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Senate Legal and Constitutional Legislation  
Committee  
Parliament House  
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**By email**

Dear Secretary

**Submission in relation to the proscription of the  
*Kurdistan Workers Party (PKK)***

We appreciate the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the listing of the Kurdistan Workers Party (PKK) as a terrorist organisation under the *Criminal Code Act 1995*.

We have numerous concerns that the listing of the PKK under the *Criminal Code* will affect our client group, that is asylum seekers and refugees in Australia. These concerns may be summarised as follows:

- We are concerned that the proscription power *itself* breaches a fundamental principle of criminal law, which is that guilt is attributed to individuals on the basis of their own individual involvement in causing harm or damage.
- The *Criminal Code* provides for a number of offences, which arise where an organisation has been listed or where an organisation fits the definition of a terrorist organisation. We are concerned that these offences could criminalise non-violent activity such as communication, liaison and international solidarity with the PKK, as well as for organisations associated with the PKK, *even by people who do not support armed insurgency*.
- The veracity of any intelligence provided to Australia by Turkish authorities concerning 'terrorist incidents' in Turkey and people present in Australia must be carefully considered in light of Turkey's historical abuse of the Kurdish people.
- The criminalising of the PKK will affect the status of refugees and asylum applicants in Australia. Prior to the listing of the PKK as a terrorist organisation, membership or imputed membership of the PKK in Turkey has been considered as grounds for invoking Australia's protection obligations.

## **1. The Refugee Advice and Casework Service (Australia) incorporated (RACS)**

RACS, the oldest Community Legal Centre specialising in providing advice to asylum seekers, was originally set up in NSW in 1987 to provide a legal service to meet the specific needs of asylum seekers.

A not-for-profit incorporated association, RACS relies primarily on income through the Immigration Advice and Application Assistance Scheme administered by the Department of Immigration and Multicultural and Indigenous Affairs, donations from the community, an extensive volunteer network and a Management Committee. RACS' principle aims may be summarised as follows:

- to provide a free, expert legal service for individuals seeking asylum in Australia;
- to provide referral for counselling and assistance on related welfare issues such as accommodation, social security, employment, psychological support, language training and education;
- to provide a high standard of community education about refugee law, policy and procedure;
- to provide training sessions, workshops and seminars on refugee law, policy and procedure to legal and welfare agencies and individuals involved in advising and assisting refugees;
- to establish a resource base of current information and documentation necessary to support claims, for use by RACS, community organisations and lawyers assisting refugee claimants;
- to participate in the development of refugee policy in Australia as it relates to the rights of those seeking asylum in this country; and
- to initiate and promote reform in the area of refugee law, policy and procedures.

At a broader level, RACS aims to promote the issues asylum seekers face by raising public awareness and to advocate for a refugee determination process which both protects and promotes the rights of asylum seekers in the context of Australia's international obligations.

## **2. General concerns relating to the proscription of organisations under the *Criminal Code***

We are concerned that the proscription power breaches a fundamental principle of criminal law, which is that guilt is attributed to individuals on the basis of their own individual involvement in causing harm or damage. By imposing criminal liability on groups and on those who associate with them the proscription power relies on guilt by association. It imposes criminal liability on individuals who may have no proven or provable connection to violent acts that threaten the safety of the public.

We also submit that proscription is inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights*, most notably those obligations relating to freedom of association (Article 22). The listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security.

While RACS does not support the activities of the PKK we submit that proscribing and banning organisations who do not pose a direct threat to Australia's domestic national security reflects a politicised and undemocratic process. Indeed the fact that the PKK was listed a week after the visit of the Turkish Prime Minister suggests that this proscription serves mainly to criminalise domestic support for the political opponents of an ally of Australia.

Furthermore, we believe that listing the PKK is not necessary in order to protect the public from any politically and religiously motivated violence within Australia. Were any threats to Australia verified, then acts such as bombings, murder, kidnapping and the planning of such crimes are already illegal under existing criminal law.

### **3. Offences associated with the listing of the PKK in the *Criminal Code***

The *Criminal Code* provides for a number of offences, which arise where an organisation has been listed or where an organisation fits the definition of a terrorist organisation.

