

EXPLANATORY STATEMENT

Select Legislative Instrument No. 261, 2013

Issued by the authority of the Attorney-General

Criminal Code Act 1995

*Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) 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 the Islamic State of Iraq and the Levant, also known as Al-Qa'ida in Iraq, Al-Qa'ida in Iraq – Zarqawi, Al-Qa'ida of Jihad in the Land of the Two Rivers, Al-Qa'ida of Jihad Organization in the Land of the Two Rivers, Al-Tawhid, Al-Tawhid and al-Jihad, Brigades of Tawhid, Islamic State of Iraq, Dawla al-Islamiya fi Iraq wa as-Shams, Islamic State of Iraq and al-Sham, Jama'at al-Tawhid wa'al-Jihad, Kateab al-Tawhid, Mujahidin Shura Council, Qa'ida of the Jihad in the Land of the Two Rivers, Tanzeem Qa'ida al-Jihad Bilad al Raafidaini, Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, The al-Zarqawi network, The Monotheism and Jihad Group, The Organisation Base of Jihad Country of the Two Rivers, The Organisation Base of Jihad Mesopotamia, The Organisation of Jihad's Base in the Country of the Two Rivers, Unity and Holy Struggle, Unity and Holy War and Unity and Jihad Group, for the purpose of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code.

The Regulation replaces the current *Criminal Code (Terrorist Organisation – Al-Qa’ida in Iraq) Regulation 2013* which specifies Al-Qa’ida in Iraq for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. This regulation was made with effect from 12 July 2013 and will sunset on 12 July 2016. The *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013* reflects a change in the name of the organisation from Al-Qa’ida in Iraq to the Islamic State of Iraq and the Levant, which is the name used by the organisation itself.

The Regulation enables the offence provisions in Division 102 of the Code to continue to apply to persons with links to the Islamic State of Iraq and the Levant. 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 the Islamic State of Iraq and the Levant 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 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 it takes effect.

Statement of Compatibility with Human Rights

Objective

The object of the *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant) 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 the Islamic State of Iraq and the Levant, and provide support or associate with the Islamic State of Iraq and the Levant.

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 – Islamic State of Iraq and the Levant) Regulation 2013* may limit the right to freedom of association with the Islamic State of Iraq and the Levant, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with the Islamic State of Iraq and the Levant 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 the Islamic State of Iraq and the Levant 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 – Islamic State of Iraq and the*

Levant) 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 – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant) Regulation 2013

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) 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 – Islamic State of Iraq and the Levant

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 the Islamic State of Iraq and the Levant is specified.

Subsection 102.1(2) provides that the Islamic State of Iraq and the Levant is also known by the following names:

- (a) Al-Qa’ida in Iraq;
- (b) Al-Qa’ida in Iraq – Zarqawi;
- (c) Al-Qa’ida of Jihad in the Land of the Two Rivers;
- (d) Al-Qa’ida of Jihad Organization in the Land of the Two Rivers;
- (e) Al-Tawhid;
- (f) Al-Tawhid and al-Jihad;
- (g) Brigades of Tawhid;
- (h) Islamic State of Iraq;
- (i) Dawla al-Islamiya fi Iraq wa as-Shams;
- (j) Islamic State of Iraq and al-Sham;
- (k) Jama’at al-Tawhid wa’al-Jihad;
- (l) Kateab al-Tawhid;

- (m) Mujahidin Shura Council;
- (n) Qa'ida of the Jihad in the Land of the Two Rivers;
- (o) Tanzeem Qa'ida al-Jihad Bilad al Raafidaini;
- (p) Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn;
- (q) The al-Zarqawi network;
- (r) The Monotheism and Jihad Group;
- (s) The Organisation Base of Jihad Country of the Two Rivers;
- (t) The Organisation Base of Jihad Mesopotamia;
- (u) The Organisation of Jihad's Base in the Country of the Two Rivers;
- (v) Unity and Holy Struggle;
- (w) Unity and Holy War;
- (x) Unity and Jihad Group.

Schedule 1 – Amendments

Criminal Code (Terrorist Organisation – Al-Qa'ida in Iraq) Regulation 2013

Item 1 – The whole of the regulation

This schedule repeals the whole *Criminal Code (Terrorist Organisation – Al-Qa'ida in Iraq) Regulation 2013*.

