

Submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the relisting of the Kurdistan Workers' Party (PKK) 2018

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Introduction

1. Please accept this submission made in my professional capacity as a senior lecturer at the Faculty of Law, UNSW Sydney. My expertise is in counter-terrorism law and policing, including the proscription of terrorist organisations. I have published socio-legal research on the impacts of proscription of the PKK on the Kurdish diaspora in Australia, the United Kingdom and the European Union.¹ I co-published a major study commissioned for the *Berghof Foundation for Conflict Transformation* (Berlin) on the impacts of proscription laws across jurisdictions on the resolution of armed conflicts, including the impacts of listing on the Turkish-Kurdish conflict.² My knowledge of the conflict is based on 13 years of research engagement. I have engaged with Kurds across the diaspora, NGOs and mediators who work to resolve armed conflicts and with policy makers in the European Union and United Kingdom.
2. My submission is directed to assisting the Committee with the more complex and less understood aspects of the PKK. I also draw on the research evidence to identify the negative impacts of the listing on prospects for resolution of the armed conflict and on Kurds in Australia. I have had the opportunity to review the submission of the Kurdish Community Centres of Victoria and New South Wales and I endorse the recommendations made therein.
3. I welcome the opportunity to assist the Committee by providing evidence at hearing.

Submission in Summary:

4. My submission is that the Committee recommend to disallow the regulation. The statement of reasons provided by the Minister, the objective evidence and the application of sound principles of merit review endorsed by the Committee in 2004, do not provide a reasonable basis to justify the re-listing of the PKK.
5. In summary:
 - i) The statement of reasons discloses no link between the PKK's military conduct and any threat to Australia. No direct connection between the PKK and any threat to Australia takes the listing beyond the objects of the legislation;

¹ Sentas, V (2014) *Traces of Terror: Counter-terrorism law, policing and race*, Clarendon Studies in Criminology, Oxford: Oxford University Press (Chapter 7 on terrorist listing); Sentas, V (2016) 'Policing the Diaspora: Kurdish Londoners, MI5 and the proscription of Terrorist Organizations in the United Kingdom', *British Journal of Criminology*; Sentas, V (2018) 'Terrorist Organization Proscription as Counterinsurgency in the Kurdish Conflict', 30 (2) *Terrorism and Political Violence*.
² Boon-Kuo, L., Hayes, B., Sentas, V. and Sullivan, G. (2015), *Building Peace in Permanent War: Terrorist Listing and Conflict Transformation*. International State Crime Initiative and Transnational Institute.

ii) During the review period, the Kurdish population in south-east Turkey were subject to systemic violations by Turkey including extrajudicial killings, curfews and displacement. The popular, mainstream and grassroots political Kurdish movement continues to be treated by Turkey as support for terrorism and thousands of Kurds have been detained and prosecuted in recent years for speech acts and non-violent dissent. The context of Turkish state crimes is a relevant consideration for the Committee in understanding why the PKK continues in an armed conflict with Turkey.

iii) In the absence of any threat of the PKK to Australia's security, it is not justifiable that the PKK be listed in order to give effect to the goal of deterring individuals in Australia from giving legitimacy to the PKK. The PKK's political claims for Kurdish and other minority rights, women's rights and broader democratisation in Turkey are objectively legitimate by any measure applied by a liberal democracy. The PKK's political claims have only grown in legitimacy internationally since the PKK was first listed, evident in Australia's defacto cooperation with the PKK and sister organisations in fighting ISIS in Syria and Iraq.

iv) Listing the PKK in practice criminalises its democratic political objectives – objectives that are a necessary condition for restarting the peace process. Australian terrorist organisation offences are constructed in a way that non-violent Kurdish affiliation to the PKK cannot be readily distinguished in law from the HPG's military offensive against the Turkish armed forces.

v) In the absence of any threat of the PKK to Australia's security, the effect of listing is to unreasonably impede the individual rights of Kurds in Australia under international law (including freedom of association, to family life) in the absence of an express legislative intention to do so. The listing also impedes the Kurds' implied freedom of political communication in the Australian Constitution.

vi) Research indicates that the global listing of the PKK contributes to closing off non-military solutions of political engagement for the PKK, further entrenches the armed conflict and makes the conditions for political settlement of the conflict more difficult. The evidence from best practice in conflict resolution is that listing the PKK will make the human cost of the current counter-terrorism approach in Turkey, worse.

vii) Australia has alternatives to listing the PKK in order to better meet Parliament's objectives for achieving peace and security in Turkey. This includes taking a positive role in advocating for a renewed peace process designed to address the root causes of the conflict. A practical first step is for Australia to encourage all the parties to adhere to International Humanitarian Law (IHL) in order to protect civilians and prevent further violence.

