

Arts and Recreation Committee

Ethnic Minorities Committee

Ethnic Arts Sub Committee
Planning Committee

Report (4.9.85) by the

Director of Recreation and
the Arts and the
Principal Race Relations Adviser

Item 6	AR 2442
LONDON AGAINST RACISM IN THE ARTS - USE OF COUNCIL FACILITIES AND PREMISES OTHER THAN THE SOUTH BANK CONCERT HALLS Prog. refs: A12 and A22	

RECOMMENDATIONS

- (a) That the Committees agree to exclude performers/artists or groups of such persons, who are willing to perform before any audiences in South Africa, Namibia and the Homelands, from the use of the Council's facilities and premises at the following places:-
- (1) GLC Parks and open spaces
 - (2) GLC historic houses
 - (3) Brixton Recreation Centre
 - (4) Covent Garden market
- and that such artists/groups also should not be employed by the Council for events promoted by the Council at places not in the ownership of the Council.
- (b) That the policy set out in (a) be applied only to individual artists or groups named in advance publicity.
- (c) That with effect from 1 October 1985 the undertaking contained in Appendix C of AR2200 be applied in future to all new contracts with directly engaged artists/groups and with promoters and that the Special Conditions contained in Appendix C of AR2200 be inserted in all such contracts.
- (d) That the policy be monitored and if necessary a report on its effects be submitted after six months.

Introduction

1 The Arts and Recreation Committee on 17 April 1985 decided (AR 2200), inter alia that the use of the Council's premises and facilities at the South Bank Concert Halls should be withheld from performers/artists or groups of such persons who are willing to perform before any audiences in South Africa, Namibia and the Homelands. This decision was taken on the basis that it should apply to individual artists or groups named in advance publicity and that it should be applied until such time as the Director of the United Nations Centre against apartheid may decide that the system of apartheid in South Africa has ceased to exist. The Committee requested that a further report should be prepared, as a matter of urgency, reviewing the arrangements for the hiring of artists and performers at other venues and events run by the Council. The document AR 2200 is re-circulated as an appendix to this report, since the detailed analysis of the policy within that document is also relevant to this report.

2 Apart from the South Bank Concert Halls there are five main areas where the Council hires artists and performers in connection with events run by the Council, or in association with the Council. These are:

- (a) arts and entertainments events in GLC parks and open spaces;
- (b) recitals and exhibitions in the historic houses;
- (c) arts and entertainment events provided in the Music for All programme;
- (d) arts and entertainment events at Brixton Recreation Centre;
- (e) arts and entertainment events at Covent Garden market.

Paragraphs 3-7 consider the particular situations in each of these areas. Generally, the legal and financial problems which it was necessary to consider with reference to the South Bank Concert Halls do not arise in the same complexity. This is because, firstly, events are planned on a much shorter time scale and there are very few commitments beyond 1985. Secondly, the great majority of events are Council promotions where it is possible to exercise greater control from the outset and, thirdly, there is less involvement of professional artists and groups who work internationally and who are likely to have the opportunity to visit South Africa. The Committee are therefore recommended to apply the same policy to other GLC venues and events as has been agreed for the South Bank Concert Halls, namely:-

- (1) The use of the Council's facilities and premises at Brixton Recreation Centre, Covent Garden, GLC historic houses and in GLC parks and open spaces be withheld from performers/artists or groups of such persons who are willing to perform before any audiences in South Africa, Namibia and the Homelands.
- (2) The policy only be applied to individual artists or groups named in advance publicity.
- (3) The policy only be applied until the system of apartheid ceases to prevail in any of the above territories as decided by the Director of the United Nations centre against apartheid in case of dispute.

- (4) With effect from 1 October 1985 the undertaking contained in Appendix C of AR.2200 be applied in future to all new contracts with directly engaged artists/groups and with promoters and that the special conditions contained in Appendix C be inserted in all such contracts.

