



**Lawyers for Palestinian Human Rights' briefing on the UK government's guidance and consultation in relation to administering authorities preparing and maintaining an Investment Strategy Statement under Regulation 7 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016**



### **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.

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## Section I: Introduction

1. In the UK government's November 2015 consultation document *Local Government Pension Scheme: Revoking and replacing the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009*<sup>1</sup> (the 'Consultation'), 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').<sup>2</sup>
2. LPHR prepared a response<sup>3</sup> to the Consultation in February 2016 in which it set out its main concerns in relation to the proposed Guidance due to the wording of paragraphs 3.7 and 3.8 of the Consultation. Paragraph 3.7 stated "The Secretary of State has made clear that using pensions and procurement policies to pursue boycotts, divestments and sanctions against foreign nations and the UK defence industry are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government." Paragraph 3.8 stated that such Guidance is intended to "make clear" that administering authorities should not "pursue [investment] policies which run contrary to UK foreign policy."<sup>4</sup>
3. LPHR raised key proposals for careful consideration by the Government in relation to the proposed Guidance, with the two most significant being: (1) to ensure its 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"; and (2) to ensure its compatibility with UK government and local authorities' overarching policy commitment to implement the UN Guiding Principles on Business and Human Rights.
4. On 15 September 2016, the Department for Communities and Local Government published its Guidance to administering authorities on preparing and maintaining an Investment Strategy Statement under Regulation 7 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (the 'Regulation'). It states that administering authorities will be required to act in accordance with the provisions in the Guidance when the Regulation comes into force (on 1 November

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1 The Consultation is available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/479642/Consultation\\_on\\_investment\\_reform.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479642/Consultation_on_investment_reform.pdf)

2 Consultation, paragraph 3.8

3 LPHR's response to the Consultation is available at: <http://lphr.org.uk/wp-content/uploads/2016/02/LPHRs-response-to-the-consultation-on-the-local-government-pension-scheme-investment-regulations-February-2016-Final.pdf>

4 Ibid.



2016). The language from Paragraph 3.7 and 3.8 was replicated in full in the Guidance. The Government subsequently published its response to the Consultation on 27 September 2016 (the 'Government Response').<sup>5</sup> This briefing sets out LPHR's position on both documents as they relate to the issues outlined at paragraph 3 above.

**Section II: Is the new Guidance compatible with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory when defining “boycott, divestment and sanctions”?**

5. In our February 2016 response to the Consultation, we expressed the concern that the Government's references to the 'inappropriateness' of boycott, divestment and sanctions do not properly distinguish between the application of such initiatives in relation to Israel, and those that specifically relate to illegal Israeli settlements in the occupied Palestinian territory. This concern was prompted by a Conservative Party press release on the proposed Guidance which referred to a local authority's boycott of products emanating from illegal settlements in the occupied West Bank as an example of an action that should be prevented.<sup>6</sup>
6. We stated that the need to avoid troubling conflation of these two separate issues is highlighted by considering: (a) the UK government's long-standing and clear foreign policy position recognising the illegality of Israeli settlements in the occupied Palestinian territory; (b) the Government's current guidance issued to UK businesses which does not encourage trade with settlements; and (c) the recent statement by all EU member states “unequivocally and explicitly” making the distinction between Israel and all territories occupied by Israel since 1967.<sup>7</sup>
7. In this context, we expressed that 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 in the occupied Palestinian territory, as a matter of compliance with their fundamental legal obligations.
8. To reiterate from our February 2016 response to the Consultation, we take this position due to the legal consequences flowing from the illegality of settlements. The establishment of illegal settlements and their related infrastructure, which includes the

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5 The Government Response is available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/555690/Government\\_response\\_to\\_2016\\_consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555690/Government_response_to_2016_consultation.pdf)

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

7 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](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)



illegal wall (Wall), obstructs the Palestinian right of self-determination, which is a norm of significant status under international law in that it places a separate and additional legal obligation on all states, including the United Kingdom, to respect and promote this specific right. This fundamental legal obligation encompasses a duty not to recognise as lawful a situation resulting from the violation of the right to self-determination, and a duty not to render aid or assistance to maintain that situation. Local authorities, as an organ of the state, crucially share these legal duties.