We are concerned that these offences could criminalise non-violent activity such as communication, liaison and international solidarity with the PKK, as well as for organisations associated with the PKK, even by people who do not support armed insurgency. We note in particular the following offences contained in subdivision 102B of the *Criminal Code*:

- *Providing support or resources to a terrorist organisation to help them engage in a terrorist act.* "Providing support" is undefined. Given the broad definition of a "terrorist act" (a terrorist act need not be violent) writing an article or speaking in support of Kurdish self determination could be construed as inviting support for the PKK. And attending a demonstration in support of a fair trial for Ocalan, the jailed leader of the PKK, might also be construed as providing support.
- *Membership or informal membership of a terrorist organisation.* Terms such as "membership" and "informal membership" are undefined. Given the PKK is multi-faceted political, military and social organisation, and Turkey has assumed that pro-Kurdish expression equals membership or support of the PKK, we submit that "membership" must be explicitly defined.
- *Associating with a terrorist organisation.* It is an offence to "associate" (which means to meet or to communicate) with a person who is a member, promoter or director of a banned terrorist organisation, if there is knowledge that that person is involved with a terrorist organisation, and by associating with that person there is an intention to provide support for the continued existence or expansion of the organisation.

We submit that the offences of “association” and “membership” will have a chilling effect on freedom of political affiliation and freedom of speech. Indeed, the offences’ broad definitions which were activated on proscription of the PKK will affect a potentially broad group of people.

Furthermore, in our view, the penalties for these offences, from 3 years imprisonment for association offences to 25 years imprisonment for funding offences, are excessive and disproportionate given the breadth of offences and the absence of any requirement that there be a nexus between the offences and actual terrorist violence.

We are concerned that the PKK listing will result in a political environment for Kurdish refugees in Australia that mirrors the restrictions Kurds face in Turkey. As a community legal centre working with this group of people, RACS is concerned that they will not find a place of refuge in Australia and will face further restrictions on the expression of pro-Kurdish viewpoints.

We note that the PKK is a complex organisation with both non-violent objectives to pursue Kurdish rights through parliamentary means as well as a military arm. The objective of advancing Kurdish rights is likely to be shared by a large number of Australians. When the broad range of offences is considered in conjunction with the non requirement of any link to a terrorist act, it appears that almost any support in relation to these objectives would cause many Australian residents to be subject to prosecution.

The ASIO security assessment of the PKK provides no analysis of the nature of the relationship of Kurdish people, or Kurdish organisations in Australia, to the political objectives of the PKK and fails to address the potentially devastating impact of proscription on communities in Australia.

#### **4. The veracity of reports by Turkish authorities of “terrorist incidents” and the purported identification of members of the PKK**

We submit that the veracity of any intelligence provided to Australia by Turkish authorities concerning ‘terrorist incidents’ in Turkey and people present in Australia must be carefully considered in light of Turkey’s historical abuse of the Kurdish people.

It is well documented that Turkish-Kurds have been and continue to be persecuted, dispossessed and that their human rights have been violated by the Turkish government. There is also extensive evidence from independent organisations that individuals associated with the PKK and organisations imputed as supporters of the PKK are subject to state surveillance, harassment, torture, disappearance and extra judicial killings. Indeed, the Turkish authorities have designated a range of human rights organisations and democratic parliamentary parties as PKK ‘sympathisers’ or ‘supporters’. Authorities in Australia have accepted this as fact.

The Department of Foreign Affairs and Trade has recognised that being actively pro-Kurdish could certainly attract police attention, and where support for the PKK is implied this:

may constitute an invitation to be interrogated, tortured, disappeared or even killed. Being pro-Kurdish usually means support or sympathy for the PKK....Sometimes the state has difficulty in drawing the line between true PKK members or sympathisers and people who are Kurdish by ethnic origin and are not associated with any political violence. <sup>1</sup>

In their 2005 report “Thirteen Bullets - Extra-judicial killings in Southeast Turkey” the UK based Kurdish Human Rights Project (**KHRP**) report the results of their fact finding mission in Turkey, and concludes that extra judicial killings for those imputed as PKK supporters continues.<sup>2</sup> This evidence is supported by Amnesty International’s 2005 Report on Turkey. Amnesty reports the following incident:

Police officers shot dead Mehmet Kaymaz and his 12-year-old son Uğur outside their house in K1z1ltepe on 21 November. The authorities claimed that they were armed members of Kongra Gel and that they had shot at police officers who returned fire. Witnesses alleged that it was an extrajudicial execution and that weapons were planted on them after they were killed. <sup>3</sup>

The long standing problems of torture and abuse by Turkish authorities in custody continues to be a serious concern with beatings, electric shocks, sexual abuse and death threats being reported.<sup>4</sup> Human Rights Watch reported that:

In the first months of 2004 the Human Rights Directorate of the Office of the Prime Minister recorded that it has received 50 complaints of torture and ill-treatment in police custody. The Turkish Human Rights Association reported 692 incidents of torture and ill-treatment by police in the first 6 months of 2004. During the first 8 months of 2004, 597 people applied to the Turkish Human Rights Foundation for medical attention for torture, ill-treatment as well as illness arising from prison conditions” <sup>5</sup>

In 2005 the KHRP found that:

Many Kurdish people suspected of being involved in terrorist activities are taken into unofficial detention. No records are kept of such incidents and suspects are generally kept until the authorities have the information they require. After the information is obtained the suspect is detained for the requisite 24-hour period and then taken straight to Court or imprisoned. The mission were told of a person who was detained unofficially after being suspected of involvement in the PKK. He was taken to a rural area and tortured both physically and psychologically. He was hooded and beaten, had a gun was fired close to his head and was subjected to electric shock treatment. <sup>6</sup>

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<sup>1</sup> Department of Foreign Affairs and Trade, CX32372, CIR 390/98, 21 October 1998,

<sup>2</sup> See: <http://www.khrp.org/publish/p2005/05C.htm>

<sup>3</sup> Amnesty International, *Amnesty International 2005 – Turkey*, available at <http://web.amnesty.org/report2005/tur-summary-eng>

<sup>4</sup> Ibid

<sup>5</sup> Kurdish Human Rights Project, “Thirteen Bullets - Extra-judicial killings in Southeast Turkey”, Fact-Finding Mission Report, March 2005

<sup>6</sup> Ibid

Of further concern is the culture of impunity for these wrong doings by Turkish authorities. Amnesty International has reported on the lack of effective mechanisms to monitor the implementation of detention regulations and investigate patterns of abuse by the security forces, the failure to investigate effectively, and has questioned the impartiality and independence of those investigations which did occur. Further delays in prosecutions of individuals accused of torture and ill treatment have resulted in the withdrawal of such prosecutions due to the statute of limitations. Amnesty provides these examples:

- On 10 November the Court of Appeal upheld the sentence of a police officer for involvement in the death of trade unionist Süleyman Yeter who died in police custody as a result of torture in March 1999. The trial court had reduced his 10-year sentence to four years and two months' imprisonment for "good conduct", of which he will have to serve only 20 months. Meanwhile, legal proceedings against nine police officers accused of having tortured Süleyman Yeter and 14 other detainees in another incident in 1997 were dropped when the statute of limitations expired on 11 November.
- On 2 December, the trial of four police officers for the torture including sexual torture of two high-school students in March 1999 in Iskendurun was postponed for the 30th time, despite the existence of medical reports corroborating the allegations. Meanwhile one of the students, Fatma Deniz Polattaş, remained in prison for membership of the PKK on the basis of statements allegedly extracted under torture.<sup>7</sup>

In light of the above facts we submit that the treatment of Kurdish people in Turkey must be carefully considered in assessing the veracity of any intelligence supplied to Australia by Turkish authorities. Our submission is further supported by the fact that Australian refugee status determination bodies have discredited Turkey's identification of individual Kurds as being 'PKK'. We submit that ASIO's unreferenced and unverified 3-page security assessment needs to be read in this context.

## 5. Criminalisation of Refugees

We submit that the criminalising of the PKK will affect the status of refugees and asylum applicants in Australia. We note that prior to the listing of the PKK as a terrorist organisation, membership or imputed membership of the PKK in Turkey has been considered as grounds for invoking Australia's protection obligations. Decisions of Australia's Refugee Review Tribunal (**RRT**) acknowledge that "Kurds perceived to be publicly or politically asserting their Kurdish identity risk harm, and in some cases serious harm."<sup>8</sup> Publicly proclaiming a pro-Kurdish position has been recognised by the RRT to be enough to impute membership of the PKK in the eyes of the Turkish state. The RRT has continued to recognise pro Kurdish Turkish asylum seekers as refugees throughout 2004 and 2005.