Criteria for review of the listing

6. In its 2015 review the Committee recommended that the PKK should remain listed because it ultimately met the statutory thresholds established in s102.1 of the *Criminal Code*. Proscription is an extraordinary executive power that undermines key principles of criminal responsibility. The Committee has the opportunity to provide effective limits to the proscription power. As the Committee has previously noted, the breadth of s102.1 means that many hundreds of organisations could meet the definition of 'terrorist organisation'. But only a select number of organisations of the many more that could meet the statutory criteria have been listed. The decision to proscribe on the basis of s102.1 is necessarily one that should be limited by relevant considerations and reasonable grounds.
7. The non-statutory criteria (or ASIO criteria) are important considerations that ought to be applied to limit which organisations are listed, in order to ensure that listing meets the legislative objective of protecting Australia's security. I consider the key ASIO criteria below.
8. The Committee's assessment of the causes of the armed conflict in Turkey is a fundamental, overarching consideration that directly relates to the application of the ASIO criteria. In the absence of a demonstrable PKK threat to Australian security, the ulterior political goal of proscription is implied to be to deter and end political violence, wherever it be in the world. I submit that deterring political violence anywhere in the world regardless of the existence of a threat to Australian security, is not the legislative intent of the Australian proscription regime. Investigating the root causes of the PKK's political violence are however, necessary considerations in the Committee's determination of whether there are reasonable grounds for the listing.

The cause of the armed conflict between Turkey and the PKK

9. I concur with the material on the conflict provided to the Committee by the Kurdish Community Centres. There is some discussion in the 2006 listing review on the history and origins of the conflict. My submission is intended to supplement the Committee's understanding of key facets of the conflict and to note relevant considerations relating to the conflict.
10. The established cause of the armed conflict is Turkey's historic and continuing suppression of Kurdish aspirations for self-determination through the repression and assimilation of Kurdish identity. The historical record is well established.³ The reason

³ See for example, Kahraman, A. (2007), *Uprising, Suppression, Retribution: The Kurdish Struggle in Turkey in the Twentieth Century* (Trans. A. Penny). Taderon Press; Gunter, M. (2008), *The Kurds*

for the PKK's continued engagement in military combat with the Turkish Armed Forces is Turkey's continuing suppression of Kurdish rights and serious, widespread crimes against the Kurdish people. The Committee has in past reviews given some recognition that the PKKs military conduct is pursued in furtherance of self-determination and in resistance against oppression.

11. Turkey has long defined the PKK as a terrorist organisation since the beginning of the PKK's guerrilla conflict with the Turkish Armed Forces in 1984. The ban of the PKK functioned as a key plank in Turkey's counterinsurgency strategies to eliminate the PKK, which intensified in the 1990's, including expansive counterterrorism laws targeted to Kurdish identity, emergency rule and the repression and control of Kurdish populations in the south-east.
12. Turkey's counterinsurgency strategy against the PKK relied upon targeting the Kurdish population as a whole, with laws and prosecution strategies that formalised the indistinction between civilians and guerrillas that have re-escalated in the present day. The banning of organisations was integral in repressing and targeting the Kurdish populations support for political causes. The earliest prosecution of individuals for Kurdish separatism related to organizations were for charges of carrying out communist propaganda for the Workers Party of Turkey, in 1971. Leftist and Kurdish political parties began to be closed down by the Constitutional Courts as 'terrorist fronts', a patterned strategy that continued throughout the decades to the present.⁴
13. The *Act to Fight Terrorism (Anti-Terror Act), 1991* formalised a dual legal system in Turkey, restricting the civil rights of civilian Kurds and constituting them as apriori terrorist. The legal designation of the PKK as a terrorist organisation under Article 5 of the *Anti-Terror Act 1991* was integral to the mass criminalisation of the Kurds in this period. Lengthy imprisonments were given to thousands of Kurds imputed as PKK supporters in jails notorious for the routine use of torture and extra-judicial killings⁵ Thousands of Kurdish refugees sought asylum during the heightened repression of the 1980's and 1990's, including to Australia.
14. Still today, Turkey does not distinguish between Kurdish civilians and guerrillas in its criminal detentions and prosecutions relating to the ban of the PKK, a situation that has become much worse since the failed coup and the rise of authoritarian repression against Turkish civil society more broadly. This important context is not

Ascending: The Evolving Solution to the Kurdish Problem in Iraq and Turkey. Palgrave MacMillan; Yildiz, K. and Breau, S. (2010), *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms*. Routledge.

⁴ Yildiz and Breau above n 3.

⁵ Kahraman, above n 3; Gunter, above n 3.

considered in the 2018 Statement of Reasons. The Minister does not give consideration to the root causes and continuing role of Turkey in sustaining the armed conflict.

