

EXPLANATORY STATEMENT

Select Legislative Instrument No. 8, 2015

Issued by authority of the Attorney-General

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) 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 Code (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; provide training to, receive training from or participate 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)).

The purpose of the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* (the Regulation) is to specify Army of Mohammed; Army of the Prophet; Jaish-e-Mohammed; Jaish-e-Muhammed; Jaish-i-Mohammed; Jaish-i-Mohammad; Jaish-i-Muhammad; Jaish-i-Muhammed; Jaish-e-Mohammad Mujahideen E-Tanzeem; Jamaat ul-Furqan; Jeish-e-Mahammed; Jesh-e-Mohammadi; Khudamul Islam; Khuddam ul-Islam; Kuddam e Islami; Mohammed's Army; National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet; and Tehrik Ul-Furqaan, 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 Jaish-e-Mohammad. 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 ‘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.

Subsection 102.1(1A) provides that, an organisation advocates the doing of a terrorist act if the organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act; directly or indirectly provides instruction on the doing of a terrorist act; or directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

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.

In determining whether the Minister 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, or advocates 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 Jaish-e-Mohammad 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.

The Regulation also repeals existing Regulation 4K of the *Criminal Code Regulations 2002* which had specified this organisation as a terrorist organisation for the purpose of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. Regulation 4K ceases to have effect on 10 March 2015. The repeal of Regulation 4K ensures there is no duplication if the new Regulation is made before the previous Regulation ceases.

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 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 it takes effect.

Statement of Compatibility with Human Rights

Overview

The *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) 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 Jaish-e-Mohammad, and provide support to or associate with Jaish-e-Mohammad.

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—Jaish-e-Mohammad) 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 rights provided in the following articles of the International Covenant on Civil and Political Rights (ICCPR):

- Article 6
- Article 19, and
- Article 22.

The *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* will engage the inherent right to life expressed in Article 6 of the ICCPR. The object of the Regulation is to protect by law those persons who may lose their life as a result of a terrorist act advocated by Jaish-e-Mohammad.

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.

While the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* may limit the right to freedom of association with Jaish-e-Mohammad, the association offence is subject to the safeguards outlined above. The general limits of the right to freedom of association with Jaish-e-Mohammad are reasonable, necessary and proportionate, and are

in the interests of public safety and national security, after taking into consideration possible consequences of the organisation's advocacy of terrorist activities, 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 Jaish-e-Mohammad satisfies the criteria for listing as a terrorist organisation under subsection 102.1(2) of the Code.

There are safeguards and accountability mechanisms in the Act providing for consultation and enabling review of *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* 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* of 25 June 2004, and the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) 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—Jaish-e-Mohammad) 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—Jaish-e-Mohammad) 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—Jaish-e-Mohammad) Regulation 2015* 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) 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.

Details of the Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015

Section 1- Name of Regulation

This section provides that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) 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 – Terrorist organisation—Jaish-e-Mohammad

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 Jaish-e-Mohammad is specified.

Subsection (2) provides that Jaish-e-Mohammad is also known by the following names:

- (a) Army of Mohammed;
- (b) Army of the Prophet;
- (c) Jaish-e-Mohammed;
- (d) Jaish-e-Muhammed;
- (e) Jaish-i-Mohammed;
- (f) Jaish-i-Mohammad;
- (g) Jaish-i-Muhammad;
- (h) Jaish-i-Muhammed;
- (i) Jaish-e-Mohammad Mujahideen E-Tanzeem;
- (j) Jamaat ul-Furqan;
- (k) Jeish-e-Mahammed;
- (l) Jesh-e-Mohammadi;
- (m) Khudamul Islam;
- (n) Khuddam ul-Islam;
- (o) Kuddam e Islami;
- (p) Mohammed’s Army;
- (q) National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet;
- (r) Tehrik Ul-Furqaan.

Schedule 1 – Amendments

This schedule amends the *Criminal Code Regulation 2002*.

Clause 1 – Regulation 4K

This clause provides that regulation 4K of the *Criminal Code Regulations 2002* is repealed. Regulation 4K was the regulation listing Jaish-e-Mohammad as a terrorist organisation for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the Code. This clause ensures there is no duplication if the new Regulation was made before the current Regulation ceases.

JAISH-E-MOHAMMAD

(Also known as: **Army of Mohammed; Army of the Prophet; Jaish-e-Mohammed; Jaish-e-Muhammed; Jaish-i-Mohammed; Jaish-i-Mohammad; Jaish-i-Muhammad; Jaish-i-Muhammed; Jaish-e-Mohammad Mujahideen E-Tanzeem; Jamaat ul-Furqan; Jeish-e-Mahammed; Jesh-e-Mohammadi; Khudamul Islam; Khuddam ul-Islam; Kuddam e Islami; Mohammed’s Army; National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet; Tehrik Ul-Furqaan**)

The following information is based on publicly available details about the Jaish-e-Mohammad (JeM). 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, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.