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<sup>7</sup> Amnesty International, *Amnesty International 2005 – Turkey*, available at <http://web.amnesty.org/report2005/tur-summary-eng>

<sup>8</sup> For example see: N05/50976 [2005] RRTA 214 (26 July 2005)

It is important to note the breadth of political affiliations (or political affiliations perceived by the Turkish state) which have been considered to give rise to a well founded fear of persecution. For example, in one Tribunal decision the applicant was involved in TADAK, a non violent support group for family and friends of those who had been jailed as PKK supporters or members. The applicant was subject to routine detentions without charge, beating and intimidation by Turkish authorities.<sup>9</sup> Indeed as discussed previously, the Turkish authorities have imputed a range of organisations from the democratic party DEHAP to other pro Kurdish groupings as well as simply the expression of Kurdish identity or politics as pro-PKK, which has resulted in extra judicial police repressions as well as imprisonment for these people.

A declaration of membership of the PKK or a pro-Kurdish organisation will expose refugees who have been granted asylum to criminal prosecution for membership or a number of other serious offences related to a proscribed organisation. It is important to note that the Criminal Code allows no consideration for the different contexts in which these organisations operate, so the example above of TADAK may attract such prosecution, despite recognition by Australian refugee status determination bodies that the Turkish state is persecuting these people. In addition such declarations may trigger excessive ASIO detention and questioning, further exposing refugees to state harassment.

Future refugee applicants who would otherwise be granted protection may be subject to the exclusion provisions of the UN Refugee Convention which allows for Australia to avoid its obligations under the Convention if there are "serious reasons for considering" the applicant has committed a crime against peace, a war crime or a crime against humanity amongst other grounds.<sup>10</sup> Further mechanisms in the Migration Act give the Minister broad discretion to refuse or cancel a permanent visa on 'character grounds'.<sup>11</sup>

During Prime Minister Erdogan's visit to Australia, immediately preceding the AG's listing of the PKK, he was reported have urged the need for better intelligence exchanges between Turkey and Australia in the fight against terrorism. "We should not be keeping intelligence from each other if we would like to succeed," he said. "We have to trust each other."<sup>12</sup>

The listing raises serious concerns which remain unaddressed. Given that Australian refugee status determination authorities have found that Turkish authorities wrongly identify members of the PKK and find their assessment as to the level of risk they present to be skewed, it is essential that any intelligence as to suspected PKK members be treated with caution. Important questions which remain unaddressed include the following:

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<sup>9</sup> N05/50976 [2005] RRTA 214 (26 July 2005)

<sup>10</sup> Convention Relating to the Status of Refugees 1951 Article 1(f)

<sup>11</sup> Migration Act 1958 (Cth), s 501

<sup>12</sup> Marian Wilkinson, "Turkish PM defends trial for mention of genocide", Sydney Morning Herald, 10 December 2005

- Will Kurdish refugees who have been granted asylum on the basis of Turkey imputing their sympathy with the PKK be subject to surveillance and prosecution in Australia?
- Will the Australian government provide intelligence to Turkey on the pro-Kurdish political activity of Australians?
- How will this impact on the potential persecution of Kurds in Turkey?
- How will listing the PKK as a terrorist organisation impact on the granting of protection visas to Kurdish refugees who have fled persecution?

## **6. Further concerns relating to the process of proscription of the PKK**

We note that there is no information program for community groups who may be potentially affected by the listings despite Recommendation One of the Committee's March 2005 Report.

We are concerned about the lack of adequate notice and time given for public submissions, with the timing over the holiday break particularly counter-productive to an open and accountable process.

## **7. Concluding Remarks**

In the absence of publicly available, verifiable and credible grounds for proscription beyond discretionary foreign policy motivations, we oppose the listing of the PKK as a terrorist organisation under the *Criminal Code Act 1995*.

A submission such as this cannot possibly canvas all the issues which may be of interest to the Committee. Accordingly, please do not hesitate to contact Louise Boon-Kuo of the Refugee Advice and Casework Service at [louise.boon-kuo@racs.org.au](mailto:louise.boon-kuo@racs.org.au)

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

**Mark Green**  
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