15. The cause of the armed conflict is a relevant consideration for the Committee's review. The conflict between Turkey and the PKK is a non-international armed conflict governed by the Geneva Conventions. International Humanitarian Law (IHL) and the Law of Armed Conflict provide the proper means to regulate the armed conflict and ensure that hostilities against civilians are designated as war crimes. I refer to the Kurdish Community Centres' submissions, which outline the relevance of IHL to this review in detail.
16. Turkey's escalated military offensive from 2015 against the Kurds in the south-east of the country, provides a critical context for the Committee's deliberations. I refer to the evidence outlined in the Kurdish Community Centres' submissions. I also refer the Committee to the March 2018 verdict of the Permanent People's Tribunal on Turkey and the Kurds.⁶ The Tribunal found on the evidence that Turkey had committed war crimes in the cities of Cizre, Sirnak, Nusaybin and Diyarbakir. Considering Turkey's 'Collapse Plan', proposed at a National Security Council meeting on October 30, 2014, the Tribunal found:

The Collapse Plan called for Kurdish settlements to be destroyed, repopulation suppressed and pacification to be obtained by mass destruction, arrests and evacuations. During this Plan of suppression, many thousands of Kurds were killed, wounded and arrested with some 150-300,000 survivors removed prior to bombing. This plan employed in the four cities mentioned above was intended to paralyse and neutralise the PKK Kurdish response during 2015-2016.⁷

17. The very real prospect that continuing to list the PKK contributes to an environment where Turkey's state crimes are given tacit approval as a counter-terrorism measure, is a critical consideration for the Committee. Giving due consideration to Turkey's state crimes, and the role of these crimes in fostering the continuation of the conflict is relevant to whether the Minister has listed the PKK on reasonable grounds.

ASIO criteria – ideology: The PKK and the relationship to the Kurds

18. The PKK's ideology is one of the ASIO criteria relevant to determining whether it is an organisation which ought to be listed. I address the context of the PKK's ideology

⁶ "The Permanent Peoples' Tribunal (PPT) was established in Bologna in 1979 as a direct continuation of the Russell Tribunals on Vietnam (1966–67) and Latin America (1973–76). As declared in its Statute, the Tribunal's competence extends to serious and systematic violations of the rights of peoples, whether committed by States, by authorities other than States, or by private groups or organizations." <http://tribunal-turkey-kurds.org/index.php/quest-ce-que-le-tp/>

⁷ Verdict, *Permanent People's Tribunal on Turkey and the Kurds*, March 2018. <http://tribunal-turkey-kurds.org/index.php/the-verdict-2/>

more broadly in relation to the PKK as a social movement to assist the Committee in applying this criteria, not least because it is relevant to also understanding the impact of the listing on Kurds in Australia.

19. The PKK are comparable to no other non-state armed actor, both in structure, culture or politics. The PKK began with a classic Marxist-Leninist party structure in 1978 but has diversified into a multifaceted and complex organisation, described as a 'party-complex':

... a formation of parties and organizations comprising several parties (including the PKK as a party), a co-party which separately organizes women, sister parties in Iraq (PCDK), Iran (PJAK) and Syria (PYD) and guerrilla forces related to these parties. Next to this cluster of parties, the PKK established institutions through which integration and co-ordination of political practices take place.⁸

20. The PKK is comprised of several political manifestations, with some being legislative and others executive in function. There are broad based, participatory local and regional councils with umbrella assemblies and there is a National Congress of Kurdistan (KNK), pan with representatives from all over the world. Importantly, the PKK are a popular, grassroots social movement of diverse forms of assembly with mainstream support amongst Kurds in Turkey and in the diaspora.

21. The complexity of understanding the PKK is not only at the level of political organisation. 'The PKK' also reflects an idea and an aspiration for Kurdish identity and democratic freedom that has evolved through the economic, cultural, socio-political dynamics of the conflict itself.⁹ The PKK is intricately woven through Kurdish political identity, historic and contemporary social relations and is also central to understanding the Kurdish diaspora's connection to the PKK.¹⁰

22. PKK expert Vera Eccarius-Kelly, identifies how the PKK 'reinforces the idea of ethnic membership that bonds diaspora Kurds to the larger cause of Kurdish political social and cultural rights'.¹¹ As well as an armed group within a 'party-complex', it is this conception of the PKK as a social movement generated by an existential and collective investment by the Kurds in their survival as a people, which is banned by

⁸ Jongerden, J. and Akkaya, AH. "Democratic Confederalism as a Kurdish Spring: The PKK and the Quest for Radical Democracy" in Mohammed M.A. Ahmed and Michael M. Gunter (eds.), *The Kurdish Spring* (Mazda Publishing: Costa Mesa, CA, 2013), 165-166.

⁹ Marcus, A. (2007) *Blood and Belief: The PKK and the Kurdish fight for independence* (New York University Press).

¹⁰ Mojab, S. and Gorman, R. (2007), 'Dispersed Nationalism: War, Diaspora and Kurdish Women's Organizing', *Journal of Middle East Women's Studies*, 3/1: 58-85; Soguk, N. (2008), 'Transversal Communication, Diaspora and the Euro-Kurds', *Review of International Studies*, 34/S1: 173-192; Eccarius-Kelly, V. (2002), 'Political Movements and Leverage Points: Kurdish Activism in the European Diaspora', *Journal of Muslim Minority Affairs*, 22/1: 91-118.

