

EXPLANATORY STATEMENT

Select Legislative Instrument No. 128, 2015

Issued by the authority of the Attorney-General

Criminal Code Act 1995

*Criminal Code (Terrorist Organisation— Hamas' Izz al-Din al-Qassam Brigades)
Regulation 2015*

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 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 for a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; and associating with 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 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 results of such conduct) occur in Australia.

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

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (paragraph 102.1(1)(a)); or
- an organisation that is specified by the regulations for the purposes of this paragraph (paragraph 102.1(1)(b)).

Subsection 102.1(20) of the Criminal Code provides that a reference to the doing of a terrorist act includes a reference to the doing of a terrorist act, even if a terrorist act does not occur; a reference to the doing of a specific terrorist act; and a reference to the doing of more than one terrorist act.

The purpose of the *Criminal Code (Terrorist Organisation— Hamas' Izz al-Din al-Qassam Brigades) Regulation 2015* (the Regulation) is to specify Hamas' Izz al-Din al-Qassam Brigades, also known as Ezzedeem Al-Qassam Brigades; and Izz al-Din Al-Qassem Brigades, 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 apply to persons with links to Hamas' Izz al-Din al-Qassam Brigades. 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 a regulation specifying an organisation for the purposes of paragraph (b) of the definition of a ‘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 the Minister is 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 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 (DFAT), and advice from the Australian Government Solicitor (AGS). The Statement of Reasons in respect of Hamas’ Izz al-Din al-Qassam Brigades 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 DFAT, ASIO and AGS. In addition, the Attorney-General wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the States and Territories. The Attorney-General also offered the Leader of the Opposition a briefing in relation to the proposed re-listings.

The Regulation repeals existing Regulation 4U of the *Criminal Code Regulations 2002* which specifies Hamas’ Izz al-Din al-Qassam Brigades, for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Criminal Code. The repeal of existing Regulation 4U ensured that there is no duplication, if the new Regulation was made before the existing Regulation ceased to have effect.

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 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.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulation 2015* (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 Hamas’ Izz al-Din al-Qassam Brigades, and provide support to or associate with, Hamas’ Izz al-Din al-Qassam Brigades.

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 Hamas’ Izz al-Din al-Qassam Brigades, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Hamas’ Izz al-Din al-Qassam Brigades 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 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 Hamas' Izz al-Din al-Qassam Brigades 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 Hamas' Izz al-Din al-Qassam Brigades 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) of 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— Hamas’ Izz al-Din al-Qassam Brigades) Regulation 2015

Section 1 – Name

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulation 2015*.

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*.

Section 4 – Schedules

This schedule amends the *Criminal Code Regulations 2002*.

Section 5 – Terrorist organisation— Hamas’ Izz al-Din al-Qassam Brigades

Subsection (1) provides that for paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Hamas’ Izz al-Din al-Qassam Brigades is specified.

Subsection (2) provides that Hamas’ Izz al-Din al-Qassam Brigades is also known by the following names:

- (a) Ezzedeen Al-Qassam Brigades; and
- (b) Izz al-Din Al-Qassem Brigades.

Schedule 1—Amendments

Schedule 1 provides that regulation 4U of the *Criminal Code Regulations 2002* is repealed. Regulation 4U is the current regulation listing Hamas’ Izz al-Din al-Qassam Brigades 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*. This clause ensured that there was no duplication if the new Regulation was made before the current Regulation ceased to have effect.

Hamas' Izz al-Din al-Qassam Brigades

(Also known as: Ezzedeem Al-Qassam Brigades and Izz al-Din Al-Qassem Brigades)

This statement is based on publicly available information about Hamas' Izz al-Din al-Qassam Brigades. To the Australian Government's knowledge, these details are accurate and reliable and have 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, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.

Details of the organisation

Hamas is a Palestinian Sunni Islamist organisation and political party founded in 1987 during the uprising known as the first intifada. Hamas began as a branch of, and retains an ideological affinity with, the Muslim Brotherhood. Hamas is a multifaceted organisation that maintains extensive social service networks and is largely responsible for the administration and provision of government services, including health, education and security, to Gaza's inhabitants. Despite previous power struggles between Hamas and Fatah, the primary Palestinian authority in the West Bank, the two groups have attempted to establish a unity government in 2014.

Hamas' Izz al-Din al-Qassam Brigades (hereafter referred to as the Brigades) were officially established circa 1991 to provide Hamas with a paramilitary capability. Originally, the Brigades were organised secretly, comprising compartmentalised cells that specialised in terrorist attacks, assassinations and kidnappings inside Israel. The Brigades were forced to develop, at least partially, into a more traditional military unit following Hamas forming government in Gaza in 2007 and the announcement of a unity government with Fatah in 2014¹. The Brigades operate predominantly in Gaza, with limited representation in the West Bank.

