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Ms Margaret Swieringa  
Secretary  
Parliamentary Joint Committee on Intelligence and Security  
Parliament House  
Canberra ACT 2600

3 February 2006

Dear Ms Swieringa

**Submission in relation to the listing of the PKK as a ‘terrorist organisation’  
under the *Criminal Code***

I would like to thank the Parliamentary Joint Committee on Intelligence and Security (‘the Committee’) for the opportunity to make a late submission in relation to this inquiry.

My submission reiterates a number of the general points raised in my submissions to the Committee’s earlier listings inquiries, and applies them to the listing of this particular organisation. It recommends disallowance of this particular listing.

Should the Committee have any queries, please do not hesitate to contact me.

Yours sincerely,

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## **SUBMISSION IN RELATION TO THE LISTING OF THE PKK AS A 'TERRORIST ORGANISATION' UNDER THE CRIMINAL CODE**

### **1. General considerations relating to the listing of organisations**

I have emphasised in earlier submissions to the Committee in relation to the listing of organisations under the *Criminal Code* that this power is extremely broad in the range of organisations it covers. This is the result of the interaction between sections 100.1 and 102.1 of the *Criminal Code*.

The first of these provisions defines a 'terrorist act' to include any action or threat of action where the following four criteria are met:

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
  - cause serious physical harm, or death, to a person; or,
  - endanger the life of a person other than the one taking the action; or,
  - create a serious risk to the health and safety of the public, or of a section of the public; or,
  - cause serious damage to property; or,
  - destroy, or seriously interfere with or disrupt, an electronic system;

- the action is, or the threatened action would be:
  - action that is not advocacy, protest, dissent or industrial action; or,
  - intended to cause either serious physical harm, or death, to a person; or,
  - intended to endanger the life of a person other than the one taking the action; or,
  - intended to create a serious risk to the health and safety of the public, or of a section of the public.

This definition therefore includes virtually all actual, attempted or threatened politically or religiously motivated violence, in Australia or overseas, whether undertaken by a government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification. Thus, it undoubtedly includes within its scope such conduct as the attacks upon New York and the Pentagon of September 11, 2001. However, it also includes within its scope much action that many do not wish to condemn, including such historical events as the American and French Revolutions, as well as more recent events such as the armed struggles of the African National Congress and Freltin, or the invasion of Iraq by Australia, the United States and the United Kingdom.

Since the amendments made by the *Anti-Terrorism Act (No 2) 2005* (Cth), section 102.1 gives the Attorney-General the power to list any organisation as a 'terrorist organisation' if one of the following criteria is satisfied:

- is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- directly or indirectly counsels or urges the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,

- directly or indirectly provides instruction on the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or,
- directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act (whether or not a terrorist act has occurred or will occur).

(The last three of these grounds are, somewhat misleadingly, characterised as the ‘advocacy’ of terrorism.<sup>1</sup>)

If an organisation is listed, a number of criminal offences are enlivened by Division 102 of the *Criminal Code*. These impose penalties ranging from a maximum of 3 years imprisonment for associating with members or ‘informal members’ (whoever they might be!), to 10 years for membership of ‘informal membership’, to 25 years for other sorts of intentional involvement. In the case of one of the training offence under section 102.5, the prosecution need not even prove any mens rea as to the identity of the organisation in order to obtain a conviction with a maximum penalty of 25 years.

The breadth of the statutory definition of ‘terrorist act’, together with the breadth of such concepts as ‘directly or indirectly assisting in’, ‘directly and indirectly fostering’, ‘directly or indirectly counselling’ or ‘directly praising’ such acts, means that an extremely wide range of groups is liable to be listed. A wide range of primarily charitable organisations may well be apt to be listed, for example, as well as political organisations whose connection to acts of violence is peripheral or tenuous at best.

The statutory power, with its recently expanded scope, seems to extend even further than this, however. To illustrate by way of example: Marx’s *Communist Manifesto* famously concludes with the following words:

The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE!<sup>2</sup>

These words directly counsel terrorist acts. It therefore seems that any organisation that disseminates them (a publisher, a political party) is liable to being proscribed for indirectly counselling terrorist acts. (This also must raise doubts about its constitutionality of the power to list organisations. Can the Attorney-General, by way of regulation, really achieve what the Parliament, by way of legislation, could not, namely, the criminalisation of political parties on the basis of a threat they are deemed, but have never been proven, to pose?<sup>3</sup>)

The extreme breadth of this power makes its exercise highly discretionary. The fact that the power is exercised by a senior Cabinet Minister, and that it relates to organisations characterised by their connection, more or less tenuous, to political activity, makes the politicisation of the exercise of this discretion a genuine and disturbing possibility. The power poses a genuine threat to Australian political traditions, by allowing the government of the day to use the threat of severe criminal penalties as a device for controlling and limiting political organisation and activity.

