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17 May 2021

The Hon. Ms. Karen Andrews
Minister of Home Affairs
Email: Karen.Andrews.MP@aph.gov.au

We are writing on behalf of the following organisations:



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We understand that in 2021 the proscription of the Kurdistan Workers' Party (PKK) as a terrorist organisation is being reviewed, that the Minister of Home Affairs is responsible for the decision, which is to be made by August, and that the Joint Parliamentary Committee on Intelligence and Security (JPCIS) reviews the Minister's decision. We consider that re-listing PKK as a terrorist organisation is unjust and has deleterious consequences for thousands of Kurdish Australians, Kurds in other diasporas, and the 40+ million Kurds in the Kurdistan Regions of Turkey, Syria, Iraq, Iran, as well as those in Armenia and Georgia.

We ask the Australian Government to delist the PKK as a terrorist organisation based on the following points:

1. The ruling of Justice Lucy McCallum in the Supreme Court of NSW in the case of [R v Lelikan \(No 5\) \[2019\] NSWSC 494 \(7 May 2019\)](#). (Appendix A)

Justice McCallum concluded that the PKK, or a member of the PKK, does not pose a threat to Australia or, in any particular sense, to Australians.

Justice McCallum also concluded that PKK's goals are to achieve freedom, justice and democracy for everyone in Turkey, no matter their gender, ethnicity or religion;

2. PKK is not linked to and does not coordinate with any other terrorist organisation. In fact, PKK stands out from other terrorist groups in its goals, values and strategies, and its willingness to defend civilians, such as the Yezidi population of Shingal/Sinjar from ISIS.

3. The 2020 [ruling](#) of Belgium's highest court – the Court of Cassation – upheld two lower [courts'](#) rulings, the rulings being that PKK is not a terrorist organisation because the PKK fits all the criteria of being a non-state party to a non-international armed conflict, or civil war, where the use of legitimate military force is [allowed](#). The Belgium courts found that the PKK adheres to the Geneva Convention and that the Turkish government's evidence that PKK is a terrorist organization was unable to be substantiated. As a result, the courts concluded that any cases brought against PKK should be considered under international humanitarian law, not terrorism law.

4. Since the mid-1990s, PKK has announced numerous unilateral ceasefires and engaged in the first ever bilateral ceasefire with the Turkish Government (2013 – 2015). The Turkish Government called an end to this ceasefire after a pro-Kurdish party succeeded to entering parliament in national elections, and two Kurdish youths (who were not members of PKK) killed two police officers based on allegations (and considerable evidence) that these officers intentionally did not prevent an ISIS terrorist attack that killed 32 Kurdish and non-Kurdish youths in Suruc in July 2015. Since the end of the ceasefire, PKK has repeatedly claimed it is willing to enter into any internationally mediated and monitored peace process.

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5. PKK maintains it maintains a defensive position against Turkey's intensive air and ground campaigns, that now include drones, and has eliminated, or at least greatly reduced, the number of armed offensive actions inside Turkey leading to a 60 percent drop in incidences in 2020 from 2019 levels.

6. In KLA's 2020 Submission to the Ministry of Home Affairs and the JPCIS titled: '*Why Delisting the Kurdistan Workers' Party (PKK) as a terrorist organisation needs to be considered by the PJCS*' (Appendix B) provides numerous reasons for not relisting the PKK as a terrorist organization. Some of the main arguments are that:

- A. PKK's designation is largely based on a non-rigorous process that entails political expediency, rather than security or legal considerations, as indicated by the USA and Australia only classifying PKK as a terrorist organisation after intense lobbying from Turkey and after the PKK had made significant changes in its goals, strategies and tactics.
- B. The 'evidence' offered by the various arms of the Turkish State used to support the 'terrorist' classification is often hearsay, unverifiable, or has been disproved. It must be emphasized that Turkish authorities often blame PKK for an act before an investigation takes place, and rarely conducts adequate investigations into who is responsible for a 'terrorist' act in Turkey or Syria. Nor does Turkey allow impartial international investigations of acts allegedly committed by PKK in Turkey, Syria or Iraq, the most recent being Turkey's accusation that PKK killed Turkish soldiers, intelligence officers and police that had been PKK prisoners for many years, during a Turkish raid on a PKK camp in Gare, in the Qandil Mountains of the Kurdistan Region of Iraq. In contrast, PKK has repeatedly expressed its willingness to fully cooperate with any impartial investigation into any incident.
- C. The Turkish state is unwilling to have its actions scrutinized, as evidenced by Turkey having the world's [highest rate of incarceration of investigative journalists in the world](#), raw numbers being second only to China's record.
- D. Despite President Recep Tayyip Erdogan claiming 'We have no problem with our Kurdish brothers, only with terrorists' the Turkish State grossly misuses the label 'terrorist', which frequently results in any pro-peace and/or pro-Kurdish elected parliamentarian, municipal mayor or councilor, or any journalist, lawyer, academic or activist, who questions the Turkish president and his government policies, actions, and/or accounts, being dismissed and/or imprisoned for years without charge.

7. PKK's armed struggle was born out of the Turkish state's massacre, torture, incarceration, displacement, oppression and discrimination of Kurds (as outlined in Appendix A). These crimes are on-going in Turkey, Syria and Iraq. Hence, Kurds in Turkey are not allowed to freely express their culture, be educated in their mother tongue, or even advocate for peace and basic human rights. For a period between 2009 and 2015

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Kurds had the freedom to identify as Kurdish, speak Kurdish, publish and perform in Kurdish, and attend private Kurdish language classes. Since 2015, Kurds have been physically attacked in the street for identifying as Kurdish and/or speaking Kurdish, and have been imprisoned for performing or publishing in Kurdish. State authorities have closed down many Kurdish publishing houses, cultural organisations, charities and other non-government organisations. In the last month, Turkey has arrested more than 20 Kurdish women for advocating a woman's right to be protected from domestic [violence](#). An Assyrian priest, Sefer Bilecen, has been given a two-year prison sentence on unsubstantiated charges related to providing food and water to 'terrorists'. His real crime is that he serves in the [Kurd-majority area](#) of Mardin.

8. Turkey prevents Kurds from politically and democratically organizing. Even those who [mediated](#) between the government and PKK in the past are now being called 'terrorists' by association. Turkey has a history of allowing and then banning pro-Kurdish political parties. The most recent example is what is happening to the People's Democratic Party (HDP). In June 2015, HDP became the first pro-Kurdish party to pass the 10 percent electoral threshold. This allowed HDP parliamentarians to participate in parliament as a party, rather than as independents. HDP became the third largest party in Turkey, preventing President Erdogan's party from gaining a parliamentary majority. Rather than form a coalition, Erdogan called an end to the ceasefire with PKK, and began air and ground offensives against Kurds in towns and villages of eastern Turkey, claiming to be targeting PKK. More than a thousand civilians were killed (some burnt to death while hiding in Cizre basements); hundreds of thousands of civilians were displaced, and whole townships were destroyed. In this climate Erdogan re-ran the elections in November 2015. The following year, Erdogan ordered air and ground offensives in northern Syria and the Kurdistan Region of Iraq, again claiming these offensives were targeting PKK terrorists. From November, HDP parliamentarians, HDP mayors and members of HDP were being imprisoned, allegedly for having links to terrorism or spreading terrorist propaganda. The Turkish [government](#) and an [Ankara court](#) are now moving to ban HDP.

9. Turkey has killed or imprisoned every significant Kurdish political leader in the history of the republic. Abdullah Ocalan, co-founder of PKK, has been held in solitary confinement for 22 years. Former HDP Co-chair, Ms Figen Yuksekdag, and former HDP Co-chair and two time presidential candidate, Selahattin Demirtas, have been held without charge since November 2016. In Demirtas' case, this is despite the European Court of Human Rights twice ordering his release.

In the 97-year history of the Republic of Turkey, the Turkish state has denied Kurds in Turkey their political, cultural, social and economic rights to self-determination. Its military approach to PKK has failed. PKK has proved to be enduring and adaptable. The organization is not based on one individual or family, but on frameworks that could lead to progressive change, such as having a male and female co-chair for every leadership position. Since the outbreak of the Syrian civil war, the Republic of Turkey has also been working to deny Syrian Kurds, Armenians and others their same right to self-determination, despite these rights being enshrined in the UN Charter, the United States' Declaration of Independence, and the constitutions of many nation-states.

