

**SUBMISSION OF THE FEDERATION OF COMMUNITY  
LEGAL CENTRES (VIC.) INC**

**TO THE PARLIAMENTARY JOINT COMMITTEE ON  
INTELLIGENCE AND SECURITY**

**REVIEW OF THE LISTING OF THE KURDISTAN  
WORKERS PARTY (PKK)  
AS A TERRORIST ORGANISATION UNDER THE  
*CRIMINAL CODE ACT 2004***

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## CONTENTS

About the Federation of Community Legal Centres.....	3
Executive Summary.....	4
Introduction.....	7
General Concerns.....	8
Grounds for Listing the PKK.....	16
The Impact of Listing the PKK.....	25
Conclusion.....	37
APPENDIX A.....	39

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## **ABOUT THE FEDERATION OF COMMUNITY LEGAL CENTRES VICTORIA**

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's') assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use CLC's are on low incomes, with most receiving some form of pension or benefit. CLC's also see a considerable number of people from culturally and linguistically diverse communities.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

## **EXECUTIVE SUMMARY**

The Federation opposes the listing of the PKK as a 'terrorist organisation' under the *Criminal Code*. In summary our concerns and recommendations are as follows:

### General Concerns with the Proscription Power

- That the practice of listing organisations is undemocratic and a departure from fundamental principles of criminal law.
- That the practice of listing organisations unduly impinges on freedom of association.
- That the practice of listing organisations is neither a necessary nor effective mechanism for combating politically, religiously and ideologically motivated violence in Australia.
- That the criteria for listing organisations are overly expansive and undefined and therefore listing has the potential to be applied to an excessively broad range of organisations including liberation struggles against repressive regimes.
- That the listing regime affords the Attorney-General very wide discretion, thereby creating the risk that the power may be exercised in an inconsistent, discriminatory and politically motivated abuse of the law.

### Specific concerns with the grounds for listing

- That the grounds for listing and the process deployed are not transparent
- That the case for listing is grounded in predominantly foreign policy considerations rather than legitimate domestic criminal law concerns.
- There is no evidence the PKK poses a security threat to Australia.
- That the intelligence relied on is not credible or verifiable. Evidence from respected Human Rights organisations suggests that the Turkish military are engaged in systematic corruption, annihilation operations of the PKK

and violent unprovoked attacks against Kurdish civilians, some of which have been attributed to the PKK.

- That the implications for listing on Australian communities must be considered.

#### Specific concerns with the impact of the listing of the PKK

- That listing collapses the distinctions between the PKK's political and military arms. In doing so listing criminalises support for the political goals of the PKK, which are recognised as the liberation of the Kurdish people from an oppressive regime through democratic means such as the advocacy of human rights and participation in the political process.
- That like the ANC in South Africa and Fretelin in East Timor, the PKK has responded to brutal police and military repression and counter-insurgency warfare with armed resistance. Listing makes no provision for recognition of the international rights to self defence in support of the principle of self determination.
- That listing denies the connection between the emergence of the PKK, the survival of the Kurdish people and the arguably genocidal practices of the Turkish state. The PKK as a symbol of Kurdish liberation is a significant connection between Kurdish diasporas and the desire for their people's liberation.
- That listing criminalises freedom of political association with the PKK, in the absence of any requirement for connection to a terrorist act or involvement in violent acts. Listing also allows the criminalisation of the legitimate expression of Kurdish identity and rights through expansive and broadly defined terrorist organisation offences
- That the terrorism organisation offences should require some nexus between the offence and a terrorist act, which at present they do not.
- That the penalties specified in relation to the offences are excessive.
- The listing will impact on the status of refugees, who in all other circumstances, Australia would have an obligation to provide protection to.

- That listing denies engagement with the PKK, and the role of the PKK itself, as a primary strategy for resolution of the conflict. This is a strategy deployed by many nations and human rights organisations. Significantly, Norway does not recognise the PKK as a terrorist organisation so as to not jeopardise involvement in negotiations for peace.

## INTRODUCTION

This submission opposes the listing of the PKK as a terrorist organisation under the Criminal Code.

The Federation continues to be seriously concerned with the proscription powers under the *Criminal Code Act 1995* (Cth). The powers breach fundamental principles of our criminal law system and fundamental civil and political rights outlined in International Conventions to which Australia is a party. While these concerns have previously been outlined to the Committee however we reiterate the key problems with proscription due to the seriousness of the flawed processes repeated in the listing of the PKK.

The Federation notes that Recommendation 1 of the Committee's Report on the Review of the listing of six terrorist organisations, was that ' . . . a comprehensive information program, that takes account of relevant community interest groups, be conducted in relation to any listing.'<sup>1</sup> As with previous listings, the government has merely published a media release with a short description of the PKK, and the reasons for listing the organisation. The Federation considers that this that this information is insufficient in a number of ways.

There is currently insufficient publicly available information relating to the criteria relied upon by the Attorney General in deciding to proscribe an organisation. There is also insufficient information about the *process* for applying the criteria to the relevant supporting information in order to decide whether or not to proscribe the PKK. In addition the supporting information provided by ASIO in recommending proscription and relied upon by the Attorney General in determining whether the PKK should be proscribed is unverified and has not been subject to public scrutiny. The Federation argues that in the context of

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<sup>1</sup> *Review of the Listing of six terrorist organisations* March 2005, Parliamentary Joint Committee of ASIO, ASIS and DSD , Recommendation 1.

severe political repression, with a plethora of state security forces and armed actors it is extremely difficult to assess the veracity of reports of any 'terrorist' incidents with certainty. Whilst the Federation clearly does not support the armed or violent activities of the PKK, we submit that the proscription of the PKK as a 'terrorist organisation' is clearly not justifiable nor appropriate for a democracy.

## **GENERAL CONCERNS**

The Federation has a number of general concerns regarding the proscription regime which are relevant to the listing of the PKK.

### Breadth of Definition of terrorist act

In order for the Governor-General to make regulations specifying a particular organisation as a terrorist organisation the relevant Minister, that is, the Attorney-General, must be satisfied on reasonable grounds that:

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

More recently the latter part of this definition has been amended by the *Anti-Terrorism Act (No 2) 2005 (Cth)* to read 'whether or not a terrorist act occurs' rather than referring to a specific terrorist act. This definition has also been amended so that it may be applied where an organisation 'advocates the doing of a terrorist act'.

This definition hinges on the definition of 'terrorist act'.

Broadly, a 'terrorist act' is defined as an action or threat of action done or made with

- the intention of advancing a political, religious or ideological cause; and



- with the intention of coercing or influencing by intimidation a government of the Commonwealth, State, Territory, foreign country or the public.

Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death, endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.<sup>2</sup>

An exception has been created for advocacy, protest, dissent or industrial action that is not intended to cause death, physical harm, and endangerment to a person or a serious risk to public health or safety.<sup>3</sup>

The Federation is of the view that this definition is overly broad and consequently may be applied to an inordinately wide array of acts and threats of acts. This is of particular concern given that all terrorism offences and the criteria for identifying and specifying organisations as terrorist organisations derive from this key definition. It is of even greater concern since the recent passage of the *Anti-Terrorism Act (No 2) (Cth) 2005* which itself broadens further the definition of a terrorist organisation for the purpose of specification as such.<sup>4</sup>

#### Criminalising Political, Religious and Ideological Acts

A further concern is that the definition of 'terrorist act' necessarily criminalises politically, religiously and ideologically motivated acts only, particularly insofar as committing a 'terrorist act' is an offence in itself. In this sense this definition is particularly prone to being applied in a discriminatory manner or in a way that suppresses political dissent. This also raises the important question of whether the motivation for the act is actually a relevant factor and in fact a suitable matter for legislative application. In our view, it is the action itself that poses a social problem, regardless of the motivation for that act. It follows from this that in fact

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<sup>2</sup> Paragraph 100.1, Schedule 1, *Criminal Code Act 1995 (Cth)*

<sup>3</sup> *ibid*

<sup>4</sup> Paragraph 10, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*

existing criminal law definitions and offences should suffice to address terrorist activity. An act of property damage or endangerment to persons may be prosecuted under standard criminal legislation.

