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Online Submission

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Submission – Review of the Listing of Hamas as a Terrorist Organisation

Thank you for the opportunity to make a submission. I am Challis Chair of International Law at The University of Sydney with expertise in international counter-terrorism law, humanitarian law, and human rights law. My relevant books include the *Research Handbook on International Law and Terrorism*, *Defining Terrorism in International Law*, and the *Oxford Guide to International Humanitarian Law*. I have advised governments, militaries and security services on counter-terrorism law, including in Israel, the US, UK and Palestine; advised the United Nations (including the Security Council's Counter-terrorism Executive Directorate, UN Office of Counter-terrorism, UN Office on Drugs and Crime, and UN High Commissioner for Human Rights); co-drafted the UN Model Law on Victims of Terrorism; acted as counsel in security cases before the UN (including five successful cases against Australia); and was described by the UN Special Tribunal for Lebanon as one of the world's leading counter-terrorism lawyers.

In summary, this submission makes these points:

1. Hamas 'in its entirety' likely meets the statutory criteria for listing as an 'organisation' involved in 'terrorists acts', because of the breadth of the definition of an 'organisation'. However, **it meets only some of the non-statutory criteria** for listing. It does not meet the most important criterion – a threat to Australia; it is not regarded as terrorist by most countries (which is not a decisive criterion anyway); and opportunities for Hamas to participate in peace negotiations must be considered in the light of the limited opportunity genuinely afforded them to do so by Israel [Section 1 and 1.1]

2. **The statutory criteria are too broad, blunt and one-dimensional** where a hybrid group like Hamas performs civilian and/or governmental functions. **Involvement in terrorism should not be the sole legal basis for listing.** The law should require a contextual assessment of whether listing is necessary and proportionate in all the circumstances, considering the threat to Australia, the relative importance of its terrorist activities, and the adverse impacts on other legitimate interests – including the plurality of the group's functions, the humanitarian needs and human rights of civilians under its control, and Australia's security and foreign policy interests. The non-statutory criteria should be revised and legislated to reflect such interests. [Section 1.2]

3. **The law should exclude the activities of armed forces in armed conflict**, which is already governed by international humanitarian law. This is the approach in six international counter-terrorism treaties to which Australia is a party, as well as in the European Union (and more narrowly in Canada and New Zealand). As a party to an armed conflict, Hamas could not be listed as a terrorist organisation for acts of violence committed as part of the armed conflict; war crimes law would apply [Section 1.2.3]

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4. Vesting the decision to list an organisation in a minister inappropriately carries risks of politicising decisions, arbitrariness, partisanship, and selectivity. It undermines public confidence that a law, with serious criminal consequences, will be applied impartially and objectively. **The decision to list should be made by a court.** [Section 1.3]

5. **Many of the offences related to terrorist organisations are excessively broad**. When applied to a hybrid governmental actor like Hamas, they unjustifiably criminalise ordinary civilian, humanitarian, business and governance activities, which have no genuine or proximate link to the commission of terrorism. Such offences do not prevent terrorist acts, and do infringe on legitimate rights and interests of civilians. Hamas should not be listed until the offences are amended, to confine their scope to acts which proximately contribute to the commission of a terrorist act by the group [Sections 2–3]

6. Excessive offences may counter-productively **increase some risks of terrorism to Israel, Palestine, and Australia**, by impeding civilian law and order and other public goods and services by Gaza's civilian authorities, thus stoking instability. [Section 4]

7. The law's excessively punitive approach is not accompanied or balanced by adequate **measures to address the conditions conducive to terrorism in Palestine**, as Australia has committed to do under the UN Global Counter-terrorism Strategy. [Section 5]

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1 Criteria for Listing

Hamas 'in its entirety' would satisfy the statutory criteria for listing as a 'terrorist organisation' if the Minister is satisfied on reasonable grounds that is an 'organisation' involved in or advocating a 'terrorist act'.

