

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation)

Regulations 2018

The purpose of the *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulations 2018* (the Regulations) is to specify Hizballah’s External Security Organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.¹ Hizballah’s External Security Organisation is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulation 2015*, which is repealed by the Regulations. Details of the Regulations are set out in Attachment A.

Section 5 of the *Criminal Code Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Schedule to the Act sets out the *Criminal Code*.

Paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code* provides that regulations can specify organisations for the purposes of the definition of ‘terrorist organisation’.

Subsection 102.1(2) of the *Criminal Code* provides that before the Governor-General makes regulations specifying an organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or advocates the doing of a terrorist act.

The Minister for Home Affairs is satisfied on reasonable grounds that the Hizballah’s External Security Organisation is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. In coming to this position, the Minister for Home Affairs has taken into consideration an unclassified Statement of Reasons provided by the Director-General of Security, as well as advice from the Australian Government Solicitor (AGS). The Statement of Reasons is at Attachment B.

¹ A ‘terrorist organisation’ is defined in subsection 102.1(1) of the *Criminal Code* as:

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

Effect of the instrument

Division 102 of the *Criminal Code* sets out the following offences relating to terrorist organisations

- directing the activities of a terrorist organisation
- being a member of a terrorist organisation
- recruiting persons to a terrorist organisation
- receiving training from, providing training to or participating in training with a terrorist organisation
- getting funds to, from or for a terrorist organisation
- providing support to a terrorist organisation, and
- associating with a terrorist organisation.

The Regulations ensure that the offences in Division 102 of the *Criminal Code* continue to apply to conduct relating to the Hizballah's External Security Organisation. Regulations specifying Hizballah's External Security Organisation as a terrorist organisation have been in effect since 2003.

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

The Regulations commence on the day after it is registered. Subsection 102.1(3) of the *Criminal Code* provides that regulations for the purposes of paragraph (b) of the definition of 'terrorist organisation' cease to have effect on the third anniversary of the day on which they take effect.

Consultation

The unclassified Statement of Reasons was prepared by the National Threat Assessment Centre in the Australian Security Intelligence Organisation, in consultation with the Department of Foreign Affairs and Trade, Attorney-General's Department and the Department of Home Affairs (Home Affairs). Home Affairs also sought the advice of the AGS to inform the decision of the Minister for Home Affairs.

Subsection 102.1(2A) of the *Criminal Code* provides that before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1(1) of the *Criminal Code*, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation. The Minister for Home Affairs wrote to the Leader of the Opposition enclosing the information upon which he was satisfied that Hizballah's External Security Organisation met the legislative criteria for listing.

The *Intergovernmental Agreement on Counter-Terrorism Laws* (June 2004) (the IGA) requires that the Commonwealth Government consult with the governments of the states and territories prior to making regulations specifying an organisation for the purposes of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*. The IGA provides that if a majority of the states and territories object to the making of such a regulation within a time frame nominated by the Commonwealth, and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

The Minister for Home Affairs wrote, on behalf of the Prime Minister, to the Premiers and Chief Ministers of the states and territories. A majority of the states and territories did not object to the making of the Regulations within the time frame nominated by the Minister.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation— Hizballah’s External Security Organisation) Regulations 2018* (the Regulations) 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 *Criminal Code*.

The object of the Regulations is to identify Hizballah’s External Security Organisation as a terrorist organisation under Australian law, and put the organisation and members of the public on notice of that fact. Notification is important to help people avoid engaging in activities which might constitute an offence under Division 102 of the *Criminal Code* in relation to Hizballah’s External Security Organisation.

The Regulations, which are part of Australia’s terrorist organisation listing regime, support the application of the offences in Division 102 of the *Criminal Code*, the object of which is to protect national security, public safety and the rights and freedoms of persons within and outside of Australia. In particular, the Regulations provide that the offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Hizballah’s External Security Organisation.

Terrorist organisations, including Hizballah’s External Security Organisation, present a threat to the security of Australia and often seek to harm Australians and our democratic institutions. The statutory definition of a ‘terrorist organisation’ requires that these bodies directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act which includes the causing of serious harm to persons or death and serious damage to property (refer to [Attachment B](#) for details).

