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Secretary

Parliamentary Joint Committee on Intelligence and Security

Parliament House

Canberra ACT 2600

20 January 2006

Dear Secretary,

**Submission in relation to listing of Kurdish Workers Party (PKK)
as a 'terrorist organisations' under the *Criminal Code***

Thank you for the opportunity to make a submission in relation to the proscription of the Kurdish Workers Party ('PKK') under the *Criminal Code*.

Liberty Victoria opposes the power to proscribe 'terrorist organisations' under the *Criminal Code*.¹ Of all the proscriptions so far under the *Criminal Code*, the banning of the PKK is possibly the

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¹ See Liberty Victoria, *Submission to PJAAD's inquiry into the listing of al-Qaida and other organisations* (2005) (available at http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub14.pdf).

most significant. It highlights the inherent dangers of the proscription regime. The risk of arbitrary application is illustrated by the flawed process accompanying the banning of PKK and the government's failure to provide a justification based on preventing political violence especially in Australia. Worse, there are grounds for suspecting that the banning has been motivated by foreign policy considerations.

The unfairness of a proscription regime that imposes guilt by association is also apparent with the banning of the PKK. Its banning will possibly result in the persecution of Australians, including political refugees, engaged in non-violent activities. For all these reasons, Liberty Victoria opposes the listing of the PKK as a 'terrorist organisation' under the *Criminal Code*.

I FLAWED PROCESS

In one of its reports, the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJAAD') recommended that:

- (a) comprehensive information program, that takes account of relevant community groups, be conducted in relation to any listing of an organization as a terrorist organisation.²

Despite the fact that there are thousands of Kurdish Australians,³ there is no evidence that such consultation has occurred.

The criteria for listing the PKK are also unclear. ASIO has enumerated various factors in selecting organizations for listing including:

- links to Australia;
- threat to Australian interests;
- engagement in peace/mediation process.⁴

² PJAAD, *Review of the listing of six terrorist organisations* (2005) 20.

³ See Australian Bureau of Statistics, *2001 Census: Ancestry – First and Second General Australians: Census Paper No 03/01a* (2003).

⁴ See PJAAD, *Review of the listing of four terrorist organisations* (2005) 17.

Despite the Attorney-General stating in his press release announcing the banning of the PKK that ‘(t)he Government will not tolerate involvement with groups or activities that *threaten the safety and security of Australia*’,⁵ the information he provided to supporting the listing makes no reference to either the PKK’s links to Australia or the threat it poses to Australian interests.⁶ It would seem that the PJAAD’s recommendation made in 2004 that ‘the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing’⁷ has been ignored.

Moreover, the information provided by the Attorney-General indicates that the PKK (or one of its manifestations) has or is still engaged in peace negotiations with the Turkish government.⁸ Contrary to the criteria stipulated by ASIO, there has been no assessment of the impact of banning the PKK on this process. This is particularly serious especially given the PJAAD’s view that:

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.⁹

These circumstances demonstrate a flawed process of banning the PKK. There is, in the PJAAD’s words, the need for ‘a more considered process’.¹⁰ To remedy these deficiencies in process, it is imperative that the Committee hold a public and transparent inquiry into this

⁵ Attorney-General Philip Ruddock, ‘PKK listed as Terrorist Organisation’ (Press Release, 15 December 2005) (emphasis added).

⁶ Attachment A: *Kurdistan Workers Party (PKK)* available at <http://www.aph.gov.au/house/committee/pjcis/pkk/background.pdf> (on 19 January 2006).

⁷ PJAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004* (2004) 24.

⁸ Attachment A: *Kurdistan Workers Party (PKK)* 1.

⁹ PJAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004* (2004) 23.

banning. At the very least, public hearings must be held in conjunction with private hearings.¹¹

II NO DEMONSTRATED NEED BASED ON PREVENTING POLITICALLY/IDEOLOGICALLY MOTIVATED VIOLENCE OR DEALING WITH DOMESTIC THREAT

In the debate leading up to the passage of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), many groups and individuals argued that a power to ban or proscribe ‘terrorist organisations’ was unnecessary in efforts to prevent politically/ideologically motivated violence.¹²

This argument for lack of necessity is simple. It says that if the aim is to prevent politically/ideologically motivated violence and acts that intentionally assist such violence, a power to proscribe or ban organisations is unnecessary because such violence and acts are already illegal.

