

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 194

Issued by the authority of the Attorney-General

Criminal Code Act 1995

Criminal Code Amendment Regulation 2012 (No. 10)

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 (the Code).

Division 102 of the Code sets out the offences in relation to terrorist organisations, which are: directing the activities of a terrorist organisation; being a member of a terrorist organisation; recruiting persons to a terrorist organisation; receiving training from or providing training to a terrorist organisation; being an associate of and receiving funds from or making available funds, support or resources to a terrorist organisation.

Offences in Division 102 of the Code apply to conduct (or the results of such conduct) constituting the alleged offence whether or not the conduct (or the result) occurs in Australia.

A terrorist organisation' is defined in subsection 102.1(1) of the Code as:

- an organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) (paragraph 102.1(1)(a)); or
- an organisation specified in the regulations (paragraph 102.1(1)(b)).

The purpose of the regulation is to amend the *Criminal Code Regulations 2002* (Criminal Code Regulations) to specify Palestinian Islamic Jihad, also known as al-Quds Brigades, Harakat al-Jihad al-Islami fi Filistin, Islamic Jihad, Islamic Jihad Palestine, Islamic Jihad – Palestine Faction and Islamic Holy War, and PIJ, for the purpose of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code.

The regulation enables the offence provisions in Division 102 of the Code to continue to apply to persons with links to Palestinian Islamic Jihad. Details of the regulation are set out in Attachment A.

Subsection 102.1(2) of the 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) of the Code, the Minister must be satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) or advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

The Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the regulation pursuant to subsection 102.1(2A) of the Code.

In determining whether she is satisfied on reasonable grounds that the organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, the Minister takes into consideration an unclassified Statement of Reasons prepared by the Australian Security Intelligence Organisation (ASIO) in consultation with the Department of Foreign Affairs and Trade, as well as advice from the Australian Government Solicitor. The Statement of Reasons in respect of Palestinian Islamic Jihad is at [Attachment B](#).

Prior to making the regulation, consultations were held with the Department of Foreign Affairs and Trade, ASIO and the Australian Government Solicitor. In addition, the Attorney-General wrote to the Premiers and Chief Ministers of the States and Territories on behalf of the Prime Minister, and the Attorney-General offered the Leader of the Opposition a briefing.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulation commences on the day after it is registered on the Federal Register of Legislative Instruments. Subsection 102.1(3) of the 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.

Statement of Compatibility with Human Rights

This regulation 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*.

Objective

The object of the *Criminal Code Amendment Regulation 2012 (No. 10)* is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. This will engage the inherent right to life expressed in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

The object of the regulation also engages Article 19 and Article 22 of the ICCPR. Whilst Article 19 protects the right to freedom of expression, this right may be subject to restrictions which include protecting national security. The right to freedom of association in Article 22 of the ICCPR protects the right to form and join associations to pursue common goals, such as political parties. Article 22(2) provides that freedom of association may be subject to restrictions imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The *Criminal Code Amendment Regulation 2012 (No. 10)* makes it an offence under Division 102 of the Criminal Code, to direct the activities, become a member of, recruit, train

or receiving training, get funds to, from or for Palestinian Islamic Jihad, and provide support or associate with Palestinian Islamic Jihad.

The offence in subsection 102.8 of the Criminal Code of associating with a terrorist organisation is limited in its application only to an organisation that is a listed organisation under Criminal Code Regulations. The offence does not apply if the association is with a close family member, or takes place in the course of practising a religion in a place used for public religious worship, or the association is for the purpose of providing humanitarian aid or for the purpose of providing legal advice or representation.

Whilst the *Criminal Code Amendment Regulation 2012 (No. 10)* may limit the right to freedom of association with Palestinian Islamic Jihad, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Palestinian Islamic Jihad are reasonable, necessary and proportionate, and are in the interests of public safety and national security, after taking into consideration the direct and indirect terrorist activities of the organisation, which threaten human life, as detailed in the Statement of Reasons (at [Attachment B](#)).

The Criminal Code offences in Division 102 applying to terrorist organisations do not target any specific religious or ethnic group and are designed to promote security and protect all members of the community from the threat of terrorism, regardless of national or ethnic origins or religious beliefs.

The information in the Statement of Reasons ([Attachment B](#)) supports the Attorney-General's decision made on reasonable grounds, that Palestinian Islamic Jihad satisfies the criteria for listing as a terrorist organisation under subsection 102.1(2) of the Criminal Code.

There are safeguards and accountability mechanisms in the Act providing for consultation and enabling review of *Criminal Code Amendment Regulation 2012 (No. 10)* specifying an organisation as a terrorist organisation. These measures include the following:

- the Commonwealth must consult with the States and Territories in accordance with the *Inter-Governmental Agreement on Counter-Terrorism Laws*. The *Criminal Code Amendment Regulation 2012 (No. 10)* may only be made if a majority of the States and Territories do not object to the regulation within a reasonable time
- under subsection 102.1(2A) the Minister must arrange for the Leader of the Opposition to be briefed in relation to the regulation
- under subsection 102.1(3) the *Criminal Code Amendment Regulation 2012 (No. 10)* will cease to have effect on the third anniversary of the day on which it takes effect
- subsection 102.1(4) 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. The effect of the Minister's declaration is that the organisation is de-listed as a terrorist organisation under Division 102 of the Criminal Code

- subsection 102.1(17) provides that an individual or an organisation may make a de-listing application to the Minister
- the *Criminal Code Amendment Regulation 2012 (No. 10)* may be reviewed by the Parliamentary Joint Committee on Intelligence and Security under section 102.1A of the Act, and
- both Houses of Parliament may disallow the *Criminal Code Amendment Regulation 2012 (No. 10)* within the applicable disallowance period which is 15 sitting days after the regulation was laid before that House, as provided in subsection 102.1A(4).

