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3 September 2018

Committee Secretary  
Joint Committee on Intelligence and Security  
Parliament House  
CANBERRA ACT 2600  
AUSTRALIA

By email: [picis@aph.gov.au](mailto:picis@aph.gov.au)

Dear Secretary,

**Submission in relation to the proscription of the Kurdistan Workers' Party (PKK) under the *Criminal Code Act 1995* (Cth).**

We appreciate the opportunity to make a submission in relation to the proscription of the Kurdistan Workers' Party (PKK) as a 'terrorist organisation' under the *Criminal Code Act 1995* (Cth).

We make this submission on behalf of the Democratic Kurdish Community Centre of NSW and the Kurdish Democratic Community Centre of Victoria.

Yours sincerely,

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## **Introduction**

1. These submissions are made on behalf of the Kurdish Democratic Community Centre of Victoria and the Democratic Kurdish Community Centre of NSW (collectively, the **KA**) in relation to the Parliamentary Joint Committee on Intelligence and Security's (the **PJCIS**'s) review of the re-listing of the Kurdistan Workers' Party (the **PKK**).
2. The re-listing was made on 2 August 2018 by the *Criminal Code (Terrorist Organisation – Kurdistan Workers' Party) Regulations 2018* (the **2018 Regulation**). On 3 August 2018, the Minister for Home Affairs issued an Explanatory Statement, together with a Statement of Reasons (the **2018 Statement of Reasons**), in relation to the listing.
3. The 2018 Regulation is a disallowable instrument for the purposes of s 102.1A of the *Criminal Code* (Cth), and is subject to the PJCIS's review. By s 102.1A(2), the PJCIS may report comments and recommendations to each House of the Parliament consequent upon its review.
4. The Kurdish Democratic Community Centre of Victoria is an incorporated association with approximately 400 active members. The organisation hosts many cultural and social activities throughout the year with attendance exceeding over 1000 on each occasion. The Democratic Kurdish Community Centre of NSW is an incorporated association with approximately 262 registered members. The organisation serves over 1500 Australian Kurds in NSW. Each organisation, by its rules of association, is committed to democracy and the rule of law.
5. The KA submit that the PJCIS should recommend disallowance of the 2018 Regulation. The Minister's decision to re-list is founded upon unreliable foreign intelligence and is not consistent with a proper assessment of core non-legislative factors. The Minister's decision also fails to take into account the political context in Turkey and the implications of the 2018 Regulations for Kurdish Australians (in particular, the impact on their freedom of political communication, a freedom protected under the Commonwealth Constitution, as recognised by the High Court of Australia in its seminal decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).

## **Objections to listing mechanism based on the statutory criteria**

### **Minister's decision founded upon unreliable foreign intelligence.**

6. The PKK was first listed as a terrorist organisation in Australia on 17 December 2005. It was re-listed on 28 September 2007, 8 September 2009, 18 August 2012, 11 August 2015 and 2 August 2018.
7. In deciding to re-list the PKK, the Minister must address the statutory criteria provided for in s 102.1 of the *Criminal Code*. The statutory criteria are very broad, with many groups capable of satisfying the definition. Both ASIO and the Attorney General's office have previously stated that not every group that engages in political violence can or should be proscribed under Australian domestic law.<sup>1</sup> The KA agree with this position.
8. In order to limit the use of this extraordinary power, the Minister must be satisfied of the statutory criteria on "reasonable grounds" and can be guided by non-statutory factors (as long as those factors are not inconsistent with the statute).
9. In the 2018 Explanatory Statement, the Minister states that he is satisfied on reasonable grounds that the PKK "is engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act". The 2018 Statement of Reasons says the Statement is "based on publicly available information" and that "[t]o the Australian Government's knowledge, this information is accurate, reliable and has been corroborated by classified information".<sup>2</sup> That information forms the factual basis upon which the Minister made his decision to re-list. Accordingly, the question of whether the Minister's satisfaction (for the purposes of s 102.1) is "on reasonable grounds" must involve an assessment of the reliability of the information upon which his decision was based.
10. ASIO has previously explained that the relevant fact-finding relies on foreign intelligence services:

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<sup>1</sup> Parliamentary Joint Committee on Intelligence and Security (PJCIS), Minority Report of Sir Duncan Kerr and the Hon John Faulkner, 2006, paragraph 1.21.

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=pjcis/pkk/report/minority.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=pjcis/pkk/report/minority.htm)

<sup>2</sup> 2018 Statement of Reasons (Attachment B to the Explanatory Statement, p 9).

In terms of the corroborating classified intelligence, because the proscribed organisations are based overseas much of the classified reporting relied upon in each statement of reasons comes **from intelligence partners rather than Australian law enforcement agencies...**<sup>3</sup> (Emphasis added.)

