

Parliamentary Joint Committee on Intelligence and Security
Attorney-General's submission
Response to issues raised by Kurdish Association of Victoria

Background

On 17 June 2015, Mr Cemal Erdogan, President, Kurdish Association of Victoria (KAV) wrote to the Attorney-General, Senator the Hon George Brandis QC. Mr Erdogan, on behalf of the KAV, made an application to de-list or not renew the listing of the Kurdistan Workers Party (PKK) as a terrorist organisation under section 102.1(2) of the Criminal Code.

On 21 July 2015, the Attorney-General wrote to Mr Erdogan advising that he had considered the KAV's application and had determined, based on the information available, that the PKK met the legislative criteria for listing and should therefore remain listed as a terrorist organisation. The Attorney-General advised that he remained satisfied that the PKK is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts. The Attorney-General attached a copy of the Statement of Reasons with respect to the PKK.

PJCIS review of the re-listing of the PKK

On 13 August 2015, the PJCIS resolved to inquire into regulations re-listing the PKK, al-Shabaab, Hamas' Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba and the Palestinian Islamic Jihad.

On 10 September 2015, the PJCIS held a private hearing as part of their review. Representatives from the Attorney-General's Department, the National Threat Assessment Centre in the Australian Security Intelligence Organisation (ASIO) and the Office of National Assessments provided evidence at the hearing.

The PJCIS referred to the letter dated 17 June 2015 from Mr Erdogan to the Attorney-General, and requested that the Department and agencies provide further information in relation to each of the matters raised by Mr Erdogan.

This submission responds to those matters.

Relevant provisions in the Criminal Code Act 1995 (Criminal Code)

The Criminal Code provides that, before the Governor-General makes a regulation specifying an organisation as a terrorist organisation for the purposes of paragraph (b) of the definition of *terrorist organisation*, the Minister (Attorney-General) must be satisfied on reasonable grounds that the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.

To assist the Attorney-General in being 'satisfied on reasonable grounds' as to whether an organisation meets the legislative criteria for listing as a terrorist organisation under the Criminal Code, ASIO prepares a Statement of Reasons outlining information addressing the legislative criteria in subsection 102.1(2) to be considered with respect to an organisation. ASIO may also include information on non-legislative factors in the Statement of Reasons.

The Criminal Code also sets out a mechanism for 'de-listing' an organisation as a terrorist organisation.

If an organisation is specified by regulations and the Attorney-General ceases to be satisfied of either of the following:

- (a) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act;
- (b) that the organisation advocates the doing of a terrorist act;

the Attorney-General must make a declaration to the effect that the Attorney-General has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

If an individual or an organisation makes an application to the Attorney-General for a declaration under subsection 102.1(4) in relation to the listed organisation, and the de-listing application is made on the grounds that there is no basis for the Attorney-General to be satisfied that the listed organisation meets the legislative criteria for listing in subsection 102.1(2), the Attorney-General must consider the de-listing application.

Subsection 102.1(17) does not limit the matters that may be considered by the Attorney-General for the purposes of subsection 102.1(4). However, there is no requirement for the Attorney-General to consider matters outside the legislative criteria, such as broader political issues, when considering whether to list, de-list, or not re-list an organisation as a terrorist organisation.

Response to Question on Notice – kidnapping of children by the PKK

The PKK admits to recruiting child soldiers. The PKK claims all such recruits are willing volunteers and are not given firearms until they turn 18. Between 2000 and 2012, the PKK recruited around 4000 people under the age of 18, peaking at 750 children in 2011.

Despite these claims, multiple open source reports, confirmed by information available to ASIO, indicate the PKK obtains some of these recruits by kidnapping, and pressures Kurdish families not to complain. Families have conducted protests demanding the return of their children. There has been widespread media reporting in Turkey and internationally regarding both the kidnappings and protest.