#### General Concerns Regarding the Listing of Organisations

There are two consequences where an organisation that is found to meet the definition of a 'terrorist organisation'. Firstly, that organisation may be 'specified' as a terrorist organisation in regulations made by the Governor-General (ie 'listed' as a terrorist organisation) and secondly, a series of terrorism offences arise in relation to that organisation.

The Federation has a number of concerns regarding the listing of organisations and in particular the definition of a 'terrorist organisation' and how this definition is applied.

The Federation is concerned about the practice of listing organisations as it creates offences in relation to an organisation regardless of the specific activities of that organisation in Australia at a given point in time. Once listed as a terrorist organisation, the consequences of being a listed organisation continue regardless of what activities that organisation does or does not undertake. This effectively functions as a legislative 'black list'. In our view, this is not an appropriate legislative practice in a democratic society. The practice of listing organisations removes the nexus between criminal prosecution and actual criminal activity. For example, a person who provides training to a listed organisation will have committed an offence, regardless of whether that organisation has been involved in some sort of criminal activity under Australian law and regardless of whether the training provided relates to any criminal activity. This power moves away from a fundamental principle of the criminal law, that is, of assigning criminal responsibility to individuals based on their actions and intentions in causing harm to the community. Instead, an individual will attract criminal liability based solely upon the activities of an organisation.

We are also concerned that these provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>5</sup> most notably those obligations relating to freedom of association (Article 22). We suggest that the listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security, particularly in light of the threat of ideological and political violence.<sup>6</sup>

Furthermore, it is also not clear that the practice of listing organisations is a necessary legislative mechanism or one that serves to combat politically and religiously motivated violence. Firstly it would seem unlikely that listing an organisation would actually have deterrent effect where serious terrorist violence is concerned. As noted above, a legislative response to politically and ideologically motivated violence is unlikely to prevent such activity given the inherently extra-legal nature of the activity. In addition, it is our view that the existing criminal law offers sufficient protection against politically and ideologically motivated violence. If listed organisations are responsible for the kinds of politically and ideologically motivated violence alleged, then the offences reasonably required to protect the public from such actions are already available to law enforcement authorities, in the following ways:

1. Through 'ordinary' criminal law. Murder, kidnapping, intentionally causing serious injury and robbery *inter alia* are already serious offences. Deliberately assisting in these acts would fall under offences such as conspiracy to commit such acts.
2. Through the terrorism offences set out in Paragraph 101 of the *Criminal Code*.

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<sup>5</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

<sup>6</sup> Article 22(2), *International Covenant on Civil and Political Rights*.

3. If the organisation is not listed, under the same terrorist organisation offences (provided that the prosecution is able to show that an organisation meets the definition of 'terrorist organisation' under Paragraph 102.1 of the *Criminal Code*).

It is, therefore, difficult to see how listing an organisation would assist matters other than in cases where the link between the accused or the relevant organisation and the 'terrorist act' could not be established to the satisfaction of a court. In such cases we submit that the imposition of criminal liability is not justified in any event.

We also note that there is no evidence to suggest the practice of listing organisations was necessitated by an inability to prosecute those involved with these organisations in Australia, as would be evidenced by failed prosecutions.

#### Broad Criteria for Listing

The Federation is also of the view that the criteria for listing organisations is overly broad, which in turn creates issues of inconsistent application and excessive Ministerial discretion. As noted above, the determinative criterion for listing is whether an organisation fits the legislative definition of a 'terrorist organisation'. This definition is extremely general. Firstly, it hinges on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts (as discussed above). Secondly, an organisation need only be directly or indirectly engaged in preparing, planning, assisting in or fostering such a terrorist act to be a terrorist organisation according to the legislative definition. Further, it is important to recall that this definition has been made even more expansive due to the *Anti-Terrorism Act (No 2) 2005 (Cth)* which, as noted above, also defines a terrorist organisation as one which 'advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)<sup>7</sup>. In this context 'advocates' may include directly or indirectly counselling or urging a

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<sup>7</sup> Paragraph 10, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*

terrorist act or directly praising the doing of a terrorist act where this might have the effect of leading a person to engage in a terrorist act.<sup>8</sup>

Given the broad statutory definitions of 'terrorist organisation' and 'terrorist act', a remarkably wide range of groups and Governments may fall within the ambit of the listing regime. In a modern democratic society it is clearly undesirable that there be this kind of listing of organisations, particularly insofar as it restricts citizens' freedom of association. If, however, it is accepted that such a practice is required due to certain exceptional circumstances certainly that practice should be restricted and clarified to impinge on individual freedoms as little as possible. Here the opposite has occurred. The criteria for listing organisations are so broad that it creates the possibility that a very large number of organisations may be listed as terrorist organisations. In our view this legislative response is not commensurate with the level of terrorist threat in Australia.

#### Wide Ministerial Discretion and the criteria for listing

As a further consequence of these broad definitions the Attorney-General is afforded an extremely wide discretion in determining which organisations should be listed as terrorist organisations. This is exacerbated as the legislative regime does not provide for judicial determination of which organisations should be listed nor any mechanism for substantial judicial review on the merits of a decision. An organisation facing listing has no opportunity to make a case against the proposed listing. Once an organisation is listed, this does trigger a review of the decision by this Committee, the Parliamentary Joint Committee on Intelligence and Security (formerly ASIO, ASIS and DSD), however the outcome of this review is not necessarily binding on the Attorney-General and does not function as an appeals process. The Attorney-General's decision to list an organisation may be appealed pursuant to the *Administrative Decisions (Judicial Review) Act 1977*. This offers limited merits review, however, given the broad criteria for listing we imagine that it is unlikely that a decision to list would be found unlawful.

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<sup>8</sup> Paragraph 9, *ibid.*

Given the wide Ministerial discretion and lack of judicial review, it is also crucial that this power be exercised in an open and transparent manner in order to ensure due process, executive accountability and public confidence in the executive. To achieve this there should be public disclosure of all criteria, evidence and processes involved in its exercise.

In determining organisations for proscription, ASIO has acknowledged that it takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.<sup>9</sup>

We submit that the invocation of these undefined criteria and wide-reaching Ministerial discretion have in practice resulted in inconsistent application of the listing power. We refer particularly to a research note, *The Politics of Proscription in Australia*, published by The Parliamentary Library.<sup>10</sup> This research illustrates the arbitrary listing of organisations thus far. There has been listing of organisations that have no links to Australia, while other organisations that do have links with Australia have not been listed. For example, in the case of the listing and proscription of the Palestinian Islamic Jihad, ASIO expressly acknowledged that there were no financial or other links to Australia and that the

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<sup>9</sup> PJAAD, *Review of the listing of six terrorist organisations* (2005) at 2.3.

<sup>10</sup> Nigel Brew, *The Politics of Proscription in Australia*, Parliamentary Library Research Note No 63/2003-04 (2004).

organisation's proscription and listing was largely prompted by its proscription in other countries.<sup>11</sup>

While the purported legislative aim of this power is the maintenance of Australian national security, it is evident that this aim is not used to inform the exercise of the power. In practice, the executive does not require that organisations actually pose a threat to Australian national security before they are listed. We submit that, by listing organisations with no demonstrable link to Australia, the executive is exceeding the intended scope of the legislation.

In previous listings, while the organisations links to Australia and the threat posed to Australia have not been emphasized, consideration such as the proscription by 'like minded countries' have been strongly relied upon. Such foreign policy considerations have no place in the application of the domestic criminal law in a democracy. Likewise, the relevance of concepts such as the 'ideology' of an organisation, 'engagement in terrorism' and 'Australia's interests' remains undefined in inquiries to date. The weight given to such concepts and the process of applying the aforementioned criteria and the supporting information relied on remains secret.