11. The KA have concerns about the Minister's reliance on foreign intelligence, in circumstances where the likely sources of that intelligence are Turkish intelligence agencies. Turkey is not a reliable source of information about the PKK. Pro-Kurdish groups within Turkey are political rivals of the Turkish government, which has a history of using terrorism allegations and charges as a means to restrict the right of Kurdish people in Turkey to political association and participation.<sup>4</sup> Further compounding concerns about the credibility of information derived from Turkish intelligence agencies is the fact (previously acknowledged by the PJCIS) that the Turkish Government has staged PKK attacks.<sup>5</sup>
12. The unreliability of information relied upon by the Australian Government in deciding to re-list the PKK is borne out by a review of the Government's statements of reasons over time.
13. In 2009, the Statement of Reasons asserted that "[t]he PKK acquires the overwhelming bulk of its money from drug trafficking, which some commentators have claimed garnered as much as 500 million Euros ... for the organisation in 2008".<sup>6</sup> The Statement did not provide any source for these claims or identify the "commentators". The Statement went further and said "at different times, the PKK has reportedly controlled up to 80 per cent of the European illicit drug market".<sup>7</sup> This is an extraordinary claim, but again the source was not identified. It is notable that the Government does not appear to have taken any steps to verify this information, instead repeating various claims and reports from unnamed commentators. These claims were substantially

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<sup>3</sup> Independent National Security Legislation Monitor (**INSLM**), Commonwealth of Australia, *Annual Report 17 November 2013*, 67.

[https://www.pmc.gov.au/sites/default/files/files/INSLM Annual Report 20131107.pdf](https://www.pmc.gov.au/sites/default/files/files/INSLM%20Annual%20Report%2020131107.pdf) ('*INSLM Report*')

<sup>4</sup> Human Rights Watch, "Turkey: Crackdown on Kurdish Opposition", 20 March 2017 at <https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition> (accessed 28 August 2018).

<sup>5</sup> Review of the listing of the Palestinian Islamic Jihad (PIJ), Parliamentary Joint Committee on ASIO, ASIS and DSD, June 2004, paragraph 2.17.

<sup>6</sup> Review of the re-listing of Hamas' Brigades, PKK, LeT and PIJ as terrorist organisations, Parliamentary Joint Committee on Intelligence and Security, November 2009, Appendix E at page 53 (the **PJCIS 2009 Review**)

<sup>7</sup> Ibid at page 53.

repeated in the 2012 Statement of Reasons.<sup>8</sup>

14. It is significant, however, that allegations about financing do not appear at all in the 2015 Statement of Reasons.<sup>9</sup> In the 2018 Statement, the picture of the PKK's fundraising painted by the Government is different to the picture painted in earlier Statements. The 2018 Statement says: "Financing for the group has historically been obtained through fundraising among Kurds in Turkey and the European Kurdish diaspora. Additional sources of funding include criminal activity, such as narcotics smuggling and extortion". Thus, the 2018 Statement (in contrast to the earlier statements) suggests the principal source of financing is legitimate via fundraising from Kurdish people. This is a material (and unexplained) departure from the position described in earlier statements.
15. These significant differences between the Statements of Reasons on a matter as fundamental as "how is the PKK funded?" highlights the lack of reliable information underlying the Australian Government's decision-making in relation to the PKK. The fact that the Australian Government has dramatically changed its position in relation to the PKK's funding without explanation - should properly raise concerns for the PJCIS about the quality of the information being relied upon by the Australian Government in listing the PKK.
16. The same concerns about the quality of information are highlighted by a further example. The 2015 Statement of Reasons alleged that "the PKK has also forced kidnapped teenagers to join the group" and referred to a report of the PKK having kidnapped "more than 300 children between December 2013 and May 2014".<sup>10</sup> These are, of course, very serious allegations.
17. It is notable, then, that the 2018 Statement contains no allegations of kidnapping for recruitment purposes. In relation to the kidnapping of children, the 2018 Statement does no more than repeat what was said in the 2015 Statement (which itself simply recorded an unattributed "report"). Despite the passage of three years, no further detail about this "report" is given and no updated information going to the current situation is provided.
18. In the KA's submission, these factual inconsistencies between the various Statements of Reasons (going to serious matters relevant to the re-listing and the

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<sup>8</sup> Review of re-listing of five terrorist organisations, Parliamentary Joint Committee on Intelligence and Security, September 2012, Appendix E at page 38. (the **PJCIS 2012 Review**)

<sup>9</sup> Review of the re-listing of al-Shabaab, Hamas' Izz al-Din al-Qassam Brigades ( Hamas Brigades), the Kurdistan Workers Party (PKK), Lashkar-e-Tayyiba (LeT) and Palestinian Islamic Jihad (PIJ) as terrorist organisations, Parliamentary Joint Committee on Intelligence and Security, October 2015, Appendix C. (the **PJCIS 2015 Review**).

<sup>10</sup> Appendix C to the 2015 PJCIS Review (Kurdistan Workers' Party – Statement of Reasons) at p 2.

PJCIS's review) raise real doubts about the credibility and reliability of the information relied upon by the Australian Government in re-listing the PKK. These matters should be taken into account by the PJCIS in its review. A step as serious as listing an organisation as a terrorist organisation under the *Criminal Code* with the implications such a listing carries should not be taken on the basis of unreliable and inconsistent information.

