

Legal advice on IHRA motion

The Council has various duties under the Equality Act 2010, including not to discriminate directly or indirectly on the grounds of any of 9 protected characteristics, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation .

Further by Section 149 of the same Act the Council is under a duty in the exercise of all its functions to have regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

In 2016, the International Holocaust Remembrance Alliance (IHRA) adopted the following non-legally binding definition of antisemitism.

“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.”

Various legal commentators have taken different views about the degree of ease or difficulty there may be in using the examples which accompany this definition as a touchstone to decide whether statements and/or actions are antisemitic and therefore racist. This is because of a perceived tension between the use of the examples and Articles 10 and 11 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998, which provide that everyone has the right to freedom of expression and freedom of assembly and association.

Some commentators have pointed to legal difficulties if criticism of the State of Israel per se were considered to be tantamount to a breach of the duties in the Equality Act not to discriminate.

For example, Hugh Tomlinson QC advises that a Council is lawfully entitled to prohibit conduct which incites hatred or intolerance against Jews, but would not be lawfully entitled to prohibit conduct on “the sole basis that supporters of the State of Israel found it upsetting or offensive”. His opinion further states that the examples accompanying the definition must be read in the light of the definition and can only properly be regarded as antisemitic, if they manifest hatred or intolerance of Jews.

Hugh Tomlinson QC, like other commentators, has advised the exercise of caution because of this tension, but has noted that a public authority is free to decide whether or not to adopt the IHRA definition as part of its own anti-racism policies. He goes on to note that a public authority must if it adopts the definition, interpret the definition “in a way that is consistent with its own statutory obligations”.

There would always in any instance be a duty to act in accordance with the Council's statutory obligations, but this does not preclude the adoption of the definition. It means that it would be very important that the rights set out in Article 10 and 11 ECHR are taken fully into account in any decision to apply the definition in any particular set of circumstances. The Council would always be under a duty to act proportionately.

Such an approach is not inconsistent with the adoption of the IHRA definition and the inclusion of a reference to it in its Respect and Diversity at Work Policy and/or guidance pertaining to it. However on a case by case basis the Council would need to weigh the Article 10 and 11 rights fully, in the particular circumstances of the situation.

Under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000/2853, employment matters, (subject to a limited number of exceptions) are the responsibility of the Mayor, and he has delegated disciplinary matters such as amendments to the Respect and Diversity at Work policy to officers. If the Council decides to support the motion, it will need to request officers to amend the Respect and Diversity at Work policy appropriately following the Council's normal procedure in such matters.

The application of the definition in circumstances other than employment situations, would require a similar consideration and proportionality.