It is because of this that, in previous submission to the Committee, I have urged the Committee to insist that the government make clear the grounds on which it is exercising the power. The Attorney-General's Department has stated that

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<sup>1</sup> *Criminal Code* s 102.1(1A).

<sup>2</sup> Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

<sup>3</sup> In the well known *Communist Party Case*, the High Court of Australia struck down as unconstitutional the *Communist Party Dissolution Act 1950* (Cth): *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. Cf Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27 *UNSW Law Journal* 482-523. See also the remark of George Williams, quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47, that the proscription regime under the *Criminal Code* bears 'disturbing similarity' to the *Communist Party Dissolution Act 1950* (Cth).

It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.<sup>4</sup>

However, a moment's thought will indicate that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*. The tensions between the quoted remarks, and other remarks of the Attorney-General's Department, and also remarks made by the Australian Security Intelligence Organisation ('ASIO'), were noted in the Committee's *Review of the listing of six terrorist organisations*.<sup>5</sup>

The former Director-General of ASIO, in a hearing before the Committee held on February 1, 2005, stated that in selecting organisations for proscription ASIO takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.<sup>6</sup>

As part of a subsequent inquiry, on May 2, 2005 ASIO informed the Committee that these factors

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<sup>4</sup> Attorney-General's Department, *Submission No 7 to the Parliamentary Joint Committee on ASIO, ASIS and DSD's Inquiry into the listing of six terrorist organisations*, p 1, available at <[http://www.apf.gov.au/house/committee/pjcaad/terrorist\\_listingsa/subs/sub7.pdf](http://www.apf.gov.au/house/committee/pjcaad/terrorist_listingsa/subs/sub7.pdf)>.

<sup>5</sup> *Review of the listing of six terrorist organisations* (2005) at 2.23

<sup>6</sup> PJC, *Review of the listing of six terrorist organisations* (2005) at 2.3.

are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.<sup>7</sup>

When one considers this remark, and then attends to the organisations which have been listed, it is difficult to see that these factors are being applied in any systematic fashion at all. In particular, the questions of a link to Australia, or a threat to Australian interests, seems to be given rather little consideration in most cases. The Committee has noted this itself in several of its reports.<sup>8</sup>

Part of the difficulty in the application of the factors identified by ASIO may result from the fact that their meaning is not always clear. For example, what is meant by ‘engagement in terrorism’? If ‘terrorism’ in this factor has the meaning of ‘terrorist act’ as that phrase is defined by the *Criminal Code*, then the factor gives little guidance beyond simply restating the statutory requirement for proscription. But if ASIO understands ‘terrorism’ in this context to have some more narrow meaning – for example, engaging in illegitimate attacks upon civilians – then it is incumbent upon ASIO to make this meaning clear, and to explain how it is being applied. This narrower meaning could then be incorporated into the statutory definition.

What is meant by the ‘ideology’ of an organisation. Does this refer to the political or religious outlook of its members? Or, given the coupling of ideology with links to other groups, does ‘ideology’ mean the organisation’s conception of itself as a player in the geo-political arena? Until the meaning of this factor is made clear, it is impossible to analyse the way in which it is being applied. If ‘ideology’ refers to political outlook, then a further question is raised: what sorts of ideology does ASIO regard as illegitimate? Presumably, given that the threat posed by the organisation to Australia is listed by ASIO as a separate factor, ASIO does not limit its consideration of ideology to the question of opposition to the Australian state or the Australian people. Some other standard is being applied. In a democracy, it must always be a

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<sup>7</sup> PJC, *Review of the listing of Tanzim Qa’idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.4.

<sup>8</sup> *Review of the listing of six terrorist organisations* (2005) at 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* (2005) at 2.24, 2.28; *Review of the listing of seven terrorist organisations* (2005) at 3.12,

matter of concern when a necessarily clandestine security agency is given a significant degree of power in determining which political outlooks are legitimate, and which are not, and are liable to lead to criminal prosecution. A democratic culture cannot thrive under such conditions. If only certain ideologies are regarded as criminal by those authorities who actually apply the *Criminal Code*, this should be made explicit, and incorporated into the statutory definition.

