

EXPLANATORY STATEMENT

Select Legislative Instrument No. 241, 2013

Issued by the authority of the Attorney-General

Criminal Code Act 1995

*Criminal Code (Terrorist Organisation-Al-Qa'ida in the Arabian Peninsula) 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 Al-Qa'ida in the Arabian Peninsula, also known as Al-Qa'ida in Yemen, Ansar al-Sharia, AQAP and AQY, 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 Al-Qa'ida in the Arabian Peninsula. Details of the Regulation are set out in Attachment A.

Al-Qa'ida in the Arabian Peninsula was first listed as a terrorist organisation under *Criminal Code Amendment Regulations 2010 (No. 4)*.

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 Al-Qa'ida in the Arabian Peninsula 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 4Y of the *Criminal Code Regulations 2002* which had specified this organisation as a terrorist organisation for the purpose of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code. Regulation 4Y ceased to have effect on 27 November 2013. The repeal of Regulation 4Y ensures there is no duplication if the new Regulation is made before the previous Regulation ceases.

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-Al-Qa'ida in the Arabian Peninsula) 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-Al-Qa'ida in the Arabian Peninsula) 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 Al-Qa'ida in the Arabian Peninsula, and provide support or associate with Al-Qa'ida in the Arabian Peninsula.

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-Al-Qa'ida in the Arabian Peninsula) Regulation 2013* may limit the right to freedom of association with Al-Qa'ida in the Arabian Peninsula, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Al-Qa'ida in the Arabian Peninsula 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 Al-Qa'ida in the Arabian Peninsula 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-Al-Qa'ida in the Arabian Peninsula) 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-Al-Qa'ida in the Arabian Peninsula) 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-Al-Qa'ida in the Arabian Peninsula) 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-Al-Qa'ida in the Arabian Peninsula) 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-Al-Qa'ida in the Arabian Peninsula) 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.

Details of the Criminal Code (Terrorist Organisation-Al-Qa'ida in the Arabian Peninsula) Regulation 2013

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation-Al-Qa'ida in the Arabian Peninsula) 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- Al-Qa'ida in the Arabian Peninsula

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 Al-Qa'ida in the Arabian Peninsula is specified.

Subsection 102.1(2) provides that Al-Qa'ida in the Arabian Peninsula is also known by the following names:

- (a) Al-Qa'ida in Yemen;
- (b) Ansar al-Sharia;
- (c) AQAP;
- (d) AQY.

Schedule 1 – Amendments

This schedule amends the *Criminal Code Regulations 2002*.

Clause 1 - Regulation 4Y

This clause provides that regulation 4Y of the *Criminal Code Regulations 2002* is repealed. Regulation 4Y was the regulation listing Al-Qa'ida in the Arabian Peninsula as a terrorist organisation for the purposes of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code. This clause ensures there is no duplication if the new Regulation is made before the current Regulation ceases.

Al-Qa'ida in the Arabian Peninsula
(Also known as: Al-Qa'ida in Yemen; Ansar al-Sharia; AQAP; AQY)

This statement is based on publicly available details about al-Qa'ida in the Arabian Peninsula (AQAP). 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

AQAP was known previously as al-Qa'ida in Yemen (AQY), which was founded after the escape of 23 extremist detainees from a high-security government correctional facility in Sana'a in February 2006. In a January 2009 statement, AQY announced a change of name to AQAP, the name of the previous al-Qa'ida network in Saudi Arabia, which was dismantled by Saudi authorities in 2006. In the same statement, AQAP announced two Saudi former Guantanamo Bay detainees had joined the group as senior members. One of them has since surrendered to Saudi authorities.

In an audio recording released in April 2011, AQAP official Abu Zabayr Adl al-Abab said '[t]he name Ansar al-Sharia is what we use to introduce ourselves in areas where we work, to tell people about our activity and goals, and that we are on the path of God.'

Objectives

In May 2010, AQAP issued a statement titled, *Who are the mujahideen in the Arabian Peninsula*, which laid out AQAP's objectives. These included the 'expulsion of Jews and crusaders from the Arabian Peninsula'; the re-establishment of the Islamic caliphate and the introduction of sharia; and the liberation of Muslim lands. While the group mainly operates inside Yemen and has conducted attacks in Saudi Arabia, it has also attempted to conduct attacks within the United States (US).

