



Lawyers for Palestinian Human Rights' response to the government consultation “Revoking and replacing the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009”



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a legal charity in the UK that works on projects to protect and promote Palestinian human rights. Our trustees include leading human rights lawyers Sir Geoffrey Bindman QC, Michael Mansfield QC and Daniel Machover.

Contact

Tareq Shourouh
Director of LPHR
Direct Line 07949 212 795
Email: contact@lphr.org.uk



Introduction

1. In its November 2015 consultation document *Local Government Pension Scheme: Revoking and replacing the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009*¹, the Government announced that it would provide guidance on how administering authorities' environmental, social and governance (ESG) policies concerning the selection, retention and realisation of investments should "reflect foreign policy and related issues" (the 'Guidance').² The Government stated that such Guidance is intended to "make clear" that administering authorities should not "pursue [pension] policies which run contrary to UK foreign policy."³
2. This response to the consultation sets out LPHR's main concerns in relation to the proposed Guidance and the wording of paragraphs 3.7 and 3.8 of the consultation. In particular, LPHR raises four key proposals for careful consideration: (1) ensure compatibility with UK government and local authorities' overarching policy commitment to implement the UN Guiding Principles on Business and Human Rights; (2) ensure compatibility with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory when defining the phrase "boycott, divestment and sanctions"; (3) extend the inappropriately narrow range of exceptions in the proposed Guidance; (4) distinguish between "procurement" and "investment".
3. It should also be noted that there is presently a clear scrutiny gap as the draft text of the proposed Guidance has not been published. We strongly recommend that the draft Guidance is published as soon as possible and is subject to public consultation and parliamentary scrutiny.

Background to proposed pension policy Guidance relating to "non-financial factors"

4. On 3 October 2015, the Conservative Party issued a press release which stated: "*The Government will amend pension legislation to make clear using pensions and procurement policies to pursuit [sic] boycotts, divestments and sanctions campaigns against foreign nations and the UK defence industry are inappropriate...*"⁴
5. Paragraph 3.7 of the consultation directly quotes from this press release, illustrating the context against which the Guidance referred to in paragraph 3.8 of the Consultation is being proposed.

1 The Consultation is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479642/Consultation_on_investment_reform.pdf

2 Consultation, paragraph 3.8

3 Ibid.

4 The Press Release is copied in full at: <http://www.economicvoice.com/government-to-stop-divisive-town-hall-boycotts-sanctions/>



6. LPHR notes in the same press release that the Conservative Party stated the Government would issue “new Procurement Policy guidance to implement the same approach in procurement law.”⁵ LPHR will respond to any such Procurement Policy guidance separately, if it is issued.

Proposal 1: Ensure compatibility with UK Government and local authorities overarching policy commitment to implement the UN Guiding Principles on Business and Human Rights

7. On 21 March 2011, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) were introduced in a report⁶ before the UN Human Rights Council. The UN Guiding Principles are grounded in recognition of the state's existing duty to respect, protect and fulfil human rights; the corporate responsibility to respect human rights; and the need for access to effective remedies when rights and obligations are breached. The UN Guiding Principles recognise that states, businesses, and civil society have a key role to play in enhancing standards of business respect for human rights.
8. With relevance to this consultation, international law makes clear that local authorities are organs of the state (see Appendix A). Local authorities, accordingly, share the same obligations as central government under the UN Guiding Principles.
9. The UK government was one of the first states to implement the UN Guiding Principles, when, in September 2013, it published its first National Action Plan on business and human rights⁷ (UK National Action Plan). The UK government's clear policy commitment to the UN Guiding Principles is underscored in the foreword to the UK National Action Plan, which states:

“The Government strongly believes that the promotion of business and respect for human rights should go hand in hand... The Government welcomes the creation of the UN Guiding Principles on Business and Human Rights. Government, businesses, trade unions and civil society all have roles to play in the implementation of these, domestically and internationally.”⁸

10. The implementation of the second of the UN Guiding Principles is at the heart of LPHR's concerns about this consultation. It provides that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”⁹

5 Ibid.

6 The UN Guiding Principles report is available at:
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

7 The UK National Action Plan is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf

8 UK National Action Plan, page 4. The Foreword is by the then Secretary of State for Foreign Affairs, Mr. William Hague, and the then Secretary of State for Business, Innovation and Skills, Dr. Vince Cable.

