

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 160

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013

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 (the Code).

Division 102 of the Code sets out the offences in relation to terrorist organisations, which are: directing the activities of a terrorist organisation; being a member of a terrorist organisation; recruiting persons to a terrorist organisation; receiving training from or providing training to a terrorist organisation; being an associate of and receiving funds from or making available funds, support or resources to a terrorist organisation.

Section 102.9 of the Code provides that section 15.4 (extended geographical jurisdiction - category D) applies to an offence against Division 102 of the Code. The effect of applying section 15.4 is that offences in Division 102 of the Code apply to conduct (or the results of such conduct) constituting the alleged offence whether or not the conduct (or the result) occurs in Australia.

Terrorist organisation is defined in subsection 102.1(1) of the Code as:

- an organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) (paragraph 102.1(1)(a)); or
- an organisation specified in the regulations (paragraph 102.1(1)(b)).

The purpose of the Regulation is to specify Abu Sayyaf Group, also known as Abou Sayaf Armed Band, Abou Sayyef Group, Abu Sayaff Group, Al-Harakat Al-Aslamiya, Al-Harakat Al-Islamiyya, Al-Harakat-ul Al-Islamiyya, Al-Harakatul-Islamia, and Mujahideen Commando Freedom Fighters, for the purpose of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code.

The Regulation enables the offence provisions in Division 102 of the Code to continue to apply to persons with links to Abu Sayyaf Group. Details of the Regulation are set out in [Attachment A](#).

Subsection 102.1(2) of the 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) of the Code, the Minister must be satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) or advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

In determining whether he is satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, the Minister takes into consideration an unclassified Statement of Reasons prepared by the Australian Security Intelligence Organisation (ASIO) in consultation with the Department of Foreign Affairs and Trade, as well as advice from the Australian Government Solicitor. The Statement of Reasons in respect of Abu Sayyaf Group is at Attachment B.

Subsection 102.1(2A) of the 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 Code, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the regulation.

Prior to making the Regulation, consultations were held with the Department of Foreign Affairs and Trade, ASIO and the Australian Government Solicitor. In addition, the Attorney-General wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the States and Territories, and the Attorney-General offered the Leader of the Opposition a briefing.

The Regulation also repeals existing Regulation 4C of the *Criminal Code Regulations 2002* which had previously specified Abu Sayyaf Group as a terrorist organisation for the purpose of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. The separate *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* now specifies Abu Sayyaf Group as a terrorist organisation under subsection 102.1(1) of the Code.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments. Subsection 102.1(3) of the 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.

Statement of Compatibility with Human Rights

Objective

The object of the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. This will engage the inherent right to life expressed in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

The object of the Regulation also engages Article 19 and Article 22 of the ICCPR. Whilst Article 19 protects the right to freedom of expression, this right may be subject to restrictions which include protecting national security. The right to freedom of association in Article 22 of the ICCPR protects the right to form and join associations to pursue common goals, such as political parties. Article 22(2) provides that freedom of association may be subject to restrictions imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* makes it an offence under Division 102 of the Criminal Code, to direct the activities, become a member of, recruit, train or receiving training, get funds to, from or for Abu Sayyaf Group, and provide support or associate with Abu Sayyaf Group.

The offence in subsection 102.8 of the Criminal Code of associating with a terrorist organisation is limited in its application only to an organisation that is a listed organisation under Criminal Code Regulations. The offence does not apply if the association is with a close family member, or takes place in the course of practising a religion in a place used for public religious worship, or the association is for the purpose of providing humanitarian aid or for the purpose of providing legal advice or representation.

Whilst the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* may limit the right to freedom of association with Abu Sayyaf Group, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Abu Sayyaf Group 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, as detailed in the Statement of Reasons (at [Attachment B](#)).

The Criminal Code offences in Division 102 applying to terrorist organisations do not target any specific religious or ethnic group and are designed to promote security and protect all members of the community from the threat of terrorism, regardless of national or ethnic origins or religious beliefs.

The information in the Statement of Reasons ([Attachment B](#)) supports the Attorney-General's decision made on reasonable grounds, that Abu Sayyaf Group satisfies the criteria for listing as a terrorist organisation under subsection 102.1(2) of the Criminal Code.