Following AQAP's attempted attack on Northwest Airlines flight 253 on 25 December 2009, AQAP issued a statement saying 'we tell the American people that since you support the leaders who kill our women and children ... we have come to slaughter you [and] will strike you with no previous [warning], our vengeance is near ... we call on all Muslims ... to throw out all unbelievers from the Arabian Peninsula by killing crusaders who work in embassies or elsewhere ... [in] a total war on all crusaders in the Peninsula of [Prophet] Muhammad.'

Leadership

AQAP's leader, or emir, is Nasir al-Wahishi (aka Abu Basir) – a Yemeni national who was amongst the group of 23 veteran extremist leaders who escaped from a Yemeni Government correctional facility in February 2006. This group went on to form the leadership elements of the current AQAP organisation. Al-Wahishi is reported to have served as an aide and a bodyguard to Usama bin Ladin in Afghanistan. Al-Wahishi, whose appointment as AQAP leader was confirmed by then-deputy al-Qa'ida leader Ayman Al-Zawahiri, is featured on Saudi Arabia's most wanted terrorist list.

AQAP announced the death of its deputy leader Sa'id al-Shihri (aka Abu Sayyaf, aka Abu Sufyan)—a Saudi national and former Guantanamo detainee—on 16 July 2013. Al-Shihri was returned to Saudi Arabia in 2007 and underwent a rehabilitation program, but fled to Yemen upon his release. AQAP has not announced a replacement for al-Shihri.

AQAP's operational commander is Qasim al-Rimi (aka Abu-Hurayrah al-San'ani).

Membership

AQAP consists of at least several hundred fighters. Yemen's economic, political and environmental crises have enabled AQAP to find sanctuary there.

Recruitment and funding

AQAP is comprised mostly of Yemenis and Saudis but also recruits internationally. Those who have joined their ranks include Western, African and Asian citizens, and the (now-deceased) influential AQAP cleric and dual US and Yemeni citizen Anwar al-Awlaqi. AQAP recruits from a variety of sources, including conflict zones such as Afghanistan, prisons and through familial and tribal links. AQAP also employs media, including the digital magazine *Inspire* and audio messages via its online media outlet al-Malahim.

AQAP is self-funded and raises money through the collection of *zakat* (religious donations) by both willing and unsuspecting donors in Yemen, Saudi Arabia and other countries; collection of cash at mosques; criminal activities such as robberies; and ransom payments for hostages.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts

AQAP employs person and vehicle-borne improvised explosive devices (including suicide attacks), small arms and rocket-propelled grenades against Yemeni and foreign government interests. Kidnapping of foreign nationals is relatively common.

Terrorist attacks by AQAP continue to be a major concern of Western governments. According to news reports, in August 2013, the US closed diplomatic missions in the Middle East and Africa in response to intercepted messages between al-Zawahiri and al-Wahishi. The *New York Times* claimed al-Zawahiri ordered AQAP to conduct an attack.

Significant attacks for which responsibility has been claimed by, or reliably attributed to, AQAP include:

- 4 March 2013: a car bomb at the Popular Committee barracks in Lawdar District killed at least 12 people and wounded more than a dozen others;