In our submission, the information relied on by ASIO in recommending that an organisation be listed as a terrorist organisation should be publicly available. Furthermore, the credibility of this evidence should be publicly demonstrable. At present, there is no publicly available means of testing the reliability of the supporting information obtained and relied on by ASIO. In addition, the specific criteria applied by the Attorney-General in deciding whether or not to list an organisation should be publicly known. We further submit that the supporting information and process of applying the criteria to that information should be publicly available in each individual case where this power is exercised.

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<sup>11</sup> PIJ Report [3.15]

The Federation is concerned that the broad criteria for listing organisations, the lack of judicial review and the lack of transparency combine to create a massive excess of executive power. By giving the Attorney-General a very broad decision-making power and failing to provide for judicial review or transparent processes, the legislative regime gives rise to the possibility that the power to specify organisations may be misused or abused for political ends.

We now address the specific case made by the Attorney General for the proscription of the PKK.

## **GROUNDS FOR LISTING THE PKK**

The publicly available case for listing consists of the Attorney General's one page media statement and a three-page security assessment are said to be drawn from publicly available information.<sup>12</sup> However, the information is unreferenced and is comprised of unverified intelligence. The security assessment does not explicitly outline the criteria relied on to support its determination and hence fails to provide a transparent and accountable process. With reference to the criteria outlined previously, we consider the applicability of these grounds to the security assessment.

### 'Terrorist organisation' or liberation struggle?

The case for proscription is made ostensibly on the grounds that the PKK fits the statutory criteria of a 'terrorist organisation.' Critically, the case for proscribing the PKK, presents no evidence of PKK organisation in Australia, or of any threat of violence in Australia posed by the PKK.

Banning organisations like the PKK, who do not pose a direct threat to Australia's domestic national security, reflects a highly politicised process of criminalising

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<sup>12</sup> Ruddock, P, *PKK listed as terrorist organisation*, News Release, 15<sup>th</sup> December 2005.  
[http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2005\\_Fourth\\_Quarter\\_15\\_December\\_2005\\_-\\_PKK\\_listed\\_as\\_terrorist\\_organisation\\_-\\_2382005](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Fourth_Quarter_15_December_2005_-_PKK_listed_as_terrorist_organisation_-_2382005)



domestic support for the political opponents of Australia's allies. While the PKK is designated as 'terrorist' by Turkey and many western states, this is by far a universal truth. The PKK is also considered 'a political party committed to the recognition and establishment of Kurdish identity and the rights of Kurdish people'.<sup>13</sup> The Kurdish community is denied the most basic human rights in Turkey, including cultural rights such as using the Kurdish language which are deemed "separatist" and consequently "terrorist". Displacement of Kurdish communities and military onslaughts causing massacres are considered part of the Turkish effort for the "denial and annihilation of the Kurds".<sup>14</sup>

We submit that the nature and extent of the Kurdish people's struggle for basic human rights and self determination is a relevant consideration for the Committee in its determination as to whether the PKK is a 'terrorist' organisation. We support the Committee's view that there are circumstances where not all armed conflict should be characterised as terrorist.<sup>15</sup> We attach for the committee's consideration an overview of the findings of respected human rights organisations in relation to the situation in South East Turkey, such as Amnesty, Human Rights Watch, the Kurdish Human Rights Project and The US State Department. (Appendix A). In summary we draw the Committee's attention to:

- the continued suppression of Kurdish language and cultural identity
- the critical problem of internally displaced peoples who are not permitted to return to their villages
- systemic practices of police beatings, torture and extra judicial killings which continue in spite of the liberalisation programs introduced by the Turkish government in its bid for EU accession;
- the banning of political parties, human rights organisations and other political opponents especially those who are pro-Kurdish

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<sup>13</sup> Kurdistan Workers' Party & Ors, R (on the application of) v Secretary of State for the Home Department [2002] EWHC 644 (Admin) (17th April, 2002) United Kingdom at para 40.

<sup>14</sup> Statewatch News Online, EU adds the PKK to list of Terrorist Organisations, May 2002 [www.statewatch.org/news/2002/may/04pkk.htm](http://www.statewatch.org/news/2002/may/04pkk.htm)

<sup>15</sup> PJAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004* (2004) 23.

- the repression of free speech, pro-Kurdish views and democracy movements as 'sympathisers' of the PKK

Moreover, the goals and predicament of the PKK demands comparison with the historic situation of the African National Congress, the PLO or Freltin who similarly responded to a brutal military occupation with armed resistance. It is worth noting that these 'liberation movements' with militant wings have been elevated to political party status over the course of recent history. Again this demonstrates the dangers in reducing complex political situations to the designation of 'terrorist organisation'.

The PKK is a multifaceted secular independence movement with its key political objectives pursued through democratic platforms as well as maintaining armed insurgency.<sup>16</sup> We urge the Committee to consider the literature and other evidence which supports that the PKK are engaged in armed conflict against an undemocratic and oppressive regime, in particular, in the exercise of the internationally recognised right to the self-determination of peoples. We draw the committee's attention to the distinction stressed by the European Parliament Committee on Citizens' Freedoms and Rights between acts of terrorism and "acts of resistance in third countries against state structures which themselves employ terrorist methods" and the "Statement" attached to the EU Council's Framework Decision on combating terrorism which recognised the legitimacy of liberation struggles.<sup>17</sup>

We submit that consideration is given to the relationship of the listing of the PKK to Australian law pertaining to international armed conflict. The *Crimes (Foreign*

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<sup>16</sup> For a discussion of the PKK's goals for democracy and peace, see in particular section d of: Urban and Regional Socio-Economic Problems, Democratisation in Turkey and the Kurdish Question, *Suggestions for and Expectations from the Turkey-EU Negotiating Process* - 1 September 2005, Diyarbakir, [http://www.kongra-gel.com/Dossier/Olli.Rehn/dossier\\_index.html](http://www.kongra-gel.com/Dossier/Olli.Rehn/dossier_index.html)

<sup>17</sup> As cited in Statewatch News Online, *EU adds the PKK to list of Terrorist Organisations*, May 2002 [www.statewatch.org/news/2002/may/04pkk.htm](http://www.statewatch.org/news/2002/may/04pkk.htm)

*Incursions and Recruitment) Act 1978* only applies to prohibit Australians from engaging in armed conflict overseas, except in the defence of Australia.

The goal for Kurdish rights maintains strong support in countries where the PKK is banned, such as US, UK, Canada, and now Australia. Proscription will criminalise support for the *political objectives* of the PKK, that is, support for the liberation of the Kurdish people. Proscription will criminalise support for the advancement of Kurdish rights in Turkey and will make a range of political activity liable to state surveillance and potential prosecution.

We recommend that the committee to give due consideration to the symbolic and political significance of the PKK to Kurdish liberation aspirations. The following extract from the affidavit of Estella Schmidt,<sup>18</sup> (*in the Matter of the Terrorism Act 2000: Application for a declaration of incompatibility under the Human Rights Act, UK*) demonstrates the relationship of the PKK to the political aspiration of Kurds.

“There is no doubt that the expression of Kurdish identity and nationhood that the political movement, including finally, the armed rebellion initiated by Abdullah Ocalan constituted the last opportunity for the defeated Kurds to survive as a people. Despite the recognition in the United Nations' Charter and the United Nations' Declaration of Human Rights that all peoples have a right to self-determination, no such recognition to these central principles was ever acknowledged by the Turkish government, or indeed, any government under whose control Kurds were compelled to live. It is clear that the Kurds were living, at the time of the birth of the PKK, at best, a slave-like existence and that the Kurdish people would die out as a people; the generation that still spoke Kurdish would have died out and/or left the area and in many ways the uprising led by Abdullah Ocalan was the first significant attempt in the twentieth century to give back confidence to the Kurds to assert themselves as a people. The UN

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<sup>18</sup> Schmidt is the co-ordinator of two Kurdish campaigning groups in the United Kingdom, edits a magazine called "Kurdish Report" and provides administrative advice and support for the Kurdistan National Congress which maintains an office in London.

