



**JEWISH COUNCIL**  
AUSTRALIA

Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

## **Jewish Council of Australia submission to the Inquiry into the Commission of Inquiry into Antisemitism at Australian Universities Bill 2024**

The Jewish Council of Australia welcomes the opportunity to make a submission to the Committee on this important topic. We request the opportunity to speak to our submission at the forthcoming public hearing of this inquiry.

### **About the Jewish Council of Australia**

The Jewish Council of Australia provides an independent, expert Jewish voice opposing antisemitism and racism. We are a diverse coalition of Jewish academics, lawyers, writers, and teachers who support Palestinian freedom, justice and equality.

Over 770 Jews have signed onto our core principles which include that: ‘Racism and antisemitism are on the rise in Australia. The only way to effectively fight antisemitism is by committing to work in solidarity with other groups facing bigotry and discrimination to fight all forms of racism.’

### **Executive Summary**

The Jewish Council of Australia opposes this Bill. Our primary concern is that the framing of this Bill will be counter-productive in tackling the very real rise in antisemitism in Australian society, and its passage would be used to shut down free speech on campus in support of Palestinian rights. This would ultimately disadvantage everyone, including Jewish staff and students.

We are deeply concerned at the rise of antisemitism in Australia, which is part of a broader increase in racist rhetoric and conduct that includes Islamophobia, anti-Indigenous and anti-Palestinian racism. However, this Bill is not directed at actually addressing rising antisemitism. Rather, it relies on disputed definitions of antisemitism and methodologically unsound survey data which conflate criticism of Israel with antisemitism.

The unsound conflation of antisemitism with criticism of Israel is reinforced by the proposed Commission’s adoption of the International Holocaust Remembrance Alliance’s (IHRA) non-binding working definition of antisemitism and its examples. The IHRA definition was never intended to be used as a tool to regulate free speech and is increasingly rejected by scholars of antisemitism and Jewish studies, including its own author. This is because its examples have been weaponised globally to chill criticism of Israel and Zionism, with a particular impact on silencing Palestinian voices. Its

widespread adoption in the university setting would undermine academic freedom of inquiry and speech and is incompatible with the principles identified in the Hon Robert French AC's *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (French Review).

If an Inquiry were to be established which relies on a conflation of antisemitism with criticism of Israel, this will ultimately make it harder to tackle antisemitism and racism. It will chill legitimate discourse and protest and stoke a culture war around the nature and function of the academy that will undermine rather than protect our academics, students and staff from racial intimidation, discrimination and hatred. The Senate should not be party to such naked politicisation.

Finally, to the extent that racism on our campuses is identified and understood, it should be tackled with an effective antiracism strategy that respects university autonomy and academic freedom and is guided by an intersectional approach which recognises the interconnection between all forms of discrimination. As members of the Jewish community committed to antiracism, antifascism and peace, we recognise that Jewish freedom is intimately connected to the defeat of all forms of racism and colonialism. This guides our work, consistent with our commitment to Tikkun Olam (repair of the world) and the ethos of social justice embedded in our shared histories.

We call on the Committee to reject the Bill.

### **Recommendations:**

#### Recommendation 1: Protection of Academic Freedom

That the Committee:

- i) reject passage of the legislation on the basis that it is likely to lead to policy outcomes which go far beyond reasonable restrictions based on racial discrimination and relies on politicised definitions of antisemitism which interfere with academic freedom and free speech.
- ii) support and encourage the full and good faith implementation of the French Review and its Model Code across Australian Universities and urge universities to consider how its principles can be achieved consistent with a robust antiracist strategy (see Recommendation 2).

#### Recommendation 2: Antiracism Strategy

That the Committee recommend to the government that it fund and support universities to develop and implement antiracism strategies that:

- (i) are informed by the findings of the Australian Human Rights Commission's independent study of racism at universities.
- (ii) are supported by independent, evidence-based studies based on sound, robust methodology to identify and address racism on campuses.
- (iii) reject the adoption of the IHRA definition of antisemitism.
- (iv) encourage good faith dialogues between students with opposing views.
- (v) adopt an intersectional, human rights-based approach to the definition of antisemitism.

#### Recommendation 3: Rejection of Establishment of a Commission of Inquiry

That the Committee reject the Bill's proposal to establish a Commission of Inquiry into Antisemitism considering its potential to create a hierarchy of categories of racism, exacerbate division, and undermine collaborative, multicultural, multi-faith efforts to tackle racism.

## **Jewish Council of Australia Submission**

### **1. Relevance of the French Review**

The Australian report on academic freedom, known as the *French Review*, was authored by Robert French, the former Chief Justice of the High Court of Australia, and released in March 2019. The report was commissioned by the Australian government to assess the state of academic freedom and freedom of speech in Australian universities.

