

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Home Affairs

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation—Hay’at Tahrir al-Sham) Regulations 2022*

The purpose of the *Criminal Code (Terrorist Organisation—Hay’at Tahrir al-Sham) Regulations 2022* (the Regulations) is to specify the organisation known as Hay’at Tahrir al-Sham for the purposes of paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1) of the *Criminal Code*.<sup>1</sup>

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 Hay’at Tahrir al-Sham 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

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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 Part 5.3 of the *Criminal Code* apply to conduct relating to Hay'at Tahrir al-Sham.

The Regulations also repeal the *Criminal Code (Terrorist Organisation—Jabhat Fatah al-Sham) Regulations 2019* (the JFS Regulations), which would otherwise cease to have effect on 9 April 2022 by operation of subsection 102.1(3) of the *Criminal Code*. Hay'at Tahrir al-Sham is a militant organisation formed from an alliance between Jabhat Fatah al-Sham and other Syrian opposition groups, and which has ceased its affiliation with Al-Qa'ida in order to pursue local political and military objectives. With the Regulations now specifying Hay'at Tahrir al-Sham as a terrorist organisation, the repeal of the JFS Regulations reflects this development. It also provides clarity and ensures there is no duplication where the Regulations specifying Hay'at Tahrir al-Sham are made before the JFS Regulations would otherwise have ceased to have effect.

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 Hay'at Tahrir al-Sham 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—Hay’at Tahrir al-Sham) 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—Hay’at Tahrir al-Sham) Regulations 2022* (the Regulations) specify Hay’at Tahrir al-Sham 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 Hay’at Tahrir al-Sham 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 Hay’at Tahrir al-Sham.

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 Hay’at Tahrir al-Sham as a listed terrorist organisation.

Terrorist organisations, including Hay’at Tahrir al-Sham, 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 Hay'at Tahrir al-Sham. 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 Hay'at Tahrir al-Sham.

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 Hay'at Tahrir al-Sham, 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—Hay’at Tahrir al-Sham) Regulations 2022**

**Section 1 – Name**

1. This section provides that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Hay’at Tahrir al-Sham) 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. Information in this column is intended 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—Jabhat Fatah al-Sham) Regulations 2019* (the JFS Regulations).

**Section 5 – Terrorist organisation—Hay’at Tahrir al-Sham**

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 Hay’at Tahrir al-Sham is specified.



10. The effect of specifying Hay'at Tahrir al-Sham 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 Hay'at Tahrir al-Sham.
11. Subsection 5(2) provides that the organisation Hay'at Tahrir al-Sham is also known by the names names Tahrir al-Sham and Organisation for the Liberation of the Levant.

#### Schedule 1—Repeals

12. Item 1 of Schedule 1 to the Regulations repeals the *Criminal Code (Terrorist Organisation—Jabhat Fatah al-Sham) Regulations 2019* (the JFS Regulations).
13. The JFS Regulations specify the organisation Jabhat Fatah al-Sham 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 JFS Regulations cease to have effect on 9 April 2022, being the third anniversary of the day on which they took effect.
14. Hay'at Tahrir al-Sham is a militant organisation formed from an alliance between Jabhat Fatah al-Sham and other Syrian opposition groups, and which has ceased its affiliation with Al-Qa'ida in order to pursue local political and military objectives. With the Regulations now specifying Hay'at Tahrir al-Sham as a terrorist organisation, the repeal of the JFS Regulations reflects this development. It also provides clarity and ensures there is no duplication where the regulations specifying Hay'at Tahrir al-Sham are made before the JFS Regulations would otherwise ceased to have effect.

## Statement of Reasons

### Listing of Hay'at Tahrir al-Sham as a terrorist organisation under the *Criminal Code Act 1995*

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

#### **Name of the organisation**

Hay'at Tahrir al-Sham (HTS)

#### **Known aliases**

- Tahrir al-Sham
- Organisation for the Liberation of the Levant

#### **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**

Hay'at Tahrir al-Sham has not previously been listed under the Criminal Code. The group's predecessor, Jabhat al-Nusra, also known as Jabhat Fatah al-Sham, was listed by the Australian Government on 29 June 2013 and re-listed on 28 June 2016 and 9 April 2019.