There are safeguards and accountability mechanisms in the Act providing for consultation and enabling review of *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* specifying an organisation as a terrorist organisation. These measures include the following:

- the Commonwealth must consult with the States and Territories in accordance with the *Inter-Governmental Agreement on Counter-Terrorism Laws*. The *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013*

may only be made if a majority of the States and Territories do not object to the regulation within a reasonable time

- under subsection 102.1(2A) the Minister must arrange for the Leader of the Opposition to be briefed in relation to the regulation
- under subsection 102.1(3) the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* will cease to have effect on the third anniversary of the day on which it takes effect
- subsection 102.1(4) 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. The effect of the Minister’s declaration is that the organisation is de-listed as a terrorist organisation under Division 102 of the Criminal Code
- subsection 102.1(17) provides that an individual or an organisation may make a de-listing application to the Minister
- the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* may be reviewed by the Parliamentary Joint Committee on Intelligence and Security under section 102.1A of the Act, and
- both Houses of Parliament may disallow the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013* within the applicable disallowance period which is 15 sitting days after the regulation was laid before that House, as provided in subsection 102.1A(4).

Conclusion

The Regulation is compatible with human rights because it advances the protection of human rights, and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

ATTACHMENT A

Details of the Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulation 2013*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Criminal Code Act 1995*.

Section 4 – Schedule(s)

This section provides that each instrument specified in a Schedule to this Regulation is amended or repealed as set out in the Schedule, and any other item in a Schedule to this Regulation has effect according to its terms.

Section 5 – Definition

This section provides that a reference in this Regulation to the word *Code* means the *Criminal Code*.

Section 6 – Terrorist organisation – Abu Sayyaf Group

This section provides that for paragraph (b) of the definition of ‘*terrorist organisation*’ in subsection 102.1(1) of the Code, the organisation known as Abu Sayyaf Group is specified.

Subsection 102.1(2) provides that Abu Sayyaf Group is also known by the following names:

- (a) Abou Sayaf Armed Band;
- (b) Abou Sayyef Group;
- (c) Abu Sayaff Group;
- (d) Al-Harakat Al-Aslamiya;
- (e) Al-Harakat Al-Islamiyya;
- (f) Al-Harakat-ul Al-Islamiyya;
- (g) Al-Harakatul-Islamia; and
- (h) Mujahideen Commando Freedom Fighters.

Schedule 1 – Amendment

This schedule amends the *Criminal Code Regulations 2002*.

Clause 1 – Regulation 4C

This clause provides that Regulation 4C of the *Criminal Code Regulations 2002* is repealed. Regulation 4C was the previous regulation listing Abu Sayyaf Group, and this clause ensures there is no duplication if the new Regulation is made before the current Regulation ceases.

ATTACHMENT B

Abu Sayyaf Group

(Also known as: Abou Sayaf Armed Band; Abou Sayyef Group; Abu Sayaff Group; Al-Harakat Al-Aslamiya; Al-Harakat Al-Islamiyya; Al-Harakat-ul Al-Islamiyya; Al-Harakatul-Islamia; Mujahideen Commando Freedom Fighters)

This statement is based on publicly available information about the Abu Sayyaf Group (ASG). To the Australian Government's knowledge, this information is accurate and reliable and has been corroborated by classified information.

Basis for listing a terrorist organisation

Division 102 of the *Criminal Code* 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 (whether or not a terrorist act has occurred or will occur); or
- (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Details of the organisation

Objectives

ASG was founded in 1991 as a separatist militant Islamist movement by Filipino national Abdurajak Janjalani. ASG remains influenced by its founding objective of creating an independent Islamic state in the southern Philippines areas of Mindanao and the Sulu Archipelago.

Leadership

Following the deaths over the last decade of a number of its key senior leaders, including former Emir, Khadaffy Janjalani, in September 2006, ASG has continued to fragment. It remains unclear whether a single figure now leads the group. However, a number of key leadership figures have extensive operational experience and are capable of conducting their own independent operations—including Radullan Sahiron, Isnilon Hapilon, Yasir Igasan and Khair Mundos.

Membership

Since its inception, ASG has been composed of loosely-affiliated sub-groups, mostly organised along traditional clan and familial lines. ASG membership consists primarily of young Filipino Muslims from the Sulu archipelago, though the group also

attracts poverty-stricken Muslims from across the southern Philippines. ASG membership at times has included foreign jihadists.

ASG recruitment efforts have ensured membership numbers remain at approximately 400 fighters, spread predominantly across the Sulu Archipelago. However, membership numbers fluctuate in response to successful terrorist operations and pressure from the Philippine military, which dictate the available resources and relative incentives of membership.