The *French Review* introduced a *Model Code* designed to protect these freedoms. The *Model Code* defines academic freedom broadly, including the rights of academics to engage in intellectual inquiry, express opinions on university governance, and participate in public debates. It also emphasises the importance of universities being open to diverse views and not imposing unreasonable restrictions on speech.

The report recommended that universities adopt the *Model Code* or adapt it to their context to ensure robust protections for academic freedom while balancing other considerations such as the well-being of students and staff. The Code has been widely adopted across Australian universities, though the extent of implementation varies. By the end of 2021, all 42 Australian universities had either adopted the Model Code directly or adapted it to fit their specific contexts.

#### Relevance to support for Palestinians on campus and the IHRA definition of antisemitism

The *Model Code* emphasizes the right of academics and students to engage in intellectual inquiry and express views on controversial issues even if they are unpopular or contentious.

The *Model Code* draws an important distinction between this right and the duty to ensure that no staff or students are subject to “adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief”.

Despite adoption of the *Model Code*, many universities have responded to anti-war student protestors, and academics expressing views critical of the State of Israel and support for Palestinian human rights, with covert or overt suppression. This includes limiting the scope of events, imposing conditions on speakers, or disciplining students or staff who are vocal in their support for Palestinians.

The creation of a Commission of Inquiry would undermine the work that was done to establish the *Model Code* and interfere with efforts to strengthen its implementation and application.

### **2. The Bill does not propose to address antisemitism or racism in a principled way**

The Jewish Council of Australia is committed to the struggle against antisemitism and all forms of racism including Islamophobia and anti-Palestinian racism. We are concerned at reports of the rise of antisemitism in Australia, including incidents of anti-Jewish prejudice and hate in our universities.

This Bill, however, achieves neither the objective of preventing antisemitism, nor the objective of addressing racism more broadly. Rather, the establishment of a Commission of Inquiry dedicated solely to antisemitic speech on campus, using the International Holocaust Remembrance Association (IHRA) definition and its examples, will achieve the exact opposite.

As scholars of racism, antisemitism and discrimination have recognised, the struggle against antisemitism is inseparable from the overall fight against all forms of racial, ethnic, cultural, religious,

and gender discrimination. This intersectional approach lies at the heart of the Jewish Council of Australia's work to combat antisemitism.

We do not underestimate the subjective fear which many Jews have about antisemitism. What we challenge are assertions that these fears can be addressed and protected by a Commission of Inquiry which uses misleading definitions of antisemitism which operate to chill campus activism and silence Palestinians and their allies.

**i) Racism and discrimination must be distinguished from legitimate political speech**

Tackling racism in our universities requires a very clear distinction between discrimination, hatred or animosity against a person or group based on legal protected attributes, and legitimate political speech.

Regarding antisemitism, this means distinguishing between hatred, animosity and discrimination against Jewish people for being Jewish, and critique of Israel and Zionism. While Israel's advocates often seek to conflate Zionism and support for Israel with Jewish identity, thereby arguing that critiques of Zionism are antisemitic, it is important to distinguish between the two.

There is a long history of Jewish opposition to both Zionism and the actions of the State of Israel, from the beginning of Zionist thought in the late-19th century, to the present day.

Jewish identities trace back over 3,000 years and span a vast range of cultures and traditions. Jewish identities are a rightly protected category under all racial discrimination laws, whereas political ideologies such as Zionism are not.

**ii) Tackling antisemitism on campuses should be informed by the findings of the Australian Human Rights Commission's independent study of racism at universities**

The Jewish Council of Australia welcomes the government's commission of the Race Discrimination Commissioner, Giridharan Sivaraman, to study the prevalence and impact of racism in Australian Universities, with a particular focus on the incidence of antisemitism, Islamophobia and the experience of First Nations peoples. We note that the Commissioner has said that the study will be 'comprehensive'. University students and staff will share their experiences of racism, and additional research will be undertaken to assess structural racial barriers.

The AHRC promises to conduct a robust, independent, intersectional trauma-informed inquiry, drawing on its extensive expertise and experience. This sort of study is a prerequisite to any effective tackling of antisemitism on our campuses.

**3. The IHRA definition is unfit to be used to assess speech on university campuses**

**i) The draft Bill's implementation of the IHRA definition**

Although it does not directly incorporate the definition, the imprint and influence of the IHRA and its examples are evident throughout the draft legislation.

Notably, para 6(3)(b) would require the Commissioner to inquire into whether Australian universities have 'adopted and implemented an appropriate definition of antisemitism for all purposes such as the International Holocaust Remembrance Alliance definition.' In explaining this provision, the Explanatory Memorandum (at paras 24 and 25) references not just the IHRA definition but its series of examples as 'modern manifestation of antisemitism which should be included' in any inquiry.