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We consider that delisting the PKK as a terrorist organisation has potential to contribute to peace and stability in Turkey, Syria, Iraq, Iran and beyond because:

1. PKK is a secular organisation that advocates for multi-ethnic representation, democracy, federalism, women's rights, religious freedom and a sustainable ecology.
2. PKK has played a vital role in fighting ISIS in Syria and Iraq.
3. Turkey has veered away from democracy and [judicial independence](#) in favour of authoritarianism, nepotism, Islamism and ultra-nationalism.
4. Turkey is using the label terrorist to outlaw the third largest political party in Turkey's parliament, and imprison elected parliamentarians and municipal mayors, academics, journalists, lawyers and others who criticize Turkey's military offensives;
5. The Turkish state is using the PKK terrorist label to justify waging multiple wars. Since Turkey declared an end to a bilateral ceasefire with the PKK in mid 2015, Turkey has launched military offensives in Turkey (2015 – 2016), Syria (2016, 2018, 2019) and Iraq in the name of neutralizing all PKK 'terrorists', that includes fighters, administrators, workers and sympathisers. These actions are ongoing. Turkey's offensives destabilize the targeted regions, cause thousands of civilian deaths, thousands more to 'disappear' or be kidnapped for ransom, thousands to be imprisoned and tortured, more than 1000 documented cases of rape in Afrin (Syria) alone, and more than one million civilians being forcibly displaced. Such atrocities continue unabated, in [northern Syria](#) and the [Kurdistan](#) Region of [Iraq](#). In Iraq, Turkey's air and ground offensives have killed more than 100 civilians and have caused the evacuation of up to 500 villages. These military offensives are also killing and displacing Armenians, Assyrians and Arabs.
6. The Turkish State supports terrorism in multiple ways.
 - The Turkish state is waging war against the US-allied, Kurd-led Syrian Democratic Forces (SDF) that continue to fight ISIS in Syria, and are responsible for securing camps of ISIS members and their families on behalf of countries that refuse to take responsibility for their ISIS citizens.
 - Members of ISIS live freely in Turkey and transfer money, weapons and people through Turkey. If they are arrested they are often released within a short time.
 - Turkey is recruiting, training and paying Islamist extremist militants, including former ISIS, al-Qaida and Hayat Tahir al-Sham fighters, to take part in military offensives in Syria, Iraq, Libya, Azerbaijan and elsewhere.
 - Turkey is creating a 'safe haven' for these fighters and their families in Turkey and Turkey-occupied Syria. In northern Syria, these fighters are committing war crimes and crimes against humanity, including ethnic cleansing; renting out or selling the houses of displaced people; destroying temples, churches and cemeteries; burning crops and silos of wheat and cutting down olive trees when not trying to profit from the sale of olives. Turkey is drastically cutting water flow into the Syrian section of the Euphrates River, and Turkish forces frequently stop

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water being pumped to supply water to one million people in northeast Syria.

- Many tens of Turkey's Syrian Islamist mercenaries have escaped to Europe.

7. Turkey supports ultra-nationalist mercenary organisations such as SADAT, in and outside Turkey. It is alleged that Turkish National Intelligence (MIT) and SADAT train Turkey's proxies in the Syrian 'National' Army.

8. Only by Turkey negotiating with Kurds and their political, civil, tribal and religious representatives, and their women and youth, will there be potential for mutually advantageous peace, stability and prosperity. Levers need to be applied to convince Turkey to change its 97-year trajectory. One unilateral lever is that governments can delist PKK as a terrorist organization, and support a peace process.

If the Australian Government relists the PKK as a terrorist organisation, then the Australian Government is complicit in:

- Turkey justifying its military offensives, Islamisation and Turkification of eastern Turkey, northern Syria and northern Iraq in the name of eliminating PKK terrorists;
- Turkey's current authoritarian, militaristic, Islamist trajectory; and
- Turkey's capacity to further destabilise the Middle East, north Africa, the Caucasus, the Mediterranean Sea, the Black Sea and Europe.

The Australian Government should not relist the PKK as a terrorist organisation out of concern for Australia's so called 'special relationship' with Turkey based on Turkey allowing Australians to visit Gallipoli to celebrate the ANZACS' defeat in 1915. Turkey has no trouble dealing with Russia and the UN, neither classifying PKK as a terrorist organisation. Other democracies, like Switzerland and India, do not classify PKK as a terrorist organisation. For all these reasons, we ask you to seriously consider delisting the PKK as a terrorist organization.

See **Appendix A:** The Ruling of Justice Lucy McCallum in the Supreme Court of NSW [R v Lelikan \(No 5\) \[2019\] NSWSC 494 \(7 May 2019\)](#) after signatures.

Yours Sincerely,

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Opposition Leader in the Northern Territory, The Hon. Mr. G. Higgins
Chief Minister of the ACT, The Hon. Mr. Andrew Barr
Opposition Leader in the ACT, The Hon. Mr. Alistair Coe
The Hon. Mr Andrew Wilkie, Independent Member for Clark, Tasmania

APPENDIX A

Supreme Court

New South Wales

Case Name: R v Lelikan (No 5)

Medium Neutral Citation: [2019] NSWSC 494

Hearing Date(s): 18 April 2019

Decision Date: 7 May 2019

Jurisdiction: Common Law

Before: McCallum J

Decision: The offender is convicted of the offence of membership of a terrorist organisation contrary to s 102.3(1) of the Criminal Code.
Pursuant to s 8(1) of the Crimes (Sentencing Procedure) Act, instead of imposing a sentence of imprisonment, I make a community correction order for a period of 3 years from 7 May 2019.
The conditions of the order are:
The offender must not commit any offence;
The offender must appear before a court if called on to do so at any time during the term of the order;
The offender must accept the supervision of Community Corrections;
The offender must undertake 500 hours of community service work; and
The offender must report to Community Corrections at St Leonards as soon as practicable and no later than within seven days

Catchwords: CRIME – sentencing – offence of being a member of a terrorist organisation – where offender spent over two years travelling with PKK and HPG guerrillas in the mountains of Iraq and Turkey wearing the uniform and carrying the accoutrements of those organisations including weaponry – characterisation of offending as that of a sympathetic chronicler of the events of the

struggle – consideration of the nature of the PKK –
Bugmy considerations – whether a sentence of full-time
custodial imprisonment required

Legislation Cited:

Crimes Act 1900 (NSW), ss 154F, 253
Crimes Act 1914 (Cth), ss 16A, 17A(1), 20AB(1)
Crimes (Foreign Incursions and Recruitment) Act 1978
(Cth) (repealed), s 6(1)(b)
Crimes (Sentencing Procedure) Act, ss 8, 67, 88, 89
Criminal Code Act 1995 (Cth), Sch, ss 100.1, 102.1,
102.3(1)

Cases Cited:

Bugmy v The Queen (2013) 249 CLR 571; [2013] HCA
37
Benbrika v the Queen (2010) 29 VR 593; [2010] VSCA
281
Lelikan v Director of Public Prosecutions (Cth) [2016]
NSWSC 1467
Lodhi v The Queen [2007] NSWCCA 360; 179 A Crim
R 470
R v Alou (No 4) [2018] NSWSC 221; 330 FLR 402
R v Ghazzawy [2017] NSWSC 474
R v Lelikan (No 3) [2019] NSWSC 90
R v Qutami [2001] NSWCCA 353; 127 A Crim R 369
Sagacious Procurement Pty Ltd v Symbion Health Ltd
[2008] NSWCA 149

Category:

Sentence

Parties:

Regina (Crown)
Renas Lelikan (offender)

Representation:

Counsel:
P McGuire SC, R Ranken (Crown)
P Boulten SC (offender)

Solicitors:
Office of the Commonwealth Director of Public
Prosecutions (Crown)
Younes & Espiner Lawyers (offender)

File Number(s):

2016/219466

Publication Restriction:

None

JUDGMENT

- 1 HER HONOUR: Renas Lelikan stands to be sentenced for an offence described in the *Criminal Code*¹ as “membership of a terrorist organisation”. Before making any assumption as to the nature of his offending by reference to its label, it is important to understand the context in which the charge was brought.

Circumstances in which the charges were brought

- 2 Mr Lelikan is a Kurd.² He was born in 1978 in Elazig in Turkey under the name Jêhat Demirbag. He is the youngest of eight children.
- 3 From the youngest age Mr Lelikan was aware of his “Kurdishness”. He was raised to understand that the Turkish government did not recognise the separate ethnicity of Kurds. He was not permitted to speak Kurdish, the only language he spoke as a young child, at the government schools he attended. His family was very involved in political and often rebellious opposition to the Turkish authorities.
- 4 Around the time Mr Lelikan was born, an organisation called the Partiya Karkerên Kurdiatsanê (the PKK) was established to support the creation of an independent Kurdish state. Mr Lelikan grew up with the story that his father had been detained for questioning and tortured by Turkish authorities after coming in contact with PKK guerrillas; he had scars on his hands to show for it. By the early 1980s, the PKK was known to have a military arm that engaged in armed conflict with the Turkish authorities. Unchallenged expert evidence before me states that “the established cause of the armed conflict is Turkey’s historic suppression of Kurdish aspirations for self-determination through the repression and assimilation of Kurdish identity through processes of cultural genocide.”³
- 5 Over the years, Mr Lelikan followed his older brothers in becoming politically involved in the struggle for self-determination for Kurds and support for the

¹ Schedule to the Criminal Code Act 1995 (Cth).

² The facts stated at [3]-[6] of this judgment are drawn primarily from the offender’s statutory declaration dated 10 December 1996 provided in support of his application for refugee status which formed part of exhibit B tendered by the Crown at the trial; reproduced as part of exhibit 1 tendered by the offender at the proceedings on sentence.

³ Dr Victoria Sentas, expert report in sentencing proceedings at par 3.