Human rights implications

The Regulations promote the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR):

- the inherent right to life in Article 6.

The Regulations limit the following human rights contained in the ICCPR:

- the right to freedom of expression in Article 19, and
- the right to freedom of association in Article 22.

The inherent right to life in Article 6

Article 6 of the ICCPR provides that countries have a duty to take appropriate steps to protect the right to life and to investigate arbitrary or unlawful killings and punish offenders. The Regulations, and the terrorist organisation listing regime more broadly, ensure that the offence provisions in Division 102 of the *Criminal Code* apply to certain conduct in relation to listed terrorist organisations. These offence provisions operate to penalise conduct that presents a significant risk to life, both in Australia and overseas, and, in conjunction with the terrorist organisation listing regime, also act as a deterrent to that conduct. Deterring the conduct, and thereby preventing the risk to life, promotes the inherent right to life expressed in Article 6 of the ICCPR.

The right to freedom of expression in Article 19

Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression. However, Article 19(3) provides that freedom of expression may be limited if it is necessary to achieve a legitimate purpose, including for the protection of national security. The Regulations, and the terrorist organisation listing regime more broadly, limit the right to freedom of expression to the extent that persons are prohibited from directing the activities of, recruiting for, providing support to or associating with terrorist organisations, including Hizballah's External Security Organisation. 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 Hizballah's External Security Organisation.

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 Hizballah's External Security Organisation, the Regulations are subject to the safeguards outlined below. The limits on these rights are reasonable, necessary and proportionate, and are in the interests of public safety and national security, after taking into consideration the direct and indirect terrorist activities of the organisation, which threaten human life.

The *Criminal Code* provides safeguards and accountability mechanisms requiring prior consultation and enabling review of the Regulations, including the following:

- the Commonwealth must consult with the states and territories in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws* of 25 June 2004, and the Regulations may only be made if a majority of the states and territories do not object to the Regulations within a reasonable time specified by the Commonwealth
- under subsection 102.1(2A) of the *Criminal Code* the Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed Regulations
- under subsection 102.1(3) the *Criminal Code*, the Regulations will cease to have effect on the third anniversary of the day on which it takes effect
- subsection 102.1(4) of the *Criminal Code* provides that if the Minister ceases to be satisfied of the criteria necessary for listing an organisation under subsection 102.1(2) of the *Criminal Code*, the Minister must make a declaration to that effect by written notice published in the Gazette, with the effect of the Minister's declaration that the Regulations listing the organisation cease to have effect and the organisation is de-listed as a terrorist organisation under Division 102 of the *Criminal Code*
- subsection 102.1(17) of the *Criminal Code* provides that an individual or an organisation may make a de-listing application to the Minister
- the Regulations may be reviewed by the Parliamentary Joint Committee on Intelligence and Security under section 102.1A of the *Criminal Code*, and
- both Houses of Parliament may disallow the Regulations within the applicable disallowance period, which is 15 sitting days after the Regulations are laid before that House, as provided for in subsection 102.1A(4) of the *Criminal Code*.

Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights. To the extent that the terrorist organisation listing regime, of which the Regulations are part, may also limit human rights, those limitations achieve a legitimate purpose and are reasonable, necessary and proportionate.

Details of the Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulations 2018

Section 1 – Name

This section would provide that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulations 2018*.

Section 2 – Commencement

This section would provide for the commencement of each paragraph in the instrument, as set out in the table.

Subsection (1) would provide that each provision in the instrument specified in column 1 of the table commences in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms. Columns 1 and 2 would provide that the Regulations commence the day after the instrument is registered.

The note to subsection (1) would clarify that the table only relates to the provisions of this instrument as originally made, and that it will not be amended to deal with any later amendments to the instrument.

Subsection (2) would provide that information in column 3 of the table is not part of the instrument. It is designed to assist readers, and may be updated or changed in any published version of these Regulations. Column 3 is empty at the time of making the instrument.