Islamic State of Iraq and the Levant

**(Also known as: Al-Qa'ida in Iraq; Al-Qa'ida in Iraq – Zarqawi;
Al-Qa'ida of Jihad in the Land of the Two Rivers;
Al-Qa'ida of Jihad Organization in the Land of the Two Rivers; Al-Tawhid;
Al-Tawhid and al-Jihad; Brigades of Tawhid; Islamic State of Iraq;
Dawla al-Islamiya fi Iraq wa as-Shams;
Islamic State of Iraq and al-Sham; Jama'at al-Tawhid wa'al-Jihad;
Kateab al-Tawhid; Mujahidin Shura Council;
Qaida of the Jihad in the Land of the Two Rivers;
Tanzeem Qa'idat al-Jihad/Bilad al Raafidaini;
Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn;
The al-Zarqawi network;
The Monotheism and Jihad Group;
The Organisation Base of Jihad/Country of the Two Rivers;
The Organisation Base of Jihad/Mesopotamia;
The Organisation of Jihad's Base in the Country of the Two Rivers;
Unity and Holy Struggle; Unity and Holy War;
Unity and Jihad Group)**

This statement is based on publicly available information about the Islamic State of Iraq and the Levant, formerly listed as al-Qa'ida in Iraq. 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 Act 1995* 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).

Background to this listing

The name al-Qa'ida in Iraq (AQI) has never been used by the group itself. It was devised by Western intelligence services to reflect the group's al-Qa'ida affiliation. The name has been adopted widely and continues to be used by many sources as the most convenient term for a group that has undergone several name changes since its inception.

The first listing of this group for proscription purposes was under the Arabic name it used, Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, in 2005. It was relisted in 2007 under the same name. Since then, the listing has appeared under the name AQI as the most commonly recognised label for the group. This statement has been prepared to support the continued listing of AQI under the Arabic name it now uses, Dawla al-Islamiya fi Iraq wa as-Shams, which means the Islamic State of Iraq and the Levant (ISIL), and which is the name in

common use in Western intelligence and open sources, especially in regards to its activities in Syria.

The use of ISIL in this statement does not represent a change in the leadership, membership or methods of the group, but reflects the expansion of its operating area to include both Iraq and Syria. Various sources will continue to use the name AQI separately or in conjunction with ISIL or other aliases, including those referred to above, but the references are to the same group that was originally proscribed in 2005.

Details of the organisation

Objectives

ISIL is an Iraq and Syria-based Sunni extremist group and al-Qa'ida affiliate that adheres to the global jihadist ideology. ISIL follows an extreme interpretation of Islam which is anti-Western, promotes sectarian violence and targets those that do not agree with its interpretations as infidels and apostates. ISIL aspires to overthrow both the Iraqi Government and the Syrian regime of President Bashar al-Assad. Concurrently, it aims to establish a Salafist-orientated Islamist state spanning Iraq, Syria and other parts of the Levant.

The group became an al-Qa'ida affiliate in October 2004 when its former leader, Abu Musab al-Zarqawi, pledged allegiance to Usama bin Laden. In late 2011, ISIL established operations in Syria through its former subordinate organisation, Jabhat al-Nusra. In April 2013, ISIL leader Abu Bakr al-Baghdadi announced the creation of ISIL to replace the Islamic State of Iraq, subsume Jabhat al-Nusra and consolidate operations across Iraq and Syria.

Jabhat al-Nusra leader Abu-Muhammad al-Jawlani attempted to annul the announcement by pledging allegiance to al-Qa'ida leader Ayman al-Zawahiri. In June 2013, al-Zawahiri ruled that Jabhat al-Nusra was the only al-Qa'ida affiliate in Syria and annulled the creation of ISIL. However, al-Baghdadi refused to follow this ruling and confirmed the creation of ISIL, which continues to operate in both Syria and Iraq as one consolidated organisation, with its operations in Syria remaining separate to those of Jabhat al-Nusra.

Leadership

ISIL's current leader is Ibrahim Awwad Ibrahim Ali al-Badri. He has many aliases and is usually known as Abu Bakr al-Baghdadi or Abu Du'a. Al-Baghdadi became the leader of ISIL following the May 2010 death of his predecessor, Abu Hamza al-Muhajir. He is currently located in Syria and continues to lead ISIL in both Iraq and Syria. In August 2013, al-Baghdadi appointed Abu Muhammad al-Adnani al-Shami as ISIL's Emir for Syria.

ISIL has a highly hierarchical structure, featuring an overall leadership council and provincial governments in both Iraq and Syria. Regional cells act with relative autonomy under general direction from ISIL senior leaders.

Membership

ISIL has around 2500 members in Iraq, mostly young Iraqi Sunni men. ISIL claimed responsibility for a prison break at Abu Ghraib in July 2013 that freed hundreds of ISIL members, many of whom are still at large.

ISIL has around 5000 members in Syria, drawn from both Syrian nationals and foreign fighters. Due to ISIL's Iraqi origins, a large number of its Syria-based senior operatives and leadership are Iraqi nationals.

Recruitment and funding

ISIL uses a combination of threats, incentives and ideology to recruit new members. It mostly targets young Sunni men, exploiting anger at the government's perceived mistreatment of Sunni Muslims. It also aims to recruit Iraqi security force members to gather intelligence and undermine the performance of its enemies.