PKK. He became a member of the youth wing of a lawful political party called the HEP, translated into English as the “People’s Labour Party”.⁴

- 6 When Mr Lelikan was a young teenager, his older brother Orhan was detained for a month after attending a funeral. About a year later Mr Lelikan and his brother Fuat were detained after shouting slogans protesting against the war and supporting the PKK at a traditional Kurdish celebration. They were kept for a week at a government facility and questioned in relation to their association with the PKK. Mr Lelikan was kicked, punched and subjected to “falaka” or footwhipping. Fuat, who was older, was treated more harshly. After their release, Fuat left home and joined the PKK guerrillas. That brought even greater attention on Mr Lelikan’s family. Over the following year Mr Lelikan was detained, questioned and sometimes tortured by authorities three more times. His brothers decided he should leave Turkey to seek refuge in another country. He was then aged 14 years. Two other brothers, Orhan and Ahmet, also left Turkey and fled to Sweden where they were granted refugee status. After leaving Turkey, the brothers learned that Fuat had been killed by the Turkish militia while fighting in the mountains as a PKK guerrilla.
- 7 Mr Lelikan eventually came to Australia, where he has a sister, in 1996 and claimed refugee status on the basis of a well-founded fear of being persecuted if returned to Turkey for reasons of his nationality (Kurdish), membership of a social group (his family) and political opinion (his support for the PKK). In his statutory declaration in support of the refugee application he openly declared his support for the PKK. In 1997, the Australian government recognised Mr Lelikan as a person entitled to protection as a refugee on that basis.⁵
- 8 In February 1999 the leader of the PKK, Abdullah Öcalan, was arrested sparking protests around the world. Mr Lelikan participated in a protest at the Greek Consulate in Sydney where he was arrested. He was later convicted of possessing an offensive weapon (a Molotov cocktail) and property damage related to his participation in the protest. It appears Mr Lelikan then owned a number of items that confirmed his support for the PKK including two PKK flags said to have been purchased in Germany in 1993, one HPG banner, a white t-

⁴ Crown statement of facts on sentence at par 17.

⁵ Crown statement of facts on sentence at par 21.

shirt depicting a “Free Öcalan” motif, banners depicting Abdullah Öcalan and books written by Abdullah Öcalan. These items were later to be seized and formed part of the case against him.

- 9 On 26 July 1999, the offender changed his name to Renas Lelikan in honour of his brother Fuat, who was nicknamed Renas and had also taken the name Lelikan after Mount Lelikan, where he later died.⁶
- 10 On 9 October 1999, Mr Lelikan participated in a “Kurdish Freedom” demonstration in front of Sydney Town Hall during the course of which he set himself on fire causing third degree burns to 80% of his body. Shortly after setting fire to himself, he yelled the words: “I do this for peace, for Kurdistan”.
- 11 From about 2002, Mr Lelikan worked as a journalist and writer.⁷
- 12 In 2003, Mr Lelikan was granted Australian citizenship.⁸ In 2004 he left Australia and travelled to Iraq via Jordan, eventually reaching Mount Qandil in Iraqi Kurdistan. There he spent time researching to find the place where his brother Fuat was buried and also interviewing PKK guerrillas and villagers, collecting and writing stories. He spent several periods of time at Makhmour Refugee Camp in Iraq. He made three trips to Mount Lelikan in search of his brother’s body but did not find it.
- 13 In 2005, the Australian government specified the PKK as a terrorist organisation for the purpose of the Criminal Code.
- 14 At the end of 2005 Mr Lelikan travelled to Europe to visit family and continue writing. In early 2007 he moved to Paris. His home in Paris and other Kurd households were raided by French Police. His laptop and his Australian passport were seized. He was charged with terrorism offences related to his association with the PKK. Later that year, he fled France whilst on bail. He was later arrested in the Netherlands on an international warrant and extradited back to France where he remained on bail until March 2011. He fled France again using a relative’s passport, this time travelling to the Kurdish region of northern Iraq. He was later convicted of the French offences and sentenced in

⁶ Tcpt, 19 October 2018, pp 418-419.

⁷ Tcpt, 19 October 2018, pp 422-423.

⁸ Crown statement of facts on sentence at par 25.

his absence for the offence of participation in a criminal association with the purpose of preparation of an act of terrorism. Those offences related to the period 2006 and 2007. He was sentenced to a 3-year suspended prison sentence and was excluded from French territory for 5 years. Mr Lelikan's evidence in the trial before me was that, during the period to which those charges related, he was working as a journalist for the Kurdish newsagency and as a writer, reporting news in relation to Kurdish cultural and political activities and preparing for the publication of a book titled "Mountain Writings".

15 Mr Lelikan gave evidence, which I accept, that he left France because he felt he was not safe from the risk of being deported to Turkey and because he wanted to record the history of Kurdish resistance and freedom. He planned to write a series of five books about the struggle of the Kurds and their stories.

16 In April 2011 Mr Lelikan went to Mount Qandil. Between that time and about August 2013 he was travelling in the mountains with PKK guerrillas. That is the period of offending, which I will address at length later in this judgment.

17 Eventually Mr Lelikan returned to Makhmour Refugee Camp. He was there in August 2014 when ISIS attacked Makhmour and Kurdish forces repelled them.⁹ The refugee camp was considered to be under threat from attack by ISIS at that time so PKK guerrillas came to protect it. Mr Lelikan helped evacuate elders, women and children from the camp and stayed with them in the hills around the camp.¹⁰

18 In January 2015, Mr Lelikan made contact with the Australian Embassy in Iraq and requested a new Australian passport. He submitted a passport application to the Australian Embassy in Baghdad, Iraq by email on 20 February 2015. In August 2015, that application was denied by the Australian Government on the basis of a security assessment. On 28 September 2015, Mr Lelikan was issued with an Australian Emergency Passport with an expiry date of 16 November 2015. He returned to Australia on 24 October 2015.¹¹

⁹ Crown statement of facts on sentence at par 58.

¹⁰ Tcpt, 24 October 2018, pp 565-566.

¹¹ Crown statement of facts on sentence at pars 59-63.

Charges and trial

- 19 Upon his return to Australia, Mr Lelikan agreed to be interviewed by Federal Agents. He was not arrested at that time. After a careful investigation, the Australian Federal Police charged Mr Lelikan with two offences. He was initially charged on 20 July 2016 only with the offence for which he now stands to be sentenced. On 27 March 2017, he was charged with an offence of “foreign fighting”. That charge alleged that Mr Lelikan had engaged in a hostile activity in Iraq and Turkey contrary to s 6(1)(b) of the (now repealed) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
- 20 When the first charge was laid, Mr Lelikan was initially refused bail. He remained in custody for 2 months and 24 days. On 14 October 2016, he was granted conditional bail in the Supreme Court: *Lelikan v Director of Public Prosecutions (Cth)* [2016] NSWSC 1467.
- 21 The foreign fighting charge was tried on indictment before me with a jury over four weeks last year. The Crown case was based primarily on writings, photographs and other items seized from Mr Lelikan. The case relied on a combination of four acts of which there was ample evidence in the photographs: being present in the border region; wearing the uniform and insignia of the PKK or HPG; carrying weaponry (a rifle and a belt with grenades); and being in the company of PKK or HPG guerrillas. Mr Lelikan did not dispute that he had engaged in those acts. The main issue in the trial was whether it could be inferred that he had engaged in a hostile activity in a foreign state. I ruled that the fault element of the offence required proof beyond reasonable doubt that the accused did the acts alleged with the intention of achieving the objective of engaging in armed hostilities in Iraq or Turkey. As to the physical element, I ruled that there had to be some realistic connection between the acts relied upon by the Crown and the alleged objective of engaging in armed hostilities. I directed the jury accordingly.¹²
- 22 After deliberating for 4 weeks, the jury was unable to agree and was discharged. The Commonwealth Director of Public Prosecutions subsequently filed a notice of discontinuance in respect of that charge. It follows that Mr

¹² See *R v Lelikan (No 3)* [2019] NSWSC 90.

Lelikan must be sentenced on the basis that, during the time when he was a member of the PKK, he did not engage in any hostile activity that meets the requirements as to which the jury was directed.

23 Mr Lelikan pleaded guilty to the membership charge in the Local Court. The charge alleges that between about 5 April 2011 and 15 August 2013 in Turkey, Iraq and elsewhere he intentionally was a member of a terrorist organisation (the PKK) knowing that it was a terrorist organisation contrary to s 102.3(1) of the Criminal Code. It was indicated that the plea was entered on the basis that the definition of “membership” includes “informal membership”.¹³ The Crown accepted that characterisation.¹⁴

24 The maximum penalty for the offence is imprisonment for 10 years. The maximum serves as a yardstick to guide the sentencing task. As submitted by Mr Boulten SC, appearing for Mr Lelikan, it indicates that the offence of membership is one of moderate seriousness compared with other terrorism offences in the Criminal Code. Mr Boulten noted that the offence attracts the same maximum penalty as the Criminal Code offences of theft (contrary to s 131.1) and of making, providing or possessing a false travel document (contrary to s 73.8), as well as the NSW offences of stealing a motor vehicle or vessel and making a false document (contrary to ss 154F and 253 of the *Crimes Act 1900* (NSW)).

Proceedings on sentence

25 At the proceedings on sentence, both parties relied on parts of the evidence at the trial, particularly the evidence given by Mr Lelikan. The parties also relied on secondary material concerning the listing of the PKK as a terrorist organisation including the most recent review of that listing. Further material concerning the PKK was provided in an expert report tendered by Mr Lelikan. The parties also adduced evidence concerning Mr Lelikan’s likely classification as a prisoner and conditions of incarceration if sentenced to a term of imprisonment. Mr Lelikan also gave further evidence and called character evidence from his nephew.

¹³ Criminal Code, s 102.1(1).

¹⁴ Tcpt, 18 April 2019, p 26(36).

