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LIBERTY'S BRIEFING FOR THIRD READING OF THE ECONOMIC ACTIVITY OF PUBLIC BODIES (OVERSEAS MATTERS) BILL (ANTI-BOYCOTT BILL), JANUARY 2024

INTRODUCTION

1. The deterioration of the crisis in Israel and Gaza has prompted individuals and communities from all sides of the political spectrum to seek to make their voices heard, whether through political lobbying, vigils, or demonstrations. Rather than taking action to ease tensions, Government ministers have made divisive and provocative statements,¹ including going so far as to seek to ban a Palestine protest on Armistice Day notwithstanding the Met Commissioner's own judgment that it would not result in serious public disorder. Within this wider context, the Government has brought the Economic Activity of Public Bodies (Overseas Matters) Bill back to Parliament for Third Reading. As noted by Layla Moran MP, the only British Palestinian MP who has family trapped in Gaza, *"The Bill was divisive at the best of times, and the fact is that this is the worst of times."*²
2. The ability to 'vote with your feet' – and to influence those in power to do the same – through debate and discussion is a vital component of a healthy and democratic society. In particular, boycotts – and political expression advocating boycotts – have been used throughout history by people of all political persuasions to exert pressure and achieve change, notably in the campaign to end apartheid in South Africa. The European Court of Human Rights and a former UN Special Rapporteur for freedom of expression have both acknowledged that boycott, divestment, and sanctions tactics fall within the protection of the right to freedom of expression (including under Article 10 of the European Convention on Human Rights (ECHR)).³
3. The impact of the Anti-Boycott Bill extends far beyond the domestic response to the Israel and Palestine conflict – it could stop individuals from making their voices heard and demanding change in a variety of ways. For example, Uyghur exiles in the UK have raised concerns that the Bill may undermine their ability to hold China to account over its human rights record.⁴ **Liberty opposes the Anti-Boycott Bill and urges Parliamentarians to vote down the Bill at Third Reading, given its pernicious impact on the rights to freedom of conscience, expression, and privacy.**

GAGGING PUBLIC BODIES

4. The Anti-Boycott Bill seeks to ban public bodies (such as Government departments, NHS Trusts, and local councils) from taking into account foreign state conduct when making procurement and investment decisions. Breaches of the ban may result in a fine, the maximum of which the Secretary of State will set by regulation. This general ban is subject to a list of exemptions – in particular, the Bill gives the Secretary of State or the Minister for the Cabinet Office the power to specify a country/territory or public body to which the ban does not apply. Notwithstanding this, the Bill states that the ban *cannot* be disapplied if the foreign state conduct relates to Israel, the Occupied Palestinian Territories, or the Occupied Golan Heights. In other words, public bodies are prohibited from having regard to foreign state conduct in relation to these three territories in all relevant decisions. There are no exceptions to this rule. To amend it, a change must be made to the primary legislation.
5. Clause 4 of the Anti-Boycott Bill prohibits public bodies (and the people who in fact make decisions for public bodies, such as local council leaders, university vice chancellors, or even the chief executive of a private company delivering public services) from publishing public statements indicating that they intend to act in a way that would contravene the ban, or that they would, in theory, intend to act that way if not for the ban. For example, it would appear under this clause that a local council could no longer publish statements such as the following:

¹ Home Office, Letter to Chief Constables in QEngland and Wales following the Israel-Hamas conflict, 10 October 2023:

<https://www.gov.uk/government/publications/police-chiefs-asked-to-protect-communities-from-provocations/letter-to-chief-constables-in-england-and-wales-following-the-israel-hamas-conflict-accessible>

² HC Deb 25 October 2023, vol. 738, col. 912

³ OL USA 2/2019, Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 14 February 2019:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24338>

⁴ Mitib, A., *Uighurs say anti-boycott bill lets Xi off the hook*, 20 June 2023: <https://www.thetimes.co.uk/article/uighurs-say-anti-boycott-bill-lets-xi-off-the-hook-lzct8qdv8>

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“Our local council would have boycotted these goods from this state-owned enterprise due to the state’s conduct in relation to this territory, but the law does not permit this, and we intend to comply with the law.”

6. On the face of the legislation, it would appear that clause 4 would only apply to official statements published by public bodies. **However, the very existence of this prohibition will create a far wider chilling effect – thus its designation by critics as a ‘gagging clause’.** In practice, a public body seeking to comply with the Bill is likely to take steps to distance itself from anything which suggests that it holds any political or moral views as to the conduct of foreign states, for fear that it could be found to be in breach of the ban or the related prohibition on statements. In turn, public bodies are likely to treat debate or discussion of such matters as giving rise to legal risk and to take steps to minimise that risk, for example by preventing them from happening or disciplining individual employees or councillors for voicing their concerns. Individuals within public bodies may also feel a need to self-censor even when acting in a private capacity in order to reduce the risk of legal action being taken again against them.
7. **In gagging public bodies and encouraging self-censorship, Clause 4 is likely to be a disproportionate interference with article 10 ECHR as incorporated by the HRA.** This is particularly serious given the weight and importance accorded to free discussion and debate as an essential part of a democratic society, and the fact that those who may be prevented or deterred from speaking out may have been democratically-elected to public bodies precisely in order to raise issues relating to the UK’s foreign policy. Cross-party parliamentarians have criticised the gagging clause and numerous Conservative MPs supported amendments to remove the clause or mitigate its impact at Report Stage.