¹¹ Eccarius-Kelly, above n 7, 94.

the Australian listing. The importance of an accurate characterisation of the PKK cannot be overstated for appreciating the deleterious impact of the listing on the Kurds.

23. The PKK is listed in the regulation with 23 additional names, as 'other names the PKK is known as', presumably provided by Turkey. The list of 'pseudonyms' seeks to define the PKK but the boundaries are unclear. The scope and context of the PKK as defined in the Regulation is a relevant consideration for the Committee in ensuring a potentially very large number of people are not criminalised. Journalist, Ezgi Basaran identifies that the PKK changed names:

..first, out of a desire to reinvent and adapt the organisation through different ideological phases. Second, *it wishes to accommodate as many people as possible within the movement*. It is difficult to involve non-violent activists and public figures in an armed group but easier to do so through different assemblies and organisations.'(emphasis added)¹²

Who and how many people are imputed through the scope of the Regulation to be PKK by Turkey and targeted as 'terrorist'?

24. The Minister's reliance on Turkey's characterisation of the PKK is also contentious because of the inclusion of the TAK/Kurdish Freedom Falcons/Kurdish Liberation Hawks as a pseudonym of the PKK. Turkish security sources characterise the TAK to be a PKK front that targets civilians on behalf of the PKK so it can plausibly deny responsibility. Whether the TAK is controlled by the PKK or if it is a separate organisation that the PKK does not exert control over, is contested amongst security experts and many argue it is unclear.¹³ The evidence for characterising the TAK as part of the PKK in the Regulation would need to be carefully identified and considered by the Committee.
25. The connection between the Kurdish people and the PKK is two-fold. First, without the PKK's guerrilla campaign the Kurds understand they would have been subject to genocide and complete assimilation. Second, since the early 2000's the PKK has developed its political program for democratisation both as a Kurdish social movement as well as calls for democracy across Turkish society. Kurds express hope in the potential for a democratic Kurdish movement to peacefully resolve the conflict.
26. In 2005 the PKK adopted principles developed by Abdullah Oclan, he called 'democratic autonomy' and 'democratic confederalism' in a significant move towards direct democracy that do not involve taking state power. As Jongerden and Akaya explain: 'Democratic autonomy refers to practices in which people produce and reproduce the necessary and desired conditions for living through direct engagement and collaboration with one another' ... 'Democratic confederalism can be

¹² Basaran, E. (2017) *Frontline Turkey: The Conflict at the heart of the Middle East* (LB Tauris), 34.

¹³For example, Eccarius Kelly, V. (2011) *The Militant Kurds: A Dual Strategy for Freedom* (Praeger, California) 198-199.

characterized as a bottom-up system for self-government.¹⁴ In 2005 the Kurdistan Communities Union (KCK), was established as a societal organisation to coordinate this new grass roots self-organisation.¹⁵ The KCK manifests as a network of participatory local people's assemblies at the level of villages and towns. The KCK's grounding in civil society has been understood by experts to be integral to the future transformation of the PKK away from military combat to an entirely political formation.¹⁶

27. The political context of how Turkey responded to the PKK's democratisation is important. From 2009 Turkey renewed a program of mass arrest and prosecution of Kurdish civil society in a continuing operation against the KCK. Turkey saw the KCK as the urban expression of the PKK, and charged it with aiming to create a 'parallel state'. Between 2009 and 2013 official figures from Turkey indicate it prosecuted almost 40 000 people for offences of membership of a terrorist organisation; aiding and abetting a terrorist organization; and attempting to destroy the country's unity and integrity.¹⁷ The mass arrests were intended to disrupt the political appeal of the KCK as a social movement.¹⁸
28. The operation against the KCK continues to target the widest possible array of Kurdish civil society actors, narrowing the scope for Kurdish non-violent political participation. Since the failed coup, thousands more activists, lawyers, parliamentarians, mayors and journalists have been detained as alleged members or supporters of the KCK as a PKK front. Charges have been based on allegations that public statements, or otherwise implicit support for the goals of the KCK, are support for separatism. Key pro-Kurdish civil society organisations and mainstream political parties have been singled out for disruption. These include the Kurdish political party the HDP (the Peoples' Democratic Party and formerly the BDP), the Human Rights Association of Turkey (the largest and oldest human rights organisation in Turkey) and the Democratic Society Congress (DTK), a general assembly of delegates of Kurdish NGOs, political parties and elected individuals from the population.¹⁹
29. Turkey's counter-terrorism strategy has been to marginalize pro-Kurdish politics in Turkey, effectively closing the political space available for the PKK to be able to transform away from military action. This vital context ought to be part of the Committee's deliberation. The PKK's approach to democratic participation, women's

¹⁴ Jongerden and Akaya, above n 8 at 171, 172.

¹⁵ Ibid 163-185; Basaran, above n 12 at 35.

¹⁶ Democratic Process Institute (DPI), *Turkey's Kurdish Conflict: An Assessment of the Current Process* (London: Democratic Process Institute, 2013), 17, citing Turkone's work

¹⁷ Kayhan I and Koç, O (2013) "Turkey's Terrorism Report," *Firat News*, 15 November.
<http://en.firatnews.com/news/features/turkey-s-terrorism-report.htm>.

