

SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC

TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

**REVIEW OF THE RE-LISTING OF THE KURDISTAN WORKERS PARTY (PKK) AS A
TERRORIST ORGANISATION UNDER THE CRIMINAL CODE ACT 1995**



Federation of
Community Legal Centres
VICTORIA

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

The Anti-Terrorism Laws Working Group supports community legal centres to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports legal centre lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

The Federation opposes the re-listing of the Kurdistan Workers Party ('the PKK') as a 'terrorist organisation' under Division 102, Schedule 1 of the *Criminal Code Act 1995 (Cth)* ('the Criminal Code). Our concerns regarding the re-listing of the PKK are set out below.

1. Lack of Procedural Fairness - A Flawed Review Process

Pursuant to Division 102 of the Criminal Code, a regulation proscribing an organisation ceases to have effect on the second anniversary of the day on which that regulation took effect. Most recently, the PKK were re-listed in advance of that second anniversary by the then-Attorney General on 27 September 2007. Public notice was provided by the Attorney General by way of a media release and release of a Statement of Reasons. That re-listing then lapsed upon the prorogation of the 41st parliament.

A regulation re-listing the PKK was made again on 12 February 2008 under the 42nd parliament. On this occasion the Attorney General did not make a media release giving public notice of the relisting and did not provide a Statement of Reasons as has been practice in previous listings. The Parliamentary Joint Committee on Intelligence and Security ('the Committee') has previously stated:

There has been a clear commitment to ensure that the power to proscribe an organisation is based, to the maximum extent possible, on publicly available information. The Statement of Reasons is a stand alone document and its publication at the time a listing comes into effect ensures public notification of the listing. The Statement of Reasons also enables an entity to know the case against it and to pursue a remedy if it believes that proscription is unlawful.¹

Under the Criminal Code, the Committee may review a relisting and make recommendations to parliament before the end of the disallowable period for each house - 15 sitting days. We understand the new Committee was convened on 13 February 2008 and heard evidence in private hearing from federal agencies on 20 March 2008, which was the end of the disallowable period.

The Committee's review function encompasses both the procedure and the merits of a listing 'based on an examination of all the available material as to the goals and activities of the organisation'.²

According to the Committee's report of its [Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995](#), a decision whether to conduct a hearing with other parties is decided once public submissions are received. If there is a prima facie case against listing or if members or supporters of the organisation make submissions, the opportunity to give oral evidence through public hearings will be created. While there was initially no public submission process, we submit that the recommendations of the Committee's review into the original listing of the PKK alone indicate a prima facie case against listing so as to warrant a public hearing. For example, the majority report of the Committee, while supporting the listing, also recommended that:

- ... the matter be kept under active consideration and requests, in that process, that the Government take into account:
- the number of Australians of Kurdish origin who may support the broad aims of the PKK without endorsing or supporting its engagement in terrorist acts;
 - whether it would be sufficient to proscribe the PKK's military wing, the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan HRK) referred to in the Attorney's Statement of Reasons; and
 - the fluid state of moves towards possible ceasefires.³

In addition, the Minority recommended that the Government reassess this listing, and also that the same matters

¹ Parliamentary Joint Committee on Intelligence and Security, [Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995](#) (2007) paragraph 2.40

² Ibid at paragraph 2.35

³ Parliamentary Joint Committee on Intelligence and Security, [Review of the listing of the Kurdistan Workers' Party \(PKK\), April 2006](#) Majority Report 33

be taken into account as those recommended by the majority.⁴

We also believe that submissions received through the limited public submission process will confirm that public hearings on this re-listing are necessary.

In respect of the listing of terrorist organisations, the Committee has repeatedly emphasised the importance of community consultation. The Committee has previously recommended that:

A comprehensive information program that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organization.⁵

We are concerned that, despite the recommendations contained in the previous review of the PKK listing, no community consultation has occurred in respect of the re-listing.

In summary, we submit that the process for re-listing that has taken place has lacked procedural fairness:

- Effectively, no public notice of the relisting on 12 February 2008 was given.
- No Statement of Reasons for the relisting has been provided
- No call for public submissions has been made. The amendment to the Committee website on 16 April 2008 to allow for public submissions to be made by 5 May 2008 was not accompanied by a media release calling for public submissions. Consequently, those who may make submissions will only have done so because of word of mouth. Furthermore, the lack of media release combined with a timeframe of less than 3 weeks for the receipt of submissions, render the public consultation process perfunctory.
- In any event, the disallowable period in which a report with recommendations to parliament may be made has already passed. Clearly, this review cannot serve its intended purpose of providing scrutiny of the Attorney General's power to proscribe if it cannot legally make any recommendations regarding the exercise of that power.