At Second Reading, Conservative MP Kit Malthouse said:

“I have never before seen legislation that outlaws disagreement with the law, and I think that breaching that right to free speech is a very problematic step.”⁵

At Report Stage, he reiterated:

“Many councillors and Members of the devolved Administrations who campaign on social, moral, ethical and, indeed, foreign policy issues would say that they have a mandate, and not even to be able to express opposition to the law while still complying with it seems very un-British, extremely illiberal and unnecessarily draconian.”⁶

At Second Reading, Chair of the Foreign Affairs Committee and Conservative MP Alicia Kearns called clause 4 “*completely inappropriate.*”⁷

In supporting an amendment to mitigate the impact of clause 4 at Report Stage, Conservative MP David Jones said:

“This is a Conservative Government. Conservatives believe in and value free speech... This is a deeply un-Conservative measure and I believe that the amendment is right and that the provision should go.”⁸

8. **Beyond the free expression impacts of the gagging clause, it could deter effective decision-making and ultimately be unworkable.** The Local Government Association has said, in the context of the Local Government Pension Scheme that “[t]he Bill should not stifle appropriate and proper discussion at committee meetings about concerns relating to risk factors around investments. Geopolitical and territorial factors are relevant to the risk of making , or retaining, certain investments.”⁹ At Report Stage, Conservative MP David Simmonds highlighted how the clause may be rendered ineffective by other rules:

⁵ HC Deb 3 July 2023, vol. 735, col. 619.

⁶ HC Deb 25 October 2023, vol. 738, col.906

⁷ HC Deb 3 July 2023, vol. 735, col. 606.

⁸ HC Deb 25 October 2023, vol. 738, col. 915

⁹ Written evidence submitted by the Local Government Association (LGA) to the Public Bill Committee on the Economic Activity of Public Bodies (Overseas Matters) Bill (EAPBB43), 14 September 2023: <https://publications.parliament.uk/pa/cm5803/cmpublic/EconomicActivityPublicBodies/memo/EAPBB43.htm>

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“There will be circumstances in which councillors, including those who sit in the House of Lords and who sit as part of international bodies, such as the congress of the Council of Europe, benefit from parliamentary privilege in expressing their views. There is therefore a risk that this gagging order is not simply gagging what people should expect as freedom of speech, but is also ineffective in the objective it sets out to achieve.”¹⁰

9. **The Government has itself admitted that the wider aim of clause 4 is to suppress debates around investment and procurement decisions altogether.** For example, in response to an amendment to prevent pre-emptive enforcement of the ban at Committee Stage of the Bill, the Parliamentary Under-Secretary of State for Levelling Up, Housing and Communities Felicity Buchan MP said: “the powers given to enforcement authorities to be used before such a breach will *prevent the sort of deeply divisive activity* that we have heard about [...] in oral evidence,”¹¹ with the “divisive activity” referenced in this quote being that of the BDS campaign against Israel. The implication here is that the Anti-Boycott Bill is aimed not only at preventing investment or procurement decisions from being influenced by political or moral judgments, but also potentially at preventing discussions about such decisions from taking place altogether. In a democratic society, political debates are often divisive: people hold strong views and in expressing them seek to persuade others to change their minds. In seeking to curb such discussions within our public bodies through the threat of severe fines and other consequences, this legislation risks clamping down on legitimate debate.
10. **In other jurisdictions, anti-boycott laws have had a severe impact on the right to freedom of expression.**¹² In one case in the US, a speech pathologist in Texas lost her school contract because she declined to sign an agreement promising not to boycott Israel on the basis of a similar anti-boycott law;¹³ in another, a dermatologist was withheld payment for a lecture for failing to agree to not boycott Israel.¹⁴ US campaigners have further warned that anti-boycott legislation, once enacted, is liable to be extended to a plethora of issues - from fossil fuels to gun control.¹⁵