Declaration of Human Rights of course, allows for the potential of, as a last resort against a tyrannical oppressor, armed struggle could be resorted to.

It would be impossible to approve the emergence of the concepts of identity and self-determination for the Kurds without supporting the role of the PKK in that emergence and it is impossible now to contemplate the continuing political activity in Europe and elsewhere to achieve those objectives without the active involvement of the PKK. There is no doubt that it is for example, the PKK that has driven the political initiatives including those that have led, for instance, to the setting up of the Kurdistan National Congress. Similarly, the ERNQ (used to be the Kurdistan National Liberation Front) (now the YKB), the mass organisation of Kurdish community groups (e.g. lawyers' groups, teachers, businessmen, etc.) has had equally, political dynamism injected by the PKK. PKK activities, during the twentieth century and now into the twenty-first century, have been throughout, focused upon a dynamic political initiative. In every way, its concept has been to move the Kurdish people forward. The PKK has always encouraged and continues to encourage political activity throughout the world; thus the birth or rebirth of intense Kurdish political activity world wide has been to a large extent inspired by and driven by the aims and objectives of the PKK."

*"[t]o banish the PKK and those who support it from participation in democratic discussion of the political future of Turkey and the Turkish people is to remove not merely the main nationalistic expression of Kurdish identity of the forty million Kurds world wide, but to make a mockery of any intelligent prospect of democratic debate and permanent peace in Turkey and elsewhere.(emphasis added)"<sup>19</sup>*

We also recommend that the committee to give due consideration to contemporary politics in Turkey and the debate over a solution to the Kurdish question, the pressure from local and international human rights organisations for Turkey to engage with the PKK for a peaceful solution, and the critical role of the PKK itself in the negotiations for peace.

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<sup>19</sup> Affidavit of Estella Schmidt, 2001, in the Matter of the Terrorism Act 2000: Application for a declaration of incompatibility under the Human Rights Act, UK.

The security assessment acknowledges that:

“The organisation has now ostensibly abandoned the goal of a separate Kurdish state and instead seeks to promote and advance the rights of Kurds living in Turkey, specifically the right to maintain ethnic identity”<sup>20</sup>

The objective of advancing Kurdish rights is likely to be shared and supported by a large number of Australians. Remembering that no link to any terrorist act is required, virtually any kind of contact or support in relation to these objectives leaves Australians open to prosecution. Critically, the case for listing makes no claim of evidence of PKK organisation or activity in Australia. We are gravely concerned that there is a manifest risk that listing of the PKK will criminalise a broad range of legitimate political opinion and activity. This is explored in more detail in the section on the impact of proscription.

The ‘evidence’ for proscription appears to be based entirely on foreign policy considerations, rather than any legitimate domestic criminal law concerns.

Listing of the PKK was made one week after the visit of the Turkish Prime Minister Erdogan on the 7<sup>th</sup> December. The stated purpose of the visit was reported as discussion of counter terrorism, trade and defence.<sup>21</sup> Criticism has been leveled at the UK that proscription of the PKK was only achieved after persistent pressure from the Turkish government rather than domestic security considerations.<sup>22</sup> We submit that it is incumbent on the government to make publicly available the nature of the trade and defence relationships with Turkey and the precise nature of ‘Australia’s interests abroad’ allegedly furthered by proscription of the PKK.

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<sup>20</sup> Ruddock, P, *PKK listed as terrorist organisation*, News Release, 15<sup>th</sup> December 2005.

<sup>21</sup> AAP General News (Australia) “Turkish PM begins Aust tour”, 7<sup>th</sup> December 2005.

<sup>22</sup> *A Permanent State of Terror?*, Campaign Against Criminalising Communities and the Index on Censorship, London, October 2003

The Attorney General in his press release concluded that;

“Listing this group as a terrorist organisation will deter Australians from becoming involved in their activities. The Government will not tolerate involvement with groups or activities that threaten the safety and security of Australia, and our law enforcement agencies will continue to pursue relentlessly those who commit terrorist offences.”<sup>23</sup>

Contradictorily, the Attorney General invokes Australia’s security to justify listing yet no such claim is made in the security assessment to this effect, let alone explaining how the PKK threatens the security of Australia.

Further, the violent acts attributed to the PKK are not accompanied by an explanation as to the relevance of these crimes to Australian criminal law. No attempt is made to connect the listing of the PKK to the prosecution of crimes such as murder, bombing and kidnapping which are normally only offences when committed in Australia. The case for proscription makes no justification for why these acts of violence in Turkey should be targeted by Australian law. In the absence of any connection or justification, these violent crimes should not be grounds for proscription.

### Unverifiable and Contested Intelligence

The case for proscription relies predominantly on intelligence that the PKK has claimed or has had attributed to it a series of bombings and other attacks on Turkish military and on civilians in 2004 and 2005. While the PKK have certainly carried out bombings and other violent attacks, this of itself does not justify proscription of the organisation. Government material does not acknowledge the political context of the PKK’s armed insurgency in a civil war with Turkey, nor

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<sup>23</sup> Ruddock, P, *PKK listed as terrorist organisation*, News Release, 15<sup>th</sup> December 2005.

Turkey's appalling human rights record, nor its role in the recommencement of hostilities. Critically, the Security assessment ignores the documented role of Turkish security forces in initiating and escalating violence and the frustration of the PKK's ceasefires. In August 2005 the PKK called a unilateral ceasefire in response to Erdogan's conciliatory remarks which the PKK stated had "created a positive atmosphere for a resolution". "We are not against the state," the PKK said in a statement. "We are of the opinion of democratising the state and resolving the question together with the democratic state within the framework of Turkey's unity." In its statement the PKK was reported as rescinding the ceasefire only in "self-defence".<sup>24</sup>

There are credible reports that the PKK's five year cease fire was called off due to sustained annihilation operations against the PKK by the Turkish authorities.<sup>25</sup> This is consistent with media reports that;

"Past unilateral ceasefires have been (similarly) dismissed, with Turkey saying it would maintain its military drive against the "terrorists" until they surrendered or were killed"<sup>26</sup>.

The role of Turkish security forces in frustrating ceasefires requires considered analysis if the PKK are to be listed. The implication of the Turkish military in present hostilities must be given due consideration in the Committee's determination. Indeed, nations and non government organisations involved in considering Turkey's accession to the EU process have engaged in sustained

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<sup>24</sup> Smith, H, [The Guardian](http://www.guardian.co.uk/international/story/0,,1552842,00.html), PKK declares ceasefire after Erdogan offers olive branch in Athens, Saturday August 20, 2005, <http://www.guardian.co.uk/international/story/0,,1552842,00.html>. For a discussion of the PKK's stance of self defence see 11 Ozgur Gundem, Kongra-Gel News Bulletin Interview with Murat Karayilan, President of the Executive Council of the Democratic Confederalism of Kurdistan (KKK) October 2005, <http://www.kongragel.com/index.php?option=content&task=view&id=290&Itemid=>

<sup>25</sup> BBC News, "Country profile: Turkey"  
[http://news.bbc.co.uk/1/hi/world/europe/country\\_profiles/1022222.stm](http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1022222.stm)

<sup>26</sup> Smith, H, [The Guardian](http://www.guardian.co.uk/international/story/0,,1552842,00.html), PKK declares ceasefire after Erdogan offers olive branch in Athens, Saturday August 20, 2005, <http://www.guardian.co.uk/international/story/0,,1552842,00.html>. See also Chomsky, "Terror and counter terror" speech given at Diyarbakir, reproduced in, *A Permanent State of Terror?*, Campaign Against Criminalising Communities and the Index on Censorship, London, October 2003.

debate about the urgency of the Turkish government in reigning in shadowy military forces as a requirement for peace and democracy. Authentication of the veracity or credibility of information drawn on for the security assessment is highly desirable. We submit that intelligence supplied by Turkey must be treated with the utmost caution and that consideration be given to the complexities of the conflict.

