to a listed terrorist organisation, that the organisation advocates the doing of a terrorist act.

## Human rights implications

The Regulations promote the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR):

* the inherent right to life in Article 6.

The Regulations limit the following human rights contained in the ICCPR:

* the right to freedom of expression in Article 19, and
* the right to freedom of association in Article 22.

### The inherent right to life in Article 6

Under Article 6 of the ICCPR, 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 Khorasan Province. 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 Khorasan Province.

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 Khorasan Province, 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 Regulationsmay only be made if a majority of the states and territories do not object to the Regulations within a reasonable time specified by the Commonwealth
* under subsection 102.1(2A) of the *Criminal Code* the Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed Regulations
* under subsection 102.1(3) the *Criminal Code*, the Regulations will cease to have effect on the third anniversary of the day on which they take effect
* subsection 102.1(4) of the *Criminal Code* provides that if the Minister ceases to be satisfied of the criteria necessary for listing an organisation under subsection 102.1(2) of the *Criminal Code*, the Minister must make a declaration to that effect by written notice published in the Gazette, with the effect of the Minister’s declaration that the Regulations listing the organisation cease to have effect and the organisation is de-listed as a terrorist organisation under Division 102 of the *Criminal Code*
* subsection 102.1(17) of the *Criminal Code* provides that an individual or an organisation may make a de‑listing application to the Minister
* the Regulationsmay 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 Regulationswithin 15 sitting days after the Regulations are laid before that House, as provided for in section 42 of the *Legislation Act 2003* and noting that this period may be extended by operation of subsection 102.1A(4) of the *Criminal Code* if the Parliamentary Joint Committee on Intelligence and Security reviews the Regulations.

## Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights. To the extent that the terrorist organisation listing regime, of which the Regulations are part, may also limit human rights, those limitations are for a legitimate purpose and are reasonable, necessary and proportionate.

**The Hon Peter Dutton MP
Minister for Home Affairs**

**Attachment B**

**Details of the *Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2020***

Section 1 – Name

1. This section would provide that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2020*.

Section 2 – Commencement

1. This section would provide for the commencement of each provision in the proposed Regulations, as set out in the table.
2. Subsection 2(1) would provide that each provision in the proposed Regulations, as specified in column 1 of the table, commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 would provide that the proposed Regulations commence in their entirety on 3 November 2020.
3. The note to subsection 2(1) would clarify that the table only relates to the provisions of the proposed Regulations as originally made, and will not be amended to deal with any subsequent amendments to the instrument.
4. Subsection 2(2) would provide that the information in column 3 of the table is not part of the proposed Regulations. It is designed to assist readers of the proposed Regulations.

Section 3 – Authority

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

Section 4 – Schedules

1. This section would provide that each instrument that is specified in a Schedule to the proposed Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule would have effect according to its terms.
2. Schedule 1 to the Regulations would repeal the whole of the *Criminal Code (Terrorist Organisation—Islamic State Khorasan Province) Regulations 2017.*

Section 5 – Terrorist organisation*—*Islamic State Khorasan Province

1. Subsection 5(1) would provide that, for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Islamic State Khorasan Province is specified.
2. The effect of specifying Islamic State Khorasan Province as a terrorist organisation would be to ensure that offences in Subdivision B of Division 102 of the *Criminal Code* that relate to terrorist organisations are able to operate, where the appropriate elements are satisfied, in relation to conduct in connection with Islamic State Khorasan Province.
3. Subsection 5(2) would provide a list of names that Islamic State Khorasan Province is also known as:
4. Daesh Khorasan (paragraph (a))
5. Daesh-Khorasan (paragraph (b))
6. IS-Khorasan (paragraph (c))
7. Islamic State in the Khorasan Province (paragraph (d))
8. Islamic State Khorasan (paragraph (e))
9. Islamic State-Khorasan (paragraph (f))
10. Islamic State of Iraq and al-Sham-Khorasan (paragraph (g))
11. Islamic State of Iraq and Syria-Khorasan (paragraph (h))
12. Islamic State of Iraq and the Levant-Khorasan (paragraph (i)), and
13. Wilayat Khorasan (paragraph (j)).