2. Grounds for De-Listing the PKK

2.1 Application of the Law of armed conflict

Previously, the Committee, the Australian Security Intelligence Organisation (ASIO) and the Attorney General's Department have indicated that listing will always be limited to a smaller group of organisations than that which would otherwise be covered by the broad definition of 'terrorist organisation' contained in the Criminal Code.

In respect of several listings, the Committee has reiterated the view that, while political violence is not an acceptable means of achieving a political end in a democracy:

... 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. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:

[When] there is a peace process ... you can unintentionally make things worse if you do not think through the implications of the listing.⁶

⁴ Ibid, Minority Report 41

⁵ Joint Parliamentary Committee on ASIO, ASIS and DSD, [Review of the listing of six terrorist organisations](#), March 2005

Although the above views have been reiterated in each subsequent reviews, direct consideration has never been given to the question of whether a conflict is governed by the laws of armed conflict and if proscription therefore conflicts with Australia's obligations under international law.

The Committee's [Review of Security and Counter Terrorism Legislation](#) recommended that:

the definition of terrorism be amended to include a provision or a noted that expressly excludes conduct regulated by the law or armed conflict.⁷

There is ample evidence to suggest that the PKK is engaged in a protracted civil conflict in furtherance of self-determination by an ethnic minority, subject to the laws of armed conflict and the Geneva Convention. In our submission it should not, therefore, be designated by Australia as 'terrorist'. Breaches of the laws of war by both sides to the overseas conflict are unable to be regulated by Australian domestic criminal law. Instead, proscription generates guilt by association for Kurds who have resettled in Australia. Furthermore, it hinders resolution of civil conflicts by de-legitimising peace efforts by non-state actors and their supporters.

In its review of the original PKK listing the Committee acknowledged that not all political violence need be defined as terrorism. It referred to the United Nation Declaration of Human Rights and in particular, the right to engage in armed struggle against tyranny for self determination and in self defence.⁸ Whether international law governs this particular conflict was deemed to be an open question and was not considered in the review. We submit that continuing and present human rights abuses against Kurds require greater consideration by the Committee.

The Kurdish Human Rights Project, a respected non-government organisation based in London, stated in 2008:

Turkey continues to systematically abuse the human rights of its 15 million-strong Kurdish population. Violence and discrimination are regularly used against Kurds despite hopes that the EU accession process might encourage Turkey to improve their situation.

Major abuses by Turkey include torture and the employment of armed forces against civilians. The state generally refuses to account for fatalities and injuries it causes – this trend has been highlighted by the recent overturning of jail sentences for military officers implicated in the bombing of a Kurdish bookshop.

Freedom of expression has been particularly targeted, with many prosecutions brought against those expressing peaceful opinions. Language rights are also restricted, with technical requirements in the curriculum being introduced to make the task of teaching in Kurdish more difficult in the private schools where it is allowed.

More worrying are the conditions set out in new anti-terror legislation such as the wide definition of 'terrorist', the permission given to officers to use weapons 'without hesitation' and the decision to allow suspects to be held 'incommunicado' for 24 hours. These regulations give the Turkish state wide scope to arrest, prosecute or shoot 'undesirables' and remain within the law. Although the legislation does not meet international human rights standards, the EU has failed to condemn it.

In fact, Turkey's progress on human rights issues has become largely overshadowed in the EU accession process by European domestic concerns such as the ratification of the proposed constitution and efforts to prevent Cyprus derailing the process. Combined with the desire of many EU officials to stress the potential benefits of Turkish membership to a sceptical public, this lack of focus seriously diminishes the value of the EU accession process to human rights in Turkey.⁹

We also draw the Committee's attention to the Turkish security forces' violent suppression of Kurdish Newroz celebrations in March 2008 and the documented use of extreme force on civilians by the authorities.¹⁰

⁶ Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Palestinian Islamic Jihad*, June 2004, paragraph 3.21

⁷ Parliamentary Joint Committee on Intelligence and Security, [Review Of Security And Counter Terrorism Legislation](#), December 2006, 65

⁸ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 2.13

⁹ See <http://www.khrp.org/content/view/279/128>

¹⁰ Kurdish Human Rights Project, *KHRP Condemns Ongoing Violence against Civilians in Turkey and Syria since Newroz Festival* at <http://www.khrp.org/content/view/364/2/> 2 April 2008

In addition, the recent cross border military offensives by Turkey against the PKK have reportedly escalated military abuses against civilians. In our submission, Turkey's contribution to the escalation of brutal civil conflict requires extended diplomatic solutions by Australia and not domestic criminalisation of Kurds who have settled in Australia.

2.2 The PKK does not meet the non-statutory criteria for listing

In a hearing relating to the *Review of the listing of six terrorist organisations* on 1 February 2005, ASIO informed the Committee about its evaluation process.¹¹ ASIO provided the following criteria in a confidential exhibit engagement in terrorism:

- ideology and links to other terrorist groups or networks;
- links to Australia;
- threats to Australian interests;
- proscription by the UN or like minded countries; and
- engagement in peace/mediation processes.

