



Economic Activity of Public Bodies (Overseas Matters) Bill - Second Reading 3 July 2023

Main provision

The main provision in the Bill (Clause 1) is a prohibition on public bodies being influenced by “political or moral disapproval of foreign state conduct” when taking procurement and investment decisions. Exemptions are provided for certain matters arising from bribery, labour-related misconduct, environmental misconduct and the UK’s international law obligations.¹

Why the Bill undermines human rights

- It would make it almost impossible for public bodies to use their procurement and investment policies to incentivise ethical business conduct that is human rights compliant.
- Companies depending on public contracts will feel more confident that their global impacts on human rights and the environment will be irrelevant to their success in tendering processes.
- Businesses making an effort to adhere to global standards such as the UN Guiding Principles on Business and Human Rights may find themselves at a competitive disadvantage.
- It undermines the freedom of expression of public sector decision-makers who may find that statements of principle are illegal and punishable even if they are not reflected in their public body’s decisions.
- It uniquely privileges one State, Israel, at a time when Israeli authorities continue to flagrantly breach international law, including through imposing a system of apartheid on Palestinians.
- It conflicts with the UK’s long-standing policy to differentiate between Israel’s internationally recognised borders and the Occupied Palestinian Territories, which the UK doesn’t recognise as part of Israel.
- It runs contrary to the UK’s endorsement of UN Resolution 2334 that requires states to differentiate between their dealings with Israel in its recognised borders and the Occupied Palestinian Territories.
- It undermines the attempts of the UK’s devolved governments to integrate human rights into their procurement policies.

In light of these issues Amnesty International urges all MPs to speak and vote against the Bill in its entirety, as it is not amenable to amendment.

Public bodies should use procurement/investment policies to incentivise business to be ethical and human rights compliant

Public procurement represents a significant share of the UK economy, with an underlying average of around 14% of GDP.² This provides an enormous opportunity to drive the transition to sustainable

¹ See the Government’s impact assessment of the Bill for further explanation;

https://publications.parliament.uk/pa/bills/cbill/58-03/0325/EAPB_IA_15-03-23.pdf

² Organisation for Economic Co-operation and Development, Public Procurement statistics;

<https://stats.oecd.org/Index.aspx?QueryId=107598>

production and consumption. Yet, like other governments, the UK currently procures goods and services via supply chains in which serious human rights abuses are widespread, and in recent years public sector purchases have been linked to such abuses. Public procurement laws and policies should be specifically framed to address human rights.³ The proposed law would inhibit public bodies from addressing human rights abuses in their supply chains in so far as any attempt to do so would risk being challenged for reflecting “political or moral disapproval of a foreign state”.

For example, if NHS bodies took steps to avoid sourcing surgical equipment and rubber gloves from certain suppliers in Malaysia, Thailand, Pakistan and Mexico that have been implicated in modern slavery⁴, then the companies concerned could take legal action under this law on grounds that the decision makers were influenced by “political or moral disapproval of foreign state conduct”. It would be left to the courts to determine whether the exemption in the Bill for ‘Labour-related misconduct’ applies in a particular case. The same would hold for a public body excluding a tenderer who sources goods from the Xinjiang region of China. If challenged, the onus would be on the public body to prove that their decision was determined entirely by international law and labour-related considerations rather than “disapproval of foreign state conduct”. This is an almost impossibly high bar to meet.

This creates significant risk for any public sector body taking such a decision. It would encourage them to desist from such decisions at a time when the role of public purchasing in leveraging ethical business conduct is widely viewed as an important driver of change.

The Bill removes a key hook for public bodies to exclude tenderers on human rights grounds. At present the Procurement Act 2023 allows for tenderers to be excluded on grounds of ‘professional misconduct’. This is now made subject to the prohibition on “disapproval of foreign state conduct”.

Businesses should face consequences when they breach human rights standards

If businesses believe that public bodies are most unlikely to exclude them from contracts on human rights grounds, then this creates moral hazard whereby companies that respect human rights face being undercut by those that knowingly breach international standards with little fear of consequences.

Almost all cases of companies abusing human rights have a territorial dimension in so far as they relate to violations taking place in a particular country and context. A public purchaser would have great difficulty in taking a decision about the conduct of a company involved in human rights violations without considering the role of the state. At that point the public body would come into conflict with the prohibition on “disapproval of foreign state conduct”.

