UNIVERSITY OF WARWICK

For the meeting of the Assembly to be held on 28 February 2024

Report by the Assembly Working Party on Antisemitism and Racism (AWP)

Summary

At the Assembly held on 21st June 2021, our working party was tasked with making recommendations, overseen by the Race Equality Taskforce, on the handling of allegations of all forms of racism, including antisemitism, against staff or students. More specifically, it was asked to consider recommending that the University adopt the Jerusalem Declaration on Antisemitism (JDA). This mandate describes the point of departure of our work; it does not determine its outcome.

Our aim has been to provide a document that can support the work already being done of creating an ethos of inclusion and mutual respect in our community. To this end, we conducted a year-long series of in-depth conversations with educators, community organisers, and legal experts as well as experts on antisemitism and racism across the sector, as well as with Warwick students and affected colleagues. We have from the outset been entirely independent, with no financial or administrative support from the University.

In keeping with our brief, we focused on three issues: (1) national and international debates around the JDA and the IHRA definitions of antisemitism, and ways to counter antisemitism and create links between work against racism and against antisemitism on campus[1], (2) the University's disciplinary processes; and (3) the inclusion of consideration of antisemitism in new and emerging antiracism initiatives and policies at all levels of our University.

With regard to the first: we interviewed academics in this country and abroad, who had been tasked with formulating policies for their own universities on the question of which, if any, definitions should be adopted by their institutions, what it means to 'adopt' a definition and so forth.

With regard to the second: we interviewed some who had been through disciplinary processes as a result of alleged antisemitism as well as legal experts with knowledge of those processes, and offered recommendations on how the University could improve the same, including the introduction of a new triage stage.

With regard to the third: the Race Equality Task Force, delegated by Assembly for oversight of the AWP, appointed three members (Mark Hinton, Professor Sotaro Kita, Professor Stephen Shapiro) to the AWP. The RET was kept informed of the AWP both through these representatives and by several RET agenda discussions.

The fight against racism and antisemitism poses urgent challenges for Universities across the country and internationally, given that the rise in both racist and antisemitic attacks has been accelerating in

[1] We will continue to use "antisemitism" in this report, but some members of the AWP prefer to replace the term with, "anti-Jewish racism."

recent years. Combating antisemitism faces particular problems in this context, given widespread ignorance about its history and nature.

Though we are a broad church, we have all, from the outset, recognized the huge importance some have attached to the IHRA definition as for many Jews it has been the only visible action or policy taken by universities in response to antisemitism, and seems the only bastion against its worrying rise.

We have, at the same time, been mindful of the passionate views of those who have in some instances been threatened with silencing through the misapplication of the IHRA outside of its express purpose as a non-legally binding guide - and of those who are against the IHRA because in their view, it fails to appropriately distinguish between antisemitism and criticisms of the Israeli government.

We have, throughout, been keenly aware that debates around the IHRA are politically charged, with support for the definition seen either as essential to tackling antisemitism, or as a failure to respect the right to free speech, especially in support of Palestinian rights and interests.

But as most of those with whom we consulted agree, existing definitions of antisemitism all have limitations. They seem to promise the removal of ambiguities and to offer an easy decision mechanism but are in fact unable to meet that promise. For example, the IHRA and other definitions currently in widespread use in a university setting (e.g. JDA and Nexus) emphasise that their application requires consideration of context, which highlights the continued necessity of informed judgment and interpretation in applying any of them. This limits the usefulness of definitions, if applied on their own, independently of other criteria, in proscriptive, disciplinary contexts, most especially in the context of growing pressures on the exercise of freedom of speech. Maintaining the right balance has become increasingly urgent.

We therefore hold that *extreme caution* should be used when applying definitions of antisemitism in university disciplinary processes.

At the same time we believe, more strongly than ever, that there is a great deal we can and must do as a community to combat antisemitism and its consequences. We hold that antisemitism, like all other forms of racism, is not *just* a concern for the individual well-being of the targets of that hatred, but that it is *in the interest of the entire campus community* to create an environment free of such hatred. We believe that all leading definitions of antisemitism have an important role to play in this endeavour.

This report sets the foundation for future institutional work on its highlighted issues. We present it for Assembly's endorsement in order to inaugurate further and ongoing efforts to ensure diversity, respect, and the enshrinement of academic free speech within Warwick.