¹⁸ Bayit, D 'The role of the judicial system in the politicide of the Kurdish opposition', in Gunes, C and Zeydanoglu, W (eds) *The Kurdish Question in Turkey: New Perspectives in Violence, Representation and Reconciliation* (London, Routledge 2013) 33.

¹⁹ Jongerden and Akkaya, above n 8, 180-182.

rights, ecology and environment and to a democratic Middle East, is a relevant consideration for why the regulation should be disallowed.

ASIO criteria – threats to Australian security interests

30. The Minister's explanatory statement explains: 'Terrorist organisations including the Kurdistan Workers' Party, present a threat to the security of Australia and often seek to harm Australian and our democratic institutions.'²⁰ There is no evidence provided in the statement of reasons or elsewhere, that the PKK seeks to harm Australians or Australia's democratic institutions.

31. The Committee has previously sought to constrain an overly broad concept of security in accordance with the legislative purpose of proscription:

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.²¹

32. In its 2006 review report, the Committee identified that:

Australian interests have been defined for the Committee in previous reviews in terms of threats of harm to Australian travelling into the area of operation of a terrorist organisation or dangers to Australian businesses or trade in such places or threats to Australians in Australia.²²

33. The Minister's 2018 statement of reasons identifies that the PKK's direct attacks are against Turkish armed forces, and that 'attacks by the group have treated civilian bystanders as acceptable collateral':

In late-2015 and 2016 there was an increase in the scale of PKK attacks with an expansion of the groups areas of operation to include urban areas across Turkey, including metropolitan centres in the country's west and cities popular with tourists on Turkey's Aegean and Mediterranean coast.

34. The nature of the any particular, collateral threats to Australian civilians should be specified in order that the legislative purpose that listing protect Australian security be accorded with. The statement of reasons does not identify any claimed PKK attacks against any civilians for the relevant period. Hypothetical or potential collateral injury by Australian civilians are too remote to meet the Committee's test that there be reasonable grounds for a connection to Australian security.

²⁰ Minister for Home Affairs, *Explanatory Statement – Criminal Code (Terrorist Organisation – Kurdistan Workers' Party) Regulations* 2018, 4.

²¹ PJCIS (2007) *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, para 4.28.

²² PJCIS (2006) *Review of the listing of the Kurdistan Workers Party (PKK)* para 2.43 .

ASIO criteria - 'Links to Australia': Impacts of listing the PKK on Australian Kurds

35. The Committee has previously understood that while direct links to Australia are not legally necessary to justify a listing, 'it should be an important consideration.'²³ For the then Attorney General, it was a 'significant factor' in a listing decision.²⁴ The Committee has stated that:

... a more serious consideration exists where there are substantial links to Australia. 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

36. The Committee subsequently departed from this approach. In its 2015 review report the Committee concurred with the Department's view that the PKK's support within the Kurdish community in Australia 'is not relevant to determining whether the organisation meets the criteria for listing as a terrorist organisation.'²⁶ With respect, the impact of the listing on the Kurds in Australia should remain an important consideration and a significant factor for the Committee's review of the merits of this listing.
37. The Committee has previously acknowledged the strong support in the Kurdish diaspora, and in Australia, for the political objectives of the PKK in that many Kurds see the PKK as 'their party'.²⁷ 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.²⁸
38. The PKK is recognized by Kurds across the diaspora as fighting for a liberation struggle in self-defence of Kurdish self-determination. The survival of Kurdish identity is entwined with the military defense of the Kurds by the PKK. The experiences of severe repression and punitive cultural assimilation of ordinary Kurdish civilians relied upon a legal and political regime that equated Kurdish identity with being a terrorist. The designation of the PKK as a terrorist organisation in Australia thus has a detrimental, psycho-social effect on the Kurds that fosters social exclusion and stigma.

²³ Ibid 2.35.

²⁴ Ibid 2.33 citing review of the listing of the PIJ June 2004, p.19

²⁵ Ibid 2.36

²⁶ PJCIS (2015) *Review of the re-listing of Al-Shabaab, Hamas' Izz al-Din al-Qassam Brigades, Kurdistan Workers Party (PKK), Lashkar Tayyiba and Palestinian Islamic Jihad as terrorist organisations* 3.46; 3.56.

²⁷ PJCIS (Minority Report) (2006) *Review of the relisting of the PKK* 1.31.

²⁸ PJCIS (Majority report) (2006) *Review of the relisting of the PKK* 2.38.