3 GLC parks and open spaces

(a) GLC promotions

Professional artists and groups, mainly musicians but including some actors and dancers, are employed for the Summer programme of open-air entertainment in the parks. The main areas where these artists appear are the Kenwood and Crystal Palace open-air symphony concerts, Holland Park open-air theatre and the South Bank weekends. Professional children's entertainers and theatre groups are also employed for the summer holiday programme of events in GLC parks throughout London. In 1985 over 800 events have been arranged. It should be noted that many of the events in the parks also involve considerable participation by the community and voluntary organisations, often including groups funded by the Council. It is not proposed to include these groups - who mainly participate in events such as the Easter Parade, the May Festivals and the South Bank weekends - within the scope of the new policy which will be restricted to professional artists/groups.

The 1985 programme of open-air entertainment, which was approved by Committee in December 1984, is almost completed.

(b) Promotions by others

It is the Committee's policy to assist others to stage open-air events in the parks. These events can be divided into three categories: (i) community festivals, (ii) charity events, (iii) commercial promotions e.g. pop concerts. The first two categories mainly involve non-professional groups though there may in some cases be professional artists/groups involved. Commercial promotions are most likely to involve professional artists. It is recommended that the new policy should in future apply to professional groups in all three categories. It is possible that the effect of this decision might be to make it difficult to respond positively to groups who apply to do an event at short notice.

4 GLC historic houses

(a) Recitals

Professional artists and groups, musicians and actors, are employed by the Council for the Sunday evening music and poetry recitals at Kenwood House and Ranger's House. The artists are usually booked three to six months in advance. It is proposed to apply the new policy to all the bookings of professional artists. In practice this is likely to include the majority of the artists booked, excepting only the young artists who take part in the spring series at Ranger's House, who are mainly students.

(b) Exhibitions

The policy is inapplicable to the historical exhibitions at the historic houses, but where there is the occasional exhibition of the work of living artists, the policy will be implemented.

5 Arts and entertainments events provided in the 'Music for All' programme

The Council arranges a number of lunch-time music programmes at shopping centres throughout Greater London, and there is also a programme of music-hall performances in old people's homes and day-centres arranged on a touring basis. Concerts are also promoted at the Fords factory in Dagenham in association with the Ford Motor Co.

These events are all planned well in advance with artists/groups well known to the Council, and the policy will apply to professional artists who feature in advance publicity.

6 Arts and entertainment events at Brixton Recreation Centre

Facilities at Brixton Recreation Centre include a main sports hall which is licenced to seat 1,200 spectators, for major sports, entertainments and exhibition events.

h events Although the development of a programme is in its early stages it is planned to hold major sporting/ entertainments and exhibitions at the Centre. Many of the events will be local in content. ILEA's "Come Alive" festival held in July 1985 had youth and sport as its themes. For entertainment events and arts exhibitions that are likely to employ professional entertainers and artists the Council's new policy will be applied.

7 Arts and entertainment events in Covent Garden market

There are two areas in the vicinity of the market currently licensed for entertainment. On the West Piazza the programme of entertainment is arranged and co-ordinated for the Council by Alternative Arts. The North Hall busking area is organised by the Market Manager, Covent Garden. Both these spaces are used extensively for street entertainment, particularly buskers, and programmes are arranged on a daily rota basis.

It is considered that it would be impractical to apply the new policy to the street entertainers, many of whom are professional artists, as there are no formal contracts and the programme is arranged on a day-to-day basis. However, it is the intention of Alternative Arts to inform all those who perform on the Piazza of the Council's policy. Both Alternative Arts and the Market Manager also employ professional artists/groups for particular programmes e.g. Alternative Arts arrange a lunch-time theatre season in the summer, and it is proposed that the policy shall apply to these groups. Alternative Arts also make the point that they do not accept sponsorship for events in the Piazza (or elsewhere) from companies with holdings in South Africa, Namibia and the Homelands.

LONDON AGAINST RACISM IN THE ARTS - USE OF COUNCIL FACILITIES AND PREMISES
OTHER THAN THE SBCH

Report (4 9 85) by the Director of Finance

1. The Committee are asked to agree to the exclusion of performers/artists or groups of such persons who are willing to perform before any audiences in South Africa, Namibia and the Homelands from using Council facilities and premises at the places listed in recommendation (a) of the main report and from appearing in any event promoted by the Council at a venue not in it's ownership.

