

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations

2019

The purpose of the *Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations 2019* (the Regulations) is to specify al-Qa’ida in the Indian Subcontinent for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹ Al-Qa’ida in the Indian Subcontinent is currently specified for this purpose by the *Criminal Code (Terrorist Organisation— Al-Qa’ida in the Indian Subcontinent) Regulation 2016*, which is repealed by the Regulations. Details of the Regulations are set out in Attachment A.

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*, which prescribes offences against humanity and related offences, and dangers to the community and national infrastructure.

Paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code* provides that regulations can specify organisations for the purposes of the definition of ‘terrorist organisation’.

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 subsection 102.1(1), 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.

The Minister for Home Affairs is satisfied on reasonable grounds that al-Qa’ida in the Indian Subcontinent is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. In coming to this position, the Minister for Home Affairs has taken into consideration an unclassified Statement of Reasons provided by the Director-General of Security, as well as advice from the Australian Government Solicitor (AGS). The Statement of Reasons is at Attachment B.

¹ A ‘terrorist organisation’ is defined in subsection 102.1(1) of the *Criminal Code* as:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph.

Effect of the instrument

Division 102 of the *Criminal Code* sets out the following offences relating to terrorist organisations:

- directing the activities of a terrorist organisation
- being a member of a terrorist organisation
- recruiting persons to a terrorist organisation
- receiving training from, providing training to or participating in training with a terrorist organisation
- getting funds to, from or for a terrorist organisation
- providing support to a terrorist organisation, and
- associating with a terrorist organisation.

The Regulations ensure that the offences in Division 102 of the *Criminal Code* continue to apply to conduct relating to al-Qa'ida in the Indian Subcontinent. Regulations specifying al-Qa'ida in the Indian Subcontinent as a terrorist organisation have been in effect since 2016.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 29 November 2019. 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 they take effect.

Consultation

The unclassified Statement of Reasons was prepared by the National Threat Assessment Centre in the Australian Security Intelligence Organisation, in consultation with the Department of Foreign Affairs and Trade and the Department of Home Affairs (Home Affairs). Home Affairs also sought the advice of the AGS to inform the decision of the Minister for Home Affairs.

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. The Minister for Home Affairs wrote to the Leader of the Opposition enclosing the information upon which he was satisfied that al-Qa'ida in the Indian Subcontinent met the legislative criteria for listing.

The *Intergovernmental Agreement on Counter-Terrorism Laws* (June 2004) (the IGA) requires that the Commonwealth Government consult with the governments of the states and territories prior to making regulations specifying an organisation for the purposes of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*. The IGA provides that if a majority of the states and territories object to the making of such a regulation within a timeframe nominated by the Commonwealth, and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

The Minister for Home Affairs wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the states and territories. A majority of the states and territories did not object to the making of the Regulations within the timeframe nominated by the Minister.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations 2019* (the Regulations) specifies al-Qa’ida in the Indian Subcontinent for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.

The object of the Regulations is to identify al-Qa’ida in the Indian Subcontinent as a terrorist organisation under Australian law, and put the organisation and members of the public on notice of that fact. Notification is important to help people avoid engaging in activities which might constitute an offence under Division 102 of the *Criminal Code* in relation to al-Qa’ida in the Indian Subcontinent.

The Regulations, which are part of Australia’s terrorist organisation listing regime, support the application of the offences in Division 102 of the *Criminal Code*, the object of which is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. In particular, the Regulations provide that the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with al-Qa’ida in the Indian Subcontinent.

Terrorist organisations, including al-Qa’ida in the Indian Subcontinent, present a threat to the security of Australia and often seek to harm Australians and our democratic institutions. The statutory definition of a ‘terrorist organisation’ requires that these bodies directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act which includes the causing of serious harm to persons or death and serious damage to property (refer to [Attachment B](#) for details).

Human rights implications

The Regulations promote the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR):

- the inherent right to life in Article 6.