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Introduction

At the Assembly held on 21st June 2021, our working party was tasked with making recommendations, overseen by the Race Equality Taskforce, on the handling of allegations of all forms of racism, including antisemitism, against staff or students. More specifically, it was asked to consider recommending that the University adopt the Jerusalem Declaration on Antisemitism (JDA). This mandate describes the point of departure of our work; it does not determine its outcome. We have from the outset been entirely independent, with no financial or administrative support from the University. Here we offer for discussion a summary of the findings and recommendations.

Our aim has been to provide a document that can serve as input to further enhancing the work already being done of creating an ethos of inclusion and mutual respect in our community. To this end, we have conducted a year-long series of in-depth conversations with educators, community organisers, and legal experts and experts on antisemitism and racism across the sector, as well as with Warwick students and affected colleagues.

All our meetings were confidential. So, too, are our own deliberations throughout this process. We learned much from our conversations with Warwick students and members of staff and would like to make a case for such conversations continuing in more structured and ambitious ways. We also found our inter-university discussions extremely useful and illuminating, as did those with whom we held these conversations. In all of these it became clear that many universities face very similar issues to those we face, and we strongly advocate continuing discussion with other institutions.

It has also become clear to us as a committee set up specifically to consider antisemitism, and the handling of allegations of antisemitism, that specific consideration of particularities is important for all forms of racism and ethno-religious and ethno-geographic discrimination. Yet we hope that what we have begun to learn about antisemitism may also be useful for other groups facing similar or related issues in our community and indeed across the sector.

In keeping with our brief, we focus here on three issues: (1) national and international debates around the JDA and the IHRA definitions of antisemitism[2], (2) the University's disciplinary processes; and (3) the inclusion of consideration of antisemitism in new and emerging antiracism initiatives and policies at all levels of the University.

Background

Before listing our recommendations, some general observations about definitions are in order, given the current political climate.

As the oldest and currently most widely used attempt at definition, the IHRA working definition has attained a particular prominence. The debate around the IHRA has become polarized on political

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grounds. Support for the definition is seen either as essential to tackling antisemitism, or as a failure to respect the right to free speech, especially in support of Palestinian rights and interests. Over the past few months, moreover, there has been a dramatic rise, both nationally and internationally, in antisemitic expression and aggression. There have also been increasing pressures on the exercise of freedom of speech. Maintaining the right balance here has, correlatively, become increasingly urgent.

Like all those with whom we spoke across the sector, we believe that it is up to us as community to protect our Jewish students and staff from both verbal and physical attack. In the face of rising antisemitism, it is important to directly state and confirm unconditionally that Jews in all their diversity can feel secure and welcome as an integral part of our Warwick community, as both students and staff. We hold that antisemitism (like all other forms of ethno-religious and ethno-geographical hatred) is not *just* a concern for the individual well-being of the targets of that hatred, but that it is *in the interest of the entire campus community* to create an environment free of such hatred. As an institution with education and research as its primary aims, we have a moral obligation to do a great deal more than police negative behaviour. We must strive towards creating a climate in which the nature of antisemitism is well understood, in the context of our work on racism and social justice, and through these efforts help ensure that it will not emerge, and be challenged when it does. The IHRA and the JDA and other definitions can and should be used as an important educative guide in such contexts. This is, indeed, the way the IHRA presented its definition. Its aim, it says, is to 'sensitize individuals, organizations, and policymakers to issues like Holocaust denial and distortion, antisemitism, and anti-gypsyism/anti-Roma discrimination. They help raise awareness of how these issues may, taking into account the overall context, manifest themselves. This helps ensure that broad swathes of society are included in the discussions on how to address these persistent problems.'[3]

We recognize the huge importance some have attached to the IHRA as for many Jews it has been the only visible action or policy taken by universities in response to antisemitism. We recognise the passionate views of those who have in some instances been threatened with silencing through the misapplication of the IHRA outside of its express purpose as a non-legally binding guide. But as most of those with whom we consulted agree, we note that all existing definitions of antisemitism have limitations. They seem to promise the removal of ambiguities and an easy decision mechanism but are in fact unable to meet that promise. For example, the IHRA and other definitions currently in widespread use in a university setting (e.g. JDA and Nexus) emphasise that their application requires consideration of context, which highlights the continued necessity of informed judgment and interpretation in applying any of them. This limits the usefulness of definitions, if applied on their own, independently of other criteria, in proscriptive, disciplinary contexts. And it limits their usefulness, on their own, when weighed against the university sector's commitment to freedom of speech. It also masks their importance as educative tools.