We submit that official investigations into the role of Turkish security forces in orchestrating recent attacks attributed to the PKK require consideration. For example, evidence has emerged that the Turkish paramilitary police intelligence service, JIT, were involved in the November 9 2005 bombing of a bookshop in the Kurdish town of Şemdinli, killing one man. The bombing however was attributed to the PKK. After villages caught two members of the JIT and an ex PKK guerilla turned informer red handed, Turkey undertook to commence a criminal investigation.<sup>27</sup> Amnesty reports that while ‘the prosecutor carried out a scene-of-crime investigation, the assembled crowd was fired upon from a car, resulting in the death of one civilian and injury of others. The prosecutor’s crime-scene investigation was postponed. A gendarmerie special sergeant has been detained on charges of disproportionate use of force resulting in death.’<sup>28</sup>

In calling for an independent commission of inquiry, Amnesty argue that investigation is required of the following issues, amongst others:

“(t)he questions raised in the report of a preliminary investigative mission into the 9 November incidents undertaken by eight non-governmental organizations (including Human Rights Association, Mazlum Der, trade union branches, local professional chambers and others), including the suggestion that forensic

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<sup>27</sup> Birch, N, Bombing puts Turkey's EU credentials to the test, [The Guardian](http://www.guardian.co.uk/eu/story/0,,1651325,00.html), Saturday November 26, 2005 accessed from <http://www.guardian.co.uk/eu/story/0,,1651325,00.html>

<sup>28</sup> Amnesty International, ‘Public Statement - Bombing in Semdinli: How high up does it go?’ AI Index: EUR 44/033/2005 (Public) News Service No: 313 18 November 2005, <http://web.amnesty.org/library/Index/ENGEUR440332005?open&of=ENG-TUR>



evidence may indicate a link with the earlier bombing in Semdinli on 1 November 2005 which resulted in multiple injuries of civilians and damage to property;

The precise chain of command and level of involvement in the 9 November incidents in Semdinli of gendarmerie and military personnel at senior levels, and the possibility that the incidents of 9 November were part of a wider conspiracy or policy;<sup>29</sup>

## **THE IMPACT OF LISTING THE PKK**

The security assessment fails to provide an analysis of the nature of the relationship of Kurdish people or Kurdish organisations in Australia to the political objectives of the PKK. The failure of the case against the PKK to address the devastating impact of proscription on communities in Australia presents a dangerous omission. We note that no information program for community groups who may be potentially affected by the listings was initiated despite Recommendation One of the Committee's March 2005 Report.

### Terrorist Organisation Offences

The *Criminal Code* provides for a number of offences relating to terrorist organisations. These offences arise where an organisation has been listed, or where an organisation fits the definition of a terrorist organisation.

The offences which follow are that of

- directing the activities of a terrorist organisation;<sup>30</sup>
- membership of a terrorist organisation;<sup>31</sup>
- recruiting for a terrorist organisation;<sup>32</sup>
- giving training to or receiving training from a terrorist organisation;<sup>33</sup>

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<sup>29</sup> Ibid

<sup>30</sup> Paragraph 102.2, Schedule 1, *Criminal Code Act 1995 (Cth)*

<sup>31</sup> Paragraph 102.3, *ibid*

<sup>32</sup> Paragraph 102.4, *ibid*

- getting funds to or from a terrorist organisation;<sup>34</sup>
- providing support to a terrorist organisation.<sup>35</sup>
- associating with members of a terrorist organisation<sup>36</sup>

#### Nexus Between the Offence and a Terrorist Act

The terrorist organisation offences do not require a nexus between the offence and an actual act of politically, religiously or ideologically motivated violence. The above offences may arise where no actual terrorist act has taken place and possibly was not even planned. The offences themselves also do not require a connection between the offence and an act of terrorism. For the offence of receiving training from a terrorist organisation, it is not required that the training received be directly linked to a terrorist act. Therefore, it may be that the training received pertains to a perfectly innocent purpose, and yet the training recipient may still be liable to prosecution. Where the aim of this legislation is to deter and to punish acts of terrorism, we submit that prosecuting individuals who are only tenuously linked to acts of violence, is beyond the scope of this legislative purpose.

#### Lack of Specificity

The Federation is also concerned that these offences lack specificity and seem to have been enacted without consideration of the possible consequences that may arise. For example, in the offence relating to getting funds to or from a terrorist organisation an exception has been created to allow lawyers to receive money for the purposes of providing legal representation. There is not further exception, however, to cover other service providers. The legislation also does not require a link between the funds provided or received and an actual terrorist act. The funds could therefore relate to all manner of things, including ordinary and perfectly innocent goods and services provided and received. This has the

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<sup>33</sup> Paragraph 102.5, *ibid*

<sup>34</sup> Paragraph 102.6, *ibid*

<sup>35</sup> Paragraph 102.7, *ibid*

<sup>36</sup> Paragraph 102.8, *ibid*

potential to expose an array of people to prosecution even where these individuals are not connected to any terrorist act. This example typifies the way the above offences may be applied to individuals

### Excessive Penalties

A further excess are the sentences specified in relation to the above offences. All of these offences attract very serious penalties, ranging from a maximum of 10 years imprisonment for membership to 25 years imprisonment for all of the other offences where committed with actual knowledge. The severity of the penalties is particularly worrying considering the breadth of these offences. For example, the offence of providing or receiving training does not require that the training relate in any way to a terrorist act. That being the case, it is possible for a person to train a supposed 'terrorist organisation' in anything from first aid to accounting practices and receive a term of imprisonment of 25 years for so doing. In our view the penalties that flow from these offences are overwhelmingly excessive given the breadth of the offences and the absence of a requirement that there be a nexus between the offences and actual terrorist violence.

### Terrorist Organisation Offences and the PKK

The terrorist organisation offences criminalise non violent activity such as communication, liaison and international solidarity with the PKK, it's affiliates and for pro-Kurdish democracy organisations associated with or imputed to be associated with the PKK. Turkey continues to persecute individuals and organisations with a pro-Kurdish identity as PKK members or supporters. As discussed, the PKK comprises political movements concerned with democratic participation in civil society as well as guerilla affiliations. The terrorist organisation offences do not distinguish between these differing objectives. The Federation is deeply concerned that the criminalisation of the PKK in Australia will operate to extend Kurdish migrants and refugees experiences of repression and fear.

Statewatch, a UK non government organisation, provides this analysis of the impact of proscription on groups involved in liberation struggles:

The complex situations in the Basque country, Colombia, India, Iran, Palestine, Sri Lanka, The Philippines, Turkey - each with its own history and context - have all been lumped together under the banner of "international terrorism" and subjected to the same sanctions as Osama bin Laden and Qaida. This is devastating for these movements, criminalising not only the proscribed/designated "terrorist" groups and named individuals, but their members (and suspected members), supporters, associates and their family members and so on. The criminalisation of "passive support" goes as far as to criminalise all solidarity with any of the groups named, whatever the basis and motivation for that solidarity. Incredibly, long established networks like the Palestine Solidarity Campaign and Columbia Solidarity Campaign now find themselves on the wrong side of the law. In European countries that have large resident populations associated with these movements - for example the Kurds in the UK and Germany and the Iranians in France - we are witnessing the criminalisation of entire communities.<sup>37</sup>

We alert the committee to the deleterious impact of proscription on Kurds in the UK and in particular we draw the committee's attention to the report of the Campaign Against Criminalising Communities to the Submission to the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001 (ATCSA 2001)<sup>38</sup>.

The report documents in detail charges under the UK Terrorism Act in relation to the proscription of the PKK, including charges against Kurdish activists for attending demonstrations and collecting money for Kurdish language rights protests. The charges were ultimately dismissed by the Courts. We urge the Committee to consider the similarities in the UK proscription regime to the Australian laws and to take into account the impacts in this jurisdiction.

