

EXPLANATORY STATEMENT

Select Legislative Instrument 2016 No.

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016

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 *Criminal Code*).

Division 102 of the *Criminal 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 *Criminal Code* provides that section 15.4 (extended geographical jurisdiction – category D) applies to an offence against Division 102 of the *Criminal Code*. The effect of applying section 15.4 is that offences in Division 102 of the *Criminal 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 *Criminal 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 Abu Sayyaf Group, also known as Abou Sayaf Armed Band, Abou Sayyef Group, Abu Sayaff Group, Al-Harakat Al-Aslamiya, Al-Harakat Al-Islamiyya, Al-Harakat-ul Al-Islamiyya, Al-Harakatul-Islamia and Mujahideen Commando Freedom Fighters, for the purpose of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.

The Regulation enables the offence provisions in Division 102 of the *Criminal Code* to continue to apply to persons with links to the Abu Sayyaf Group. Details of the Regulation are set out in Attachment A.

Subsection 102.1(2) of the *Criminal 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 this section, the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or advocates the doing of a terrorist act.

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 Abu Sayyaf Group is at [Attachment B](#).

Subsection 102.1(2A) of the *Criminal 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 *Criminal Code*, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed 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 28 June 2016. Subsection 102.1(3) of the *Criminal 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

Overview

The *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016* (the Regulation) makes it an offence under Division 102 of the *Criminal Code*, to direct the activities, become a member of, recruit for, train, receive or participate in training, get funds to, from or for Abu Sayyaf Group, and provide support to or associate with, Abu Sayyaf Group.

The offence of association with a terrorist organisation in subsection 102.8 of the *Criminal Code* is limited in its application 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 legal representation.

The object of the Regulation is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia.

Human rights implications

This instrument engages the following rights:

- Article 6
- Article 19, and
- Article 22.

The Regulation 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.

Whilst the Regulation may limit the right to freedom of association with Abu Sayyaf Group, the association offence is subject to the safeguards outlined below. The general limits of the right to freedom of association with Abu Sayyaf Group 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 ([Attachment B](#)).

The offences in Division 102 of the *Criminal Code* that apply 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 Abu Sayyaf Group 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 *Criminal Code* requiring prior consultation and enabling review of the Regulation specifying Abu Sayyaf Group 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* of 25 June 2004, and the Regulation 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) of the *Criminal Code* the Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed Regulation;
- under subsection 102.1(3) the *Criminal Code*, the Regulation will cease to have effect on the third anniversary of the day on which it takes effect;

- subsection 102.1(4) of the *Criminal Code* 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 by written notice published in the Gazette, with the effect of the Minister's declaration that the regulation listing the organisation ceases to have effect and the organisation is de-listed as a terrorist organisation under Division 102 of the *Criminal Code*;
- subsection 102.1(17) of the *Criminal Code* provides that an individual or an organisation may make a de-listing application to the Minister;
- the Regulation may be reviewed by the Parliamentary Joint Committee on Intelligence and Security under section 102.1A of the *Criminal Code*; and
- both Houses of Parliament may disallow the Regulation within the applicable disallowance period, which is 15 sitting days after the regulation was laid before that House, as provided for in subsection 102.1A(4) of the *Criminal Code*.

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, necessary and proportionate.

Details of the Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016

Section 1 – Name

This section would provide that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2016*.

Section 2 – Commencement

This section would provide for the commencement of each paragraph in the instrument, as set out in the table.

Subsection (1) would provide that each provision in the instrument specified in column 1 of the table commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 would provide that the Regulation commences on 28 June 2016.

The note to subsection (1) would clarify that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) would provide that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of this Regulation. Column 3 clarifies that the instrument would commence on 28 June 2016.

Section 3 – Authority

This section would provide that the Regulation is made under the *Criminal Code Act 1995*.

Section 4 – Schedules

This section would provide that the instrument specified in Schedule 1 is repealed as set out in Schedule 1.

Section 5 – Terrorist organisation—Abu Sayyaf Group

Subsection (1) would provide that for paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Abu Sayyaf Group is specified.

Subsection (2) would provide that Abu Sayyaf Group is also known by the following names:

- (a) Abou Sayaf Armed Band;
- (b) Abou Sayyef Group;
- (c) Abu Sayaff Group;
- (d) Al-Harakat Al-Aslamiya;

- (e) Al-Harakat Al-Islamiyya;
- (f) Al-Harakat-ul Al-Islamiyya;
- (g) Al-Harakatul-Islamia; and
- (h) Mujahideen Commando Freedom Fighters.

Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2013* is repealed.