More generally, as the issue of definitions applies specifically to Universities, we find unhelpful the debate, encouraged by the government, about which definitions of antisemitism Universities should 'adopt'. It is unclear what it means for a university to adopt a definition. If it implies that a definition should be applied uncritically either in the educative or disciplinary setting, we reject the whole idea that Universities should adopt definitions of antisemitism. Education about antisemitism does not involve imposing a definition on people, but rather engaging them in critical thinking about antisemitism, including about definitions of antisemitism.

The use of definitions in disciplinary processes also requires critical engagement with them, especially in the light of the University's obligations to protect free speech. A critical engagement with definitions should be expected and supported. No definition, such as the IHRA or the JDA, can provide an

[3] https://www.holocaustremembrance.com/resources/ihra-working-definitions-and-charters

independent basis for disciplinary action. Academic freedom and free speech are protected within the law, and the safest legal position is that academic work and speech in the academic community is protected unless it is a violation of the civil or criminal law. Relevant criminal laws include the law against inciting racial or religious hatred and various terrorism laws. Civil laws include the law protecting people against discrimination and harassment. Consulting definitions of antisemitism can contribute to determining whether the law has been breached. But even in this role, definitions need to be handled carefully to ensure that the law is interpreted in a way that is compliant with free speech protections that are enshrined both in domestic law and in Article 10 of the European Convention of Human Rights. It is illegal to treat a definition of antisemitism as a legal code that applies to conduct directly, and it is illegal to fail properly to account for free speech obligations in assessing whether speech or academic work violates the law. This significantly limits the application of definitions of antisemitism in the context of disciplinary processes. We provide more detail about both the law, and the role of definitions in interpreting it, in the Appendix on disciplinary matters.

Conclusions and recommendations

I. With regard to definitions of antisemitism, a distinction must be made between their *educative* and *proscriptive* functions within a university context. While each of the leading definitions of antisemitism has educative value, and all have a part to play in any serious effort to think critically about antisemitism, *extreme caution must be exercised when applying any single definition of antisemitism in a university disciplinary process*.

II. With respect to disciplinary processes which have the potential to result in sanctions, the University should clarify and publish the legal position that the only proper basis of a complaint based on an allegation of antisemitic expression is a violation of the civil or criminal law, such as the law of harassment, discrimination, or incitement to racial or religious hatred. *It is vital that the University be guided by the law in all such cases.* Prior to commencing a disciplinary process, allegations should be scrutinised carefully to see whether there is a case to answer, and in conducting that process the University must determine whether any speech that forms the basis of an allegation is protected by rights to academic freedom and free speech*. A body with legal expertise and the ability to consult external expertise should be established to perform this task to ensure that free speech and academic freedom are robustly protected in the long term*.

III. In our efforts to ensure that the University is, and is perceived to be, a place in which Jewish student and staff do not experience discrimination in their pursuit of equal participation within the university, we believe it is important that:

(i) The University recognize the diversity of our Jewish staff and students in terms of culture, heritage, and religious observation, as well as political opinion. The University must strive not to elevate or consecrate one constituency over another and exercise care not to dictate what is acceptable for Jewish staff and students to discuss in terms of their own heritage. This should involve recognizing that, for example, that attitudes towards Zionism and other political issues are also varied and diverse. As Jewish Minority Ethnic (JME) identity is a protected category, we encourage consideration of these concerns within the work of the Race Equality Task Force to enshrine anti-racism policies and education as an exemplary hallmark of Warwick's culture.

(ii) There should be clarity about appropriate routes for Jewish and other minorities, e.g. Muslim, students and staff, to raise practical issues such as dates of exams that conflict with religious holidays and resources given to the chaplaincy to support the university community's diversity.

(iii) As a means of further understanding of current and historical antisemitism we recommend funding a series of lectures on the subject, hosted for example by the Centre for Global Jewish Studies, whose activities we hope the university will continue to support, and to include training on antisemitism into Warwick's anti-racist staff training.