### **Failure to take into account political context**

19. Every Statement of Reasons since 2006 has overlooked crimes against the Kurdish people by the Turkish state. This context is important for reasons including raising questions about the reliance of the Australian Government on information from Turkish intelligence agencies, and an understanding of the PKK's motivations. It also raises questions about the reasonableness of the Minister's satisfaction of the matters in s 102.1(2) of the *Criminal Code*. The following sets out reports of violence, damage to property, dismissals, arrests and the evolving constitutional setting in Turkey.
20. State-sanctioned violence causes theoretical ruptures in Australia's prosecution of terrorism. What makes terrorism so deplorable is its violent disruption of peaceful democratic institutions.<sup>11</sup> The analysis changes when State institutions are themselves violent, oppressive and deny basic democratic freedoms.
21. The longstanding oppression of the Kurds is well documented by various bodies including the United Nations and respected human rights organisations, and has previously been acknowledged - to some degree - by the PJCIS.<sup>12</sup> For decades Turkey has not permitted the teaching of the Kurdish language in schools, or its use in government institutions. The documentation of violence against the Kurdish people or reference to 'Kurdistan' is met with austere penalty and lengthy jail terms.<sup>13</sup>
22. In 2005 Human Rights Watch published a report on the longevity of the Kurdish conflict:

"Security forces in Turkey forcibly displaced Kurdish rural communities

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<sup>11</sup> Professor Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient - Or Criminalizing Thought?' Legal Studies Research Paper No. 08/123, page 8.

<sup>12</sup> Minority Report of Sir Duncan Kerr and the Hon John Faulkner, Above n.1, paragraph 2.14.

<sup>13</sup> Such as Nobel Laureate Orhan Pamuk who was fined for acknowledging Kurdish massacres. Hurriyet Daily News "Nobel laureate Orhan Pamuk gets fined" 27 March 2011 <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=orhan-pamuk-will-pay-compensation-for-his-words-court-decided-2011-03-27>; Another prominent lawyer received a 6-month prison term for using the term "Kurdistan" in an article Amnesty International "Take Action! Amnesty Write for Rights Campaign for Eren Keskin" 9 December 2016 <https://humanrightsturkey.org>

during the 1980s and 1990s in order to combat the Kurdish Workers' Party (PKK) insurgency, which drew its membership and logistical support from the local peasant population...

Evacuations were unlawful and violent. Security forces would surround a village using helicopters, armoured vehicles, troops, and village guards, and burn stored produce, agricultural equipment, crops, orchards, forests, and livestock. They set fire to houses, often giving the inhabitants no opportunity to retrieve their possessions. During the course of such operations, security forces frequently abused and humiliated villagers, stole their property and cash, and ill-treated or tortured them before herding them onto the roads and away from their former homes. The operations were marked by scores of "disappearances" and extrajudicial executions. By the mid-1990s, more than 3,000 villages had been virtually wiped from the map, and, according to official figures, 378,335 Kurdish villagers had been displaced and left homeless."<sup>14</sup>

23. These reports have been repeated post-Coup.<sup>15</sup> In May 2016 the UN High Commissioner for Human Rights received a 'succession of alarming reports' about violations allegedly committed by Turkish military.<sup>16</sup> The High Commissioner noted:

"There also appears to have been massive, and seemingly highly disproportionate, destruction of property and key communal infrastructure including buildings hit by mortar or shellfire, and damage inflicted on the contents of individual apartments and houses taken over by security forces...There are also allegations of arbitrary arrests, and of torture and other forms of ill-treatment, as well as reports that in some situations ambulances and medical staff were prevented from reaching the wounded. On top of all this, there has been huge displacement triggered by the curfews and by subsequent fighting, shelling, killings and arrests in many places in the south-east."<sup>17</sup>

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<sup>14</sup> Human Rights Watch, "Still critical": Prospects in 2005 for Internally Displaced Kurds in Turkey (2005) 5, cited by Liberty Victoria in their Submissions to the PJCIS in 2005.

<sup>15</sup> Amnesty International "Amnesty: Turkey's escalating abuses risk return to dark days of 1990s" 5 July 2016, <https://humanrightsturkey.org/2016/07/05/amnesty-turkeys-escalating-abuses-risk-return-to-dark-days-of-1990s/> Human Rights Watch "Turkey: Emergency Decrees Facilitate Torture" 25 October 2016 <https://www.hrw.org/news/2016/10/25/turkey-emergency-decrees-facilitate-torture>

<sup>16</sup> UN News Centre "Alarming" reports of major violations in south-east Turkey" <http://www.un.org/apps/news/story.asp?NewsID=53895#.WIVjS7Fh3dc>

<sup>17</sup> European Parliament News "Freeze EU accession talks with Turkey until it halts repression, urge MEPs" 24 November 2016, <http://www.europarl.europa.eu/news/en/news-room/20161117IPR51549/freeze-eu-accession-talks-with-turkey-until-it-halts-repression-urge-meps> Office of the High Commissioner for Human Rights "Need for transparency, investigation, in light of



24. The UN has used satellite imagery to monitor the damage to Kurdish towns; in Surici alone 792 buildings have recently been erased.<sup>18</sup> In 2018 the UN continued to document “killings; torture; violence against women; excessive use of force; destruction of housing and cultural heritage; prevention of access to emergency medical care, safe water and livelihoods and severe restrictions on the right to freedom of expression”.<sup>19</sup>

25. Human rights violations and unlawful killings have been a major impediment to Turkish accession in to the European Union. On 24 November 2016, the European Parliament announced it would suspend EU accession talks because of the “disproportionate repressive measures”.<sup>20</sup> The European Court of Human Rights (**ECHR**) issued a number of urgent injunctions in regard to curfews and violations regarding torture in relation to the town of Cizre.<sup>21</sup>

26. There have been widespread professional dismissals. Since the failed coup, the UN has documented the dismissal of at least 152,000 civil servants,<sup>22</sup> including 4,200 Judges and prosecutors.<sup>23</sup>

27. There have been widespread arrests. According to the Turkish Ministry of Interior (cited by OHCHR), by December 2017 159,506 individuals had been arrested in relation to the emergency decrees.<sup>24</sup> The UN report continues:

Some 570 lawyers were arrested, 1480 faced some kind of prosecution, and 79 were sentenced to long-term imprisonment. Moreover, approximately 34 bar associations were shut down on the ground of alleged affiliation to a terrorist organisation. OHCHR also identified a pattern of persecution of lawyers representing individuals accused of terrorism offences.<sup>25</sup>

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‘alarming’ violations in south-east Turkey”

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19937&LangID=E>

<sup>18</sup> Office of the High Commissioner for Human Rights (**OHCHR**) ‘Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East’, April 2018, page 26.