The IHRA definition includes highly dubious and discredited examples of antisemitism such as ‘Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour.’ This is not antisemitism. A historical analysis of the racism involved in the founding or existence of any state is a subject of legitimate study, and critique.

As several Australian universities have, after careful consideration and study, *rejected* the IHRA definition as at best unnecessary, at worst a threat to academic freedom, this provision reflects an intention to use the Commission as a vehicle through which to assess all academic and political speech at Australian Universities against the standard of the IHRA definition. This should be identified and rejected by the Committee.

#### Depicting boycotts as antisemitic

Other elements of the IHRA’s problematic examples appear in para 6(3)(e). This provision requires the Commissioner to inquire into whether universities have adopted and implemented policies and procedures to prevent academics, staff and students from engaging in:

- (i) de facto boycotts against collaborations with Jewish or Israeli academics, institutions, students or staff;

This conflation of ‘Jewish or Israeli’ is highly problematic. To our knowledge, there is no evidence of any Australian university ever having considered a boycott – de facto or de jure – against individuals or institutions on the basis of their being ‘Jewish’. Clearly, a boycott which targets individuals because of their ethnic or religious identity would be abhorrent. It would be also illegal in Australian law, and a breach of every university’s Code of Conduct. One can only assume that this conflation in the drafting of the provision results from an assumption that Israeli institutions are somehow essentially ‘Jewish’ in their character by virtue of their state of incorporation – a clear logical fallacy, but consistent with the IHRA’s modus operandi.

The boycotting of an *institution* on the basis of its conduct in assisting, aiding or supporting human rights violations, war crimes, genocide or the crime of apartheid, however, is a legitimate and time-honoured form of political action.

As an example, the Australian government itself can and has sanctioned both complicit individuals and national institutions under its statutory sanctions regimes. After Russia’s illegal invasion of Ukraine, at least one Australian university announced sweeping measures to end cooperation and engagement with all Russian tertiary institutions. Although not without controversy, such sanctions have not been met with bold accusations of animus against national or religious groups.<sup>1</sup>

More pressingly, the International Court of Justice’s recent Advisory Opinion reaffirmed the obligation on all states of non-recognition of Israel’s illegal annexation of territory or changes in demographic composition of the territory it occupies, as well as an obligation to abstain from ‘economic or trade dealings with Israel’ concerning the Occupied Palestinian Territory (OPT) which may entrench its unlawful presence, and not to render aid or assistance in maintaining this situation of illegality.<sup>2</sup>

These powerful statements of legal obligation stand in stark contrast to the depiction of the Boycott, Divestments and Sanctions (BDS) movement, implied in the Bill, as inherently antisemitic. There are,

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<sup>1</sup> See [ANU’s Russian boycott sparks debate in Australian universities | Times Higher Education \(THE\)](#); [Academics criticise ANU’s decision to cut ties with Russian institutions | Riotact \(the-riotact.com\)](#)

<sup>2</sup> International Court of Justice, *Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (19 July 2024) [278]-[279].

in other words, valid legal and ethical arguments in favour of the boycott movement which must be capable of being heard on university campuses.

It is also notable that this provision misrepresents the academic boycott movement. The Palestinian Campaign for the Academic and Cultural Boycott of Israel (PACBI) which provides the guidelines for all academic boycott campaigns is clear that the academic boycott is *institutional* and does not target individuals as such.<sup>3</sup> No matter one's views on the strategy of boycotts, a healthy democracy which values academic and political freedom must ensure that debates about boycotts can be heard in our higher institutions.

#### Conflation of Jewish and Israeli symbols

Another example of the tendency to conflate is found in the Explanatory Memorandum's explanation of the purposes of paragraph 6(3)(d) on the display of cultural and religious symbols. It notes:

For the purposes of paragraph 6(3)(d), cultural and religious symbols could include, but is not limited to, a Star of David, a menorah, a hand of Miriam, a chai symbol, a kippah or displaying a Chanukiah or Israeli flag. The display of cultural and religious symbols in the context of this paragraph should be taken to extend to religious acts such as praying or holding a Shabbat dinner.

To place the Israeli flag in the same category as enduring cultural and religious symbols that reflect the richness and depth of our tradition such as the chai, menorah or Chanukiah, and provide it with the same protection that those symbols merit, is to engage in a highly problematic conflation of national symbolism with Judaism and Jewish identity.

#### Support for 'terrorism'

Para 6(1) implies that 'antisemitic activity' includes 'advocacy for or the glorification of violence' or the 'support for listed terrorist organisations'. In the absence of an elaboration of what this might involve, it is hard to parse this paragraph.

Supporting a listed terrorist organisation is already unlawful in Australian law, as is incitement to violence or racial violence.