This lack of necessity is illustrated by the banning of the PKK. The information provided by the Attorney-General instances various conduct claimed or attributed to the PKK that is characterised as ‘terrorist activities’. These including killings of Turkish soldiers, kidnappings and attacks on passenger transport.¹³ Even without the

¹⁰ Ibid 24.

¹¹ The Committee has presently scheduled one private hearing (see <http://www.aph.gov.au/house/committee/pjcis/pkk/hearings.htm> on 19 January 2006).

¹² See Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] etc* (2002) [3.101]-[3.140].

¹³ Attachment A: *Kurdistan Workers Party (PKK)* 4-5.

banning of the PKK, these acts were already illegal with many, notably murder, punishable by severe penalties. In a similar vein, persons deliberately assisting such acts, while not directly engaged in them, would be caught by the offences of conspiracy and/or incitement.¹⁴

As mentioned earlier, no evidence has been adduced as to why the banning of PKK is necessary to deal with the threat to Australian citizens. Indeed, it is difficult on the information provided to see any specific threat to Australian citizens given that the objective of the PKK is said to be ‘promoting and advancing the rights of Kurds living in Turkey’ and none of the attacks attributed to the PKK either happened on Australian soil or were directed at Australian interests.¹⁵

III PROSCRIPTION A FOREIGN POLICY TOOL OF REPRESSION?

Why then has the PKK been banned?

The information provided by the Attorney-General refers to the listing of the PKK as a ‘terrorist organisation’ by the governments of the United Kingdom, United States and Canada as well as the European Union.¹⁶ This is, of course, relevant to the question whether PKK should be banned in Australia. But what is much more significant than the mere fact an organisation is banned overseas are the reasons for the banning. No information has been provided by the Attorney-General on these matters. By acting on overseas proscriptions without further inquiry into their reasons, strategies developed in other contexts will

¹⁴ See, for example, *Criminal Code* ss 11.2 & 11.4-11.5.

¹⁵ *Attachment A: Kurdistan Workers Party (PKK)* 4-5.

¹⁶ *Attachment A: Kurdistan Workers Party (PKK)* 1.

be uncritically adopted; a process that has been criticised as ‘policy-laundering’.¹⁷

The timing of the banning of PKK perhaps give a clue as to the real reason for its banning. The Attorney-General announced the banning of the PKK on 15 December 2005, a week after the visit by Recep Erdoğan, Prime Minister of the Republic of Turkey, to Australia.¹⁸ At the very least, such closeness in time raises the suspicion that the banning of the PKK was at the instigation of the Turkish Prime Minister. The dangerous possibility is that the proscription power, instead of being genuinely used to prevent political violence, has been put to the aid of foreign policy goals.

What is even more sinister is the possibility that proscription is being used as a foreign policy tool of repression. As the information provided by the Attorney-General indicates, the PKK has been engaged in protracted conflict with the Turkish government since the 1980s. Neither side is innocent. Human Rights Watch, for instance, has drawn attention to the ‘gross violations (of human rights) committed by state forces and armed opposition groups fighting in the countryside and cities in the early 1990s’.¹⁹ In its 2006 country report on Turkey, Human Rights Watch further observed that ‘(p)olitical violence by the Kurdish Workers’ Party (PKK) flared during the year,

¹⁷ See <http://www.policylaundering.org/>

¹⁸ See Prime Minister John Howard’s address to the parliamentary luncheon in honour of the visit to Australia by Prime Minister Recep Erdogan (available at <http://www.pm.gov.au/news/speeches/speech1719.html> on 19 January 2006).

¹⁹ Human Rights Watch, *Essential Background: Overview of human rights issues in Turkey* (available at <http://hrw.org/english/docs/2005/01/13/turkey9882.htm> on 17 January 2006).

increasing tension and provoking heavy-handed responses, including human rights violations, by state forces'.²⁰

One of the most egregious human rights violations by Turkish government authorities involves the displacement of hundreds of thousands of Turkish Kurds in the 1980s and 1990s. A Human Rights Watch report provides the following description:

Security forces in Turkey forcibly displaced Kurdish rural communities 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. Turkish security forces did not distinguish the armed militants they were pursuing from the civilian population they were supposed to be protecting. That failure can in part be explained by the fact that Turkish security forces knew that the civilian population included people who were supplying and hiding the militants, willingly or unwillingly. The local gendarmerie (soldiers who police rural areas) required villages to show their loyalty by forming platoons of "provisional village guards," armed, paid, and supervised by the local gendarmerie post. Villagers were faced with a frightening dilemma. They could become village guards and risk being attacked by the PKK or refuse and be forcibly evacuated from their communities.