<sup>19</sup> Ibid, pg 4.

<sup>20</sup> See for example, NY Times “European Parliament Votes to Suspend Talks With Turkey on E.U Membership” 25 November 2016 <https://www.nytimes.com/2016/11/24/world/europe/european-parliament-turkey-eu-membership.html>

<sup>21</sup> ANF NEWS “ECHR demands written statement from Turkey on Cizre and Sur cases 31 January 2017 <http://anfenglish.com/human-rights/echr-demands-written-statement-from-turkey-on-cizre-and-sur-cases>.

<sup>22</sup> OHCHR report, above n 18, page 2.

<sup>23</sup> Ibid, page 3.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

28. Hundreds of journalists have also been arrested for 'verbal act offences' or for 'membership' of terrorist organisations.<sup>26</sup> Indeed, much pro-democratic sentiment is now assessed by the Turkish Government as synonymous with the PKK. The UN report continues:

In January 2016, a group of 1,128 academics from 89 Turkish universities, along with 355 international academics, released a petition calling on the Government of Turkey to "put an end to violence inflicted against its citizens" in the South-East. By December 2017, 380 academics who had signed the petition had been dismissed from their universities and barred from public service. The trials of these academics started on 5 December 2017. At least 146 academics from public and private universities in Istanbul would face individual and separate trial hearings for "spreading terrorist propaganda on behalf of PKK."<sup>27</sup>

29. With both parliamentary co-chairs and several other MP's of the mainstream Kurdish HDP party now in custody, Kurdish political expression in Turkey is highly restricted.<sup>28</sup>

30. A referendum recently approved 18 amendments to the Constitution. These amendments vested the President with the power to enact laws without Parliament and to control appointments to the Judiciary.<sup>29</sup> This political landscape sits in contrast to the 'democratic confederalism' proposed by the PKK.

31. The political context for the PKK's activities has been taken into account in other jurisdictions. For example, a German Court recently imposed a suspended sentence for a PKK member, noting both Turkish human rights violations, and findings that Turkey had assisted the rise of the Islamic State.<sup>30</sup> In the KA's submission, the Minister (and the PJCIS) should take into account the realities of the political situation in Turkey in considering re-listing the PKK. The context raises real questions about reliance on information sourced from the Turkish

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<sup>26</sup> Ibid.

<sup>27</sup> OHCHR report, above n 18, page 17.

<sup>28</sup> See for example, Reuters "Turkey orders arrest of pro-Kurdish party leader: agency"<sup>9</sup> February 2018 <https://www.reuters.com/article/us-turkey-security-kurds/turkey-orders-arrest-of-pro-kurdish-party-leader-agency-idUSKBN1FT16I>

<sup>29</sup> OHCHR report, above n 18, page 7.

<sup>30</sup> See for example, NSNBC International "German Court Hands Down Suspended Sentence for PKK Member Citing Turkey's Support of ISIS" 26 November 2016 <https://nsnbc.me/2016/11/26/german-court-hands-down-suspended-sentence-for-pkk-member-citing-turkeys-support-of-isis/> A study from Columbia University corroborates these assertions [http://www.huffingtonpost.com/david-l-phillips/research-paper-isis-turke\\_b\\_6128950.html](http://www.huffingtonpost.com/david-l-phillips/research-paper-isis-turke_b_6128950.html)

Government or its agencies.

**The PKK do not meet salient non-legislative factors**

32. As the PCJIS has previously noted, in making a decision under s 102.1 of the *Criminal Code*, the Minister may consider a range of what have been described as “non-legislative” factors.<sup>31</sup>

33. Policy guidelines developed by government agencies purport to assist the relevant Minister with his or her task. These guidelines frame the protection of Australia as a core criterion, in keeping with the clear intent of the legislation and extrinsic material. The following factors are currently publicly identified by the Australian Government as “key” non-legislative factors:<sup>32</sup>

- a. the organisation’s engagement in terrorism
- b. the organisation’s ideology**
- c. links to other terrorist groups
- d. links to Australia**
- e. threats to Australian interests**
- f. listing by the United Nations or like-minded countries, or
- g. Engagement in peace or mediation processes.** (Emphasis added.)

34. The Australian Government website continues:

“Depending on available information, some factors may carry more weight than others in selecting organisations for consideration. For example, **information indicating links to Australia or threats to Australian interests may tend to prioritize consideration of listing a particular group as a terrorist organisation.** However, a lack of information with respect to one or more factors will not preclude an organisation from being considered for listing.”<sup>33</sup> (Emphasis added.)

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<sup>31</sup> 2015 PJICIS Review at Chapter 1 (see also [3.9 , [3.30 ).

<sup>32</sup> See Australian National Security, Protocol for listing terrorist organisations <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/ProtocolForListingTerroristOrganisations.aspx> (accessed 28 August 2018).