1.1 'Organisation'

An 'organisation' is statutorily defined as either a registered body corporate (which Hamas is not) or an 'unincorporated body'. The Australian courts have interpreted the latter as:

> a body which, of itself, has no separate legal existence apart from its members. In other words, it consists of people, *a group or collection of people who come together for a particular shared aim or aims*, it might have one aim, it might have many, or purposes. It may have characteristics which suggest its existence; *it may have some sort of structure; there may be a leader or a director*; there may be other people who hold or assume other offices in the organisation.[1]

Other relevant factors identified by the courts include: whether there is a common fund for the purpose of the body; some method of including or excluding persons as members; a public or clandestine name; and formality as to meetings.[2] The courts have emphasised that:

> All or some of these characteristics may be present but whether some of them are or not, to constitute a body, *there must be more than a fluctuating or amorphous group of individuals. There must be some measure at least of stability of membership*.[3]

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[1] Trial judge jury direction quoted in *Benbrook v R* [2010] VSCA 281 at [40] (Maxwell P, Nettle and Weinberg JJA) and approved at [95].
[2] Ibid.
[3] Ibid.

An organisation is distinguished, for example, from a mere crowd.[4] It need not, however, have clear controls on or structures delineating members from non-members.[5] The focus of the 'organisation' criterion is whether there is an identifiable group with a common purpose, not the nature of that purpose or the significance of multiple purposes. The second step is whether the organisation is involved in terrorist acts.

1.1.1 Identifying What Constitutes the Hamas 'Organisation'

The initial question is whether the military and civilian 'wings' of Hamas are part of the same 'organisation' in the legal sense, or whether each group constitutes a separate 'organisation', particularly in light of any degree of independence exercised by its military wing.

In my view, on the publicly available evidence, the two groups are sufficiently connected to plausibly comprise a single 'organisation'.[6] The legal test for an 'organisation' is very wide and does not require total unity, integration or cohesion of its members. The various components of Hamas constitute a group of people who have come to together with the shared political aim of, inter alia, liberating Palestine from Israeli control and establishing a Palestinian state; it has a civilian and military leadership structure, in part manifest through participation in elections and control of Gazan governmental structures; and it has endured over time. It is not legally necessary that the organisation possesses a strict hierarchy in which the military wing is subordinate to the civilian wing or vice versa – views differ on this issue – or that some elements of the movement may pursue different or more limited purposes; or that some elements are public and others are clandestine. The different elements regard themselves as operating under the broad Hamas umbrella, however diffuse or centralised in certain respects.

The Minister need only be satisfied on reasonable grounds that there is an 'organisation'. Her Statement of Reasons relevantly identifies apparent factual linkages between the leadership of the two parts of the organisation, although this information is fairly limited.

I note, however, that the Minister's Statement of Reasons is weak in other respects at establishing the nature of the organisation. It relies at length on public statements made by Hamas political and military leaders about the unity of the organisation which may not necessarily reflect objective reality, but could have been made for political or propagandistic reasons, whether directed toward Palestinian or foreign audiences. Some of these statements are very dated (e.g. 2004). The Statement also provides scant information about the scale of Hamas funding or to which parts of the organisation it is directed and for what purposes.

The Statement further indicates the supposed size of the military Brigades, but this is extremely sketchy – 'several thousand to up to 30,000 fighters' – raising questions about whether the Minister really knows is the extent of the 'organisation' being listed. Further, the Statement provides no estimate at all of the size of the political/civilian side of Hamas, including whether this is believed to include the Gazan governmental apparatus controlled by Hamas. There are perhaps 50,000 civil servants in Gaza, with the government being a major contributor to employment and economic activity in a territory under strict blockade. This raises important legal and practical questions about what is the scope of the 'organisation' listed.

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[4] Ibid.

[5] *R v Abdirahman-Khalif* [2020] HCA 36 at paras 45-46.

[6] A previous Independent National Security Legislation Monitor, Bret Walker SC, in 2011-12 criticised the anomalous separation of the civilian and military wings of Hamas in the context of criminal listing, including where it was already treated as a single entity for the different purpose of sanctions.

1.1.2 De Facto Government in Gaza as Part of the Hamas 'Organisation'

Unlike many clandestine terrorist groups, since 2007 Hamas has been the de facto government of Gaza. It inherited and has adapted the governance structure of previously exercised by the Palestinian Authority under the Palestinian Basic Law, and there is still some coordination with the Fatah authorities in the West Bank. However, Hamas personnel head all Gazan ministries and many other leadership posts; Hamas appointed a new judiciary and police; it captured local municipalities; it gained an electoral majority in the Palestinian Legislative Council in 2006; and the Hamas Shura Council may act as a 'shadow government' coordinating with the formal government to ensure consistency of purpose.[7]

As such, it is strongly arguable that the whole of the de facto government apparatus in Gaza, being under the firm control of Hamas, is part of the banned Hamas 'organisation', notwithstanding that the de facto government may also claim a separate formal legal status under the Palestinian Basic Law. It would be highly artificial to attempt to separate those parts of the government which are not associated with Hamas from those that are. The existence of an 'organisation' also does not require that all persons connected with it share its purpose. This includes public servants who are not themselves Hamas 'party' members or activists as such.

