



Economic Activity of Public Bodies (Overseas Matters) Bill – House of Lords February 2024

Economic Activity of Public Bodies Bill (the Bill) fails necessity and proportionality tests.

The Bill is predicated on the unevidenced assumption that some procurement and investment decisions on the part of public bodies are driven by or result in antisemitism. The Government's Impact Assessment of the Bill provides a clear indication of the lack of underpinning evidence¹:

- Para 60 “Without a larger volume of evidence, we are unable to draw definitive conclusions regarding the impacts of the proposed legislation on indirect discrimination for ‘race’ and ‘religion or belief.’”
- Para 61 “There is no data indicating the proportionate level of support that boycott and disinvestment policies receive based on ‘race’ and ‘religion or belief’. This makes it hard to assess how far the proposed measures might in practice have an impact on a particular group.”
- Para 64 “...we cannot say with certainty when or if a boycott and disinvestment campaign incites hate crimes or antisemitism and anti-Muslim hatred...”

The Bill has also been presented in terms of stopping public bodies from pursuing their own foreign policy and ensuring that the UK speaks with one voice internationally. However, there is a lack of evidence that public bodies currently take decisions that have any impact at all on UK foreign policy. Presenting the Bill in such terms distorts the wide range of considerations that public bodies take account of when developing and implementing procurement and investment policies.

In light of this, Amnesty International considers the Bill to be damaging to human rights even if it were to be significantly amended, because its core premise is intended to delegitimise human rights advocates and constrain public bodies from taking procurement and investment decisions that incentivise ethical business. This is a far-reaching and foreseeable adverse consequence that cannot be justified by any achievable goal.

¹ Government's Impact Assessment of Bill https://publications.parliament.uk/pa/bills/cbill/58-03/0325/EAPB_IA_15-03-23.pdf

Amnesty International urges all Parliamentarians to speak and vote against the Bill in its entirety.

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.

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 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”.

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

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

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>

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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 purchase goods and services through public

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

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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 regard to war crimes in Gaza, house demolitions, forced evictions, 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

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>

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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 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 Parliamentarians to vote against the Bill in its entirety.

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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>

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>

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