A case study of child kidnapping

On 23 April 2014, the PKK kidnapped 25 students between the ages of 14 and 16 from the Lice District Revolutionary Patriotic High School in Diyarbakir Province while they were attending a picnic commemorating Turkey's National Sovereignty and Children's Day. The parents of one of the kidnapped children, 15 year old Sinan Bockum, staged a sit-in protest demanding that the PKK return their son. On 19 May 2014, the parents of Halime Gunduz and Firay Aydin Eren (who were also kidnapped) joined the protest. By 30 May 2014, 21 families were demonstrating against the PKK and demanding the return of their children. After 17 days of protests, the PKK returned three of the children. The rest of the children remain missing.

Response to matters raised by Mr Cemal Erdogan, Kurdish Association of Victoria (letter dated 17 June 2015)

1. No threat to security

1.1 *The PKK is not engaged in activities that would satisfy the Minister of matters in subsection 102.1(2). Alternatively, the criteria set out in subsection 102.1(4) justify the Minister making a declaration under that subsection.*

Response: The Statement of Reasons in relation to the PKK was prepared by ASIO and set out the manner in which the grounds for listing the PKK as a terrorist organisation under subsection 102.1(2) of the Criminal Code are satisfied.

On 15 July 2015 Mr Mark Molloy, Senior General Counsel, Australian Government Solicitor, provided independent legal advice that the Attorney-General could, on the basis of the Statement of Reasons, be satisfied on reasonable grounds that the matters specified in subsection 102.1(2) of the Criminal Code have been met.

On 21 July 2015, the Attorney-General confirmed that, based on the information outlined in the Statement of Reasons, he was satisfied on reasonable grounds that the PKK met the legislative criteria for listing as a terrorist organisation under subsection 102.1(2) of the Criminal Code.

The Attorney-General has considered the recent de-listing application and has determined that he is not required to make a declaration under subsection 102.1(4) because he continues to be satisfied that the PKK meets the legislative criteria for listing as a terrorist organisation.

1.2 *The Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth) states that the object of the Amendment Act was to permit the Commonwealth Government to proscribe organisations whose activities and ambitions represent a security threat to Australia.*

Response: The Explanatory Memorandum to the *Criminal Code Amendment (Terrorist Organisations) Act 2004* provides guidance in the interpretation of the relevant provisions where it is unclear, on the face of the legislation, how a particular provision should be interpreted. Subsection 102.1(2) of the Criminal Code, which was inserted by the *Criminal Code Amendment (Terrorist Organisations) Act 2003*, is not ambiguous on its face. Subsection 102.1(2) allows the Attorney-General to list an organisation by regulations as a terrorist organisation under the Criminal Code provided the legislative criteria are met, without reference to decisions by the United Nations Security Council.

Although the PKK does not directly target Australian interests or conduct attacks in Australia, its indiscriminate attacks in public places represent a threat to Australians and Australian interests in Turkey. Recent PKK attacks have deliberately targeted passenger trains and tour buses. Even when not targeting civilians, PKK attacks in public areas can result in incidental casualties among civilians.

The Statement of Reasons provides examples of PKK attacks directed against military targets that resulted in the death or injury of civilians in public areas.

- 1.3 *ASIO and PJCIS have previously determined that the PKK does not present a threat to Australian security interests. As discussed below, the armed conflict between Turkey and the PKK has been in ceasefire since March 2013.*
- 1.4 *The parties have been engaged in negotiations towards a peace process, since at least 2009. There is ample evidence in the public domain to support a conclusion that the parties to the conflict are engaged in an historic peace process.*
- 1.5 *The Turkish Government has formally recognised the peace process with the passing of 'The Law to End Terror and Strengthen Social Integration' (1 October 2014). The effect of this law is to put the Government on a legal footing to continue negotiations with the PKK.*
- 1.6 *The PKK is genuinely committed to a political process to resolve the conflict, as evident from consistent declarations and roadmaps issued by the leadership. Most recently, the PKK announced a 10-point roadmap for peace on 28 February 2015.*

Response: While it is open to ASIO to consider 'non-legislative' factors, such as the organisation's links to Australia and threats to Australian interest, when prioritising the selection of organisations for consideration for listing, the Criminal Code does not require the Attorney-General to be satisfied that an organisation poses a 'threat to Australian security interests' before deciding to make a regulation to list an organisation as a terrorist organisation under subsection 102.1(2).