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<sup>37</sup> Statewatch Analysis, *Terrorising the Rule of Law: the policy and practice of proscription*, <http://www.statewatch.org/terrorlists/terrorlists.html>

<sup>38</sup> [http://www.campacc.org.uk/ATCSA\\_consult-final.pdf](http://www.campacc.org.uk/ATCSA_consult-final.pdf)

In Australia, the offences of 'association' and 'membership' will particularly suppress freedom of political affiliation or potentially even passive acts of pro-Kurdish identity.

### Association and membership

Concepts such as 'membership' and 'informal' membership are undefined in the legislation and are vague concepts. Given the PKK is multi-faceted political, military and social organisation, and Turkey has imputed pro-Kurdish expression to comprise membership or support of the PKK, the Australian government must make explicit what 'membership' means.

It is an offence to associate (which means to meet or to communicate) with a person who is a member, promoter or director of a banned terrorist organisation, if there is knowledge that they are involved with a terrorist organisation, and by associating with them there is intention to provide support for the continued existence or expansion of the organisation. The Federation remains concerned that association offences will reproduce a de facto endorsement of the suppression of the Kurdish people by criminalising the right to political association, enshrined in the International Convention for Civil and Political Rights, of which Australia is a signatory.

### Financing

Raising money for charitable or for non military purposes fall within this offence. The PKK is also already banned under *Charter of the United Nations 1945* which makes it a serious offence to deal with the assets of the PKK, to finance the PKK, or otherwise to make assets available to the PKK. The case for proscription under the Criminal Code however does not address how the UN regime currently operates in Australia, nor why listing under the Criminal Code is a necessary extension.

### 'Supporting' the PKK

We provide an illustration of the broad and vague import of the 'support' offence. The PKK flag has become a de-facto national symbol for many in the Kurdish community in Australia (in the absence of any other widely recognised symbol). Could any person attending an event featuring the flag (eg. on the wall) be prosecuted for 'supporting a terrorist organisation'? Providing support is undefined in the Act. Given the broad definition of terrorist act (a terrorist act need not be violent) writing an article or speaking in support of Kurdish self determination could be construed as inviting support for the PKK. Would attending a demonstration in support of a fair trial for Ocalan, the jailed leader of the PKK, be construed as providing support? Would solidarity work with a human rights organisation imputed by Turkey to be PKK sympathizers attract the offence? Would attending a delegation which met with the PKK on several occasions urging them to call a ceasefire attract the association offence? These absurd and profoundly anti-democratic results would appear to be permissible under the legislation. Whilst in practice such prosecutions may not be pursued, it reinforces that such discretionary power should not be available to authorities. Proscribing an organisation on a strict liability basis is a simplistic and dangerous approach.

Proscribing the PKK denies the critical role the PKK has in a peaceful resolution of conflict. Indeed, the Turkish Prime Minister, Erdogan in the quest for accession to the EU has publicly stated a commitment to 'more democracy' in resolving the Kurdish question in a first ever recognition of the existence of the Kurdish question.<sup>39</sup> Pro-Kurdish political parties in Turkey as well as international NGO's , and Governments engage with dialogue with the PKK on issues such as the resolution of conflict, the compilation of information dossiers or for the support of jailed PKK leader Abdullah Ocalan, who is the subject of a sustained popular international campaign for a fair trial.

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<sup>39</sup> Smith, H, "PKK declares ceasefire after Erdogan offers olive branch in Athens", [The Guardian](http://www.guardian.co.uk/international/story/0,,1552842,00.html), Saturday August 20, 2005, <http://www.guardian.co.uk/international/story/0,,1552842,00.html>.

Indeed Norway recently declared that it does not recognize the EU listing of the PKK as terrorist as it would conflict with Norway's role as a facilitator for peace in the region. In particular the difficulty for opportunities for contact with proscribed groups and Norway's commitment to international peace and security was cited as the key reason. Critically, Norway continues to 'condemn all forms of terrorism' while asserting that 'the international legal obligations that form the basis for Norway's efforts to combat international terrorism will remain the same',<sup>40</sup>Norway's leadership in refusing to recognise the PKK as terrorist should serve as a positive example of a governmental approach to a democratic solution to the Kurdish question and conflict in the region.

Proscription severely compromises the right of the Kurdish diaspora to maintain a political and public Kurdish identity with a stake in influencing strategies for democracy in Turkey, activity that would otherwise be lawful.

Writing on the relationship of the Kurdish diaspora to the Kurdish question the Director of the Kurdish Human Rights Project wrote:

"Perhaps the most important factor in changing the parameters within which Kurdish issues are conceived has been the immense growth of the Kurdish diaspora. Severe repression, violent conflict and forced displacement have led many thousands of Kurds to flee their homes and settle particularly in Europe, but also in the United States and Australia.

Kurds make up one of the largest and most prominent diasporas in the Western world, and their experiences in exile vary a great deal. On the whole, Kurds retain abiding links with their native countries, and many continue to be animated by a desire to see the resolution of the conflict in the Kurdish regions and the reconstruction of their homelands. The diaspora has achieved marked success in rejuvenating and sustaining Kurdish culture and learning, as well as in putting the Kurdish question on the map in Europe.

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<sup>40</sup> Turkish Daily News, Norway says it doesn't recognize terrorist organizations list of EU, 16 January 2006 <http://www.turkishdailynews.com.tr/article.php?enewsid=33215>

What has become increasingly apparent, however, is that Kurds in the diaspora lack effective input into policy making. The scale of suffering which Kurds endure at home, and the proximity of the Kurdish regions to Europe, have meant that Kurds make up a significant proportion of immigrants and asylum seekers in Europe. However, upon arrival, Kurds face considerable hurdles. Decision-making on Kurdish asylum claims is poor and, like most asylum seekers, Kurds endure social exclusion, poverty and discrimination. Legal immigration routes to Europe are severely restricted. Beyond this, Kurds suffer from the discriminatory inferences from counter-terrorism measures operative throughout the EU proscribing a number of organisations, including Kurdish groups. Kurdish interests should be represented in decision making in these areas.”<sup>41</sup>

We call on the Committee to make explicit how the listing of the PKK will impact on Australians.

### The Impact of Listing the PKK on Refugees

Criminalisation of the PKK will affect the status of refugees and asylum applicants. Prior to the listing of the PKK as terrorist, membership or imputed membership of the PKK has been found to constitute grounds for refugee status in Australia. Decisions of Australia’s Refugee Review Tribunal (RRT) acknowledge that ‘Kurds perceived to be publicly or politically asserting their Kurdish identity risk harm, and in some cases serious harm.’<sup>42</sup> Publicly proclaiming a pro-Kurdish position has been recognised by the RRT to be enough to impute membership of the PKK in the eyes of the Turkish state.

It is important to note the breadth of political affiliations (or political affiliations perceived by the Turkish state) which have been considered to give rise to a well founded fear of persecution. For example, in one Tribunal decision the applicant

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<sup>41</sup> Yildiz, K, ‘The Role of NGOs in the Protection and Promotion of the Human Rights of the Kurds’, Paper delivered at the conference ‘*Kurdish Human Rights: Statelessness, Resistance and Survival*’ San Francisco, 4 September 2004 at p.20

<sup>42</sup> N05/50976 [2005] Refugee Review Tribunal (26 July 2005)



was involved in TAYAD, a non violent support group for family and friends of those who had been jailed as PKK supporters or members. The applicant was subject to routine detentions without charge, beatings and intimidation by Turkish authorities.<sup>43</sup> Indeed the Turkish authorities have imputed a range of organisations from the democratic party DEHAP to other pro-Kurdish groupings as well as simply the expression of Kurdish identity or politics as pro-PKK, which has resulted in extra judicial police repressions as well as imprisonment for these people.