Schedule 1 – Repeals

1. Clause 1 of Schedule 1 would repeal the *Criminal Code (Terrorist Organisation—Islamic Khorasan Province) Regulations 2017* (the Current Regulations)*.*
2. The CurrentRegulationsspecify Islamic State Khorasan Province as a terrorist organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, commencing on 3 November 2017. Pursuant to subsection 102.1(3) of the *Criminal Code*, regulations for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ cease to have effect on the third anniversary of the day on which they take effect. Clause 1 of Schedule 1 would ensure there is no duplication where the Regulations are made before the Current Regulations cease to have effect.

**Attachment C**

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| **STATEMENT OF REASONS FOR ISLAMIC STATE KHORASAN PROVINCE** |
| Also known as: Islamic State in the Khorasan Province; Islamic State Khorasan; Islamic State-Khorasan; IS‑Khorasan; Islamic State of Iraq and the Levant-Khorasan; Islamic State of Iraq and Syria-Khorasan; Islamic State of Iraq and al-Sham-Khorasan; Wilayat Khorasan; Daesh Khorasan, Daesh-Khorasan. |
| This statement is based on publicly available information about Islamic State Khorasan Province (IS-KP). 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:1. is directly or indirectly engaged in, preparing, planning, or assisting in or fostering the doing of a terrorist act; or
2. 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 previously listed IS-KP as a terrorist organisation under the *Criminal Code* on 3 November 2017.  |
| **3.** | **Terrorist activity of the organisation** ObjectivesIS-KP is an officially-recognised Islamic State (IS) affiliate that adheres to IS’ global jihadist ideology and follows an extreme interpretation of Islam which is anti-Western, promotes sectarian violence and targets as infidels and apostates those who do not agree with its interpretations. The objective of IS-KP is to establish the *wilayat* (province) of Khorasan as part of the global caliphate of IS. Khorasan is a historical name for the region encompassing present day Afghanistan, Pakistan and Central Asia.IS-KP 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 actsIS-KP directly engages in terrorist attacks in and outside of Afghanistan, including assassinations, attacks using remote detonated improvised explosive devices (IEDs), and suicide IED attacks. Significant attacks for which IS-KP has claimed responsibility, and is assessed to have undertaken, since the group was last proscribed (in November 2017) include: * 2 August 2020: a shooting attack at the Jalalabad Prison Complex in Eastern Afghanistan, killing at least 29 people and wounding over 50 others. This attack resulted in the escape of up to 400 prisoners, which included IS-KP and Taliban loyalists;
* 12 May 2020: a suicide bombing attack against a funeral in Kuz Kunar District, Nangarhar Province, Afghanistan, which killed 32 people and injured 133;
* 25 March 2020: a shooting attack against a Sikh temple in Kabul, killing at least 25 people and wounding eight;
* 6 March 2020: a shooting attack against a ceremony in Kabul commemorating the death of prominent Hazara Shia leader, Abdul Ali Mazari, which killed at least 32 people and injured 58;
* 26 February 2020: the detonation of two IEDs attached to motorcycles in Kabul, Afghanistan, injuring at least nine people;
* 17 August 2019: a suicide bombing attack against a Shia wedding in Kabul, which killed at least 63 people and injured 180;
* 20 April 2019: a combined bombing and shooting attack against the Ministry of Telecommunications and Information Technology in Kabul, which killed at least seven people, including four civilians and three security personnel;
* 7 March 2019: a mortar attack on a Shia memorial service in Kabul attended by politicians and officials, which killed at least 11 people;
* 13 July 2018: a suicide bombing at a political rally in Mastung, Baluchistan Province, Pakistan, which killed at least 149 people and injured 189;
* 26 June 2018: a suicide bombing attack against a local police camp in Kunar Province which killed 13 people and injured five;
* 22 April 2018: a suicide bombing attack against a voter registration centre in Kabul, which killed 69 people and injured 120; and
