

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021

The purpose of the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021* (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*.¹ Jaish-e-Mohammad is currently specified for this purpose by the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018*, which are repealed by the Regulations.

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*, which prescribes offences against humanity and related offences, and dangers to the community and national infrastructure.

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. In coming to this position, the Minister for Home Affairs has taken into consideration unclassified information (Statement of Reasons) provided by the Department of Home Affairs ([Attachment C](#)).

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 Jaish-e-Mohammad. Regulations specifying Jaish-e-Mohammad as a terrorist organisation have been in effect since 2018.

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

The Regulations commence on 3 March 2021. 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.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

Further details of the Regulations are set out in [Attachment B](#).

Consultation

The Department of Home Affairs sought the advice of the Australian Government Solicitor (AGS) in relation to the unclassified information (Statement of Reasons).

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 timeframe 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 timeframe nominated by the Minister.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021* (the Regulations) 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*.

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 offence of associating with a terrorist organisation in section 102.8 of the *Criminal Code* applies in relation to associating with Jaish-e-Mohammad as a listed terrorist organisation.

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 an organisation directly or indirectly engages in, prepares, plans, assists in or fosters the doing of a terrorist act or, in relation to a listed terrorist organisation, that the organisation advocates the doing of a terrorist act.

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

Under Article 6 of the ICCPR, 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) the *Criminal Code*, the Regulations will cease to have effect on the third anniversary of the day on which they take 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 15 sitting days after the Regulations are laid before that House, as provided for in section 42 of the *Legislation Act 2003* and noting that this period may be extended by operation of subsection 102.1A(4) of the *Criminal Code* if the Parliamentary Joint Committee on Intelligence and Security reviews the Regulations.

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 are for a legitimate purpose and are reasonable, necessary and proportionate.

The Hon Peter Dutton MP
Minister for Home Affairs

Details of the Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021

Section 1 – Name

1. This section would provide that the title of the proposed Regulations is the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2021*.

Section 2 – Commencement

2. This section would provide for the commencement of each provision in the proposed Regulations, as set out in the table.
3. Subsection 2(1) would provide that each provision in the proposed Regulations, as 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 proposed Regulations commence in their entirety on 3 March 2021.
4. The note to subsection 2(1) would clarify that the table only relates to the provisions of the proposed Regulations as originally made, and will not be amended to deal with any subsequent amendments to the instrument.
5. Subsection 2(2) would provide that the information in column 3 of the table is not part of the proposed Regulations. It is designed to assist readers of the proposed Regulations.

Section 3 – Authority

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

Section 4 – Schedules

7. This section would provide that each instrument that is specified in a Schedule to the proposed Regulations is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule would have effect according to its terms.
8. Schedule 1 to the Regulations would repeal the whole of the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018*.

Section 5 – Terrorist organisation—Jaish-e-Mohammad

9. Subsection 5(1) would provide that, for the purposes of 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.

10. The effect of specifying Jaish-e-Mohammad as a terrorist organisation would be to ensure that offences in Subdivision B of Division 102 of the *Criminal Code* that relate to terrorist organisations are able to operate, where the appropriate elements are satisfied, in relation to conduct in connection with Jaish-e-Mohammad.
11. Subsection 5(2) would provide a list of names that Jaish-e-Mohammad is also known as:
- (a) Afzal Guru Squad (paragraph (a));
 - (b) Army of Mohammed (paragraph (b));
 - (c) Army of the Prophet (paragraph (c));
 - (d) Jaish-e-Mohammad Mujahideen E-Tanzeem (paragraph (d));
 - (e) Jaish-e-Mohammed (paragraph (e));
 - (f) Jaish-e-Muhammad (paragraph (f));
 - (g) Jaish-e-Muhammed (paragraph (g));
 - (h) Jaish-i-Mohammad (paragraph (h));
 - (i) Jaish-i-Mohammed (paragraph (i));
 - (j) Jaish-i-Muhammad (paragraph (j));
 - (k) Jaish-i-Muhammed (paragraph (k));
 - (l) Jamaat ul-Furqan (paragraph (l));
 - (m) Jeish-e-Mahammed (paragraph (m));
 - (n) Jesh-e-Mohammadi (paragraph (n));
 - (o) JuF (paragraph (o));
 - (p) Khudamul Islam (paragraph (p));
 - (q) Khuddam ul-Islam (paragraph (q));
 - (r) Kuddam e Islami (paragraph (r));
 - (s) KuI (paragraph (s));
 - (t) Mohammed's Army (paragraph (t));
 - (u) National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet (paragraph (u));
 - (v) Tehrik ul-Furqan (paragraph (v)).

Schedule 1 – Repeals

12. Clause 1 of Schedule 1 would repeal the *Criminal Code (Terrorist Organisation—Jaish-e-Mohammad) Regulations 2018* (the Current Regulations).
13. The Current Regulations specify 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*, commencing on 3 March 2018. Pursuant to subsection 102.1(3) of the *Criminal Code*, 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. Clause 1 of Schedule 1 would ensure there is no duplication where the Regulations are made before the Current Regulations cease to have effect.