With respect to the PKK's participation in peace negotiations, the PKK announced the end of the ceasefire on 25 July 2015 and has since conducted a number of attacks in 22 Turkish provinces. Further, as was the case with previous ceasefires, the PKK's terrorist activities and attacks continued throughout the 2013-2015 ceasefire. The Statement of Reasons provides examples of PKK attacks occurring during the 2013-2015 ceasefires.

Information about recent terrorist activities attributed to the PKK is at [Attachment A](#).

- 1.7 *The PKK does not represent a threat to the security of any of Australia's allies. To the contrary, it is well established that the PKK and its sister organisations in Syria (which are not listed by Australia or our allies as terrorist organisations) have been critical partners in the fight against ISIS. The PKK is integral to security and peace across the middle-eastern region.*

Response: In determining whether an organisation meets the legislative criteria for listing as a terrorist organisation under subsection 102.1(2) of the Criminal Code, the Attorney-General is not required to consider whether an organisation represents a threat to Australian allies.

Similarly, the PKK's fight against the Islamic State of the Iraq and the Levant (ISIL) is not relevant to determining whether the group meets the criteria for listing under Division 102 of the Criminal Code.

Although the PKK maintains links with other Kurdish groups including the Syrian People's Protection Units (YPG), the Iraqi Peshmerga and the Iranian Party of Free Life of Kurdistan (PJAK), the PKK is a separate organisation with its own structure, funding and operations.

- 1.8 *The definitions of 'terrorist organisation' and 'terrorist act' are broadly drawn in the statute so as to include violence or the threat of violence directed towards civilians, as well as conduct directed towards militaries, including civil armed conflict as*

defined in International Humanitarian Law (IHL). However Parliament did not intend that all political violence in the world engaged by non-state actors warrants their listing. This view is supported by the PJCS.¹

Response: The Statement of Reasons for renewing the listing of the PKK provides examples of the PKK's activities. The Attorney-General is satisfied that the PKK meets the definitions of 'terrorist organisation' and 'terrorist act' respectively.

Information about recent terrorist activities attributed to the PKK is at [Attachment A](#).

1.9 *There is no publically available evidence to suggest that the PKK has targeted civilians or civilian objects since the incidents referred to in the Attorney-General's statement of reasons in support of the listing of the PKK as a terrorist organisation in 2012. The PJCS has previously made distinctions between violence directed towards civilians and violence directed to militaries, indicating that acts of violence targeted to civilians are particularly unacceptable to Australia and the international community.*

Response: The Statement of Reasons includes examples of PKK attacks against non-military targets and indiscriminate attacks in public areas that resulted in civilian casualties. The Attorney-General is satisfied that these attacks and activities meet the criteria for listing as a terrorist organisation under Division 102 of the Criminal Code.

Information about recent terrorist activities attributed to the PKK is at [Attachment A](#).

The PKK was re-listed by a Criminal Code regulation with effect from 18 August 2012. Before the sunset of this regulation on 18 August 2015, ASIO conducted a review of the status of the PKK, including an examination of any activities undertaken by the organisation since the 2012 Statement of Reasons had been prepared.

1.10 *This is notwithstanding recent terrorist acts targeting Kurdish civilians by unapprehended perpetrators. In the lead up to the national election on 7 June 2015, there have been reports of more than 70 attacks on the pro-Kurdish Peoples' Democratic Party (HDP) election offices campaigners, including two bomb attacks. On 5 June 2015, two bombs targeted a HDP election rally in Diyarbakir, killing three and wounding hundreds of others.*

Response: Attacks against Kurdish interests in Turkey are not relevant to determining whether the PKK meets the criteria for listing according to Division 102 of the Criminal Code.