* 31 March 2018: a suicide bombing attack that killed Kunar Provincial Council member Shah Wali Himmat and a religious scholar.
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| **4.** | **Details of the organisation** In October 2014, six former senior Tehrik-e-Taliban Pakistan (TTP) members pledged allegiance to IS leader Abu Bakr al-Baghdadi. In January 2015, then-IS spokesman Abu Mohammad al-Adnani accepted the pledge of allegiance and announced the creation of IS‑KP.LeadershipIS-KP has suffered military defeats and territorial losses since 2017, resulting in fluid leadership, in-fighting among IS-KP members and an organisational restructure. As at July 2019, IS-KP’s leader was Malawi Abdullah, also known as Mawlawi Aslam Farooqi. On 5 April 2020, Afghan security forces announced Farooqi’s arrest. IS-KP has strong ties to IS. Important personnel appointments are discussed with IS, and when required, IS provides direction to IS-KP. MembershipGiven IS-KP’s recent military and territorial losses, the surrender of IS-KP members and Afghanistan’s complex and dynamic security environment, it is difficult to accurately identify IS-KP’s current strength. A recent United Nations report has put the residual numerical strength of IS-KP at around 2,200 fighters clustered in small cells in and around Kunar, Nuristan and adjoining areas.Recruitment and fundingIS-KP recruits primarily from disaffected former Taliban members, Pakistan, Afghanistan-based Salafists, and foreign sympathisers. Following territorial losses, IS-KP is increasingly shifting its recruitment to focus on disaffected, urban, non-Pashtun youth. IS-KP receives funding from overseas sympathisers via *hawala* networks, through its own criminal enterprises, and through direct subsidy from IS.Since the February 2020 agreement between the United States and the Taliban, IS-KP is projecting itself as the only defiant jihadist group committed to jihad in the hope of attracting hardline factions of the Taliban and al-Qa’ida opposed to the peace agreement.Links to other terrorist organisationsIS-KP remains affiliated to and ideologically aligned with IS, and continues to receive support and guidance from IS senior leadership.Links to AustraliaAustralian security and law enforcement agencies are aware of some Australian citizens who have possibly provided support for IS-KP, which in some instances has included an intention to travel overseas in support of IS-KP.Threats to Australian interestsNo Australian citizens have been killed or injured in IS-KP attacks, nor has IS-KP specifically mentioned Australia or Australian interests as a target. However, IS-KP is formally aligned with IS, which has specifically called for attacks against Australia and Australian interests. IS-KP has called for attacks against Westerners and Western interests more generally, both in Khorasan and in Western countries. IS-KP maintains the capability to conduct mass-casualty attacks in Kabul, where Australians are most likely to be located in Afghanistan.Listed by the United Nations or like-minded countriesThe United Nations Security Council includes IS-KP in the ISIL (Da’esh) and al-Qa’ida Sanctions List. The United States designated IS-KP as a foreign terrorist organisation under the name Islamic State in Iraq and the Levant-Khorasan (ISIL-K) in 2015.Engagement in peace or mediation processesIS-KP is not involved in any peace or mediation processes. |
| **5.** | **Conclusion**On the basis of the above information, the Australian Government assesses that IS-KP continues to be directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts, involving threats to human life and serious damage to property.In the course of pursuing its objectives, IS-KP is known to have committed actions that:* 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;
* are intended to have those effects;
* are done with the intention of advancing a political, religious or ideological cause; and
* are done with the intention of:
	+ coercing, or influencing through intimidation, the government of one or more countries; or
	+ intimidating the public or a section of the public.
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1. 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; or

an organisation that is specified by the regulations for the purposes of this paragraph. [↑](#footnote-ref-1)