9. In LPHR's response to the Consultation, we stated that this significant international law and human rights context makes it entirely justifiable and permissible for local authorities to take into account, in their investment decisions, the extent to which businesses are involved with illegal Israeli settlements and related infrastructure including the Wall.
10. We accordingly proposed that the Guidance should: (a) clearly differentiate between boycott, divestment and sanctions in relation to Israel and those in relation to the occupied Palestinian territory so as to ensure that it is fully compatible with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory; and (b) expressly re-state the Overseas Business Risk advice from the Foreign Office that specifies it does not encourage or offer support to economic or financial activities in the settlements.
11. Although the Guidance and the Government Response does not expressly address these proposals, **LPHR nonetheless takes the view that the newly published Guidance should be read as being compatible with existing UK government policy and guidance on illegal Israeli settlements in the occupied Palestinian territory.**
12. To explain our position, it is useful to split the relevant phrase in the Guidance into two parts (indicated in the following quote by square brackets): "pension policies [1] to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, [2] other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government."
13. LPHR takes that view that Part [1] of the above stipulation in the Guidance is not relevant to administering authorities potentially divesting from or deciding not to invest in companies engaged in certain activities (i.e. involvement with illegal settlements and its related infrastructure, including the Wall, etc) within the occupied Palestinian territory because, (a) the occupied Palestinian territory cannot legitimately be asserted as falling under the sovereignty of Israel, and (b) such a potential policy by an administering authority would be based on a company being involved with activities linked to Palestinian human rights violations, rather than to a particular geography. This accordingly means that the exceptions in Part [2] of the above stipulation in the Guidance are not engaged because they are only relevant as an exception to Part [1].



**14.** To underscore this, it is important to emphasise that, as set out in LPHR’s response to the Consultation, UK foreign policy affirms that Israeli settlements in the occupied Palestinian territory are illegal. In particular, the Foreign and Commonwealth Office has stated in its Overseas Business Risk advice: ‘There are...clear risks related to economic and financial activities in the [Israeli] settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities...in Israeli settlements or benefiting Israeli settlements, entail legal and economic risk stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognized as a legitimate part of Israel’s territory.’<sup>8</sup>

**Section III: Is the new Guidance compatible with UK Government and local authorities’ overarching policy commitment to implement the UN Guiding Principles on Business and Human Rights?**

**15.** In our February 2016 response to the Consultation, we expressed concern that the proposed Guidance should not prevent local authorities from exercising their obligations under the UN Guiding Principles on Business and Human Rights. 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.

**16.** We outlined how 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 rights<sup>9</sup> (UK National Action Plan). We then detailed that local authorities, as organs of the state under international law, share the same obligations as central government under the UN Guiding Principles, and consequently the UK National Action Plan.<sup>10</sup> In addition, LPHR notes that the Officer of the High Commissioner for Human Rights has confirmed that the UN Guiding Principles also apply to institutional investors directly, regardless of their nexus to the state.<sup>11</sup>

**17.** In our response to the Consultation, we asserted that preserving the discretion of a local authority to devise, and amend, their investment strategies to enable promotion of

<sup>8</sup> The Foreign and Commonwealth Office’s ‘Overseas Business Risk – Israel’ is available at: <https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel--3>

<sup>9</sup> 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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf)

<sup>10</sup> LPHR has considered this issue in detail at paragraphs 10-11 and Appendix A of its response to the Consultation, available at: <http://lphr.org.uk/wp-content/uploads/2016/02/LPHRs-response-to-the-consultation-on-the-local-government-pension-scheme-investment-regulations-February-2016-Final.pdf>

<sup>11</sup> The Office of the High Commissioner for Human Rights’ analysis is available at: <http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf>



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. We accordingly recommended that 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.

18. Although our concern was not expressly addressed in the Government's Response, **LPHR takes the view that the newly published Guidance does not limit the UK government and local authorities' overarching responsibilities under the UN Guiding Principles and the UK National Action.** In particular, LPHR notes that, in the context of assessing companies engaged in certain activities which infringe Palestinian human rights, there is notably no wording in the Guidance which prevents or restricts an administering authority from having a policy of properly taking into account its business and human rights obligations under the UN Guiding Principles when making investment decisions.
19. The following line in the Government's Response sets this out clearly: 'Provided that the guidance to be published under draft Regulation 7(1) is complied with, **there is nothing in draft regulation 7(2)(e) to prevent an administering authority from taking any non-financial consideration into account** provided that it is made in the best long term interests of scheme beneficiaries, and does not represent any significant risk to the health of the fund' (bolded by LPHR for emphasis).
20. Relevant and significant non-financial considerations that may therefore be permissibly taken into account by an administering authority in the context of protecting and promoting Palestinian human rights, include acting compatibly with: international humanitarian and human rights law; the UN Guiding Principles on Business and Human Rights; the OECD Guidelines for Multinational Enterprises; the UK National Action Plan on Business and Human Rights; and the UK's foreign policy position and Overseas Business Risk advice in relation to Israeli illegal settlement activities in the occupied Palestinian territory.
21. However, LPHR remains very concerned that the Guidance stipulates that non-financial considerations are not permitted to be taken into account in relation to the restrictions on boycott divestment and sanctions against foreign nations and the UK defence industry. We take the view that these arbitrary restrictions on the investment decision-making of administering authorities are unjustifiable and set a deeply disturbing precedent. However, our view is that these restrictions are not directly relevant to any administering authority that may wish to protect and promote Palestinian human rights through adopting an investment policy that includes giving effect to its business and human rights responsibilities.



## 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.'

...