It is unclear how these terms would be operationalised as criterion for identifying antisemitism or racial hatred.

International Law permits forms of resistance against an illegal occupation. As Justice Hilary Charlesworth notes in her Declaration in the ICJ Advisory Opinion, 'it is worth recalling that, under customary international law, the population in the occupied territory does not owe allegiance to the occupying Power, and that it is not precluded from using force in accordance with international law to resist the occupation.'<sup>4</sup>

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<sup>3</sup> 'Anchored in precepts of international law and universal human rights, the BDS movement, including PACBI, rejects on principle boycotts of individuals based on their identity (such as citizenship, race, gender, or religion) or opinion. Mere affiliation of Israeli cultural workers to an Israeli cultural institution is therefore not grounds for applying the boycott. If, however, an individual is representing the state of Israel or a complicit Israeli institution, or is commissioned/recruited to participate in Israel's efforts to "rebrand" itself, then her/his activities are subject to the institutional boycott the BDS movement is calling for.'

<sup>4</sup> Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (19 July 2024), Declaration Judge Charlesworth [23].

## ii) Critiquing the IHRA Definition

Consistent with the views of scholars, legal experts and antiracist advocates globally, the Jewish Council of Australia rejects the IHRA definition and its examples and urges the Committee to do the same. Regardless of the original intent of its framers – some of whom, such as its principal author Kenneth Stern, have since retreated from its endorsement<sup>5</sup> – the definition has become a shield and a sword for apologists for Israel’s actions, stifling free speech and academic freedom in the process. It has no place in our academy, nor in any inquiry into antisemitism.

### Academic rejection

There is growing concern amongst Shoah and genocide scholars, as well as a broad spectrum of Jewish studies academics, about the IHRA definition’s expansion of antisemitism, its tendency to conflate criticism of Israel with antisemitic speech and conduct, and its weaponisation to silence pro-Palestine speech and shield Israel from criticism.<sup>6</sup> As a recent example, in November 2022, 128 scholars specialising in antisemitism, Holocaust studies, modern Jewish history and related fields, signed a statement expressing concern with ‘politically motivated efforts to instrumentalize the fight against antisemitism at and against the United Nations’ through the use of the IHRA whose examples they describe as having a ‘divisive and polarising effect’.<sup>7</sup>

Another group of scholars, concerned with the IHRA’s capacity to be weaponised through its examples, drafted an alternative definition of antisemitism known as the Jerusalem Declaration on Antisemitism (JDA). Initially signed by over 200 scholars in Jewish studies, Israel studies, Middle Eastern studies, comparative literature and sociology, the Declaration now has 350 signatories.

Without expressing an opinion on or endorsing the JDA definition itself, the Jewish Council of Australia notes the informed opinion of these scholars that:

[c]riticizing or opposing Zionism as a form of nationalism, or arguing for a variety of constitutional arrangements for Jews and Palestinians in the area between the Jordan River and the Mediterranean [is not antisemitic]. It is not antisemitic to support arrangements that accord full equality to all inhabitants “between the river and the sea,” whether in two states, a binational state, unitary democratic state, federal state, or in whatever form.<sup>8</sup>

The Jewish Council of Australia brings to the Committee’s attention this significant body of opinion amongst Jewish studies, genocide and legal scholars that it is not antisemitic to engage in the activities and make the types of statements for which anti-war students have been demonised, punished and silenced on Australian campuses over recent months.

### The silencing effect on the Palestinian critique

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<sup>5</sup> See Written Testimony of Kenneth S. Stern, Executive Director, Justus & Karin Rosenberg Foundation, Before the United States House of Representatives Committee on The Judiciary, November 7, 2017, Hearing on Examining Anti-Semitism on College Campuses; also Stern, Kenneth, ‘I Drafted the Definition of Antisemitism. Right Wing Jews Are Weaponizing It,’ *The Guardian*, 13 December 2019.

<https://www.theguardian.com/commentis-free/2019/dec/13/antisemitism-executive-order-trump-chilling-effect>

<sup>6</sup> See, for instance, Rebecca Ruth Gould, *Erasing Palestine: Free Speech and Palestinian Freedom* (2023, London: Verso Books); Neve Gordon, ‘The “New Anti-semitism,”’ (2018) 40 *London Review of Books*; Brian Klug, ‘The Collective Jew: Israel and the New Antisemitism’ (2013) 37 *Patterns of Prejudice* 117–138; Antony Lerman, *Whatever Happened to Antisemitism? Redefinition and the Myth of the “Collective Jew”* (2022, London: Pluto).

