

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 165

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Jemaah Islamiyah) 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 Jemaah Islamiyah, also known as Al-Jama'ah Al-Islamiyah, Jamaah Islamiyah, Jama'ah Islamiyah, Jemaa Islamiya, Jema'a Islamiya, Jemaa Islamiyah, Jema'a Islamiyya, Jemaa Islamiyya, Jemaa Islamiyyah, Jemaah Islamiyah, Jemaah Islamiya, Jemaah Islamiyah, Jema'ah Islamiyah, Jemaah Islamiyyah and Jema'ah Islamiyyah, 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 Jemaah Islamiyah. Details of 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 Jemaah Islamiyah 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 4B of the *Criminal Code Regulations 2002* which had previously specified Jemaah Islamiyah 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 – Jemaah Islamiyah) Regulation 2013* now specifies Jemaah Islamiyah 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) 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 Jemaah Islamiyah, and provide support or associate with Jemaah Islamiyah.

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 – Jemaah Islamiyah) Regulation 2013* may limit the right to freedom of association with Jemaah Islamiyah, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Jemaah Islamiyah 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 Jemaah Islamiyah 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) 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 – Jemaah Islamiyah) Regulation 2013

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation – Jemaah Islamiyah) 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 – Jemaah Islamiyah

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 Jemaah Islamiyah is specified.

Subsection 102.1(2) provides that Jemaah Islamiyah is also known by the following names:

- (a) Al-Jama’ah Al-Islamiyah;
- (b) Jamaah Islamiyah;
- (c) Jama’ah Islamiyah;
- (d) Jemaa Islamiya;
- (e) Jema’a Islamiya;
- (f) Jemaa Islamiyah;
- (g) Jema’a Islamiyya;
- (h) Jemaa Islamiyya;
- (i) Jemaa Islamiyyah;
- (j) Jemaah Islamiah;
- (k) Jemaah Islamiya;
- (l) Jemaah Islamiyah;
- (m) Jema’ah Islamiyah;

- (n) Jemaah Islamiyyah; and
- (o) Jema'ah Islamiyyah.

Schedule 1 – Amendment

This schedule amends the *Criminal Code Regulations 2002*.

Clause 1 – Regulation 4B

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

ATTACHMENT B

Jemaah Islamiyah

(Also known as: Al-Jama'ah Al-Islamiyah, Jamaah Islamiyah, Jama'ah Islamiyah, Jemaa Islamiya, Jema'a Islamiya, Jemaa Islamiyah, Jema'a Islamiyya, Jemaa Islamiyya, Jemaa Islamiyyah, Jamaah Islamiah, Jamaah Islamiya, Jeemah Islamiyah, Jema'ah Islamiyah, Jamaah Islamiyyah, Jema'ah Islamiyyah)

This statement is based on publicly available details about Jemaah Islamiyah (JI). 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, 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

Despite disruption efforts by Indonesian authorities and their regional counterparts, Jemaah Islamiyah (JI) continues to exist as a functional terrorist organisation. While no confirmed JI-linked terrorist attack has occurred since 2009, JI remains committed to its long-term strategy to overthrow the Indonesian Government and establish a pan-Islamic state in South-East Asia—through violence if necessary.

Founded in Malaysia on 1 January 1993 by Indonesian Islamist clerics Abdullah Sungkar and Abu Bakar Ba'asyir, JI is a Salafi jihadist group, inspired by the same ideology as al-Qa'ida. JI regards the Indonesian Government, along with other governments in the region, to be illegitimate. JI seeks to revive a pure form of Islam, governed by the tenets of *Sharia* (Islamic law), and represents an evolutionary development of the Indonesian Islamist movement, Darul Islam (DI), which fought a violent insurgency to establish an Islamist state in Indonesia in the 1950s and 1960s. JI's goals are essentially those of DI, but with a regional perspective.

JI's charter and operating manual, the "*General Guide for the Struggle of Al-Jama'ah Al-Islamiyah*" (PUPJI), outlines the religious principles and administrative aspects underlining JI's primary objectives. These entail establishing a solid support base of followers and then, through armed struggle, creating an Islamist state in Indonesia

followed by a pan-Islamic Caliphate incorporating Malaysia, Singapore, Brunei and the southern Philippines and ultimately a global theocratic Islamic state.