2. The Committee are further asked to agree that the policy outlined above be applied only to individual artists or groups named in advance publicity and that the undertaking and special conditions set out in Appendix C of AR2200 (attached to the main report) be applied to all new contracts with effect from 1 October 1985.

3. When the Committee approved the implementation of this policy at the South Bank Concert Halls to take effect on 1 July 1985 it asked officers to report further on the extension of the policy to cover other entertainment events organised by the Council. This report fufils that request.

4. The financial considerations relating to the introduction of this proposal are set out in paragraph 8 of the main report. Basically the policy is not expected to have any significant financial effect in 1985/86 due to the following reasons:

- i) The majority of the 1985/86 planned entertainment programme has already been arranged.
- ii) Since all entertainment events involve the Council in net expenditure, the inability to arrange a specific event as a consequence of the proposed policy would in fact produce a financial saving.
- iii) In cases where an event had already been arranged but artists had to be withdrawn at short notice to accord with the proposed policy, it would usually be possible to engage a replacement. Even if a replacement could not be engaged in the time, since the majority of events involve free admission, any consequential decline in attendances would be unlikely to result in significant income losses.

5. Although the likelihood of any significant financial loss in 1985/86 is remote, the policy, if approved, will be closely monitored and a further report submitted later in the financial year if necessary.

6. Before deciding on the proposal the Committee will wish to consider the observations made in the concurrent report by of the Head of Legal Branch .

7. Under financial standing orders this report does not require the concurrence of the Finance and General Purposes Committee.

6**AR 2442 A**

LONDON AGAINST RACISM
IN THE ARTS -
USE OF COUNCIL FACILITIES
AND PREMISES OTHER THAN
SOUTH BANK CONCERT HALLS

Concurrent report (10.9.85) by
Head of Legal Branch

1. The report recommends that the undertaking and special conditions contained in Appendix C of AR 2200 be applied to and contained in (respectively) all new contracts with effect from 1 October 1985. The recommendation does not in para (c) expressly make it clear whether the undertaking and contract conditions contained in Appendix C1 or C2 of AR 2200 should be applied (i.e. total or partial ban) although it is clear from para (a) that C1 (i.e. a total ban) is intended. Nevertheless, for the avoidance of doubt, I consider that the Committee's decision should clarify this point.

2. My amended concurrent report dated 16.4.85 (AR 2200A) with appended Counsel's opinions which was circulated with AR 2200 and is recirculated herewith accordingly is relevant to the report now circulated and similar considerations arise with the following modifications :-

(a) Since it appears that the likelihood of any significant financial loss is remote (see para 8 of the report and para 5 of the concurrent report by the Director of Finance), the financial considerations which arose in the case of the earlier report and which brought in the question of fiduciary duty do not arise in this case.

(b) Para 2 of the report gives reasons why the other problems which arose in the former report do not arise in the same complexity in this case.

(c) The case referred to by myself and Leading Counsel (Lord Gifford) (see para 13 of my concurrent) of *Wheeler and Others v Leicester City Council* has now been reversed by the House of Lords (as reported in *The Times Newspaper* of 26 July 1985) but I do not think that this significantly affects the issue since the Lords clearly confirmed that a Council in exercising statutory discretions is fully entitled to pay regard to what it considers to be in the best interests of race relations. The decision not to uphold the Court of Appeal's ruling was founded on the particular facts of that case and on the manner in which the Leicester City Council took their decision. It seems to me therefore that the decision in that case is still supportive of Lord Gifford's view, particularly where, as in this case, the Committee has had so full a report on the relevant considerations.

6

AR 2200A

Amended

Concurrent Report (16.4.85) by

Head of Legal Branch

*To be substituted for
Concurrent report circulated
with report (AR 2200)*

1 Section 71 of the Race Relations Act 1976 provides as follows:-

'Without prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need -

- (a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity, and good relations, between persons of different racial groups.'

2 The main report indicates the concern of the inhabitants of Greater London that artists, actors, musicians and other entertainers who have performed and continue to perform in South Africa and Namibia are using the Council's facilities and concert halls.