A declaration of membership of the PKK or a pro-Kurdish organisation will expose refugees who have been granted asylum to criminal prosecution for membership or a number of other serious offences related to a proscribed organisation. It is important to note that there is no consideration of the different contexts in which these organisations operate. The example above of TAYAD may attract such prosecution, despite recognition by Australian refugee status determination bodies that the Turkish state is persecuting these people. In addition such declarations may trigger excessive ASIO detention and questioning warrant powers, further exposing refugees to state harassment.

We wish to draw to the Committee's attention to the interaction of the proscription regime with the following provisions of the Refugee Convention and the Migration Act (Cth).

Firstly, refugee applicants who would otherwise be granted protection, may be subject to the exclusion provisions of the *UN Convention Relating to the Status of Refugees*, which allows for Australia to avoid its obligations under the Convention under the following very broad criteria.

Article 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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<sup>43</sup> Ibid

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.<sup>44</sup>

Proscription of the PKK would disproportionately affect asylum seekers in a manner in which they would not be under current provisions of the Refugee Convention. Current laws require an investigation of the circumstances behind an individual's past activities and assessment of whether there are 'serious reasons' to consider a person comes within the exclusion provisions of the Refugee Convention. Simple proscription of an organisation fails to take account of such complex circumstances and could place asylum seekers at risk of being unfairly denied refugee status and returned to a situation of danger.

Secondly, the Convention also provides for Article 33(2):

### 33 PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final

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<sup>44</sup> UN Convention Relating to the Status of Refugees 1951, Article 1(f)

judgment of a particularly serious crime, constitutes a danger to the community of that country.

Terrorism organisation offences attract serious penalties. As outlined previously, the lack of a nexus between the terrorist organisation offences and a terrorist act, together with their ambiguous character as 'crimes committed by association' make their reach expansive. We submit that the listing of the PKK exponentially increases discretionary criteria for the expulsion of refugees fleeing Turkish persecution.

Thirdly, mechanisms in the Migration Act give the Minister broad discretion to refuse or cancel a permanent visa on 'character grounds'.<sup>45</sup>

s.501 (6) For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct; the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia

or

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<sup>45</sup> Migration Act 1958 (Cth) s501

(iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the character test.

A refugee applicant already faces consideration of articles 1F and 33(2) in addition to good character requirements of the Migration Act s.501 before they can be granted a protection visa. We submit that one effect of the terrorist organisation characterisation of the PKK is that s.501 may come into operation more readily because of the way in which the terrorism organisation offences are primarily offences of association.

A member Community Legal Centre solicitor provided the Federation with the following case study:

“I acted for two Turkish Kurdish clients some years ago who were members of the PKK 'youth wing' for a short time but were involved in political not military activities. Both DIMIA and ASIO accepted this and the clients were granted refugee status. Had the PKK been proscribed, DIMIA or ASIO may not have clarified this issue, but simply refused the claims invoking the proscription provisions together with the character provisions of the Migration Act.”

During Erdogan’s visit to Australia, immediately preceding the Attorney General’s listing of the PKK, he was reported as urging the need for better intelligence exchanges between Turkey and Australia in the fight against terrorism. “We should not be keeping intelligence from each other if we would like to succeed,”

he said. "We have to trust each other."<sup>46</sup> We submit that the listing of the PKK raises serious concerns for refugees which remain unaddressed. Given that Australian refugee status determination authorities have found that Turkish authorities wrongly identify members of the PKK and find their assessment as to the level of risk they present to be skewed, *it is essential that any intelligence as to suspected PKK members be treated with the utmost caution*. Will Kurdish refugees who have been granted asylum on the basis of Turkey imputing their sympathy with the PKK be subject to surveillance and prosecution in Australia? Will the Australian government provide intelligence to Turkey on the pro-Kurdish political activity of Australians? How will this impact on the potential persecution of Kurds in Turkey? How will listing the PKK as a terrorist organisation impact on the granting of protection visas to Kurdish refugees who have fled persecution? We ask that the Committee provide consideration to these questions in making its determination.

## **Conclusion**

The proscription of the PKK raises serious issues for this Committee. Norway's disavowal of the European proscription regime raises critical and complex questions. If Australia wishes to involve itself in the resolution of the conflict in Turkey, then it is appropriate in an open democracy that this should be an explicit foreign policy determination. Alternative strategies in the region are urgently needed if this is in fact the goal of the listing, since outlawing the PKK will not put an end to long running conflict, and domestic criminal law should not be used to repress the opponents of a foreign ally where there is no evidence of a threat to Australian security.

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<sup>46</sup> Wilkinson, M, 'Turkish PM defends trial for mention of genocide; Little outrage when I was jailed, he says', Sydney Morning Herald, 10<sup>th</sup> December 2005

Australia's commitment to a diverse society and democratic ideals such as freedom of expression, freedom of political affiliation and ethnic identity are critical priorities both domestically and for international relations. The listing of the PKK materially contradicts and threatens these priorities.

## APPENDIX A

### **The Persecution of the Kurdish People – An Overview of Findings**

The civil war between the pro-Kurdish PKK and the Turkish security forces must be considered in the context of Turkey's historical and continued persecution of Kurds. Whilst the PKK are designated as 'terrorist' by Turkey and by Turkish allies who have proscribed the PKK, the PKK are also widely considered to be engaged in liberation struggle, resisting a repressive state and advocating Kurdish identity and rights.

In 2005, the director of the UK based Kurdish Human Rights Project (KHRP) stated:

“Since the foundation of the Turkish Republic in 1923, Turkey has not recognised the existence of a separate Kurdish ethnic community within its borders. Over 20 million Kurds presently live in Turkey, who for decades have been subjected to economic disadvantage and human rights violations which bear the hallmarks of systematic persecution intent on destroying Kurdish identity.”<sup>47</sup>

In response to the savage repression of Kurds by the military junta in 1980 the PKK launched an uprising in 1984. The east and south-east of Turkey saw 15 years of civil war in which over 30,000 people died, 3 500 villages destroyed and 3 million Kurds forcibly displaced by Turkish counter-insurgency campaigns seeking to root out support for the PKK.<sup>48</sup>

The KHRP wrote that:

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<sup>47</sup> Yildiz, K, 'The Role of NGOs in the Protection and Promotion of the Human Rights of the Kurds', Paper delivered at the conference '*Kurdish Human Rights: Statelessness, Resistance and Survival*' San Francisco, 4 September 2004

<sup>48</sup> Kurdish Human Rights Project, Fact-Finding Mission report 'Turkey's implementation of Pro-EU reforms', November 2004

In June 1999, following a large number of judgments against Turkey, the European Union Council of Ministers issued an unprecedented interim resolution criticising Turkey for “*repeated and serious*” human rights violations committed by state security forces against Kurds, and calling upon the Turkish authorities to take the necessary measures to prevent torture, destruction of property, illegal killings and disappearances.<sup>49</sup>

A 2003 KHRP fact finding mission concluded that systematic human rights abuses continue in the Kurdish region of Turkey despite the lifting of the state of emergency.<sup>50</sup> The European Commission’s October 2004 report on Turkey’s progress towards accession describes the perpetration of “numerous” cases of torture and ill-treatment, the “numerous provisions in different laws which can be interpreted to unduly restrict freedom of expression”, the prosecution of non-violent opinion, the judicial harassment of human rights defenders, the serious problem of violence against women, restrictions on the exercise of cultural rights, and the critical situation of the internally displaced.<sup>51</sup>

Indeed, Turkey’s continuing state terror remains a key factor in the continued stalling of the accession process to join the EU. Australia, has also acknowledged the ongoing persecution of Kurdish refugees granting asylum to those who fear persecution because of pro-Kurdish views or because they have been imputed by the Turkish authorities to be supporters of the PKK.

A brief overview of the general nature of ongoing human rights abuses is outlined.

