

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022

The purpose of the *Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022* (the Regulations) is to specify the organisation known as Al-Qa’ida for the purposes of paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1) of the *Criminal Code*.¹

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 **AFP Minister** (the Minister for Home Affairs) 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 the organisation Al-Qa’ida is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, and advocates the doing of a terrorist act. In coming to this position, the Minister has taken into consideration unclassified information provided by the Department of Home Affairs (the Statement of Reasons at [Attachment C](#)).

Effect of the instrument

Division 102 of Part 5.3 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 Part 5.3 of the *Criminal Code* apply to conduct relating to Al-Qa'ida.

The Regulations repeal the *Criminal Code (Terrorist Organisation—Al-Qa'ida) Regulations 2019*, which would otherwise cease to have effect on 10 April 2022 by operation of subsection 102.1(3) of the *Criminal Code*. Making new Regulations ensures the organisation Al-Qa'ida continues to be specified for the purposes of paragraph (b) of the definition of ***terrorist organisation***.

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

The Regulations commence on 9 April 2022. 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 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 this Statement is at [Attachment A](#).

Further details of the Regulations are set out in [Attachment B](#).

Consultation

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 paragraph (b) 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.

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 she was satisfied that Al-Qa'ida meets the legislative requirements for listing.

The Department of Home Affairs obtained advice from the Australian Government Solicitor in relation to the Statement of Reasons at Attachment C.

Statement of Compatibility with Human Rights

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

Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022

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 of the Disallowable Legislative Instrument

The *Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022* (the Regulations) specify Al-Qa’ida 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 specify Al-Qa’ida 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 that might constitute an offence under Division 102 of Part 5.3 of the *Criminal Code* in relation to Al-Qa’ida.

The Regulations, which are part of Australia’s terrorist organisation listing regime, support the application of the offences in Division 102 of Part 5.3 of the *Criminal Code*, the object of which is to protect national security, public safety and the rights and freedoms of persons. In particular, the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Al-Qa’ida as a listed terrorist organisation.

Terrorist organisations, including Al-Qa’ida, 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 engage the following rights:

- the inherent right to life in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right to freedom of expression in Article 19 of the ICCPR, and
- the right to freedom of association in Article 22 of the ICCPR.

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, 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-Qa'ida. 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-Qa'ida.

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 paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1) 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-Qa'ida, 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 in the House of Representatives 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 being 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 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 and tables its report during the applicable disallowance period for that House.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the right to life. To the extent that it limits human rights, those limitations are for a legitimate purpose and are reasonable, necessary and proportionate.

The Hon Karen Andrews MP
Minister for Home Affairs

Details of the Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022

Section 1 – Name

1. This section provides that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2022*.

Section 2 – Commencement

2. This section provides for the commencement of each provision in the Regulations, as set out in the table.
3. Subsection 2(1) provides that each provision in the 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 provide that the Regulations commence in their entirety on 9 April 2022.
4. The note below subsection 2(1) clarifies that the table only relates to the provisions of the Regulations as originally made, and will not be amended to deal with any subsequent amendments of the instrument.
5. Subsection 2(2) provides that the information in column 3 of the table is not part of the Regulations. It is designed to assist readers of the 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 the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule to the Regulations has effect according to its terms.
8. Schedule 1 to the Regulations repeals the whole of the *Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulations 2019* (the 2019 Regulations).

Section 5 – Terrorist organisation – Al-Qa’ida

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 Al-Qa’ida is specified.

10. The effect of specifying Al-Qa'ida as a terrorist organisation is to ensure that offences in Subdivision B of Division 102 of Part 5.3 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 Al-Qa'ida.
11. Subsection 5(2) provides a list of names by which the organisation Al-Qa'ida is also known, at paragraphs 5(2)(a) to (n):
 - Al-Jihad al-Qa'eda;
 - Al-Qa'eda;
 - Al-Qaida;
 - International Front for Fighting Jews and Crusaders;
 - Islamic Army;
 - Islamic Army for the Liberation of Holy Places;
 - Islamic Salvation Foundation;
 - New Jihad;
 - The Base;
 - The Group for the Preservation of the Holy Sites;
 - The Jihad Group;
 - The World Islamic Front for Jihad against Jews and Crusaders;
 - Usama bin Laden Network;
 - Usama bin Laden Organisation.

Schedule 1—Repeals

12. Item 1 of Schedule 1 to the Regulations repeals the *Criminal Code (Terrorist Organisation—Al-Qa'ida) Regulations 2019* (the 2019 Regulations).
13. The 2019 Regulations specify the organisation Al-Qa'ida for the purposes of paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1) of the *Criminal Code*. Subsection 102.1(3) of the *Criminal Code* provides that the 2019 Regulations cease to have effect on 10 April 2022, being the third anniversary of the day on which they took effect.
14. While the 2019 Regulations would otherwise have ceased to have effect on this date, repealing the 2019 Regulations provides clarity and ensures there is no duplication where the new Regulations are made before the 2019 Regulations cease to have effect.

Statement of Reasons

Listing of al-Qa'ida as a terrorist organisation under the *Criminal Code Act 1995*

This Statement of Reasons is based on publicly available information about al-Qa'ida. To the Australian Government's knowledge, this information is accurate, reliable and has been corroborated by classified information where available.

Name of the organisation

Al-Qa'ida (AQ)

Known aliases

- Al-Jihad al-Qa'eda
- Al-Qa'eda
- Al-Qaida
- International Front for Fighting Jews and Crusaders
- Islamic Army
- Islamic Army for the Liberation of Holy Places
- Islamic Salvation Foundation
- New Jihad
- The Base
- The Group for the Preservation of the Holy Sites
- The Jihad Group
- The World Islamic Front for Jihad against Jews and Crusaders
- Usama bin Laden Network
- Usama bin Laden Organisation

Legislative basis for listing a terrorist organisation

Division 102 of the *Criminal Code Act 1995* (the Criminal Code) provides that for an organisation to be listed as a terrorist organisation, the AFP Minister (the Minister for Home Affairs) must be satisfied on reasonable grounds that the organisation:

- a) is directly or indirectly engaged in, preparing, planning, 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.

Background to this listing

The Australian Government first listed al-Qa'ida under the Criminal Code on 21 October 2002. Al-Qa'ida was re-listed on 1 September 2004, 26 August 2006, 9 August 2008, 22 July 2010, 12 July 2013, 28 June 2016, and 10 April 2019.

Details of the organisation

Al-Qa'ida (AQ) is a Sunni Islamist religiously-motivated violent extremist (RMVE) group, which seeks to establish a transnational Islamic caliphate by removing, using violence as necessary, governments in Muslim-majority countries that it deems 'un-Islamic'. The group's overall aim is to replace these governments with Sharia-based Islamic governance in an attempt to supplant foreign influence. To achieve this, the group supports Islamist causes in various global conflicts. Al-Qa'ida views the United States (US) and its allies, including Australia, as enemies and a significant obstacle to achieving its objective.

AQ was founded by Usama bin Laden and Abdullah Azzam in 1988, to continue their jihad against perceived enemies of Islam following the Soviet withdrawal from Afghanistan. Bin Laden gained full control of the organisation after Azzam's death in 1989. During the 1990s, AQ developed a global network of affiliates to secure a cadre of fighters to promote global jihad.

AQ cultivates influence over affiliates and assigned groups by incorporating local grievances into their global strategy and consulting with the leaders and deputies of its global affiliates. Education and religious outreach, exploitation of local insurgencies, and a terrorist campaign against the 'far enemy' – primarily Western countries – remain AQ's long-term objectives.

Sustained counter-terrorism pressure has weakened the group, which has conducted fewer attacks against Western countries since 11 September 2001 and is likely prioritising efforts to rebuild. In doing so, AQ's senior leadership probably seek to minimise direct, public links to significant attacks in Western countries or against Western interests globally.

Leadership

AQ's core leadership and surviving senior commanders are dispersed across countries including Afghanistan, Pakistan, Syria, Iran, Libya and Yemen, in a likely attempt to protect the group from a single strike eliminating the entire senior cohort. The group's overall leader is Ayman al-Zawahiri, who succeeded bin Laden after his death in 2011. Al-Zawahiri is reportedly in poor health and, if alive, probably operates from within the Afghanistan-Pakistan border region.

Membership

In 2016, al-Zawahiri delegated oversight of the group's operational activities to the Hattin Committee, a core group of AQ's senior members located in Iran. The committee facilitates operational and financial connections between AQ's senior leadership and its affiliates. Al-Zawahiri's deputy and Hattin Committee member Abu Muhammad al-Masri was killed in Tehran in 2020. This group likely includes al-Zawahiri's successor.

AQ has a number of global affiliate organisations which operate with varying degrees of independence and are listed separately under the Criminal Code, including:

- al-Qa'ida in the Arabian Peninsula (AQAP)
- al-Qa'ida in the Lands of the Islamic Maghreb (AQIM)
- al-Qa'ida in the Indian Subcontinent (AQIS)
- Harakaat al-Shabaab al-Mujahidin (al-Shabaab)
- Hurras-al-Din (HaD)
- Jama'at Nusrat al-Islam wal-Muslimin (JNIM)

Links to other groups

AQ has been known to engage with and provide guidance to other RMVE groups, including Abu Sayyaf Group, Asbat al-Ansar, Jemaah Islamiyah, Harakat ul Mujahideen, Lashkar-e-Tayyiba, and Jaish-e-Mohammad.

Terrorist activity

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

It has been over a decade since AQ's senior leadership has been directly linked to a significant attack against the West. Instead, senior AQ members outline strategic priorities and guidelines, and global affiliate leaders have discretion to adapt these priorities to suit local conditions – distancing AQ's core from terrorist acts conducted by affiliates or ideologically-aligned groups.

While AQ's senior leadership does not direct affiliate activity, its message shapes and inspires attacks by affiliates, ideologically-aligned groups and lone actors. Affiliates generally adhere to the global goals, objectives and strategy outlined by AQ senior leadership figures. AQ's leadership probably seeks to minimise its direct, public links to significant attacks against Western interests globally as a deliberate strategy to avoid counter-terrorism pressure.

Recent examples of AQ fostering the doing of terrorist acts by affiliated groups include:

- On 5 January 2021, AQ affiliate al-Shabaab conducted an attack on Manda Bay Airfield in Kenya, killing three US nationals. Al-Shabaab's official statements claimed the attack was carried out under the guidance and direction of AQ leader al-

Zawahiri, and was part of the ‘*Jerusalem will never be Judaized*’ campaign directed by AQ senior leadership.

- On 20 January 2019, AQ affiliate JNIM attacked a United Nations base in Mali, killing 10 Chadian peacekeepers and injuring 25 others. JNIM’s official statements claimed the attack was part of the ‘*Jerusalem will never be Judaized*’ campaign directed by AQ senior leadership. JNIM probably considered the attack to have been sanctioned by AQ senior leaders.

Advocates the doing of a terrorist act

AQ’s leadership and media outlets often encourage, promote and praise terrorist attacks conducted by affiliates, other terrorist organisations or lone-actor jihadists against ‘enemies of Islam’, including Western countries. AQ’s ‘*Jerusalem will never be Judaized*’ campaign attempts to prevent global acceptance of the state of Israel with Jerusalem as its capital, and targets governments perceived to support Israel.

Recent examples of AQ advocating the doing of terrorist acts include:

- On 11 September 2021, AQ leader al-Zawahiri praised attacks by lone actors and affiliates, including a lone-actor attack at Naval Air Station Pensacola in the US on 6 December 2019, and a claimed suicide attack by affiliate Hurras al-Din against a Russian military base in Syria in January 2021. Al-Zawahiri’s statements were likely made with the intention of leading other persons to engage in similar terrorist acts and pose a substantial risk of doing so.
- On 12 March 2021, AQ’s official media outlet as-Sahab released a propaganda video denouncing the lack of response to the Rohingya refugee crisis. The video featured audio clips of al-Zawahiri, who called on Muslims to attack Myanmar and its interests to avenge the violence committed against the Rohingya people.
- On 2 January 2021, as-Sahab released a statement encouraging Muslims to respond to statements made by the president of France by conducting jihad ‘by all means’, including repeating the 2015 terrorist attack on the Charlie Hebdo offices in France.
- On 8 June 2020, as-Sahab published an article promoting ‘e-jihad’ – which is stated to include hacking and leaking information as well as cyber-attacks to cause serious disruptions to electronic systems such as financial, communications and other critical infrastructure.
- On 11 September 2019, as-Sahab released a speech by al-Zawahiri, calling for Muslims to attack American, European, Israeli and Russian interests. Speaking in response to the US president’s recent claim that the Golan Heights were Israeli territory, al-Zawahiri insisted that violent jihad was the only method to make the enemy reconsider their actions, and encouraged Palestinians to seek ‘martyrdom’ and engage in attacks against Israelis.
- On 23 March 2019, as-Sahab published a statement calling on young people to conduct violent attacks to avenge the 15 March 2019 terrorist attack against two

mosques in Christchurch, New Zealand. As-Sahab directed potential attackers to target ‘crusaders’ in crowded places.

Other considerations

Links to Australia and threats to Australian interests

Australians have previously been killed and injured in attacks directed or inspired by AQ, including 10 Australians killed in the 11 September 2001 attacks.

While AQ has directed large-scale terrorist attacks in the past, most AQ-inspired attacks in Western countries in the last five years have been relatively simple and unsophisticated. Australia remains a terrorist target, and an attack by a lone actor or small group could be conducted by Sunni Islamist violent extremists, including those affiliated with or inspired by AQ.

A small number of Australians overseas are currently affiliated with AQ.

Listings by likeminded countries or the United Nations

The United Nations Security Council ISIL (Da’esh) and al-Qa’ida Sanctions Committee designates AQ for targeted financial sanctions. AQ is proscribed as a terrorist organisation by the US, United Kingdom, Canada, New Zealand, and the European Union.

Engagement in peace or mediation processes

AQ is not engaged in any peace or mediation processes.

Conclusion

On the basis of the information above, the Australian Government assesses that the organisation known as al-Qa’ida is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts, and advocates the doing of terrorist acts.