



Minority Report

- 1.1 The Joint Committee on Intelligence and Security (formerly the Joint Committee on ASIO, ASIS and DSD) does not divide on partisan lines. Members have accepted that their participation on the Committee requires them to form judgments only after careful assessment of both public and confidential materials – and that this is a special responsibility.
- 1.2 Members put aside any issues of party advantage and bring their independent judgment to bear on all material issues.
- 1.3 Where possible the Joint Committee attempts to reach consensus. In the past that has resulted in unanimous conclusions on the various matters that have been the subjects of report.
- 1.4 However, in this rare instance, achieving unanimity has not been possible.
- 1.5 This short minority report recommends that the Government review the proposed listing of the PKK as a proscribed organisation.
- 1.6 A summary of the reasons that have led to that conclusion are set out below.

Criteria not met

- 1.7 No evidence has been placed before the Joint Committee that the proposed listing meets the criteria previously submitted by ASIO and adopted by the Joint Committee as a template for its previous reports. Those criteria were intended to justify discrimination between those organisations which have resorted to the use of political violence that should be listed as terrorist organisations under Australian domestic law (in which case membership or support of those organisations, without more, becomes a crime), and those (the larger majority) which should not.

- 1.8 The Joint Committee has outlined the evidence that was put before it in support of the proposed listing. It is plain that that evidence does not address those template criteria. Implicitly accepting that conclusion, those advocating the listing instead argued that the PKK fell within the literal terms of the statutory definition of a terrorist organisation. The Attorney General's Department and ASIO argued that a prior statement of policy cannot limit the power to make regulations conferred by statute.
- 1.9 That is of course true as a strict matter of legal entitlement – because proper implementation of a policy must allow for the examination of exceptional cases--but it says nothing of the wisdom of the proposed course of action in this particular instance.
- 1.10 There has been no rationale developed in this case to justify a departure from the policy ASIO identified in earlier hearings and which this Joint Committee has endorsed. As both ASIO and the Attorney General have acknowledged, not every organisation that has resorted to political violence can or should be proscribed under Australian domestic law. Once that is conceded, it makes sense to consistently limit the use of the power to those circumstances justified by sound policy – as articulated by ASIO itself. No special circumstances (except perhaps the point discussed under point 2 below) were advanced by those proposing the listing.
- 1.11 The Joint Committee has a statutory obligation, *inter alia*, to review proposed listings. The Parliament relies on this Committee to ensure that the quite extraordinary legal step of making it a crime to support or belong to an organisation is not taken in inappropriate circumstances.
- 1.12 If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its own prior reports and not based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds, to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament.

No direct security benefits

- 1.13 Second, the Joint Committee received nothing by way of evidence or submissions that would justify a conclusion that the proscription would have any direct positive security benefits for Australia. Australia already has strong laws to criminalise actual conduct involving terrorism.
- 1.14 Actions giving direct assistance to any acts of terrorism are already unlawful. Sending money out of Australia to aid the PKK is already prohibited and it is already an offence under Australian domestic law for

- any Australian to serve an organisation seeking to overthrow a foreign government by force. No Australian has been charged with such existing offences.
- 1.15 What the proposed proscription would do would be to take a further step and create a criminal offence which would be complete if a person belonged to or gave any support to the PKK. The offences so created would be disconnected from the need to prove any act of or support for terrorism.
- 1.16 When asked to identify any direct conduct in Australia by Australians of Kurdish origin, ASIO responded with four incidents: in 1992, where stones and paint and stones were thrown at the Turkish Consulate-General in Melbourne in protest at the killing of Kurds in Turkey; in 1994 when 70 Kurds occupied the German Consulate-General in Melbourne, protesting at the treatment of Kurds in Germany (a window was smashed and a police officer assaulted); in 1999, on the arrest of the PKK leader, Abdullah Ocalan, when 65 Kurds broke into and occupied the office of the Greek Consulate-General causing extensive damage (some charges of assault were laid); and in 1999, in Sydney a young protester set himself alight. Since 1999 Kurdish PKK protest has been peaceful.¹
- 1.17 None of these matters reported to the Committee about previous acts of violence remotely resemble acts of terrorism.
- 1.18 In only one remote regard was the Joint Committee taken to any suggestion of a link between the PKK and contemporary threats to Australian interests. There was no evidence to suggest that Australians or Australian interests in Turkey have ever been targeted by the PKK or its military wing – but some evidence that attacks on tourism infrastructure could cause risk to Australians visiting Turkey.
- 1.19 To date no Australian tourist has been injured or killed as a result of any PKK related activity.
- 1.20 When pressed to identify why a risk to tourists in Turkey placed the situation of the PKK in any different position to that of other organisations involved in political violence overseas where incidental violence can always spill over to affect innocent third parties, including tourists – for example such as in Sri Lanka with the Tamil Tigers (which is not a proscribed organisation), it was faintly suggested that the number of Australian tourists in Turkey is much larger than that to Sri Lanka.
- 1.21 The facts however are to the contrary. More Australians visit Sri Lanka than visit Turkey. The rationale does not stand up.

¹ ASIO, answers to questions on notice, 2 March 2006, pp. 1-2.

