

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 164

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Jamiat ul-Ansar) 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 Jamiat ul-Ansar, also known as Al-Faran, Al-Hadid, Al-Hadith, Harakat ul-Ansar, Harakat ul-Mujahideen and Harakat ul-Mujahidin, 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 Jamiat ul-Ansar. 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 Jamiat ul-Ansar 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 4D of the *Criminal Code Regulations 2002* which had previously specified Jamiat ul-Ansar 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 – Jamiat ul-Ansar) Regulation 2013* now specifies Jamiat ul-Ansar 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 – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar) 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 Jamiat ul-Ansar, and provide support or associate with Jamiat ul-Ansar.

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 – Jamiat ul-Ansar) Regulation 2013* may limit the right to freedom of association with Jamiat ul-Ansar, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Jamiat ul-Ansar 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 Jamiat ul-Ansar 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 – Jamiat ul-Ansar) 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 of *Criminal Code (Terrorist Organisation – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar) Regulation 2013

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation – Jamiat ul-Ansar) 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 – Jamiat ul-Ansar

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 Jamiat ul-Ansar is specified.

Subsection 102.1(2) provides that Jamiat ul-Ansar is also known by the following names:

- (a) Al-Faran;
- (b) Al-Hadid;
- (c) Al-Hadith;
- (d) Harakat ul-Ansar;
- (e) Harakat ul-Mujahideen; and
- (f) Harakat ul-Mujahidin.

Schedule 1 – Amendment

This schedule amends the *Criminal Code Regulations 2002*.

Clause 1 – Regulation 4D

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

ATTACHMENT B

Jamiat ul-Ansar

(Also known as: Al-Faran, Al-Hadid, Al-Hadith, Harakat ul-Ansar, Harakat ul-Mujahideen; Harakat ul-Mujahidin)

This statement is based on publicly available information about Jamiat ul-Ansar (JuA), formerly known as Harakat ul-Mujahideen (HuM), a name that is still commonly used for the group. 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

JuA seeks to unite all of Kashmir with Pakistan and establish a caliphate based on Islamic law. JuA has advocated the use of Pakistan's nuclear weapons against India, and opposes efforts to normalise relations between the two countries.

JuA has also pledged support for Afghan militants fighting Coalition forces in Afghanistan. This may have involved indirect assistance such as training militants or the travel of JuA-affiliated fighters to Afghanistan. Some elements within JuA have wanted to re-focus their activities to bring them more into line with global jihad inspired by al-Qa'ida against the United States (US) and Israel and their allies.

Leadership

The leader of JuA is Fazlur Rehman (sometimes Rahman) Khalil, (also known as Maulana Farzul Ahmed Khalil and Maulana Ahmed Khalil).

In 1991, Khalil and his followers split from Harakat ul-Jihad Islami (HuJI), a group that fought the Soviets in Afghanistan and later turned its attention to Indian-administered Kashmir, to form Harakat ul-Mujahideen (HuM). In 1993, HuM reunited with HuJI under the name Harakat ul-Ansar (HuA).

As a consequence of reports linking the group to al-Qa'ida, HuA was proscribed as a terrorist organisation by the US in 1997. The group re-adopted the name HuM to escape the ramifications of proscription.

HuM was banned by both the US and Pakistan following the 11 September 2001 terrorist attacks, and adopted the name Jamiat ul-Ansar (JuA). JuA was also subsequently banned by Pakistan in November 2003.

Membership

JuA has been reported to have a strength of no more than a few hundred, but exact membership numbers cannot be determined with accuracy. JuA's membership is mostly drawn from Pakistan, Afghanistan and the Indian State of Jammu and Kashmir. However, JuA also has attracted recruits and provided training to Islamic militants from around the world, including Bangladesh, and South-East Asia, the United Kingdom (UK) and the US.