To the extent that the factors used by ASIO are clear, they seem to emphasise foreign policy rather than domestic considerations. For example, the concept of ‘posing a threat to Australian interests’ is most naturally interpreted in as a foreign-policy concept.<sup>9</sup> Likewise, the proscription of an organisation by the United Nations, the proscription of an organisation by like-minded countries (which is itself a concept belonging to foreign policy), and the engagement of the organisation in a peace process, are all primarily foreign policy matters. There is no doubt that Australia’s democratically elected government has the right to pursue its foreign policy goals in accordance with its conception of the country’s national interest. But the criminal law should not be used as a tool to enforce these foreign policy preferences. Australia a multi-cultural democracy whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries. It is not the proper function of Australian law to make criminals, by way of executive fiat, of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day.

I therefore reiterate the following criteria suggested in my previous submissions, and noted by the Committee in its reports.<sup>10</sup> At a minimum, any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code* ought to indicate:

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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* (2005) at 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89.

<sup>9</sup> The Committee noted the vagueness of this factor in its *Review of the listing of six terrorist organisations* (2005) at 2.29.

<sup>10</sup> *Review of the listing of six terrorist organisations* (2005) at 2.32-2.35; *Review of the listing of Tanzim Qa’idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.7; *Review of the listing of seven terrorist organisations* (2005) at 2.25.



- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
  - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
  - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
  - the way in which the concept of ‘membership’, and particularly ‘informal membership’, will be applied in the context of the organisation;
  - the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.

These criteria recognise that the operation of Australian criminal law will be primarily confined to Australia (a point that the Committee has also noted.<sup>11</sup>) and that it is the impact of a listing upon what would otherwise be the lawful activity of Australian citizens and residents that must be given the foremost consideration.

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<sup>11</sup> *Review of the listing of six terrorist organisations* (2005) at 2.28; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.27.

## 2. The process of listing organisations under the *Criminal Code*

Any decision to list an organisation under the *Criminal Code* ought to be preceded by, and followed by, community consultation. Although the Committee, as a result of its review work, has a degree of success in encouraging the Attorney-General's Department to take more seriously its obligations of consulting with other branches of the Commonwealth Government, and with State Governments, in relation to the proscription of organisations under the *Criminal Code*,<sup>12</sup> its recommendation that community consultation take place<sup>13</sup> does not seem to have been taken up.<sup>14</sup>

Community consultation in relation to listings is crucial if these are to be seen by those they affect as legitimate exercises of power within the framework of Australia's democracy, and not simply as anti-democratic interferences with civic and political freedom. Whatever its own political convictions, a government in a liberal democracy like Australia has a special duty to preserve the integrity of that liberal democracy, including the freedom of political outlook and political dissent that characterises democratic life. The listing of an organisation makes criminal the political activities of some, and impacts more diffusely on the political life of many more. If no serious attempt is made to justify to those people the singling out of their political commitments for targeting by the criminal law, they are likely to experience a listing as nothing more than an anti-democratic attempt to stifle their political freedom. This is not good for the health of Australian democracy.

To relate this point back to the grounds for listing that were argued for above: it is not sufficient that the Attorney-General or ASIO be satisfied that an organisation is connected to political violence, and that the ordinary criminal law of this or some other country is inadequate to respond to that violence. Steps must be taken to ensure that those who will be directly affected by a listing are likewise satisfied of this. Of course, this sort of consultation with the community would be a natural consequence

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<sup>12</sup> *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.10-1.18.

<sup>13</sup> *Review of the listing of six terrorist organisations* (2005) at 2.38 to 2.40 and Recommendation 1.

of applying the fourth criterion for listing set out above: for the most natural way for the government to develop an understanding of the impact upon Australians of the listing of an organisation, is to talk to them about it.

### 3. The listing of the PKK

In relation to the listing of the PKK, the Attorney-General, in his press release, stated that

[A] regulation has been made to list the PKK as a terrorist organisation on the advice of competent authorities...

The Government will not tolerate involvement with groups or activities that threaten the safety and security of Australia, and our law enforcement agencies will continue to pursue relentlessly those who commit terrorist offences.<sup>15</sup>

There is no indication in these remarks that any community consultation has taken place. There is, rather, a somewhat sinister reference to ‘competent authorities’ – presumably ASIO is meant – and to what the government will or will not tolerate. As was argued above, however, in a democracy it is not up to the government to determine what is or is not legitimate politics.

Furthermore, the remarks that Australian police and prosecutors will ‘pursue relentlessly’ terrorist offenders are simply untrue. Given the breadth of the concept of ‘terrorist act’ in Australian law, and the even greater range of conduct that constitutes ‘terrorist offences’ under the *Criminal Code*, it is obvious to anyone who reflects on it that not all these offences are being pursued. For example, all foreign soldiers are training with organisations that are indirectly fostering political violence (that is, they belong to armies), and therefore are committing terrorist offences.<sup>16</sup> But it is obvious

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<sup>14</sup> *Review of the listing of Tanzim Qa’idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.19-1.21; *Review of the listing of seven terrorist organisations* (2005) at 2.16; *Review of the listing of four terrorist organisations* (2005) at 2.18, 2.21.