<sup>33</sup> Ibid.

### **Non-legislative factor: ideology**

35. There are presently 26 organisations proscribed under Australian law. Twenty-five of these organisations are Islamist, calling for an Islamic State or the imposition of Sharia law through violence. The ideology is anti-democratic, anti-western and anti-Australian with a focus on gross violence against civilians.
36. The PKK is a secular organisation that once called for independence for Turkey's 15 million Kurds, but for several decades has requested a degree of ethnic autonomy and the enjoyment of basic human rights.<sup>34</sup> The 'democratic confederalism' proposed by PKK leader Abdullah Ocalan has influenced the model of self-governance in the Kurdish controlled cantons in Syria, which emphasizes the emancipation of women, environmentalism and democratization.<sup>35</sup> It is one of the most progressive, egalitarian models for government advanced in the Middle East.
37. The ideology of the PKK no doubt informs coalition willingness to enter into de facto alliance with the PKK, and formal alliance with the separate and distinct Peoples' Protection Units (the **YPG/YPJ**) and the Syrian Democratic Forces (the **SDF**) in the war against the Islamic State. For example, on 7 August 2014 an international coalition including Australia staged a humanitarian intervention in the Sinjar province. On 14 August 2014 an Australian RAAF C-130J aircraft delivered nine tons of aid to Yezidi civilians under siege on Mount Sinjar.<sup>36</sup> Shortly after, the PKK and YPG established an evacuation corridor, clearing 20,000 - 35,000 civilians from the mountain.<sup>37</sup> The PKK is widely reported in credible news sources to have abated this genocide.<sup>38</sup> While the PKK was at

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<sup>34</sup> "The PKK's objectives have changed over time, in line with Turkey's evolving political environment. The organisation now calls for autonomy for Kurds within Turkey and seeks to promote the rights of Kurds living in Turkey, specifically the right to maintain a Kurdish ethnic identity" Australian National Security, Terrorist organisations, Kurdistan Workers' party (PKK).

<https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/KurdistanWorkersPartyPKK.aspx>

<sup>35</sup> CNN "Rojava: A safe haven in the middle of Syria's brutal war" 30 March 2016

<http://edition.cnn.com/2016/03/30/opinions/rojava-kurds-syria-democracy/>

<sup>36</sup> See for example, Department of Defence, Global Operations, Operation OKRA, Air Task Group <http://www.defence.gov.au/Operations/Okra/ATG.asp>

See for example, Public Radio International, "If it wasn't for the Kurdish fighters, we would have died up there" <https://www.pri.org/stories/2014-08-29/if-it-wasn-t-kurdish-fighters-we-would-have-died-there> ; Sydney Morning Herald "Kurds Open escape route for some trapped Yazidis" 10 August 2014 <http://www.smh.com.au/world/kurds-open-escape-route-for-some-trapped-yazidis-20140810-102e92.html>.

<sup>38</sup> See for example The Australian "PKK saved us when Peshmerga ran away"

<http://www.theaustralian.com.au/news/world/the-times/pkk-saved-us-when-peshmergas-ran-away-yazidis/news-story/a4cf854079d899f7b7877b6e06b0b2b9> ; The Washington Post "A US designated

work on the ground, the Australian air force conducted four airdrops between 20 and 24 November, comprising 32 tons of aid.

### **Non-legislative factor: risk to Australia**

38. The *Criminal Code* provides for the review of any listing decision by PJCIS. The need for a security nexus between Australia and the armed group the subject of a listing decision has been noted by the PJCIS on a number of occasions, both as a matter of statutory interpretation and sound policy. In 2004 the PJCIS noted:

“The immediate and threatening aspects of a particular entity, its transnational nature and the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing.”<sup>39</sup>

39. Further, in 2006 the PJCIS noted:

“Although the Committee understands that direct links to Australia are not legally necessary in order for an organisation to be listed under the Criminal Code, it is the Committee’s view that it should be an important consideration. The views of ASIO, the Attorney-General and Mr Emerton would appear to be consistent with the Committee’s opinion.”<sup>40</sup>

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terrorist group is saving Yazidis and battling the Islamic State”, 11 August 2014 [https://www.washingtonpost.com/news/worldviews/wp/2014/08/11/a-u-s-designated-terrorist-group-is-saving-yazidis-and-battling-the-islamic-state/?utm\\_term=.613407cff904](https://www.washingtonpost.com/news/worldviews/wp/2014/08/11/a-u-s-designated-terrorist-group-is-saving-yazidis-and-battling-the-islamic-state/?utm_term=.613407cff904); Reuters “Smugglers and Kurdish militants help Iraq’s Yazidis flee to Turkey” 26 August 2014 <http://www.reuters.com/article/us-iraq-security-turkey-yazidis-idUSKBN0GQ1MX20140826>; The New Yorker “The Front Lines, On the border of ISIS territory, Iraqi civilians fight for their survival” 18 January 2016 <http://www.newyorker.com/magazine/2016/01/18/the-front-lines>; the BBC “Analysis: Could support for the ‘other’ Kurds stall Islamic State” 7 August 2014 <http://www.middleeasteye.net/news/kurds-unite-oust-militants-bid-rescue-yazidi-civilians-881764545>; Al Jazeera After repelling ISIL, PKK fighters are the new heroes for Kurdistan” 17 October 2014 <http://america.aljazeera.com/articles/2014/10/17/pkk-s-rise-in-iraqikurdistan.html>

<sup>39</sup> Review of the listing of the Palestinian Islamic Jihad (PIJ), Parliamentary Joint Committee on ASIO, ASIS and DSD, June 2004, paragraph 3.21.