Principles to be applied

- 26 The sentencing task is governed by the provisions of Part 1B of the *Crimes Act 1914* (Cth). The court is required to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.¹⁵ The Act provides a mandatory, non-exhaustive list of factors to be taken into account if relevant and known to the court.¹⁶
- 27 The Crown submitted that, in sentencing an offender for a terrorist offence, the prominent considerations are the protection of the community; the punishment of the offender; denunciation of the offence and deterrence, citing the decision of Johnson J in *Alou*.¹⁷ That decision provides a helpful summary of principles and propositions for guidance in like cases. However, as I think was accepted by the Crown, the present case is not like any of the cases from which those principles have been drawn. Such guiding “principles” or “propositions” will always be subservient to the fact-specific assessment of the nature of the offending under consideration in the case at hand.¹⁸
- 28 The Crown also relied on the decision of *Lodhi v The Queen*¹⁹ where the Court of Criminal Appeal endorsed the proposition that, in passing sentence for “the most serious terrorist offences”, the object of the court will be to punish, deter and incapacitate and that rehabilitation is likely to play a minor part. However, it was not suggested that the present offence falls within the description of being the “most serious terrorist offence”.

Nature and circumstances of the offence

- 29 It is necessary to begin by considering the nature and circumstances of the offence and to make an assessment of its objective seriousness. In the present case, that must include an assessment of the conduct that is taken to have amounted to membership of the organisation in question as well as an assessment of the nature of that organisation.

¹⁵ Crimes Act 1914 (Cth), s 16A(1).

¹⁶ Crimes Act 1914 (Cth), s 16A(2).

¹⁷ R v Alou (No 4) [2018] NSWSC 221; 330 FLR 402 at [165]-[171].

¹⁸ Cf Sagacious Procurement Pty Ltd v Symbion Health Ltd [2008] NSWCA 149 at [66] (per Giles JA).

¹⁹ Lodhi v The Queen [2007] NSWCCA 360; 179 A Crim R 470 at [89].

- 30 The Crown provided a statement of facts which, subject to one small qualification, was agreed. The following summary is drawn primarily and mostly verbatim from that statement.
- 31 The starting point is April 2011 when, having travelled from France to Iraq, Mr Lelikan joined up with the military arm of the PKK, the Hezen Parastina Gel (HPG) (translated into English as the “People’s Defence Force”) in Northern Iraq. During the period the subject of the charge between 5 April 2011 and about 15 August 2013, Mr Lelikan lived in Northern Iraq and Turkey and spent a significant amount of time in the mountains travelling with members of the HPG. When in their company, he wore the HPG uniform and insignia and often carried standard accoutrements including firearms, ammunition and grenades. During that time he promoted and supported the PKK in his writing, some of which was published online and in printed form.
- 32 Mr Lelikan also took many photographs during that time and was often photographed by others. As noted by the Crown, the photographs show that over many months during the charge period he was regularly photographed in full HPG uniform including an accoutrements belt and armed with a grenade and an AK-47 rifle. However, that description does not quite do justice to the nature of the photographs, many of which (at the risk of sounding trite) also have a certain humanity. Photographs taken in June 2011 show him in front of a panel of PKK commanders in company with HPG members with radios, apparently studying a text book in front of PKK and Öcalan banners. In one image he is shown handling the ammunition and magazine of an AK-47 style rifle. In another, he is facing the camera smiling broadly as he feeds a baby goat.
- 33 On 19 October 2011, 26 Turkish security personnel were killed in an attack by the PKK on police and an army post called “Gezgin Tepe” in Cukurca, Yuksekova District, Hakkari Province, in south eastern Turkey.
- 34 On 28 December 2011, Turkish Air Forces bombarded a large group of people, thought to be PKK militants, in Uludere, west of Geçimli and south-west of Hakkari near the border between Turkey and Iraq. Turkish officials later

announced that the group consisted of civilian villagers, 34 of whom were killed.

35 Photographs taken during January and February 2012 depict Mr Lelikan in the company of HPG guerrillas travelling in snowy conditions up into the Zagros Mountains.

36 The year 2012 was characterized by major social unrest and fighting between the PKK and the Turkish army. One of the main battlefields was the Hakkari Province.

37 On 6 February 2012, the offender sent an email to his cousin, Rusen Demirbag in which he wrote about being in the Zagros Mountains. He wrote:

“We will welcome this spring with the greatest and most fierce resistance in history. We have been preparing for this resistance for a long time. We, as HPG, are ready to welcome this spring with glory. And this spring will be the spring of freedom for the people of Kurdistan. I did write a letter addressing yourself. We will, later on, publish that letter on the HPG site.”

38 On 1 May 2012, the offender forwarded an email to Ruşen Demirbag in which he wrote about his intention to travel to Hakkari, stating:

“I will rest until the evening, then head to the Zagros with my group. Despite the objections of the organisation, as a result of my insistence I will head to Zagros mountains and from there to around Hakkari. It is something else to be a guerrilla around there. Hakkari has majestic mountains and geography as well as a militant people. It was my dream to be a guerrilla in those areas for a term. I will make that a reality ... But for a long time I will not have the facility to write because the places we will be going to are battle fields.”

39 Photographs taken on 10 June 2012 depict the offender in company with HPG guerrillas crossing the North/South border of Iraq and Turkey.

40 Between 16 and 17 June 2012, the offender reached the peak of Cilo Mountain. Images depict him walking on glacial ice. On the same dates, the offender said he was “marching” towards Şitazin and Oramar (Dağlıca and Yeşiltaş).

41 Between June and August 2012, a series of clashes took place between the PKK and the Turkish Armed Forces in Hakkari. In particular:

- At about 4:00 am on 19 June 2012, a large group of PKK militants armed with a wide range of heavy guns infiltrated from Iraq and attacked the police station in Yesiltas village on the Daglıca route resulting in 8 soldiers being killed and 19 soldiers being wounded;

- On 23 July 2012, the PKK conducted a large-scale raid in order to control the town of Semdinli in the Hakkari Province, which is in close proximity to the east of Yesiltas and Daglica. This started a 2-month long heavy military engagement in the region encompassing Yesiltas, Daglica, Geçimli, Semdinli and Yüksekova;
 - Between 4 and 5 August 2012, the PKK attacked a military post in Geçimli with RPG-7 missiles, killing 8 soldiers and wounding 22 soldiers; and
 - On 24 August 2012, the PKK conducted three attacks on Turkish military posts in the Semdinli District of Hakkari Province, killing 5 military personnel and injuring 4 others.
- 42 Further photographs taken during this period again depict Mr Lelikan in PKK/HPG uniform and in the company of armed PKK/HPG guerrillas and commanders. Some of these images depict him with prominent HPG commanders. On 26 August 2012, he is shown with a group of HPG guerrillas in photographs described in an email as “moments of rest after action.”
- 43 On 3 September 2012, the PKK attacked the headquarters of Turkish soldiers at the slopes of the Kato Mountains. The Beytüssebap governor’s office was also attacked. Ten soldiers were killed.
- 44 Between 8 and 13 September 2012, there were a number of skirmishes between the PKK and Turkish Forces in the Hakkari-Yüksekova-Semdinli triangle, which includes Daglica and Yesiltas, with casualties and fatalities sustained on both sides.
- 45 Photographs taken between 21 September 2012 and 30 October 2012 depict the offender in various locations with members of the HPG while wearing the PKK uniform and accoutrements and in possession of an AK-style rifle.
- 46 In October and November 2012, there were further clashes between the PKK and the Turkish Forces, including an incident on 17 October 2012 in which the PKK attacked military stations in Çukurca, Hakkari. Over the course of October and November 2012, 437 soldiers and 86 PKK militants were killed in armed hostilities.
- 47 Between 6 and 7 December 2012, the offender sent his cousin Ruşen Demirbag about 30 emails which included a number of the aforementioned images and articles as attachments. In the first email (subject: “daglidan...”), the offender wrote:

“Hi Ruşen I went to Hakkari at the beginning of spring. For about a year, I have been on the move in a wide area from Hakkari Çukurca, Oramar, Gever and Şemdinli to Botan. Our time has been spent with the intensity of revolutionary operations. 7 times I managed to make it by a whisker. Once we got ambushed by the enemy. After a battle lasting twelve hours we were able to get out of the circle without any loss. The loss for the enemy was 10. Us two friends got wounded. It was a slight wound but I am well. I recovered. I was most recently in the Oramar area. I became sick due to the freezing cold, came to a hospital against my will, forced by my friends. I have got medicine etc. I am recovering. I hope that you are well as a family. After resting for a while I will again return to my post. It has snowed a lot here. It is very cold. As, in general, I am continually on the move I don't get seriously affected...”

48 Attached to the email were 29 articles, all in Turkish, written by the offender under the name “Jêhat Bêrtî” or “Jêhat Nûda Yayla”. In particular:

- In the article titled, ‘I got shot...’, the offender likened the Guerrillas to butterflies, stating:

“They are getting shot by tanks, artillery, bullets that don't ask for an address, by chemicals hidden in the air. Flowers blossom in the blood flowing from their bodies to the soil while being shot so that a butterfly can land on. They are getting shot like butterflies for butterflies. To create a flower home for the butterflies burning in a fire, they get shot and provide blood for the soil. They are, in fact, getting shot .. As they get shot, the daughters of the land become more beautiful. As they get shot, the soil gets adorned with flowers. As they get shot, the motherland turns into the land of butterflies flying in the flower garden.”

“We have opted to be the butterfly land's children and defenders.”

“As I keep looking I know I will be shot. I will be shot. I know. For my heart is a butterfly land. I recognise them all. My heart knows them. None of them is nameless. In my butterfly land, butterfly Sema, butterfly Bêrtan, butterfly Vîyan, butterfly Nûda, butterfly Renas, butterfly Zekiye, butterfly Adil, butterfly Kûrtay, butterfly Brûsk, butterfly Rûken and butterfly Armanc flutter about. My heart is registering all of this like butterfly Halil's camera, like butterfly Ekin's diary, and butterfly Rojînda's poems.”

