

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Home Affairs

*Criminal Code Act 1995*

*Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018*

The purpose of the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018* (the Regulations) is to specify Jaish-e-Mohammad for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1) of the *Criminal Code*.<sup>1</sup> Jaish-e-Mohammad is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015*, which is repealed by the Regulations.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 Jaish-e-Mohammad 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](#).

### *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

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<sup>1</sup> 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.

- 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 Jaish-e-Mohammad. Regulations specifying Jaish-e-Mohammad 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 Jaish-e-Mohammad 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 for Home Affairs.

## Statement of Compatibility with Human Rights

### *Overview*

The *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018* (the Regulations) specifies Jaish-e-Mohammad 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 Jaish-e-Mohammad 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 Jaish-e-Mohammad.

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 Jaish-e-Mohammad.

Terrorist organisations, including Jaish-e-Mohammad, 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 Jaish-e-Mohammad. 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 Jaish-e-Mohammad.

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 Jaish-e-Mohammad, 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) of 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—Jaish-e-Mohammad) Regulations 2018**

**Section 1 – Name**

This section would provide that the title of the Regulation is the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) 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—Jaish-e-Mohammad) Regulation 2015*.

**Section 5 – Terrorist organisation—Jaish-e-Mohammad**

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 Jaish-e-Mohammad is specified.

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

- a) Afzal Guru Squad;
- b) Army of Mohammed;
- c) Army of the Prophet;

- d) Jaish-e-Mohammad Mujahideen E-Tanzeem;
- e) Jaish-e-Mohammed;
- f) Jaish-e-Muhammad;
- g) Jaish-e-Muhammed;
- h) Jaish-i-Mohammad;
- i) Jaish-i-Mohammed;
- j) Jaish-i-Muhammad;
- k) Jaish-i-Muhammed;
- l) Jamaat ul-Furqan;
- m) Jeish-e-Mahammed;
- n) Jesh-e-Mohammadi;
- o) JuF;
- p) Khudamul Islam;
- q) Khuddam ul-Islam;
- r) Kuddam e Islami;
- s) KuI;
- t) Mohammed's Army;
- u) National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet;
- v) Tehrik ul-Furqan.

#### Schedule 1—Repeals

Schedule 1 would provide that *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* is repealed.

The *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulation 2015* specifies 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 *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 JAISH-E-MOHAMMAD

Also known as: Afzal Guru Squad, Army of Mohammed, Army of the Prophet, Jaish-e-Mohammed, Jaish-e-Muhammad, Jaish-e-Muhammed, Jaish-i-Mohammad, Jaish-i-Mohammed, Jaish-i-Muhammad, Jaish-i-Muhammed, Jaish-e-Mohammad Mujahideen E-Tanzeem, Jamaat ul-Furqan, Jeish-e-Mahammed, Jesh-e-Mohammadi, JuF, Khudamul Islam, Khuddam ul-Islam, Kuddam e Islami, Kul, Mohammed's Army, National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet, Tehrik ul-Furqan.

This statement is based on publicly available information about Jaish-e-Mohammad (JeM). 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 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; 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**

JeM was first proscribed in Australia as a terrorist group on 11 April 2003. It was re-listed on 11 April 2005, 31 March 2007, 14 March 2009, 9 March 2012 and 3 March 2015.

#### **3. Terrorist activity of the organisation**

##### Objectives

JeM is a Pakistan-based fundamentalist Sunni Islamist organisation which primarily conducts terrorist attacks in the Indian Administered region of Jammu Kashmir. It uses violence in pursuit of its stated objective of forcing the withdrawal of Indian security forces from Indian Administered Kashmir with the goal of placing Jammu Kashmir under the control of Pakistan.

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

JeM is directly engaged in preparing, planning and undertaking terrorist acts. Since 2015, JeM has been responsible for an increasing number of terrorist attacks and is regarded as having a more aggressive strategy than other terrorist groups in the region.

- 26 August 2017: JeM militants were suspected of conducting a terrorist attack on Indian police in Pulwama, Jammu Kashmir. The attack left eight Indian security force members dead.
- 29 November 2016: three members of the JeM sub-cell Afzal Guru Squad, attacked and

killed seven Indian army soldiers in Nagrota, Jammu Kashmir.

- 2 January 2016: JeM conducted an attack on an Indian air force base in Pathankot, located in the Indian state of Punjab. The attack left seven Indian security force members dead. The attack was planned by senior JeM figure Rauf Asghar, the brother of the JeM's leader, Masood Azhar. JeM's involvement in the attack was identified through forensic examination of the site, including DNA testing of the assailants. Online chat information indicates a JeM handler was in contact with the assailants during their attack on the airbase.

#### Advocating the doing of terrorist acts

- JeM publishes the online journal, al Qalam Weekly, which contains extremist material and advocates terrorist attacks against India. The publication praises JeM attacks against Indian security forces and includes contributions from JeM's leader Masood Azhar.
- JeM held numerous rallies in early 2017, encouraging youths to conduct terrorist attacks against India.
- 26 January 2014: Azhar addressed (via telephone) a large rally in Muzaffarabad, Pakistan calling for a renewed jihad against India. During his address he launched a book based on diary entries of Afzal Guru - executed by Indian authorities in 2013 for his role in the 2001 JeM attack against the Indian parliament. Guru's diary includes exhortations for violent jihad and terrorist attacks in Kashmir. The rally and speech reportedly focused on Guru's execution and the struggle in Indian Administered Kashmir, with the crowd responding by chanting slogans favouring renewed jihad to liberate Kashmir.

#### **4. Details of the organisation**

JeM adhere to a radical interpretation of Sunni Islam and supports establishment of Islamic rule not only in Jammu Kashmir, but beyond. JeM has called for attacks against all nations identified to have violated the rights of Muslims, in particular, Israel and the United States.

##### Leadership

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, the Afghan Taliban, Osama bin Laden and several Sunni extremist organisations in Pakistan. Azhar remains the leader of JeM.

##### Membership

There is no reporting on current membership numbers for JeM; however, reporting from 2014 estimated its numbers at several thousand supporters, 300–400 of which are active fighters. Media reporting from August 2017 states nearly two dozen cadres of JeM fighters were present in Jammu Kashmir—no further details of the size of a cadre was given.

##### Recruitment and funding

JeM has a good financial base with income derived from both legitimate business interests and Islamic charitable foundations.

- the Al-Rehmat Trust is the principal source of income for JeM and continues to operate despite being sanctioned by several countries.
- JeM supports over 300 Islamic institutions in Pakistan and gathers donations from

attendees at these institutions. Publically, the donations are stated 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.”

Links to other terrorist organisations

JeM has extensive links to other terrorist groups including al Qa’ida, Lashkar-e-Tayibba and the Afghan Taliban.

Links to Australia

There are no known direct links between JeM and Australia.

Threats to Australian interests

JeM has not made statements specifically threatening Australians or Australian interests; however, it would consider Westerners—including Australians—to be legitimate targets for attack. Further, JeM has conducted attacks indiscriminately to achieve its objectives, including targeting foreigners.

Listed by the United Nations or like-minded countries

JeM is listed as a proscribed terrorist organisation in the United Nations 1267 Committee’s consolidated list and by the governments of the United States, the United Kingdom and Canada.

Engagement in peace or mediation processes

JeM is not engaged in any peace or mediation process.

**5. Conclusion**

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

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

- a) cause, or could cause, death, serious harm to persons, serious damage to property, endanger 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 JeM’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.