The Regulations limit the following human rights contained in the ICCPR:

- the right to freedom of expression in Article 19, and
- the right to freedom of association in Article 22.

The inherent right to life in Article 6

Article 6 of the ICCPR provides that countries have a duty to take appropriate steps to protect the right to life and to investigate arbitrary or unlawful killings and punish offenders. The Regulations, and the terrorist organisation listing regime more broadly, ensure that the offence provisions in Division 102 of the *Criminal Code* apply to certain conduct in relation to listed terrorist organisations. These offence provisions operate to penalise conduct that presents a significant risk to life, both in Australia and overseas, and, in conjunction with the terrorist organisation listing regime, also act as a deterrent to that conduct. Deterring the conduct, and thereby preventing the risk to life, promotes the inherent right to life expressed in Article 6 of the ICCPR.

The right to freedom of expression in Article 19

Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression. However, Article 19(3) provides that freedom of expression may be limited if it is necessary to achieve a legitimate purpose, including for the protection of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right to freedom of expression to the extent that persons are prohibited from directing the activities of, recruiting for, providing support to or associating with terrorist organisations, including al-Qa'ida in the Indian Subcontinent. The restrictions on freedom of expression are justified on the basis that such conduct could jeopardise the security of Australia, the personal safety of its population and its national interests and the restrictions are reasonable, necessary and proportionate to the objective of protecting Australia's national security.

The right to freedom of association in Article 22

Article 22 of the ICCPR protects the right of all persons to group together voluntarily for a common goal and to form and join an organisation. Article 22(2) provides that this right may be limited for the purpose of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right of freedom of association to prevent people engaging with and participating in terrorist organisations, in this instance al-Qa'ida in the Indian Subcontinent.

The offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* is limited in its application to an organisation that is a listed terrorist organisation under the definition of 'terrorist organisation' in paragraph 102.1(1)(b) of the *Criminal Code*. The offence does not apply if the association is with a close family member and relates to a matter of family or domestic concern, or takes place in the course of practicing a religion in a place used for public religious worship, or the association is only for the purpose of providing humanitarian aid or only for the purpose of providing legal advice or legal representation.

Due to the severity of the danger posed by terrorist organisations, it is reasonable, necessary and proportionate to limit the right of individuals who, by their association with a terrorist organisation, pose a threat to Australians.

General safeguards and accountability mechanisms

Whilst the Regulations may limit the right to freedom of expression and the right to freedom of association with al-Qa'ida in the Indian Subcontinent, the Regulations are subject to the safeguards outlined below. The limits on these rights 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.

The *Criminal Code* provides safeguards and accountability mechanisms requiring prior consultation and enabling review of the Regulations, including the following:

- the Commonwealth must consult with the states and territories in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws* of 25 June 2004, and the Regulations may only be made if a majority of the states and territories do not object to the Regulations within a reasonable time specified by the Commonwealth
- 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 Regulations
- under subsection 102.1(3) the *Criminal Code*, the Regulations 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 Regulations listing the organisation cease 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 Regulations 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 Regulations within the applicable disallowance period, which is 15 sitting days after the Regulations are laid before that House, as provided for in subsection 102.1A(4) of the *Criminal Code*.

Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights. To the extent that the terrorist organisation listing regime, of which the Regulations are part, may also limit human rights, those limitations achieve a legitimate purpose and are reasonable, necessary and proportionate.

Details of the Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations 2019

Section 1 – Name

1. This section provides that the title of the Regulations is the *Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations 2019*.

Section 2 – Commencement

2. This section provides for the commencement of each paragraph in the instrument, as set out in the table.
3. Subsection 2(1) provides that each provision in the instrument, as 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 provide that the Regulations commence on 29 November 2019.
4. The note to subsection 2(1) clarifies that the table only relates to the provisions of this instrument as originally made, and will not be amended to deal with any subsequent amendments to the instrument.
5. Subsection 2(2) provides that the 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 version of these Regulations.