- The offender tells the reader to fall for beautiful things so they can be beautified:

“...fall for them with your skin, heart, mind; and be shot, not like a fickle, but through your forehead.”

- In the article titled “February...”, the offender refers to travelling to various guerrilla camps saying “whichever guerrilla camp I visit, I quickly become its resident and settle there”. The offender mentions that “when I learn that [the Guerrillas] do read my writings, I cannot but feel proud”.
- In the article titled “Recep's hat...”, the offender provides commentary on the revolutionary operations announced by the PKK leadership. The offender states:

“Consequently, the intellectual Turks, the AKP Government and progressively whole of the Turkish state have plunged into the political and battle field with eyes closed or wild- eyed. The Kurds are patiently weaving their war and politics with foresight, by being organised and with considerable patience”

“One can very clearly see the connection between the success in the Guerrilla’s action within the Revolutionary Operations process and his political concentration level.”

- In the article “Watered borders...”, the offender explains how he attaches himself to guerrilla groups. He recounts how the “inexperienced” ask if he is a friend of the group and states that “those who have got used to my habits, say ‘Yes, he is a member of every group on the move’”. The offender refers to his “fellow travellers” as being “in a revolutionary operations march” and provides an anecdote of urinating on a border stone that is in view of a military post. The offender describes his feeling about crossing borders and states “I understand better my enemy’s enmity...”. Finally, he refers to taking souvenir photographs around the border stone.
- In the article “Revolutionary operations are a mystery ...”, the offender provides a metaphoric description of guerrillas and how they are mysterious:

“The guerrilla might get shot by most merciless weapons and best atomic technologies, but the numbers of the guerrilla do not decline they always increase. For the guerrilla is the child of the non-drying fountain, the unsubsiding wind, and the fertile soils. He does not get defeated, he forever multiplies. For in no story, tale or legend, heroes get defeated.”

- The offender further wrote:

“For over a year I have shared a mystery with the children of mystery on many parts of the Kurdistan mountains. All that took place was before my eyes. I shared their hellish pains and quiet times, in comparison to which, all hells paled into insignificance.”

- The offender describes how a large force gathers in preparation for action actions against military posts at Şitazina and Oramar and he describes the attacks as “revolutionary operations”.

- In the article “From the creators...”, the offender wrote:

“I am amongst them, watching the Revolutionary Operations they started months ago on the Zagros mountain ranges. I have been assigned the duty of ‘war observer’. I am confused as to how much of an observer, participant, narrator or listener I am, but everyone is looking at me with an eye that tells me it is necessary for me, to one way or another, take a couple of pictures of them and somehow send their stories somewhere. I am so deep into the story that, most of the time I say let someone tell it so that I can see my part in the story”

- The offender then provides an account of the attack on a military post in the village of Rindikê in the Colamêrg area. He wrote,

“I was watching from a hill the marching of those who were going to live their stories. As well as feeling the pride of sharing [their] bread for

days, I was also experiencing uneasiness. I knew some of them wouldn't be returning. We would be left with their stories. They would live their stories, contribute a lot to our lives, and we would, as a duty, and with great pride, tell their stories to their comrades and peoples."

- The offender then details the dying moments of three guerrillas from the attack. One commits suicide off a bridge before being captured and two use suicide bombs and their final radio transmissions are published in the article, one of which glorifies Abdullah Öcalan with "long live leader Apo". The offender explains that "by integrating these stories, they are turning them into tomorrow's legend that will be listened to by tomorrow's free children".
- In the article "Don't underestimate Rindê!", the offender wrote about a goat named Rindê that followed a group of guerrillas back from an attack on a military post. The offender described the attack as follows:

"They went there to raid a lodge, a military post of the fascist soldiers of an imperialist state, now called 'kalekol', which used to be called 'karakol'. In the true sense of the word, it was pandemonium all round. On one hand, the sons and daughters of this people, with the hearts of hell, are coming down from the mountains to the villages and the plains. They are quietly streaming onto the herds of oppression, with their eyes looking as though saying 'If it's hell, let it be hell'. While in the military post, those monsters and oppressors of the weak and defenceless during daytime, become pathetic in the face of hell and cry 'my mum, my commander'"

- In the article "The soul of time...", the offender states he has been "monitoring the reasons, development and possible historical outcomes of the Revolutionary Operations initiative by HPG on the Botan-Behdinan border ... for the past few months".

49 In March 2013, the PKK announced a unilateral ceasefire and commenced peace talks with the Turkish Government.

50 On 21 July 2013, the offender is shown in photos in company with Duran Kalkan both in HPG uniform.

51 On 6 August 2013, the offender was photographed in a series of images wearing HPG uniform. The offender later attached a number of these images to emails he sent to his cousin Daren Delshad on 15 August 2013.

52 As that material reveals, the task of assessing the nature of Mr Lelikan's membership of the PKK during the charged period is complex and highly contextual. Appropriately, Mr Boulten did not seek to draw the boundary as to where the notion of membership starts and ends. It comprehends a broad range of conduct extending from charismatic leadership to informal participation.

- 53 There is no requirement to show that any steps were taken toward a “particular end” such as a terrorist activity: *Benbrika v The Queen*.²⁰ The fact that bare membership of a terrorist organisation without proof of any terrorist act on the part of the member or even any intention to carry out a terrorist act is criminalised and made punishable by imprisonment for 10 years indicates that the notion of “membership” must be taken to assume a basal level of adherence to the tenets of the particular organisation in question.
- 54 The principal features of Mr Lelikan’s membership of the PKK are that he supported the struggle including in his writings, wore the uniform and insignia, carried arms and travelled with the guerrillas under their instruction. It is relevant to have regard to the period of offending. As submitted by the Crown it was lengthy and active and Mr Lelikan was fully aware of the organisation’s ideologies, motivations and objectives. So much may be taken from the plea of guilty, by which the offender acknowledges that he knew that the PKK was a terrorist organisation. It was indicated that the plea was entered on the basis that Mr Lelikan knew during the relevant period that the PKK/HPG were engaged in, preparing, planning, assisting in or fostering acts that fall within the definition of “terrorist act”. Mr Lelikan is taken to have known that the PKK was engaged in military conflict with Turkish armed forces and that it carried out acts made with the intention of influencing, by intimidation, the Turkish government.
- 55 It is clear, however, that Mr Lelikan was not a militant. In my assessment, the acts relied upon by the Crown were correlative to the object of making a chronicle of the PKK struggle. During the charged period, in addition to the acts relied upon by the Crown, Mr Lelikan spent much of his time writing, taking photographs, searching for the body of his dead brother and living amongst displaced Kurds at Mahkmour Refugee Camp. His writings during that period were clearly supportive of the PKK but the manner in which he wrote is significant. As submitted by Mr Boulten, although certainly transgressive, his writings were philosophical and almost poetic. They did not seek to incite or exacerbate extremist ideology. His photography can be similarly characterised. The photographs depict human exposure to battle often with no direct link to

²⁰ *Benbrika v the Queen* (2010) 29 VR 593; [2010] VSCA 281 at [130]

violent conflict. The evidence did not establish any personal commitment to violent activities, whether through his writing, photography or other conduct. Mr Boulten submitted that Mr Lelikan's role was as "a sympathetic chronicler of the events of the struggle". I accept that characterisation.

56 On the strength of the material collected in the Crown statement of facts tempered by my own assessment of Mr Lelikan's evidence at the trial, I would characterise the nature of his informal membership of the PKK as being towards the lowest order of seriousness. As submitted by Mr Boulten, it is difficult to conceive of a lesser involvement that would still fall within the scope of the offence. Had Mr Lelikan been an independent embedded journalist that would not have amounted to "membership". Mr Lelikan's relationship with the PKK was something more than that. He was ideologically supportive of its cause and gave expression to that support in his wearing of the uniform including weaponry and in his writings. However, there is no evidence to establish he did anything more. He was not a leader; he occupied no position or rank within the organisation; he required permission to travel with them; there is no evidence to suggest he taught the guerrillas any skills or provided them with any practical support (in fact they supported him). His involvement was that of a passive, sympathetic observer who sought to chronicle their struggle.

The history and nature of the PKK

57 The Crown statement of facts also addresses the history of the PKK. Further information on that issue was provided in the expert report tendered by Mr Lelikan. As explained by the Victorian Court of Appeal in *Benbrika*,²¹ that evidence is relevant to the assessment of both the objective seriousness of the offence and the moral culpability of the offender.

58 The information provided in the Crown statement of facts is as follows. The PKK was formally established under the leadership of Abdullah Öcalan in 1978 and was primarily committed to the creation of an independent Kurdish state in south-eastern Turkey, north eastern Syria and northern Iraq. The PKK engaged in armed struggle to advance its goals.