1.11 *It is relevant that the conflict between Turkey and the PKK is characterised as a civil armed conflict in international law. The relevance of this classification is that there are alternate means to listing the PKK for achieving any broader governmental purpose of minimising any return to indiscriminate violence. IHL is designed to regulate the conduct of both parties to the conflict in order to prevent and minimise the effects of violence on civilians and Turkish society. If the PKK were not listed, IHL would continue to prohibit any acts of terrorism committed by either side of the conflict as war crimes.*

¹ PJCS Review of the re-listing of the Kurdistan Workers' Party (PKK) 2006, para 2.13

Response: In being satisfied as to whether an organisation is a 'terrorist organisation' for the purposes of subsection 102.1(2), the Attorney-General must consider whether the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) advocates the doing of a terrorist act.

The issue of whether the conflict between Turkey and the PKK is a 'civil armed conflict in international law' is not relevant for the purposes of the Attorney-General's determination of whether the organisation meets the legislative criteria for listing as a terrorist organisation under subsection 102.1(2) of the Criminal Code.

1.12 *Some members of the Turkish Government and society insist that only the PKK's permanent demilitarisation in advance is sufficient to progress political negotiations. Indeed, it appears to be in Australia's security interest that the PKK not demilitarise, in order to continue its defensive campaign against ISIS in Syria, where the PKK remains a key player in protecting civilians from ISIS attacks.*

Response: Please refer to the response to point 1.2.

1.13 *The resolution of armed conflict is a complex, long term and multifaceted political process, often characterised by the return to violence during negotiations. Best practice in past conflicts demonstrates that the causes of armed conflict are only sustainably resolved through political processes, not counter-terrorism or military measures. The recent electoral success of the HDP on 7 June 2015 relied on a campaign platform that included peaceful resolution of the Kurdish Question and democratic, inclusive and pluralist policies. The HDP won 13% of the vote, clearing the legal threshold requiring parties to obtain 10% of the vote to qualify for representation in Parliament. The 10% threshold is widely understood to be an unfair barrier to Kurdish political representation in Turkey. Whilst the HDP is a separate political party from the PKK, they maintain a cooperative relationship. The HDP's electoral success is heralded by commentators as the best opportunity for securing the political resolution of the conflict.*

Response: The HDP is not a terrorist organisation under the Criminal Code. The PKK's relationship with the HDP is not relevant to determining whether the PKK meets the criteria for listing as a terrorist organisation under Division 102 of the Criminal Code.

1.14 *If military hostilities between Turkey and the PKK were to resume, it would remain open to the Minister to make a finding that there is no basis for the listing of the PKK. The express object of the statute supports such a conclusion, in that the listing of the PKK does not protect Australia's security.*

Response: Please refer to the response to point 1.2.

Information about recent terrorist activities attributed to the PKK is at [Attachment A](#).

2. Non-statutory criteria

2.1 *Engagement in terrorism: As outlined above, the PKK is not engaged in conduct that can be classed as terrorism.*

Response: Please refer to the response to point 1.8.

2.2 *Ideology and links to other terrorist groups or networks: It is established that the PKK is engaged in a process of democratisation within Turkey, does not seek a separate state, and is committed to the peace process. The PKK's key political claims for the peace process are: constitutional recognition of Kurdish ethnicity and language, including the right to education in Kurdish languages; recognition of all ethnic and religious minorities in Turkey; gender equality; devolved regional autonomy and decision making for the Kurdish regions within the Turkish state. It is not clear how the PKK's ideology justifies its criminalisation, particularly as its political objectives reflect the best hope for democratisation in the entire region.*

Response: Although background information on the PKK's objectives is included in the Statement of Reasons, the PKK's designation as a proscribed terrorist organisation is based on its activities, not its stated aims or ideology.

Information about recent terrorist activities attributed to the PKK is at [Attachment A](#).

Please refer to the response to point 1.8.

