

LIBERTY'S BRIEFING ON THE ECONOMIC ACTIVITY OF PUBLIC BODIES (OVERSEAS MATTERS) BILL (ANTI-BOYCOTT BILL), JUNE 2023

The Economic Activity of Public Bodies (Overseas Matters) Bill bans public bodies from being influenced by political or moral disapproval of foreign states' conduct when making procurement and investment decisions. In doing so, it effectively outlaws a powerful tactic of dissent and a key exercise of the right to freedom of expression, which has been used throughout history to achieve social change. **Liberty urges Parliamentarians to rethink the Anti-Boycott Bill and decline to give it a second reading.**

INTRODUCTION

"[A]nother attempt to draw away from the ordinary citizens of this country the ability to express their moral concerns, and to take from local government the ability to reflect the moral concerns of ordinary people and take them to the centre..."

These were the words of Viscount Falkland during debates on what would become the Local Government Act 1988, which sought to stop local councils from considering political issues when making contracts in the context of widespread boycotts of apartheid South Africa. Nearly thirty years later, Parliament is set to have the same debate, despite having witnessed the power of boycotts as a tactic of protest and dissent. **For the impact the Anti-Boycott Bill will have on the right to freedom of expression, Liberty urges Parliamentarians to decline to give the Bill a second reading.**

BAN ON PUBLIC BODIES ENGAGING IN POLITICAL AND MORAL BOYCOTTS

Clause 1(2) of the Anti-Boycott Bill creates a general ban on public authorities (such as Government departments and local councils) from being influenced by political or moral disapproval of foreign state conduct in relation to a "territorial consideration" when making procurement and investment decisions. 'Territorial consideration' is defined as "a consideration that relates specifically or mainly to a particular foreign territory" (clause 1(3)).

This general ban is subject to a list of exemptions. In particular, clause 3(5) provides that the Secretary of State or the Minister for the Cabinet Office may by regulations specify a country/territory to which the ban does *not* apply. Further, the Schedule provides that certain bodies and functions are exempted from the prohibition, and it also sets out a list of considerations to which the decision-maker *may* have regard in making decisions. This includes if the consideration relates to a potential breach of the UK's obligations under international law, labour-related misconduct, or environmental misconduct. Clause 2(2) gives the Secretary of State or Minister the power to add to Schedule 2 by way of regulation.

Notwithstanding the above exemptions, clause 2(7) provides that the Secretary of State *cannot* make regulations disapplying the ban on boycotts if the foreign state conduct in question 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.

Public authorities suspected of contravening the ban (or who simply appear as if they are about to contravene the ban) may be served with an Information Notice requesting disclosure of information by the relevant enforcement body to aid in its investigation of whether there has been (or is likely to be) a breach. Subsequently, the public authority may be served with a Compliance Notice. If an enforcement authority is satisfied that the public authority has failed to comply with the prohibition and with a Compliance Notice, it may impose a monetary penalty on the public body, the maximum of which the Secretary of State will set by regulation.

THE RIGHT TO FREEDOM OF EXPRESSION INCLUDES THE RIGHT TO BOYCOTT

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 – from the Boston Tea Party, to the Montgomery Bus Boycott, to more recent boycotts against apartheid South Africa, Israel in relation to its illegal occupation of Palestine, Russia in relation to its invasion of Ukraine, and China in relation to its human rights abuses in the Xinjiang Uyghur Autonomous Region.² The European Court of Human Rights and a former

¹ Local Government Bill HL Deb 28 January 1988 vol492 c772. At the time, 162 councils were exercising a boycott of products from apartheid South Africa.

² 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>

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 ECHR).³

The Anti-Boycott Bill threatens individuals' and public bodies' right to freedom of expression by effectively outlawing political and moral boycotts relating to foreign states' conduct. While the Explanatory Notes to the Anti-Boycott Bill do not engage substantively with the impact of the Bill on individuals' human rights, on the basis that "public authorities... do not have Convention rights,"⁴ clause 1(7) provides that references to the decision-maker include "the individuals who in fact make the decision for the decision-maker". Ultimately, regardless if the ban is capable of being directly imposed on an individual, its intended effect is clear: to stop individuals from exercising their right to try and influence public bodies' decisions by expressing political or moral disapproval of foreign states' conduct. The Bill achieves this both by directly punishing public bodies who are found to contravene the ban; and creating a chilling effect for individuals who may be deterred from expressing their views by public bodies who fear that 'a reasonable observer of the decision-making process' would conclude these views have influenced their decisions (thus causing them to fall foul of the ban).

The corrosive impact of anti-boycott laws in the US is instructive in assessing the potential impact of the Anti-Boycott Bill in the UK.⁵ In one case, 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;⁶ in another, a dermatologist was withheld payment for a university lecture for failing to agree to not boycott Israel.⁷ 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.⁸

GAGGING CLAUSE

The ban in clause 1 is exacerbated by the related 'gagging clause' at clause 4. Clause 4 prohibits public bodies from making 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. It would appear under this clause that a local councillor, when contributing to a debate about a particular procurement decision, could no longer make statements such as the following: "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."

This a staggering interference with individuals' exercise of the right to free political expression – it would effectively ban public bodies (and the individuals who make decisions on behalf of public bodies) from simply expressing their desire to engage in boycotts. Banning individuals from expressing political views in this way is highly likely to be a disproportionate interference with article 10 ECHR, especially given the recognised weight and importance accorded to free discussion and debate as an essential part of a democratic society.

WIDE INFORMATION DISCLOSURE OBLIGATIONS

Clause 7 gives the enforcement authority the power to issue a notice to a public authority requesting information (including personal information) that will enable them to assess whether the public authority has (or is likely to) contravene the prohibition. Clause 7(8) would disapply existing restrictions on disclosure and would also qualify data protection legislation in relation to it. Due to the breadth of clause 1 and the wide disclosure requirement in clause 7, investigations into any purported contravention of the ban imposed by clause 1 would appear to allow an enforcement body to request extensive disclosure of information about the individuals making a relevant decision as well as "any person seeking to persuade the decision-maker to act in a certain way". This could pose severe intrusions on individuals' right to privacy under Article 8 ECHR while also exacerbating the chilling effect on freedom of expression.

CONCLUSION

The Anti-Boycott Bill is the latest example of the shrinking space for freedom of expression in the UK, following the passage of the Police, Crime, Sentencing and Courts Act and the Public Order Act. For its attack on a cherished and vital form of political expression, Liberty urges Parliamentarians to decline to give the Anti-Boycott Bill a second reading.

For more information, please contact junp@libertyhumanrights.org.uk.

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 Paragraph 87, Economic Activity of Public Bodies (Overseas Matters) Bill Explanatory Notes, 19 June 2023.

⁵ 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>

⁶ 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/>

⁷ 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=IwAR1R72V9Dli-Qn0iU1YzJpLqsz0aZ0Elvz9CFzYU8mFbWefetJYrvq-CzUw>

⁸ 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>