²¹ *Benbrika v the Queen* (2010) 29 VR 593; [2010] VSCA 281 at [554]-[556]

- 59 While the precise membership figures of the PKK are not known, the organisation had nearly 15,000 full-time fighters by 1986, about a third of whom were from Turkey; the rest being from Syria, Iran and Iraq. Up to 75,000 part-time guerrillas were also in the PKK ranks. More recently, the number of PKK members has been estimated to be approximately 7,000, with the majority of the organisation's militants based in northern Iraq. The PKK also draws on logistical support from sympathetic segments of the Kurdish community in south-east Turkey, Syria and Iran. There are also PKK supporters outside the region, mostly in Germany, the Netherlands and Belgium.
- 60 Most PKK members are recruited from the main Kurdish areas of south-east Turkey, with some drawn from the Kurdish population in Iran and Syria, and the Kurdish populations spread across Europe. Most recruitment in rural areas of Turkey occurs through personal acquaintance. In urban areas and in Europe, a network of PKK members and sympathisers working in non-governmental organisations and predominantly Kurdish political parties manage the recruitment process.
- 61 The PKK's objectives have changed over time. By 2012, the organisation's objectives included autonomy for Kurdish people within Turkey and advancing the rights of Kurds living in Turkey, specifically their right to maintain their ethnic identity.
- 62 The PKK has engaged in armed hostilities since 1984. Its main targets are the Turkish military and police, along with other Turkish government interests such as infrastructure and civilians associated with the government. The PKK's involvement in armed hostilities has been concentrated in Turkey's south and east, particularly in the provinces of Diyarbakir, Sirnak and Hakkari.
- 63 The period from 1984 to 1999 was one of active guerrilla fighting in the history of the PKK.
- 64 On 15 February 1999, the Turkish security forces captured Abdullah Öcalan. Öcalan has remained in prison serving a life sentence since his capture. Notwithstanding his incarceration, Öcalan has remained the PKK's leader and figurehead. Since at least 2009, the day-to-day affairs of the PKK were

managed by Murat Karayilan. Other key PKK leaders include Nurettin Halef al-Muhammad, Cemil Bayik, Duran Kalkan, Fehman Huseyin and Riza Altun.

- 65 Between September 2008 and July 2011, a series of 11 meetings took place in Oslo, Norway involving direct talks between the PKK and the Turkish government with the aim of achieving a peaceful resolution to the conflict. When these talks stopped in 2011, the armed conflict flared up again with hostilities on both sides.

The PKK as a prescribed terrorist organisation

- 66 The fact that the PKK is specified as a terrorist organisation is an element of the offence and cannot, of itself, inform the measure of seriousness of this particular offence. As acknowledged by the Crown, there is a broad range of kinds of organisation that could be specified for the purpose of the section. It is accordingly necessary to understand the process that underpins the listing (and re-listing) of terrorist organisations and to make an assessment of the particular features of the PKK in that context.

- 67 In order for an organisation to be specified as a terrorist organisation for the purpose of the Criminal Code, the relevant Minister must be satisfied on reasonable grounds that it is an organisation that is “directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act” or that it advocates the doing of a terrorist act.

- 68 The definition of the term “terrorist act” in s 100.1 of the Criminal Code is broad. It contains three elements. First, it must be action or a threat of action that falls within s 100.1(2) but not s 100.1(3). In summary, the burden of that element is that it includes acts that cause or risk causing death or serious harm to persons or property or disrupt important electronic systems such as those needed for transport, telecommunications or finance but excludes advocacy, protest, dissent or industrial action which is not intended to cause such harm. The second element is that the action is done or the threat is made with the intention of advancing a political, religious or ideological cause. The third is that the act is done or the threat is made with the intention of coercing, or influencing by intimidation, the government of (relevantly for present purposes) a foreign country; or intimidating the public or a section of the public.

- 69 The PKK was first listed as a terrorist organisation on 17 December 2005. Listings expire after three years and must be reviewed within that period. The PKK has been continuously listed since 2005, its most recent re-listing occurring on 4 August 2018.
- 70 The expert report relied on by Mr Lelikan addressed the characterisation of the PKK as a terrorist organisation under the Criminal Code. The report was prepared by Dr Victoria Sentas, an expert in counter-terrorism law including the proscription of terrorist organisations. Dr Sentas has extensive knowledge and expertise concerning the PKK.
- 71 Dr Sentas states that the characterisation of the PKK as a terrorist organisation and the nature of the violence in which it engages are highly contested in international law. She states:

“It is well established that the conflict between Turkey and the Kurds is classified as a non-international armed conflict, within the meaning of the Geneva Conventions, their additional protocols and the Rome Statute of the International Criminal Court of 17 July 1998. In international law, the PKK are a non-state actor engaged in a non-international armed conflict and a party to that conflict. The PKK understands itself as a party to an armed conflict. The PKK has made unilateral commitments to the United Nations to comply with International Humanitarian Law (IHL), and have agreed to deeds of commitment with Geneva Call regarding child recruitment, sexual violence and landmines. The conduct of both parties to the conflict is governed by IHL.

IHL distinguishes between attacks against civilians and civilian objects, which are prohibited, and lawful attacks against military objects or personnel, which are not prohibited (‘the principle of distinction’). Article 52(2) of Additional Protocol 1 (AP1) defines a ‘military object’ as: ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.

IHL requires that attacks must be both *necessary* from a military perspective and *distinct* from civilian objectives. A ‘civilian object’ is defined as ‘all objects, which are not military objectives’. Under IHL, the targeting of civilians and other acts of terror by state and non-state entities are unlawful and can be criminalized as war crimes and crimes against humanity by any state. It is only lawful violence against military objectives that cannot be considered a war crime under IHL.”

- 72 It is important to be precise as to the relevance of those matters to the task of making an assessment of the nature and quality of the PKK as a listed terrorist organisation in Australia. Dr Sentas noted that Australian law does not expressly incorporate international humanitarian law into the Criminal Code. An attempt to reform the Criminal Code so as to exclude conduct regulated by the

law of armed conflict was rejected in 2006. I must pay due regard to the fact that Australia has maintained the listing of the PKK on that unqualified basis. That is an indication of the legislature's intention to condemn support for organisations that condone acts falling within the Criminal Code definition of terrorist acts even where such organisations have self-imposed regulation by the international law of armed conflict. That is not merely a relevant fact; it is a juridical premise of the present task. However, in the factual assessment of the nature of the PKK, it is relevant to have regard to the fact that the features of the PKK's rules of engagement described by Dr Sentas distinguish it from every other terrorist organisation addressed in other sentencing decisions concerning the same offence.

- 73 In *Benbrika*, the Victorian Court of Appeal approved an approach of assessing the objective seriousness of the offence by reference to the kind of terrorist acts committed and likely to be committed by the organisation, positing a range between "a rag-tag collection of malcontents whose commitment to terror never advances further than a conception that one day, some time, they will undertake a 'terrorist act' of as yet undetermined nature and scope" on the one hand and violent jihad involving the worst terrorist acts imaginable on the other hand.
- 74 In accordance with that approach, it is necessary to undertake the difficult task of making an evaluative judgment of the nature of the acts committed by the PKK and the ideology that underpins them. The complexity of that assessment is neatly captured in the fact that association with the PKK has seen Kurds recognised variously as refugees, terrorists and de facto allies of the US coalition.
- 75 The expert report relied on by Mr Lelikan addressed those matters. She described the ideology, objectives and structure of the PKK. Having regard to the importance of this issue in the sentencing task, it is appropriate to set the relevant passage out in full:

"At least since the early 2000s, the PKK's armed conflict with Turkey is aimed at internal self-determination for the Kurdish people rather than secession. The PKK's political goals to achieve this aim have been constitutional recognition of Kurdish rights, identity and culture and through a form of devolved government within the Turkish State referred to as 'democratic autonomy' and

'democratic confederalism'. The PKK has also routinely called for and engaged in peace negotiations and unilateral ceasefires.

The PKK are comparable to no other listed non-state armed actor, both in structure, culture or politics. The PKK began with a classic Marxist-Leninist party structure in 1978 but has up to the present, 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 (PCDX), Iran (PJAK) and Syria (PYD) and guerrilla forces related to those parties. Next to this cluster of parties, the PKK established institutions through which integration and co-ordination of political practices take place.'

The PKK is comprised of several political manifestations, some 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) a pan-Kurdish platform with representatives from all over the world, including Australia. The PKK are a popular, grassroots social movement made up of diverse forms of assembly with mainstream support amongst Kurds in Turkey and in the diaspora.

The complexity of understanding the PKK is not only at the level of political organisation and participation. '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. The PKK is intricately woven through Kurdish political identity, historic contemporary social relations and is also central to understanding the Kurdish people's connection to the PKK. It is well established sociologically that the PKK "reinforces the idea of ethnic membership that bonds diaspora Kurds to the larger cause of Kurdish political social and cultural rights". This conception of 'the PKK' as integral to social and cultural identity is generated by an existential and collective investment in the PKK by many Kurds as responsible for their survival as a people against genocide.

In 2004 the PKK formally adopted principles developed by jailed PKK leader, Abdullah Öcalan, 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 characterized as a bottom-up system for self-government'.

In 2005 the Kurdistan Communities Union (KCK) was established as a societal organisation, or umbrella movement, to coordinate this new grass roots self-organisation. 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 to be integral to the future transformation of the PKK away from military combat to an entirely political formation. The PKK has sought 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'.

From 2009 Turkey renewed a program of mass arrest and prosecution of Kurdish civil society in a continuing operation against the KCK. Turkey understands 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. Mass arrests were intended to disrupt the political appeal of the KCK as a social movement."