Evacuations were unlawful and violent. Security forces would surround a village using helicopters, armored 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.²¹

Such accounts should leave no doubt that the PKK and the Turkish government are engaged in armed conflicts that the PJAAD had in

²⁰ Human Rights Watch, *World Report 2006: Country Report on Turkey* (2006) available at <http://hrw.org/wr2k6/pdf/turkey.pdf> on 19 January 2006)

²¹ Human Rights Watch, *"Still critical": Prospects in 2005 for Internally Displaced Kurds in Turkey* (2005) 5 (available at <http://www.hrw.org/reports/2005/turkey0305/> on 19 January 2006).

mind in its report on the listing of Palestinian Islamic Jihad.²² In such situations, some Australians might consider the PKK's cause to be just as many considered Fretilin's armed attacks on Indonesian military forces to be right.

The repressive consequences of banning PKK are exacerbated by other circumstances. First, the exercise of the proscription power under the *Criminal Code* imposes criminal liability upon entire group and persons who engage in certain forms of association with the proscribed group. In other words, it imposes guilt by association and breaches the principle that criminal liability should be based on an individual's actions in causing harm or damage.

Breach of this principle is highlighted by the fact that the 'terrorist organisation' offences criminalise conduct distantly related to acts like bombings and hijackings. The 'terrorist organisation' training offence vividly illustrates this. A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act. Moreover, the training element of these offences does not have to be related to a 'terrorist act': it suffices that any training is received or provided to a 'terrorist' organisation.²³ For example, an Australian lawyer providing training to PKK parliamentarians on the legal criteria applying to Turkey's possible membership of the European Union would clearly be committing a training offence.

The effect of the 'terrorist organisations' offences is likely to be made worse by the fragmented nature of the PKK. The information provided

²² See text accompanying n 9.

by the Attorney-General identifies at least 18 different names for the PKK. Importantly, the information distinguishes between the ‘military’ and ‘political’ wings of the PKK.²⁴ The banning of PKK, however, draws no such distinction. Hence, Australians supporting elements of the PKK solely for the purpose of encouraging peace negotiations will still be caught by the ‘terrorist organisations’ offences.

One group of Australians that might be caught by this dragnet are Turkish Kurds who have been accepted as refugees on grounds of political persecution. A recent example of such situations is provided by the decision of Refugee Review Tribunal Member McIntosh in *Re N05/50976*. In reaching the conclusion that the applicant was entitled to a protection visa because of a well-founded fear of political persecution under the *Refugees Convention*, the Member said that:

I have no doubt that the Applicant represents much that the Turkish police, at grassroots level, continue to find unacceptable. *He is a Kurd who has supported a leftist/pro-PKK group in the past*, and who has effectively refused to co-operate with the police in their attempts to gather intelligence on that group. While he was not located by police during his final year in Turkey, I accept that that was so only because he did not go out to work, did not live at any address which might be checked by the police and did not settle in any one place in Istanbul. That is clearly not a situation which he could, or could reasonably be expected to, maintain if he returned to Turkey.

I have no doubt, and find, that there is a real chance he will be subjected to some serious harm by members of the police force or the Turkish Revenge Brigade if he returns to Turkey, because of a political opinion imputed to him.²⁵

The banning of PKK then raises the danger of criminalising refugees for the same reasons they were granted asylum.

²³ *Criminal Code* s 102.5.

²⁴ *Attachment A: Kurdistan Workers Party (PKK)* 1-2.

²⁵ *Re N05/50976* [2005] RRTA 214 (unreported, Refugee Review Tribunal, Tribunal Member McIntosh, 26 July 2005) (emphasis added) (available at <http://www.austlii.edu.au/au/cases/cth/RRTA/2005/214.html> on 19 January 2005).

In conclusion, we thank the Committee for reading this submission and urge it to recommend against the listing of PKK.

Yours sincerely,

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