The law to proscribe terrorist organisations was primarily designed to deal with groups whose main purpose is terrorism, and which are often clandestine in nature, particularly in the light of the post-9/11 Al Qaeda context. When the law bans the whole of a hybrid group which governs civilians and/or has many purposes other than the commission of terrorism, they may have excessive and unjustifiable impacts on other legitimate interests, as the following sections explain. I note that the LTTE in Sri Lanka was never listed as a terrorist organisation under the Criminal Code, in part due to its hybrid nature, its participation in armed conflict under the law of war, its non-terrorist governance functions, and the lack of a threat posed by it to Australia – all factors equally relevant to Hamas.

Further, to use an analogy, even where a de jure government of a country is engaged in, for example, international crimes such as genocide, crimes against humanity or war crimes, Australian law has never gone so far as to proscribe the whole foreign government – and thus expose all of its non-violent functions and personnel to criminalisation, solely because parts of the government are engaged in international crimes. Instead, the appropriate response has always been a combination of sanctions applied to the government, and individual criminal liability only for those persons who are actually involved in the commission of illegal violence.

1.1.3 Significance of Palestinian Statehood and Hamas as a Government

Neither unincorporated associations nor bodies corporate include a nation, its government or its population,[8] which accordingly cannot be terrorist organisations. The State of Palestine is recognised as a state by 139 countries, representing over 72% of all countries, and also recognised as a state by the United Nations and the International Criminal Court.

Hamas is the de facto government in that part of the State of Palestine known as the Gaza Strip since it took power there in 2007. The government arrangements are complex because of the administrative coordination between the Hamas authorities and the Fatah administration in the West Bank; and since Hamas' has an electoral majority in the currently suspended Palestinian Legislative Council, which is the parliament of the Palestinian Authority/State of Palestine, the

[7] Are Hovea, *The Public Services under Hamas in Gaza* (Peace Research Institute Oslo, Report 03-2010) 13-16.
[8] *Abdirahman-Khalif v R* [2019] SASCFC 133 at [22]-[23] (Kouras CJ).

formal governance entity for Palestinians in Gaza and the West Bank as a whole. Fatah not Hamas is recognised as the executive government (through an elected President, a Prime Minister and Cabinet) of the State of Palestine, despite Hamas' parliamentary mandate, although both actors claim to be the sole legitimate representative of the Palestinian people.

The Australian government does not recognise the State of Palestine or Hamas (or Fatah) as any kind of government there. The executive's view of the legal existence of a foreign state or government is not necessarily conclusive in Australian legal proceedings. However, it is very likely that the Australian courts would defer to the executive and find that neither Palestine is a state nor Hamas a government, even if, on the statehood question, Australia's view is a minority position that is out of step with international opinion. Hamas also does not claim that Gaza is a state distinct from Palestine. As such, there is no impediment on this basis to the listing of Hamas as an 'organisation'.

1.2 'Terrorist' Organisation

If it is factually correct that the various components of the Hamas movement operate as a single organisation, there is little doubt that Hamas, through some of its personnel, is involved in or advocates terrorist acts, according to the statutory criteria. In short, there is ample evidence that Hamas uses violence to compel Israel for a political purpose. In principle, necessary and and proportionate measures to prevent illegal violence against Israeli civilians are welcome. However, the statutory criteria are far too broad for a number of key reasons.

1.2.1 Listing All of a Hybrid Entity is Unnecessary and Disproportionate

Listing all of a hybrid organisation as terrorist supposedly aims to stringently discourage any involvement in such organisation, on the assumption that any participation in or support for it may somehow ultimately assist it to commit terrorism. There are certainly risks that certain kinds of civilian goods or services could be diverted to terrorist purposes.

However, listing all of a hybrid organisation can be excessive and adversely affect other legitimate interests. The legislation does not ask, for instance, whether the *primary or predominant function* of the organisation is the commission of terrorism; or whether it has other political, economic, social or civilian functions which should be weighed in an overall assessment; or whether substantial adverse consequences for civilians are a countervailing interest. In Gaza, many civilian governance and service functions for two million civilians are unrelated to Hamas' terrorist activities and have little or no capacity to contribute to them, except in an abstract, tenuous manner that does not warrant consequential criminal liability.