- 1.22 There is also some doubt, because of the paucity of evidence as to the nature of any current threat to Australia's security interests as to whether the proposed regulations meet the intended statutory criteria.
- 1.23 The Explanatory Memorandum to the legislation which introduced the proscription regime appears to support a reading of the statute that would limit the circumstances in which it is legally available, to those where the conduct of the organisation proposed to be banned directly affects Australia's current security interests. Whether the statements in the Explanatory Memorandum could be used to assist in interpreting the statute in such a way remains untested and ASIO's internal legal advice is to the contrary – but, whatever may be the ultimate legal resolution of that question should it be litigated, there is no doubt that the government's own explanatory materials issued to the parliament with the bill clearly set out that intention. This Parliament is entitled to expect the government to act in accordance with those statements

Blunt instrument—the option of limiting proscription to the PKK's military wing requires further examination

- 1.24 In previous proposed listings in which the Government and ASIO has examined an organisation having not only the aspects of a terrorist organisation but also the character of a national liberation movement or a revolutionary political party, only its military wing has been banned. That makes sense. It has allowed Australians to exercise their democratic right to freely express their political support for organisations such as Hamas and Hezbollah (however disagreeable to most in our community their aims may be) but at the same time to crack down and treat membership of their military (terrorist) wings as a criminal offence.
- 1.25 Given that the Attorney General's considered public statement of reasons issued in support of this proposed proscription also refers to the PKK's military wing the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan, HRK) there appears no sufficiently articulated reason for the Government and the Parliament not to follow the well established precedents established in the cases of Hamas and Hezbollah. Even assuming that proscription of elements of the PKK involved in political violence is justified the Government should reconsider limiting the banning to the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan, HRK) the PKK's military wing.

Potentially catastrophic community impact on persons of Kurdish origin in Australia

- 1.26 Fourth, but related to the third point above, the proponents of the listing have not evaluated or given any consideration to the possibility that the proposed listing, if implemented, might expose many (potentially thousands) of Australians of Kurdish background to severe criminal penalties--people who live perfectly ordinary lives in Australia and who themselves have had nothing to do with terrorism but who identify the PKK as 'their party' in the sense that they see it as fighting a liberation struggle for the freedom of the Kurdish people in Turkey. In this regard it is quite different in character to any previous listing – in no previous case was there any reasonable hypothesis open that the banning of an organisation might catch up large numbers of Australians or trench on their civil rights.
- 1.27 This minority report notes and relies on evidence given by senior officers of the Attorney General's Department that the practical impact of imposing severe criminal penalties on large numbers of Australian residents who support organisations they see (even if we do not share their views) as national liberation struggles is a proper consideration for the Joint Committee to take into account.
- 1.28 Having being advised that the Joint Committee should seek information about the number of those holding such views from ASIO the Joint Committee was told that ASIO regarded this factor as irrelevant and that it could not assist its members by providing any assessment of the breadth of support for the PKK amongst Australians of Kurdish descent. That left the Joint Committee having to guess at the likely impact.
- 1.29 Given the terrible history of conflict and the role that the PKK has taken in leading uprisings in support of Kurdish independence, sometimes leading to widespread loss of life on both sides it is possible, indeed likely, that the PKK may be seen by many Australians of Kurdish origin--certainly not all but perhaps a majority – not as a terrorist organisation but as a legitimate national liberation movement. In the absence of evidence on this point from those providing evidence to the Joint Committee it is impossible to reach definitive conclusions on this matter².

2 To check that the impressions set out above were not completely unrealistic one member of the Joint Committee contacted three people from Kurdish backgrounds whose names were suggested to him by a member of the House of Representatives representing an electorate in NSW with a large population of people of Kurdish background. The three, representing something of the diversity of views of that group, were simply asked to give their views about how the PKK was seen by Australians of Kurdish background. . The first person spoken to referred to the PKK as 'their own party' and offered an invitation to the Kurdish national day celebrations to be held on 18 March at the Blacktown Civic Hall where 'everyone at the national day would be a supporter of the PKK'. He was aware of and troubled by the proposed proscription – but appeared to have no awareness of its seriousness. The second person spoken to said 'we believe the PKK is fighting for the freedom of the Kurdish people'. The third person was the

- 1.30 On the evidence before the Joint Committee it is clear that what was once a hot war between the PKK and Turkey with many tens of thousands of victims is now at a much lower level of intensity – even accepting that there has been a relatively recent breakdown of the former truce. It seems clear that there are ongoing divisions of opinion within the PKK about tactics--and there is no reason to suppose that every member of the PKK even within Turkey supports a renewal of armed conflict – or terrorist tactics such as renewed attacks on Turkish economic infrastructure.
- 1.31 Outside of Turkey, and particularly in Australia, support for the PKK seems as likely to be for its aims as for its tactics. It seems possible, indeed likely that significant numbers of the 5000 Australians of Kurdish origin who have nothing to do with terrorism who would, notwithstanding, see the PKK as 'their party' in the sense that they would view it as fighting for the freedom of the Kurdish people in Turkey.
- 1.32 Such people, and many other Australians, would be horrified by the idea that such general support – disassociated from any other conduct on their part--if not repudiated, could cause them to be charged with crime and if convicted face a term of imprisonment.

Conclusion

- 1.33 To give effect to the above considerations the following alternative recommendations are proposed.

Recommendation 1

The Minority recommends that the Government reassess this listing.

exception. He said that he had once been a PKK supporter but no longer identified with them. He said he now saw the PKK as terrorists and was avoiding all Kurdish cultural events. He said he no longer identified as part of a Kurdish community--and thought that ethnic community identification was wrong. He made it clear that he was putting his view as the opinion of a person who had taken himself outside of, and no longer had much connection with, the Kurdish Diaspora.

Recommendation 2

In undertaking the reassessment the Minority requests the Government to take into account, inter alia:

- the number of Australians of Kurdish origin who may peacefully support the broad aims of the PKK;
- whether it would be sufficient to proscribe the PKK's military wing, the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan, HRK); and
- the fluid state of moves towards possible ceasefires.



Hon Duncan Kerr SC, MP



Senator the Hon John Faulkner