9 UN Guiding Principles, page 8.



11. Local authorities share this obligation as an organ of the state, and, as such, share an equal responsibility with the UK government to implement the UN Guiding Principles and adhere to the UK National Action Plan. As the United Nations Human Rights Council Advisory Committee has stated:

“Local authorities are obliged to comply, within their local competencies, with their duties stemming from the international human rights obligations of the State. Local authorities are actually those who are to translate national human rights strategies and policies into practical applications”¹⁰ (see Appendix A for further relevant excerpts).

12. The UK National Action Plan itself recognises the inextricable link between its central objective of promoting business respect for human rights and the role of pension funds. It notably states:

“Companies increasingly understand that there is a business case for respect for human rights and that this brings business benefit in various ways by... appealing to institutional investors, including pension funds, who are increasingly taking ethical, including human rights, factors into account in their investment decisions.”¹¹

13. Imposing a broad ban on “boycotts, divestments and sanctions”, with a narrow range of exceptions, as suggested at paragraph 3.7 of the consultation, would be a major and unacceptable curtailment on local authorities ability to act in full accord with the UN Guiding Principles and UK National Action Plan. To take one example, if a company was found to be in breach of human rights obligations under the OECD Guidelines on Multinational Enterprises – which embodies the UN Guiding Principles – by the UK National Contact Point, it should be within the power of a local authority to take this material human rights factor into account when making investment decisions.
14. Preserving the discretion of a local authority to devise, and amend, their investment strategies to enable promotion of business respect for human rights, is therefore essential given their obligations under the UN Guiding Principles and significant role in implementing the UK National Action Plan.
15. LPHR strongly suggests that:
 - (a) the proposed guidance should not be introduced because it appears to restrict the scope of local authority pension funds’ investment decisions in any way which does not take proper account of existing government policy on promoting business respect for human rights; or

10 The United Nations Human Rights Council Advisory Committee report on “the role of local government in the protection and promotion of human rights”, dated 7 August 2015, is available at: http://webcache.googleusercontent.com/search?q=cache:xT2u2_-3gusJ:www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_49_ENG.docx+&cd=2&hl=en&ct=clnk&gl=uk

11 UK National Action Plan, page 6



(b) if LPHR's position in paragraph 15 (a) is not accepted, the proposed guidance should be appropriately worded to be fully compatible with UK government and local authorities' overarching responsibilities under the UN Guiding Principles and the UK National Action Plan, and should further reflect proposals 2 to 4 below.

Proposal 2: Ensure compatibility with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory when defining “boycott, divestment and sanctions”

16. Both the Conservative Party press release and paragraph 3.7 of the consultation state that the Guidance is intended to prevent administering authorities from pursuing “boycotts, divestments and sanctions”. The Conservative Party press release expressly refers to a local authority’s boycott of products emanating from settlements in the occupied West Bank as an example of an action that should be prevented.¹²
17. LPHR does not take a position in relation to the movement to boycott, divest from, and sanction Israel, but it does take a considered policy position that the UK Government and local authorities should withhold incoming and outgoing trade with illegal Israeli settlements as a matter of compliance with their fundamental legal obligations. This is due to the legal consequences flowing from the illegality of settlements (see paragraphs 20-22 below). LPHR is seriously concerned that neither the Conservative Party press release nor the consultation properly distinguishes between boycott, divestment and sanctions initiatives in relation to Israel, and those that specifically relate to illegal Israeli settlements in the occupied Palestinian territory. The need to avoid troubling conflation is highlighted by considering the UK government’s long-standing and clear policy recognising the illegality of Israeli settlements in the occupied Palestinian territory, the UK government's current guidance issued to UK businesses which does not encourage trade with settlements, and the recent statement by all EU member states “unequivocally and explicitly” making the distinction between Israel and all territories occupied by Israel since 1967.¹³
18. The Foreign and Commonwealth Office (FCO) has published guidance (the ‘FCO Guidance’) which does not encourage UK businesses from operating within illegal settlements. The Overseas Business Risk advice for Israel states: *“The UK has a clear position on Israeli settlements: The West Bank, including East Jerusalem, Gaza and the Golan Heights are territories which have been occupied by Israel since 1967. Settlements*