<sup>7</sup> *128 scholars warn: ‘Don’t trap the United Nations in a vague and weaponized definition of antisemitism’* 3 November 2022, *EU Observer*, available at: [9e86df02ddf67c6046d190b65e4380df.pdf](https://euobserver.com/9e86df02ddf67c6046d190b65e4380df.pdf) ([euobserver.com](https://euobserver.com))

<sup>8</sup> Jerusalem Declaration on Antisemitism, <https://jerusalemdeclaration.org/>



Several scholars have identified the ways in which the institutionalisation of definitions of antisemitism such as the IHRA operates to equate Palestinian voices, experiences, and critiques with racism and hatred. Professor Muhannad Ayyash, for instance, describes how it has operated to ‘expel’ the Palestinian critique from parts of the American academy, erasing Palestinian voices and experiences, and ‘toxifying’ the Palestinian as a racialized being.<sup>9</sup> Professor Ayyash notes:

the expulsion of the Palestinian critique of Zionism and Israel from rational and even anti-racist discourse... takes place through the toxification of the Palestinian other whereby Palestinian epistemology is to be mistrusted and shunned because it is allegedly rooted in an antisemitic disposition. This amounts to a racialization of the Palestinian critique in the name of anti-racism, which can be seen in recent definitions of antisemitism, the debate over the boycott of Israeli academic institutions and harassment campaigns against Palestinian scholars.

The Jewish Council of Australia considers that the proposed Commission of Inquiry is likely similarly to operate to toxify and racialize the Palestinian critique. We reject this distortion and inversion of antiracism and urge the Committee to do the same.

#### Evidence of the weaponisation of the IHRA definition on campuses in other jurisdictions

Much has been written about the regressive impact of the IHRA on the tertiary sector, especially in the UK where the former government introduced coercive measures to ensure its adoption in the sector. Other submissions will undoubtedly address this data in more detail. We note, however, the salutary lessons from the study conducted by the European Legal Support Centre (ELSC) and British Society for Middle Eastern Studies (BRISMES) which analysed 40 cases where UK university staff and students were accused of antisemitism on the basis of the IHRA definition between 2017 and 2022, and noted that ‘[i]n all instances, except for two ongoing cases, the accusations of antisemitism were rejected.’<sup>10</sup>

The impact on academic freedom and the functioning of the academy by false accusations of antisemitism cannot be underestimated. The ELSC/BRISMES report, for instance, notes the cancellation of external speakers who have supported BDS and of events which have used the term ‘apartheid’ to describe the occupation, as well as accusations of antisemitism levelled against student unions and Palestinian students. With respect to the obstruction and cancellation of academic events, the authors noted:<sup>11</sup>

In all these cases, allegations of antisemitism were found to be spurious. They were made by complainants who disagreed with the objectives and/or content of the event or the politics of one or more of the event’s participants or organisers. The IHRA definition, which was explicitly referenced in all of these cases, undermined academic freedom and freedom of expression on UK campuses and in some instances had damaging repercussions for student organisers, student societies and invited speakers.

Importantly, the ELSC/BRISMES report also documents the stress, anxiety and personal distress endured by those against whom false accusations were made for their criticisms of Israel. This

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<sup>9</sup> M. M. Ayyash, ‘The Toxic Other: The Palestinian Critique and Debates About Race and Racism’ (2023) 49(6) *Critical Sociology* 953.

<sup>10</sup> European Legal Support Centre (ELSC) and British Society for Middle Eastern Studies (BRISMES), *Freedom of Speech and Academic Freedom in UK Higher Education: The Adverse Impact of the IHRA Definition of Antisemitism* (September 2023) 4.

<sup>11</sup> *Ibid* 27.

includes students worried about being expelled, academics anxious about their reputations and careers – and, for many, a retreat into silence and self-censorship, including in the classroom.<sup>12</sup>

The use of the IHRA definition to intimate, harass and initiate disciplinary measures against those supporting Palestinian rights has also been documented in Canada. In their submission of 9 May 2024 to the Standing Committee on Justice and Human Rights, Dr Sheryl Nestel of Independent Jewish Voices Canada wrote:<sup>13</sup>

[S]ubstantial empirical evidence shows that many students and faculty in Canada have faced threats, intimidation, harassment and disciplinary measures initiated by Jewish on- and off-campus organizations, creating what has been described as a “chilly climate” for political and academic expressions of support for Palestinian human rights. In a 2022 survey of 77 pro-Palestine faculty and students from 21 Canadian universities, respondents reported serious violations of academic freedom, including political intervention into hiring decisions, pressure to self-censor in relation to writing or speaking about Palestine, harassment, surveillance and litigation by pro-Israel advocacy groups and media outlets, attacks from academic colleagues, and threats and harassment related to ethnic, racial or sexual identity. Academics surveyed reported encountering Islamophobia and/or anti-Palestinian racism from colleagues, students, and at campus events and protests. Academics who had contractual appointments or were as yet untenured felt particularly vulnerable. Numerous respondents indicated they had suffered significantly from the emotional stress of working in a hostile environment.