Objectives

The Brigades seek to establish a Palestinian Islamist state comprising Gaza, the West Bank and Israel, destroying Israel as a political entity in the process. Due to the disparity in the military capabilities of the Brigades and Israel, the Brigades have adopted terrorist tactics in their efforts to defeat Israel, including indiscriminate rocket attacks, suicide bombings and kidnappings. The Brigades have never demonstrated intent to conduct attacks outside of Israel and the Palestinian Territories or to target interests of countries other than Israel.

¹ The Australian Government does not recognise Hamas as a legitimate government.

Leadership and membership

The size of the Brigades is difficult to determine. According to 2014 estimates, the Brigades have several thousand full-time members and thousands of reservists and trainees. The proportion of members assigned to more standard military and security duties, and those involved in planning terrorist attacks, is unknown.

The Brigades are structured as a distinct and discrete organisation separate from Hamas's political structures. Accordingly, the Brigades operate with a significant degree of independence. The leader of the Brigades is Mohammed Deif, who has held the position since 2002. The Brigades reaffirmed his position in 2015. The Brigades maintain their own website, including an English-language version, which publicises their aims and activities. It is used to claim responsibility for terrorist attacks, praise other groups' terrorist attacks against Israel and announce the deaths of Brigades members killed in Israeli counter-terrorism actions. The Brigades also publish propaganda with the intention of intimidating Israel. In March 2015, a Brigades-linked video released online stated that Israelis are not safe from the Brigades.

Hamas's funding comes from a range of official and private sources. Saudi Arabia and Iran are the largest sources of financial aid. Hamas collects taxes within Gaza and also receives funds through charitable donations. The amount of money allocated to the Brigades is difficult to ascertain.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts

Since their first suicide bombing in 1993, the Brigades are reported to have killed more than 500 people in over 350 separate terrorist attacks. Since 2005, the majority of the Brigade's terrorist activity has comprised small-arms, rocket and mortar fire directed at Israeli military assets and communities in the vicinity of Gaza. These attacks have caused property damage as well as deaths and injuries to military personnel and civilians. Due to the operational losses incurred during Israel's Operation Protective Edge, the Brigades are rebuilding, but still retain the capability to conduct attacks on Israel, primarily through rocket fire and asymmetric tactics.

- Between 8 July and 26 August 2014, the Brigades launched multiple rocket and mortar attacks into Israel from Gaza.
- In 2013, the Brigades launched at least five rockets into Israel from Gaza.
- In June and November 2012, the Brigades launched multiple rocket and mortar attacks into Israel from Gaza.

Directly or indirectly preparing and/or planning terrorist acts

The Brigades' preparation for further conflict with Israel includes the rebuilding of tunnels linking Israel and Gaza, restocking of ammunition and the training of new members.

Directly or indirectly assisting in the doing of terrorist acts

The Brigades control supply lines to Iran, where it sends fighters for military training. These same supply lines are used by Palestinian Islamic Jihad (PIJ) — also a proscribed terrorist organisation under Australia’s Criminal Code—for the procurement of resources. The Brigades are also involved in joint training exercises with PIJ.

Advocating the doing of a terrorist attack

The Brigades encourage Palestinian resistance against Israel and the use of all means possible to resist alleged Israeli oppression and aggression. On 5 November 2014, a Hamas member purportedly conducted a vehicle-ramming attack near the Gush Etzion junction in the West Bank that injured three Israeli soldiers.

The Brigades also praise rudimentary terrorist attacks against Israel not linked to Hamas, including the 18 November 2014 attack during which two Palestinians armed with a gun and meat cleavers attacked the Kehillat Yaakov synagogue in West Jerusalem. During the heightened tensions between Israel and the Palestinian Territories in October and November 2014, the Brigades reaffirmed intent for continued resistance against Israel.

Conclusion

On the basis of the above information, ASIO assesses the Brigades continue to directly and/or indirectly engage in, prepare, plan, assist, foster or advocate the doing of terrorist acts involving threats to life and serious property damage. This assessment is corroborated by information provided by reliable and credible intelligence sources.

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

- cause serious damage to property, or the death of persons or endanger a person’s life;
- are intended to have those effects;
- are done with the intention of advancing the Brigades’ political, religious or ideological causes;
- are done with the intention of coercing or influencing by intimidation the government of a foreign country; and,
- are done with the intention of intimidating the public and sections of the public.

Other relevant information

Level of participation in peace negotiations

The Brigades are not involved in peace negotiations. Hamas has stated it does not object to a truce between resistance groups in Gaza and Israel. However, any truce would have set conditions and a limited timeframe.

Other designations

The governments of the United Kingdom and New Zealand proscribe the Izz al-Din al-Qassam Brigades as a terrorist organisation.

The governments of Canada and the United States proscribe Hamas (including the Izz al-Din al-Qassam Brigades) as a terrorist organisation.

The European Union lists Hamas for the purposes of its anti-terrorism financing measures. Hamas is also included in the Department of Foreign Affairs and Trade's Consolidated List maintained under the *Charter of the United Nations Act 1945*, which implements Australia's obligations under United Nations Security Council Resolution 1373 in relation to countering the financing of terrorism.