



## **Submission on Hamas to the Parliamentary Joint Committee on Intelligence and Security** By the Palestine Israel Ecumenical Network (PIEN)\*

### **Summary**

This submission by PIEN opposes the recent listing of the Palestinian organisation Hamas (including its Izz al-Din al-Qassam Brigades and its various aliases) as terrorist organisations under Division 102 of the *Criminal Code Act 1995*.

While Hamas has certainly reacted in violent resistance against Israel from time to time, Israel as the occupying power has committed far greater, damaging acts of violence, particularly in the Gaza Strip, causing many thousands of deaths and injuries.

Accordingly, while not condoning violence by either side, finding it repugnant, we argue that rather than list Hamas as a terrorist organisation, Australia should acknowledge the whole reality of this conflict, and (in considering Hamas in the specific context of the *Criminal Code*) recognise that Hamas' actions, are a regrettable, but tragically inevitable consequence of Israel's occupation of Palestinian land (particularly since 1967) and of Israel's policies of apartheid against the people of Palestine in Gaza, the West Bank (including East Jerusalem) and in Israel itself.

As elaborated below, we also argue that the process by which this listing of Hamas was recommended by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and decided by the Australian Government was unacceptable since it was biased against Hamas due to a) the absence of any non-government witnesses (including Palestinian representatives) at the hearing other than strongly pro-Israeli representatives; b) the lack of any regard, in the PJCIS hearing and in the Government's Statement of reasons for the listing, having been given to the historical and contemporary context of the Palestine-Israel conflict; and c) a failure to recognise the fundamental human rights, and the right to self-defence of all Palestinians, including those living in the Gaza Strip under Gaza's freely elected representative government, Hamas.

From the 'comfort' of a peaceful Australia, we may rightly contend that acts of self-defence and resistance ought to be limited to those held to be morally and legally justified. But in the midst of Gaza's citizens' terror and dreadful confusion (and death and injury) during Israel's frequent, destructive violence in Gaza, who are we to say what acts are, or are not so justified? These are properly matters for the International Criminal Court, as we have discussed in this submission.

The submission is a response to the invitation of the Parliamentary Joint Committee on Intelligence and Security, whose hearing on 1 October 2021 preceded the Government's listing decision in March 2022.

The Conclusions and Recommendations, which reflect PIEN's opposition to Australia's listing of Hamas, also reflect the overall history and context of the conflict between Palestine and Israel, as outlined in the submission. Accordingly, they include recommendations aimed at preventing, or minimising the impact of, current Australian Government agreements and arrangements with Israel which may – whether intentionally or unintentionally – be adverse to Palestine's legitimate interests and thus are likely to exacerbate the conflict.

### **Introduction**

1. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) has invited submissions by 13 May 2022 on the current listing of terrorist organisations under Division 102 of the *Criminal Code Act 1995*. This submission responds to that invitation.

*We are Australian Christians and supporters who seek lasting peace for the people of Palestine and Israel.  
We aim to equip and inform Australian churches, inspired by Christ's vision for universal reconciliation.*

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2. Among those current listings is Hamas, in its entirety, in effect replacing a separate listing of the Izz al-Din al-Qassam Brigades (hereinafter ‘Brigades’), generally considered the military wing of Hamas.

3. This submission relates only to the listing of Hamas, and its several aliases.

4. The listing of Hamas occurred for the first time on 3 March 2022 by Regulation, the *Criminal Code (Terrorist Organisation – Hamas) Regulations 2022* under the Minister for Home Affairs. As a disallowable instrument, it may be disallowed by either house of the parliament within 15 sitting days of having been laid before that house.<sup>1</sup> The listing ceases three years after it came into effect, but the relevant minister may revoke it sooner, or re-list it at any time.

5. No prosecution of any person under this listing may be commenced without the prior written approval of the Attorney-General, who has provided written policy guidance concerning circumstances under which that approval might, or might not, be given (see [Attachment A](#)).

6. In summary, this guidance includes: ‘*Given Hamas’ linkages and involvement in Gaza, there may be reasons why a person may need to engage with Hamas that are not related to terrorism ... [and it] is not the intention of the Australian Government to prosecute Australians engaged in daily activities not connected with terrorism or terrorist acts.*’ Moreover, the guidance states that ‘*[w]ithout limiting the discretion of the Attorney-General, examples of conduct where consent [to prosecute] is unlikely to be granted may include:*

- *paying taxes to the de facto governing authority of Gaza [which is Hamas];*
- *accessing or paying for food, medicine, education or fuel provided by Hamas;*
- *voting for Hamas in an election;*
- *sending remittances to a member of Hamas for their personal education, health and/or basic living expenses;*
- *being engaged in employment by Hamas in a capacity where responsibilities are not linked to the preparation or planning of terrorist acts; and*
- *selling goods or providing services to Hamas where the goods or services are not linked to the preparation or planning of terrorist acts*

*where such conduct does not indirectly or directly assist Hamas to engage in, prepare, plan, assist in, or foster the doing of a terrorist act.’*

*Sub-section 102.8(4)(c) of the Criminal Code is also particularly relevant, since it provides that associating with a listed terrorist organisation for the provision only of aid of a humanitarian nature is not an offence.*

## **General Remarks on Matters Affecting the Listing of Hamas**

7. The general point of this submission is that the Australian Government’s designation and listing of Hamas under the *Criminal Code* as a terrorist organisation is biased and unnecessary and should be revoked forthwith.<sup>2</sup> We give some specific reasons for this, arising from our analysis of the Minister for Home Affairs’ explanations in ‘*Submission 2*’, to which we will refer later in our submission. Before doing so, however, we wish to comment more generally on the conflict between Israel and Palestine and related issues.

### *Sources of Conflict*

8. In pre-1948 (British-mandated) Palestine, the territory was almost entirely owned by indigenous Palestinians.<sup>3</sup> By 1946, with the minority Jewish population slowly increasing by immigration, Jews comprised about 35 percent of the population and owned about 6 percent of the land (in mostly small, scattered locations). The balance (about 65 percent of the population and 94 percent of the land) was that of the (non-Jewish) Palestinian majority.

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<sup>1</sup> At the time of writing this submission, no motion of disallowance had been moved; nor had the ‘15 sitting day rule’ period expired in either house. The dates when the Regulations were tabled in the Parliament were 28 March 2022 (Senate) and 29 March 2022 (House of Representatives).

<sup>2</sup> We acknowledge that similar listings of Hamas and/or the Brigades have been made by the US, the UK, Canada and New Zealand. PIEN does not, however, take that to be persuasive since it is just as likely that those countries have made the same, ill-advised pro-Israel decisions on the matter as we argue have been made in Australia.

<sup>3</sup> In addition to the population of Muslim and Christian Palestinians (with about 10% being Christian) in pre-British mandate times, there was also a similar minority population of Jews.

9. Despite these demographic facts, in 1947 the United Nations developed a ‘partition plan’ which proposed a Jewish state (with close to equal Jewish and Palestinian populations of about 500,000 each) on 55 percent of the land and a Palestinian (Arab) state (of over 750,000 Palestinians and less than 10,000 Jews) on the remaining 45 percent of the land. It was hardly surprising that the Palestinians, representing over 71 percent of the total population, were very strongly opposed to this ‘plan’! The result, very soon after, was the Jewish Agency’s declaration of an independent state - Israel - the simultaneous withdrawal of the British administration, much harried by Jewish terrorism (for instance the bombing of the King David Hotel in Jerusalem), and a one-sided war in which about 720,000 Palestinians were forced, violently, from their homes and, largely, from the land. The outcome over a short time was that Israel controlled all of what had been British-mandated Palestine, except for the West Bank (at that time controlled by Jordan) and the Egypt-controlled Gaza Strip (hereinafter ‘Gaza’).

10. Israel’s nascent army, based on Haganah (the main Zionist paramilitary organisation in mandatory Palestine), was associated with members of several anti-British and anti-Arab terrorist groups – including the Irgun Zvai Leumi, Palmach, and Stern Gang – which, for example, were jointly responsible in April 1948 for the massacre of the Palestinians of Deir Yassin. These, with other militia, ultimately coalesced into what became the IDF, the Israeli Defense Force.

11. In 1967, Israel easily defeated weakly armed Palestinians and poorly coordinated Arab neighbours in a Six-Day War and occupied both Gaza and the West Bank. Much could be written about what happened then and since, but for this submission it suffices to mention a few salient points:

- Many more Palestinians were forced to flee, mostly to refugee camps in Jordan and Lebanon, and over 400 Palestinian villages were destroyed;
- Palestinians in the West Bank and Gaza came under Israel’s military law and remain so today in the West Bank, with Gazans living under an Israeli air, sea and land blockade.
- Israel, frequently with United States’ support via its veto rights in the UN Security Council, has determinedly ignored a great many internationally legal obligations, including those of the Fourth Geneva Convention (concerning the rights of occupied peoples, especially the prohibition on Israelis settling on occupied Palestinian land) and many United Nations’ resolutions.
- In 2006, following the IDF’s withdrawal from Gaza in late 2005, Hamas was the majority vote-winner in freely held Palestinian elections in Gaza and has remained the governing entity in Gaza since then. We will have more to say about Hamas later in this submission.
- There have been several attempts to negotiate an effective, long lasting peace agreement between Palestine and Israel, in particular the so-called Oslo Accords, which were agreements between the Palestine Liberation Organisation (PLO) and Israel, signed in 1993 and 1995. (The Oslo process began after secret negotiations in Oslo, resulting in both the recognition of Israel by the PLO and the recognition by Israel of the PLO as the representative of the Palestinian people). The Accords should have marked the start of a peace process aimed at achieving a peace treaty based on Resolutions 242 and 338 of the UN Security Council and at fulfilling ‘*the right of the Palestinian people to self-determination.*’ One of the few long-lasting outcomes of the Oslo Accords was the creation of the Palestinian National Authority (usually referred to as the Palestinian Authority, or PA).
- The primary reason for the failure of the Oslo Accords and all other negotiations is that they have never included, or resulted in, equitable, workable terms for Palestinian self-determination or the establishment of a Palestinian state. This is not the place for arguing the pros and cons of these agreements, other than to say that independent assessments of them invariably find them wanting from a Palestinian point of view and affirm that Israel’s mistreatment of Palestinians in every conceivable way, including through many discriminatory laws (such as Israel’s declaration of Israel as *The Nation State of the Jewish People*) has become ever more oppressive. As well, it has become increasingly clear over recent years that the former Netanyahu Government, far from contemplating a Palestinian state, had declared the whole of Jerusalem (including East Jerusalem in the West Bank) as Israel’s ‘undivided’ capital, and supported - in every way possible – the development and expansion of internationally illegal Israeli settlements and outposts on occupied Palestinian land. The current

Israeli (Bennett-Lapid) Government is even more determined to ensure there will never be a Palestinian state.<sup>4</sup>

### *Israel as an Apartheid State*

12. In a recent, very detailed, report, *Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity*, Amnesty International has demonstrated that Israel subjects Palestinians to a system of apartheid founded on policies of segregation, dispossession and exclusion. Amnesty says Israel enforces a system of oppression and domination against Palestinians. Amnesty says (in a 211 page report) that its findings are based on research into and legal analysis of Israel's seizure of Palestinian land and property, unlawful killings, forcible transfer of people and denial of citizenship. Amnesty also reported that these measures, together with Israel's restrictions on Palestinian movement in Israeli-occupied territory, underinvestment in Palestinian communities in Israel, and preventing the return of Palestinian refugees, have created a system of oppression and domination over Palestinians.

13. 'We didn't come to this conclusion lightly,' Amnesty's director for the Middle East and North Africa said. 'What that means is that Palestinians are treated by Israel as an inferior racial group, and they are kept that way.' Amnesty International spent four years forensically researching the report, based on known Israeli policies, documents and directives.<sup>5</sup>

14. Similar reports, by Human Rights Watch, the Israeli human rights groups B'Tselem and Yesh Din and the Harvard Law School's International Human Rights Clinic, have also recently shown Israel to be an apartheid state. The *Rome Statute* of the International Criminal Court, to which Australia is party, defines the crime of apartheid as '*inhumane acts of a character similar to other crimes against humanity committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.*' Whether they live in Gaza, East Jerusalem, Hebron, other parts of the West Bank, or in Israel itself, Palestinians are treated by Israel as an inferior racial group and systematically deprived of their rights.

15. Christian churches have struggled with their attitude to the Palestine-Israel conflict, but at national and international levels many are now recognising the need to:

- increase awareness of the existential threat facing the Palestinian people at the present time. If there is no excuse for silence, there is even less for ignorance. Church leaders are urged as a matter of priority to use worship and appropriate programs and projects to educate their congregations about the facts of the present crisis;
- recognise that Israel is an apartheid regime and the grave reality of facts on the ground which demonstrate this truth. Can churches continue to support by their words, actions – or silence – national Israeli policies which practise apartheid in its dealings with the Palestinian people? These include the violent dispossession of land for illegal Jewish settlements in the occupied territories, the destruction of thousands of homes, the displacement of families and communities, the denial of nationality and identity, the violation of human rights and a matrix which controls by walls, barriers and check points every aspect of the daily life of Palestinians; a situation not only illegal but criminal under international law – which has continued for 55 years and worsens constantly.

### **Australia's Listing of Hamas as a Terrorist Organisation**

16. We return now to the listing of Hamas. We have two recent, readily available official sources of information on this matter. The first is the PJCIS record of its hearing of 1 October 2021. The second is 'Submission 2' of the Minister for Home Affairs in which the listing of Hamas is explained. According to a PJCIS media release on 31 March 2022, the listing of Hamas as a terrorist organisation by the Minister

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<sup>4</sup> Current Israeli Prime Minister Naftali Bennett recently stated that he will not agree to political talks with Palestinians and will not allow the establishment of the Palestinian state during his tenure. 'As long as I am prime minister, there will be no implementation of the Oslo agreement,' he said.

<sup>5</sup> Israel denies it is an apartheid state, saying that 'accusation' amounts to anti-semitism as defined by the International Holocaust Remembrance Alliance (IHRA). However, over 40 anti-racist Jewish organisations have condemned the IHRA definition. A large, widely representative international group of Jewish and other scholars have developed what they regard as a superior definition – the Jerusalem Definition on Anti-semitism (JDA) - which avoids elements of the IHRA definition which are relied on by the Government of Israel in denying it is an apartheid state.

followed a recommendation to that effect by the PJCIS. We shall discuss both the hearing and the formal listing in this part of our submission.

### *The PJCIS Hearing*

17. The PJCIS record (copy at [Attachment B](#)) lists the PJCIS Members present (in person or online), the Terms of Reference of the Inquiry and the Witnesses (in person or online) who gave evidence at the hearing. The witnesses were of two categories – a) several non-government persons representing elements of the conservative, pro-Zionist Australian Jewish community leadership<sup>6</sup> and one US-based person representing the US-based *Foundation for Defense of Democracies*;<sup>7</sup> and b) senior members of various Australian Government departments and agencies.<sup>8</sup>

18. It is apparent that, although the initial terms of reference of the hearing were to seek witnesses' views on whether Hamas' Izz al-Din al-Qassam Brigades should be relisted, the hearing almost from the outset (and certainly from the first witness) quickly switched to consideration of the question whether Hamas in its entirety should be listed (for the first time in Australia) as a terrorist organisation.

19. PIEN notes that there are four features of the hearing that stand out:

- That the members of the PJCIS, with one exception on one relatively minor aspect, took as a given that Hamas and its military Brigades were (and are), without exception, the guilty parties in a violent conflict with an innocent Israel; and that, accordingly, the only issue before them (and on which their witnesses should be questioned) was whether the Brigades alone (already listed as terrorist organisations) should continue to be so listed, or whether Hamas in its entirety should be listed instead.
- That the record of the PJCIS hearing shows that all the non-government witnesses and a majority of the PJCIS members were strongly pro-Israel and anti-Hamas, to the extent in at least one case that the cautious expression by one or two government officials of some possibly adverse concerns regarding a wider listing was repeatedly questioned ('are you seriously suggesting ...?'). It is difficult to deduce otherwise than that the PJCIS's members' minds on the merit and necessity of listing Hamas in its entirety were decided for all practical purposes very early in the hearings (hardly surprising given the organisations the non-government witnesses represented) and that nothing being said later by the government officials should be construed to the contrary.
- That a serious omission in the hearings was the absence of any witnesses willing and able to address the issues before the PJCIS from the broader perspective of the conflict between Palestine and Israel. There are several NGOs (and no doubt many academics) in Australia capable of doing this, and their absence is at best puzzling and at worst a signal of pro-Israeli and anti-Hamas bias.
- That the PJCIS should have been interested in hearing about the origins of the conflict and whether there may have been reasons – other than the terrorism it so readily accepted – why Hamas and the Brigades act as they do! If the stated terms of reference of the hearing should be seen as preclusive, that is the fault of the terms of reference and/or of the implied disposition to so label Hamas due to the prior 'listing processes' for the Brigades.

20. It is not the intention of this submission to argue – as some might – that Hamas and the Brigades are directed, operated and managed separately. We accept their overall organisational unity in the context of possible listings under the *Criminal Code*.<sup>9</sup> Our concerns are far more fundamental, as outlined below.

### *The Explanation for the Hamas Listing by the Minister for Home Affairs (from Submission 2)*

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<sup>6</sup> These were the Zionist Federation of Australia, the Australia/Israel and Jewish Affairs Council, and the Executive Council of Australian Jewry. There are, for the record, other Australian Jewish leaders with less conservative positions, but none of them was a witness at the PJCIS hearing on 1 October 2021.

<sup>7</sup> This name does not convey the Foundation's mission or work. Founded in the US in 2001, it claims to be a non-profit, non-partisan research institute focusing on foreign policy and national security. Wikipedia, however, describes it as part of the Israel lobby in the United States, which is consistent with the nature of the presentation of its representative at the PJCIS hearing.

<sup>8</sup> These were the Australian Security Intelligence Organisation, the Department of Home Affairs, the Department of Foreign Affairs and Trade and the Office of the Ambassador for Counter Terrorism.

<sup>9</sup> It is noteworthy, however, that the Minister for Home Affairs in her own description of Hamas as a terrorist organisation more often than not describes acts of the Brigades, not of Hamas *per se*. Referring to Hamas' role as Gaza's governing entity, this submission draws attention to the fact that, but for Hamas, hospital, education and other government services would not be available in Gaza.

21. We have downloaded the relevant part of Submission 2, the Minister for Home Affairs' Statement of Reasons for Listing Hamas as a terrorist organisation under the *Criminal Code Act 1995*. It is included in this submission as Attachment C. In this part of our submission, we analyse and, where appropriate, criticise it.

- The Minister's statement in its 'Details of the organisation' section says that Hamas '... participated in the Palestinian election and in 2007 overthrew the Palestinian Authority, seizing control of Gaza.' That description is misleading. Hamas clearly won a democratic election in 2006, which was internationally recognised as free and fair. One of the international observers at the election was an Australian who is now a minister in the current coalition government. Hamas' governing control of and responsibility for Gaza were therefore its right by virtue of the election.

22. Other key parts of the Minister's statement, which we find seriously in error, seek to describe Hamas and discuss its terrorist activity in terms of the *Criminal Code's* description of acts that give rise to offences under Division 102 of the Code, either for undertaking or for advocating a terrorist act. At no place in the statement has any thoughtful or nuanced consideration been given as to why Hamas exists and acts as it does, other than to assert it is a violent extremist organisation which does not recognise Israel and supports a strategy of armed resistance, all of which beg the question that is unasked and unanswered in the Minister's statement (and in the PJCIS hearing).

23. The answer to that unanswered question is very clear! Israel was established as the British withdrew from Palestine, and without the consent of the Palestinian population, who owned the vast majority of the land.. From its beginning in 1948 and even more so since the 1967 occupation, Israel's occupation and illegal misappropriation of Palestinian land, coupled with its violent expulsion and gross mistreatment of Palestinians, including in Gaza – as described in this submission – have led to acts of self-defence and resistance by – among others – Hamas and the Brigades, some of which have involved acts of violence. Violence is always abhorrent, an outcome of human failure, but in the face of systemic oppression, it can also be understandable. Unlike Israel, neither Hamas nor the Brigades have access to modern fighter jets and the latest military technology.

24. Our question of the Australian Government is on what ethical policy or security basis it decided – and continues to decide – that Israeli violence, no matter how injurious, should draw little if any criticism, while the violence of Hamas and its Brigades – which in fact is far less injurious to human life – is condemned as terrorism and treated as such via Australia's *Criminal Code*?<sup>10</sup> Where is the justifiable regard to the Palestinian right to self-defence and resistance?

25. This is an appropriate place to acknowledge some key aspects concerning self-defence and resistance. On the right to self-defence:

- Article 51 of the UN Charter states that: *Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations ..., etc.* The difficulty here is that it may be argued (and that is Australia's current position) that the Palestine-Israel conflict is not between two UN member states. The basic right of self-defence is clear, nevertheless, and is further elaborated in customary international law on self-defence which derives from the so-called *Caroline* case.<sup>11</sup>
- It is indeed a mystery that Australian Prime Ministers, among others, can – and do – invoke the right to self-defence in justifying (or at least excusing) Israel's close to total destruction of much of Gaza and the death or injury of up to thousands of Gazans, whenever it occurs, but are unable to find it in themselves (nor in their application of the laws on terrorist organisations) to consider that Hamas' (mostly meagre) resistance may be justified acts of self-defence.

As to resistance:

- In World War 2, Germany's occupation of France led to multiple cells of resistance, based on the concept of 'absurd refusal' (no matter how seemingly absurd, refusal to accept the occupation). Over

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<sup>10</sup> Notwithstanding the listing of the Brigades several times since 5 November 2003, and most recently on 4 August 2021, the Office of the Commonwealth Director of Public Prosecutions has confirmed '[t]here have not been any prosecutions under sub-sections 102.2-102.8 of the Criminal Code relating to the military brigades of Hamas.' These sub-sections cover offences under the Code.

<sup>11</sup> The *Caroline* case established that there needed to exist 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation, and furthermore that any action taken must be proportional, since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'

time, this resistance came to include the employment against the occupiers of weapons, bombs, false papers, money, radios, espionage, sabotage and guerrilla warfare. Germany responded with collective punishment, death, reprisal, torture, hostage-taking, executions and massacres, but acts of resistance continued and were acknowledged as justified resistance by all states opposed to Germany.

- If the French resistance (and similar resistance in Belgium, Poland, and others) was appropriate at that time in the face of the German occupation, Palestinian resistance – including by Hamas in Gaza – is also appropriate in the face of the Israeli occupation and violence. Other cases of resistance, armed and otherwise, such as that of the African National Congress in what was then Apartheid South Africa, add weight to this argument.

26. Implicit in the Minister’s statement of the ‘terrorist tactics’ employed by the Brigades - of ‘indiscriminate rocket attacks, suicide attacks, bombings, shootings and kidnappings against Israeli military and civilian targets’ – is that they were the initiators of all this violence, this terrorism. On the contrary, our research has shown that – almost invariably – Hamas and the Brigades were responding to Israeli-initiated violence or oppression associated with maintaining and strengthening the (almost 55 years old) Israeli occupation. Specific examples of this – some recent, some more dated - are outlined in Attachment D, which also summarises some others’, particularly some Israeli writers’, lived experiences.

27. The Minister’s statement is also explicit in claiming that Hamas refuses to recognise Israel. That may have been true historically, but more recent Hamas leadership claims about its Charter are ambiguous.<sup>12</sup> In any case, the Minister’s statement itself makes clear that, in terms of Hamas’ engagement in peace or mediation processes, it has been involved in ceasefire agreements and in negotiations with Israel, and also sought reconciliation with Fatah and the Palestinian Authority.

- Hamas certainly is not committed to an unconditional recognition of Israel – why should it in the circumstances – but its actions as described above are, in the circumstances, understandable and in PIEN’s view not such as should attract Australia’s listing as a terrorist organisation. If its actions in launching rockets (usually resulting in relatively few civilian deaths and injuries), are deemed war crimes, they will be so found by the International Criminal Court (see paragraph 32).
- As to the Minister’s vague comment that Hamas ‘has been known to cooperate’ with other violent, extreme terrorist organisations, including the (currently listed) ‘Palestinian Islamic Jihad’, we note that direct cooperation of that nature is no longer the case and, indeed, Hamas has more recently generally taken on a dissuasive role regarding such groups.

28. We note the Minister acknowledges, importantly, ‘[t]here are no known direct links between Hamas and Australia [and] Hamas has not made statements specifically threatening Australians or Australian interests.’ The remainder of that section of the Minister’s statement involve unestablished possibilities and allegations. It is therefore puzzling and troubling, under the Minister’s own admissions, that the Australian Government should wish to list – and has listed – Hamas (and the Brigades) as terrorist organisations when they have no Australian links and in no way pose any threat to Australians or Australian interests.

### **Related Australian Policy Positions**

29. It is instructive to note the reported Australian Government position on other current international situations, particularly relating to Russia’s violent attacks on Ukraine. On 16 April 2022, *The Canberra Times* reported aspects of that conflict in the following terms:

- Husbands and sons have been brutally murdered while trying to protect wives and sisters. Grieving women have had to bury partners and children slain by the Russians.

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<sup>12</sup> Dr. Ahmed Yousef, an adviser to Ismail Haniyeh (the senior political leader of Hamas), has stated that Hamas has changed its views over time since its Charter was issued in 1988. In 2006, Hamas stated that ‘the question of recognising Israel is not the jurisdiction of one faction, nor the government, but a decision for the Palestinian people.’ In 2010 Hamas’ leader Khaled Mashaal stated that the Charter is ‘a piece of history and no longer relevant but cannot be changed for internal reasons.’ In any case, Hamas’ acceptance in recent years of a Palestinian state based on the 1967 borders is, in essence, a *de facto* recognition of Israel. Although many remain sceptical of Hamas’s new stance and view it as a ploy to hide its true agenda, others argue that the ‘new’ discourse of diluted religious content and the movement’s increasing pragmatism and flexibility in the political domain reflect a genuine and cumulative change within Hamas.



- The United Nations has been exposed as a flawed instrument in which the strong can dominate the weak, and it has done little. [Russia and China, as permanent members of the UN Security Council, are able to veto motions censuring Russia].
- These acts of aggression cannot be allowed to stand unchallenged.
- Australia, and others, are applying economic and political sanctions on Russia as well as supporting Ukraine by providing weapons and other military and defence equipment and expressing support for an International Criminal Court investigation of what seem very likely to be war crimes by Russia.

30. Moreover, *The Canberra Times* on 20 April 2022, quoted Prime Minister, Scott Morrison, as saying, about Russia ‘We have seen that bullying ... we’ve seen it from Russia ... and the world needs to deal with this. We won’t sit passively and allow the complete turning of the tables on the international order by those who would seek to change it by sheer force and coercion ... Australia is no soft touch ... when it comes to protecting ... the peace and freedom of our region.’

31. Australia’s approach in that case is legally and ethically appropriate and stands in total contrast to its position concerning the Palestine-Israel conflict. Were Australia to apply the equivalent of its Palestine-Israel bias in the Ukraine-Russia situation, it would be supporting Russia and listing the operatives of Ukraine’s defence (which inevitably involves violence) as terrorist organisations!

32. The International Criminal Court is currently investigating possible war crimes and crimes against humanity arising from the 2014 Gaza War, Israel’s settlement policies and the 2018-2019 Gaza border protests. The ICC has indicated that the actions of both Israel and Hamas will be included in the investigation. Israel is refusing to cooperate, but Palestinian leaders have welcomed the ICC investigation.

- Australia filed an objection with the ICC, mainly on grounds the Court does not have jurisdiction. The US and some other countries have also objected, but the ICC prosecutor has decided to proceed on the basis that it does have jurisdiction in the matter.
- Australia’s approach appears to be a further example of its siding with Israel in virtually all aspects of the conflict.
- This Australian bias in favour of Israel by opposing an ICC investigation becomes all the more apparent when we note, by contrast, how quick Australia has been to support immediate investigations by the ICC into possible war crimes and crimes against humanity by Russia on Ukrainian civilians, as noted above.

### Conclusions and Recommendations

31. Resulting from the considerations in this submission, which include and go beyond the question of Hamas *per se*, PIEN concludes and recommends as follows:

- a) The PJCIS hearing on 1 October 2021 was seriously deficient, primarily due to the one-sided pro-Israel and anti-Hamas bias of the non-government witnesses (and some of the PJCIS members), as well as the absence of any consideration of the overall history and context of the Palestine-Israel conflict. The PJCIS must rehear the matter (when re-established after the 2022 election) and ensure that witnesses with a full understanding of all relevant issues are included. Among the witnesses should be people, such as Gideon Levy and Nurit Peled-Elhanan (see Attachment D) as well as former UN rapporteurs on the conflict, such as former Princeton Professor Emeritus, Richard Falk. Online participation would facilitate this occurring.
- b) The Minister for Home Affairs, or whoever becomes the relevant Minister for the purposes of Division 102 of the *Criminal Code Act 1995* after the 2022 federal election, should revoke forthwith the Regulation listing Hamas (and its aliases) as a terrorist organisation under the Code but retain that Regulation’s current repeal of the listing of the Izz al-Din al-Qassam Brigades, so that neither Hamas nor the Brigades shall be listed.
- c) Should the Government or the relevant Minister decide to further consider a possible listing of Hamas and/or the Brigades, such consideration must be preceded by a comprehensive analysis by the new PJCIS and relevant government departments and agencies which takes full account of the overall history and context of the Palestine-Israel conflict and draws on the experience and expertise of a far more representative group of witnesses than took part in the PJCIS hearings of 1 October 2021.
- d) If, notwithstanding items a) – c) above, the new Government decides to retain the *status quo* regarding the listings of Hamas and/or the Brigades as terrorist organisations without further



analysis, then the Attorney-General's guidance (Attachment A) – and the details of sub-section 102.8(4)(c) of the *Criminal Code* - should be made available, with amplifying examples, to the Australian public and, more particularly, to all NGOs and others known or expected to be likely to provide humanitarian or other aid or support not connected with terrorism or terrorist acts in Gaza or elsewhere to, or through, the listed organisations.

- e) In parallel with agreement on items a) – c) above, and in cognisance of this submission's findings on Israel's complicity in the mistreatment of Palestinians under the occupation of the West Bank and the blockades of (and extreme violence in) Gaza, the Australian Government should (i) reconsider its pro-Israel (anti-Palestinian) patterns of voting in the UN General Assembly and in all other fora, (ii) make representations to Israel, expressing the strongest possible reservations and concern about these matters, (iii) substantially increase humanitarian and development assistance aid to Palestinian authorities, including Hamas, both directly and via relevant UN organisations, and (iv) make public statements on these matters wherever possible, particularly if Israel's responses to Australia's representations are not wholly satisfactory.
- f) Having regard to the International Criminal Court's decision that, having jurisdiction, it will proceed to investigate possible war crimes and crimes against humanity against Israel and Hamas, the Australian Government should withdraw its previous opposition and express its support for those investigations.
- g) Australia should recognise Palestine fully diplomatically and support its achieving full member status in the UN and the UN's agencies.
- h) Noting the extent and variety of Australia's defence, research and development agreements and arrangements with Israel and its agencies, Australia should review them so as to ensure that their implementation does not, and cannot, directly or indirectly involve adverse implications for Palestinians in the context of the Palestine-Israel conflict.

The Palestine Israel Ecumenical Network (PIEN)

Helen Rainger, President

11 May 2022

\* PIEN is a Christian Organisation, committed to human rights and non-violence. Its members come from several denominations and the wider Australian community. PIEN's statement of objectives says it comprises "*Australian Christians and supporters who seek lasting peace for the people of Palestine and Israel. We aim to equip and inform Australian churches, inspired by Christ's vision for universal reconciliation.*" Where we deem it appropriate, we may contact government representatives and related departments and agencies to convey our views on matters of concern. With a wide range of lived experiences and perspectives, it's not surprising that individual members of PIEN may express their support for PIEN's objectives in various ways and sometimes disagree with one another in developing and expressing positions on contentious issues. This submission has the full support of the majority of PIEN's committee which was charged with this task.

Items accompanying this submission are:

Attachment A – the Attorney-General's Policy Guidance

Attachment B – the PJCIS hearings concerning Hamas on 1 October 2021

Attachment C – the 'Statement of Reasons' of the Minister for Home Affairs

Attachment D - Identifying Initiators in the Conflict Involving Hamas and Israel, and Other Matters