Recent judicial consideration in Canada of alleged breaches of Codes of Conduct by students protesting the war on Gaza are instructive in both illustrating the weaponisation of the IHRA definition against pro-Palestinian activists, and in protecting the principles of academic freedom against illegitimate interference. In a decision of the Ontario Superior Court of Justice, Justice Markus Koehnen noted:<sup>14</sup>

The encampment itself has people of various backgrounds including Muslims and Jews. It conducts weekly Shabbats involving Jews and Muslims. Both Jewish and Muslim members of the encampment have testified about its inclusive, peaceful nature.

There was considerable controversy over certain slogans used at the encampment such as “From the River to the Sea, Palestine shall be Free.” A number of parties ask me to find that this and other slogans are antisemitic. The record does not establish a strong *prima facie* case to demonstrate that the slogans are antisemitic. The record before me shows that the slogan and a similar one used by Jewish Israelis, convey a variety of meanings ranging from a call for a uniquely Jewish or uniquely Palestinian state in the area between the Jordan River and the Mediterranean Sea, to a single state in which Jews and Palestinians are equal, to a two state solution. The record suggests that the precise meaning depends on the circumstances in which it is used. There is no evidence that the named respondents or occupants of the encampment were using any of the slogans with antisemitic intentions.

In rejecting another alleged breach of the Code by students at Toronto Metropolitan University by students, Retired Chief Justice J. Michael MacDonald reiterated what was at stake:<sup>15</sup>

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<sup>12</sup> See *ibid* 28f (2.2 Consequences for Individual Staff and Students, and 2.3 The ‘Chilling Effect’).

<sup>13</sup> [Sheryl Nestel submission to Justice Committee Re Study of Antisemitism \(ourcommons.ca\), https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR13099749/br-external/IndependentJewishVoicesCanada-e.pdf](https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR13099749/br-external/IndependentJewishVoicesCanada-e.pdf); see also Sheryl Nestel and Rowan Gaudet, *Unveiling the Chilly Climate: The Suppression of Speech on Palestine in Canada* (October 12, 2022).

<sup>14</sup> *University of Toronto (Governing Council) v. Doe et al.*, 2024 ONSC 3755 [8]-[9].

<sup>15</sup> Retired Chief Justice J. Michael MacDonald, *Strengthening the Pillars: Report of the TMU External Review* (31 May 2024) [torontomu.ca/content/dam/report-release/TMU External Review Report dated May 31, 2024.pdf](https://torontomu.ca/content/dam/report-release/TMU%20External%20Review%20Report%20dated%20May%2031,%202024.pdf).

The principles of freedom of expression, including those set out in the Statement on Freedom of Speech, give wide latitude for students to apply their experience and learning, and to experiment with written advocacy. The standard is not perfection. Students are entitled to make mistakes, and even cause harm, without necessarily facing sanctions.

#### The distorting effect of the IHRA for Australian tertiary institutions

As outlined below, the use of the IHRA definition in recent surveys on antisemitism on campuses tends to distort and confuse our understanding of what is happening. This in turn undermines good faith attempts to identify and address the nature and scale of racism in Australia generally and in universities specifically. The IHRA definition is not fit for purpose as an analytic tool, let alone as a legal criterion for identifying breaches of academic Codes of Conduct.

In this context, we also note the rejection by the Academic Boards of several Australian universities of the definition, including the Australian National University, Griffith University, James Cook University, University of Sydney, University of Adelaide and University of New South Wales. Although grounds were not always made public, there were concerns expressed that it could stifle both academic freedom and free speech, particularly criticism of Israel, and was unnecessary given existing legal protections against discrimination and the existence of robust mechanisms for investigating breaches of respective Codes of Conduct.<sup>16</sup>

As Palestinian scholar Dr Lana Tatour has pointed out, official rejection of the IHRA definition has not meant it has had no impact on these institutions in Australia. Her recent research demonstrates how both before but especially since Israel's war on Gaza, 'the campaign to label Palestine scholarship, teaching, and activism on campuses as antisemitic has impacted academic freedom and the rights of scholars and students.'<sup>17</sup> Confronting such attacks is a common experience for those of us working in these spaces, including Jewish academics and students.

#### **4. Adopting Evidence-based Approaches**

##### i) The survey data relied upon conflates Jewishness with support for Israel

The Explanatory Memorandum of the Bill relies on the *Australian Jewish University Experience Survey* conducted by the Social Research Centre (SRC). This survey reveals clear instances of people being abused and targeted on the basis of their Jewish identity. However, the utility to which this survey and others like it can be relied upon is limited due to fundamental problems surrounding the framing of questions conflating antisemitism with criticism of Israel, as well as sampling bias.

