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LIBERTY'S BRIEFING FOR SECOND READING OF THE ECONOMIC ACTIVITY OF PUBLIC BODIES (OVERSEAS MATTERS) BILL, HOUSE OF LORDS, FEBRUARY 2024

INTRODUCTION

1. The deterioration of the crisis in Israel and Gaza has prompted individuals and communities across the country to make their voices heard, whether through political lobbying, vigils, or demonstrations. Rather than seeking to ease tensions, Government ministers have engaged in divisive and provocative actions,¹ including proposing new anti-protest restrictions including a blanket ban on wearing masks at demonstrations² and attempting to ban a Palestine protest on Armistice Day despite the Met Commissioner's own judgment that it would not result in serious public disorder.³ Within this wider context, the Economic Activity of Public Bodies (Overseas Matters) Bill (Anti-Boycott Bill) will shortly be having its Second Reading in the House of Lords. As noted by British Palestinian Liberal Democrat MP Layla Moran at Report Stage in the House of Commons: *"The Bill was divisive at the best of times, and the fact is that this is the worst of times."*⁴
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, including 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)).⁵
3. The Anti-Boycott Bill will not only affect boycotts related to Israel and Palestine – it will have a pernicious impact on wider civil society campaigning. Whether is it Uyghur exiles in the UK who have raised concerns that the Bill may undermine their ability to hold China to account over its human rights record;⁶ environmental groups who have warned about the negative impact of the Bill on campaigns for climate action;⁷ or human rights groups and trade unions who argue that the Bill could delegitimise human rights advocates and disincentivise ethical and human rights compliant investment and procurement practices;⁸ civil society opposition to the Bill runs wide and deep. **Liberty opposes the Anti-Boycott Bill and urges Peers to oppose it at Second Reading, given its damaging impact on the rights to freedom of expression, conscience, and privacy.**

BAN ON PUBLIC SECTOR BOYCOTTS

4. The Anti-Boycott Bill will ban public bodies (including Government departments, NHS Trusts, universities, 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

¹ Home Office, Letter to Chief Constables in England 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 Syal, R., *Masked protesters could soon face arrest, says Home Office*, The Guardian, 8 February 2024: <https://www.theguardian.com/uk-news/2024/feb/08/masked-protesters-could-soon-face-arrest-says-home-office>

³ Quinn, B. and Dodd, V., *Sunak calls Armistice Day pro-Palestinian protests 'disrespectful'*, The Guardian, 3 Nov 2023: <https://www.theguardian.com/world/2023/nov/03/rishi-sunak-calls-armistice-day-pro-palestinian-protests-disrespectful>

⁴ HC Deb 25 October 2023, vol. 738, col. 912

⁵ 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>

⁶ 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>

⁷ Friends of the Earth Parliamentary Briefing, House of Commons Second Reading of the Economic Activity of Public Bodies (Overseas Matters) Bill, June 2023: https://cdn.friendsoftheearth.uk/sites/default/files/downloads/FOE%20Second%20Reading%20briefing%20Economic%20Activity%20of%20Public%20Bodies%20Bill%20June%202023_2.pdf?_ga=2.38867169.377747275.1707737057-1990050711.1707737055

⁸ Amnesty International UK, Economic Activity of Public Bodies (Overseas Matters) Bill – House of Lords February 2024:

https://www.amnesty.org.uk/files/2024-02/Amnesty%20International%20UK%20Briefing%20-%20Economic%20Activity%20of%20Public%20Bodies%20-%20Lords%202nd%20Reading%20-%20February%202024.pdf?VersionId=nA3L8Msz9IUh3Fk_vVJG8nco2FcWq670 and Written evidence submitted by UNISON to the House of Commons Public Bill Committee considering the Economic Activity of Public Bodies (Overseas Matters) Bill (supplementary submission): <https://publications.parliament.uk/pa/cm5803/cmpublic/EconomicActivityPublicBodies/memo/EAPBB39.htm>

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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.

GAGGING PUBLIC BODIES

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 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 against them.
7. **In gagging public bodies and encouraging self-censorship, Clause 4 is likely to be a disproportionate interference with the right to freedom of expression, protected by Article 10 ECHR as given domestic effect by the HRA.** These impacts are 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. For example, 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.”⁹

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.”¹⁰

At Second Reading, Chair of the Foreign Affairs Committee and Conservative MP Alicia Kearns called clause 4 “*completely inappropriate.*”¹¹

⁹ HC Deb 3 July 2023, vol. 735, col. 619.

¹⁰ HC Deb 25 October 2023, vol. 738, col.906

¹¹ HC Deb 3 July 2023, vol. 735, col. 606.

