

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 2021*

The purpose of the *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2021* (the Regulations) is to specify the organisation known as 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

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 for Home Affairs 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 the organisation Hamas’ Izz al-Din al-Qassam Brigades is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. In coming to this position, the Minister has taken into consideration unclassified information (the Statement of Reasons) provided by the Department of Home Affairs ([Attachment C](#)).

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 Part 5.3 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 Part 5.3 of the *Criminal Code* apply to conduct relating to Hamas' Izz al-Din al-Qassam Brigades.

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

The Regulations commence on 4 August 2021. 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.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

Further details of the Regulations are set out in [Attachment B](#).

Consultation

The Department of Home Affairs sought advice from the Australian Government Solicitor (AGS) in relation to the unclassified information (the Statement of Reasons) at [Attachment C](#).

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 she was satisfied that Hamas’ Izz al-Din al-Qassam Brigades meets 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 paragraph (b) 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

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2021

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2021* (the Regulations) 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*.

The object of the Regulations is to specify 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 that might constitute an offence under Division 102 of Part 5.3 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 Part 5.3 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 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 as a listed terrorist organisation.

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 an organisation directly or indirectly engages in, prepares, plans, assists in or fosters the doing of a terrorist act or, in relation to a listed terrorist organisation, that the organisation advocates the doing of a terrorist act.

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

Under Article 6 of the ICCPR, 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. Detering 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 in the House of Representatives 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 they take 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 being 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 15 sitting days after the Regulations are laid before that House, as provided for in section 42 of the *Legislation Act 2003*, and noting that this period may be extended by operation of subsection 102.1A(4) of the *Criminal Code* if the Parliamentary Joint Committee on Intelligence and Security reviews the Regulations and tables its report during the applicable disallowance period for that House.

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 are for a legitimate purpose and are reasonable, necessary and proportionate.

The Hon Karen Andrews MP
Minister for Home Affairs

Details of the Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2021

Section 1 – Name

1. This section provides that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2021*.

Section 2 – Commencement

2. This section provides for the commencement of each provision in the proposed Regulations, as set out in the table.
3. Subsection 2(1) provides that each provision in the proposed Regulations, 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 proposed Regulations commence in their entirety on 4 August 2021.
4. The note to subsection 2(1) clarifies that the table only relates to the provisions of the proposed Regulations as originally made, and will not be amended to deal with any subsequent amendments of the instrument.
5. Subsection 2(2) provides that the information in column 3 of the table is not part of the proposed Regulations. It is designed to assist readers of the proposed Regulations.

Section 3 – Authority

6. This section provides that the proposed 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 the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule to the Regulations has effect according to its terms.
8. Schedule 1 to the Regulations repeals the whole of the *Criminal Code (Terrorist Organisation— Hamas’ Izz al-Din al-Qassam Brigades) Regulations 2018*.

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

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

10. The effect of specifying Hamas' Izz al-Din al-Qassam Brigades as a terrorist organisation is to ensure that offences in Subdivision B of Division 102 of Part 5.3 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 Hamas' Izz al-Din al-Qassam Brigades.
11. Subsection 5(2) provides a list of names by which the organisation Hamas' Izz al-Din al-Qassam Brigades is also known:
 - (a) Ezzedeem Al-Qassam Brigades (paragraph (a)), and
 - (b) Izz al-Din Al-Qassem Brigades (paragraph (b)).

Schedule 1 — Repeals

12. Item 1 of Schedule 1 to the Regulations repeals the *Criminal Code (Terrorist Organisation— Hamas' Izz al-Din al-Qassam Brigades) Regulations 2018* (the repealed Regulations).
13. Subsection 102.1(3) of the *Criminal Code* provides that the repealed Regulations cease to have effect on 4 August 2021, being the third anniversary of the day on which they took effect. While the repealed Regulations cease to have effect on this date, the repeal provides clarity and ensures there is no duplication if the proposed Regulations were made before the repealed Regulations cease to have effect.

Statement of Reasons

Listing of Hamas' Izz al-Din al-Qassam Brigades as a terrorist organisation under the *Criminal Code Act 1995*

This Statement of Reasons 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 where available.

Legislative basis for listing a terrorist organisation

Division 102 of the *Criminal Code Act 1995* (the *Criminal Code*) provides that for an organisation to be listed as a terrorist organisation, the AFP Minister (the Minister for Home Affairs) 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.

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.

Background to this listing

The Australian Government first listed 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, 11 August 2015 and 4 August 2018.

Details of the organisation

Name of the organisation

Hamas' Izz al-Din al-Qassam Brigades

Known aliases

- Ezzedeen Al-Qassam Brigades
- Izz al-Din Al-Qassem Brigades

Organisational overview and objectives

The Izz al-Din al-Qassam Brigades (the Brigades) were officially established in 1991 as the paramilitary wing of Hamas, an ideologically and religiously motivated violent extremist organisation and political party, which fuses Palestinian nationalist and Sunni Islamist objectives. In recent years, Hamas has prioritised its nationalist orientation—probably due to political pragmatism where an inflexible adherence to religious principles is seen as detrimental to the group's political objectives.

Hamas' overarching goal is to 'liberate Palestine' by establishing an independent Palestinian state—comprising Gaza, the West Bank and Israel—guided by Islamic principles and destroying Israel as a political entity in the process. Islam is Hamas' 'frame of reference', the lens through which its 'principles, objectives and means' are determined. Hamas supports the strategy of armed resistance in pursuit of its goals.

