

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2021

The purpose of the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) Regulations 2021* (the Regulations) is to specify the organisation known as Palestinian Islamic Jihad 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 Palestinian Islamic Jihad 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 Palestinian Islamic Jihad.

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 Palestinian Islamic Jihad 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—Palestinian Islamic Jihad) 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—Palestinian Islamic Jihad) Regulations 2021* (the Regulations) 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*.

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

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 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. 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 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—Palestinian Islamic Jihad) Regulations 2021

Section 1 – Name

1. This section provides that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) 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—Palestinian Islamic Jihad) Regulations 2018*.

Section 5 – Terrorist organisation—Palestinian Islamic Jihad

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 Palestinian Islamic Jihad is specified.

10. The effect of specifying Palestinian Islamic Jihad 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 Palestinian Islamic Jihad.
11. Subsection 5(2) provides a list of names by which the organisation Palestinian Islamic Jihad is also known:
 - (a) Al-Quds Brigades (paragraph (a))
 - (b) Harakat al-Jihad al-Islami fi Filistin (paragraph (b))
 - (c) Islamic Jihad (paragraph (c))
 - (d) Islamic Jihad Palestine (paragraph (d))
 - (e) Islamic Jihad—Palestine Faction and Islamic Holy War (paragraph (e))
 - (f) PIJ (paragraph (f))
 - (g) Saraya al-Quds (paragraph (g)), and
 - (h) The Jerusalem Brigades (paragraph (h)).

Schedule 1 — Repeals

12. Item 1 of Schedule 1 to the Regulations repeals the *Criminal Code (Terrorist Organisation—Palestinian Islamic Jihad) 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 Palestinian Islamic Jihad as a terrorist organisation under the *Criminal Code Act 1995*

This Statement of Reasons 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 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

Palestinian Islamic Jihad was first listed as a terrorist organisation under the *Criminal Code* on 3 May 2004. Palestinian Islamic Jihad 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

Palestinian Islamic Jihad

Known aliases

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

Organisational overview and objectives

Palestinian Islamic Jihad is a religiously and ideologically motivated violent extremist organisation. Palestinian Islamic Jihad's ideology fuses Sunni Islamic and Palestinian nationalist objectives, which are intertwined and not easily distinguishable. Ultimately, Palestinian Islamic Jihad's goal is the

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

Palestinian Islamic Jihad focuses almost exclusively on militant activities that further its objectives. As such, Palestinian Islamic Jihad's military wing, the al-Quds Brigades, and the organisation as a whole are indistinguishable. The al-Quds Brigades claim responsibility for attacks on behalf of Palestinian Islamic Jihad, and its statements are disseminated via the al-Quds Brigades-run website or Palestinian Islamic Jihad-affiliated media outlets.

Palestinian Islamic Jihad primarily operates in Gaza, but has offices elsewhere in the Middle East, including in Syria and Lebanon.

Leadership

Palestinian Islamic Jihad was founded in Gaza in 1981 by Dr Fathi abd al-Aziz Shaqaqi and Shayk Abd al-Aziz Awda. While both were originally members of the Muslim Brotherhood—a transnational Sunni organisation—they believed the group was too moderate and created Palestinian Islamic Jihad as a radical militant alternative focused on the liberation of Palestine.

The current Secretary-General of Palestinian Islamic Jihad is Ziyad al-Nakhleh—who took over from Dr Ramadan Abdullah Shallah in 2018 after Shallah's hospitalisation. Nakhleh oversees Palestinian Islamic Jihad's leadership council, which is responsible for directing Palestinian Islamic Jihad operations via regional commands.

Membership and recruitment

The exact size of Palestinian Islamic Jihad's membership is unclear, with estimates ranging from less than a thousand, up to 8,000 members.

Due to its secretive nature, Palestinian Islamic Jihad's current approach to recruitment is unclear; however, Palestinian Islamic Jihad 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.

Financing

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

Links to other terrorist organisations

Despite being a Sunni group, Palestinian Islamic Jihad remains ideologically supportive of, and maintains close ties with Hizballah, whose External Security Organisation is a listed terrorist organisation under the *Criminal Code*.