In brief, the SRC report – which was commissioned by the Zionist Federation of Australia (ZFA), with support of the Australasian Union of Jewish Students (AUJS), the Scanlon Foundation, the Besen Family Foundation and the World Zionist Organization (WZO) – surveyed students reached exclusively through direct invitation to contacts on the AUJS database, and through the Zionist Federation of Australia's communication channels.<sup>18</sup> For the findings to be robust, the SRC needed to establish mechanisms to ensure its research methods were appropriately quarantined from the

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<sup>16</sup> See Caitlin Cassidy, 'Australian Universities Split on Decision to Adopt Controversial Definition of Antisemitism,' *The Guardian* (Sydney, 6 February 2023) <https://www.theguardian.com/australia-news/2023/feb/06/australian-universities-split-on-decision-to-adopt-controversial-definition-of-antisemitism>

<sup>17</sup> Tatour, L. (2024). Censoring Palestine: human rights, academic freedom and the IHRA. *Australian Journal of Human Rights*, 13 August 2024.

<sup>18</sup> Zionist Federation of Australia, *The Jewish University Experience Survey*, July 2023, 3, available on the AUJS website at: <https://aujs.com.au/wp-content/uploads/2023/08/Jewish-University-Experience-Survey-EMBARGOED-UNTIL-15-AUGUST-2023.pdf>

preferred outcomes and potential biases of the organisations which commissioned and funded the study. This was not done.

For many politically progressive Jews, especially those involved in activism in support of Palestinian human rights and anti-war activism, the positions of these organisations are alienating. Many such Jews are unlikely to be part of the ZFA or AUJS databases, or to have been reached by the survey. Nor would the views and positionality of these Jewish students be captured by the questions asked.

Although the survey does not explicitly adopt the IHRA definition of antisemitism, the types of questions asked align closely with this definition.<sup>19</sup> This framing could readily lead respondents to classify political speech or criticism of Israel as antisemitism, thereby inflating the reported rates of antisemitism.

As a result, it becomes very difficult to make any generalisable conclusions about the data. We note, for instance, that 37% of respondents cited the example of ‘someone comparing Israel to Nazi Germany’, and 25% cited ‘being involuntarily singled out, or excluded, because of matters relating to Israel’ as experiences of antisemitism. Without knowing the context within which such conduct occurred, it is impossible to reach a conclusion that any discriminatory conduct or hate speech occurred in these instances beyond criticism of the state. It appears instead to rely on a highly subjective account of antisemitism.

Interestingly, the report also notes that 39% of respondents were unsure whether a statement or action they experienced was antisemitic, indicating a significant level of uncertainty.<sup>20</sup> This suggests that the survey’s framing may have influenced respondents’ *perceptions* of what constitutes antisemitism. Indeed, one example indicates that it was only once a student was introduced to the IHRA definition that they were able to identify certain (unspecified) conduct as antisemitic.<sup>21</sup>

This is consistent with a pattern identified by scholars who have examined the ways in which the IHRA operates to cultivate an ‘affective resonance’ or attachment between the Jewish individual and the Israeli state, shaping collective alignments and emotional orientations towards Israel.<sup>22</sup> The IHRA examples work to incite Jewish students ‘to *experience* utterances such as ‘Israel is an apartheid regime’ ... as if it were directed against them personally and, consequently, that they are victims of antisemitic hate speech.’<sup>23</sup>

Although not referenced in the Explanatory Memorandum, we note that reliance is likely to be placed on the July 2024 survey conducted by the Community Security Group (CSG) Victoria, an organization that provides security services and support to Jewish communities. The CSG’s

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<sup>19</sup> Those questions were as follows: Q1 Thinking about your time at university, have you ever experienced any of the following, either on campus or online in a university setting (such as online lectures/ tutorials and university affiliated online meetings)?

- a) Antisemitism based on religion or race
- b) Antisemitism based on perceptions of Jewish money, power or influence
- c) Someone denying or minimising the Holocaust
- d) Someone comparing Israel to Nazi Germany
- e) Being involuntarily singled out, or excluded, because of matters relating to Israel
- f) People or events that made you feel intimidated because of your Jewish identity.

<sup>20</sup> ZFA 11.

<sup>21</sup> Ibid 16.

<sup>22</sup> Neve Gordon, ‘Antisemitism and Zionism: The Internal Operations of the IHRA Definition’ (2024) Middle East Critique, 1, 5-6. [Full article: Antisemitism and Zionism: The Internal Operations of the IHRA Definition \(tandfonline.com\)](https://www.tandfonline.com)

<sup>23</sup> Ibid 6.

methodology is more opaque than that of the CSR survey and relies exclusively on self-reporting. As with the CSR survey examples, its report contains highly disturbing instances of clearly racist conduct directed at Jewish students. Its self-reporting methodology, however, limits its utility. While such instances appear to have increased since 7 October, it would be methodologically problematic to generalise from these experiences and the many impact statements in the report that these represent the experience of the broader Jewish student population on campuses.