For example, Hamas providing medical treatment to civilians, repairing roads, or policing shop lifting have no proximate link to Hamas' commission of terrorism, and present no risks of diversion to terrorism. Such acts may or may not contribute to Hamas' political legitimacy as a good government, which in turn may strengthen it as an organisation, which in turn may enhance its capacity for violence. But this is an extremely tenuous chain of causation in criminal law context; and the civilian, non-terrorist activities of an organisation – which can involve protected human rights – should not be labelled as part of a 'terrorist organisation'.

Fair labelling matters in the criminal law. Australian law treats the commission of 'terrorism' – even a single act thereof – as the sole defining characteristic of how an 'organisation' should be legally classified. This is plainly a blunt, overbroad, and reductive approach which does not recognise the real-world political context of certain groups or consider countervailing interests. It prioritizes countering terrorism above all else, including the legitimate needs and human

rights of civilians living in areas governed by listed groups. Whole hybrid organisations should not be stigmatised as terrorist when that is only part of their function.

The Parliamentary Joint Committee on Intelligence and Security made these very points in its 2007 inquiry into the proscription of terrorist organisations, giving the example of the comparable hybrid group Hezbollah:

> *Where an organisation has a degree of legitimacy through popular support and has a wide ethnic or national constituency it is important that listing only be applied to the component that is directly responsible for acts of terrorist violence.* For example, Hizballah's stated aim of establishing a radical Shi'a Islamic theocracy in Lebanon remains one of its core ideological pillars. However, Hizballah has evolved into a more pragmatic socio-political movement; it participates in representative politics and has gained a degree of political legitimacy through the election of some of its members to the Lebanese Parliament. It is for this reason that Australia's listing is confined to the External Security Organisation (ESO). Australia has avoided listing Hizballah's social and political arms and has distinguished ESO from Islamic Resistance, the militia wing of Hizballah that operates inside Lebanon.[9] (emphasis added)

In that inquiry, the Australian Human Rights Commission also proposed that there should be a 'necessity and proportionality' test, to enable all relevant factors to be taken into account, and to minimise disproportionate infringements of human rights – including by excessively proscribing elements of an organisation which are not involved in terrorism.[10] Considerations such as these are neither part of the statutory criteria nor even of the non-statutory criteria.

1.2.2 Non-Statutory Criteria

The Minister, advised by ASIO, also considers non-statutory criteria when deciding which of the (many) groups that meet the statutory criteria should be listed. The Statement of Reasons for Hamas establishes the criteria of engagement in terrorism and links to other terrorist groups.

However, the evidence in relation to other criteria is very weak. The Statement of Reasons concedes that Hamas has no direct links to Australia and Hamas has not specifically **threatened Australia or Australian interests** – although the same Minister's Statement of Compatibility for Human Rights incoherently claims the opposite, without providing any evidence.[11] The PJCIS stated in its 2007 inquiry into proscription that '[t]he intention of the legislation [based on its Explanatory Memorandum and government statements] is to protect Australia's security interests'.[12] The PJCIS further emphasised 'that particular weight should be placed on the existence of known or suspected links to Australia, the nature of those links and the nature of the threats to Australian interests more generally'.[13] This particularly important basis therefore provides no grounds whatsoever to list Hamas.

[9] PJCIS, Inquiry into the Proscription of 'Terrorist Organisations' under the Australian Criminal Code (2007) para 4.12.
[10] Ibid, para 4.7.
[11] It claims without evidence that Hamas is 'a threat to the security of Australia and often seek[s] to harm Australians and our democratic institutions'. This suggests that a sloppy 'cut and paste' job has been done, drawn from previous compatibility statements for other groups, and hardly gives confidence that adequate care has been taken when taking the very serious step of listing a terrorist organisation.
[12] PJCIS Proscription Inquiry (2007) para 4.28 (citing Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1 new subsection 102.1(2)).
[13] Ibid para 4.29.

The further criterion or **proscription by the UN or like-minded groups** also provides little support to list Hamas. Hamas is not listed by the UN. It is not listed by any regional organisation, including the European Union (comprising 27 democracies). It is not listed by the overwhelming majority of states, including most democracies. The Statement of Reasons mentions only the UK, US and Canada as states which list it for criminal purposes, in which case Australia is part of a radical minority of Israel's allies. In addition, the PJCIS has previously stated that proscription by other countries not a 'decisive' factor,[14] and as such listing by a handful of states is of little significance.