<sup>40</sup> Review of the listing of the Kurdistan Workers Party (PKK), Parliamentary Joint Committee on Intelligence and Security, April 2006, paragraph 2.35 (the **PJCIS 2006 Review**).

40. In 2018 the PKK have been depicted as a domestic security threat. In the 2018 Explanatory Statement, the Minister says:

“Terrorist organisations, including Kurdistan Workers’ Party, present a threat to the security of Australia and often seek to harm Australians and our democratic institutions.”<sup>41</sup>

41. The Minister provides no basis for his view that the PKK presents a threat to the security of Australia, and that it “often” seeks to harm Australians and Australia’s democratic institutions. With respect, nothing in the Explanatory Statement or Statement of Reasons provides support for such statements. In the Statement of Reasons there is a section styled “Links to Australia”, which notes only that one Australian has been charged with being a member of the PKK. Importantly, this prosecution relates to conduct in 2013 in Turkey. The absence of any risk posed by the PKK to Australia was confirmed by the Supreme Court of New South Wales at the successful application for bail in that case.

42. In the KA’s submission, there is nothing in the Statement of Reasons to support the view that the PKK presents a risk to the security of Australia, or that the PKK seeks to harm Australians or its democratic institutions.

43. In the absence of any real basis to form the view that the PKK seeks to harm Australians or its democratic institutions, the PJCIS should recommend disallowance of the 2018 Regulation.

### **Non-legislative factor: engagement in peace or mediation processes**

44. Of the 26 proscribed organisations, 25 have not entered into formal or meaningful peace negotiations.<sup>42</sup> The PKK is the only organisation to have imposed unilateral cease-fires (first in 1999, 2009 and again in 2013) and conducted formal peace negotiations supported by the international community. Their leader, Abdullah Ocalan, has repeatedly called for a cessation of hostilities. There was reportedly an enduring peace between 2013 and 2015, the break down many have attributed to Turkish airstrikes.<sup>43</sup>

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<sup>41</sup> Explanatory Statement, page 4.

<sup>42</sup> The Australian Government website notes two organisations: Al Qaeda in the Arabian Peninsular (AQAP) – entered into peace talks with Yemen in 2013 with the condition that Sharia law would be imposed. One faction of Boko Haram has also informally proposed conditions. These were not accepted by the Nigerian Government.

<sup>43</sup> See for example, BBC “Who are Kurdistan Workers’ Party (PKK) rebels?” 4 November 2016 <http://www.bbc.com/news/world-europe-20971100>.

45. Moreover, the proscription regime can hinder peace negotiations. In 2004, the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the PJCIS) observed:

“[When] there is a peace process... you can unintentionally make things worse if you do not think through the implications of the listing.”<sup>44</sup>

Similar concerns have been raised by parliamentarians during the listing debates in the United Kingdom.<sup>45</sup>

46. In their seminal work on the PKK peace process Boon-Kuo, Hayes, Sentas and Sullivan found:

“Listing structures the kinds of negotiations that can take place, limits the political status and opportunities of the PKK and Kurdish mediators, and criminalizes both formal and informal relations of support from the Kurdish movement which might otherwise progress political mechanisms.”<sup>46</sup>

47. The ways in which proscription regimes impact peace building efforts are well-documented.<sup>47</sup> At its most extreme, US case law prohibits peace building efforts as ‘material’ support for terrorism.<sup>48</sup> In Australia, several terrorist organisation offences do not contain exemptions for neutral or impartial actors. The terrorist training provisions arguably capture non-military training provided by the ICRC or Geneva Call.

48. The PJCIS should have regard to fact that de-listing the PKK may facilitate further engagement with the peace process. Among other things, de-proscription would allow Australians to engage in the PKK peace process without fear of committing a serious criminal offence.

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<sup>44</sup> Cited in Review of the listing of the Palestinian Islamic Jihad (PIJ), Parliamentary Joint Committee on ASIO, ASIS and DSD, June 2004, paragraph 3.21.

<sup>45</sup> Ibid.

<sup>46</sup> Boon-Kuo, Hayes, Sentas, Sullivan, “Building Peace in Permanent War, Terrorist Listing and Conflict Transformation”, page 121.

<sup>47</sup> See for example, “Proscribing Peace: the impact of terrorist listing on peacebuilding organisations” [http://reliefweb.int/sites/reliefweb.int/files/resources/Conciliation\\_Resources\\_Counter-terrorism\\_brief.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Conciliation_Resources_Counter-terrorism_brief.pdf)

<sup>48</sup> NY Times “Court Affirms Ban on Aiding Groups Tied to Terror” 21 June 2010 <http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=print>

**The conflict in Turkey and Iraq is properly the subject of International Humanitarian Law (IHL) and not domestic criminal law.**