PREEMPTIVE ENFORCEMENT AND CARVE-OUTS FROM DATA PROTECTION

11. The Anti-Boycott Bill establishes an enforcement mechanism for alleged breaches of the boycott ban and the gagging clause. The enforcement authority is in most cases the Secretary of State or the Treasury, apart from in relation to a registered English higher education provider where the enforcement authority is the Office for Students. The Bill gives the Secretary of State, Treasury, and the Office for Students the power to request information from public bodies to assess whether there has, or may be, a breach of the boycott ban or gagging clause. Where they believe a public body will engage in such a breach, they have the power to impose a compliance notice.
12. These enforcement powers appear to qualify the data protection legislation, by stating that “[a]n information notice does not require the provision of information where its provision would contravene the data protection legislation (*but in determining whether it would do so, the provisions of this section are to be taken into account*). In addition, these clauses also provide that “[a] person providing information in compliance with an information notice does not breach— (a) any obligation of confidence owed by the person in respect of the information, or (b) any other restriction on the disclosure of information (however imposed).” This includes legal privilege.
13. **The enforcement mechanism established by the Anti-Boycott Bill would enable the Secretary of State or Treasury to investigate public bodies (including local councils) *before* any breaches have occurred or**

¹⁰ HC Deb 25 October 2023, vol. 738, col. 905

¹¹ HC Deb 14 September 2023, col. 166

¹² Human Rights Watch, *US: States use anti-boycott laws to punish responsible businesses*, 23 April 2019: <https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses>

¹³ Byrne, E., *Texas speech pathologist celebrates free speech win, hopes it inspires*, 26 April 2019: <https://www.texastribune.org/2019/04/26/Texas-bahia-amawi-speaks-out-against-anti-israel-boycott/>

¹⁴ Bailey, A., *Arkansas owes a Jewish man \$500 but won't pay up because he refuses to sign a pledge to not boycott Israel*, Arkansas Times, 2 May 2023: <https://arktimes.com/arkansas-blog/2023/05/02/arkansas-owes-a-jewish-man-500-but-wont-pay-up-because-he-refuses-to-sign-a-pledge-to-not-boycott-israel?fbclid=IwAR1R72V9DJl-QnQlU1YzJpUgsz0aZ0Elvz9CFzYU8mFbWeFetJYryq-CzUw>

¹⁵ ACLU, *It's Time to Reaffirm Our First Amendment Right to Boycott*, 20 October 2022: <https://www.aclu.org/news/free-speech/its-time-to-reaffirm-our-first-amendment-right-to-boycott>; See: <https://justvision.org/boycott/failed-legislation> and <https://fmep.org/wp/wp-content/uploads/BDS-Laws-as-Template-for-Laws-on-Other-Issues.pdf>

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prohibited statements have been published. In practice, the Secretary of State could use this power to require the provision of information on the views held or expressed by members of the public body, or even information about people who have previously lobbied that public body. **Such intrusive investigations into public bodies risk exacerbating the chilling effect created by the Bill and undermining individuals' rights to free expression and privacy, as protected by the ECHR.**

14. **The information notice provisions of the Anti-Boycott Bill carve out vital data and privacy protections.** The Bill would explicitly disapply existing restrictions on information disclosure “however imposed”. This means that an individual, in providing information to the enforcement authority (the Secretary of State, Treasury, or Office for Students) would not be liable for any breaches of their duties of confidentiality, safeguarding, legal privilege, or other forms of restrictions on disclosure. From a data protection standpoint – and given the overlap between Article 8 ECHR (right to respect for one’s private and family life) – this provision risks undermining requirements of proportionality and necessity that exist to protect people’s human rights. The LGA has raised concerns about the “far-reaching” nature of these powers and said: “This would give all enforcement authorities, including the Pensions Regulator for the LGPS, powers greater than those available in other legal proceedings.”¹⁶
15. The Bill also mimics recent legislation (such as the Police, Crime, Sentencing and Courts Act 2022) in appearing to qualify the data protection legislation. The effect of the qualifying language is that, in determining whether a disclosure of information would contravene the data protection legislation, the power conferred by clause 7 is to be taken into account. This drafting is circular, and as a result is susceptible to being interpreted in a way that will allow the investigative powers to supercede the data protection legislation. It is unclear whether any attention has been paid as to how the powers conferred by the enforcement powers of the Bill will actually influence assessments of whether there is a legal basis for the processing of data, not to mention of necessity and proportionality, under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

CONCLUSION

16. Governments frequently exploit moments of crisis in order to push through restrictions on our civil liberties. The Economic Activity of Public Bodies Bill is one such example, and its continued progress through Parliament at a time of heightened conflict and bloodshed in Israel and Gaza will not only endanger individuals’ ability to speak out about the causes that they hold dear but also risk exacerbating and entrenching societal division. For all of the above reasons, Liberty urges Parliamentarians to oppose the Anti-Boycott Bill at Third Reading.

For more information, please contact Jun Pang, Policy and Campaigns Officer at Liberty (junp@libertyhumanrights.org.uk).

¹⁶ Written evidence submitted by the Local Government Association (LGA) to the Public Bill Committee on the Economic Activity of Public Bodies (Overseas Matters) Bill (EAPBB43), 14 September 2023: <https://publications.parliament.uk/pa/cm5803/cmpublic/EconomicActivityPublicBodies/memo/EAPBB43.htm>