ISIL continues to attract a large number of foreign fighters, including Westerners. Although foreign fighters with an extremist mindset were initially drawn to Jabhat al-Nusra, ISIL's establishment of independent operations in Syria resulted in the defection of some Jabhat al-Nusra members to ISIL.

ISIL uses funds donated for operations in Syria to also fund its activities in Iraq and transfers weapons and resources between the two countries. It also sources funding through extortion, kidnapping, theft, black marketeering, smuggling and legitimate businesses.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts

ISIL is one of the world's deadliest and most active terrorist organisations and conducts daily, often indiscriminate attacks. ISIL targets crowds and public gatherings during holidays and religious festivals to maximize casualties and publicity.

ISIL's operations in Iraq consist of daily attacks, mostly in central Iraq and the provinces to the north and west of the capital. Attacks in the Kurdish-controlled northern provinces and the Shia-majority provinces in the south are less common. ISIL's primary Iraqi targets are security forces; Shia civilians in public areas, including cafes, mosques and markets; political figures; community and tribal leaders who publicly condemn ISIL; and anti-ISIL militias. By attacking these targets, it hopes to undermine security force efforts to contain ISIL, destroy public confidence in the security forces and provoke a widespread revolt against the government.

ISIL's operations in Syria consist of suicide, sniping and small-arms attacks against the Syrian regime of Bashar al-Assad as well as the Syrian armed opposition, which it considers to be apostates and infidels. ISIL has also targeted Turkish militants in northern Syria.

Significant attacks either claimed by, or reliably attributed to ISIL since the group was last proscribed (under the name al-Qa'ida in Iraq in July 2013) include:

- 16 November 2013: ISIL carried out a series of executions throughout Syria, including six Free Syrian Army members and a sharia committee member in Lattakia, a youth in al-Bab and a militant in Aleppo;
- 29 September 2013: ISIL bombed the Kurdistan Democratic Party's Directorate of Security headquarters in Irbil, killing six people;

- 28 August 2013: ISIL claimed responsibility for a wave of bombings in public places in Baghdad that killed approximately 80 civilians;
- 21 September 2013: two ISIL suicide bombers attacked a funeral in a Shia neighbourhood of Baghdad, killing at least 60 people and injuring over 100 others;
- 18 September 2013: ISIL occupied the Syrian city of Azaz after clashes that killed at least five people; ISIL took at least 100 people captive;
- 24 August 2013: ISIL captured and executed three Syrian Alawite truck drivers in Iraq, posting a video of the murders online;
- 10 August 2013: ISIL claimed responsibility for a wave of bombings in Baghdad that killed approximately 52 people; and
- 21 July 2013: simultaneous attacks on prisons at al-Taji and Abu Ghraib killed approximately 29 people and freed hundreds of prisoners. Most are believed to be ISIL operatives, including senior leaders.

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

Several media statements have been issued by the group that advocate the doing of terrorist acts, including:

- 29 July 2013: Abu Muhammad al-Adnani al-Shami, the official spokesman of ISIL, released a statement announcing the commencement of the *Soldier's Harvest* campaign. The statement claimed responsibility for a car bomb in Hamah and encouraged followers to '...strike with explosive belts and car bombs, and stun with the sticky and roadside EIDs [sic], and reap with the silences and snipers, and terrorise with the stormings'.
- January 2013: al-Adnani released a statement directing followers not to participate in the democratic process in Iraq, and to instead use violence to achieve their political goals.

Conclusion

On the basis of the above information, ASIO assesses the ISIL continues to be directly and/or 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.

In the course of pursuing its objectives, ISIL 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 done with the intention of advancing ISIL's political, religious or ideological causes;
- are done with the intention of coercing or intimidating the government of a foreign country (be that Iraq or Syria); and
- are done with the intention of intimidating sections of the public globally.

This assessment is corroborated by information from reliable and credible intelligence sources.

Other relevant information

Links to other terrorist groups or networks

A number of terrorist organisations have conducted terrorist acts or issued statements in support of ISIL, including al-Qa'ida, al-Qa'ida in the Arabian Peninsula, Jabhat al-Nusra, salafists in Gaza and al-Shabaab. Likewise, ISIL has called on jihadists to support other terrorist organisations.

Proscription by the UN and other countries

ISIL is listed on the United Nations Security Council 1267 (al-Qa'ida) Sanctions Committee's consolidated list (as an alias) and as a proscribed terrorist organisation by Canada (AQI entry last updated in August 2012), New Zealand (as an alias) and the United States (which recognizes AQI and ISIL as the same organization).

Peace and mediation processes

ISIL is not engaged in any peace or mediation process.