Terrorist activity of the organisation

Directly or indirectly engaged in terrorist acts

JuA has directly or indirectly engaged in a number of terrorist attacks. Incidents reliably attributed to JuA include:

- December 1999: An Indian airliner was hijacked en route from Nepal to India; one passenger was stabbed to death;
- 23 January 2002: US journalist Daniel Pearl was abducted and subsequently murdered on this date. Four people, including JuA member Ahmed Omar Sheikh, were convicted of Pearl's murder;
- 26 May 2004: JuA-trained members were among a number of militants drawn from several Pakistani extremist groups responsible for a twin car bomb attack near the US Consulate in Karachi;
- 9 June 2004: the same terrorist cell was involved in an attack against a convoy carrying Karachi's military commander, resulting in seven deaths;
- February 2007: a Hindu businessman was kidnapped in Pakistan's Sindh Province and subsequently beheaded ;
- February 2009: members of a terrorist cell with links to JuA and reportedly responsible for six attacks in Kabul, Afghanistan, were arrested; and
- 23 February 2010: two JuA members were among five militants killed by Indian security forces in Sopore, Kashmir; the militants blew up two houses in the battle with security forces.

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

JuA members and individuals trained by JuA, including individuals from Western countries, have been implicated in various disrupted terrorist attacks, including:

- 19 June 2005: several JuA trained individuals were arrested in Afghanistan as they were preparing to carry out acts of terrorism;
- June 2005: two American citizens were arrested for suspected participation in an al-Qa'ida plot to attack the US. Both claimed to have attended a terrorist training camp run by JuA leader Khalil;
- December 2008: UK national Rangzieb Ahmed, who had confessed to membership in JuA, was convicted on terrorism charges; and
- 21 February 2013: three British nationals were convicted in London on terrorism charges for plotting to carry out terror attacks in the UK. Two of these individuals undertook terrorist training with JuA in Pakistan in 2009 and later trained with al-Qa'ida in Pakistan in 2011.

Reporting indicates JuA has encouraged, inspired and assisted like-minded individuals. Examples of this assistance include:

- JuA operated terrorist training camps in eastern Afghanistan prior to their destruction by Coalition air strikes in 2001;
- JuA camps in Pakistan have provided both religious instruction and military training and support to terrorist organisations and individuals from around the world;
- In 2004, individuals trained by JuA were arrested for their involvement in separate suicide car bomb attacks outside the US Consulate and the Sheraton Hotel in Karachi in May and June 2002, respectively;
- In 2004, individuals trained by JuA/HuM were arrested for a failed attempt to assassinate Pakistani President Pervez Musharraf with a remote-controlled car bomb in April 2002;
- Individuals trained at JuA/HuM facilities engaged in terrorist operations in Tajikistan and Bosnia and Herzegovina in the 1990s; and
- JuA/HuM reportedly helped facilitate training by members of the Pakistani diaspora in the UK in June 2003, some of whom may have intended to return home to conduct terrorism-related activities.

Directly or indirectly fostering/advocating the doing of terrorist acts

JuA has made statements advocating the conduct of terrorist attacks against Coalition forces in Afghanistan and at least one political figure in India.

- Following his release from Pakistani detention in 2006, JuA/HuM leader Khalil reportedly visited JuA/HuM-linked mosques and madrassas in Pakistan, advocating jihad against Coalition forces in Afghanistan.
- On 4 February 2009, a death threat reportedly attributed to JuA was posted on the website of India's leader of the opposition and prime ministerial candidate L.K. Advani.

Conclusion

On the basis of the above information, ASIO assesses JuA is directly and/or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts

and/or advocates the doing of terrorist acts involving threats to human life and serious damage to property.

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

- cause, or could cause, serious damage to property or the death of persons, or 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 JuA's political, religious or ideological causes; and
- are done with the intention of intimidating sections of the public globally.

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

Other relevant information

Links to other terrorist groups or networks

JuA has cooperated with other militant groups operating in Afghanistan, Kashmir and Pakistan such as Hizb-ul-Mujahideen, Lashkar-e-Tayyiba, Jaish-e-Muhammad, Lashkar-e-Jhangvi and Sipah-e-Sahaba Pakistan.

JuA leader Khalil has strong ties to the Taliban and al-Qa'ida, and in 1998, he signed Usama bin Laden's fatwa calling for attacks on the US and its allies.

Proscription by the UN and other countries

JuA is listed in the United Nations Security Council 1267 (al-Qa'ida) Sanctions Committee's consolidated list and by the governments of Canada, the UK, the US and Pakistan.

Peace and mediation processes

JuA has not been a party to any peace discussions with the Indian Government.