39. The impact of the listing on Australian Kurds is characterised in past reviews in a way that does not account for the sociological or practical reality of the PKK and its relationship to the Kurds. The Committee have distinguished between support for the PKK's broader political aspirations, and support for its military tactics, suggesting that the Criminal Code does not criminalise 'community support for the broader Kurdish independence movement'.²⁹ The Attorney General's Department stated:

Australians do not face penalties for supporting Kurdish civil society movement or political parties in Turkey, for supporting a peaceful resolution to the conflict between the PKK and the Turkish Government or the promotion of Kurdish rights in Turkey. The listing of the PKK only provides for criminal penalties for individuals who are members of the PKK, provide support, recruit for or direct the activities of the PKK, provide training to, receive training from or participate in training with the PKK, get funds to the PKK, and in certain circumstances, associate with the PKK.³⁰

40. The Department's advice that Kurds could avoid criminalisation by maintaining support for only the political aspirations of the PKK does not give due consideration to the breadth of the offences in the Criminal Code nor to the 'breadth' of the PKK. As I have outlined, the PKK are not simply engaged in military conduct but are also associated with broad based social movements and assemblies woven into the fabric of Kurdish civil society in Turkey's south east.

41. On a proper construction of the offences, the listing of the PKK exposes Kurds who support the PKK to serious discretionary criminalisation. Listing the PKK makes directing the activities of, membership of, recruiting for, training, funding, supporting or associating with the PKK a crime under Australian law.³¹ These are among the most serious offences in the Criminal Code each carrying a maximum 24-year prison term,³² with the exception of the membership offences carrying a 10-year maximum term³³ and associating, which carries a three-year maximum³⁴. No actual involvement in, or conspiracy to commit, acts of harm in Australia, or anywhere else, are required to constitute an offence. The elements of the offences are expansive, drawing on largely undefined terms new to the criminal law. Considered in relation to the type of entity that the PKK is, the offences may criminalise the broadest range of conducts, relationships, association and affiliations of Kurds in Australia.

²⁹ Ibid 2.40.

³⁰ PJCIS (2015) above n 26, 3.47.

³¹ *Criminal Code Act 1995* (Cth) sections 102.2-102.8.

³² If the offences are committed with recklessness as to the status of the organisation, rather than knowledge as to that status, then the maximum penalty is fifteen years imprisonment. *Criminal Code Act 1995* (Cth) sections 102.2(20), 102.4(2), 102.6(2), 102.7(2).

³³ *Criminal Code Act 1995* (Cth) section 102.3(1).

³⁴ *Criminal Code Act 1995* (Cth) section 102.8(1), (2).

42. Only the support offence is tied to the definition of terrorist act. It is an offence to intentionally provide support or resources that directly or indirectly helps a terrorist organisation engage in planning, preparing, assisting or fostering the doing of a terrorist act.³⁵ The difference between working towards the political objectives of the PKK, and support deemed to 'indirectly foster a terrorist act' may be semantic.
43. The effect of listing the PKK is to criminalise some activities of people associated with the organisation that would otherwise be an exercise of the right to family life, and freedom of association in the absence of an express legislative intent to do so. For example, sending money or remittances to family members in Turkey who are 'members' of the PKK engaged in political work, could attract the application of the provisions, recalling that being in or with the PKK is not synonymous with fighting in the HPG but extends to those who identify as PKK in its many congresses, committees and grassroots bodies.
44. Kurds in Australia have been targeted by the Australian Federal Police (the AFP) and the Australian Security and Intelligence Organisation (ASIO) and state police since the PKK was first listed. On 19 August 2010, 17 Kurdish residences across Melbourne and Sydney, including Kurdish community organisations, were raided by the AFP and Victorian and NSW Police with search and enter warrants. The reported purpose of the raids related to funding offences under division 102.6 of the Criminal Code. A spokeswoman for the Kurdish Association said the dawn raids were 'extremely degrading' for those targeted and the entire Kurdish community.³⁶ To date, no-one has been charged with an offence in relation to those investigations.
45. The Police actions communicated to the Kurds that they are being monitored as a result of the listing. Kurds across the diaspora may send money to a range of Kurdish organisations in Turkey, including Kurdish Human Rights Organisations, prisoner support groups and the HDP (People's Democratic Party). Some of these organisations are imputed by the Turkish state as supporting the PKK and many individuals associated with human rights groups and mainstream political parties including the HDP have been detained for long periods in Turkey awaiting terrorism charges relating to the PKK based on speech acts and associations.
46. In relation to the 2010 raids, the Sydney Morning Herald reported that:

The Turkish embassy in Canberra welcomed the raids, saying it had held "concerns" about the Kurdish associations for years. "They have been using flags and banners of PKK and carrying posters of Ocalan," the second secretary of the Turkish embassy in

³⁵ *Criminal Code Act 1995* (Cth) section 102.7

³⁶ Millar, P, Welch, D & Sexton, R 'Police Raids Aimed at Kurdish Terrorist Group', *The Age*, 20 August 2010.

