

EXPLANATORY STATEMENT

Select Legislative Instrument No. 108, 2014

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014

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, 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; Dawla al-Islamiya; Dawla al-Islamiya fi Iraq wa as-Sham; Islamic State of Iraq; 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 Islamic State of Iraq and the Levant; The Islamic State of Iraq and al-Sham; The Islamic State of Iraq and Syria; The Islamic Caliphate; The Islamic Caliphate State; The Islamic State of Iraq and Greater Syria; 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, for the purpose of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code.

The Regulation will replace the current *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013* which specifies the Islamic State of Iraq and the Levant 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 14 December 2013 and will sunset on 14 December 2016. The *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014* reflects a change in the name of the organisation from the Islamic State of Iraq and the Levant to the Islamic State, which was proclaimed by a spokesperson of the organisation on 29 June 2014.

The Regulation enables the offence provisions in Division 102 of the Code to continue to apply to persons with links to the Islamic State. 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 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) Regulation 2014* 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) Regulation 2014* ensures that it continues to be 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, and provide support or associate with the Islamic State.

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) Regulation 2014* may limit the right to freedom of association with the Islamic State, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with the Islamic State 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 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 the *Criminal Code (Terrorist Organisation – Islamic State)*

Regulation 2014 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) Regulation 2014* 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) Regulation 2014* 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) Regulation 2014* 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) Regulation 2014* 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) Regulation 2014

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation – Islamic State) Regulation 2014*.

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 – Terrorist organisation – Islamic State

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 Islamic State is specified.

Subsection 4(2) provides that Islamic State 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) Dawla al-Islamiya;
- (i) Dawla al-Islamiya fi Iraq wa as-Sham;
- (j) Islamic State of Iraq;
- (k) Islamic State of Iraq and al-Sham;
- (l) Jama’at al-Tawhid wa’al-Jihad;
- (m) Kateab al-Tawhid;
- (n) Mujahidin Shura Council;
- (o) Qaida of the Jihad in the Land of the Two Rivers;
- (p) Tanzeem Qa’idat al-Jihad Bilad al Raafidaini;
- (q) Tanzim Qa’idat al-Jihad fi Bilad al-Rafidayn;
- (r) The al-Zarqawi network;
- (s) The Islamic State of Iraq and the Levant;
- (t) The Islamic State of Iraq and al-Sham;
- (u) The Islamic State of Iraq and Syria;
- (v) The Islamic Caliphate;
- (w) The Islamic Caliphate State;
- (x) The Islamic State of Iraq and Greater Syria;
- (y) The Monotheism and Jihad Group;
- (z) The Organisation Base of Jihad Country of the Two Rivers;

- (za) The Organisation Base of Jihad Mesopotamia;
- (zb) The Organisation of Jihad's Base in the Country of the Two Rivers;
- (zc) Unity and Holy Struggle;
- (zd) Unity and Holy War;
- (ze) Unity and Jihad Group.

Schedule 1 – Repeal

Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013

Item 1 – The whole of the regulation

This schedule repeals the whole *Criminal Code (Terrorist Organisation – Islamic State of Iraq and the Levant) Regulation 2013*.

The Islamic State

**(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;
Dawla al-Islamiya fi al-Iraq wa as-Sham;
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 Islamic State of Iraq and the Levant;
The Islamic State of Iraq and al-Sham; The Islamic State of Iraq and Syria;
The Islamic Caliphate; The Islamic Caliphate State;
The Islamic State of Iraq and Greater Syria;
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. To the Australian Government's knowledge, this information is accurate, 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 first listing of this group for proscription purposes was under the Arabic name it formerly used, *Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn*, in 2005. It has also been listed as al-Qa'ida in Iraq and as the Islamic State of Iraq and the Levant (ISIL).

On 29 June 2014, the group proclaimed an Islamic caliphate in areas it controls and changed its name to *Dawla al-Islamiya*, or the Islamic State. This statement has been prepared to support its continued listing under this new name.