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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.”*¹²

8. While the Government argues that the Bill is needed to “stop public bodies pursuing their own foreign policy agenda”¹³ and “to prevent divisive behaviour that undermines community cohesion”¹⁴ we remain concerned about the lack of evidence provided by the Government as to how the Economic Activity of Public Bodies Bill will actually achieve these goals in practice. Indeed, the Government’s own Impact Assessment states: “we are unable to draw definitive conclusions regarding the impacts of the proposed legislation on indirect discrimination for ‘race’ and ‘religion or belief.’”¹⁵
9. We echo concerns voiced by domestic and international faith, community, and human rights groups, including the view of British Jewish organisation Yachad (which states that it does not support or promote the BDS Movement) that “using legislation to clamp down on free speech and space for dissent harms our democracy.”¹⁶ In its briefing, Yachad highlights a unanimous February 2023 motion from the Union of Jewish Students “oppo[sing] any attempt to paint the British Jewish community’s legitimate need for security as standing in opposition to democratic rights” as well as a letter from leading Israeli human rights and civil society organisations opposed to the Bill, which states: “[i]n democracies, ideas that one may disagree with should be defeated through debate, not legislated against.”¹⁷ We further highlight Quakers in Britain’s view that the Bill could “restrict Quakers and other people of faith from putting their faith into action by campaigning on matters of conscience.”¹⁸ Indeed, in compelling individuals (such as those working within public bodies) to act contrary to their conscience and convictions, the Bill could arguably constitute an interference with the right to freedom of conscience protected under Article 9 ECHR.
10. **The Government has itself admitted that the wider aim of clause 4 is to suppress debates and campaigns around investment and procurement decisions altogether.** Indeed, the Government’s own Impact Assessment lists “a reduced number of BDS campaigns and threatened campaigns across UK public bodies” as an indicator of the Bill’s success.¹⁹ 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,”²⁰ 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.
11. 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

¹² HC Deb 25 October 2023, vol. 738, col. 915

¹³ Economic Activity of Public Bodies (Overseas Matters) Bill Impact Assessment, 4 May 2023: https://publications.parliament.uk/pa/bills/cbill/58-03/0325/EAPB_IA_15-03-23.pdf

¹⁴ The Secretary of State for Levelling Up, Housing and Communities, HC Deb 3 July 2023, vol. 735, Vol. 586.

¹⁵ Economic Activity of Public Bodies (Overseas Matters) Bill Impact Assessment, 4 May 2023: https://publications.parliament.uk/pa/bills/cbill/58-03/0325/EAPB_IA_15-03-23.pdf

¹⁶ Yachad, Briefing: The Economic Activity of Public Bodies (Overseas Matters) Bill, June 2023: <https://yachad.org.uk/wp-content/uploads/2023/06/Yachad-Briefing-on-Economic-Activites-of-Public-Authorities-Bill-.pdf>

¹⁷ Ibid.

¹⁸ Written evidence submitted by Quakers in Britain, Economic Activity of Public Bodies Bill, 2023:

<https://publications.parliament.uk/pa/cm5803/cmpublic/EconomicActivityPublicBodies/memo/EAPBB12.htm>

¹⁹ Economic Activity of Public Bodies (Overseas Matters) Bill Impact Assessment, 4 May 2023: https://publications.parliament.uk/pa/bills/cbill/58-03/0325/EAPB_IA_15-03-23.pdf

²⁰ HC Deb 14 September 2023, col. 166

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through the threat of severe fines and other consequences, this legislation risks clamping down on legitimate debate, without evidence that it will prevent discrimination. This is a threat to wider civil society campaigning.

- 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.”²¹ At Report Stage, Conservative MP David Simmonds highlighted how the clause may be rendered ineffective by other rules:

*“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.”*²²

- In other jurisdictions, anti-boycott laws have had a severe impact on the right to freedom of expression.**²³ 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;²⁴ in another, a dermatologist was withheld payment for a lecture for failing to agree to not boycott Israel.²⁵ 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.²⁶

PREEMPTIVE ENFORCEMENT AND CARVE-OUTS FROM DATA PROTECTION

- The Anti-Boycott Bill will enable the Secretary of State, the Treasury, or the Office for Students to investigate the relevant public body *before* any breaches of the ban have even occurred or prohibited statements have been published, by enabling them to issue an ‘information notice’ requiring the provision of particular information (including personal information).²⁷ Such an ‘information notice’ may be requested if a person is deemed to have made, *or is judged to be about to make*, a decision or statement in contravention of the ban.²⁸ 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 and pre-emptive 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.**
- 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” in relation to information notices. This means that a public body, in providing information to the enforcement authority (the Secretary of State, Treasury, or Office for Students) would not be liable for any breaches of its duties of confidentiality, safeguarding, 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

²¹ 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>

²² HC Deb 25 October 2023, vol. 738, col. 905

²³ 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>

²⁴ 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/>

²⁵ 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-Qn0jU1YzJpUgsz0aZ0Elvz9CFzYU8mFbWeFetJYryq-CzUw>

²⁶ 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>

²⁷ Paragraph 47, Economic Activity of Public Bodies Bill Explanatory Notes, 8 November 2023: <https://publications.parliament.uk/pa/bills/cbill/58-04/0005/en/230005en.pdf>

²⁸ Clause 7(3) and Clause 7(4).

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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.”²⁹

16. The Bill also mimics recent legislation (such as the Police, Crime, Sentencing and Courts Act 2022) in appearing to qualify the data protection legislation: it states 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*).” 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 supersede 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

17. 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 Peers to oppose the Economic Activity of Public Bodies Bill at Second Reading.

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

²⁹ 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>