3 The joint opinion of Mr Stephen Sedley Q.C. and Mr W. Birtles of Counsel was obtained prior to the submission of the previous report on 4 July 1984 and it is attached hereto. Counsels' opinion can be summarised as follows:

- (a) Since there was no question of the Council altering the terms of the contracts already let the effects would not be felt until the latter part of 1985.
- (b) Surcharge was possible if a decision taken by the Council was later held not to be open to it and a Councillor who supported the decision would be guilty of wilful misconduct if he or she had been party to the taking of the decision in deliberate and reckless disregard of the matters which ultimately made it unlawful. In order to avoid surcharge the proposal must be considered on its merits without such consideration being overridden by prior commitment.
- (c) Regard must be had to the fact that the GLC is responsible for the government of London only and it may not seek to achieve larger political objectives under cover of its mandate.
- (d) Making arrangements under Section 71 of the Race Relations Act 1976 in their opinion perfectly capable of including the modification of standard forms of contract for lettings at the South Bank Concert Halls with a view to securing the lettings are carried out without unlawful racial discrimination and the other objects of the Section.
- (e) It is for Committee to judge whether the arrangements will do this provided there is material upon which judgment can properly be arrived at.

- (f) An essential ingredient in the decision ~~will be~~ any possible and probable losses of income resulting from it as well as the staffing and administration costs of implementing, and the best estimates of these. Could the losses be absorbed in some other way?
- (g) The question is one of balance for the Council - are the cost implications such as to negative the proposal as, e.g., in the Bromley case? The Courts have reserved for themselves a final area in which, enforcing the fiduciary type of duty to the ratepayers they will themselves decide whether the expenditure or loss was capable of being justified by the objective. Regard must therefore be had to the fact that the striking of the balance is more vulnerable to judicial interference than other discretionary decisions.
- (h) One of the letters of objection mentions that the proposed form of contract might be held to be unlawfully in restraint of trade. Counsel had already advised that they did not consider it to be so since this doctrine only applies where the restraint is unreasonable judged by the legitimate interests of the parties to the contract and of the public. Counsel considered that the same considerations as moved the Council to adopt the proposal would equally lead it to consider that such a restraint was reasonable in the interests of both of the contracting parties and the public; but the Court would be the judge of the balance where restraint of trade was alleged.
- (i) If the material part of the proposed form of contract is held by a court to be in unreasonable and therefore unlawful restraint of trade it will be unenforceable. If severable the provision alone will be unenforceable and they consider the present provision would be severable; but if not the entire contract will fail. A promoter might refuse to pay a deposit or demand repayment on the ground of unenforceability and the matter would have to be decided by the Court on the principles governing restraint of trade.
- (j) Thus the Committee should have regard to the general tests of unenforceability because of restraint of trade and should look at all information before them in this light as well as the other questions to which they must have regard. Counsel do not advise that the proposal is as a matter of law in unlawful restraint of trade; but they are bound to advise that a court might take a different view and a promoter might not wait until a new contract was entered into but promptly resort to the courts for a declaration that the new clause unenforceable and void.

4 Following the withdrawal of the previous report at the meeting on 4 July 1984 the opinion of Lord Gifford Q.C. has been sought and is attached. His opinion can be summarised as follows:

- (1) There is no duty on the Council to operate their Concert Halls in an economic way and the charges to be made and other terms for the use of the concert halls are left expressly by S.145(2)(b) of the Local Government Act 1972 to the discretion of the Council and the considerations of economy and efficiency which promoted the Bromley fares case are largely absent.