Canberra, Umut Ozturk, told the *Herald*. "Their rhetoric is intended to promote the activities of PKK/Kongra-Gel."³⁷

47. The Australian authorities have expressed a similar view to the Turkish embassy, intervening when Kurds have exercised their rights to political expression. In one example:

On 27 March 2006 thousands of Kurds demonstrated in Diyarbakir, Turkey, against the Turkish military's use of chemical weapons against PKK guerrillas. Unarmed civilian demonstrators were fired on by security forces, killing thirteen people including three children. At a solidarity demonstration in Melbourne outside the Turkish consulate a detective from Victoria Police's Security Intelligence Group advised protestors holding portraits of jailed PKK leader Abdullah Ocalan that it was illegal to do so now and that 'there may be consequences'. Kurdish attendees at the rally said they responded to the detective by asserting that, since Ocalan was at that time appealing his conviction in the European Courts, he was technically not a terrorist and therefore how could it be a crime to display his portrait? Attendees, however, put the portraits away.³⁸

48. No charges were subsequently brought against any person for 'informal membership' of the PKK. However the elements of the membership offence are so broad that declaring support for Abdullah Ocalan as one's leader, attending rallies or meetings that seeks to intentionally assist the PKK in its political objectives or political work, remains open on the construction of the offence. The membership offence was considered by some of the members of the PJCIS to be so broadly defined as to include informal proclamations by Kurds that the PKK was 'their party'.³⁹

49. For Kurdish communities, the emergence of the PKK is understood as the last opportunity for Kurds to have survived as a people against state repression and genocidal practices aimed at eradicating Kurdish cultural identity. The PKK and Abdullah Ocalan are at the core of collective Kurdish identity.

50. 'Ali', a Kurdish refugee who settled in Australia in the 1980s, describes the commitment many Kurds have to the PKK:

Kurdish people are the PKK and the PKK are the Kurdish people. There is strong support from the Kurdish people and the Kurdish nation for the PKK. Because of the PKK the community could see they could regain their identity and language and culture—even when migration to other countries or when we forcibly located to metropolitan cities or Europe. It is important for Kurdish people who have migrated to Australia to keep language and be part of this movement, to morally support this movement, which is a freedom movement.⁴⁰

³⁷ Welch, D, 'Police raid Kurdish Groups at daybreak', *Sydney Morning Herald*, 20 August 2010.

³⁸ Sentas, *Traces of Terror*, Above n 1, 270.

³⁹ PJCIS (Minority report) (2006), *Review of the Listing of the PKK*, para 1.31.

⁴⁰ Sentas, *Traces of Terror*, above n 1, 267.

51. The popular refrain “I am the PKK” is common across the diaspora. This does not mean that when a Kurd says “I am the PKK” that they are communicating a fact that they once were or are a guerilla. Although, almost every Kurdish family will either have a family member or know someone who went to the mountains. Uttered as speech acts and displayed on placards and t-shirts, neither is “I am the PKK” primarily a civil disobedience tactic or used as a protest performance. When Kurds say, “I am the PKK” this attests to the entwined social identity Kurds share with the PKK through collective experiences of trauma, assimilation and repression. Many Kurds will say they are the PKK, as a way of communicating that they survived Turkey’s attempts to destroy Kurdish identity, only because of the PKK. The institutionalised policies of denial of the very existence of Kurdish identity are integral to many Kurdish people’s solidarity and loyalty to the PKK, as both symbol and material vehicle for greater recognition and justice for the Kurds.⁴¹
52. In the absence of any need for an allegation of planning, preparing, funding or fostering a terrorist act, association with or membership of a terrorist organisation are not offences in the ‘normal’ sense of the criminal law. The purpose of these offences are not to criminalise *acts* but the broadest of relationships to the organisation, understood as provision of legitimacy to the political goals of the PKK. Associating with, or membership of the PKK is an identity or ‘status’ offence that disrupts the ethno-political aspirations and associations of Kurds, and the implied freedom of political communication in the Australian Constitution.
53. These select examples from my research reflect a broader pattern of how the listing of the PKK has negative impacts for the broader Kurdish community. Regardless of whether charges are laid against individuals, interventions by police or ASIO function as a form of criminalisation that stigmatizes and labels the entire Kurdish community, constructing a ‘suspect community’. The social harms of terrorist labeling include social exclusion, interpersonal racism and hate-crimes. The Kurdish community have reported receiving death threats. The Kurdish Association of Victoria building was subject to several violent attacks by unknown assailants before the building was then burnt down in April 2011. My research finds stigmatisation across the Kurdish diaspora to be a systemic effect of terrorist labelling, rather than the perceptions or poor experiences of a handful of people.