The analysis of the final criterion of **engagement in peace/mediation processes** is also unhelpful. The Statement of Reasons refers mostly to negotiations with Fatah, not Israel, yet Hamas' violence is largely not directed at Fatah. The purpose of the criterion is to assess negotiation with the state against whom terrorism is directed. On that front, the Statement mentions ceasefire discussions. However, no mention at all is made of the contextual possibilities for meaningful peace negotiations with Israel. For example, Israel has illegally annexed Palestine's East Jerusalem, and has given no indication that it is willing to return it to Palestine. Likewise, Israel is intransigent on returning Israeli settlements which have colonised Palestinian land, leaving little room for Hamas to agree to enter into genuine negotiations.

I note that the Sheller Report recommended that the non-statutory criteria should be legislated, to increase transparency and public confidence in the application of the law.[15] This would help to reduce the highly politicised nature of executive decisions applying legal criteria, in a manner which is virtually conclusive on the merits in subsequent criminal prosecutions.

1.2.3 Armed Forces in Armed Conflict Should be Excluded

The predicate definition of terrorist act criminalises any participation in armed conflict by Hamas, even when it targets Israeli soldiers or military objectives in conformity with the law of war. In contrast, six international counter-terrorism treaties to which Australia is a party, including the Terrorist Bombings Convention 1997, exclude the activities of armed forces in armed conflict governed by international humanitarian law. So too does, for example, the European Union Directive 2017 on Combating Terrorism (applicable to 27 democracies). Such an exclusion has been repeatedly recommended by reviews of terrorism laws in Australia.[16]

International humanitarian law already regulates violence by parties to an armed conflict, including Hamas military forces, and criminalises attacks on civilians as war crimes attracting universal jurisdiction. According to the International Committee of the Red Cross, additionally criminalising war fighting by armed groups as 'terrorism' has a number of undesirable effects: it makes negotiating peace more difficult by stigmatising the other side as terrorists who cannot be negotiated with; it undermines compliance with the law of war, since armed groups are treated as 'terrorists' regardless whether they fight in conformity with the law of war; and it impedes post-conflict settlement and reconciliation, again by stigmatising the other side.

Canadian and New Zealand law take the narrower approach of only excluding acts which are consistent with the law of war. This would mean that Hamas' attacks on civilians are still

[14] Ibid para 4.30.
[15] Report of the Security Legislation Review Committee (2006) ('Sheller Report') 85.
[16] PJCIS Review of Security and Counter-terrorism Legislation (2006); Annual Report of the Independent National Security Legislation Monitor, Bret Walker SC, 2011-12; COAG Review of Counter-terrorism Legislation (2013).

terrorist acts, but its attacks on Israeli military forces are not terrorism; thus only the former, not the latter, would count towards the assessment whether the organisation is terrorist.[17]

1.3 Executive Proscription

Listing requires that the Minister is satisfied on reasonable grounds that it is an 'organisation' involved in or advocating a 'terrorist act'. The decision is an administrative one which is reviewable for errors of law under the Administrative Decisions (Judicial Review) Act 1977, but not on the merits.[18] The COAG Review in 2013 argued that because 'the decision whether to proscribe (or not to proscribe) an organisation may be highly politicised' – giving the example of listing Hamas – '[i]t is clear that responsibility for such decision is best left with the executive and Parliament'.[19]

To the contrary, that executive decisions are so susceptible to extra-legal politicised considerations, and highly selective application, is precisely a reason to vest the power of prescription in the courts, not a minister. It should also be a judicial power because listing triggers the application of individual criminal offences, where the merits of the listing itself cannot be effectively challenged (other than at a political level). Making proscription a judicial power would avoid politicised listings, where ministers may be susceptible to partisan lobbying by interest groups or foreign states,[20] which would not infect judicial decision-making.

It is arguably inconsistent with the prospective certainty and predictability required of the rule of law for the Parliament to statutorily codify what is a terrorist organisation, but then devolve to a Minister the power to selectively enforce it – and thus to make up who is a 'terrorist' – depending on non-statutory criteria which are not binding and non-reviewable, which may not be applied as intended, and may be applied in an arbitrary or partisan manner.