- (2) The Arts are almost bound to be uneconomic and every local authority must make a series of value judgments about the levels and types of artistic activity to be promoted and the Council has constantly made such judgments in the past as evidenced by the considerable Arts expenditure.
- (3) The Council has a duty under Section 71 of the Race Relations Act 1976 to make appropriate arrangements with a view to securing its functions are carried out with due regard to the need to eliminate unlawful racial discrimination and promote equality of opportunity and good relations between persons of different racial groups. It is therefore for the Council to consider how to make appropriate arrangements concerning its function of the provision of concert halls and artistic entertainment.
- (4) In such arrangements it is proper for the Council to take into consideration proposals which may in this Council's judgment promote better relations between different racial groups in London. The Council must have constantly in mind the impact of such proposals upon Londoners. There are various matters which may potentially affect race relations in London.
- (i) Hastening the end of the apartheid system in South Africa which may have a significant effect on race relations in London. The Council may therefore take account both of the direct impact of the Artists Boycott Pledge and the indirect consequences of the Council giving a lead to other major municipal authorities in Britain and other parts of the world.
 - (ii) The value to good relations in London of the Council taking a firm stand against racism which includes racism in South Africa.
 - (iii) The consequences of not adopting the proposed Artists Boycott Pledge. Avowed supporters of apartheid may be enhancing their reputations by performances in the Council's Halls which may damage its overall policy of promoting good race relations and cause dissension.
- (5) Considerations against the Artists Boycott Pledge. The report indicates very clearly that there is a serious risk of substantial financial losses if the proposal is agreed. A number of promoters and organisations connected with performances on the South Bank have indicated they do not agree with the Pledge. However:
- (a) Some performers may be reassured by considerations of detail and it remains to be seen how many performers or orchestras will refuse to comply.
 - (b) The Concert Halls are booked a long time in advance and there is no intention of breaking existing contractual arrangements and it will be possible to see over an extended period how the policy is operating and to make alternative arrangements if the promoters refuse to book the halls.

- (6) Nevertheless there is a risk of loss inherent in the Pledge which must be weighed. Members must also weigh the counter argument set out by some organisations that changes in the Apartheid system may be better achieved through contact and dialogue.
- (7) The reports set out fully the considerations on each side and in Counsel's opinion if the Council decides to adopt the proposal the decision could not be challenged on administrative law grounds.
- (8) Other Considerations of Law:

The Council has already received advice that the proposed arrangements would not be held to be an unreasonable restraint of trade and Counsel agrees with this advice. In the present case the restriction being imposed is only upon the freedom of artists to enter into contractual arrangements in one particular country in the world, and many being members of the Musicians Union are already obliged not to perform there.

(9) Detailed considerations:

- (a) It would be prudent to limit the Pledge to Artists and Groups named in advance publicity.
- (b) The Council must decide whether to limit the Pledge against performing in South Africa or Namibia at all or before all white audiences and in the homelands. The former is easier to enforce; the latter may be more acceptable to some artists. The Council could adopt the former provided the Pledge is not unlimited in time but only until the U.N. Special Committee Against Apartheid rules that Apartheid has ended in either South Africa or Namibia and decided in case of dispute by the Director of the U.N. Centre against Apartheid.
- (c) The Council could make exceptions in the case of South African opponents of apartheid wishing to return to perform in South Africa.

5 (9) (c) in paragraph 4 above raises the possibility of claims under the Race Relations Act 1976 Section 1 (1) (a) if the Council made exceptions in the case of South Africans as suggested therein (i.e., a non South African denied a exception might claim that he was being treated less favourably than the South African on racial grounds contrary to the section). Lord Gifford has therefore clarified the point in consultation confirming that a discretionary power of this kind exercised sparingly in the case of South African residents whom the Council wished to support because of their opposition to apartheid would not raise questions of discrimination under the Race Relations Act 1976 provided the exception was not made automatically and provided its basis was the wish to support opponents of apartheid irrespective of race. It follows that the door should not be closed to non South Africans also being excepted on that basis.

6 Where differing opinions are obtained from Leading Counsel on a matter where it is clear that the law is obscure the Committee is entitled to take the advice of either provided that such opinion is not obviously or patently

suspect. Further I do not consider the opinions here to be fundamentally different. They differ principally in the quality of reassurance they are able to give. In my opinion it is open to the Committee in this case to follow whichever of these opinions it chooses.