The *Criminal Code (Terrorist Organisation—Abu Sayyaf Group) Regulation 2013* specifies Abu Sayyaf Group as a terrorist organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*. The proposed clause would ensure there is no duplication where the new Regulation is made before the current Regulation ceases to have effect.

Abu Sayyaf Group

(Also known as: Abou Sayaf Armed Band; Abou Sayyef Group; Abu Sayaff Group; Al-Harakat Al-Aslamiya; Al-Harakat Al-Islamiyya; Al-Harakat-ul Al-Islamiyya; Al-Harakatul-Islamia; Mujahideen Commando Freedom Fighters)

This statement is based on publicly available information about the Abu Sayyaf Group (ASG). 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* 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 Australian Government first proscribed the Abu Sayyaf Group (ASG) as a terrorist organisation under the Criminal Code with effect from 14 November 2002. The Abu Sayyaf Group was re-listed on 5 November 2004, 3 November 2006, 1 November 2008, 29 October 2010 and 12 July 2013.

Terrorist activity of the organisation

Objectives

ASG remains influenced by its founding objective of creating an independent Islamic state in Mindanao including the Sulu Archipelago. While many recent attacks, including kidnappings, have been largely motivated by financial gain, religious ideology contributes to ASG's activities, and is incorporated in its messaging and propaganda. Furthermore, the financial gain that is sought by these attacks – particularly kidnappings – is derived from acts carried out to support ASG's extremist ideological objectives and with the purpose of advancing this ideological cause. ASG Basilan leader Isnilon Hapilon has pledged allegiance to the Islamic State (IS) and has declared himself IS Emir for the Philippines. Westerners—including Australians—feature among the broad range of kidnap targets.

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

ASG has been responsible for the planning and conduct of terrorist attacks and kidnappings against a wide range of targets, including Philippine security forces and foreign interests; in Mindanao, including the islands of Basilan, Tawi Tawi and Jolo in the Sulu Archipelago, and Malaysia's Sabah State.

ASG has been involved in numerous kidnappings in these areas. Kidnappings in recent years off the coast of Palawan and Davao indicate that ASG's operational reach is expanding beyond its traditional area of operations. Westerners and other wealthy foreign nationals, as well as local politicians, business people, and civilians feature among the broad range of kidnap targets. Kidnappings attributed to ASG since its re listing by the Australian Government as a terrorist organisation on 12 July 2013 include:

- On 21 September 2015, ASG kidnapped two Canadians, a Norwegian, and a Philippine citizen from a resort on Samal Island near Davao city in eastern Mindanao.
- In April 2014, two German nationals were kidnapped from their yacht off the coast of Palawan. The ASG released the captives in October 2014 following payment of a ransom.
- In May 2015, ASG kidnapped two Malaysians from a seafood restaurant in eastern Sabah, Malaysia. In November, one hostage was released and the other beheaded when ransom demands weren't met.

Significant recent attacks either claimed by, or reliably attributed to, ASG include the following:

- In June 2015, 20 ASG members attacked troops who were guarding a water system in Basilan following ASG's extortion demands that were not met. An ensuing firefight resulted in the death of a civilian auxiliary member, who was later beheaded by ASG.
- In May 2015, approximately 50 ASG members seized an unmanned police station and telecommunications cell site in Basilan, raising two black flags, one of which was an Islamic State flag. The ASG members rigged the two locations with explosives and then beheaded a local worker. Two ASG members were killed in a subsequent firefight with security services.
- In September 2015, ASG members kidnapped two Canadians, a Norwegian and a Philippines national from Samal Island, eastern Mindanao.

ASG has been linked to numerous large-scale attacks over the past decade, including the 27 February 2004 bombing of the Superferry in Manila harbour, killing 114 people, and the 14 February 2005 coordinated bombings in the cities of Makati, Davao and General Santos, killing 11 people. Historical attacks attributed to ASG include:

- 12 July 2011: two US nationals were kidnapped near Zamboanga City by ASG militants
- 1 February 2012: a Swiss and Dutch national were kidnapped along with their Filipino guide off the Tawi-Tawi islands, Sulu. Following their initial abduction, Philippine authorities stated that the victims were seen in the custody of ASG militants.
- 28 July 2012: seven soldiers were killed during an armed clash with ASG in the village of Panglayahan, Jolo.

- 10 July 2012: six rubber plantation workers were killed when suspected ASG fighters ambushed a vehicle ferrying workers in Tumahubong, Basilan.
- 28 November 2011: three people were killed when an improvised explosive device (IED) was detonated at a wedding ceremony in a hotel in Zamboanga City.
- 10 March 2011: five people were killed when an IED detonated outside an elementary school in San Raymundo village, Jolo, Sulu.