Palestinian Islamic Jihad has engaged in operations, including shared use of tunnel networks, with Hamas' Izz al-Din Al-Qassam Brigades (Hamas' Brigades), which is a listed terrorist organisation under the *Criminal Code*.

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

Palestinian Islamic Jihad continues to conduct attacks and engage in attack planning against Israel, and is assessed as responsible or can be reasonably assessed as responsible for the following terrorist attacks and actions:

- From 10-21 May 2021, Palestinian militants, including from Palestinian Islamic Jihad, launched over 4,000 rockets into Israel from Gaza. Palestinian Islamic Jihad's al-Quds

Brigades have publicly claimed responsibility for launching rockets, mortar shells and rocket-propelled grenades against Israel during this period.

- In March 2021, Palestinian Islamic Jihad published a video showing its members preparing to fire rockets. This coincided with the launch of a rocket towards Be'er Sheva, Israel around the time Israeli Prime Minister, Benjamin Netanyahu, was scheduled to visit the area.
- On 24 August 2020, four Palestinian Islamic Jihad members were killed in an apparent bomb-making incident at an al-Quds Brigades compound in Gaza. Palestinian Islamic Jihad announced that its fighters were killed during 'preparations to remove the criminal entity from our occupied lands'. By 'criminal entity', Palestinian Islamic Jihad is almost certainly referring to the state of Israel.
- Tensions between Palestinian Islamic Jihad and Israel escalated in February 2020:
 - On 23 February 2020, the Israel Defense Forces (IDF) claimed it had fired at two Palestinian Islamic Jihad militants, killing one, as they attempted to plant an explosive device along the Gaza perimeter fence east of Khan Younis in Gaza. The IDF accused the militants of being part of a Palestinian Islamic Jihad cell that had planted at least two other explosive devices along the perimeter fence in recent months. Palestinian Islamic Jihad confirmed the deceased militant was a Palestinian Islamic Jihad member and threatened 'the blood of martyrs will not be in vain'.
 - From 23-24 February 2020, Palestinian Islamic Jihad fired a barrage of rockets and mortar rounds into Israel in response to its member's death and Israeli air strikes on its positions in Gaza and Syria. According to the IDF, Palestinian Islamic Jihad fired 80 rockets, although most were intercepted by Israeli air defence systems.
- From 3-5 May 2019, tensions between Palestinian Islamic Jihad and Israel escalated in response to the deaths of several Palestinian protestors during confrontations along the Israel-Gaza perimeter fence and the wounding of two Israeli soldiers in sniper fire from Gaza. Palestinian Islamic Jihad and the Hamas' Brigades fired over 700 rockets into Israel, killing at least four civilians and injuring dozens of others.

On the basis of these examples, Palestinian Islamic Jihad is responsible for directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of terrorist acts.

Advocates the doing of a terrorist act

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

- On 7 February 2020, Palestinian Islamic Jihad spokesperson, Abu Hamza, publicly called on Palestinians to attack Israeli military checkpoints and settlements in response to the US 'deal of the century' Middle East peace plan. Hamza stated on Twitter: 'we call for comprehensive and direct conflict' and 'heroic operations in Jerusalem and the West Bank are a response of our people, emphasized with blood and weapons, that are against the "deal of the century" and the Judaization of the holy places'.

On the basis of these examples, Palestinian Islamic Jihad advocates the doing of a terrorist act.

Other considerations

Links to Australia and threats to Australian interests

There are no known direct links between Palestinian Islamic Jihad and Australia. Palestinian Islamic Jihad has not made statements specifically threatening Australians or Australian interests. However, Australians could be incidentally harmed in attacks.

Listings by likeminded countries or the United Nations

Palestinian Islamic Jihad is proscribed as a terrorist organisation by the governments of Canada, New Zealand, the United Kingdom and the United States.

Engagement in peace or mediation processes

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

However, Palestinian Islamic Jihad leadership had previously publicly committed to maintaining a ceasefire brokered with Hamas and Israel in 2014, where all parties were understood to have breached the ceasefire in the intervening period. Palestinian Islamic Jihad also engaged in ceasefire agreements in November 2019 and February 2020.

Conclusion

On the basis of the information above, the Australian Government assesses that Palestinian Islamic Jihad is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts, and advocates the doing of a terrorist act.