7 Mr Stephen Sedley Q.C. advised against a policy of withholding access based on past appearances of an artist, etc., in South Africa and Namibia or on an artist's attitude to apartheid. As drafted the forms make it a simple matter of contract for an artist desirous of appearing in the Council's premises to have to agree not to appear before any or all-white audiences in South Africa or before any audience in the Homelands or any audience in Namibia. These are set out in the alternative pending the Committee's choice (see Appendices C1 and C2.) Counsel (Mr Stephen Sedley QC) thought that a prohibition of any appearance whatsoever in South Africa and Namibia would be more open to challenge, but by no means did he advise against this latter choice if, after due and proper consideration, members should decide to adopt it and the various arguments in favour of and against this are fully set out in the report. Counsel (Mr Stephen Sedley QC) advised against an indefinite undertaking intended to out-last the contract for appearance in the Council's premises, as a court would be likely to hold this unreasonable.

8 The main report and this report have been seen and approved by Lord Gifford Q.C. and the forms as set out in Appendix C1 and C2 are that now recommended by Lord Gifford Q.C. based on that devised by Mr Stephen Sedley Q.C. and Mr W. Birtles.

Mr Stephen Sedley Q.C. and Mr W. Birtles advised that the forms should not provide for automatic termination on breach, but should give the Council an option to terminate. This will give the Council flexibility to investigate the circumstances of each case and will avoid disputes over whether a contract has terminated in a case where the facts are disputed. In particular, it will enable the Council not to terminate the contract of a promoter who has done his or her best to ensure compliance.

In Stephen Sedley Q.C.'s and Mr W. Birtles' opinion the forms are not in breach of the Competition Act 1980, nor in unreasonable or unlawful restraint of trade nor contrary to European law. They deal further with restraint of trade in their annexed opinion.

9 In para. 30 of the main report reference is made to the policy bearing more heavily upon South African nationals. Under s.1(1)(b) of the Race Relations Act 1976 it is discriminatory for the Council to apply to a person a requirement or condition which it applies or would apply equally to persons not of the same racial group (which means a group of persons defined by reference to colour, race, nationality or ethnic or national origins) as that other but -

- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- (ii) which the Council cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

- (iii) which is to the detriment of that other because he cannot comply with it.

In the event of challenge by a South African national ~~that Council~~ would therefore have to show the requirement or condition to be justifiable irrespective of nationality or national origins. It appears that the Council could do this provided the policy was equally applied to all nationals of all nations.

10 There are two separate possible types of losses involved, firstly due to unwillingness to sign when the question of what replacement events if any could be organised is obviously the major consideration and secondly losses due to a cancellation of an event when it is discovered that there has been a breach of undertaking.

11 The question of cancellation of events at a late stage when it would be impossible to provide a replacement event leaving a dark night with attendant losses raises difficulties and it might be desirable in some cases to allow an event to proceed notwithstanding a breach - indeed it might be held an unreasonable exercise of discretion not to do this if the policy was being generally followed and enforced. Hence the suggestion of a panel to decide this question merits serious consideration. Moreover since it would be impossible to fix a financial limit for possible losses involved it would be impossible to fix an upper financial limit to any delegation to an officer and very large sums could be involved.

12 The Committee's attention is drawn to the letters of objection particularly the Association of British Orchestras' letter of objection which mentions possible maladministration references to the Ombudsman. In my view the Ombudsman would not make a finding of maladministration in connection with a policy decision where proper consideration had been given to all relevant factors. The question of restraint of trade is also mentioned and this is dealt with earlier in this report.

13 Members may have noted the decision of the Court of Appeal in Wheeler and others v Leicester City Council reported in The Times on Friday, 15 March 1985 when the Court (by a majority) upheld the right of the City Council to deny use of recreation facilities to Leicester Rugby Club for a year the authority acting pursuant to its duty under Section 71 of the Race Relations Act, because the club failed to dissuade three of its members from taking part in an rugby tour of South Africa. It should be noted that it appears the Club may appeal to the House of Lords. The outcome of this case supports Lord Gifford's view, and he has suggested it should be mentioned in this concurrent report.

Arts and Recreation Committee - 11 September 1985

Item 6 - AR 2442/A

London Against Racism in the Arts - Use of Council facilities
and premises other than the South Bank Concert Halls

Amendment to be moved on submission

In addition to recommendations (a) to (d) it is recommended
that the policy only be applied until the system of apartheid
ceases to prevail in any of the above territories as decided by
the Director of the United Nations Centre against Apartheid in
case of dispute.