#### **Details of the organisation**

Hay'at Tahrir al-Sham (HTS) is a Sunni Islamist religiously-motivated violent extremist (RMVE) group based in north-western Syria. HTS opposes the government of Bashar al-Assad and aims to replace the government with an Islamic caliphate. HTS leaders have sought to transition the group from an insurgency to an organised paramilitary force and civilian authority in an attempt to gain domestic and international support for its objectives.

HTS' predecessor, Jabhat al-Nusra, was aligned with al-Qa'ida. In July 2016, the organisation changed its name to Jabhat Fatah al-Sham (JFS) and announced it was no longer affiliated with al-Qa'ida. In January 2017, JFS announced it had merged with a number of other Syrian opposition groups to form HTS. HTS is an independent organisation focused primarily on operations in Syria – it almost certainly retains no formal links to al-Qa'ida, and does not publicly advocate for global jihad.

### ***Leadership***

Abu-Muhammad al-Jawlani (also known as Ahmad Hussayn al-Shara) is the leader of HTS, and is likely guided by a Shura council. HTS operates a number of paramilitary units, and likely controls the Salvation Government – a civilian-run administrative and political body in north-western Syria.

### ***Membership***

In 2020, HTS reportedly had between 12,000 and 15,000 fighters. HTS largely recruits from the Syrian population, including from other extremist groups in the region.

HTS' approach towards foreign fighters is unclear. HTS sought to remove foreign fighters from Idlib in 2021, likely viewing them as drawing unwanted targeting by security forces and carrying the risk of infiltration by rival groups. More recently, al-Jawlani stated that the group would protect foreign fighters according to its religious and cultural teachings.

### ***Links to other groups***

HTS was formed from a merger of JFS and a number of other Syrian opposition groups, including Ansar al-Din, Jaysh al-Sunna, and Nour al-Din al-Zenki. Some former members of JFS have since separated to form the al-Qa'ida-aligned group Hurras al-Din. HTS is aligned with the Idlib-based Salvation Government.

## **Terrorist activity**

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

HTS is engaged in ongoing hostilities against Syrian Government forces and rival militant groups in pursuit of its political objectives. Recent terrorist attacks which can be reliably attributed to the group include:

- On 11 June 2021, HTS claimed to have fired 140 rockets and artillery shells at positions held by Russian and Syrian forces in Idlib, as revenge for the killing of senior HTS members.
- On 24 August 2020, HTS claimed to have killed three members of a pro-Syrian government militia in Jabal az Zawiyah south of Idlib.
- On 24 January 2020, HTS artillery fire reportedly injured 15 members of a pro-Syrian government militia in western Aleppo.

- From 10-11 July 2019, militant groups including HTS attacked the town of Hamamiyat. Forty-one Syrian soldiers and pro-government fighters were reportedly killed in the engagement.
- On 25 February 2019, an HTS missile attack on Syrian Army forces killed eight soldiers and injured at least 17.
- On 7 September 2018, an HTS rocket attack on the town of Mahardeh killed nine civilians and injured 20.

## **Other considerations**

### ***Links to Australia and threats to Australian interests***

Although HTS does not publicly call for attacks against Western interests and is focused primarily on the Syrian conflict, there is a possibility that Australians may be incidentally harmed in attacks undertaken by HTS.

A number of Australians and former Australians in Syria are members of or affiliated with HTS.

### ***Listings by likeminded countries or the United Nations***

HTS is proscribed as a terrorist organisation by the United Kingdom and Canada. The United States specifies HTS as Specially Designated Global Terrorists.

### ***Engagement in peace or mediation processes***

HTS is not engaged in any peace or mediation processes. HTS has been involved in several local ceasefires with other elements of the Syrian opposition – however, these agreements are usually short and fail soon after they are formed.

## **Conclusion**

On the basis of the information above, the Australian Government assesses that the organisation known as Hay'at Tahrir al-Sham is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts.