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The Baroness Drake CBE, Chair
Constitution Committee
By email: contactholmembert@parliament.uk

15 March 2024

Dear Jeannie,

I am writing to you in your capacity as Chair of the Constitution Committee in response to the Committee's report on the Economic Activity of Public Bodies (Overseas Matters) Bill. May I start by extending my thanks to the Committee for its contribution to our debate. I acknowledged some of the points raised in the Committee's report during my closing remarks at Second Reading and I would like to take this opportunity to provide a full response to your concerns.

Freedom of Expression

1. The Committee has expressed the view that clause 4 unduly limits the speech of public authorities and recommends that the House considers removing this clause from the Bill.
2. This clause is necessary in order that the Government fulfils the 2019 manifesto commitment, to "ban public authorities from imposing their own direct or indirect boycotts, disinvestment or sanctions campaigns against foreign countries".
3. This commitment was written into the manifesto out of concern that some public authorities had been pursuing boycotts and divestment campaigns. This includes publishing statements indicating that they intend to boycott or divest from a country or territory, or would if it were legal to do so.
4. For example, in 2014, Leicester Council passed a BDS motion on goods from Israeli settlements. Its resolution stated that it would boycott produce from the Israeli settlements "insofar as legal considerations allow". This resolution was widely condemned by Jewish groups and was divisive for communities in the UK. Such statements can be just as divisive as boycott and divestment policies that are implemented.

5. We very much agree that free speech must be protected and this is why this Bill only applies to public authorities, as defined in section 6 of the Human Rights Act 1998, and not to individuals or private companies, in their private capacities. Public authorities have the ability to undermine community cohesion and potentially confuse the foreign policy set by the UK Government. It is however justified to set restrictions on how these bodies can spend public money. Moreover, these bodies do not have Article 10 rights to freedom of expression guaranteed under the European Convention of Human Rights (ECHR), as the purpose of the ECHR is to prevent State interference with individuals' rights rather than to grant the State (and bodies deemed extensions of the State) any rights of its own.
6. We heard why the Bill is right to stop such declarations from a number of witnesses giving evidence to the Public Bill Committee in the other place. Jonathan Turner from UK Lawyers for Israel, described such declarations as harmful, with the same impact on community cohesion as boycotts that are implemented. Russell Langer from the Jewish Leadership Council supported the need for this clause; he said that it is not just the implementation of BDS measures which has an impact on the Jewish community in the UK, but also the associated debate being brought into our public bodies.

Higher Education Providers

7. The Committee asks how this Bill interacts with the Higher Education (Freedom of Speech) Act 2023. This Bill is limited and only applies to the procurement and investment decisions of universities or other higher education providers (collectively "HE providers") captured by the Bill. The Bill does not apply to students or visiting speakers. The Bill only places restrictions on public authorities. Staff, including lecturers, are only captured when they are speaking on behalf of a public authority, which will be scenario specific, based on the authorisation that the person has been given by the public authority to make such a statement. The Bill would not restrict a member of staff with no role in an HE provider's decision-making processes from stating their personal views in a lecture or on their personal social media in favour of their university - or indeed other higher education providers engaging in boycott or divestment policies, as long as this was not authorised by that body. The Bill would prevent staff from publishing a statement on behalf of the HE provider, such as on the provider's social media, indicating that it is the intent of the HE provider to boycott or divest.
8. It has been made clear in the Bill's explanatory notes that the ban is not intended to prohibit a higher education provider from deciding to terminate a collaboration with a foreign university on the grounds of academic freedom, in line with their statutory duties in Part A1 of the Higher Education Act 2017 or other legislation.

Procedural Fairness

9. The Committee asks that the Bill be amended to place a duty on an enforcement agency to provide reasons for the issuing of a compliance notice. We do not believe

that such an amendment is necessary as the Bill already makes it clear in clause 8(2)(b) that when the enforcement authority exercises its discretion to issue a compliance notice, that notice will set out the reasons why the public authority has or is likely to breach the ban.

10. Further, as the Committee notes, clause 8(4) provides that before the enforcement authority can issue a compliance notice, the enforcement authority must inform the person of the proposed notice and give the person an opportunity to make representations. The procedural requirement is to inform the person of the proposed compliance notice, which would therefore include the contents of the proposed compliance notice. The public authority would therefore have the information that it needed to make representations.

Financial Penalties

11. The Committee questioned the power to set a maximum financial penalty by regulation for decision-makers who fail to adhere to compliance notices.
12. First, we would like to clarify that the Bill does not create any new criminal offences, as implied in the Committee's report. The Bill will be enforced via civil measures.
13. Second, the power of enforcement authorities to impose a monetary penalty is a discretionary power. There is no obligation on them to impose a monetary penalty on public authorities which breach the ban and they are not required to impose the maximum monetary penalty for every breach of the ban. An enforcement authority may only impose a monetary penalty after issuing an initial written notice setting out their proposed penalty. A monetary penalty can only be imposed on a public authority. The purpose of the monetary penalty is to act as a deterrent to public authorities that wish to engage in boycotts and divestment campaigns.
14. Third, it is necessary to include a power for the Secretary of State to impose and vary a maximum monetary penalty for breaches of the ban so that it can be varied over time. For example, the monetary penalty may need to be varied to keep up with inflation.

Devolution

15. The Committee is concerned by reports that the Government has not consulted the devolved administrations on the provisions in the Bill. The Government has consulted with the Scotland and Wales Governments and with Northern Ireland officials on this Bill. Officials engaged with the devolved administrations prior to the Bill's introduction in the other place through the Common Framework working group process. Senior official engagement on the Bill dates back to 2022. Additionally, Minister Felicity Buchan MP has engaged with Scottish and Welsh Ministers on the Bill's provisions. We intend to engage with Ministers in Northern Ireland to seek their support now that power has been restored to the Executive and the Assembly.

16. The UK Government always seeks legislative consent for any bill that legislates for a devolved matter or alters devolved competence. We will continue to take account of the devolved administrations' views on the Bill and make changes where possible.
17. The Committee asks for clarification on why only clauses 1 and 4 engage the legislative consent motion process. We are seeking legislative consent in relation to the elements of the Bill which apply the ban to Ministers in Scotland, Wales and Northern Ireland, their departments and agencies. This is because clauses 1 and 4 are the only provisions in the Bill which may alter the executive competence of Ministers in the devolved administrations.
18. Clause 5, which the Committee highlighted as a particular concern in relation to Scotland, sets out the process for enforcement by the courts in England and Wales, Scotland and Northern Ireland. This clause is to support the enforcement of the Bill which relates to international relations, a reserved matter. Clause 5 only deals with devolved matters in consequence of the reserved purpose of the Bill and therefore does not trigger the legislative consent process. The Scottish Government does not dispute in its legislative consent memorandum that this part of the Bill is for a reserved purpose nor has it argued that clause 5 triggers the legislative consent process.

I hope this is helpful and look forward to providing any further assistance required.

I am copying this letter to the Committee and to the House Library.

Warm regards

Lucy Neville-Rolfe

Baroness Neville-Rolfe DBE CMG