



Criminal Code (Terrorist Organisation— Islamic State Somalia) Regulations 2019

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 04 April 2019

Peter Cosgrove
Governor-General

By His Excellency's Command

Peter Dutton
Minister for Home Affairs

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1 Name

This instrument is the *Criminal Code (Terrorist Organisation—Islamic State Somalia) Regulations 2019*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after the end of the period in which this instrument could be disallowed in either House of the Parliament.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Criminal Code Act 1995*.

4 Terrorist organisation—Islamic State Somalia

- (1) 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 Somalia is specified.
- (2) Islamic State Somalia is also known by the following names:
- (a) Abnaa ul-Calipha;
 - (b) ISIL Somalia;
 - (c) ISIS in East Africa;
 - (d) Mahad Moalim;
 - (e) Wilayat al Somal;
 - (f) Wilayat Sumaal.

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Islamic State Somalia) Regulations 2019

The purpose of the *Criminal Code (Terrorist Organisation—Islamic State Somalia) Regulations 2019* (the Regulations) is to specify Islamic State Somalia for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹ Details of the Regulations are set out in Attachment A.

Section 5 of the *Criminal Code Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Schedule to the Act sets out the *Criminal Code*.

Paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code* provides that regulations can specify organisations for the purposes of the definition of ‘terrorist organisation’.

Subsection 102.1(2) of the *Criminal Code* provides that before the Governor-General makes regulations specifying an organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or advocates the doing of a terrorist act.

The Minister for Home Affairs is satisfied on reasonable grounds that Islamic State Somalia 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
- being a member 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.

- 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* apply to conduct relating to Islamic State Somalia.

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

The Regulations commence on the day after the applicable disallowance period ends. 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 Somalia met the legislative criteria for listing.

The *Intergovernmental Agreement on Counter-Terrorism Laws* (June 2004) (the IGA) requires that the Commonwealth Government consult with the governments of the states and territories prior to making regulations specifying an organisation for the purposes of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*. The IGA provides that if a majority of the states and territories object to the making of such a regulation within a time frame nominated by the Commonwealth, and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

The Minister for Home Affairs wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the states and territories. A majority of the states and territories did not object to the making of the Regulations within the time frame nominated by the Minister.

Statement of Compatibility with Human Rights

Overview

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

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 Somalia.

Terrorist organisations, including Islamic State Somalia, 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 Somalia. 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 Somalia.

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 Somalia, 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.

ATTACHMENT A

Details of the *Criminal Code (Terrorist Organisation—Islamic State Somalia) Regulations 2019*

Section 1 – Name

This section would provide that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Islamic State Somalia) Regulations 2019*.

Section 2 – Commencement

This section would provide for the commencement of each paragraph in the instrument, as set out in the table.

Subsection (1) would provide that each provision in the instrument specified in column 1 of the table commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 would provide that the Regulations commence the day after the end of the period in which the instrument could be disallowed in either House of Parliament.

The note to subsection (1) would clarify that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) would provide that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of these Regulations. Column 3 is empty at the time of making the instrument.

Section 3 – Authority

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

Section 4 – Terrorist organisation—Islamic State Somalia

Subsection (1) would provide that for paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Islamic State Somalia is specified.

Subsection (2) would provide that Islamic State Somalia is also known by the following names:

- a) Abnaa ul-Calipha
- b) Mahad Moalim
- c) Wilayat al Somal
- d) Wilayat Sumaal
- e) ISIS in East Africa
- f) ISIL Somalia