Leadership

The current JI leadership remains anti-Western in orientation, refusing to denounce violent jihad as a means of achieving its desired objectives and willing to conduct attacks against local sectarian targets. JI has a well-ordered succession plan in the event of the arrest of the incumbent Emir. However, JI has not publicly appointed a new leader following the arrest of JI Emir Zarkasih in June 2007.

JI remains operationally and organisationally distinct from other regional extremist groups. Despite counter-terrorism efforts by regional authorities, JI remains a functional paramilitary organisation, supportive of the use of violence whenever strategically opportune. However, JI's leadership currently eschews attacks, preferring to focus on the consolidation of its membership and rebuilding of its support networks, in support of its strategic plan which extends to 2025.

Membership

JI's current membership is not known publicly, but was estimated in 2007 to range between 900 and several thousand members, mostly concentrated in Java but spread throughout Indonesia and neighbouring South-East Asian countries, including Malaysia, the Philippines, Thailand, and Cambodia.

Counter-terrorism operations by Indonesian authorities over the past decade resulted in the death, arrest and incarceration of a number of JI members, including senior leaders. While detention limits their participation in JI's ongoing clandestine activities, some maintain their allegiance to the group and plan their re-engagement from within prison. Many currently detained JI members will be paroled as part of an expected spike in terrorist detainees due for release in 2013 and 2014.

Recruitment and funding

Recent JI activity has an emphasis on *dakwah* (Islamic outreach) and publishing — in order to prepare a mujahideen support base for future extremist activity. JI continues to recruit covertly through personal contacts, religious study groups and from its network of 50 or more *pesantren* (Islamic boarding schools). JI's affiliated schools continue to produce a new generation of potential mujahideen indoctrinated in an ideology sympathetic to JI's long-term Islamist goals. Prisons provide a further avenue for recruitment, as some detained JI members proselytise to fellow prisoners and visitors in efforts to recruit new members to the group.

Most of JI's funding is derived from member contributions, Islamic publishing, affiliated charities and legitimate business activities. JI has also received funding from robberies and Middle East-based terrorist financiers in Saudi Arabia and Yemen.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts

Elements of JI have conducted numerous attacks targeting sectarian and foreign interests in Indonesia, particularly anti-Christian violence in Sulawesi, Maluku and Sumatra. JI targeted the Philippine Ambassador in Jakarta in 2000 and also conducted sectarian attacks across Indonesia over the 2000/2001 Christmas and New Year period.

JI's first successful anti-Western attack was the Bali bombings of October 2002 which killed 202 people, including 88 Australians. This was followed by the 2003 JW Marriot Hotel bombing and the 2004 bombing of the Australian Embassy in Jakarta. The second Bali bombing, which took place in 2005, killed four Australians. The second JW Marriot Hotel bombing took place in 2009, along with the simultaneous Ritz-Carlton bombing, which together killed seven civilians, including three Australians.

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

JI has been responsible for preparing, planning or assisting in the doing of terrorist attacks against a range of targets, but particularly Christian, Western and regional governments' interests in South-East Asia. Those previously subjected to JI attacks include hotels, bars, diplomatic premises, transport and military facilities and churches.

- Regional JI operatives undertook planning and preparatory activities in support of a second unrealised al-Qa'ida-backed aviation plot that was intended to follow the initial aviation attacks on the United States (US) on 11 September 2001.
- In December 2001, Singaporean authorities detained 11 suspects under the country's Internal Security Act (ISA) over a JI-linked plot to attack Australian, British, Israeli and US interests, and a mass rail transport (MRT) station in Singapore.

Since its re-listing by the Australian Government as a terrorist organisation on 22 July 2010, networks with social, familial, organisational and operational links to JI have been involved in attacks in Indonesia and the Philippines. Information and materiel seized in operations against JI-linked individuals since 2010 demonstrates JI retains the capability and intent to use violence to achieve its goals — and networks linked to JI continue to plan to conduct terrorist attacks in South-East Asia.

- On 22 November 2012, Philippines-based Indonesian senior JI member Ustadz Sanusi was killed during a Philippine police and military arrest operation in Marawi. Sanusi fled to the southern Philippines following his involvement in the beheading of three Christian schoolgirls by JI members in Poso, Indonesia in 2005.
- On 25 January 2011, senior Indonesian extremist Umar Patek was arrested by Pakistani authorities in Abbottabad, Pakistan and was extradited to Indonesia on 11 August 2011. On 22 June 2012, Patek received a 20-year prison sentence for his role in the 2002 Bali bombings. Patek took refuge in the

southern Philippines between 2003 and 2010, where he provided training to Philippine militants, including members of the Abu Sayyaf Group (ASG).

- On 9 August 2010, former JI co-founder and Emir, Abu Bakar Ba'aysir was rearrested by Indonesian authorities. On 16 June 2011, Ba'aysir was sentenced to 15 years prison over his involvement in a militant training camp in Aceh which was disrupted in February 2010. Ba'aysir previously served two prison sentences from September 2003 to April 2004 and March 2005 to June 2006 for conspiracy in relation to the 2002 Bali bombings.

Directly or indirectly fostering the doing of terrorist acts

JI remains focussed on *dakwah* (Islamic outreach) and its publishing operations to promote an extreme interpretation of Islam. JI's network of 50 or more affiliated religious schools continually works to inculcate future generations of Indonesian youths in this extreme form of Islam. JI's recruitment and outreach activities are designed to establish a support base in Indonesia for an Islamist State under Islamic Law, and legitimise the use of violence to achieve its objectives. Past terrorist attacks attributed to JI continue to inspire a new generation of potential jihadists.

Conclusion

On the basis of the above information, ASIO assesses that JI continues to be directly and indirectly engaged in, preparing, planning, assisting in and fostering the doing of terrorist acts involving threats to human life and serious damage to property.

In the course of pursuing its objectives, JI 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 JI's political, religious or ideological causes; and
- are done with the intention of intimidating sections of the public of Indonesia, Malaysia, the Philippines, Singapore, Australia and other persons visiting areas in which it 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 Government and people of Indonesia, as well as the governments of the Philippines, Malaysia and Singapore, which it considers apostate. The actions or threatened actions which JI is assessed to be involved in would, if successfully completed, cause serious physical harm and death to persons and serious damage to property.

The incidence of terrorist attack by JI has declined significantly. However, we assess that core members of JI remain active and retain intent to continue terrorist activities.

This assessment is corroborated by information from reliable intelligence sources.

Other relevant information

Links to other terrorist groups or networks

Having a common heritage in DI has facilitated close links between JI and other violent extremist groups in Indonesia. These groups, including DI remnants, Jamaah Anshurat Tauhid (JAT), Front Pembela Islam (FPI), Majelis Mujahidin Indonesia (MMI), KOMPAK (Crisis Action Committee), Laskar Jundullah and Majelis Dakwah Umat Indonesia (MDUI), provide recruits and support networks for JI activity. JI continues to recruit covertly through personal contacts, religious study groups and from its network of *pesantren* (Islamic boarding schools), some of which share links with other extremist groups, including JAT and KOMPAK.

JI's domestic and regional extremist links were reinforced by the simultaneous presence of JI and non-JI South-East Asian militants in al-Qa'ida training camps in the late 1980s and early 1990s. JI's 'Afghan Alumni' cultivated organisational and personal relationships with foreign extremist groups, such as al-Qa'ida, while training and fighting in Afghanistan.

Links were also forged with South-East Asian extremist groups, laying the foundation for the current JI collaboration with militant groups in the Philippines. JI has linkages to ASG and the Moro Islamic Liberation Front (MILF), who still provide refuge to JI-linked personnel despite the MILF and the Philippine Government having signed a peace framework agreement in October 2012.

Proscription by the UN and other countries

JI is listed in the United Nations Security Council 1267 (al-Qa'ida) Sanctions Committee's consolidated list and as a proscribed terrorist organisation by the governments of Canada, New Zealand, the United Kingdom and the US.

Peace and mediation processes

JI has not been a party to any peace discussions with the Indonesian Government.