<sup>15</sup> ‘PKK listed as terrorist organisation’, 15 December 2005, available at <[http://www.ag.gov.au/agd/www/ministerruddockhome.nsf/page/media\\_releases\\_2005\\_fourth\\_quarter\\_15\\_december\\_2005\\_-\\_pkk\\_listed\\_as\\_terrorist\\_organisation\\_-\\_2382005](http://www.ag.gov.au/agd/www/ministerruddockhome.nsf/page/media_releases_2005_fourth_quarter_15_december_2005_-_pkk_listed_as_terrorist_organisation_-_2382005)>.

<sup>16</sup> Australian soldiers are protected by the defence of authority under Commonwealth law: *Criminal Code* s 10.5.

that in most cases they will neither be arrested, nor charged, nor prosecuted by Australian authorities even if the opportunity arises.

It would be more productive to acknowledge that only a small group of organisations is being singled out for listing and for investigation, and to set about explaining and justifying that selection to those affected. The closest that the Attorney-General's press release comes to doing this is its reference to the 'safety and security of Australia.' The material on the PKK used by the government to justify the listing does not indicate any threat to Australia or Australians, however.

It may be that by 'security of Australia' the Attorney-General is using that phrase in the technical meaning given to it by section 4 of the *Australian Security Intelligence Organisation Act*, according to which 'security' means not only the protection of Australia from politically motivated violence, espionage and so on, but also 'the carrying out of Australia's responsibilities to any foreign country in relation to' such matters. In this case, the implication would be that Australia has listed the PKK as part of an understanding with the government of Turkey; this implication is strengthened by the fact that the listing took place a week after the visit to Australia by Recep Erdoğan, the Prime Minister of Turkey.<sup>17</sup> If this is so, it would be an outrageous example of what was criticised above, of using listing as a tool in the pursuit of foreign policy goals, rather than taking it seriously as a serious matter pertaining to the Australian criminal law, to be exercised as transparently and non-politically as possible.

What the official material in support of the listing does establish is what is any event well-known, that the PKK is involved in a long-running struggle with the Turkish government, comparable in its general character to nationalist revolts in other parts of the world. As well as indicating various attacks perpetrated by the PKK against Turkish soldiers and security forces, the material indicates alleged PKK attacks against civilians. It does not canvass the equally well-known allegations of

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<sup>17</sup> See Prime Minister John Howard, 'Address to the Parliamentary Luncheon in Honour of the Visit to Australia by Prime Minister Recep Erdoğan', 8 December 2005, available at <<http://www.pm.gov.au/news/speeches/speech1719.html>>.

human rights abuses committed by the Turkish government,<sup>18</sup> nor recent suggestions that at least some of the violence attributed to the PKK may have in fact been perpetrated by Turkish security forces.<sup>19</sup> It does not explain why this particular organisation has been singled out for listing, nor how Australia sees such a listing as contributing (if at all) to attempts within Turkey to find a political solution to the ‘Kurdish question’.

I believe that other submissions to this inquiry draw attention to the incongruity between, on the one hand, granting people asylum in Australia on the basis of the persecution they have suffered for their participation (actual or imputed) in Kurdish nationalist politics, and on the other hand, criminalising such participation by listing under the *Criminal Code* the organisation that is at the forefront of such political activity. This is just one more aspect of this listing that is ignored by both the background material, and the Attorney-General’s press release.

Of all the listings under the *Criminal Code* considered by the Committee, I believe that it is this listing which most clearly draws attention to the objectionable character of the listing regime as a whole, its propensity to abuse by a government using the criminal law in pursuit of its foreign policy aims, and the inadequacy of a process of listing that does not involve the Australian community. I therefore urge the Committee to recommend disallowance of the regulation listing the PKK as a ‘terrorist organisation’.

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<sup>18</sup> Extensive material on these human rights abuses is available from the Kurdish Human Rights Project at <<http://www.khrp.org/>>, Human Rights Watch at <<http://hrw.org/doc/?t=europe&c=turkey>> and Amnesty International at <<http://web.amnesty.org/report2005/tur-summary-eng>>.

<sup>19</sup> As reported by Human Rights Watch at <<http://hrw.org/english/docs/2005/11/18/turkey12064.htm>>.