- 29 January 2013: an attack on Yemeni Army assembly areas in al-Bayda Governorate killed 15 soldiers;
- 24 December 2012: the kidnapping of two Finnish and one Austrian citizen; they were released in May 2013;
- 18 August 2012: an attack on a military intelligence compound in Aden killed 14 officers;
- 21 May 2012: a person-borne suicide attack against a military parade rehearsal in Sana'a killed 100 people and wounded more than 300 others;
- 8 May 2012: US officials announced they had thwarted AQAP plans to detonate explosives onboard a US-bound aircraft;
- 28 March 2012: the kidnapping of Saudi Arabian Deputy Consul Abdullah al-Khalidi in Aden;
- 18 March 2012: the shooting death of US citizen Joel Shrum in Ta'izz;
- 14 March 2012: the kidnapping of a Swiss national working as a teacher in Hudaydah; she was released for a ransom payment on 27 February 2013;
- 4 March 2012: two car bombs killed at least 190 soldiers and tens were kidnapped in Zinjibar, Abyan Governorate;
- 25 February 2012: a car bomb in al-Mukallah killed 26 Republican Guards on the same day President Hadi was being sworn in as Yemeni President. AQAP claimed responsibility for the attacks, saying it was meant to send a message to the US Ambassador in Yemen and the Yemeni military;
- 29 October 2010: explosive devices concealed in printer cartridges in air freight destined for the US were set to detonate while the aircraft were airborne. The bombs were intercepted by the United Arab Emirates and the United Kingdom. Following public announcement of the disruption, AQAP claimed responsibility for the attempted attack and published details in a special edition of *Inspire* in November 2010. AQAP noted that 'From the beginning our objective was economic...to cause maximum losses to the American economy';
- 6 October 2010: a rocket propelled grenade was fired at the convoy of the British deputy ambassador to Yemen; no one was killed;
- 26 April 2010: a suicide bomber targeted the convoy of the British ambassador to Yemen; three were wounded, but the ambassador was unharmed;
- 25 December 2009: Nigerian Umar Farouk Abdulmutallab attempted to detonate an improvised explosive device aboard Northwest Airlines flight 253 en route from Amsterdam to Detroit. On 28 December, AQAP released a statement on a jihadist internet forum claiming responsibility for the attempt; and
- 27 August 2009: a suicide bomber attempted to assassinate Saudi Deputy Interior Minister Prince Muhammad bin Nayif in Jeddah, Saudi Arabia.

Directly or indirectly fostering and/or advocating the doing of terrorist acts

In July 2010, AQAP launched its online magazine *Inspire*, which attempts to incite individuals living across the world, especially in Western countries, to undertake acts of terrorism with practical guidance as well as ideological justification for attacks in their own countries. Instructions for weapons and attack planning include attaching metal blades to vehicles to mow down civilians, making basic improvised explosive devices, using firearms and starting forest fires. In addition to *Inspire*, AQAP has also published a companion document called the *Lone Mujahid Pocketbook*, which largely comprises articles previously published in *Inspire* with an emphasis on tactics for carrying out 'lone' attacks in Western countries.

The 11th issue of *Inspire*, published on 30 May 2013, was a special edition that praised the Boston marathon bombings and included an item on the attack on the British soldier in Woolwich, describing these incidents as ‘inspired by *Inspire*’.

On 23 March 2012, AQAP’s media outlet, al-Malahim Foundation, released the full version of its *Jihad of the Ummah* video, including previously missing segments offering 3000 grams of gold to anyone who murders the US Ambassador to Yemen, Gerald Feierstein, and five million Yemeni Riyals to anyone who kills an American soldier in Yemen.

Conclusion

On the basis of the above information, ASIO assesses that AQAP is directly and indirectly engaged in, preparing, planning, assisting in, and fostering the doing of terrorist acts and advocates the doing of terrorist acts, involving threats to human life and serious damage to property. It is submitted that the acts attributable to AQAP are terrorist acts as they:

- (i) constitute acts, which cause serious physical harm to persons, including death, as well as serious damage to property;
- (ii) are done with the intention of advancing a political cause, namely, removing Western influences and interests from the Arabian Peninsula; and
- (iii) are intended to coerce or influence by intimidation, the public or a section of the public outside Australia (including the governments of, and foreign nationals in, Yemen and Saudi Arabia).

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

Other relevant information

Links to other terrorist groups or networks

AQAP is a recognised affiliate of al-Qa’ida. AQAP has also developed some links with other extremist and terrorist groups, including al-Shabaab in Somalia.

Proscription by the UN and other countries

On 19 January 2010, pursuant to paragraph 2 of resolution 1904 (2009), the United Nations listed AQAP as being ‘associated with Al-Qaida, Usama bin Laden or the Taliban’. In January 2010, the US designated AQAP as a Foreign Terrorist Organisation under Section 219 of the Immigration and Nationality Act. On 23 December 2010, Canada designated AQAP as a terrorist entity under Canadian Criminal Code article 83.05.

Peace and mediation processes

AQAP was involved in peace talks with the Yemeni Government in 2013, but no agreement has been reached. AQAP senior official Ibrahim al-Rubeish said that AQAP’s conditions for the truce included amending the Yemeni constitution to accept sharia laws, monitoring non-Muslim based organizations in Yemen and removing all ‘apparent evils’ such as interest-based banks.