The Committee has acknowledged that these criteria have formed the basis for testing the listings that it has reviewed.¹²

In our submission to the Committee regarding the original listing of the PKK, we argued that the application of these criteria has been unclear. That is, it is not clear that the criteria have been applied in any systematic fashion and, rather, it seems that they have been applied inconsistently.

The Committee has on numerous occasions highlighted these inconsistencies, in particular noting that the criteria pertaining to links to Australia and threats to Australia's interests have been given little consideration in many listings.¹³

For example, despite recommending that the listing remain, the Committee indicated that the case for the listing of Palestinian Islamic Jihad had not been entirely clear. The Committee stated that:

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. This does not appear to have occurred in this listing. Nevertheless, the Committee does not object to this listing. However, it would like to see a more considered process in any future regulations. Given the serious consequences attached to listing, it should not be taken lightly.¹⁴

In September 2005, the Committee requested by recommendation that ASIO and the Attorney General specifically address all of the six criteria in future Statements of Reasons, particularly for new listings.¹⁵ The Committee stated that it 'would like to stress the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code'.¹⁶

The minority report relating to the original listing of the PKK found, however, that the criteria were not met in the

¹¹ *Review of the listing of six terrorist organisations*, *ibid*, para 2.24. Note that in every subsequent listing review the PJCS refer specifically to ASIO's 'evaluation process **in selecting entities for proscription under the Criminal Code.**' (emphasis added). See for example [Review of the Listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 2.2

¹² [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 2.3.

¹³ Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisation*, *ibid*, paragraphs 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, May 2005, paragraphs 2.24, 2.28; *Review of the listing of seven terrorist organisations*, August 2005, paragraphs 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations*, September 2005, paragraphs 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89

¹⁴ *Review of the listing of Palestinian Islamic Jihad*, *ibid*, paragraph 4.11

¹⁵ *Review of the listing of four organisations*, *ibid*, 47 Recommendation 1

¹⁶ PJCS [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 23.8.

case of the PKK. They argued that:

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.¹⁷

If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its 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.

In our submission, the criteria are not met in the case of the PKK. In the interests of brevity we will not address each of the criteria as it relates to the PKK. We will, however, examine the criteria relating to links to Australia and threats to Australian interests.

2.2.1 No threat to Australian security

In the *Review of the Listing of Six Terrorist Organisations*, the Committee indicated that the criterion 'links to Australia' includes:

- the existence of Australian members of the entity,
- the financing of the terrorist organisation here or abroad by Australians or
- the supply of Australian personnel to the organisations activities abroad.¹⁸

No such links between the PKK and Australia were evinced in the Statement of Reasons or in evidence presented to the Committee in respect of the original listing of the PKK.

The Committee has taken the view that, while direct links to Australia are not a statutory prerequisite for listing and organisation, links to Australia should be an important consideration in selection of an organisation for proscription.¹⁹ The former Attorney General has also indicated that the aforementioned criteria are a significant factor in deciding whether to list an organisation under the Criminal Code.²⁰

In several reviews, the Committee has expressed that it was unclear how selecting organisations which have no direct link to individuals in Australia would offer any security or efficacy.²¹ In its most recent inquiry, the Committee stated:

The intention of the legislation is to protect Australia's security interests and although the concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.²²

The minority report expressed the following interpretation of the purpose of the legislation:

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.²³

¹⁷ Ibid paragraph 1.8

¹⁸ *Review of the listing of six organizations*, ibid, paragraph 2.27

¹⁹ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), ibid, paragraph 2.35.

²⁰ Ibid, paragraph 2.33 citing *Review of the listing of the Palestinian Islamic Jihad*, ibid 19

²¹ Ibid, paragraph 2.36

²² [Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995](#), ibid, paragraph 4.28

²³ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), ibid, Minority Report, paragraph 1.23.

We also draw the Committee's attention to the judgement in the matter of the *PKK v Council of the European Union*. On 3 April 2008, the Court of the First Instance of the European Communities annulled the decision of the European Council to list the PKK under regulations adopting Security Council Resolution 1373.²⁴ The applicant's plea was based on the failure of the decision-maker to meet its obligation to state reasons for the decision. The Court found that as a result of the absence of any reasoning expressly appearing in the contested decision or provided immediately afterwards, the applicant was not in a position to clearly and unequivocally understand the reasoning of the decision-maker.

In our view, the Attorney General's failure to provide a Statement of Reasons for the most recent re-listing of the PKK (as discussed above) is clearly analogous to the European Union case. Similarly, the lack of transparency and consistency around the government's application of the criteria to individual listings also creates a situation where the public are unable to clearly comprehend the decision-maker's reasoning. It is our submission that this is an improper exercise of executive power and we urge the Committee to consider in-depth the question of whether the PKK has links with Australia and poses a threat to Australian interests.