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<sup>49</sup> Ibid

<sup>50</sup> Kurdish Human Rights Project, *In the Wake of the Lifting of the State of Emergency Rule: Report of a Fact-Finding Mission to Southeast Turkey*, 2003

<sup>51</sup> European Commission, ‘Communication from the Commission to the Council and the European Parliament: Recommendation of the European Commission on Turkey’s progress towards accession’, COM (2004) 656 final, Brussels, 6 October 2004,



## **Internal displacement**

The EU's October 2004 Commission Regular Report stated: "On the ground, the situation of internally displaced persons remains critical. A number of obstacles, including, village guard system and the absence of basic infrastructure, currently prevent displaced people from returning to their villages." Despite the liberalisation program promised by Turkey, in response to the pressure of the accession process to join the EU, to allow return to villages the KHRP reported in 2005 that return to the villages is a "risky" process and those who do so are viewed unsympathetically by the security forces.<sup>52</sup> Chomsky writes:

"...many of those driven from the countryside live in caves in the outer walls of the city and in its slums, still barred from return to their villages despite programmes that have been officially announced but not implemented. Human Rights Watch described this non-implementation as perhaps the most serious of the current human rights violations in Turkey."<sup>53</sup>

## **Suppression of Kurdish language and identity**

While the ban on speaking Kurdish was lifted in 1991, Kurdish language and cultural identity is still not recognized officially and formally.<sup>54</sup> While limited Kurdish broadcasting and private education in Kurdish has been allowed as part of the drive to join the EU, attempts to assert Kurdish "cultural rights" or pursue political self-determination bring a routinely harsh response.<sup>55</sup>

The 2005 US State Department report found:

" In 2004 Turkey's Constitution provides a single nationality designation for all Turks and does not recognize ethnic groups as national, racial or ethnic

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<sup>52</sup> Kurdish Human Rights Project, "Thirteen Bullets - Extra-judicial killings in Southeast Turkey", Fact-Finding Mission Report, March 2005 at p 16

<sup>53</sup> Chomsky, N, 'The People in Gravest Danger', *New Humanist*, March 01, 2003  
[http://www.newhumanist.org.uk/volume118issue1\\_more.php?id=155\\_0\\_5\\_0](http://www.newhumanist.org.uk/volume118issue1_more.php?id=155_0_5_0)

<sup>54</sup> Kurdish Human Rights Project, "Thirteen Bullets - Extra-judicial killings in Southeast Turkey", Fact-Finding Mission Report, March 2005 at p.17

<sup>55</sup> The Guardian, What's in a name? Too much in Turkey, Thursday January 25, 2001,  
<http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,428001,00.html>

minorities. Millions of the country's citizens identified themselves as Kurds and spoke Kurdish, but Kurds who publicly or politically asserted their Kurdish identity or publicly espoused using Kurdish in the public domain risk censure, harassment or prosecution.”<sup>56</sup>

### **Suppression of politics, torture and extra judicial killings**

The PKK and affiliated organisations have long been banned and membership or association has resulted in death through judicial and extra judicial killings (although now capital punishment is no longer a formal state punishment), or harsh prison sentences.

In January 2001;

“The Turkish authorities in Diyarbakir, near Batman, said they would charge 13 juveniles, including one nine-year-old, with "aiding and abetting" the PKK. The youths' "crime" was allegedly to shout pro-PKK slogans. Their families say they have been tortured while in detention. If found guilty, they face up to seven years in jail.”<sup>57</sup>

Harassment and prosecution of those imputed to be supporters of the PKK is outlined by the KHRP in their 2005 fact finding mission;

“Although DEHAP is now recognised as an official party it is still viewed by the authorities as the political wing of the PKK and the party members are not treated the same as any other party members. The President of DEHAP stated that notwithstanding his role as party President he is not relaxed in his position as he could be the subject of an extra judicial killing at any time. The police record membership of DEHAP. The Vice President explained that before he was elected in his role he had the permission of the State to sell books to teachers

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<sup>56</sup> U.S. Department of State 2005, 'National/Racial/Ethnic Minorities' in *Country Reports on Human Right Practices for 2004 – Turkey*, 28 February

<sup>57</sup> The Guardian, What's in a name? Too much in Turkey, Thursday January 25, 2001

and schools. After being elected the State withdrew the permission without any official reason being given. The Vice President told us that his son, a DEHAP member had been incarcerated in Mardin for the last 15 days. He had attended a funeral of a person who was not affiliated to DEHAP and shouted the phrase: "The dead are immortal". This is something that is frequently said at funerals and has no political meaning. The police were recording the funeral on video and arrested the Vice President's son for attempting to incite the crowd. An indictment is yet to be prepared in this matter as it has not come to Court."<sup>58</sup>

Torture and ill-treatment in police and gendarmerie custody continue to be a serious concern with cases of beatings, electric shock, stripping naked and death threats being reported.<sup>59</sup>

In an article by Human Rights Watch (HRW) on torture, it is reported that

"In the first months of 2004 the Human Rights Directorate of the Office of the Prime Minister recorded that it has received 50 complaints of torture and ill-treatment in police custody. The Turkish Human Rights Association reported 692 incidents of torture and ill-treatment by police in the first 6 months of 2004. During the first 8 months of 2004, 597 people applied to the Turkish Human Rights Foundation for medical attention for torture, ill-treatment as well as illness arising from prison conditions"<sup>60</sup>

The KHRP in 2005 found that:

"Many Kurdish people suspected of being involved in terrorist activities are taken into unofficial detention. No records are kept of such incidents and suspects are generally kept until the authorities have the information they require. After the information is obtained the suspect is detained for the requisite 24-hour period

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<sup>58</sup> Kurdish Human Rights Project, "Thirteen Bullets - Extra-judicial killings in Southeast Turkey", Fact-Finding Mission Report, March 2005

<sup>59</sup> Amnesty International Report 2005, <http://web.amnesty.org/report2005/tur-summary-eng>

<sup>60</sup> Kurdish Human Rights Project, "Thirteen Bullets - Extra-judicial killings in Southeast Turkey", Fact-Finding Mission Report, March 2005

and then taken straight to Court or imprisoned. The mission were told of a person who was detained unofficially after being suspected of involvement in the PKK. He was taken to a rural area and tortured both physically and psychologically. He was hooded and beaten, had a gun was fired close to his head and was subjected to electric shock treatment.”<sup>61</sup>

Extra judicial killings for those imputed as PKK supporters continue. This is documented by the KHRP in their 2005 report, “Thirteen Bullets - Extra-judicial killings in Southeast Turkey”, which outlines instances documented in late 2004.<sup>62</sup>

In Turkish society at large, the penal code restricts freedoms of speech and publication. Prosecutions of journalists, academics, publishers, human rights lawyers and activists who breach these regulations are commonplace. The KHRP argues that they are;

“(p)erceived as threats to the state because of their human rights work or Pro-Kurdish views, or Kurdish parliamentarians, who are frequently the subject of unfounded prosecutions.”<sup>63</sup>

Amnesty documents the frequent use of the penal code to prosecute a wide range of opinion, on the basis of the ‘denigration of Turkey’.<sup>64</sup> The high profile case of internationally renowned Turkish writer, Orhan Pamuk began on the 16<sup>th</sup> December. Pamuk was charged with the offence of insulting the Turkish state because for comments he made during an interview to a Swiss newspaper. In

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<sup>61</sup> Ibid

<sup>62</sup> See: <http://www.khrp.org/publish/p2005/05C.htm>

<sup>63</sup> Kurdish Human Rights Project ‘Freedom of expression at risk: writers on trial in Turkey’, *Trial Observation Report*, March 2005

<sup>64</sup> Amnesty International, *Public Statement - Turkey: Article 301 is a threat to freedom of expression and must be repealed now!* EUR 44/035/2005 (Public) □ News Service No: 324, □ 1 December 2005 <http://web.amnesty.org/library/Index/ENGEUR440352005?open&of=ENG-TUR>

the interview, Pamuk stated, “30,000 Kurds and a million Armenians were murdered. Hardly anyone dares mention it, so I do. And that’s why I’m hated”<sup>65</sup>

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<sup>65</sup> [The Guardian](#), ‘In praise of... Orhan Pamuk’, 16 December 2005