It is also not clear what the CSG considers as ‘antisemitic’ speech or conduct. While the report refers to incidents experienced, such as verbal abuse, the use of symbols or paraphernalia, stickering, assault, threats, graffiti, and photography/videography, these are grouped under the broader label of "hostile or hateful rhetoric" without a nuanced breakdown of what constitutes antisemitism within each category. There are also several indications of the influence of the IHRA or similar definitions, notably in the report’s emphasis on the negative impact of language used by anti-war demonstrators against ‘Zionists’. Again, this is a highly problematic conflation which skews the survey’s results.

As we have shown above, we do not consider anti-zionist rhetoric to be antisemitic; context may, of course, change its meaning. And while we sympathise with the students who ‘feel unsafe, psychologically attacked, or at best, unwelcome’ as a result of anti-zionist protest, this is not a problem that can be addressed by instrumentalising an unsound and much-critiqued expanded definition of antisemitism. This discomfort is not from racism. This discomfort is, in many cases, the result of one’s political beliefs about Israel being challenged.

Discomfort on campuses is not necessarily unwelcome. UCLA Professor Saree Makdisi expressed this elegantly in a 2016 piece in the *Los Angeles Times*:<sup>24</sup>

*In order for universities to fulfill their mission — which is precisely to expose students to the whole universe of ideas — messy and contentious debates, advocacy and arguments will continue. What we urgently need, however, are ways to distinguish between feelings of discomfort caused by exposure to new or even shocking ideas, and actual vulnerability caused by a campaign that singles out individuals explicitly, intending to cause them harm. Policing ideas and regulating speech on campus is one thing; shielding the “ivory tower” from true harassment is another.*

## **ii) The imperative of dialogue**

The Jewish Council of Australia does not question the subjective reality of the fears evident in the surveys, but we do question the objective reality that many of these examples in and of themselves constitute antisemitism rather than legitimate political speech. We consider that good faith engagement with the lived reality of Palestinians suffering under Israeli rule, and familiarity with the factual and legal realities of Israel’s conduct, would significantly shift some students’ political beliefs and identities that are currently centred on defending the State of Israel.

We also note that there are examples of good faith dialogues at universities between students with opposing views. These dialogues can aid pro-Israel Jewish students to understand that protests and strong political positions about a war and genocide are not personal attacks on their identity.

## **iii) The state of racism on Australian campuses: a call for robust intersectional research**

Although sceptical of some of the evidence presented to the Committee, the Jewish Council of Australia recognises and is concerned by reports of a rise in racist rhetoric and conduct in Australia

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<sup>24</sup> Saree Makdisi, Op-Ed: *Keeping campuses safe for free speech* (Los Angeles Times, 25 October 2016)

connected to the events in Israel and Palestine, including antisemitism, Islamophobia and anti-Palestinian racism. There is evidence that this is occurring on our campuses along with other forms of racism such as that against First Nations people. However, to the extent that it requires intervention, the nature of the problem in all its complexity should first be properly identified consistent with a sound, objective and robust research methodology, and the principles of intersectional analysis.

As noted above, we commend the government's commission of the Australian Human Rights Commission to lead an independent study to better understand and address the dangerous prevalence of racism at universities.

Moreover, we emphasise that any such study – and any effective strategy for tackling antisemitism – must take an intersectional, human rights based and anti-racist approach.

One of the myriad problems with the IHRA definition and other definitions which focus exclusively on the Jewish experience of discrimination, is that they insufficiently address how antisemitism intersects with other forms of racism and oppression. This in turn limits its effectiveness in broader anti-racist work.

As one example, one of the most prominent antisemitic conspiracy theories currently in circulation is 'the great replacement theory', which posits that Jews are promoting mass immigration to replace 'white people'. This idea combines antisemitism, anti-migrant racism, and often other forms of racism such as Islamophobia, demonstrating how antisemitism cannot be considered in isolation.

## **5. Rejecting the blunt instrument of a Commission of Inquiry**

These observations support our final recommendation, based on best practice in the field of tackling racism in all its guises, that a Commission of Inquiry is a blunt and ill-equipped instrument for approaching antisemitism on campuses. This opposition to the use of a Commission of Inquiry holds even if it should adopt a more benign definition. It is the wrong mechanism. Even if chaired by the most independently minded jurist, it is more likely to alienate, divide, polarise and chill debate rather than effectively address forms of racism on our campuses.