2.3 The listing criminalises Kurdish Australians

In its review of the original listing of the PKK, the Committee were of the view that where substantial links to Australia are apparent through broad support for the organisation, then this is a more serious consideration: 'Then the potential impact of the listing on Australians needs to be weighed carefully, especially when the offences under the legislation are tied into a broad range of activity'.²⁵ In particular, the Committee noted that the Criminal Code's terrorist organisation offences are serious and do not require a direct link between the person's activity and actual terrorism.

At the hearing, the Attorney-General's Department was asked whether an independent assessment was made of the impact the listing would have on the Australian diaspora. The Department did not have information on the extent of the diaspora, but, on notice, provided the Committee with statistics similar to those quoted from the Australian Bureau of Statistics in paragraph 2.44. Asked whether the impact on the Australian community was a legitimate question to consider prior to any listing, the departmental officer did not dispute it. However, he believed that it was a question best put to ASIO. When asked about the extent of the support in the community for the PKK or its aspirations for an independent Kurdistan, ASIO responded that that question was outside the legislative tests.²⁶

The Committee acknowledged the strong support in the Kurdish diaspora, including in Australia, for the political objectives of the PKK in that many Kurds see the PKK as 'their party'. Furthermore, the Committee acknowledged that the overall aims of the PKK are likely to generate broad sympathy among large numbers of Australians, not only people of Kurdish background.²⁷

We submit that in the absence of any evidence that the PKK poses a threat to Australians, its proscription serves to criminalise support, political association and a broad range of legitimate identifications Australians may have with the PKK. In this regard, the listing is inconsistent with Australia's obligations under the *International Covenant on Civil and Political Rights*, most notably the obligation relating to freedom of association provided for in Article 22.

In considering the impact of the listing of the PKK on Kurds in Australia, we draw the Committee's attention to several matters drawn from our consultations with the Kurdish community in Victoria:

- The listing of the PKK has caused widespread concern amongst Kurdish community members that legitimate connections to the PKK and legitimate aspirations shared with the PKK have been criminalised.

²⁴ *Osman Ocalan, on behalf of the PKK v Council of the European Union*, Case T-229/02. Accessed at: <http://curia.europa.eu/jurisp/cgi-bin/form>

²⁵ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 2.36

²⁶ *Ibid*, paragraph 2.37

²⁷ *Ibid*, paragraph 2.38

- The fears of the Kurdish community are not unfounded. For example, at a demonstration outside the Turkish consulate in 2006 Victoria Police instructed Kurdish Australians to put down portraits of jailed PKK leader Abdullah Ocalan on the basis that the listing of the PKK had made it illegal to display such portraits. Ocalan is subject to a popular broad based international campaign for his release from solitary confinement on an island prison in Turkey. If members of the police force interpret the holding of Ocalan's portrait as a criminal offence, it is not surprising that the listing has had a chilling effect on a range of activities connected to the self determination and political expression of Kurds.
- The only specific incidents ASIO mentioned in response to the Committee's question as to whether there had been any violent actions taken by Australians of Kurdish origin in Australia were four protests between 1992 and 1999 directed at Turkish, Greek and German consulates, some of which caused damage to property. The minority report of the Committee noted that none of these matters 'remotely resemble acts of terrorism'.²⁸ It is, therefore, concerning that protest action in Australia is considered by ASIO in its assessment of listing the PKK.
- The listing encourages social exclusion and exacerbates inter-community tensions by contributing to the stigmatisation of Kurdish people as supporters of 'terrorism'.
- The listing subjects the continued interest and involvement of Australians in resolution of the conflict over Kurdistan through political means, to police and security agency attention and potential prosecution through broadly constructed offences.
- The listing of the PKK presents a particular problem for Kurds who seek asylum in Australia on the basis of actual and/or perceived links to the PKK and the violence and discrimination they experience as a result. Those grounds may form the basis for a grant of asylum, however, upon settlement in Australia refugees may find themselves open to criminal investigation and prosecution for the same reasons.

3. Conclusion

In summary, the Federation's concerns regarding the re-listing of the PKK are as follows:

- That the process for re-listing the PKK has lacked procedural fairness.
- That the laws of armed conflict apply to the conflict that the PKK is involved in and as such, designated the PKK as a 'terrorist organisation' is inappropriate.
- That the PKK does not meet the non-statutory criteria for listing, in particular the criteria relating to links to Australia and threats to Australian interests.
- That the listing of the PKK criminalises Kurdish Australians and unduly impinges on freedom of political expression and association.

We trust that the Committee will duly consider these concerns and we thank the Committee for its attention. We would welcome the opportunity to elaborate on this submission or to furnish the Committee with further information if that would assist the Committee.

²⁸ Ibid, paragraph 1.17