Funding

ASG views kidnap-for-ransom and extortion ventures as profitable operational tactics. Kidnappings, in particular, have been a trademark of ASG since its creation and represent the main funding mechanism for the group. These activities help support members' livelihood and provide resources for ASG's terrorist activities, including its capacity to oppose military operations of the Armed Forces of the Philippines (AFP). ASG has also received funds from other Islamist terrorist organisations and enjoys support from elements of the local population of Jolo and Basilan.

Terrorist activity of the organisation

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

ASG has been responsible for the planning and conduct of terrorist attacks and kidnappings against a wide range of targets, including Philippine security forces and foreign interests, in Western Mindanao, the Sulu Archipelago, and Malaysia's Sabah State. Recent attacks, including bombings, have largely been motivated by financial gain rather than purely political, religious or ideological purposes. However, some of the proceeds of these attacks are used to support ASG's on-going operations in pursuit of an independent Islamic state—and the choice of victims remains influenced by this objective.

ASG has been linked to numerous kidnappings in Basilan, Sulu, Tawi-Tawi, Zamboanga City and other areas in Western Mindanao. Westerners and other wealthy foreign nationals, as well as local politicians, business people, and civilians feature among the broad range of kidnap targets. Kidnappings reliably attributed to ASG since its re-listing by the Australian Government as a terrorist organisation on 29 October 2010 include:

- On 5 December 2011, Australian national Warren Richard Rodwell was abducted from his residence in Ipil, Mindanao. In a January 2013 proof-of-life video of Mr Rodwell uploaded to YouTube, his captors stated he was being held by members of Al-Harakat Al-Islamiyya (ASG) and that money gained from his kidnapping was to be used for future operations. Mr Rodwell was released by his captors in March 2013.
- 1 February 2012: a Swiss and Dutch national were kidnapped along with their Filipino guide off the Tawi-Tawi islands. Following their initial abduction, Philippine authorities stated that the victims were seen in the custody of ASG militants.

- 12 July 2011: two US nationals were kidnapped near Zamboanga City by ASG militants.

ASG has been linked to numerous large-scale attacks over the past decade, including the 27 February 2004 bombing of the *Superferry* in Manila harbour, killing 114 people, and the 14 February 2005 coordinated bombings in the cities of Makati, Davao and General Santos, killing 11 people. Recent attacks attributed to ASG include:

- 28 July 2012: seven soldiers were killed during an armed clash with ASG in the village of Panglayahan, Jolo.
- 10 July 2012: six rubber plantation workers were killed when suspected ASG fighters ambushed a vehicle ferrying workers in Tumahubong, Basilan.
- 28 November 2011: three people were killed when an improvised explosive device (IED) was detonated at a wedding ceremony in a hotel in Zamboanga City.
- 10 March 2011: five people were killed when an IED detonated outside an elementary school in San Raymundo village, Jolo, Sulu.

Directly or indirectly fostering the doing of terrorist acts

ASG has associated with other terrorist organisations since its founding, most notably with al-Qa'ida and Jemaah Islamiyah (JI). ASG has provided sanctuary to foreign militant jihadists, including JI-linked fugitives from the South-East Asia region. This support has continued since ASG was last re-listed as a terrorist organisation on 29 October 2010. ASG also maintains operational and logistical links with other Philippines-based networks that are actively engaged in terrorist activity, including elements of the Moro Islamic Liberation Front and the Moro National Liberation Front.

Conclusion

On the basis of the above information, ASIO assesses ASG continues to be directly and/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. ASIO further assesses that elements of ASG remain active, retain a capability to conduct attacks, and have an enduring intent to directly prepare, plan, assist in or foster the doing of terrorist acts.

In the course of pursuing its objectives, ASG is known to have engaged in acts that:

- cause, or could cause, serious damage to property or the death of persons, endanger a person's life or create a serious risk to a person's safety;
- are intended to have those effects;
- are done with the intention of advancing ASG's political, religious or ideological causes; and
- are done with the intention of intimidating sections of the public of the Philippines and other persons visiting areas in which the group operates.

The above acts include actions which have been done or threatened with the intention of advancing a political, religious or ideological cause and with the intention of coercing or influencing by intimidation, the central government and people of the

Philippines. The actions or threatened actions which ASG is assessed to be involved in would, if successfully completed, cause serious physical harm and death to persons and serious damage to property.

This assessment is corroborated by information provided by reliable intelligence sources.

Other relevant information

Proscription by the United Nations and other countries

ASG is listed in the United Nations' 1267 (al-Qa'ida) Committee's Consolidated List and as a proscribed organisation by the governments of Canada, New Zealand, the United Kingdom and the United States of America.

Peace and mediation processes

ASG has not been a party to any peace discussions with the Philippine Government.