ASIO criteria - Engagement in peace process

The conflict between listing and peace processes

54. The Committee’s previous assessment, and ASIO’s advice, that proscription can do harm to a peace process, warrants consideration. There is a body of empirical

⁴¹Ibid.

research that finds terrorist listing can undermine the resolution of armed conflicts. International listing or sanctions regimes were introduced to purportedly prevent violent extremists from carrying out terrorist attacks and to incentive a behavioral change towards de-radicalization. Instead, the evidence demonstrates that diverse international listing regimes undermine the necessary conditions conducive to peace.⁴² The heart of the paradox is by design. Proscription aims to *isolate* (by removing financial and material support); *disrupt* associates; stigmatise and *delegitimise* the objectives of listed entities no matter if these objectives are just, and thereby end political violence.⁴³

55. In my 2015 collaborative research study, the proscription of non-state actors in armed conflicts was found to:⁴⁴

- Exacerbate conflicts by encouraging state repression of civil society generating additional grievances to fuel the conflict;
- Marginalise the legal right to self-determination and fail to protect oppressed minorities;
- Impede confidence-building with listed actors and inside mediators by denying their political status and generating asymmetry;
- Criminalise third party mediation and negotiation support and cause third parties to withdraw or substantially alter the scope and effectiveness of their peace building work;
- Criminalise civil society groups connected to armed actors whose engagement with the armed actor is essential for encouraging their participation in negotiations.

56. The problem is that the aims of listing are contrary to established best practice in conflict transformation approaches to peace building. Conflict transformation seeks to address the root causes of conflicts by supporting gradual change over time to ultimately facilitate constructive means to transform the entirety of the societal relationships and structures that maintain a conflict, as a necessary prerequisite for a 'just peace'. Political conflicts require political solutions and engaging with non-state armed groups is an essential requirement for conflict transformation towards sustainable peace and justice. An essential principle of peace building is not to presuppose the legitimacy of state violence and repressions but rather view the

⁴² Dudouet, V. (2011) "Anti-Terrorism Legislations: Impediments for Conflict Transformation," in *Berghof Policy Brief 02* (Berlin: Berghof Conflict Research); Haspeslagh, S. (2013) "'Listing terrorists': the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," *Critical Studies on Terrorism* 6, no. 1; Dudouet, V. and Haspeslagh, S (2011) "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," (London and Berlin: Conciliation Resources and Berghof Peace Support); Boon-Kuo, Hayes, Sentas and Sullivan, above n 2.

⁴³ Boon-Kuo, Hayes, Sentas and Sullivan, above n 2.

⁴⁴ Ibid.

political legitimacy of all parties to the conflict as a necessary precondition for dialogue. In conflict transformation, the use of violence is not a disqualifier for engagement because prematurely requiring disarmament is understood to jeopardise peace negotiations. Instead, conflict transformation emphasizes reciprocal demilitarisation in the context of broad structural, political reform to begin to address root causes. In contrast, listing shapes a norm whereby a non-state actor must renounce and desist from violence, as a condition of future engagement.

The PKK-Turkey peace negotiations

57. Over the course of the conflict, the PKK has committed to engaging in a political process to resolve the conflict. It has engaged in unilateral ceasefires over the years that have been integral first steps in each opening for negotiations. The PKK was involved in a fragile peace process with Turkey formally between 2009-2011 ('the Oslo talks' - with private first contacts from 2005) and again between 2013-2015, beginning with Abdullah Ocalan's Newroz Declaration in March 2013, calling for a peace process.
58. The reasons why the peace process broke down are complex and multifaceted and are not addressed in detail here.⁴⁵ In sum there are three broad dynamics why the peace process begun with the Oslo talks, finally broke down in 2015. First, the moderate political concessions and processes required of Turkey to move the fragile process to the next stage did not eventuate (including, constitutional recognition of Kurdish identity and a Truth and Reconciliation Commission.) This resulted in a significant undermining of trust amongst the Kurds. Second, the Oslo process was conditioned for failure by 'deep state' forces, including; the attempted prosecution of Turkey's key Oslo negotiator, the Director of Intelligence (MIT), Hakan Fidan; the designation of several Kurdish negotiators on the *US Kingpin list*, after negotiations began;⁴⁶ the murders of three PKK women in Paris in which the French prosecutor named the MIT (or individuals in the MIT) in the indictment as having a possible involvement.⁴⁷ Third, the broader context of Syria and Iraq was decisive. For Turkey's part, it saw the Kurds' declaration of an autonomous Rojava region in Syria after the PKK-YPG resisted ISIS, as a territorial threat to its sovereignty. Ocalan's blueprint for 'democratic autonomy' was applied in Rojava's cantons as an experiment in direct governance through communal assemblies. Kurdish self-governance has been argued as the reason for both Turkey's, and ironically, ISIS' hostility to Rojava.⁴⁸ For the PKK's part, it alleged Turkey to be indirectly supporting ISIS against the Kurds. The ISIS bombing of a peaceful Kurdish rally in Ankara on 10 October 2015, killing 107 and injuring more than 500, in effect ended the peace talks with an intensified return

⁴⁵ See Boon-Kuo, Hayes, Sentas, Sullivan (chapter 5).

⁴⁶ Sentas above n 1

⁴⁷ Basaran above n 12, 77-80.

⁴⁸ Ibid 167.

to the conflict between Turkey and the PKK and Turkey's military incursions in the south-east against the broader Kurdish population.⁴⁹

59. The ASIO criteria regarding the PKK's engagement in the peace process should be applied with this complex context in consideration.

⁴⁹ Ibid 122.