Section 3 – Authority

6. This section provides that the Regulations are made under the *Criminal Code Act 1995*.

Section 4 – Schedules

7. This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule has effect according to its terms.
8. Schedule 1 to the Regulations repeals the whole of the *Criminal Code (Terrorist Organisation—Al-Qa’ida in the Indian Subcontinent) Regulations 2016*.

Section 5 – Terrorist organisation—Al-Qa’ida in the Indian Subcontinent

9. Subsection 5(1) provides that for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as al-Qa’ida in the Indian Subcontinent is specified.

10. The effect of specifying al-Qa'ida in the Indian Subcontinent as a terrorist organisation is to ensure that offences in Subdivision B of Division 102 of the *Criminal Code* that relate to terrorist organisations are able to operate, where the appropriate elements are satisfied, in relation to conduct in connection with al-Qa'ida in the Indian Subcontinent.
11. Subsection 5(2) provides that al-Qa'ida in the Indian Subcontinent is also known by the name AQIS.

Schedule 1— Repeals

12. Clause 1 of Schedule 1 repeals the *Criminal Code (Terrorist Organisation—Al-Qa'ida in the Indian Subcontinent) Regulation 2016*.
13. The *Criminal Code (Terrorist Organisation—Al-Qa'ida in the Indian Subcontinent) Regulation 2016* specifies al-Qa'ida in the Indian Subcontinent 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*. Clause 1 of Schedule 1 ensures there is no duplication where the new Regulations are made before the current Regulation ceases to have effect.

ATTACHMENT B

STATEMENT OF REASONS FOR AL-QA'IDA IN THE INDIAN SUBCONTINENT

Also known as: **AQIS**

This statement is based on publicly available information about al-Qa'ida in the Indian Subcontinent (AQIS). To the Australian Government's knowledge, this information is accurate, reliable and has been corroborated by classified information.

1. Basis for listing a terrorist organisation

Division 102 of the *Criminal Code 1995* provides that for an organisation to be listed as a terrorist organisation, the AFP Minister 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; or
- b) advocates the doing of a terrorist act.

For the purposes of listing a terrorist organisation under the *Criminal Code*, the doing of a terrorist act includes the doing of a specific terrorist act, the doing of more than one terrorist act and the doing of a terrorist act, even if a terrorist act does not occur.

2. Background to this listing

The Australian Government first proscribed AQIS as a terrorist organisation under the Criminal Code with effect from 28 November 2016.

3. Terrorist activity of the organisation

Objectives

AQIS is an al-Qa'ida-affiliated extremist group, established in 2014 with the purpose of advancing al-Qa'ida's ideology in South Asia. The objectives of AQIS are the same as those previously articulated by al-Qa'ida—to prepare Muslims for military jihad against their enemies, to liberate Muslim lands now ruled by non-Muslims, and to revive the Islamic caliphate. In his 2014 announcement of the establishment of AQIS, Ayman al-Zawahiri identified Burma (Myanmar), Bangladesh, and India's regions of Assam, Gujarat and Kashmir as regions where it would operate.

On 6 March 2016, the AQIS media branch, al-Sahad in the Indian Subcontinent, provided a link to the video 'Al-Hadeed News Report'. The video outlined the objectives of AQIS as to conduct attacks on:

- the United States of America (US)
- the Pakistani Military Intelligence and Security agencies
- the Government of Pakistan
- enemies of Islam, and
- blasphemers, atheists and disbelievers.

The objectives were approved by the AQIS Central Shura following instructions from al-Zawahiri.

AQIS has undertaken the following to advance its ideology and achieve its objectives:

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

AQIS members have historically conducted attacks against Pakistani military and security personnel. The attacks have ranged from targeted assassination of senior military and intelligence officials to larger scale attacks using improvised explosive devices resulting in multiple deaths.

There has been one attack reliably attributed to AQIS since it was proscribed in November 2016. On 6 January 2017, two AQIS militants attacked the North Nazimabad Police Complex in Karachi, Pakistan, with a grenade and then fired on traffic police, killing one civilian.

