

EXPLANATORY STATEMENT

Select Legislative Instrument No. 57, 2015

Issued by the authority of the Attorney-General

Criminal Code Act 1995

*Criminal Code (Terrorist Organisation—Hizballah's External Security Organisation)
Regulation 2015*

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.

Division 102 of the Criminal 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; providing training to, receiving training from or participating in training with a terrorist organisation; being an associate of and receiving funds from or making available funds, support or resources to a terrorist organisation.

Section 102.9 of the Criminal Code provides that section 15.4 (extended geographical jurisdiction - category D) applies to an offence against Division 102 of the Criminal Code. The effect of applying section 15.4 is that offences in Division 102 of the Criminal 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.

Terrorist organisation is defined in subsection 102.1(1) of the Criminal Code as:

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (paragraph 102.1(1)(a)); or
- an organisation that is specified by the regulations for the purposes of this paragraph (paragraph 102.1(1)(b)).

Subsection 102.1(20) of the Criminal Code provides that a reference to the doing of a terrorist act includes a reference to the doing of a terrorist act, even if a terrorist act does not occur; a reference to the doing of a specific terrorist act; and a reference to the doing of more than one terrorist act.

The purpose of the *Criminal Code (Terrorist Organisation—Hizballah's External Security Organisation) Regulation 2015* (the Regulation) is to specify Hizballah's External Security Organisation, also known as the Foreign Action Unit; Hizballah ESO; Hizballah International; Islamic Jihad Organisation; Revolutionary Justice Organisation; and Special Operations Branch, for the purpose of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Criminal Code.

The Regulation enables the offence provisions in Division 102 of the Criminal Code to apply to persons with links to Hizballah's External Security Organisation. Details of the Regulation are set out in Attachment A.

Subsection 102.1(2) 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 a 'terrorist organisation' in this section, 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.

In determining whether he is 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, the Minister takes into consideration an unclassified Statement of Reasons prepared by the Australian Security Intelligence Organisation 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 Hizballah's External Security Organisation is at Attachment B.

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.

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

The Regulation repeals existing Regulation 4Q of the *Criminal Code Regulations 2002*, which specifies Hizballah's External Security Organisation for the purposes of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Code. The existing Regulation 4Q ceased to have effect on 12 May 2015. The repeal of Regulation 4Q ensured there is no duplication if the new Regulation was made before the current Regulation ceases.

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 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.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation– Hizballah's External Security Organisation) Regulation 2015* makes it an offence under Division 102 of the Criminal Code, to direct the activities, become a member of, recruit for, train, receive or participate in training, get funds to, from or for Hizballah's External Security Organisation, and provide support or associate with Hizballah's External Security Organisation.

The offence of association with a terrorist organisation in subsection 102.8 of the Criminal Code 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 legal representation.

The object of the *Criminal Code (Terrorist Organisation– Hizballah's External Security Organisation) Regulation 2015* is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia.

Human rights implications

This instrument engages the following rights:

- Article 6
- Article 19 and
- Article 22.

The *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015* 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.

Whilst the *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015* may limit the right to freedom of association with Hizballah's External Security Organisation, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Hizballah's External Security Organisation 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 ([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 Hizballah's External Security Organisation satisfies the criteria for listing as a terrorist organisation under paragraph 102.1(2)(a) of the Criminal Code.

There are safeguards and accountability mechanisms in the Criminal Code providing for consultation and enabling review of the *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015*. 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* of 25 June 2004, and the *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015* 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) of the Criminal Code the Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed regulation
- under subsection 102.1(3) of the Criminal Code the *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015* 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 regulation listing the organisation ceases to have effect and 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 (Terrorist Organisation– Hizballah's External Security Organisation) Regulation 2015* 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 *Criminal Code (Terrorist Organisation– Hizballah's External Security Organisation) Regulation 2015* within the applicable disallowance period which was 15 sitting days after the regulation was laid before that House, as provided in subsection 102.1A(4) of the Criminal Code.

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 (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation–Hizballah's External Security Organisation) Regulation 2015*.

Section 2 – Commencement

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

Section 3 – Authority

This section provides that the Regulation is made under the *Criminal Code Act 1995*.