Section 3 – Authority

This section would provide that the Regulations are made under the *Criminal Code Act 1995*.

Section 4 – Schedules

This section would provide each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedule has effect according to its terms. Schedule 1 to the instrument would repeal the whole of the *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulation 2015*.

Section 5 – Terrorist organisation — Hizballah’s External Security Organisation

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

Subsection (2) would provide 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
- f) Special Operations Branch
- g) Unit 910

Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulation 2015* is repealed.

The *Criminal Code (Terrorist Organisation—Hizballah’s External Security Organisation) Regulation 2015* specifies 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*. The proposed clause would ensure there is no duplication where the new Regulations are made before the current Regulation ceases to have effect.

ATTACHMENT B

STATEMENT OF REASONS FOR Hizballah's External Security Organisation (ESO)

Also known as: Foreign Action Unit; Hizballah ESO; Hizballah International; Islamic Jihad Organisation; Revolutionary Justice Organisation; Unit 910; 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, this information is accurate, reliable and has been corroborated by classified information.

1. Basis for listing a terrorist organisation

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

- a) is directly or indirectly engaged in, preparing, planning, or assisting in or fostering the doing of a terrorist act; or
- b) advocates the doing of a terrorist act.

For the purposes of listing a terrorist organisation under the Criminal Code, the doing of a terrorist act includes the doing of a specific terrorist act, the doing of more than one terrorist act and the doing of a terrorist act, even if a terrorist act does not occur.

2. Background to this listing

The Australian Government first proscribed Hizballah's External Security Organisation as a terrorist organisation under the *Criminal Code* on 5 June 2003. It was re-listed on 5 June 2005, 25 May 2007, 16 May 2009, 12 May 2012, and 2 May 2015.

3. Terrorist activity of the organisation

Objectives

The broader goals of Hizballah are the 'liberation' of Jerusalem, the destruction of Israel, and the establishment of a Shia-led Islamic state in Lebanon.

The ESO sits under the military wing of Hizballah: alongside, but distinct from, Hizballah's formal militia and military activity. The ESO operates as a discrete branch or entity within Hizballah. ESO operations include procurement, intelligence, counter intelligence, surveillance, planning, coordination and execution of terrorist attacks against Hizballah's enemies outside of Lebanon.

Directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of 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 activities over the past several years demonstrate ESO retains its separate

terrorist function within Hizballah's overall organisational structure.

Activity related to preparing, and planning the doing of terrorist acts reliably attributed to the ESO include:

- In June 2017, two men were arrested in the United States (US) for undertaking terrorist activities on behalf of the ESO. The men were allegedly involved in planning, and supplying material support on behalf of the ESO for attacks against Israeli and US targets. Both men had also allegedly received training from ESO.
 - One man was charged with conducting surveillance on targets in the US. Targets included military and police facilities, and Israeli military personnel in New York.
 - The other was charged with conducting missions in Panama including surveillance at the Panama Canal and the US and Israeli embassies in Panama.
- In August 2015, the Kuwait Security Service arrested up to 26 members of the Al-Abdali terror cell for stockpiling munitions and armaments on behalf of Hizballah. In January 2016, twenty-three members of the cell were found guilty of intent to carry out hostile acts against Kuwait. The methodology, including stockpiling of explosive components in preparation for hostile acts outside of Lebanon is consistent with ESO operational methods.
- In July 2015, Cyprus jailed an ESO operative, after he pleaded guilty to stockpiling explosive materials. In May 2015, Cypriot authorities uncovered an ammonium nitrate cache—partially in the form of first-aid cold packs—maintained under ESO direction. The cold packs in Cyprus were similar to those previously used in suspected ESO operations.

