

LIBERTY'S WRITTEN EVIDENCE FOR THE PUBLIC BILL COMMITTEE OF THE ECONOMIC ACTIVITY OF PUBLIC BODIES (OVERSEAS MATTERS) BILL (ANTI-BOYCOTT BILL), SEPTEMBER 2023

The Economic Activity of Public Bodies (Overseas Matters) Bill, or Anti-Boycott 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 boycotts - a powerful expression of protest which has been used throughout history to achieve social change, from the Montgomery Bus Boycott to boycotts against apartheid South Africa.

Widely criticised by Parliamentarians from across the political spectrum for its unworkability and impact on civil liberties at Second Reading, the Anti-Boycott Bill returns to Parliament on Tuesday 5 September. The ban that forms the centrepiece of the Bill will have such a chilling effect on our right to freedom of expression that no amendment is likely to fully mitigate its harms.

At Committee Stage, Liberty urges Parliamentarians to carefully scrutinise the Bill and voice their opposition to its fundamental attack on our freedom of expression.

CLAUSE 1: PROHIBITION ON PUBLIC BODIES FROM HAVING REGARD TO FOREIGN STATE CONDUCT

Clause 1(2) of the Anti-Boycott Bill creates a general ban on public authorities (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.

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.

THE BILL CREATES A CHILLING EFFECT FOR THE RIGHT TO FREEDOM OF EXPRESSION

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.¹ 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 ECHR).²

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,"³ 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 of if the ban can be directly imposed on an individual, its likely effect is clear: it will stop people 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

¹ 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>

² 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>

³ Paragraph 87, Economic Activity of Public Bodies (Overseas Matters) Bill Explanatory Notes, 19 June 2023.

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 immense impact of this ban and its inevitable chilling effect means that no amendment is likely to fully mitigate the Bill’s harms.

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.⁴ 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;⁵ in another, a dermatologist was withheld payment for a university lecture for failing to agree to not boycott Israel.⁶ 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.⁷

CLAUSE 4: GAGGING CLAUSE

Clause 4 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 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. For example, 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.”

THE BILL POSES AN UNJUSTIFIABLE RESTRICTION ON POLITICAL EXPRESSION

This a staggering and unprecedented interference with individuals’ exercise of the right to free political expression – it would effectively ban public bodies, and the individuals who make decisions on their behalf, from simply expressing their desire to engage in boycotts captured by clause 1 of the Bill. 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.”⁸ Alicia Kearns MP concurred, saying that clause 4 was “completely inappropriate.”⁹ 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.

CLAUSE 7: INVESTIGATIVE POWERS

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) would appear to qualify 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).”

THE BILL RISKS INFRINGING ON INDIVIDUALS’ RIGHT TO PRIVACY

Clause 7 creates immense powers to investigate public bodies if they are suspected of having, or being likely to, contravene the prohibition in clause 1. The way that clause 7 is drafted risks undermining existing protections for personal data and the right to privacy in two ways.

First, clause 7 mimics recent legislation (such as the PCSC Act) in appearing to qualify the data protection legislation. The effect of the qualifying language (in italics) 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

⁴ 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>

⁵ 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/>

⁶ 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-On0iUJYzJpUgsz0aZ0Elvz9CFzYU8mFbWeFetYrvq-CzUw>

⁷ 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>

⁸ HC Deb 3 July 2023, vol. 735, col. 619.

⁹ HC Deb 3 July 2023, vol. 735, col. 606.

Protection Act 2018 (DPA). This is particularly important because the prohibition's impact on individuals' rights is arguably disproportionate in the first place by unduly restricting the right to freedom of expression.

Second, and importantly, clause 7 would explicitly disapply existing restrictions on disclosure "however imposed". This could include duties of confidentiality, safeguarding, legal privilege, and 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.

Altogether, the Bill's attempt to qualify data protection legislation and carve out from duties of confidentiality would appear to ignore the importance of legal duties and professional obligations – such as confidentiality and safeguarding duties – that are essential to protecting people's dignity and privacy. The Bill intrudes on individuals' right to privacy under Article 8 ECHR and has a 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. The immense impact of this ban and its inevitable chilling effect on freedom of expression means that amendments are unlikely to fully mitigate the Bill's harms. For its attack on a cherished and vital form of political expression, Liberty urges Parliamentarians to carefully scrutinise the Bill and voice their opposition to it at Committee Stage.

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