Statement of Reasons

Listing of Jaish-e-Mohammad as a terrorist organisation under the *Criminal Code Act 1995*

This Statement of Reasons is based on publicly available information about Jaish-e-Mohammad. To the Australian Government's knowledge, this information is accurate, reliable and has been corroborated by classified information.

Name of the organisation

Jaish-e-Mohammad (JeM)

Known aliases

- Afzal Guru Squad
- 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 (JuF)
- Jeish-e-Mahammed
- Jesh-e-Mohammadi
- Khudamul Islam
- Khuddam ul-Islam (KuI)
- Kuddam e Islami
- Mohammed's Army
- National Movement for the Restoration of Pakistani Sovereignty and Army of the Prophet, and
- Tehrik ul-Furqan.

Legislative basis for listing a terrorist organisation

Division 102 of the *Criminal Code Act 1995* (the *Criminal Code*) provides that for an organisation to be listed as a terrorist organisation, the AFP Minister (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.

Background to this listing

JeM was first proscribed as a terrorist organisation under the *Criminal Code* on 11 April 2003. It was subsequently relisted on:

- 11 April 2005
- 31 March 2007
- 14 March 2009
- 9 March 2012
- 3 March 2015, and
- 3 March 2018.

Details of the organisation

Organisational overview and objectives

JeM is a Pakistan-based Sunni Islamist extremist organisation which primarily conducts terrorist attacks in the Indian-administered region of Jammu and Kashmir. JeM continues to call for the use of 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 and Kashmir under the control of Pakistan.

Leadership

JeM was founded in 2000 by Maulana Masood Azhar, a radical Islamist scholar and jihadist leader, following his release from an Indian jail on 31 December 1999 in exchange for 155 hostages hijacked aboard an Indian Airlines aircraft. Azhar reportedly formed JeM with the support of the Afghan Taliban, Osama bin Laden and several Sunni extremist organisations in Pakistan.

JeM has a decentralised, cellular structure led by regional commanders who report to Azhar. In 2019, it was reported Azhar was suffering from health issues and Azhar's brother and JeM second in command Asghar Abdul Rauf Asghar had taken over as de facto emir of JeM. However, Masood Azhar remains the official leader of JeM.

Membership

The figures on membership numbers for JeM are variable. Media reporting from mid-2019 states there were approximately 56 active JeM members in Jammu and Kashmir. UN reporting from May 2020 indicates, however, that JeM has approximately 230 armed fighters co-located with Taliban forces in Afghanistan.

Funding

JeM derives income 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. In June 2019, two JeM supporters were found guilty by a Pakistani antiterrorism court of raising funds for JeM during a religious congregation in Manghopir.

The Al-Rehmat Trust and Al-Furqan Trust were banned by the Pakistani government in May 2019 for their ties to JeM.

JeM supports over 300 Islamic institutions in Pakistan and gathers donations from attendees at these institutions. Publicly, 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.”

The United States’ Bureau of Counterterrorism’s Country Reports on Terrorism 2019 notes that JeM has withdrawn funds from bank accounts and invested in legal businesses, such as commodity trading, real estate, and the production of consumer goods.

Links to other terrorist organisations

JeM has links to extremist groups, including Lashkar-e-Jhangvi and Sipah-e-Sahaba, with which its membership probably overlaps. It maintains operational links with other groups operating in Jammu and Kashmir and Pakistan, particularly Lashkar-e-Tayyiba, and has ties to al-Qa’ida and the Taliban.

Terrorist activity

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. JeM has not engaged in large-scale attacks since February 2019; however, continued arrests and clashes with Indian security forces indicate the group is still active in Jammu and Kashmir.

- On **14 February 2019**, JeM claimed responsibility for and is assessed to have undertaken a suicide attack (Vehicle Borne Improvised Explosive Device) on a convoy of vehicles carrying security personnel on the Jammu Srinagar National Highway, in Pulwama district. The attack resulted in the deaths of 40 Central Reserve Police Force personnel. This incident resulted in widespread protests, significant international media attention and a tense military standoff between Pakistan and India.

Advocating the doing of terrorist acts

JeM's leadership has publicly advocated terrorist attacks online, and through rallies and religious sermons in Kashmir.

- On **22 March 2019**, JeM leader Chief Masood Azhar appeared in a video declaring those who denied jihad as infidels, promoting violent jihad against India and supporting martyrdom and violence as part of jihad. In this video, Azhar referenced 'a battle for India', and the 'mujahideen' engaging in 'murderfight' and achieving 'martyrdom' by going 'out into the battlefields to sacrifice their lives'.

Other considerations

Links to Australia

There are no known direct links between JeM and Australia.

Threats to Australian interests

There are no known direct links between JeM and Australia. JeM has not made statements specifically threatening Australians or Australian interests. However, it would consider Westerners, including Australians, to be legitimate targets for attack. JeM leaders have reportedly called for jihad against the US, along with Israel and India during rallies in Kashmir.

JeM has historically conducted attacks indiscriminately to achieve its objectives, including targeting foreigners.

Listings by likeminded countries or the United Nations

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.

The United Nations designated Maulana Masood Azhar as a global terrorist in May 2019.

Engagement in peace or mediation processes

JeM is not engaged in any peace or mediation process.

Conclusion

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