For example, if Hamas is listed even though it does not threaten Australia, Australians may legitimately ask why the Minister has not listed Jewish settler extremists/terrorists, whose violence against Palestinians has rapidly escalated since 2021. Such violence has been condemned by Israel's own Public Security Minister as involving organised terrorist groups; it is now monitored by the US State Department's annual terrorism report; and it has been condemned by leading US Jewish organisations.[21]

The Sheller Review in 2006 recommended, as one alternative, making proscription a judicial process.[22] The Australian Human Rights Commission[23] has made a similar recommendation, due to the impact of listing on human rights, its individual criminal consequences, and that the merits of the decision cannot be teste (including in the absence of merits tribunal review).

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[17] See generally Ben Saul, 'From Conflict to Complementarity: Reconciling International Counter-Terrorism Law and International Humanitarian Law' (2021) 103 *International Review of the Red Cross* 157

[18] It may be, therefore, that an organisation is not, in fact, a 'terrorist' one at all – the Minister may have had reasonable grounds to believe it was, but was mistaken on the facts.

[19] COAG Review (2013) 23.

[20] The latter concern was raised during the PJCIS Proscription Inquiry (2007) para 4.37.

[21] Namely, the Anti-Defamation League, the Central Conference of American (Reform) Rabbis, Israel Policy Forum, National Council of Jewish Women, (Conservative Movement's) Rabbinical Assembly, Union for Reform Judaism, and United Synagogue of Conservative Judaism (condemning 'ongoing terrorism and political violence committed by Jewish Israeli extremists in the West Bank against Palestinians, Israeli civilians, and IDF soldiers'): 'ADL, other Jewish groups denounce 'ongoing terrorism' by settler extremists', The Times of Israel, 25 January 2022.

[22] Sheller Report (2006), Recommendation 4.

[23] Submission to PJCIS Proscription Inquiry (2007) para 5.7.

2 Excessive Scope of Consequential Terrorist Organisation Offences

Listing triggers the terrorist organisation offences concerning funding, training, support or resources, membership, association and recruitment. Most of these do not require a person to intend to, or actually, support any of Hamas' terrorist activities. Only the offence of providing support or resources requires the person's act to help Hamas to commit a terrorist act. Otherwise, any contribution is enough for the other offences. For 'association', the person must intend their association to assist the organisation to expand or continue to exist, but not necessarily to commit terrorist acts; there are also narrow specified exceptions.[24] The fault elements of many of the offences are also fairly stringent.[25]

Numerous Australian official inquiries have criticised the over-breadth of the offences, including recommending the repeal of the association offence,[26] and limiting the training offence to training which is connected with committing terrorism.[27] The problem is most acute where an organisation is a hybrid political entity performing government functions.

Since the Hamas 'organisation' includes the Gazan government it controls, Australian law criminalises innocent civilian, governance and humanitarian activities – whether in Gaza, Australia or elsewhere[28] – as the following examples illustrate:

- The offence of *training* a terrorist group could capture foreign, Palestinian, or NGO experts who train Gazan officials, such as training doctors in medicine, lawyers on human rights or the law of war, sanitation workers on public hygiene, or technicians on the maintenance of public infrastructure and utilities.

- Advertising government jobs – whether for cleaners, teachers, bus drivers, or public servants – could be the crime of *recruitment*.

- Palestinians who apply for government jobs could commit the offence of *'taking steps' to become a member* of Hamas, even if they do not get the job.[29]

[24] Concerning association for family, religious, humanitarian aid, and legal reasons.
[25] Most of the offences require the person to know that the organisation is terrorist (i.e., either because it meets the statutory criteria, or has been proscribed) but recklessness is also sufficient for the offences of directing, recruiting, support or resources, or financing. (Under the Criminal Code s 5.3, '[a] person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events'; under s. 5.4(1), '[a] person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.) Neither knowledge nor recklessness is required for the training or association offences where the organisation is listed: strict liability applies. This is said to be justified because 'it is not legitimate to be a member of or have links to an organisation of a kind that could be proscribed', and fairness is supposedly secured by the requirement to publicise proscription: Security Legislation Amendment (Terrorism) Bill 2002, Explanatory Memorandum, 17. In the real world, however, Palestinians in Gaza are hardly likely to read the English language Commonwealth Gazette or Australian newspapers in which publication is required.
[26] COAG Review (2013); Sheller Report (2006); PJCIS Review (2006).
[27] COAG Review (2013); PJCIS Review (2006).
[28] The terrorism offences apply extraterritorially.
[29] In *R v Khalifa*, the High Court of Australia confirmed that the offence taking steps to become a member of the terrorist organisation ISIS could be committed where, for example (approving the view of Kelly J in dissent in *Abdirahman-Khalif v R* [2019] SASCFC 133), '[a] female supporter of Islamic State the organisation, who relocates to Islamic State the territory, marries a solider, and raises her children in that State is demonstrating a commitment to one of the goals of Islamic State, namely to consolidate a physical population stronghold over land': *R v Abdirahman-Khalif* [2020] HCA 36 at paras 42-55 .