Current Assessment

Since the last listing, we have not observed JeM as a group directly or indirectly involved in, or assisting in, the doing of terrorist acts. However, we assess JeM, through leadership statements, currently advocates the doing of terrorist acts.

Individual JeM militants have likely been involved in a small number of terrorist acts in Indian Administered Kashmir (IAK) in 2013 and 2014, however based on current reporting these actions cannot be ascribed with any confidence to JeM as a group. In contrast, statements made in 2014 by JeM leader Maulana Masood Azhar which advocate terrorist acts can be ascribed, due to his leadership position, to JeM. In this case the advocating for jihad against Indian interests to liberate IAK, targeting Israeli and US interests and exacting revenge for the death of a well-known JeM militant.

Objectives and Formation

A Pakistan-based fundamentalist Sunni Islamist organisation, JeM historically operated in Jammu and IAK. JeM used violence in pursuit of its stated objective of forcing the withdrawal of Indian security forces from IAK and uniting IAK with Pakistan under a radical interpretation of Islamic law.

We assess JeM’s once broad operational focus no longer exists; at its height JeM was able to undertake attacks in Pakistan, Afghanistan and India—both within and external to IAK. Previous notable attacks outside IAK include the assault on India’s Parliament building in 2001, the murder of US journalist Daniel Pearl in 2002 and two assassination attempts against Pakistani President Musharraf in 2003.

Leadership and membership

JeM was founded in 2000 by Maulana Masood Azhar, a radical Islamist scholar and jihadist leader, following his release from an Indian jail in exchange for 155 hostages hijacked aboard

an Indian Airlines aircraft on 31 December 1999. Azhar reportedly formed JeM with the support of Pakistan's Inter-Services Intelligence (ISI), the Afghan Taliban, Osama bin Laden and several other Sunni extremist organisations in Pakistan.

There is no reporting on current membership numbers for JeM. However, in 2012 reports estimated JeM to have several hundred armed supporters. At a January 2014 rally in Pakistan-occupied Kashmir, Azhar claimed there were 313 *fidayees*¹ in the gathering. Given the public relations aspect of this rally we assess this claim was likely to be inflated and is not a reflection of JeM's current membership.

Funding

JeM was linked to both legitimate business interests and Islamic charitable foundations, including:

- the Al-Rehmat Trust, which collects donations publicly to provide “cash and medicine” to students of servants of religious schools and centres; orphans, widows and those afflicted with disaster; and migrants on the path to God.”
- the Maymar Trust, which is the largest charity network in Pakistan. The Maymar Trust has legitimately provided aid to people affected by droughts in North Pakistan, floods in the south and thousands of internally displaced persons.
 - However, this was formerly known as the Al-Rashid Trust which was listed by the US Department of Treasury as a designated terrorist support organisation in 2001 for its links to JeM. It is unclear if these links remain.

It is unknown whether these charities continue to redirect funding towards the IAK militancy, including for militants, their families and prisoners' families.

Advocating the doing of a terrorist act

On 26 January 2014², Azhar addressed (via telephone) a large rally in Muzaffarabad, Pakistan, to launch a book based on diary entries of Afzal Guru³. The book reportedly includes text espousing and exhorting for jihad in Kashmir. This rally marked Azhar's first public discourse—if not appearance—in 10 years. The rally and speech reportedly focused on Guru's execution and the IAK struggle, with the crowd responding by chanting slogans favouring renewed jihad to liberate Kashmir.

Azhar reportedly made a number of statements during the rally that we assess demonstrate advocacy of terrorist acts⁴. Azhar reportedly;

- claimed that India would face a chilling or dreaded revenge for executing Guru
- called on Pakistan to lift restrictions on jihad
- described militants as not terrorists but formidable fighters
- said jihad was the only way to liberate the occupied territory, when recalling repressive measures by Indian military and paramilitary forces in Kashmir,
- called for the raising of an army to wage war against India and said “Let us aim guns at India first”...”we will move to Israel and United states later” and

¹ A reference to one whom is ready to sacrifice their life for a cause, reported by one paper as a reference to suicide bombers, however it could also be a reference to fighters— commandos or guerrillas.

² Indian Republic Day honouring the date that the Constitution of India came into force

³ Guru was executed on 9 February 2013 in India for the 2001 Delhi Parliament attack claimed by JeM.

⁴ Journalists were banned from taking recording devices into the rally. However given the consistency of detail published across a range of media publications in both India and Afghanistan, by a number of different journalists, we assess that the media reporting of the rally is likely to be reliable and credible.

- threatened to attack election rallies in India.

No attacks eventuated from this appearance—however, this is not necessary for meeting the threshold of advocating the doing of a terrorist act. Further, given the public relations elements of this rally, comments made by Azhar, due to his leadership position, are assessed to be reflective of JeM’s current ideology and advocacy for the doing of terrorist acts. Specifically promoting and encouraging acts (revenge, jihad, waging war, attacking) designed for a political end—liberation of Kashmir from Indian control—that endanger or cause serious harm. Appearances and statements by Azhar are rare, as JeM is banned in both India and Pakistan. We would not expect further appearances or statements to have occurred since the January 2014 rally. Further, there have been no reported statements made by JeM (or JeM senior figures) since this rally to disavow or contradict Azhar’s statements; which are a reflection of JeM’s founding ideology. As such we assess the promotion and encouragement of terrorist acts evidenced by Azhar’s statements at the rally remain JEM’s current ideological stance.

Since Azhar’s statements, Syed Salahudin, the current leader of the United Jihad Council (UJC) that includes JeM, has stated he would welcome the involvement of al-Qaida, the Taliban or other organisations in the Kashmir conflict (July 2014) and described a proscribed terrorist (Ansarul Ummah chief Maulana Fazlur Rahman Khalil) as a soldier of Pakistan and a hero of Kashmiris. While these comments cannot be ascribed to JeM, through JeM’s membership of UJC they indicate JeM’s ongoing alignment to advocacy (including glorification) of terrorist acts.

Terrorist activity of the organisation

In the period since Jaish-e-Mohammad (JeM) was last proscribed as a terrorist organisation by Australia in 2012, we have not observed the group directly or indirectly involved in, or assisting in, the doing of terrorist acts. JeM (as a group) has not been associated with an attack for over five years—the last incident was in 2009 when a suspected JeM member killed a police officer in Srinagar, Indian Administered Kashmir (IAK).

Directly or indirectly engaged in the doing of terrorist acts

There were a small number of reports during 2013 and 2014 of individuals reported as JeM militants being involved in violent altercations with security forces in IAK. While these reports may indicate that militants who are active in the IAK conflict retain a JeM ideology or have historical linkages to JeM they do not demonstrate that their activity is directed or controlled by JeM at an organisational level.

- In 2013 and 2014 there were three reports of JeM militants attacking Indian security forces in IAK; one attack involved grenades and gunfire against army personnel, and two attacks involved gunfire against military personnel.

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

There were a small number of reports during 2013 and 2014 of individuals reported as JeM militants being killed in IAK. While the presence of militants could imply potential planning or preparation for a terrorist act, due to lack of detail on the circumstances of the deaths, we cannot say with any certainty whether the individuals were involved in preparing or planning a terrorist act at the time of their death.

Directly or indirectly assisting in the doing of terrorist acts

Militants traditionally associated with JeM reportedly continue to provide both religious instruction and military style guerrilla training in a number of camps in Pakistan. We have no reporting to suggest this is organised at a group level.

Conclusion

On the basis of the above information ASIO assesses JeM advocates the doing of terrorist acts. Statements on advocating the doing of a terrorist act by JeM's leader are assessed to be reflective of JeM's longstanding adherence to a belief in violence as a means to achieve political objectives.

In the course of pursuing its objectives, the JeM is known to have advocated for violent action:

- that would advance the JeMs political, ideological or religious causes;
- with the intention to coerce or influence by intimidation the government of a foreign country; and
- is done to intimidate a section of the public of a foreign country.

Other relevant information

Links to other terrorist groups or networks

JeM is a member of the UJC, which was formed in 1990 to bring all Kashmir-focused militant groups under a single banner. Other major groups in the UJC are Hizb-ul-Mujahideen, Lashkar-e-Tayyiba, Hizb-ul-Mominee, and the Al Badr Mujahideen.

Engagement in peace or mediation processes

There is no reporting of JeM being involved in or part of peace or mediation processes.

Threats to Australian interests

In the last three years there is no reporting that JeM as a group is still involved in planning terrorist attacks against the Afghan Government and Coalition forces in Afghanistan – or against wider targets globally, including Western interests. JeM advocacy has not specially named Australian or general western interests, however we note mention of US and Israeli interests in Azhar's 2014 appearance. In addition, actions of individual JeM militants are currently focused on IAK and Indian interests. As such, JeM currently poses no direct threat to Australian interests.

Proscription by the UN and other countries

JeM remains a proscribed organisation in the United Kingdom, Canada, the United States and New Zealand according to each country's respective proscription regime.