- 76 The Crown accepted that the objectives and acts of the PKK are geographically limited and submitted on that basis that involvement with the organisation "should be treated as being somewhere between the lower to mid-range of the scale of seriousness". With respect, I do not think that submission pays due regard to the matters addressed by Dr Sentas. While the history of armed conflict that underpins the decision to list the PKK as a terrorist organisation is of course a relevant factor, a number of further features of the organisation may be noted.
- 77 First, as noted by Dr Sentas, while the PKK has continuously been relisted because it meets the broad statutory threshold in s 102.1 of the Criminal Code, that does not amount to a determination that the PKK is a threat to Australian security. The absence of any direct positive security benefits for Australia in listing the PKK prompted two members of the Parliamentary Joint Committee on Intelligence and Security in 2006 to issue a minority report dissenting from the proposed relisting. Dr Sentas states that is the first and only time the Parliamentary Joint Committee on Intelligence and Security has been divided as to whether an organisation should be listed.
- 78 Dr Sentas further states that there remains no available evidence that the PKK seeks to harm Australians or Australia's democratic institutions.²² Nor is there evidence to suggest that Australia faces any threat from the PKK. In support of the most recent re-listing by the Parliamentary Joint Committee of Intelligence and Security,²³ the Department of Home Affairs advised:

"Turkey is a popular destination for Australians. While the PKK directs attacks against Turkish government and security force targets, civilian bystanders are treated as acceptable collateral ... The PKK continues preparing and planning terrorist attacks in Turkey and Australians could be injured in such attacks."

²² Dr Victoria Sentas, expert report in sentencing proceedings at par 32.

²³ Parliamentary Joint Committee on Intelligence and Security, Review of the re-listing of five organisations and the listing of two organisations as terrorist organisations under the Criminal Code, September 2018.

- 79 The listing accordingly appears to have reached the point where its narrow focus is to protect Australians visiting Turkey. While that is a legitimate interest of the Australian government, so far as the material before me reveals (which includes government assessments of the nature of the organisation), no Australian has been killed or injured in violent incidents involving the PKK. Further, I accept, as submitted by Mr Boulten, that there is no evidence to suggest that any Australian citizen or resident was at risk of harm during the conflict in northern Iraq or in Turkey about which evidence was given during the offender's trial.
- 80 Secondly, the ideology of the PKK as expressed in the writings of Abdullah Öcalan has more in common with the values of our democracy than it does with extremist violent jihad. It is based on the notion of "democratic confederalism", which Öcalan describes as being "open towards other political groups and factions ... flexible, multi-cultural, anti-monopolistic, and consensus-oriented" and an ideology of which "ecology and feminism are central pillars". I consider that an ideology advancing core democratic principles such as those is less serious than the ideologies of other listed terrorist organisations which, as noted by Mr Boulten, include promoting "ethnic genocide, extreme misogyny and the punishment by death [of] the LGBTI community, apostates and non-Muslims".
- 81 In his evidence in chief at the proceedings on sentence, Mr Lelikan was asked what it is that he supports that the PKK stands for. He replied that the PKK has struggled for Kurdish cultural and political rights and that their main goal is "free and democratic society", which he supports.
- 82 That evidence resonates with the expert evidence of Dr Sentas, who states:
- "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."

- 83 Those aspects of the PKK and Mr Lelikan's conception of its objectives are relevant to both the objective seriousness of the offence and to Mr Lelikan's moral culpability for the offence.
- 84 It is also relevant to have regard to Australia's de facto alliance with the PKK during the Syrian conflict. Although that was in 2014, after the period of Mr Lelikan's offending, the evidence suggests that the ideological commitments and methods of the PKK did not change between the charged period and the events of 2014. Mr Boulten accordingly submitted that it is appropriate to have regard to those events in assessing the nature of the PKK. In that context, I turn again to the unchallenged evidence of the expert, Dr Sentas. She states:

"The causes of the breakdown of the tentative two year peace process between the PKK and Turkey begun in 2013 and ended in 2015 are complex. Events in Syria and Iraq were however decisive. When ISIS began to occupy Syrian cities in 2014, the PKK joined with the YPG in resistance, with the PKK widely understood as defacto US-coalition allies. For example, on 7 August 2014 an international coalition including Australia cooperated with the Kurds in a humanitarian intervention in the Sinjar province to Yezidi civilians under siege on Mount Sinjar from ISIS. The PKK is acknowledged to have been central in preventing genocide against the Yezidi people, establishing together with the YPG-YPJ an evacuation corridor for approximately up to 35,000 people."

- 85 Returning to the definition of a terrorist act, which underpins the specification of an organisation as a terrorist organisation, the evidence establishes that acts of the PKK falling within that definition have been done or threatened with the intention of advancing the cause of self-determination of an ethnic group in a foreign state and with the intention of influencing the government of that state, by intimidation, to tolerate that self-determination. Whilst I accept that support for terrorism is inherently serious, the ideal of self-determination espoused by the PKK is not the most dangerous ideal of our times. That assessment confirms my overall characterisation of the present offence as being towards the lowest order of seriousness.

Subjective case

- 86 Mr Lelikan was around 34 and 35 at the time of the offending. He is now almost 41 years old.
- 87 I have summarised Mr Lelikan's background in detail at the outset of this judgment. Mr Boulten submitted that Mr Lelikan's early experience of

oppression, persecution and discrimination as a Kurd growing up in Turkey, including his personal experience of violence and torture, should be taken into account to reduce his moral culpability in accordance with the principles stated by the High Court in *Bugmy v The Queen*.²⁴ To that I would add the experience of having to flee his homeland for his own safety at such a tender age. Mr Boulten submitted that Mr Lelikan's informal membership of the PKK was innately connected to personal trauma and intergenerational persecution. I accept that it was. That is a factor that significantly reduces the offender's moral culpability.

88 At the proceedings on sentence Mr Lelikan tendered a report from forensic psychiatrist Dr Andrew Ellis dated 7 April 2019 prepared following a psychiatric evaluation of Mr Lelikan. Dr Ellis expressed the opinion that it was likely Mr Lelikan had suffered a major depressive episode in 2016-2017 during and after his release from custody precipitated by his exposure to military trauma and also to traumatic events and isolation while in custody. Mr Lelikan gave evidence that he was severely harassed by other inmates when remanded in custody in the area that also housed supporters of ISIS.²⁵

89 Dr Ellis was asked about the risk Mr Lelikan poses to community safety. He expressed the opinion that Mr Lelikan displays few historical risk factors associated with future risk of interpersonal violence. Dr Ellis said:

“Currently [Mr Lelikan's] mental disorder (depression) is well treated with no symptoms. There is no evidence of cognitive, affective or behavioural instability. He does not express any pro-violent attitudes ... he has good professional and personal supports. He has stable accommodation in a low crime area.

...

Mr Lelikan would fall into a group of persons with a risk for general interpersonal violence which is statistically low in frequency. Maintenance of his current treatment and social support is likely to moderate any risk.”

90 The evidence establishes that Mr Lelikan has received considerable support of the kind often referred to by practitioners in this field as being “pro-social” from his family and from the Australian-Kurdish community. He has been on strict

²⁴ *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37.

²⁵ Tcpt, 18 April 2018, p9(36).

conditional bail since 14 October 2016 and has complied with all of his bail conditions.

Renunciation

- 91 The Crown in its written submissions contended that Mr Lelikan has not resiled from his support for the PKK or its ideologies and that this bears directly on his prospects of rehabilitation: *R v Ghazzawy*.²⁶ Reliance was placed in that context on the so-called principle in *R v Qutami*²⁷ and *Ghazzawy*²⁸ that, in respect of terrorist offences, whether violent or otherwise, the onus is on the offender to establish his or her renunciation on the balance of probabilities. With respect, I do not accept that a principle can be stated in those terms. Leaving aside the fact that the rules of evidence do not apply to proceedings on sentence unless the Court so directs, any statement of principle that purports to pre-empt a fact-based assessment in respect of the exercise of the sentencing discretion must be approached with caution. Such statements at best offer guidance the benefit of which deteriorates in proportion to the rigidity with which they are applied.
- 92 In any event, in light of the evidence given by Mr Lelikan at the proceedings, the Crown did not press the submission. The burden of the evidence, which I accept without hesitation, was that Mr Lelikan has renounced any ideological commitment to violence.
- 93 Mr Lelikan has supported the PKK since he was young. His evidence was that he continues to support its political objectives. However, he stated that he has no intention to return to Turkey, Iraq, Syria or any country in that region where Kurdish people live, nor does he have any intention to engage in military or guerrilla activity. In principle he supports the PKK's military efforts against Turkish forces as a last resort against violent persecution. However, he also stated that he will not contribute financially or materially to the PKK and is willing cooperate with ASIO in determining the boundaries between acceptable and unacceptable political conduct.

²⁶ *R v Ghazzawy* [2017] NSWSC 474 at [68].

²⁷ *R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369.

²⁸ *R v Ghazzawy* [2017] NSWSC 474 at [70]

- 94 Mr Lelikan gave evidence that he chose to be an Australian citizen and feels a responsibility to Australia, as it is his home. He said he likes living in Australia because of its multiculturalism, peace and democracy. That was echoed in the views he expressed to Dr Ellis whose report states that Mr Lelikan has a “love for Australia” and likes the “checks and balances of the rule of law”. The report also stated that Mr Lelikan understands his criminal proceedings to be a “legitimate response of the Australian government to his activities and associations” and that he respects Australian officials. I pause in that context to acknowledge the fairness and professionalism with which the present prosecution was presented by the relevant Federal Agents and prosecutors.
- 95 Further insight into Mr Lelikan’s ideological support for the PKK can be gleaned from the expert report of Dr Sentas quoted above.
- 96 The evidence establishes that what it means to support the PKK has changed over the years as the objectives of the organisation have shifted toward internal self-determination rather than the formation of a separate Kurdish state. I am satisfied that Mr Lelikan has renounced all violent or criminal forms of support for the PKK and that what sympathy and support he retains for that organisation may be viewed benignly when understood through the lens of his personal background.