The Brigades undertake military activity on behalf of Hamas and have adopted terrorist tactics in their efforts to defeat Israel, including indiscriminate rocket attacks, suicide bombings and kidnappings against Israeli military and civilian targets. Organised terrorist activities associated with Hamas can be reliably attributed to the Brigades.

The Brigades exist within the overall organisational structure of Hamas, subordinate to its political leadership, but structured as a distinct military wing. While decisions of the political leadership probably take precedence, the Brigades operate with a significant degree of independence and are unlikely to seek approval from the political leadership for operational activities. Historically, the Brigades have predominantly operated in Gaza, with limited representation in the West Bank.

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. The Brigades' website describe its operations as limited to within the borders of historic Palestine. However, the founder of Hamas, Sheikh Yassin, has stated the Brigades act against the Zionist enemy wherever it may be.

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

Organisation history

Hamas itself was founded in 1987 during the first intifada. It began as a branch of, and retains an ideological affinity with, the Muslim Brotherhood. Since the 2006 Palestinian legislative election, Hamas has been the governing body in Gaza, largely responsible for the administration and provision of government services, including health, education and security to Gaza's inhabitants.

Leadership

The leader of the Brigades, Mohammed Deif, has held the position since 2002. Deif has survived a number of assassination attempts by Israel and has been described by Israeli media as Israel's most wanted man. Deif's deputy, Marwan Issa, serves as the Brigades' representative in Hamas' political bureau.

Membership and recruitment

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 30,000 men. The proportion of members assigned to more standard military and security duties, and those involved in planning terrorist attacks is unknown.

Financing

The amount of money allocated to the Brigades by Hamas is difficult to ascertain. While Iran is known to fund the Brigades, Hamas' funding comes from a range of official and private sources including states, corporations, individuals, and charities. As at April 2021, Hamas has continued to collect taxes within Gaza.

Links to other terrorist organisations

The Brigades have been known to engage and operate with other violent extremist organisations. This includes coordinating operations with listed terrorist organisation Palestinian Islamic Jihad (PIJ).

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

Since 2005, the majority of the Brigades' activities have 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 Israel military personnel and civilians.

The following activities are reliably attributed to the Brigades:

- From 10-21 May 2021, Palestinian militants, including from the Brigades, launched over 4,000 rockets into Israel from Gaza. The Brigades' official spokesperson claimed its responsibility for multiple strikes against Israel during this period.
- On 29 December 2020, Palestinian militant groups, including the Brigades, launched rockets into the Mediterranean Sea off Gaza during joint military drills. According to an official Brigades statement, the exercises aimed to simulate expected threats posed by Israel and to develop the capability of Palestinian resistance fighters for conflict.
- Throughout August 2020, Palestinian militants in Gaza launched hundreds of incendiary and explosive balloons and at least 16 rockets into Israel before a ceasefire between Israel and Hamas was reached on 31 August. The Brigades probably supported some of these attacks.
- From 1-2 July 2020, the Brigades fired 24 rockets and 20 large-calibre mortars towards the sea from Gaza. An anonymous Hamas official told media that Hamas' rocket tests aim to improve its military capabilities to counter any Israeli plan to attack the Palestinian people.
- On 6 May 2019, the Brigades spokesperson posted on social media that the Brigades had 'succeeded in overcoming the so-called Iron Dome by adopting the tactic of firing dozens of missiles in one single burst' which caused 'great losses and destruction to the enemy'. The Israel Defense Forces (IDF) confirmed Hamas and PIJ had repeatedly fired at a specific location, although few rockets had penetrated the system. At least 690 projectiles were fired in total.
- On 30 May 2018, the Brigades and PIJ issued an official joint statement claiming their responsibility for 'targeting occupation settlements and military sites near Gaza Strip with tens of projectiles and mortars'.

The firing of rockets from Gaza into Israel, during the escalation of violence in April 2021, can be reasonably attributed to the Brigades as well as PIJ.

On the basis of these examples, the Brigades is assessed as responsible for directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of terrorist acts.

Other considerations

Links to Australia and threats to Australian interests

There are no known direct links between the Brigades and Australia. The Brigades have not made statements specifically threatening Australians or Australian interests. However, Australians could be incidentally harmed in attacks.

On 9 August 2001, an Australian-American dual national was incidentally killed in the Sbarro pizzeria suicide bombing in Jerusalem, attributed to the Brigades.

Listings by likeminded countries or the United Nations

The governments of the United Kingdom and New Zealand proscribe the Brigades as a terrorist organisation. The governments of Canada and the United States proscribe Hamas (including the Brigades) as a terrorist organisation.

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. The European Union lists Hamas for the purposes of its anti-terrorism financing measures.

Engagement in peace or mediation processes

The Brigades agreed to a ceasefire with Israel following the May 2021 escalation in the Israeli-Palestinian conflict involving the firing of rockets from Gaza into Israel.

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 Gaza strip; however, it did not address the future of the Brigades which, as of June 2021, have not disarmed. Hamas has been involved in other ceasefire agreements, including in August 2020. Recently, Hamas has engaged in reconciliation negotiations with Fatah.

Conclusion

On the basis of the information above, the Australian Government assesses that the Hamas Brigades are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts.