

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 130, 2015**

Issued by the authority of the Attorney-General

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation – Palestinian Islamic Jihad) 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 persons to a terrorist organisation; provide training to, receive training from or participate in training with 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.

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 – Palestinian Islamic Jihad) Regulation 2015* (the Regulation) is to Palestinian Islamic Jihad, also known as al-Quds Brigades; Harakat al-Jihad al-Islami fi Filistin; Islamic Jihad; Islamic Jihad Palestine; and Islamic Jihad–Palestine Faction and Islamic Holy War, 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 Palestinian Islamic Jihad. 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 ‘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), as well as advice from the Australian Government Solicitor (AGS). The Statement of Reasons in respect of Palestinian Islamic Jihad 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 4T of the *Criminal Code Regulations 2002* which specifies Palestinian Islamic Jihad for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. The repeal of Regulation 4T ensured that there is no duplication, if the new Regulation was made before the current Regulation ceases.

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 it takes effect.

## Statement of Compatibility with Human Rights

### *Overview*

The *Criminal Code (Terrorist Organisation – Palestinian Islamic Jihad) 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 Palestinian Islamic Jihad, and provide support to or associate with, Palestinian Islamic Jihad.

The offence of association with a terrorist organisation in subsection 102.8 of the Criminal Code 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 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 Palestinian Islamic Jihad, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Palestinian Islamic Jihad 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 Palestinian Islamic Jihad 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 providing for consultation and enabling review of the Regulation specifying Palestinian Islamic Jihad 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) 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 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 and proportionate.

**Palestinian Islamic Jihad**

(Also known as: al-Quds Brigades; Harakat al-Jihad al-Islami fi Filistin; Islamic Jihad; Islamic Jihad Palestine; Islamic Jihad – Palestine Faction and Islamic Holy War)

This statement is based on publicly available information about Palestinian Islamic Jihad. 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**

Palestinian Islamic Jihad (PIJ) is a Sunni Islamist organisation committed to the destruction of the state of Israel. In 1981, Dr Fathi abd al-Aziz Shaqaqi and Shayk Abd al-Aziz Awda founded the group in Gaza. Both were originally members of the Egyptian Muslim Brotherhood. Believing the Muslim Brotherhood to be too moderate, the two created PIJ as a radical militant alternative focused on the liberation of Palestine.

PIJ comprises a leadership council and a military wing called the al-Quds Brigades, which claims responsibility for PIJ attacks. Statements are regularly disseminated via the al-Quds Brigades-run website or PIJ-affiliated media outlets. Because PIJ focuses almost exclusively on militant activities that further its objectives, the organisation as a whole and the al-Quds Brigades are essentially indistinguishable.

Despite being a Sunni group, Iran's Islamic Revolution inspired the development of PIJ. PIJ remains ideologically supportive of, and maintains close ties with, Iran's Islamic Revolutionary Guards Corps and Hizballah. PIJ's main source of funding is Iran, and the group has also received donations from Syria and the Palestinian community.

**Objectives**

PIJ's goal is the establishment of a sovereign Islamic state within the geographic borders of the pre-1948 British-mandated Palestine. It promotes the military destruction of Israel as the only viable means to attain this goal.

**Leadership and membership**

The current leader of PIJ is Dr Ramadan Abdullah Shallah, who took over from Fathi abd al-Aziz Shaqaqi in 1995 after the latter's death. Shallah is based in Damascus, from where he and his leadership council coordinate fundraising and procurement for the al-Quds Brigades in Gaza, Lebanon and the West Bank. The General Bureau consists of eight persons and forms PIJ's leadership council.

PIJ recruits the majority of its members from Palestinian communities in Gaza and the West Bank. It is a secretive organisation and the exact size of its membership is unknown. Although PIJ membership, including its political leadership in Damascus and militants in the Palestinian Territories, is likely less than 1000 members, PIJ has previously claimed membership in the thousands.

**Terrorist activity of the organisation**

*Directly or indirectly engaged in the doing of terrorist acts*

PIJ claimed responsibility for more than 30 suicide bombings between 1987 and 2006. Since then, the majority of its attacks have featured indiscriminate indirect fire, seeking to maximise casualties. As an example, in November 2012 PIJ launched multiple rocket and mortar attacks into Israel from Gaza.

PIJ increased the intensity of its rocket and mortar fire from Gaza for the duration of Israel's Operation Protective Edge in July/August 2014. Although PIJ suffered losses during this conflict, it still retains the capability to attack Israel, primarily through indiscriminate rocket fire. PIJ also seeks to renew its asymmetric warfare capabilities, and has been linked to rudimentary attacks using basic weapons against Israeli targets. As an example, on 10 November 2014 a Palestinian PIJ member drove his car into a group of civilians waiting at a bus stop in the Gush Etzion settlement south of Jerusalem. The man then exited the vehicle, killing one and wounding two others with a knife.

#### *Directly or indirectly preparing and/or planning terrorist acts*

PIJ participates in joint training exercises with Hamas's Izz al-Din al-Qassam Brigades—a proscribed terrorist organisation—to enhance its capability and has made efforts to increase ties with the group. Similar to Hamas's Brigades, PIJ extensively uses tunnel networks to move materiel and launch attacks.

#### *Advocating the doing of a terrorist attack*

PIJ has encouraged Palestinians to use all available means to attack Israel, particularly around Jerusalem. PIJ has also praised, and called on its supporters to conduct attacks against Israel. Supporters are encouraged to consider the type of attacks that most affect Israel, including highlighting the success of martyrdom operations and the benefit of kidnapping to secure hostages that can be exchanged for imprisoned PIJ members. PIJ has also promoted the damaging psychological effect that simple tactics, including arson and knife attacks, have on Israelis.

PIJ praised the 18 November 2014 attack in which two Palestinians armed with a gun and meat cleavers attacked the Kehillat Yaakov synagogue in West Jerusalem. PIJ also praised Hizballah's 28 January 2015 anti-tank missile attack on an Israeli military convoy on the Israel–Lebanon border, stating that PIJ was ready to join any offensive against Israel.

### **Conclusion**

On the basis of the above information, ASIO assesses that PIJ continues to directly and/or indirectly engage in, preparing, planning, assisting in, fostering or advocating the doing of terrorist acts. This assessment is corroborated by information provided by reliable and credible intelligence sources. In the course of pursuing its objectives, PIJ is 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 affects;
- are done with the intention of advancing PIJ's 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*

PIJ refuses to participate in the political process and rejects the possibility of a negotiated settlement to the ongoing Israel/Palestine conflict.

#### *Other designations*

The governments of Canada, New Zealand, the United Kingdom and the United States proscribe PIJ as a terrorist organisation.

The European Union lists PIJ for the purposes of its anti-terrorism financing measures. PIJ 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 Council Resolution 1373 in relation to countering the financing of terrorism.