Other sentencing factors

- 97 The Crown did not rely on any circumstance of aggravation. Mr Boulten submitted that it would be erroneous to have regard to the wearing of armoury as an aggravating feature of the offence in circumstances where it has not been established beyond reasonable doubt that the offender had any intention of using that armoury to threaten, fight or defend himself. I accept the correctness of that submission.
- 98 The Crown submitted that Mr Lelikan has similar convictions for related offences and has committed “acts of violence, including an act of violence to himself”. The first offences identified arose from Mr Lelikan’s participation in a protest outside the Greek embassy in February 1999 which resulted in his being charged for “conduct leading to the apprehension of violence/damage” and “custody of an offensive implement in a public place” (a Molotov cocktail).

For those offences, Mr Lelikan was fined \$500 and placed on a bond. That is an indication that they were not regarded as serious offences.

99 Secondly, there was the act of self-immolation in July 1999, almost 20 years ago. I do not think that indicates a propensity to violence toward others. It may be noted in that context that the definition of “terrorist act” in the Criminal Code excludes any action that endangers the life of the person taking the action.²⁹

The Crown also noted the offender’s conviction in France in 2011 for his association with the PKK. However, it is difficult to know what to make of that conviction given that it was entered in Mr Lelikan’s absence. That is not to ignore the existence of the conviction, which must be taken as having been duly entered, but only to observe that I have no basis on which to judge its seriousness.

100 The Crown submitted that these offences should be taken into account in relation to the assessment of the offender’s character. So much may be accepted; what they show as to his character in the context of his personal history is a different matter. It is difficult to assimilate the manifestation of generations of Kurdish struggle into the peculiarly rigid taxonomy of Australian criminal law. I am not satisfied that Mr Lelikan’s criminal record demonstrates bad character or any dangerous propensity such as to deprive him of the benefit of any leniency that might otherwise be afforded to him.

101 Mr Lelikan’s nephew, Ronahi Demirbag, gave character evidence at the proceedings on sentence. He is an impressive young man. He is in the second year of a double bachelor degree at the University of Sydney. He said his side of the family is not political. He and Mr Lelikan shared a bedroom for about a year when Mr Lelikan first arrived in Australia and have remained close. He said that Mr Lelikan has always provided him with strong academic and emotional support. Asked whether Mr Lelikan had ever discussed violence or the conflict in Turkey and Kurdistan with him, apart from discussions for the purpose of a school assignment, he said:

“No. Our discussions were - because I'm not a political I don't have an understanding about those political issues, I can't really engage in those discussions. So our discussions, the scope of our discussions were basically

²⁹ Criminal Code, s 100.1(2)(d).

limited to the predetermination of historical permanency in terms of an official record of history in the Middle East, which excludes Kurdish minorities and various other minorities and then an unofficial record, which gives an autonomous voice like my other fraternities. You can see the same thing with indigenous people today and colonial perceptions of history.”

- 102 The evidence of Mr Demirbag has reinforced my own assessment of Mr Lelikan as a thoughtful man who is given more to the world of ideas than the prospect of violence.
- 103 I have regard to the plea of guilty and accept, as submitted by Mr Boulten, that it was of considerable utilitarian value.

Sentencing

- 104 The Crown provided a table of “comparable” decisions. As already noted, reliance was also placed on a series of general principles said to apply to “this kind of offence”. However, as I think may ultimately have been acknowledged, if implicitly, the present offence is far removed from the kinds of offences considered in the so-called comparable cases.
- 105 The Crown submitted that no sentence other than a term of imprisonment would meet the requirement to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence. I do not accept that submission. Section 17A(1) of the *Crimes Act 1914* prohibits the imposition of a sentence of imprisonment unless, after having considered all other available sentences, I am satisfied that no other sentence is appropriate in all the circumstances of the case. I am satisfied that another sentence is appropriate.
- 106 In reaching that conclusion I have had regard to the fact that Mr Lelikan has already spent almost three months in custody in conditions of extreme hardship due both to his classification as a maximum security prisoner and the de facto consequences of his classification, which saw him housed first in the same area as members of other terrorist organisations whose objects include the murderous destruction of organisations such as the PKK and later in complete isolation.
- 107 In accordance with s 20AB(1) of the *Crimes Act 1914*, the other available sentences include those available under the *Crimes (Sentencing Procedure) Act 1999* (NSW). That Act creates a hierarchy of sentences that may be

imposed instead of a sentence of imprisonment. The most serious alternative to imprisonment is an intensive correction order, which is characterised as a custodial sentence. That option is not available in the present case.³⁰ It is neither necessary nor appropriate to attempt to discern the rationale for that exclusion. The task with which I am concerned is to discern the intention of the Commonwealth Parliament. There is no provision in the Criminal Code that mandates the imposition of a full time custodial sentence for the present offence (the constitutional validity of such a provision might be contestable). Further, there is no textual basis for concluding that the sentencing discretion is confined in that way.

108 After intensive correction orders, the next most serious alternative to a sentence of imprisonment is a community correction order.³¹ The maximum term of such an order is 3 years. It must include the standard conditions set out in s 88 of the *Crimes (Sentencing Procedure) Act*. They are that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the order. A community correction order may also include additional conditions under s 89 of the Act. The additional conditions that may be imposed include a condition that:

- imposes a curfew;
- requires the offender to undertake community service work;
- requires the offender to participate in a rehabilitation program or receive treatment;
- requires the offender to abstain from drugs or alcohol;
- prohibits association with particular persons;
- prohibits the frequenting of or visits to a particular place or area; or
- requires the offender to submit to supervision.

109 However the additional conditions of a community correction order must not include:

- a home detention condition;
- an electronic monitoring condition; or
- a curfew condition exceeding 12 hours in any 24 hour period.

³⁰ Crimes (Sentencing Procedure) Act 1999 (NSW), s 67.

³¹ Crimes (Sentencing Procedure) Act 1999 (NSW), s 8.

- 110 Before a community service work condition can be imposed the offender must be assessed as suitable to undertake such work.³² Mr Lelikan has been assessed suitable and could be offered 22.5 hours community work per month.
- 111 At a further sentence hearing following the receipt of that report I raised the prospect of a further condition prohibiting Mr Lelikan from leaving Australia. Neither party sought that condition. It was noted, however, that Mr Lelikan does not have a passport and is unlikely to receive one in the foreseeable future which provides a practical impediment to any overseas travel irrespective of whether such a condition is imposed. Neither party sought a curfew condition, a non-association condition or any condition relating to rehabilitation. It was implicit in those concessions on the part of the Crown that protection of the community may be given less weight in this case than might be suggested by the description of the offence in the Criminal Code.
- 112 Mr Boulton submitted that, despite the fact that Mr Lelikan is an apparently law-abiding citizen of Australia, there would be some utility in a supervision condition so that authorities are aware as to where he is living, whether he is properly engaged in productive community life and whether his associations are likely to lead him into a position where there is a risk of harm to the community. I accept that submission and propose to impose a supervision condition for that reason.
- 113 The Crown submitted that a community correction order that included no more than the standard conditions and a community service work condition would not achieve a penalty of severity appropriate in the circumstances of the case. There was, with respect, a measure of inconsistency implicit in the submission. Having acknowledged that Mr Lelikan does not pose such a threat as to require supervision or the imposition of a curfew, the suggestion appeared to be that, shorn of such constraints, the severity of the order would be too low and that he should instead go to gaol. It was further submitted that, since the office of community corrections can offer only 22.5 hours per month, the burden of the work order would be inadequate (by reference to some unspecified punitive standard).

³² Crimes (Sentencing Procedure) Act 1999 (NSW), s 67.

114 I do not accept those submissions. For the reasons addressed at length in this judgment, in the unusual circumstances of this case, I do not think Mr Lelikan's offence requires a substantial degree of punishment or deterrence such as to warrant the imposition of a custodial sentence. A measure of punishment has already resulted from his previous period of incarceration which, while short, had an extreme impact on him. The weight to be given to denunciation and deterrence in this case must be assessed as one of the many complexities of the case. I do not think those considerations militate against the order I propose.

115 Mr Boulten noted that, while the Act allows the imposition of a community work order of up to 500 hours, it is open to impose a lesser requirement. I have given anxious consideration to that issue. Upon reflection, I consider that it is appropriate to impose the maximum requirement allowed under the Act. That should allow Mr Lelikan to complete the work component of the order by attending one day a week over a total of 22 months which is a significant burden.

Orders

116 Renas Lelikan, please stand:

- (1) I convict you of the offence of membership of a terrorist organisation contrary to s 102.3(1) of the Criminal Code.
- (2) Pursuant to s 8(1) of the *Crimes (Sentencing Procedure) Act*, instead of imposing a sentence of imprisonment, I make a community correction order for a period of 3 years from 7 May 2019.
- (3) The conditions of the order are:
 - (a) you must not commit any offence;
 - (b) you must appear before a court if called on to do so at any time during the term of the order;
 - (c) you must accept the supervision of Community Corrections;
 - (d) you must undertake 500 hours of community service work; and
 - (e) you must report to Community Corrections at St Leonards as soon as practicable and no later than within seven days.

117 You are required to attend the Registry of the Supreme Court for finalisation of the community correction order.