¹² An example relating to a decision by Leicester City Council is given prominent reference in the 'Notes to Editors' section of the Press Release.

¹³ Council Conclusions on the Middle East Peace Process, paragraph 8, dated 18 January 2016. It is available at: http://www.consilium.europa.eu/en/press/press-releases/2016/01/18-fac-conclusions-mepp/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Council%20conclusions%20on%20the%20Middle%20East%20Peace%20Process



are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution to the Israeli-Palestinian conflict impossible.”¹⁴

19. Set against this clear legal context, the FCO Guidance states: “*There are therefore clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity.*”¹⁵
20. It is important to be aware that there are significant legal consequences flowing from the illegal status of settlements. The establishment of illegal settlements and their related infrastructure obstructs the Palestinian right of self-determination. The right to self-determination is recognised by the International Law Commission as a norm of such importance – called a ‘peremptory norm’ – that it includes a separate and additional legal obligation on all states, including the United Kingdom, to respect and promote this specific right.
21. The International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts¹⁶, clarify that the duty on states consists of an obligation not to recognise as lawful, or act in a manner that implies recognition for, a situation resulting from a violation of a peremptory norm, even if committed by another state. Nor may they render aid or assistance in maintaining that situation. The International Court of Justice has confirmed, in the context of the construction of the illegal Wall in the occupied West Bank, that the duty on all states of non-recognition and non-assistance applies to the obstruction of the right of self-determination for Palestinians. As noted at paragraph 8 above, local authorities, as an organ of the state, crucially shares this duty.
22. Initiatives to refrain from trade or investment with internationally recognised illegal settlements, as reflected in the FCO guidance to UK businesses operating with illegal settlements, entirely align with the above fundamental legal obligation on all states to respect and promote the vitally important Palestinian right to self-determination. It is against this urgent and critical international law and human rights context that local authorities’ investment decisions concerning businesses involved with illegal Israeli settlements should be understood and accepted as entirely justifiable.
23. LPHR strongly suggests that any forthcoming Guidance should:
 - (a) clearly differentiate between boycott, divestment and sanctions in relation to Israel and those in relation to the occupied Palestinian territory so that it is fully compatible with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory; and

14 The FCO Guidance is available at: <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel>

15 Ibid.

16 The ILC Articles on State Responsibility for Internationally Wrongful Acts is available at: <http://www.un.org/documents/ga/docs/56/a5610.pdf>



(b) expressly re-state that the FCO does not encourage or offer support to economic or financial activities in the settlements.

Proposal 3: Extend the inappropriately narrow range of exceptions in the proposed Guidance