2.3 *Links to Australia: The last PJCS review found that the PKK has no links to Australia. We concur that the PKK does not maintain organisations in Australia. We detail however in section 3 how the PKK enjoys broad support for its political aims in Australia.*

Response: The PKK's support within Australia is not relevant to determining whether the organisation meets the criteria for listing as a terrorist organisation under Division 102 of the Criminal Code.

2.4 *Threats to Australian security: As outlined above, the PKK do not present a threat to Australian security interests.*

Response: Please refer to the response to point 1.2.

2.5 *Proscription by the UN or like-minded countries. There is no international consensus that the PKK should be listed as a terrorist organisation. In particular, the role of the PKK defending communities attacked by ISIS has prompted reported discussion by officials in many governments that the listing is not warranted. The PKK is not proscribed by the UN. Norway does not list the PKK on the grounds that such an action would conflict with its role in facilitating peace negotiations.*

Response: The PKK is listed as a proscribed terrorist organisation by Australia, Turkey, the European Union, the United States, the United Kingdom, Canada, Austria, Azerbaijan, Iraq, France, Germany, the Netherlands, Kazakhstan, Moldova, New Zealand and the Philippines.

The Statement of Reasons notes that the PKK is also included in the Department of Foreign Affairs and Trade's Consolidated List maintained under the *Charter of the United Nations Act 1945* which implements Australia's obligations under the United Nations Security Council Resolution 1373 in relation to countering the financing of terrorism.

2.6 *Engagement in peace/mediation processes: ASIO and the PJCS have recognised in previous listing reviews that where armed conflicts are subject to peace processes, that listing one party as a terrorist organisation can 'make things worse' and that 'peace processes should be allowed to run their course and actions by any side*

which target civilians need to be condemned and dealt with under the laws of armed conflict'. It is inevitable in peace processes that armed conflict may reoccur. We submit that the broader context of the peace process warrants de-listing of the PKK. We submit that this criteria should not be subject to irrelevant considerations, such as the wishes of the Turkish government that its allies maintain proscription of the PKK, but should properly by [sic] applied to Parliament's purpose in enacting the legislation, namely, to protect Australia's security.

Response: The legislative criteria for listing an organisation as a terrorist organisation under the Criminal Code does not require the Attorney-General to seek or take into consideration the views of foreign governments. Please also refer to the response to point 1.3.

3. Impacts of listing the PKK on Australian Kurds

3.1 *The PKK is a popular liberation movement which has strong support across the Kurdish diaspora, including amongst Kurds in Australia. Kurds who support the PKK do not accept that the PKK is a terrorist organisation, and recognise the PKK as a legitimate political actor engaged in an armed conflict in furtherance of the right to self-determination. Whilst many Kurds may disagree with the PKK's past tactics, there is a strong support for the PKK's goals for greater democratisation within Turkey, and for a peaceful political resolution of the conflict.*

Response: As with other proscribed terrorist organisations, the PKK's designation as a proscribed terrorist organisation is based on its activities, regardless of community support for its stated goals or ideology.

3.2 *Listing attracts serious criminal offences. There have been no charges or prosecutions in Australia in relation to the listing of the PKK. These provisions however, have detrimental impacts on the fundamental common law, civil and political rights of Australian Kurds. This is because these offences criminalise legitimate and non-violent connections and support that Australian Kurds may maintain with the PKK and Kurdish civil society movements in Turkey. Kurds in Australia are involved in a range of activities that might be imputed as 'support' of the PKK. Such activities range from campaigns to support the peace process and the release of Mr Abdullah Ocalan, to advocating mother-tongue education or a visible and proud Kurdish identity.*

Response: Australians do not face penalties for supporting Kurdish civil society movements 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.

3.3 *On 18 August 2010 the Australian Federal Police conducts a counter-terrorism operation with search warrants against our Kurdish community centres in Melbourne and Sydney and several homes, alleging the provision of funds to the PKK. The raids did not result in charges for any criminal offences, but did result in*

the fear that legitimate political affiliations with no connection to violence are being criminalised as 'terrorist'. This police operation continues to marginalise our community and the listing of the PKK directly impedes our legitimate rights to freedom of association and speech. After the counter-terrorism operation, the Kurdish Association of Victoria premises was subject to repeated racist threats and attacks before being burnt down by unknown persons on 14 April 2011.