- Gazan public servants could be criminal *members* of Hamas, whether providing health services,[30] education, electricity, water, sanitation, fire-fighting, or justice, unless they resign from their jobs[31] (and become destitute in an economy of acute unemployment).

- *Associating* with any Gazan public servant might be an offence, where it would help Hamas in non-terrorist ways, such as by businesses supplying the government with any goods or services, from payroll to stationery to spare parts for public buses.

- Providing charitable, humanitarian or development *funding* for Gazan public services run by Hamas, such as water, sanitation, electricity, housing, education or healthcare, could be a crime, even if not intended for terrorism, not likely to be so used, or if adequate safeguards are in place to prevent diversion to terrorism. (In contrast, existing sanctions on Hamas concern the freezing of assets and offences for dealing with assets.)

The existence of prosecutorial discretion to not prosecute in cases such as these is not an adequate protection. As the British Supreme Court held in *R v Gul*, the separation of powers requires that the Parliament must decide with precision what conduct is criminal or not, and it contrary to the principle of legality and the rule of law to enact overly broad laws and expect prosecutors to subjectively decide on a case-by-case basis who is a good or bad 'terrorist'.[32]

Maintaining the listing of an organisation such as Hamas in its entirety as terrorist could only be justified if the terrorist organisation offences were much more narrowly defined, so as to only target conduct which proximately assists in the commission of a terrorist act by Hamas.

3 Impacts on Human Rights and Humanitarian Needs

Criminalisation of ordinary civilian and humanitarian activities excessively and unjustifiably interferes in the basic rights of Palestinians to liberty and security of person (i.e., through disrupting Hamas's provision of law and order), food, health care, education, housing, work, social security, an adequate standard of living, religion, freedom of association and so on.

Uncertainty about the legal risks also deters and impedes humanitarian actors from doing their job to aid vulnerable civilians. Such actors are already under unjustifiable pressure from Israel, whether unproved allegations against a World Vision employee in Gaza to spurious terrorism accusations against six leading Palestinian NGOs. Notably, international humanitarian support and official donor assistance to Gaza (through the United Nations and the International Committee of the Red Cross) is not sufficient to meet the basic needs of the population, so criminalising efforts to bridge the gap cannot be justified.

Listing Hamas sends a legal message of deterrence that no-one should work for or cooperate with the Gaza authorities. For Australia, civilian governance in Gaza is simply terrorism. The consequence of the law's overreach is that ordinary civilians may suffer even more than they already do under the crippling Israeli blockade. The ailing economy will tank further. Degraded civilian infrastructure and services will disintegrate more. Even if there are links between Hamas' civilian and military wings, the law disproportionately harms Palestinian civilians.

[30] The High Court implicitly accepted that a person who willingly provides nursing care in ISIL governed territory could be a member of that organisation: *R v Abdirahman-Khalif* [2020] HCA 36 at paras 42-55.
[31] Criminal Code s 102.3(2) provides that the offence 'does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation'.
[32] *R v Gul* [2013] UKSC 64, para 36.

I note that in the different context of Security Council sanction on the Taliban, in 2021 the Security Council softened blanket sanctions on the Taliban, precisely because of their adverse impacts on ordinary civilians, by requiring all countries exempt from sanctions humanitarian assistance for basic needs. In other words, even though providing funds or assets may entail risks of diversion, this risk still does not outweigh humanitarian concerns for civilians. The same principle is relevant to the scope of Australia's listing of Hamas for the purposes of both sanctions (which Australia misleadingly claims implements resolution 1373 (2001)) as well as criminal proscription (where there are offences concerning financing organisations, as well as the other offences relevant to impeding humanitarian activities).

