

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Home Affairs

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2018*

The purpose of the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2018* (the Regulations) is to specify Palestinian Islamic Jihad for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.<sup>1</sup> Palestinian Islamic Jihad is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulation 2015*, which is repealed by the Regulations.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*.

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 Palestinian Islamic Jihad 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](#).

### *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

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<sup>1</sup> 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.

- 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 Palestinian Islamic Jihad. Regulations specifying Palestinian Islamic Jihad as a terrorist organisation have been in effect since 2004.

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

The Regulations commence on the day after it is registered. 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 Palestinian Islamic Jihad 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 time frame 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 time frame nominated by the Minister.

## Statement of Compatibility with Human Rights

### *Overview*

The *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2018* (the Regulations) specifies Palestinian Islamic Jihad 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 Palestinian Islamic Jihad 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 Palestinian Islamic Jihad.

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 Palestinian Islamic Jihad.

Terrorist organisations, including Palestinian Islamic Jihad, 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 Palestinian Islamic Jihad. 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 Palestinian Islamic Jihad.

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 Palestinian Islamic Jihad, 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) of 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—Palestinian Islamic Jihad) Regulations 2018**

**Section 1 – Name**

This section would provide that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2018*.

**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 Regulations commence the day after the instrument is registered.

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 these Regulations. Column 3 is empty at the time of making the instrument.

**Section 3 – Authority**

This section would provide that the Regulations are made under the *Criminal Code Act 1995*.

**Section 4 – Schedules**

This section would provide each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedule has effect according to its terms. Schedule 1 to the instrument would repeal the whole of the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulation 2015*.

**Section 5 – Terrorist organisation — Palestinian Islamic Jihad**

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 Palestinian Islamic Jihad is specified.

Subsection (2) would provide that Palestinian Islamic Jihad is also known by the following names:

- a) al-Quds Brigades;
- b) Harakat al Jihad al-Islami fi Filistin;

- c) Islamic Jihad;
- d) Islamic Jihad Palestine;
- e) Islamic Jihad–Palestine Faction and Islamic Holy War;
- f) PIJ;
- g) Saraya al-Quds;
- h) The Jerusalem Brigades.

#### Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulation 2015* is repealed.

The *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulation 2015* specifies Palestinian Islamic Jihad 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 Regulations are made before the current Regulation ceases to have effect.



## ATTACHMENT B

### STATEMENT OF REASONS FOR PALESTINIAN ISLAMIC JIHAD

Also known as: PIJ; al-Quds Brigades; Harakat al-Jihad al-Islami fi Filistin; Islamic Jihad; Islamic Jihad Palestine; Islamic Jihad—Palestine Faction and Islamic Holy War; The Jerusalem Brigades; Saraya al-Quds

This statement is based on publicly available information about Palestinian Islamic Jihad. 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* provides that for an organisation to be listed as a terrorist organisation, the Minister for Home Affairs 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 Palestinian Islamic Jihad (PIJ) as a terrorist organisation under the *Criminal Code* on 3 May 2004. It was re-listed on 5 June 2005, 7 October 2005, 8 September 2007, 8 September 2009, 18 August 2012, and 11 August 2015.

#### **3. Terrorist activity of the organisation**

##### Objectives

PIJ's goal is the establishment of a sovereign Islamic state within the historic borders of Palestine. PIJ promotes the military destruction of Israel as the only viable means to attain this goal, and rejects a two-state solution.

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

During the second intifada—between 2000 and 2005—PIJ is reported to have conducted as many as 60 attacks against Israeli interests, including suicide attacks, bus bombings, and rocket fire. Since then, PIJ attacks against Israeli interests have regularly featured indirect rocket fire.

- On 12 March 2018, Israeli security forces arrested 10 members of PIJ for their involvement in a plot to fire a missile at an Israeli naval ship, and abduct a number of Israeli sailors.

PIJ maintains a tunnel network to launch and facilitate attacks; smuggle goods and ammunition

across borders; and, enable training.

