Federal Court weighs antisemitism and free speech in Australian schools - Pearls and Irritations

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The recently concluded Federal Court case brought against Brighton Secondary College in Victoria, resulting in a distressing confirmation of antisemitism during 2013-2020 is a case study in institutional bias against members of a minority group.

The insights into institutional behaviour extend far beyond its effects on Jewish students, and remember that the evidence was tested before a well-experienced trial judge. Chief Justice Debra Mortimer was clearly able to assess the merits of conflicting and inconsistent oral testimony, as well as incomplete school records (which came in for a caning as well). The level of detail – including the transcripts of oral testimony from all parties- in the 440 page plus judgement is extraordinary and also deserves to be studied by policy makers, researchers and students, into how racism can be manifested through lack of leadership, whether in schools or elsewhere. However, what is not clear is if the experience of the Jewish students who were bullied was typical of other Jewish students in the school. This was not subject to investigation in the trail, but it does not matter. This group of adolescent boys were singled out for separate and unequal treatment that breached the Racial Discrimination Act and that is bad enough.

The principal was particularly called out by Justice Mortimer for his “unique sense of inertia about antisemitism. The principal displayed “the absence of any apparent recognition there might be a more systemic problem at [the school] which needed to be addressed. In my view [the principal] was simply not prepared to recognise that possibility, or deal with it”. This resulted in a signal being given to continual harassment and violence by several gangs of students, and weak action by junior staff. However, claims against one women staff member for being antisemitic because of teaching and student behaviour in discussions of the Israel-Palestine problem were not upheld. This issue is taken up below.

A payout of at least $460,000 has been ordered with a strong recommendation by the judge for ex-gratia payments by the State.

A yardstick by which the principal and other teachers’ behaviour was measured was in comparison to the treatment of another visible group in the school— LGBTIQ+ people students. The Chief Justice: “It was a school which promoted LGBTQIA+ rights, celebrated diversity in those communities and sought to build self-esteem in students still working through their own sexual and gender identity issues” None of this occurred towards the Jewish students who brought the case.

Further, as observed by the judge, Jewish students who suffer discrimination or violence (as occurred in assaults in this case) may be very reluctant to complain because their complaints may not be taken seriously, or worse, will be subject to more bullying or worse. This finding is probably relevant to any number of other young people and their parents from minority groups who are too scared or

lack confidence to complain to teachers. We certainly know the situation for LGBTQIA+ students.

Indeed, if it has been such a struggle, as is claimed for Jewish students and their families who are part of a community which is well resourced with social, political, legal, and financial capital go to court, then an even worse situation is likely for students from other minorities in Australia (not to speak of indigenous children). How many of them have the similar resources as those available to members of the Jewish community?

It was rightly claimed by the applicants in the case and in the media that there need to be effective educational programs against antisemitism. And, to its credit, the Executive Council of Australian Jewry, in a submission to the Senate, has also recognised the complex nature of multicultural Australia, linking education against antisemitism to a wholistic approach which includes strategies against multiple forms of bigotry. However, what do we do about adult educators who appear to be blind to their own deep-set and perhaps unconscious prejudices? I have no easy answer, but Departments of Education need to take on the bigotry of their employees, not just students, and the same applies to the private school sector.

The issue of antisemitism being linked to Israel-Palestine is also a highly controversial one, and in Australia, there has been a push from various Jewish organisations for the adoption of the International Holocaust Remembrance Alliance (IHRA) non-legally binding Working Definition of Antisemitism and particularly explanatory guidelines and examples by governments and into higher education. It has been adopted by the Federal government, as well as the Victorian, NSW and other state governments. Professor Suzanne Rutland, a witness, also said that "anti-Zionism that seeks to delegitimise the State of Israel" was a form of antisemitism. An apology for "anti-Israel conduct" in teaching about the Middle East was called for by the students and their parents. In contrast to this, the IHRA examples have have been subject to considerable criticism both in Australia and internationally-including by many Jewish academics– because they conflate many forms of criticism of Israel with traditional antisemitism.

However, Chief Justice Mortimer had this to say regarding debate over the Israel-Palestine issue and what happened in the school. "I find this led to both young men becoming hypersensitive, and seeing any reference to matters touching on Israel, or Palestine, or Judaism, or Jewish and Palestinian people, as slights and targeting of them, when objectively it was not. It is understandable they felt unprotected and unsafe at BSC at the time, but I find that both [students] came to see antisemitism where there was none."

There will be criticism of this narrower construction of antisemitism by some Jewish organisations, but they have argued all along that the IHRA definition and examples are non-legally binding, so here is a learned, binding legal decision to consider. There is no indication of appeal. The Chief Justice has hit the nail on the head. In school or universities, vigorous political debate—even among sensitive adolescents and their teachers- is to be expected – and we should not see antisemitism when there is none. In fact, the judgement may well offer some judicial guidance about the nature of teaching and learning in contrast to some of the generalised claims made about antisemitism by university teachers in Australia in an uncritical and sloppy report developed by the Zionist Federation of Australia and the Australian Union of Jewish Students. However, while saying this, once again the case demonstrates the abiding existence of traditional forms of adult and juvenile antisemitism in Australia.