Conclusion

The regulation is compatible with human rights because it advances the protection of human rights, and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

ATTACHMENT A**Details of the *Criminal Code Amendment Regulation 2012 (No. 10)*****Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Criminal Code Amendment Regulation 2012 (No. 10)*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Amendment of *Criminal Code Regulations 2002*

This section provides that Schedule 1 amends the *Criminal Code Regulations 2002*.

Schedule 1 – Amendments**Item [1] – Regulation 4T**

This item substitutes the existing regulation with a new regulation 4T to provide that for paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code Act 1995* (the Code), the organisation known as is specified.

Subsection 4T(2) provides that for the purposes of subsection (1), 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.

ATTACHMENT B**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 following information is based on publicly available details about Palestinian Islamic Jihad. To the Australian Government's knowledge, these details are accurate and reliable and have been corroborated by classified information.

Basis for listing a terrorist organisation

Division 102 of the *Criminal Code* provides that for an organisation to be listed as a terrorist organisation, the Attorney-General must be satisfied on reasonable grounds that the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, or assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Details of the organisation

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

PIJ consists of a leadership council and a military wing, called the al-Quds Brigades. Responsibility for PIJ attacks is claimed by the al-Quds Brigades. Unlike groups such as Hamas and Hizballah, which maintain extensive political and social apparatuses alongside their terrorist wings, PIJ focuses exclusively on militant activity. It is therefore unnecessary to distinguish the al-Quds Brigades from the PIJ as a whole.

Despite being a Sunni group, PIJ was inspired by and remains ideologically supportive of Iran's Islamic Revolution and maintains close ties with the Iranian Revolutionary Guards Corps and Hizballah.

PIJ's main source of funding is Iran. PIJ also receives donations from Syria and the Palestinian community.

Objectives

PIJ's goal is the establishment of a sovereign Islamic state within the geographic borders of the pre-1948 British mandated Palestine. It promotes the military destruction of Israel as the only viable means to attain this goal. Accordingly, PIJ refuses to participate in the political process and rejects the possibility of a negotiated settlement to the Israel/Palestine problem.

Leadership and Membership

The current leader of PIJ is Dr Ramadan Abdullah Shallah, who took over from Fathi abd al-Aziz Shaqaqi in 1995 after Shaqaqi's death. Shallah is based in Damascus, from where he

and his leadership council coordinate fundraising and procurement for the al-Quds Brigades in Gaza, Lebanon and the West Bank.

PIJ recruits the majority of its militants from Palestinian refugee communities in Gaza and the West Bank. It is a secretive organisation and the exact size of its membership is not known, although the total size of PIJ, including its political leadership in Damascus and militant activists in the Palestinian Territories, is likely to be less than 1000 members.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts / Directly or indirectly preparing and/or planning terrorist acts

PIJ claimed responsibility for more than 30 suicide bombings between 1987 and 2006. Since that time, the majority of its attacks have consisted of indiscriminate rocket and mortar fire into southern Israel from Gaza. Its attacks are generally indiscriminate in nature, seeking to maximize casualties.

Some recent examples include:

- 29 October 2011: PIJ launched a number of rockets into several areas of Israel's Southern District, killing one Israeli civilian and wounding two.
- 20 August 2011: PIJ militants launched a series of rockets into Israel's southern district, killing one Israeli civilian and injuring seven.
- 8 January 2011: suspected PIJ militants fired two mortar rounds into an area of Israel's Southern District, wounding two Thai nationals.

PIJ has confined its attacks to the Levant and has not deliberately targeted Western interests.

Conclusion

On the basis of the above information, ASIO assesses PIJ continues to directly and/or indirectly engage in, preparing, planning, assisting, advocating or fostering the doing of terrorist acts, involving threats to life and serious property damage. This assessment is corroborated by information provided by reliable and credible intelligence sources.

In the course of pursuing its objectives PIJ is known to have committed or threatened action:

- that causes, or could cause, serious damage to property, the death of persons or endanger a person's life; and
- with the intention of advancing PIJ's political, religious or ideological causes; and
- with the intention of intimidating the public and sections of the public.

Other Relevant Information

Links to Australia

There are no known links to Australia.

Other designations

PIJ is proscribed as a terrorist organisation by the governments of Canada, New Zealand, the United Kingdom and the United States. PIJ is also listed by the European Union for the purposes of its anti-terrorism financing measures.

PIJ is also included in the DFAT Consolidated List that refers to United Nations Council Resolution 1373 in relation to countering financing of terrorism.