ASG has used terrorist tactics and threats to force local and foreign governments into meeting its political and financial demands.

- In September 2014, ASG threatened to behead one of its two German hostages if the German government did not pay a \$USD 5.6 million ransom, and cease its support for the coalition against proscribed terrorist organisation, Islamic State. The German hostages were released in October 2014 following payment of the ransom.

ASG has associated with other terrorist organisations since its founding, including al-Qa'ida and Jemaah Islamiyah. Recently, ASG has been associated with Malaysian jihadists linked to Islamic State, including Mohammad Najib Hussein (now deceased), and Mahmud Ahmad, who are looking to form a South East Asian Islamic State province by working in conjunction with ASG.

Advocating the doing of terrorist acts

ASG Basilan leader Isnilon Hapilon has pledged allegiance to Islamic State and declared himself the overall Emir for Islamic State in the Philippines in a video distributed on 4 January 2016. An official Islamic State newsletter, al-Naba, acknowledged ASG's pledge of allegiance in its 5 January 2016 issue. There is a substantial risk that ASG's public support and allegiance to Islamic State, alongside its terrorist activities—including kidnappings, bombings and beheadings—may have the effect of advocating for, or encouraging others to engage in, terrorist acts.

Details of the organisation

ASG was founded in 1991 as a separatist militant Islamist movement by Filipino national Abdurajak Janjalani. ASG operates in the southern Philippines region of Mindanao, primarily on the islands of Jolo and Basilan in the Sulu archipelago.

Leadership

Since the deaths of several leaders in 2006 and 2007, including former ASG Emir Khadaffy Janjalani, ASG's leadership structure has been fragmented, comprising loosely-affiliated sub-groups rather than a formal hierarchy. However, a number of key individuals possess extensive experience and lead their own independent operations, including Isnilon Hapilon, Radullan Sahiron and Yasser Igasan.

Membership

ASG membership totals approximately 400 personnel. Most members are native to western Mindanao and the Sulu archipelago. However, ASG has periodically provided refuge and utilised the skills of foreign jihadists, including anti-Western jihadists who were involved in the 2002 Bali bombings.

Recruitment and funding

ASG recruits young Muslims from poverty-stricken areas of western Mindanao and the Sulu archipelago. ASG views kidnap-for-ransom and extortion ventures as profitable operational tactics. Kidnappings, in particular, have been a trademark of ASG since its creation and represent the main funding mechanism for the group. ASG has received funds from other Islamist organisations in the past—including al-Qa’ida and Jemaah Islamiyah—and continues to receive funds from foreign benefactors. ASG also receives support from the local population.

Links to other terrorist organisations

ASG has pledged allegiance to Islamic State; and Islamic State has acknowledged the pledge. ASG Basilan Emir Isnilon Hapilon has declared himself the overall Islamic State Emir for the Philippines. ASG has also been associated with other terrorist organisations since its founding, most notably with al-Qa’ida and Jemaah Islamiyah.

Links to Australia

Australians are not directly involved in the organisation.

Threats to Australian interests

Westerners—including Australians—feature among the broad range of kidnap targets, primarily due to their potential ransom value.

- In early November 2015, security forces foiled a planned ASG kidnapping attempt targeting an Australian family in Agusan del Sur, north-eastern Mindanao.
- On 5 December 2011, Australian national Warren Richard Rodwell was abducted from his residence in Ipil, western Mindanao. In a January 2013 proof-of-life video of Mr Rodwell uploaded to YouTube, his captors stated he was being held by members of Al-Harakat Al-Islamiyya (ASG) and that money gained from his kidnapping was to be used for future operations. Mr Rodwell was released by his captors in March 2013.

Listed by the United Nations or like-minded countries

The United Nations Security Council ISIL (Da’esh) and al-Qaida Sanctions Committee (formerly the United Nations Security Council Al-Qaida Sanctions Committee) has designated ASG for targeted financial sanctions and an arms embargo since 6 October 2001. It is listed as a proscribed terrorist organisation by the governments of Canada, New Zealand, the United Kingdom and the United States of America.

Engagement in peace or mediation processes

ASG is not involved in any peace or mediation process.

Conclusion

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

In the course of pursuing its objectives, the ASG is known to have committed or threatened actions that:

- cause, or could cause, death, serious harm to persons, serious damage to property, endangered life (other than the life of the person taking the action), or create a serious risk to the health or safety of the public or a section of the public;
- are intended to have those effects;
- are done with the intention of advancing ASG's political, religious or ideological causes;
- are done with the intention of intimidating, the government of one or more foreign countries; and
- are done with the intention of intimidating the public or sections of the public.