

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

INTRODUCTION

1. The ongoing 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. In response, Government ministers have made multiple statements directed at Palestine solidarity protests, including the Home Secretary's extraordinary letter stating that "the waving of a Palestinian flag... may not be legitimate"¹ – a move which was criticised by former Supreme Court Justice Lord Sumption for being "ill-considered"² and which the Metropolitan Police refuted.³ Within this wider context of heightened tensions, the Government has brought the Economic Activity of Public Bodies (Overseas Matters) Bill back to Parliament for Report Stage.
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)).⁴
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.⁵ **While continuing to oppose the Anti-Boycott Bill on the whole, Liberty urges Parliamentarians to support the below amendments to mitigate some of its worst effects, and to speak out about the Bill's pernicious impact on the rights to freedom of conscience, expression, and privacy.**

GAGGING CLAUSE

Amendment 2 (In the name of Sir Desmond Swayne)

Page 3, line 13, leave out Clause 4

Explanatory Statement

4. The Anti-Boycott Bill seeks to ban public bodies (such as Government departments 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. The Bill establishes an enforcement mechanism for alleged breaches of the ban and the prohibition on making statements (see below). 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 enforcement authority the power to issue a notice to a public authority requesting information (including personal information) to assess whether there has, or may be, a breach of the ban or the prohibition on making statements; and the Bill gives the enforcement authority the power to impose a compliance notice where they consider a person is likely to contravene the ban.
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: "Our local council would

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 Billot, J., *Sumption: it's not illegal to chant for Palestine*, 22 October 2023: <https://unherd.com/the-post/sumption-its-not-illegal-to-march-for-palestine/>

³ Open letter from the Deputy Commissioner to London's Jewish communities, 12 October 2023: <https://news.met.police.uk/news/open-letter-from-the-deputy-commissioner-to-london-jewish-communities-473589>

⁴ 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?glid=24338>

⁵ 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>

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." Amendment 2 would remove clause 4.

Briefing

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. 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.*”⁶ Chair of the Foreign Affairs Committee Alicia Kearns MP concurred, saying that clause 4 was “*completely inappropriate.*”⁷
8. **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,”⁸ 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.
9. **In other jurisdictions, anti-boycott laws have had a severe impact on the right to freedom of expression.**⁹ 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;¹⁰ in another, a dermatologist was withheld payment for a lecture for failing to agree to not boycott Israel.¹¹ 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.¹²

PREEMPTIVE ENFORCEMENT AND CARVE-OUTS FROM DATA PROTECTION

Amendments 29-33 in the names of Anum Qaisar and Chris Stephens

Amendment 29: Clause 7, page 5, line 8, leave out “, or is about to make”

Amendment 30: Clause 7, page 5, line 12, leave out “, or is likely to contravene”

Amendment 31: Clause 7, page line 15, leave out “, or is about to publish,”

Amendment 32: Clause 7, page line 18, leave out “, or is likely to contravene,”

Amendment 33: Clause 8, page 6, line 6, leave out “, or is likely to contravene”

⁶ HC Deb 3 July 2023, vol. 735, col. 619.

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

⁸ HC Deb 14 September 2023, col. 166

⁹ 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>

¹⁰ 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/>

¹¹ 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=IwAR1R72V9Dlj-Qn0iU1YzJpUgSz0aZ0Elvz9CFzYU8mFbWefetJYryg-CzUw>

¹² 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://fmp.org/wp/wp-content/uploads/BDS-Laws-as-Template-for-Laws-on-Other-Issues.pdf>

Amendment 38 in the names of Anum Qaisar and Chris Stephens

Clause 7, page 5, line 39, leave out from “legislation” to the end of line 41

Explanatory Statement

10. Clauses 7 and 8 set out how the Anti-Boycott Bill will be enforced. Clause 7 gives the enforcement authority the power to issue a notice to a public authority requesting information (including personal information) to assess whether there has, or may be, a breach of the ban. Clause 7(8) appears to qualify the data protection legislation, by stating that “An 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*). Crucially, clause 7(7) provides 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).” Clause 8 applies if the enforcement authority is satisfied that a public body has contravened or is likely to contravene the ban or related prohibition on statements, and will enable the enforcement authority to give the public body a compliance notice setting out the actions that it considers the person should take to avoid contravening or further contravening the ban.
11. **Amendments 29 to 33 would remove the ability of enforcement authorities to investigate and impose requirements on public bodies prior to any actual contravention of the ban or prohibition on related statements. Amendment 38 removes the language in clause 7 that qualifies the data protection legislation.**

Briefing

12. **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 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.**
13. **The information notice provisions of the Anti-Boycott Bill carve out vital data and privacy protections.** Clause 7 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 in clause 7 to supercede the data protection legislation. It is unclear whether any attention has been paid as to how the powers conferred by clause 7 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).
14. Further, clause 7 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.

CONCLUSION

15. 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 2022 and the Public Order Act 2023. While continuing to oppose the legislation on the whole, Liberty urges Parliamentarians to support Amendments 2, 29-33, and 38 to mitigate some of its worst effects.

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