IV. We applaud the work of the Senate Working Group on academic freedom and freedom of speech. While we understand that the new Higher Education (Freedom of Speech) Act requires that the University bring the code of practice to the attention of all students at least once a year, we recommend that further steps be taken to ensure that all in our community fully understand its implications.

V. We applaud the introduction of a triage stage, overseen by a lawyer with relevant expertise, into the University's disciplinary processes and other related revisions of its Dignity at Warwick policy. We recommend that the University take this opportunity to ensure that the revised structure of its disciplinary processes be properly explained to staff as well as students, thus ensuring that all in our community fully understand how complaints are handled across the board.

VI. The AWP, as currently constituted, will have finished the work it was mandated to carry out, once it has reported to the next Assembly. This raises the question of whether, and in what form, some replacement to the AWP should continue the work on the issues it has considered, as they come up over the next few years. We recommend for serious consideration the establishment of a small, centrally supported committee of Assembly members whose role will be to continue to monitor progress on the issues that the AWP has highlighted in this report in solidarity with work on other forms of racism and ethno-religious and ethno-geographic discrimination. We also strongly recommend that such a group work in close cooperation with affected staff, students, and relevant student organisations, including the SU.

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APPENDIX

Antisemitism and Disciplinary Processes

Policies with respect to disciplinary processes at Warwick University are set out here:

https://warwick.ac.uk/services/humanresources/internal/policies/disciplinary/disciplinary_policy_and_procedure_final_april_2019v3.pdf

The University has conducted several investigations in response to complaints about antisemitism against both staff and students. In the academic year 2020-21 it investigated 15 members of staff relating to online activity. In all cases it was concluded that no further action was necessary.

Universities are under increasing pressure to use disciplinary processes to promote values of equality and inclusion. Whist such processes have a role this mission, they are also relatively ineffective alone. Furthermore, core values of free expression and academic freedom that are enshrined in domestic and international law significantly limit the proper use of disciplinary processes to respond to allegations of antisemitism. We urge caution in fostering the expectation that disciplinary processes are central to promoting equality and inclusion in general, and in particular in tackling antisemitism. A range of other measures are more important in tackling antisemitism. They include education and training; representation of Jewish staff and students in decision making; inclusion of antisemitism in equality, diversity, and inclusion training; support for Jewish societies; formal and practical recognition of significant Jewish holidays; and others that we outline in other parts of this document.

However, given that disciplinary processes have a role to play with potentially profound implications for staff and students disciplined, it is important that the University take a range of steps in improving such processes, as well as improving the confidence that staff and students have in how and when processes are instigated, their fairness, efficiency and impartiality, and the training and professionalism of those who conduct them. This includes a better articulation and understanding of the legal framework concerning free expression and academic freedom that sets significant legal limits on the use of disciplinary processes in universities to address expression and scholarship that is considered offensive. At present, this legal framework is not adequately set out in the policy and procedure document linked above.

Discussion with those who were subject to those processes reveals significant problems with these processes at Warwick. This caused considerable harm to those investigated and eventually exonerated by them whilst doing nothing to foster equality and inclusion of Jewish staff and students, or to protect them from harassment or discrimination. It is worth noting that this is partly because the University, in these cases, moved immediately to Stage 3 of the disciplinary process, which is the most formal stage of the process, rather than attempting a more informal investigation of allegations in search of a resolution. It did so in cases where the allegation concerned speech that could not reasonably considered serious misconduct, even if the allegation was proved, and so moving immediately to Stage 3 contravened the University's own policy as stated.

Academic Freedom and Freedom of Speech

Disciplinary process concerning antisemitism can be brought with respect to academic work, expression and conduct in the classroom, expression and conduct in the wider University, or expression and conduct in the broader public realm. Some conduct that is appropriate subject matter for disciplinary processes, such as assaults or criminal damage motivated by antisemitism, does not concern expression or scholarship. However, such processes have mainly been concerned with expression or scholarship,

and this raises questions of the protection of and limits to academic freedom and freedom of speech in the University. That is our focus here.

The legal framework governing academic freedom and freedom of speech is insufficiently clearly articulated at Warwick either in general, or in the context of antisemitism. A consequence is that the proper basis of disciplinary processes is poorly understood and implemented.

There are two main elements to the law to consider. First, there is a body of law, both domestic law and human rights law, that requires the University to protect free speech and academic freedom. But that body of law recognises that a state may regulate speech through both civil and criminal law. Free speech is protected within the law, and to fully understand what it is permissible to say, legal limits to speech outlined in the criminal and civil law must be understood.

The starting point for considering the legal obligations of Universities in the England and Wales is domestic legislation, and especially the obligation under s.43 of the Education (no.2) Act 1986, which requires every individual and body of persons concerned in the government of a university to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the university and for visiting speakers. This duty will be replicated, and in some ways clarified and strengthened, by the Higher Education (Freedom of Speech) Bill currently before Parliament. As s.43 makes clear, members of the university have a duty to protect freedom of speech, but only within the law. This also implies that speech that is within the law is protected, and that sets limits to the range expression that is the proper subject of disciplinary processes within universities.

There are a range of legal restrictions on speech where the duty to protect freedom of speech does not apply, as long as those legal restrictions are interpreted in a way that is compatible with the European Convention of Human Rights. But within those limits, the university is under a duty to protect freedom of speech. The limits include various criminal offences such as inciting racial and religious hatred, as proscribed by the Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006), and encouragement of terrorism and dissemination of terrorist publications, as proscribed by the Terrorism Act 2006 s.1 and s.2. The criminal law prohibits a significant range of antisemitic speech, and this speech is not protected by the right to free speech. For example, it is a criminal offence to use threatening, abusive or insulting words or behaviour with the intention to stir up racial hatred, or which is likely to stir up racial hatred. And it is a criminal offence to publish a statement that glorifies the commission or preparation of acts of terrorism. They also include civil wrongs such as defamation, and perhaps most importantly harassment and discrimination that are governed by the Equality Act 2010. The civil law potentially prohibits a broader range of speech than the criminal law, and understanding the interaction between this part of the law and freedom of speech is more challenging than it is in the criminal law.

As Universities are public bodies, they are also governed by the European Convention of Human Rights, as established by the Human Rights Act 1998. They must thus protect the right of freedom of expression as established by Article 10 of the ECHR. Again, Article 10 only protects freedom of expression within certain limits. As such, criminal and civil limits on free speech outlined above are likely compatible with Article 10 when they are appropriately construed and limited to ensure that restrictions on expression are proportionate to other goals.

One area of legal uncertainty concerns the extent to which Universities could impose contractual restrictions on speech on its members beyond those contained in criminal or civil law (precedents are mainly concerned with non-disclosure of confidential information and duties of loyalties to employers rather than offensive speech). Even if contractual restrictions on speech beyond the existing law, based on the speech being offensive, are permitted, any such restrictions must be clearly stated and must be

proportionate to the aim of those restrictions. This standard will be very difficult for Universities to meet. Definitions of antisemitism such as the IHRA definition and the JDA definition are likely insufficiently precise to meet rule of law standards required by ECHR Art.10, and incorporating these definitions into the contractual obligations of members of the Universities is legally unsafe. It is also worth noting that unlike legal standards, contractual standards are not amenable to clarification through precedent, and so cannot easily be made more precise or more predictable in their application over time.

Overall, we advise that the legally safest and most satisfactory route for the University is to restrict disciplinary processes based on offensive speech to existing parts of the criminal and civil law rather than attempting to extend restrictions on speech by contract. As we note above, whilst there are several relevant legal provisions, those likely to pose the greatest challenge in interpretation are the civil protections against harassment and discrimination.

This leads to our first recommendation to the university with respect to disciplinary processes. It must clarify in its code of conduct to members of the university the fact that the central legal basis for a disciplinary complaint against a member of the university for their speech is that there has been a violation of the law. Whilst it is to some extent arguable that there are ways in which the University could legally restrict speech where that does not contravene the criminal or civil law, both domestic and ECHR law place significant restrictions on the ability of the University to do this. It certainly cannot legally do so simply on the basis that a member of the University has said something contrary to a definition of antisemitism such as the IHRA.

As a result, the University should also clarify the role of definitions of antisemitism in its processes. Whatever definition or definitions the university adopts, the primary role of definitions of antisemitism in disciplinary processes in universities concerning speech or expression to help them to determine whether there has been a violation of the civil or criminal law. These definitions do not provide an independent code of speech or conduct on which disciplinary processes can be based. To use them in this way is to violate the law. Unfortunately, communications about the IHRA definition of antisemitism at Warwick have created the impression that this is their role. This is itself a failure of the University to abide by its legal obligations.

To be clear, the correct position in law is not that definitions of antisemitism lack a role in disciplinary processes concerning speech and expression. Rather, their role is mainly limited to helping to establish that there has been a violation of the law. For example, it may be helpful for those responsible for disciplinary processes to consult definitions of antisemitism to determine whether a member of staff has discriminated against a student, or whether one member of the university has harassed another, as proscribed by the Equality Act 2010. However, whether this is the case is not simply a matter of determining whether speech is considered antisemitic according to any definition or set of definitions of antisemitism that the university has adopted. The legal tests for these civil wrongs must be met.

Furthermore, a proper interpretation of these civil offences in the academic context must take account of the importance of free expression and academic freedom. For example, being discomforted or offended by expression or academic scholarship is not normally a sufficient basis for a claim of discrimination or harassment, even where the reaction is justified. This is so just because of the significant weight that is given to free expression and academic freedom. The proper way to respond in such cases is to challenge the offensive expression, and the right to free expression and academic freedom requires universities to create adequate opportunities for challenge of this kind. This is central to the mission of challenging discriminatory thought and expression in the university setting.

To further reinforce the point that definitions of antisemitism do not provide a proper basis for discipline, ECHR jurisprudence has consistently emphasised that offensive speech is protected by Article 10. However, definitions of antisemitism are precisely aimed at identifying conduct and speech which is offensive. For this reason alone, relying on any definition of antisemitism as the sole basis of determining whether a disciplinary complaint can be upheld is illegal. Any plausible definition of antisemitism, like any definition of any other form of discrimination, will include expression which is offensive, but which is protected by Article 10.

Furthermore, ECHR protections are especially profound in the case of academic freedom. The right to academic freedom is distinct but related to the right to free speech, both of which are protected by Article 10. Academic freedom is concerned with the right of academics to conduct research and disseminate that research both to academic audiences and beyond. It applies where certain scholarly standards are met. These protections, it should be noted, do not apply to clearly bogus scholarship, holocaust denial being the clearest and most obvious example. However, academic scholarship, and expression that draws on it, even if it is offensive, is given the utmost protection by the ECHR jurisprudence (see, especially, Erdoğan v Turkey), and it is considered unusual that, for example, a finding of harassment will be warranted based on academic research.[4]

Concerns about free expression and academic freedom not only tell against sanctions against academic staff; they tell against commencing processes where there is no realistic prospect of establishing that the civil or criminal law has been violated. The threat of disciplinary processes, even where they are unlikely to result in an adverse finding, is a significant challenge to free expression and academic freedom. It has a significant chilling effect on research and teaching. And for that reason, strict standards must be upheld to determine whether to commence disciplinary processes to investigate conduct connected to academic research or expression or public expressions of political views.

At present, Warwick has a body, the Academic Freedom Review Committee (AFRC), that scrutinises allegations of gross misconduct that could result in dismissal to assess whether an adverse finding would be an infringement of Academic Freedom. This is far too narrow. It is concerned only with allegations of gross misconduct, and it is concerned only with academic freedom and not freedom of expression. It is thus concerned only with an aspect of the broader Article 10 protections that govern universities, and it only operates where the most severe sanctions are anticipated. It is worth noting that the human right to free expression and academic freedom can be violated even where sanctions are minimal, and the ECtHR has noted the potentially chilling effect of relatively minor sanctions on scholarship and expression (see *Kula v Turkey* ECHR App. 20233 2018), and this should be reflected in University processes to ensure adequate protection of Article 10 rights. Furthermore, although members of AFRC are trained with respect to its processes, it is unclear what legal training is offered to members of AFRC, and consequently whether they have an adequate understanding of the domestic and international legal obligations free expression and academic freedom in universities.

How, if at all, Should the IHRA be used?

The IHRA is an especially controversial definition of antisemitism. Some people are strongly wedded to the IHRA and see its endorsement by universities as both practically important and an important symbol of a commitment to tackle antisemitism. Others see it as a threat to free speech and academic freedom, and a failure to show a commitment to anti-Arab racism, a cloak of protection for unjust Israeli policies, and an attack on Palestinian rights. Much of the debate about the IHRA is about its symbolic effect and the political context of Israel-Palestine, rather than whether it is a good definition of antisemitism. The

[4] See J Murray 'Examining the Interaction Between Harassment Under the Equality Act 2010 and the Law Protecting Academic Freedom and Free Express on Campus' (2022) 4 *European Human Rights Law Review* 368.

use of the IHRA in disciplinary processes at Warwick and elsewhere cannot ignore this political context. It is important for universities to publicly affirm their commitment to tackling antisemitism. But this must not be done in a way that compromises opportunities to teach, write, learn, debate and protest that are central to university life. This is also key to ensuring that the use of the IHRA in interpreting the law does not result in a violation of the University's Art.10 obligations.

The IHRA consists of a core definition of antisemitism, and some examples of conduct that may be antisemitic depending on the context. The core definition is as follows:

> **Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.**

The first sentence of the core definition is somewhat unhelpful, both as a general definition, and in interpreting the law. One deficiency is its extreme vagueness - it defines antisemitism as 'a certain perception of Jews' without saying what that perception is or involves, and it only suggests that this perception, whatever it is, may be expressed as hatred towards Jews without indicating what further is involved in antisemitism. A further deficiency is that it only identifies hatred towards Jews as the attitude involved in antisemitism. But antisemites need not hate Jews; they might be disgusted by them, fear them, patronise them, or just regard them as inferior in some other way. These other attitudes are as important as hatred in understanding whether discrimination has occurred, and the IHRA is silent on them. Furthermore, discrimination may be indirect or structural where no particular attitude is involved – Jewish people can be excluded from equal participation in university life as a result of ignorance or the University's overall failure to develop inclusive ethnic and religious policies, principles, and cultures. Decision-makers in disciplinary processes will thus need a broader grasp of the attitudinal sources of antisemitism than the IHRA provides.

The examples given in the IHRA are somewhat mixed. Some are helpful in pointing to kinds of antisemitism. And it is important to recognise differences between antisemitism and other kinds of racism. The IHRA is a helpful reminder. For example, Jewish people are victims of a distinctive kind of stereotyping, focused on control, power, deceitfulness and manipulation rather than, for example, stupidity or a tendency to violence and the IHRA is helpful in identifying this. In determining whether a person has been harassed or discriminated against, it is important for decision-makers to understand how individual instances of stereotyping contribute to widespread beliefs, attitudes, acts and conspiracy theories that have a significant impact on the lives of Jewish people in the UK and elsewhere. Furthermore, it is important to recognise the tendency to hold individual jews responsible for unjust actions by Israel, to be unjustly suspicious of Jews as a result, and to have expectations of them with respect to Israel that others do not face. This can cause stress, fear and anxiety and is a form of discrimination and harassment. Again, the IHRA is helpful in identifying this problem.

In contrast, though, the definition also includes more controversial examples that threaten academic freedom and freedom of speech. The University needs to make it clear that these examples will not themselves be the basis of disciplinary processes alone, and their inclusion without comment by the University would constitute a violation of Art.10.

We discuss the two examples that are the most controversial in this context. The first is:

> 'Denying the Jewish people their right of self-determination, e.g. by claiming that the existence of a State of Israel is a racist endeavour'.

With respect to this, what rights of self-determination people have, and on what basis, is a controversial question in political theory and philosophy. Many scholars across the political spectrum deny that people have a right of self-determination based on being a people, and especially based on ethnicity or religion. What rights of self-determination people have, and on what basis, is a legitimate matter of academic enquiry and public debate. For example, some deny that political institutions can legitimately take a stance on controversial matters about ethnic, religious, or national identity, and that this therefore forms an illegitimate basis on which to constitute a state. The same thing is true of whether the having a State of Israel is a racist endeavour. What constitutes racism, and which entities are racist, is a difficult question that must be debated within Universities. Furthermore, Palestinians and their supporters must not be denied their right to accuse Israel of racism in its individual actions, its basic institutions, and structures, and even some rationales offered for its existence. Of course, we do not take a stand on whether these criticisms are justified. But making those criticisms is a basic right, and airing and discussing such criticisms furthers the central ambition of universities. To include this example as a possible basis of disciplinary action is a serious infringement of academic freedom and free speech, and if reference to the IHRA is made in University documentation, it should be made clear that this example will not provide an interpretative tool for discipline.

The second is:

> 'Applying double standards by requiring of Israel a behaviour not expected or demanded of any other democratic nation'.

Applying double standards can, in some contexts, amount to a form of discrimination. Justified criticism of a minority can be discriminatory when it is only the minority that is singled out for criticism, for example. However, there are many reasons why a person might focus their attention on Israel, and have expectations and demands of it that they do not have of other nations. These may include a particular interest in Israel, an affiliation to it, the particular character of its institutions and its history, or the support that Israel receives from powerful nations such as the US and the UK, which have been hesitant to criticise it for human rights abuses. Again, we take no stand on which of these responses is justified; but focusing attention especially on Israel is not in itself significant evidence of antisemitism and disciplinary action should not be based on it.

Of course, the IHRA indicates only that these examples could be examples of antisemitism depending on the overall context. But without further guidance, this caveat is unhelpfully vague. Even with this caveat, the impression is created that statements that fulfil the conditions in the examples will be treated as suspect, even where they are made perfectly legitimately in an academic context, or in a way that cannot plausibly be deemed antisemitic. Furthermore, there is a concern both that decision-makers will rely on these examples in a way that disciplines people for legitimate exercises of their rights to free speech and academic freedom, but also the perception of a risk that this will be so, leading to a chilling effect on legitimate speech. As we suggest above, many statements that these examples capture are legitimate exercises of academic freedom and free speech, and the impression should not be created, as it is at the moment, that there is a case of antisemitism to answer when such statements are made. Furthermore, these examples provide a misleading impression to potential complainants about what speech is protected in the University context, and that is likely to lead to inappropriate complaints and frustrated expectations.

For these reasons, we conclude that whist it may be warranted for decision-makers to be guided by elements of the IHRA, it also problematic in this context both in the way that it narrows our understanding of antisemitic attitudes, practices and institutions, and in the examples that it includes, which are focused too heavily on Israel, and which threaten rights of free speech and academic freedom. Whilst we do not recommend that decision-makers never refer to the definition, given that it

has some positive aspects, we do recommend that if this is to be done, the University needs to be clear about appropriate limits to its use.

Summary Recommendations on Discipline

We have three key recommendations concerning disciplinary processes based on speech where there is an allegation of antisemitism that naturally flow from the legal framework discussed above.

1) The University should clarify and publish the legal position that in almost all cases, the only proper basis of a complaint based on an allegation of antisemitic expression is a violation of the civil or criminal law, such as the law of harassment, discrimination, or incitement to racial hatred. For the University to uphold complaints that are not based on a violation of the law risks violating its legal obligations to protect free speech. The obligation to make this express also flows naturally from the duty to promote the importance of freedom of speech and academic freedom contained in the s.1 (A3) of the Higher Education (Freedom of Speech) Act 2023 that has recently come into force.
2) Any definition of antisemitism, including any definition that is adopted or endorsed by the University, is normally relevant to a disciplinary process only insofar as it is relevant to establishing that the civil or criminal law has been breached. Definitions of antisemitism do not provide an independent or free-standing ground of complaint concerning expression. Furthermore, whilst the IHRA may be helpful in some ways in determining whether the law has been breached, using some elements of it even in that context threatens free speech and academic freedom.
3) A body for assessing whether complaints made against members of the University have a legal basis should be established. This body should consider all complaints concerning expression or academic scholarship, and should have a robust understanding of the rights of academic freedom and free expression and legal limits on those rights. No disciplinary proceedings should commence against members of the university on the basis of expression where there is no reasonable prospect of finding that there has been a violation of the criminal or civil law. Such a body should be given training on domestic and international obligations with respect to free expression and academic freedom, as well as training on the proper role of definitions of antisemitism and other forms of racism and discrimination in interpreting the law. Given the stringent protection of academic freedom by the ECtHR, the body identified above should apply especially strict standards to considering complaints that are based on academic scholarship, including communication that draws on that scholarship, either within the University or in the broader public domain. But it should also dismiss claims that are protected by the broader rights of free expression. This body should also develop and publish a code of practice to reinforce the University's commitment to academic freedom and freedom of speech as will soon be required by s.1 (A2) of the Higher Education (Freedom of Speech) Bill.