ATTACHMENT B

STATEMENT OF REASONS FOR ISLAMIC STATE SOMALIA	
Also known as: Abnaa ul-Calipha; Mahad Moalim; Wilayat al Somal; Wilayat Sumaal; ISIS in East Africa; ISIL Somalia	
This statement is based on publicly available information about Islamic State Somalia. 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 <i>Criminal Code Act 1995</i> provides that for an organisation to be listed as a terrorist organisation, the Attorney-General 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; 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.
2.	Background to this listing The Australian Government has not previously proscribed Islamic State Somalia (IS-Somalia) as a terrorist organisation under the <i>Criminal Code</i> .
3.	Terrorist activity of the organisation <u>Objectives</u> IS-Somalia's primary objective is to establish an Islamic Caliphate in the horn of Africa based on the application of Sharia law consistent with the global jihadist ideology of the proscribed terrorist organisation Islamic State. On 25 December 2017, IS-Somalia pledged allegiance to Islamic State. IS-Somalia has undertaken the following to advance its ideology and achieve its objectives: <u>Directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts</u> IS-Somalia conducts attacks in the northern Somali Puntland region and southern Somalia. It primarily targets Western, African Union Mission in Somalia (AMISOM), and Somali Government interests using improvised explosive devices (IEDs) and firearms. Examples of attacks for which IS-Somalia can be reliably attributed: <ul style="list-style-type: none">• Between January to October 2018, IS-Somalia claimed responsibility for multiple assassinations of officials in Mogadishu and its suburbs.

- On 3 October 2018, IS-Somalia claimed responsibility for killing three Ethiopian-Christians in the north-eastern port city of Bosaso.
- On 24 September 2018, IS-Somalia killed a member of the Puntland presidential guard unit and wounded one other person in an attack at a shopping mall near Bosaso.
- On 24 May 2017, an IS-Somalia suicide bomber attacked a police checkpoint in Puntland killing five people and injuring 12 others.
- On 8 February 2017, two IS-Somalia members attacked the International Village Hotel in Bosaso, Puntland, killing four security guards before exchanging fire with security forces and themselves being killed.
- On 26 April 2016: IS-Somalia detonated an IED against an AMISOM vehicle in Mogadishu.

Advocating the doing of terrorist acts

IS-Somalia advocates the doing of terrorist attacks, including:

- On 25 December 2017, IS-Somalia promoted attacks against Western states and called for Muslims, especially in East Africa, to join them. During the video, an IS-Somalia fighter speaking in English told would-be supporters that killing an infidel is their 'ticket out of hell'.

4. Details of the organisation

In 2014, a group of disenfranchised al-Shabaab members formed an IS-aligned group in northern Somalia, adopting the tenets of Islamic State. In ensuing years, this group made repeated attempts to reach-out to Islamic State in Syria, including making pledges of allegiance in 2015 and 2016, which were not recognised by Islamic State. Following a further video pledge in December 2017, Islamic State publicly recognised IS-Somalia and its attacks in its official weekly publication *al-Naba*.

Leadership

IS-Somalia has a centralised command structure and is currently led by Abdul Qadir Mumin.

Membership

IS-Somalia is estimated to have up to 200 fighters, with an unknown number of supporters. Many IS-Somali fighters are ethnic Somalis, although Ethiopians are also believed to be among the ranks.

Recruitment and funding

IS-Somalia is directly supported by Islamic State in Yemen, which provides experts, trainers, money, weapons, and other materials. IS-Somalia also taxes the local community, threatening harm if they don't pay. Recruiting is undertaken from within local Puntland communities, although the group raids those communities that do not support it and steals food and other necessities. IS-Somalia also works with Somali pirates, namely the Mohamed Garfanje's Hobyo-Haradhere Piracy Network.

Links to other terrorist organisations

IS-Somalia is officially recognised as an affiliate of, and ideologically aligned with, proscribed

terrorist organisation Islamic State. In October 2015, several al-Shabaab members who later joined IS-Somalia pledged allegiance to Islamic State and on 25 April 2016, Abdul Qadir Mumin also pledged allegiance to Islamic State leader Abu Bakr al-Baghdadi, strengthening the connection between the two groups. Relations between IS-Somalia and al-Shabaab are hostile.

Links to Australia

There are no known direct links between IS-Somalia and Australia.

Threats to Australian interests

IS-Somalia had not made statements specifically threatening Australians or Australian interests. However, IS-Somalia has issued statements threatening Westerners and Western interests in general, and is known to operate in Mogadishu and northern Somalia, where Westerners frequent. Furthermore, small numbers of Australians are occasionally known to be present in regions where IS-Somalia operates.

Listed by the United Nations or like-minded countries

The government of the United States proscribed IS-Somalia as a terrorist organisation in February 2018.

Engagement in peace or mediation processes

IS-Somalia is not known to have participated in any peace or mediation processes since its inception.

5. Conclusion

On the basis of the above information, ASIO assesses that IS-Somalia is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts or advocates the doing of terrorist acts.

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