49. The 2018 Statement of Reasons states that “[w]hile the PKK directs attacks against Turkish Government and security force targets, attacks by the group have treated civilian bystanders as acceptable collateral.” While the death of civilians should be condemned in the strongest terms, the concept of permissible collateral damage speaks to the tension between domestic criminal law and the body of International Humanitarian Law (IHL) recognised by Australia.
50. There are occasions where violence within a state or across borders engages the Geneva Conventions and the broader body of IHL. Depending on the threshold of violence and the nature of the armed groups,<sup>49</sup> a conflict may engage IHL, international human rights law, or simply domestic criminal law. As discussed below, the classification of a conflict as significant, as unlawful activity under domestic criminal law may be perfectly sound as a matter of IHL. This is particularly relevant to the notion of collateral damage.
51. Should a conflict meet the threshold of intensity required under IHL, the question then arises as to whether it is an ‘international’ armed conflict (*an IAC*), which can include struggles for self-determination,<sup>50</sup> or a ‘non-international’ armed conflict (*a NIAC*). Both IAC’s and NIAC’s enliven IHL but attract different levels of rights and remedies.
52. A Belgian court recently determined that a ‘non-international’ armed conflict persists in Turkey and dismissed charges of PKK membership. The Belgium Criminal Code adopts the European Council Framework Decision of Terrorism (*the Framework Decision*), where terrorism offences can be eclipsed by IHL:

“Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules

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<sup>49</sup> Article 3 of the four Geneva Conventions 1949 and Article 1(2) of the Additional Protocol II of 1977. The latter excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” The threshold of intensity has been established by the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and includes the ‘scale, nature, duration, spread of hostilities; the number of fighters and casualties; the weapons used; the extent of human displacement; and the capabilities of the group.’ The armed group must also be sufficiently organized. Saul, B “Terrorism and international humanitarian law” in Research Handbook on International Law and Terrorism Edited by Ben Saul.

<sup>50</sup> Article 1(4) of Additional Protocol of 1977.



of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.”<sup>51</sup>

This classification of conflict in Turkey has been echoed by the Geneva Academy, the peak academic institution for IHL.<sup>52</sup>

53. A French court made a similar finding in relation to the People’s Mujahedin of Iran, where the application of IHL led to terrorism charges being struck out.<sup>53</sup>

54. Australian law does not expressly incorporate the IHL regime into the terrorism provisions of the Criminal Code. The PJCIS is aware of these tensions:

“[T]he Committee would also note there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances - within an armed conflict - the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions.”<sup>54</sup>

55. The PJCIS has pressed legislative reform to accommodate IHL. Among their chief recommendations at the *Review of Security and Counter-terrorism legislation*, the PJCIS proposed:

“...the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict.”<sup>55</sup>

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<sup>51</sup> European Council Framework Decision of Terrorism, Article 11 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=en>

<sup>52</sup> The Geneva Academy, Non-international armed conflict in Turkey <http://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-turkey#collapse3accord>

<sup>53</sup> Dupont, Pierre-Emmanuel “International Terrorism, Resistance and the Jus in Bello before French Courts, The Case of the Iranian Militant Opposition” *Journal of International Criminal Justice* 11 (2013), 441-462.

<sup>54</sup> Cited in Review of the listing of the Palestinian Islamic Jihad (PIJ), Parliamentary Joint Committee on ASIO, ASIS and DSD, June 2004, paragraph 2.7.

<sup>55</sup> PJCIS, *Review of Security and Counter-terrorism legislation* The Australian Government website notes two organisations: Al Qaeda in the Arabian Peninsular (AQAP) – entered into peace talks with Yemen in 2013 with the condition that Sharia law would be imposed. One faction of Boko Haram has also informally proposed conditions. These were not accepted by the Nigerian Government.

<sup>55</sup> See for example, BBC “Who are Kurdistan Workers’ Party (PKK) rebels?” 4 November 2016 <http://www.bbc.com/news/world-europe-20971100>

<sup>55</sup> Cited in Review of the listing of the Palestinian Islamic Jihad (PIJ), Parliamentary Joint Committee on ASIO, ASIS and DSD, June 2004, paragraph 3.21.

56. The application of IHL has significant implications for this case. Careful analysis of PKK activity in Turkey could re-cast many terrorist acts as legitimate military targeting under IHL. This would re-focus the enquiry on whether attacks were legitimate military objects. The definition of a 'military object' is set out in Article 52(2) of Additional Protocol 1 (AP1):

“those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

57. This Article gives life to the principles of necessity and distinction, which are 'cardinal' rules of IHL and which pre-date the Geneva Conventions.<sup>56</sup> IHL has long recognized that attacks must be both *necessary* from a military perspective and *distinct* from civilian objectives. As a 'civilian object' is defined as 'all objects which are not military objectives'<sup>57</sup>, the definition of a 'military object' is salient.

58. The second obligation to be drawn from the Geneva conventions is that commanders must ensure objects are attacked in a *lawful manner*. This includes exercising intelligence and operational precautions, as outlined in Article 57 (2) of AP1.<sup>58</sup> This Article is quite expansive, and requires those planning and carrying out attacks to take all feasible precautions to ensure that targets are not civilian, that weapons that will minimize damage,<sup>59</sup> and that steps are taken to warn civilians about impending attacks.<sup>60</sup> Commanders are also expected to call

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<sup>55</sup> Book-Kuo, Hayes, Sentas, Sullivan, "Building Peace in Permanent War, Terrorist Listing and Conflict Transformation", page 121.

<sup>55</sup> Ibid.