24. Paragraph 3.7 of the consultation refers to the Secretary of State's view that boycott, divestment and sanctions are "*inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.*" Paragraph 3.8 of the consultation also states that administering authorities "*should not pursue policies which run contrary to UK foreign policy.*"
25. A striking discrepancy between these two positions, illuminating the flawed narrow scope of the proposed guidance, is illustrated by reference to the FCO Guidance above (see paragraphs 18 and 19). The FCO Guidance expresses a significant foreign policy position on Israeli settlements which is consistent with respect for the rule of international law and human rights. However, as the UK government has no "legal sanctions, embargoes and restrictions" in place in relation to Israel's settlement enterprise, the proposed Guidance would unreasonably prevent local authorities from taking investment decisions which could effectively support the FCO Guidance.
26. The inappropriate narrowness of the permitted exceptions under the consultation is further noted by recalling, as set out in paragraphs 8 to 11, that local authorities are obliged under the UN Guiding Principles to "set out the clear expectation to all business enterprises that they respect human rights", when devising local authority policies and investment principles. As noted at paragraph 12 above, the UK National Action Plan acknowledges this requirement by expressly recognising the relevance of institutional investors decision-making in promoting business respect for human rights.
27. LPHR strongly suggests that the exclusions from the proposed prohibition on "boycotts, divestments and sanctions" in the Guidance is significantly too narrow to allow compatibility with UK Government policy positions or with respect for international law.
28. We propose as alternative wording: "*Boycotts, divestments and sanctions are appropriate where the UK Government has supported them or their aim, for example through formal legal sanctions, embargoes, restrictions, guidance, statements or other means. Boycotts, divestments and sanctions are also appropriate where compatible with the duty to respect international law and human rights.*"
29. We alternatively, or in addition, propose that the proposed guidance "shall be taken into account" by local authorities, rather than to require its strict compliance.

Proposal 4: Distinguish between procurement and investment



30. LPHR notes that the consultation relates to the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 (the 'LGPS Regulations'). Within the LGPS Regulations, local authorities have relevance as the "administering authorities" for local authority pension funds. These pension funds invest on behalf of their local authority employee pension holders and are not involved in local authorities' procurement decisions. The references in the consultation to procurement policies are therefore not relevant to the LGPS Regulations.
31. LPHR strongly suggests that any forthcoming guidance in relation to the LGPS Regulations does not include any reference to procurement policies, as these do not bear relevance to the regulations under consideration.

Tareq Shrourou, Claire Jeffery



Appendix A

(All emphasis added)

International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Chapter 2, Commentary

“...[T]he conduct of certain institutions performing public functions and exercising public powers...is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.”

...

Article 4

“(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the state.

(2) An organ includes any person or entity, which has that status in accordance with the internal law of the State.”

Commentary

...

“(6) ...[T]he reference to a State organ in article 4 is intended in the most general sense....It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level...’

...

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units...’

...

(12) The term “person or entity” is used in article 4...in a broad sense to include any natural or legal person, including...[any] other body exercising public authority, etc. The term “entity” is used in a similar sense...”

...



Role of local government in the promotion and protection of human rights – Final report of the United Nations Human Rights Advisory Committee (A/HRC/30/49) (2015)

...

(17) As a matter of international law, the State is one single entity, regardless of its unitary or federal nature and internal administrative division. In this regard, only the State as a whole is bound by obligations stemming from international treaties to which it is a party. Thus by becoming a party to an international human rights treaty, a State assumes obligations to respect, protect and fulfil human rights...Furthermore, a State appearing before an international human rights complaints mechanism cannot defend itself by claiming that the alleged violation was committed by a local authority.

(21) It is the central government which has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play....[T]he central government might need to take necessary measures at the local level, in particular, to establish procedures and controls in order to ensure that the State's human rights obligations are implemented. Local authorities are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State. Local authorities are actually those who are to translate national human rights strategies and policies into practical applications....Institutionalized cooperation on human rights between the central and local governments can have a positive impact on the level of implementation of the international human rights obligations of the State.'

...

(27) Human rights duties of local government follow the classical tripartite typology of States' human rights obligations, namely, the duty to respect, the duty to protect, and the duty to fulfil. The duty to respect means that local officials must not violate human rights through their own actions.

...

(34)...Every person in charge of the local government must be aware of the obligations imposed by human rights. Often this awareness lacks a well-founded knowledge about the content and the scope of human rights. As a result, many local governments fail to understand and incorporate human rights into local policy and practice.'

...