There is clarity and global consensus on the human rights standards applicable to companies. The United Nations Guiding Principles on Business and Human Rights (UNGPs)⁵ were unanimously endorsed by the UN Human Rights Council in 2011. The UNGPs have gained support from the European Union, the Organisation for Economic Cooperation and Development, and the International Standards Organisation, as well as numerous businesses, civil society organisations, and government actors. Under the UNGPs the “State duty to protect” extends to situations where a commercial “nexus” exists between public actors and businesses, such as when government bodies

³ Public Procurement and Human Rights: A Survey of Twenty Jurisdictions; <https://www.oecd.org/governance/procurement/toolbox/search/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf>

⁴ BMJ; <https://www.bmj.com/company/newsroom/nhs-turning-a-blind-eye-to-labour-rights-violations-in-the-trade-of-masks-and-gloves/> and <https://jme.bmj.com/content/47/6/423>

⁵ See https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

purchase goods and services through public procurement. The UK was the first country to develop a National Action Plan to implement the UNGPs.⁶

The Bill uniquely privileges Israel (Clause 3)

The Bill is selective in its treatment of Israel, which is the only state that no Secretary of State or Cabinet Minister can exclude from the prohibition on “disapproval of foreign state conduct”. Every other state and territory in the world is exempted from the protection of this provision. It is incongruous to be singling Israel out in this way at a time when the human rights situation is deteriorating with an increase in house demolitions, forced evictions, and state-backed settler violence and when the many forms of discrimination against Palestinians are being recognised as constituting a system of apartheid⁷. At the very least, this encourages a sense of impunity.

The Bill cuts across the UK’s policy of differentiating between Israel and the occupied territories

Clause 3(7) of the Bill treats the Occupied Palestinian Territories and the Occupied Golan Heights in the same way as Israel. This is contradictory to the UK’s established policy as set out, for example, in the government’s Overseas Business Risk Guidance.⁸ Such treatment of the territories occupied by Israel appears to give credence to Israel’s de facto annexation and runs contrary to the UK’s endorsement of UN Resolution 2334 that requires states to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.⁹

Threat to Freedom of Expression

In addition to prohibiting commercial decisions which indicate disapproval of the conduct of a foreign state, the Bill also contains a direct threat to freedom of speech by preventing public officials who are ‘decision-makers’ (e.g. councillors) from expressing a view in principle based on such disapproval. Clause 4(1)(B) would prevent a decision-maker from making a statement such as “This public authority is deeply concerned by the situation in Myanmar and the involvement of some private companies in that country from a moral point of view. We would have liked to take their complicity into account when exercising our procurement and investment powers, but the law does not permit this, and we intend to comply with the law”. There is a quasi-judicial review process and an enforcement regime which can be used to prevent or punish the making of such a statement. Both would amount to interference with the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). Such interference would appear to be disproportionate and unjustifiable with regard to restrictions that are permissible under Article 10.

The Bill undermines the progress of the UK’s devolved governments in integrating human rights into public procurement

Northern Ireland, Wales and Scotland are all attempting to use the leverage of public procurement to incentivise companies to behave sustainably with regard to human rights, labour rights and the environment. Northern Ireland issued a Procurement Policy Note in 2021¹⁰ mandating the actions that Departments must take to incorporate human rights considerations into contracts when

⁶ UK National Action Plan on Business and Human Rights;

<https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020>

⁷ Amnesty International, Israel’s apartheid against Palestinians: Cruel system of domination and crime against humanity; <https://www.amnesty.org/en/documents/mde15/5141/2022/en/>

⁸ Overseas business risk: the Occupied Palestinian Territories (2.4);

<https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>

⁹ See <https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>

¹⁰ Northern Ireland, Procurement Policy Note, *Human Rights in Public Procurement*; <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PPN%2005%2021%20Human%20Rights%20in%20Public%20Procurement%20%28pdf%20Internet%20Version%2022%20Nov%2021%29.PDF>

conducting a procurement process. The Welsh Government committed to using procurement as a lever for driving economic, social and environmental benefits, recognising that unethical employment practices are taking place in supply chains.¹¹ The Scottish Government has developed a strategy on public procurement that places a strong emphasis on climate change.¹²

Imagine a case in which a public body in Scotland decided to stop sourcing beef from a Brazilian meat distribution company whose products have been linked to deforestation of the Amazon.¹³ If the proposed law had been in place during Jair Bolsonaro's presidency, at a time when exploitation of the Amazon was being actively encouraged, the Brazilian government or the company whose products were being excluded could have challenged the decision in the High Court on the grounds that it was influenced by "political or moral disapproval of foreign state conduct". It is not at all clear that the Environmental misconduct exemption referred to in Part 2 of the Bill's Schedule would prevail. Such uncertainty, with the risks and costs attached to it, would likely deter any public body from taking such a decision on environmental grounds.

For all these reasons, Amnesty International urges all MPs to vote against the Bill in its entirety as it is not amenable to amendment.

For any enquiries contact:

Peter Frankental, Economic Affairs Programme Director, Amnesty International UK
Email: peter.frankental@amnesty.org.uk

¹¹ Welsh Procurement Policy Note, *Ethical employment in supply chains for the Welsh public sector*; <https://www.gov.wales/wppn-11-21-ethical-employment-in-supply-chains-for-the-welsh-public-sector-html>

¹² Scottish Government, *Public sector procurement*; <https://www.gov.scot/policies/public-sector-procurement/procurement-and-climate-change/>

¹³ Amnesty International, *Brazil: Cattle illegally grazed in the Amazon found in supply chain of leading meat packer JBS*; <https://www.amnesty.org.uk/press-releases/brazil-cattle-illegally-grazed-amazon-found-supply-chain-leading-meat-packer-jbs>