The ESO has not generally publicly admitted responsibility for terrorist attacks outside of Lebanon. Significant attacks against targets outside of Lebanon reliably attributed to ESO include:

- On 18 July 2012, a bomb exploded on an Israeli tourist bus at Sarafovo Airport in Burgas, Bulgaria, killing the attacker, five Israelis and their Bulgarian bus driver. The Bulgarian authorities have charged two individuals in connection with the attack; they state the individuals were members of the Islamic Jihad Organisation (IJO), an alias of ESO.
- 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 ESO leader Imad Mughniyeh for his alleged involvement. No group claimed responsibility for the attack and Hizballah has repeatedly denied accusations that it conducted the attack. However, Argentine 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. Although Hizballah denied involvement, responsibility for the attack was claimed in the name of the IJO. Argentine authorities eventually issued an arrest warrant for ESO leader Imad Mughniyah for organising the attack.

Advocating the doing of terrorist acts

Due to its highly secretive nature, the ESO does not generally publicly claim attacks, or publicly advocate the doing of terrorist acts.

4. Details of the organisation

Hizballah is a 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 with 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 support its public policy 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. In 2013, Hizballah confirmed the organisation deployed combat forces in Syria, and has since provided military assistance to Syrian regime forces, Iranian and Russian troops, and pro-regime militant groups in Syria.

The ESO—alternately known as IJO—was established in 1983, after Hizballah's attack on the US military in Beirut. The ESO sits under the military wing of Hizballah, alongside, but distinct from, Hizballah's formal militia and military activity. The ESO is a discrete branch or entity within Hizballah, responsible for procurement, intelligence, counter intelligence, surveillance, planning, coordination and the execution of terrorist attacks against Hizballah's enemies outside of Lebanon. Due to its secretive nature, within Hizballah information about the organisational structure of the military wing is not widely available.

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 shift its reputation as a terrorist group. This has resulted in the ESO operating independently of its parent body. This also 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.

Leadership

Imad Mughniyah led the ESO until his assassination in Damascus in 2008. The group's current leader is Talal Hamiyah, previously a deputy of Mughniyah. Hamiyah was implicated in the 1992 and 1994 attacks in Argentina (listed above). The US State Department is offering a reward of up to USD \$7 million for information that leads to the location, arrest, or conviction in any country of Hamiyah.

Membership

Due to its highly secretive nature, little is known about the ESO's membership.

Recruitment and funding

Due to its highly secretive nature, little is known about the ESO's recruitment, and funding, as distinct from the recruitment and funding for Hizballah in general. It is believed that the ESO values recruits with dual citizenship, and who have access to passports from Western countries.

Links to other terrorist organisations

Due to its highly secretive nature, little is known about the ESO's links to other terrorist organisations, as distinct from Hizballah. Hizballah elements have provided 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 in Australia, as well as to Shia militia elements in Iraq.

Links to Australia

Bulgarian authorities have charged an Australian national in absentia with involvement in the July 2012 attack in Burgas, Bulgaria (listed above).

Threats to Australian interests

We have no information on specific threats to Australia or Australian interests posed by the ESO. However, it is possible that Australia or Australian interests could be the target of future ESO attacks, or impacted by future attacks offshore.

Listed by the United Nations or like-minded countries

The European Union and New Zealand have listed Hizballah's Military Wing—under which ESO sits—as a terrorist organisation. The United Kingdom previously listed Hizballah's ESO as a terrorist organisation, before extending the proscription to include Hizballah's Military Apparatus.

Hizballah as a whole (including ESO) has been listed as a terrorist organisation by the governments of the United States and Canada.

Engagement in peace or mediation processes

The ESO specifically, has not been known to engage in peace or mediation processes; however, as a political organisation, Hizballah engages with numerous international organisations and governments.

5. Conclusion

On the basis of the above information, ASIO assesses that ESO continues to be directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts.

In the course of pursuing its objectives, the ESO is known to have committed or threatened actions that:

- a) cause, or could cause, death, serious harm to persons, serious damage to property, endangered life (other than the life of the person taking the action), or create a serious risk to the health or safety of the public or a section of the public;
- b) are intended to have those effects;
- c) are done with the intention of advancing the ESO's political, religious or ideological causes;
- d) are done with the intention of intimidating the government of one or more foreign countries; and
- e) are done with the intention of intimidating the public or sections of the public.