- On 3 November 2017, PIJ announced that 10 members had been killed when Israel destroyed a PIJ occupied 'attack tunnel' which crossed into Israeli territory.
- On 1 December 2015, the Palestinian Authority arrested six members of a PIJ cell in the West Bank, for transporting improvised explosive devices, grenades and firearms, intended for an attack against Israeli soldiers.

#### Advocating the doing of terrorist acts

PIJ encourages Palestinians to attack Israel and to celebrate violent resistance against Israel; and advocates the use of terrorist tactics in its public messaging. PIJ maintains an Arabic website, which is used to celebrate Jihadist operations, memorialise martyrs, and promote anti-Israeli propaganda.

- On 9 January 2018, an Israeli Rabbi was shot and injured in a drive by shooting west of Nablus. PIJ praised the attack stating that the incident illustrated the continuity and vitality of the resistance against Israel, and that the Palestinian people will not abandon their cause.
- On 26 September 2017, an Israeli border police officer, and two security guards were killed and one was injured when an individual opened fire on the group near Jerusalem. Following the attack, PIJ released a statement praising the attack stating the incident was a rebuke to those who support Israel.

#### **4. Details of the organisation**

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. While both were originally members of the Muslim Brotherhood, they believed the group was too moderate and created PIJ as a radical militant alternative focused on the liberation of Palestine.

PIJ has a military wing, the al-Quds Brigades, which undertakes attacks, and also publishes claims of responsibility for attacks on behalf of PIJ. Al-Quds Brigades statements are 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 indistinguishable.

Despite being a Sunni group, PIJ remains ideologically supportive of, and maintains close ties with, Iran's Islamic Revolutionary Guards Corps and Lebanese Hizballah. Syria has historically provided support and sanctuary to PIJ—and the group's leadership is likely currently based in Damascus.

#### Leadership

The Secretary General of PIJ is Dr Ramadan Abdullah Shallah—who took over from Fathi abd al-Aziz Shaqaqi in 1995 after Shaqaqi's death. Shallah oversees the PIJ leadership council, which is responsible for directing PIJ operations via regional commands.

#### Membership

The exact size of PIJ's membership is unclear with estimates ranging from less than a thousand, up to 8 000 members. PIJ recruits the majority of its members from Palestinian communities in Gaza and the West Bank.

### Recruitment and funding

Despite being a Sunni group, PIJ supports, and receives the majority of its funding from Iran.

Due to its secretive nature, PIJ's current approach to recruitment is unclear; however, PIJ has previously used targeted selection and recruitment strategies. This has included recruitment of students for protest activities; suicide bombers including women for attacks; and children to ensure ongoing support for the Palestinian resistance into the next generation.

### Links to other terrorist organisations

PIJ has engaged in operations, including the shared use of tunnel networks, with Hamas' Izz al-Din Al-Qassam Brigades, a proscribed terrorist organisation.

### Links to Australia

There are no known direct links between PIJ and Australia.

### Threats to Australian interests

PIJ has not made statements specifically threatening Australians or Australian interests.

### Listed by the United Nations or like-minded countries

The governments of Canada, the United States, the United Kingdom and New Zealand 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 Security Council Resolution 1373 in relation to countering the financing of terrorism.

### Engagement in peace or mediation processes

While PIJ leadership has publicly committed to maintaining a ceasefire brokered with Hamas and Israel in 2014; all parties are understood to have breached this ceasefire in the intervening period. PIJ is not known to have engaged further in peace or mediation processes.

## **5. Conclusion**

On the basis of the above information, ASIO assesses that Palestinian Islamic Jihad 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.

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

- a) 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;

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|  | <ul style="list-style-type: none"><li>b) are intended to have those effects;</li><li>c) are done with the intention of advancing Palestinian Islamic Jihad's political, religious or ideological causes;</li><li>d) are done with the intention of intimidating the government of one or more foreign countries; and</li><li>e) are done with the intention of intimidating the public or sections of the public.</li></ul> |
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