

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

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

Regulations 2018

The purpose of the *Criminal Code (Terrorist Organisation— Hamas' Izz al-Din al-Qassam Brigades) Regulations 2018* (the Regulations) is to specify 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*.¹ Hamas' Izz al-Din al-Qassam Brigades is currently specified for this purpose by the *Criminal Code (Terrorist Organisation— Hamas' Izz al-Din al-Qassam Brigades) Regulation 2015*, which is repealed by the Regulations.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 Hamas' Izz al-Din al-Qassam Brigades 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 Hamas' Izz al-Din al-Qassam Brigades. Regulations specifying Hamas' Izz al-Din al-Qassam Brigades as a terrorist organisation have been in effect since 2003.

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 Hamas' Izz al-Din al-Qassam Brigades 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— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2018* (the Regulations) 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 object of the Regulations is to identify Hamas’ Izz al-Din al-Qassam Brigades 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 Hamas’ Izz al-Din al-Qassam Brigades.

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 Hamas’ Izz al-Din al-Qassam Brigades.

Terrorist organisations, including Hamas’ Izz al-Din al-Qassam Brigades, 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 Hamas' Izz al-Din al-Qassam Brigades. 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 Hamas' Izz al-Din al-Qassam Brigades.

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 Hamas' Izz al-Din al-Qassam Brigades, 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—*Hamas’ Izz al-Din al-Qassam Brigades*) Regulations 2018

Section 1 – Name

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

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

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 *Hamas’ Izz al-Din al-Qassam Brigades* is specified.

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

- a) Ezzedeen Al-Qassam Brigades;

b) Izz al-Din Al-Qassem Brigades.

Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulation 2015* is repealed.

The *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulation 2015* specifies 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*. 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 HAMAS' IZZ AL-DIN AL-QASSAM BRIGADES

Also known as: Ezzedeen 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, 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 Hamas' Izz al-Din al-Qassam Brigades as a terrorist organisation under the *Criminal Code* on 9 November 2003. 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

The Izz al-Din al-Qassam Brigades (hereafter referred to as the Brigades) were established to provide Hamas with a paramilitary capability. The Brigades undertake military activity on behalf of Hamas, and seek to establish a Palestinian Islamist state comprising Gaza, the West Bank and Israel—destroying Israel as a political entity in the process. The Brigades have adopted terrorist tactics in their efforts to defeat Israel, including indiscriminate rocket attacks, suicide bombings and kidnappings. Accordingly, organised terrorist activities associated with Hamas can be reliably attributed to the Brigades, and lone-actor terrorist activity is regularly praised by the Brigades.

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

Since 2005, the majority of the Brigades' activity has consisted of small-arms, rocket and mortar fire at Israel and communities in the vicinity of Gaza. These attacks have caused property damage, as well as deaths and injuries to both military personnel and civilians.

- In February 2018, the Brigades conducted almost daily missile tests. Israel reportedly believed these missile drills were conducted in an effort to increase the efficiency, and improve the range of Brigades' missile capability.

- On 18 April 2016, an individual detonated an improvised explosive device on a bus in Jerusalem injuring 20 people. The attacker was the only fatality. The Brigades claimed the attacker as a member, and praised the attack.

The Brigades' preparations for further attacks against Israel include: rebuilding and maintaining its cross-border tunnel network used to attack Israel; accumulating ammunition; training new members; and ongoing financial support to martyred members' families.

- In November 2017, Israeli forces destroyed an 'attack tunnel' which crossed into Israeli territory. At least 12 people were killed in the incident, including two Brigades members.
- Between January and July 2016, at least 17 people, mostly Brigades members, were killed in a number of tunnel collapses, the cause of which remain unknown.

Advocating the doing of terrorist acts

While the Brigades rarely claim attacks, they will encourage, praise, and celebrate Palestinian resistance against Israel, including the use of terrorist tactics. The Brigades regularly use channels, such as their website to issue official communiqués on their militant activities, publish anti-Israeli propaganda, disseminate claims of Israeli human rights violations, and commemorate martyred Brigade members with statements reaffirming their commitment to resisting Israel.

- On 9 January 2018, an Israeli Rabbi was shot and killed near Nablus in a drive-by shooting. The Brigades issued a statement praising the event and the martyrdom of the attacker and stated that what Israel 'feared is coming'. The Brigades described the attacker's actions as a model to be emulated in the fight against Israel.

4. 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.

The Brigades were officially established circa 1991 to provide Hamas with a paramilitary capability specialising in terrorist attacks, assassinations and kidnappings inside Israel. The Brigades are structured as a distinct military wing separate from Hamas's other structures, which include its Political Bureau and security agencies. Accordingly, the Brigades operate with a significant degree of independence in their decision making. Historically, the Brigades have predominantly operated in Gaza, with limited representation in the West Bank.

The Brigades maintain their own website, including an English-language version, which publicises their aims and activities. It is used to commemorate events, condemn perceived Israeli crimes, praise anti-Israel protest and announce the death of Brigade members killed in Israeli counter-terrorism actions.

The Brigades have not demonstrated intent to conduct attacks outside of Israel and the Palestinian Territories, or to target interests of countries other than Israel. However, the founder of Hamas, Sheikh Yassin, has stated the Brigades act against the Zionist enemy wherever it may be.

Leadership

The leader of the Brigades, Mohammed Deif, has held the position since 2002. Deif has been described by Israeli media as Israel's most wanted man.

Membership

The size of the Brigades is difficult to determine. The Brigades restrict knowledge of membership numbers to their leadership; however, estimates range from several thousand to 27 000 members, reservists and trainees. The proportion of members assigned to more standard military and security duties, and those involved in planning terrorist attacks is unknown.

Recruitment and funding

The amount of money allocated to the Brigades by Hamas is difficult to ascertain. While Iran is known to fund the Brigades, Hamas's funding comes from a range of official and private sources including states, corporations, individuals, and charities. As at February 2018, Hamas continued to collect taxes within Gaza.

Links to other terrorist organisations

The Brigades have been known to engage and operate with other terrorist organisations, including Hizballah's External Security Organisation and Palestinian Islamic Jihad's Al-Quds Force.

Links to Australia

There are no known direct links between the Brigades and Australia.

Threats to Australian interests

No Australians have been killed in attacks by the Brigades, nor has the organisation specifically mentioned Australians or Australian interests as a target.

Listed by the United Nations or like-minded countries

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.

Engagement in peace or mediation processes

The Brigades are not involved in peace negotiations.

In 2017, Hamas engaged in reconciliation negotiations with its rivals, the Fatah-led Palestinian Authority. This included a 12 October 2017 agreement to restore Palestinian Authority control to the

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| | Gaza strip; however, it did not address the future of the Brigades, which, as of February 2018, refused to disarm. |
| 5. | <p>Conclusion</p> <p>On the basis of the above information, ASIO assesses that Hamas' Izz al-Din al-Qassam Brigades continue 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.</p> <p>In the course of pursuing its objectives, the Hamas' Izz al-Din al-Qassam Brigades is known to have committed or threatened actions that:</p> <ul style="list-style-type: none">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;b) are intended to have those effects;c) are done with the intention of advancing the Hamas' Izz al-Din al-Qassam Brigades' political, religious or ideological causes;d) are done with the intention of intimidating the government of one or more foreign countries; ande) are done with the intention of intimidating the public or sections of the public. |