Section 4 – Schedules

This section provides that the instrument specified in Schedule 1—Amendments, Regulation 4Q of the *Criminal Code Regulations 2002*, is repealed as set out in clause 1.

Section 5 – Terrorist organisation – Hizballah's External Security Organisation

Subsection (1) provides that for paragraph (b) of the definition of ‘*terrorist organisation*’ in subsection 102.1(1) of the *Criminal Code*, the organisation known as Hizballah's External Security Organisation is specified.

Subsection (2) provides that Hizballah's External Security Organisation is also known by the following names:

- (a) Foreign Action Unit;
- (b) Hizballah ESO;
- (c) Hizballah International;
- (d) Islamic Jihad Organisation;
- (e) Revolutionary Justice Organisation; and
- (f) Special Operations Branch.

Schedule 1 – Amendments

This schedule amends the *Criminal Code Regulations 2002*.

Clause 1 – Regulation 4Q

This clause provides that regulation 4Q of the *Criminal Code Regulations 2002* is repealed. Regulation 4Q was the regulation listing Hizballah's External Security Organisation 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. This clause ensures there is no duplication if the new Regulation was made before the current Regulation ceases.

Hizballah's External Security Organisation

(Also known as: Foreign Action Unit; Hizballah ESO; Hizballah International; Islamic Jihad Organisation; Revolutionary Justice Organisation; and Special Operations Branch)

This statement is based on publicly available information about Hizballah's External Security Organisation (ESO). 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 Act 1995* 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, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.

Details of the organisation

Hizballah background

Hizballah is a pragmatic political organisation with deep roots in Lebanese society. Founded in 1982 with Iranian assistance during the Israeli occupation of southern Lebanon, Hizballah has evolved into a multi-faceted organisation including political, social and military components. Within Lebanon, Hizballah represents the Lebanese Shia community, the country's largest sect, and maintains a social welfare network that encompasses education and health services.

Hizballah also maintains a highly capable and well-resourced militia structured ostensibly to resist Israeli aggression, but also to defend and promote Shia interests in the context of Lebanon's historical and ongoing sectarian divisions. In 2006, Hizballah fought against the Israeli Defence Force and since then has been arming itself in preparation for future conflict. Hizballah has been providing military assistance to Syrian Government forces in Syria's civil war.

ESO objectives

The ESO is a discrete branch within Hizballah responsible for the planning, coordination and execution of terrorist attacks against Hizballah's enemies outside of Lebanon. Since entering the Lebanese Parliament in 1992 and the government in 1995, Hizballah has sought to strengthen its public image as a respected resistance movement and lessen its reputation as a terrorist group. This reinforces Hizballah's need to distance the organisation from any activity that could be construed as terrorism. Consequently, Hizballah is unlikely to either claim responsibility for a terrorist attack or acknowledge any ESO activities.

The ESO was set up by Imad Mughniyah, who until his death in 2008 was described variously as the head of Hizballah's security section, a senior intelligence official and as one of the founders of Hizballah. After Imad Mughniyah fled to Iran following Hizballah's 1983 attack on the US military in Beirut, the 'international wing' grew out of the military wing to become a separate branch under Mughniyah's control. This is thought to be the genesis of Hizballah's 'international wing', or the ESO.

Leadership and membership

The ESO was led by Mughniyah until his assassination in Damascus in 2008. Its current leader is Talal Hamiyah. Due to its highly secretive nature, little is known about the ESO's membership.

Terrorist activity of the organisation

Directly or indirectly engaged in the doing of terrorist acts

Although the ESO has not publically admitted responsibility for any terrorist attacks outside Lebanon, ASIO assesses it was almost certainly involved in at least three significant attacks against Israeli/Jewish interests outside of Lebanon:

- On 18 July 2012, a bomb exploded on an Israeli tourist bus at Sarafovo Airport in Burgas, Bulgaria, killing five Israelis and their Bulgarian bus driver. Bulgarian authorities stated the ESO was responsible for this attack.
- On 18 July 1994, a van carrying explosives was detonated outside the Argentinian-Israeli Mutual Association in Buenos Aires, Argentina, killing 85 people and injuring more than 300 others. In 1999, Argentine authorities issued an arrest warrant for Mughniyah for his alleged involvement. Although no group has claimed responsibility for the attack, Argentinean authorities concluded that the ESO was responsible.
- On 17 March 1992, a truck laden with explosives was used to destroy the Israeli Embassy in Buenos Aires, killing 29 people and injuring 242 others. Responsibility for the attack was claimed in the name of the Islamic Jihad Organisation, which cited its motive as revenge for Israel's assassination of Hizballah Secretary General Abbas al-Musawi in February of that year. The Islamic Jihad Organisation is widely considered to be synonymous with the ESO. Argentinean authorities eventually issued an arrest warrant for ESO leader Mughniyah for organising the attack.

Directly or indirectly preparing and/or planning terrorist acts

The ESO has an ongoing program of contingency planning for terrorist activities around the world. Due to the secretive nature of the ESO, it is difficult to gather detailed information about the group's role and activities. However, there is no indication that the ESO's role has changed in recent times, and recent activities over the past several years demonstrate that the ESO retains its separate terrorist function within Hizballah's overall organisational structure.

- In April 2014, an alleged ESO operative confessed to planning an attack on Israeli tourists in a popular tourist area of Bangkok, Thailand. Two men were arrested over the planned attack—Lebanese-French national Daoud Farhat and Lebanese-Filipino national Youssef Ayad.
- In May 2013, the Nigerian State Security Service arrested Lebanese-Nigerian nationals Mustapha Fawaz, Abdallah Thahini and Talal Ahmad Roda, all probably linked to the ESO. Subsequent investigations led to the discovery of two weapons and explosives caches in Kano State, Nigeria. Roda was convicted of conspiracy to import weapons into Nigeria and sentenced to life in prison.
- In March 2013, Lebanese-Swedish national Hossam Taleb Yaccob, a probable ESO operative, was sentenced to three years in prison in Cyprus for conducting surveillance of Israeli tourists in July 2012. This activity was probably related to a plan similar to the bus bombing in Burgas the same month.
- In January 2012, Thai authorities announced the arrest in Bangkok of Lebanese-Swedish national Hussein Atris, a probable ESO operative, who was in possession of a large quantity of explosive precursors. Atris was convicted of possessing explosive materials in September 2014 and sentenced to two years and eight months in prison.

Conclusion

On the basis of the above information, ASIO assesses the ESO continues to directly and/or indirectly engage in preparing, planning or assisting the doing of terrorist acts involving threats to life and serious property damage.

In the course of pursuing its objectives the ESO is known to have engaged in acts that:

- cause, or could cause, serious damage to property, the death of persons, endanger a person's life or create a serious risk to a person's safety;
- are intended to have those effects;
- are done with the intention of advancing Hizballah's political, religious or ideological causes;
- are done with the intention of coercing, or influencing by intimidation, the government of a foreign country; and
- are done with the intention of intimidating sections of the public globally.

Other Relevant Information

Links to other terrorist groups or networks

Hizballah elements provide training, operational support and material to Palestinian extremist groups, including the Palestinian Islamic Jihad and HAMAS's Izz al-Din al-Qassam Brigades, both of which are proscribed entities, and Shia militia elements in Iraq.

Links to Australia

Bulgarian authorities have alleged that an Australian national was involved in supporting the attack in Burgas, Bulgaria, in July 2012.

Proscription by other countries

The ESO is described as ‘Hizballah’s Military Wing’ in the proscription listings of the United Kingdom, the European Union and New Zealand. The proscription of ESO by the United States and Canada is part of their general listing of Hizballah.

Support for United Nations listing

The Australian Minister for Foreign Affairs listed Hizballah on the Consolidated List from 21 December 2001 under section 15(1) of the *Charter of the United Nations Act 1945*, pursuant to Australia’s obligations under United Nations Security Council Resolution 1373 of 2001. The Consolidated List, maintained by the Department of Foreign Affairs and Trade, is a list of all entities (and persons) who are subject to targeted financial sanctions or travel bans under Australian sanctions law.