The use of the name Islamic State in this statement does not represent a change in the leadership, membership or methods of the group that was originally proscribed in 2005, but reflects the expansion of its operating area and its announcement of an Islamic caliphate.

Details of the organisation

Objectives

The Islamic State is an Iraq and Syria-based Sunni extremist group and former al-Qa'ida affiliate that adheres to the global jihadist ideology. The Islamic State 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. The Islamic State's announcement of a caliphate claims the land from Aleppo in Syria to Diyala in Iraq, the Sunni-dominated areas of both countries. Eventually, 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, the group established operations in Syria through its former subordinate organisation, Jabhat al-Nusra. In April 2013, current leader Abu Bakr al-Baghdadi announced the creation of ISIL to 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. Now known as the Islamic State, it continues to operate in both Syria and Iraq as one consolidated organisation separate from Jabhat al-Nusra.

Since January 2014, the group has focussed on capturing and consolidating its control over areas of Iraq including Fallujah in Anbar Province and most of Ninawa Province— including Mosul, Iraq's second largest city.

Leadership

The Islamic State's current leader and proclaimed caliph 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 following the May 2010 death of his predecessor, Abu Hamza al-Muhajir. He is currently located in either Syria or Iraq and leads the Islamic State in both countries. In August 2013, al-Baghdadi appointed Abu Muhammad al-Adnani al-Shami as emir for Syria.

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

Membership

The Islamic State has several thousand members in Iraq, mostly young Iraqi Sunni men. Its numbers have been boosted in 2014 by its success in capturing Iraqi cities and coercing or convincing Sunni tribes to ally with the group. It has also claimed responsibility for several mass prison breaks throughout Iraq that have freed hundreds of its members, most of whom are still at large.

In Syria, the Islamic State has several thousand additional members drawn from both Syrian nationals and foreign fighters. Due to the Islamic State's Iraqi origins, a large number of its Syria-based senior operatives and leadership are Iraqi nationals. Fighters in both countries are able to pass freely across the border, which is no longer recognised by the Islamic State.

Recruitment and funding

The Islamic State uses a combination of threats, incentives and ideology to recruit new members, including a sophisticated social media campaign in several languages. It mostly targets young Sunni men worldwide, exploiting anger at the Iraqi and Syrian governments' perceived mistreatment of Sunni Muslims and encouraging them to join it in restoring an Islamic caliphate. It also aims to recruit Iraqi security force members to gather intelligence and undermine the performance of its enemies.

The group continues to attract a large number of foreign fighters, including Westerners. Although foreign fighters in Syria with an extremist mindset were initially drawn to Jabhat al-Nusra, the Islamic State's effective social media messaging, willingness to accept members rejected by Jabhat al-Nusra and highly publicised military successes have resulted in a greater flow of international recruits to the Islamic State and the defection of some Jabhat al-Nusra members.

The Islamic State uses funds donated for operations in Syria to also fund its activities in Iraq and transfers weapons, fighters 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

The Islamic State is one of the world's deadliest and most active terrorist organisations and conducts daily attacks on security forces and civilians. It targets crowds and public gatherings during holidays and religious festivals to maximize casualties and publicity. It also conducts public executions and violent punishments in areas it controls.

The Islamic State's operations in Iraq consist of military operations and daily attacks, mostly in central Iraq and the provinces to the north and west of Baghdad. Attacks in the Kurdish-majority northern provinces and the Shia-majority provinces in the south are less common. The Islamic State's primary targets in Iraq are security forces; Shia civilians in public areas, including cafes, mosques and markets; political figures; community and tribal leaders who publicly condemn the Islamic State; and anti-Islamic State militias. By attacking these targets, it hopes to undermine security force efforts to contain the group, destroy public

confidence in the security forces and provoke a widespread revolt against the government. It also attacks and controls elements of infrastructure including bridges and dams, using them to cause major damage through flooding and to restrict Iraqi security forces' freedom of movement.

The Islamic State's operations in Syria consist of suicide bombings, sniping and small-arms attacks against the Syrian regime of Bashar al-Assad. It also attacks some other Syrian armed opposition groups, which it considers apostates and infidels. The Islamic State has also targeted Turkish and Kurdish militants in northern Syria, Syrian refugees and Kurdish organisations in Turkey, Hizballah-related targets in Lebanon and threatened attacks against the Government of Turkey.

Significant attacks either claimed by, or reliably attributed to, the Islamic State since the group was last proscribed (under the name Islamic State of Iraq and the Levant in December 2013) include:

- January 2014: the capture of Fallujah and other areas of Anbar Province in Iraq;
- 2 January 2014: a claim of responsibility for a car bombing in Beirut that killed two people and wounds dozens of others; further attacks in Lebanon were threatened;
- 5 April 2014: the capture of Fallujah Dam. The group uses control of the dam to cause flood damage upstream and block the electricity supply to areas downstream;
- 1 May 2014: the public execution of seven people in the Syrian city of Ar-Raqqah; the bodies were displayed on crucifixes;
- 6-11 June 2014: following a series of offensives, the capture of Mosul and Tikrit, along with other areas of Ninewa and Salah ad-Din Provinces in Iraq;
- 7 June 2014: a claim of responsibility for five car bombings in Shia neighbourhoods of Baghdad that killed 52 people;
- 11 June 2014: an attack on the Turkish Consulate in Mosul in which 49 Turks, including the Consul-General and several children, were taken hostage; and
- 14 June 2014: the publication of photographs of its members killing dozens of captured Iraqi security force personnel near Tikrit in Iraq. The group claims to have executed 1700 Iraqi Government soldiers.

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. These include:

- 23 May 2014: the group's Baghdad Division posted a message on its Twitter account claiming responsibility for killing more than 100 Iraqi security force personnel and Shia milita members. The statement threatened further attacks, stating, 'We say again to the hate-filled Rawafidh [derogatory reference to Shia Muslims] and their Safavid [derogatory reference to the Iraqi Government] government: your headquarters and your gatherings are spread everywhere in Baghdad, and no effort will be spared, Allah permitting, to target them'; and
- 28 April 2014: in a statement claiming responsibility for two suicide bombings on polling stations during Iraq's national elections, the group threatened supporters of the Iraqi Government, stating, 'We re-warn and re-alert that every drop of blood that will

be shed from the Sunnis will be avenged, and we will drip—Allah permitting—rivers of blood from the elements of their services of oppression and their parties and militias’.

Conclusion

On the basis of the above information, ASIO assesses the Islamic State 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, the Islamic State 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 the Islamic State’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

The recent success of the Islamic State in Iraq has attracted the support of other terrorist groups around the world—including al-Qa’ida in the Arabian Peninsula, salafists in Gaza and al-Shabaab—and will be a motivating factor for individuals to participate in jihad. Likewise, the Islamic State has called on jihadists to support other terrorist organisations.

Proscription by the UN and other countries

The Islamic State is listed as the Islamic State of Iraq and the Levant on the United Nations Security Council 1267 (al-Qa’ida) Sanctions Committee’s consolidated list as an alias of al-Qa’ida in Iraq. It is also listed as a proscribed terrorist organisation by Canada (al-Qa’ida in Iraq entry last updated in August 2012); by New Zealand under the name Islamic State of Iraq and the Levant as an alias of al-Qa’ida in Iraq; and by the United States, which recognises al-Qa’ida in Iraq and Islamic State of Iraq and the Levant as the same organisation, but also lists Jabhat al-Nusra as an alias of al-Qa’ida in Iraq under a single listing.

Peace and mediation processes

The Islamic State is not engaged in any peace or mediation process.