Response: Attacks against Kurdish interests in Australia are not relevant to determining whether the PKK meets the criteria for listing under Division 102 of the Criminal Code. Please also refer to the response to point 3.2.

Attachment A

Recent terrorist attacks attributed to the PKK

- 8 September 2015 – PKK militants shot and killed a police officer while driving his personal car with his daughter between Erzincan and Tunceli.
- 8 September 2015 – PKK militants bombed a police shuttle bus escorting customs officials at the Dilucu border crossing between Turkey and Azerbaijan, then conducted an armed attack against the police officers. The militants killed 13 police officers and injured one other. The PKK claimed responsibility for the attack.
- 6 September 2015 – PKK militants bombed Turkish soldiers in Daglica, Hakkari province, killing 16 and injuring six others.
- 19 August 2015 – probable PKK militants bombed a Turkish military vehicle in Pervarii district in Siirt province, killing 8 Turkish soldiers.
- 17 August 2015 – PKK militants attacked a bus and a minibus carrying civilians in Snekeya, Erzurum province. The militants set fire to the bus and killed the minibus driver.
- 14 August 2015 – one civilian was killed and another injured during clashes between PKK militants and police in Baglar district, Diyarbakir province. The skirmish began after the PKK blocked a road by digging trenches and attacked police who responded to the roadblock.
- 14 August 2015 – two engineers working for an electricity company in Iskenderun, Hatay province, were injured in an explosion. The engineers were repairing damage to electricity lines caused by an earlier PKK attack when they were injured by explosives planted by the PKK.
- 13 August 2015 – PKK militants detained a minibus full of explosives near the Pulumur District Gendarmerie Command in Tunceli, severely damaging a military residence and eight civilian homes. A gendarmerie sergeant and four civilians were injured.
- 10 August 2015 – the PKK conducted a series of attacks in Istanbul. A car bomb exploded outside the Sultanbeyli Fatih police station, injuring 10 people. PKK militants then opened fire on emergency service workers and police investigators who responded to the bombing, killing a police officer. Two PKK militants and a police officer were later killed in clashes elsewhere in Istanbul. The PKK claimed responsibility for the attack.
- 7 August 2015 – PKK militants attacked an Iranian tour bus in Agri province, killing the driver's assistant and injuring three other passengers. On the same day, PKK militants attacked an Iranian tour bus in Van province and also set fire to two other vehicles. The militants killed a soldier in clashes that followed the attack.
- 2 August 2015 – a suspected PKK militant targeted Turkish gendarmes in a suicide vehicle bombing that killed two and injured 31 in Karabulak, Agri province.
- 31 July 2015 – PKK members attacked a police station in Pozanti, Adan province. Two police officers and two PKK militants were killed.
- 31 July 2015 – suspected PKK militants bombed a passenger train travelling between Ankara, Turkey and Tehran, Iran, near Kecikayasi in Van province. The previous day,

probable PKK militants conducted a similar attack on the Trans-Asian rail service from Ankara to Tehran. Iran cancelled all trains to Turkey following the attacks.

- 30 July 2015 – PKK militants fired on a police officer sitting in front of a tea house in Sinar district, Kiyarbakir province. The attacked killed the officer and a civilian and injured a second civilian.
- 29 July 2015 – a PKK militant fired on a police vehicle with a fully automatic weapon in Kiyarbakir, killing a civilian and a police officer and injuring another civilian.
- 27 July 2015 – suspected PKK militants bombed a gas pipeline in Agri province, causing a fire and disrupting the flow of gas between Iran and Turkey.
- 22 July 2015 – PKK militants killed two police officers in their home in Ceylanpinar, Sanliurfa province. The PKK released a statement claiming responsibility for the murders.