<sup>55</sup> See for example, "Proscribing Peace: the impact of terrorist listing on peacebuilding organisations" [http://reliefweb.int/sites/reliefweb.int/files/resources/Conciliation\\_Resources\\_Counter-terrorism\\_brief.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Conciliation_Resources_Counter-terrorism_brief.pdf)

<sup>55</sup> NY Times "Court Affirms Ban on Aiding Groups Tied to Terror" 21 June 2010 <http://www.nytimes.com/2010/06/22/us/politics/22scotus.html?pagewanted=print>

<sup>55</sup> INSLM, Annual Report 7 November 2013, Recommendation V/2/ A similar discussion has taken place in relation to declared areas, see *Centre for Military and Security Law, Submission to the Acting Independent National Security Legislation Monitor re: Offences relating to the entering and remaining in 'declared areas' under division 119 of the Criminal Code Act 1995 (Cth)*, paragraph 2. 2006, Recommendation 12.

<sup>56</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 1996, ICJ Reports, paragraph 78.

<sup>57</sup> Additional Protocol 1, art 52(1).

<sup>58</sup> Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Martinus Nijhoff Publishers, 2009) 157.

<sup>59</sup> Additional Protocol 1, art 57(2)(a)(ii).

<sup>60</sup> Additional Protocol 1, art 57(2)(c).

off attacks if they may lead to excessive civilian casualties.<sup>61</sup>

59. Against this background, it is notable that no armed attack by the PKK against Islamic State is listed in the Statement of Reasons in 2015 or 2018. This raises the question whether a determination has been made that these attacks form part of an international armed conflict and are properly the subject of IHL. It appears that the Sinjar offensive has been classified as legitimate military targeting, rather than terrorist attacks.

60. Finally, we note that the PKK has made a host of unilateral commitments to the United Nations concerning compliance with IHL,<sup>62</sup> and have signed a number of deeds of commitment with Geneva Call concerning sexual violence, child recruitment and landmines.<sup>63</sup>

### **Impact on Kurdish Australians – chilling effect of re-listing on freedom of political communication**

61. The terrorist organisation offences have unique work to do in relation to the conduct of groups who operate in Australia or pose a risk to Australians.

62. However, the position changes for groups based and operating overseas. Federal criminal law is already equipped to capture conduct aligned with non-state armed groups in foreign states. The foreign incursion regime at Part 5.5 of the *Criminal Code* prohibits any activity directed at the overthrow of foreign government by force or violence or the intimidation of civilian populations. This includes military activity, training, fundraising and other forms of dissent. Several of these offences attract life imprisonment.

63. The terrorist organisation offences do not greatly add to the foreign incursion regime for groups based overseas. However, they extend serious criminal penalties to 'association' and 'membership.' These offences are damaging to the Kurdish diaspora in Australia as they collide with international human rights obligations and the implied freedom of political communication protected under the Commonwealth Constitution.

64. In Turkey, the PKK is now synonymous with anti-government dissent. Australia relies on foreign intelligence for its definition of the PKK. This includes all of the

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<sup>61</sup> Additional Protocol 1, art 57(2)(a)(iii).

<sup>62</sup> 'PKK Statement to the United Nations', 24 January 1995 <http://www.hartford-hwp.com/archives/51/009.html>

<sup>63</sup> See for example, Geneva Call Deeds of Commitment <http://genevacall.org/turkey-pkk-movement-signs-geneva-calls-deed-commitment-prohibiting-sexual-violence-gender-discrimination/>

different names of the organisation and related off-shoots listed in the 2018 Regulations. A corollary of the Australian Government's reliance on foreign intelligence services is that it relies upon their conception of the boundaries of this organisation.

65. The definition of 'terrorism' at s 100.1 of the Code excludes advocacy, protest or dissent which is not intended to cause serious harm to a person; to cause a person's death; to endanger the life of a person, other than the person taking the action; or to create a serious risk to the health or safety of the public or a section of the public. However, membership offences under the Code include informal membership. Recent federal prosecutions suggest that the Commonwealth DPP are seeking to extend this to 'passive' membership.<sup>64</sup> This calls into question whether and at what point peaceful anti-government dissent against Turkey by Kurdish groups in Australia is an offence under Australian law. Arguably, the exemptions at s 100.1 of the *Code* are not sufficiently robust to protect against advocacy, protest or dissent as an integer or complete proof of informal or passive membership.

66. Given the importance of the PKK in the history of the Kurdish peoples' struggle for autonomy, it is difficult (if not impossible) to disentangle support for the rights and autonomy of the Kurdish people from support for the PKK and its leaders. The boundary between support / political dialogue and serious criminal offences is therefore obscure. In the KA's submission, the consequence is that the proscription of the PKK under Australian law has a chilling effect on political communication (and association) by Kurdish Australians in Australia. The impact on the ability of Kurdish Australians to communicate about political matters freely is not justified in circumstances where (among other things) there is no demonstrated risk to Australia. The concerns about the PKK are entirely unconnected to life here in Australia, and yet Kurdish Australians are left in the position of being unable to freely communicate their political ideas and beliefs in Australia. The KA considers this outcome to be inconsistent with the implied freedom of political communication protected by the Commonwealth Constitution.

67. These matters should be taken into account by the PJCIS in its decision-making. A broad approach to listing an organisation such as the PKK, which has not been

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<sup>64</sup> In pre-trial argument in a terrorism proceeding currently before the courts the expert witness has raised the possibility of 'passive' membership.

shown to pose any real threat to Australia or Australian interests, will undoubtedly have a chilling effect on the ability of Kurdish Australians to freely express their political views, including by political speech and association.

3 September 2018

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