4 Adverse Security Implications

Australia's listing is unlikely to make Israel safer from terrorism. Criminalizing Gaza's government in principle could undermine its capacity to provide law and order, a functioning economy, public services, and humanitarian assistance to civilians. This inevitably destabilises Gaza, risks fuelling further violence and militant recruitment, and encourages more extreme actors than Hamas – which already exist. It also reinforces the sentiment that the West is pro-Israel no matter the impact on Palestinians, which can have ripple effects on radicalisation elsewhere, and sour Australia's international relations with other important countries. Taking into account the adverse impacts of listing has been raised in previous inquiries.[33]

5 Unbalanced 'Securitised' Approach to Counter-terrorism

Australia supports the United Nations Global Counter-terrorism Strategy 2006, Pillar I of which commits countries to address the conditions conducive to terrorism (without regarding such conditions as justifying or excusing terrorism). Addressing such conditions was considered important not only to prevent the structural causes of terrorism, but because many states' counter-terrorism responses became excessively securitised after 9/11 – including by violating basic rights – and this in turn produced grievances which encouraged terrorism. Among the many conditions conducive to terrorism are, relevantly, 'prolonged unresolved conflicts, … violations of human rights, ethnic, national and religious discrimination, … [and] socio-economic marginalization'.[34]

Australia's current approach to dealing with Hamas is clearly unbalanced. It lists and criminalises Hamas, without simultaneously taking any equivalently serious steps to address the conditions conducive to Hamas' violence, including the unresolved conflict with Israel, Israeli violations of Palestinian rights (including routine impunity for excessive uses of force by Israeli forces, and illegal demolition of Palestinian homes), Israeli discrimination against Palestinians under its control (which could constitute the international crime of apartheid), and impoverishment resulting from Israel's excessive/disproportionate blockade of Gaza.

For example, while banning all of Hamas, Australia has not even imposed sanctions on Israel for illegally annexing by military force Palestine's East Jerusalem; or for building illegal civilian settlements on Palestinian land – which constitute systematic war crimes under international humanitarian law, violate the Palestinian right of self-determination, and have been condemned by the UN Security Council, General Assembly, and International Court of Justice. To the contrary, Australia has sought closer ties with Israel, and sought to shield it from an International Criminal Court investigation into alleged international crimes.

[33] PJCIS Proscription Inquiry (2007) para 4.33-4.34.
[34] Ibid.

Most credible experts agree that a root cause of Hamas' violence – without justifying the methods it uses, or excusing its other, illegitimate reasons for violence (such as antisemitism) – is the persistent Israeli occupation of Palestine since 1967 and its denial of Palestinian self-determination. Israel's withdrawal from Gaza in 2006 does not change that fact: the West Bank is still occupied, and Hamas seeks the liberation of the whole of Palestine, not just Gaza. In any event, many legal experts believe that Gaza is still occupied under international law, due to the high level of control Israel still exercises, in the context of long pre-existing control.

Israel counters that Palestinians failed to accept past statehood deals offered to them by Israel. As the late UN Secretary-General Kofi Annan observed, by recognising Israel, the Palestinians relinquished their claim to 78 per cent of the historic mandate territory of Palestine.[35] Yet Israel still proposed to annex about 10 per cent of the West Bank at the Camp David talks in 2000, which was obviously unacceptable if the deal were to be consistent with Palestinians' international legal rights, including self-determination over their own territory. Further, the illegal construction of Israeli civilian settlements on Palestinian land is an unprovoked, unilateral effort to colonise Palestinian territory, and has nothing to do whatsoever with any supposed unreasonableness or unlawful violence by Palestinians. It aggravates the dispute.

Further, if the State of Palestine is indeed a state, it is now arguably a victim of a continuing armed attack by Israel, since the Palestinian Authority in the West Bank is not committing a continuing, or threatening any imminent, 'armed attack' on Israel which could justify an Israeli right of self-defence under international law, and has not consented to Israel's occupation. Even if Israel has a right of self-defence against Hamas – for instance, because there is a current or imminent attack by Hamas on Israel, both of which questionable – that still does not justify Israel's occupation of the West Bank, which is not 'necessary' under international law to halt and repel any Hamas attack from Gaza. The State of Palestine would be within its rights to request collective self-defence from other states, just as Ukraine is presently doing – and Australia is responding to – against Russian aggression.

Australia's simplistic approach of banning Hamas, irrespective of addressing the structural conditions conductive to its violence, is unjustifiable and counter-productive.

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[35] Significantly, Israel was unilaterally proclaimed and established by force, not by agreement or negotiation with Palestinians, who were the majority of the population in the area. Israel's foundation was accordingly an exercise of Jewish self-determination largely with disregard for the self-determination right of Palestinians. It was thus not consistent with the UN partition plan, which itself was not based on the free will or consent of the Palestinians, did not provide a fair distribution of land to them, and dispossessed from their lands.