Advocating the doing of terrorist acts

AQIS has publicly advocated the doing of terrorist attacks in order to further its objectives, including through online propaganda designed to radicalise and inspire susceptible individuals to undertake attacks. Public statements where AQIS has advocated terrorist attacks include:

- 15 September 2018: AQIS directly urged the doing of a terrorist act by calling for lone-actor attacks in the West as revenge for perceived insults to Islam, calling on Muslims living in the West 'to kill anyone' indulging in 'blasphemous activities'.
- 24 January 2018: AQIS directly urged the doing of a terrorist act by calling for Muslims to attack the US and liberate Palestine, responding to the US recognising Jerusalem as Israel's capital.
- June 2017: AQIS directly provided instruction on the doing of a terrorist act by releasing a 20-page 'code of conduct' emphasising its allegiance to al-Zawahiri, inviting extremists to wage violent jihad on behalf of AQIS and providing instruction on the selection of targets for terrorist attacks in Afghanistan, Pakistan, India, Myanmar and Bangladesh, including targeting Western interests.

4. Details of the organisation

AQIS was established with the assistance of al-Qa'ida and shares the same anti-Western ideology. Al-Qa'ida leader, Ayman al-Zawahiri, officially announced the existence of AQIS on 3 September 2014, and identified Pakistan-based Asim Umar as its leader.

Leadership

AQIS leader Asim Umar is an Indian national from the northern region of Uttar Pradesh who moved from India to Pakistan in the 1990s. Umar was a Tehrik-e-Taliban Pakistan (TTP) military commander and al-Qa'ida propagandist prior to being named leader of AQIS in September 2014.

AQIS leadership resides in the eastern and southern regions of Afghanistan, and North and South Waziristan, Pakistan.

Membership

AQIS membership was initially drawn from extremist groups in Pakistan, with most members being Pakistani nationals. The exact size and composition of AQIS is unknown.

Recruitment and funding

AQIS established a presence in India in 2015 with the intention of radicalising and recruiting Indian nationals. The leader of AQIS in India, Mohammad Asif, was arrested by Indian authorities in late 2015. Asif said that the recruits from India were transported to Afghanistan for training in weapons, tactics and religious studies. In June 2016, charges were filed against 17 alleged AQIS members in Delhi, India, for conspiracy, recruitment for a terrorist act, and membership of a terrorist organisation.

Links to other terrorist organisations

AQIS has close links with al-Qa'ida core (al-Qa'ida is listed as a terrorist organisation under the *Criminal*

Code), the Afghan Taliban and TTP. In the group's 'code of conduct' released in June 2017, AQIS confirmed its allegiance to al-Zawahiri and ultimately the Taliban's most senior leader, Mullah Haibatullah Akhundzada.

AQIS is also associated with Bangladesh-based extremist group Ansar al-Islam Bangladesh (AIB)—AIB conducted eight killings of secularists and bloggers in Bangladesh between 2014 and 2016, and AQIS has claimed responsibility for each of these attacks.

Links to Australia

There are no known links between AQIS and Australia.

Threats to Australian interests

Australian interests have not been targeted by AQIS—however, the anti-Western ideology of the group and AQIS's willingness to undertake large scale, indiscriminate attacks may result in attacks against Australian interests.

In addition, AQIS specifically mentioned an Australian Navy vessel during the planning of the AQIS operation to take control of a Pakistani Navy Ship in 2014. AQIS noted that the Australian Navy was participating in the patrols of sea routes. Targeting of the Australian Navy vessel was abandoned in favour of easier targets.

Listed by the United Nations or like-minded countries

AQIS is listed as a proscribed terrorist organisation by the government of the US and Canada, and is included in the UK government's listing of al-Qa'ida.

Engagement in peace or mediation processes

AQIS is not engaged in any peace or mediation processes.

5. Conclusion

On the basis of the above information, ASIO assesses that AQIS 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, AQIS is known to have committed or threatened actions that:

- cause, or could cause, death, serious harm to persons, serious damage to property, endanger 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 AQIS'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.