

Bill of Rights Bill: Particular Implications in Northern Ireland

1. Rights & Security International (RSI) is a London-based NGO that has spent over 30 years advocating for UK government compliance with human rights laws in Northern Ireland, particularly when measures are taken in the name of national security.

2. The proposed Bill of Rights – if enacted – will have particular implications for Northern Ireland: firstly, the Bill will impose additional, potentially insurmountable, barriers to victims of the Troubles victims in accessing justice for crimes committed during the conflict, while also undermining the Belfast/Good Friday Agreement (B/GFA). The B/GFA requires the UK to create access to a court and to a remedy for breaches of the European Convention on Human Rights (ECHR) in Northern Ireland.

Clause 5(2)(d): another violation of rights for Troubles victims

3. Clause 5(2)(d) will make it more difficult – potentially impossible – for claimants to rely on their right to an effective investigation into serious human rights violations before the UK courts. The limitation of this right would have a particular impact in Northern Ireland.
4. The right to an effective investigation means that the UK must ensure that potentially unlawful killings, acts of torture, and cruel, inhuman or degrading treatment are investigated with adequacy (meaning that the investigating authorities engage with the case with sufficient scrutiny), independence, and transparency, while investigations must also occur promptly.¹ The right to an effective investigation is essential in ensuring that a victim’s family finds the truth about what happened to their family member, and to provide justice for what occurred.
5. The UK courts and the ECtHR have repeatedly held the UK to be in violation of its obligation to effectively investigate serious human rights violations from the Northern Ireland conflict.² In fact, much of the Court’s jurisprudence requiring effective investigations into serious human rights violations involves the UK government’s conduct during the Troubles.³ Such violations remain ongoing, with several high-profile cases yet to be sufficiently investigated after decades of waiting.⁴
6. Clause 5 seeks to restrict the application of positive obligations. Positive obligations are obligations which require a public authority to act – as opposed to refraining from doing something – in order to secure rights, for instance by warning an individual that their life may be in danger.⁵ Many of these obligations are not listed in the text of the ECHR, and have instead been recognised by the European Court of Human Rights (ECtHR) as essential components of the Convention, as a means of ensuring that human rights

¹ For an overview, see Rights & Security International, [‘The Human Right to Effective Investigations and Northern Ireland ‘Legacy’ Cases: A Legal Explainer’](#) (16 September 2021).

² Among other examples, see [Re Geraldine Finucane’s Application for Judicial Review \(Northern Ireland\)](#) [2019] UKSC 7; [Re McCaughey and another’s Application for Judicial Review \(Northern Ireland\)](#) [2011] UKSC 20; [Re Bridget Irvine’s Application for Judicial Review](#) [2022] NIQB 49; Application Number 28883/95, [McKerr v. the United Kingdom](#), Judgment, 4 May 2001; Application Number 30054/96, [Kelly and others v. the United Kingdom](#), Judgment, 4 May 2001; Application Number 37715/97, [Shanaghan v. the United Kingdom](#), Judgment, 4 May 2001; Application Number 24746/94, [Jordan v. the United Kingdom](#), Judgment, 4 May 2001; Application Number 32457/04, [Brecknell v. the United Kingdom](#), Judgment, 27 November 2007.

³ See Brice Dickson, [The European Convention on Human Rights and the Conflict in Northern Ireland](#) (Oxford: OUP, 2010).

⁴ The pertinent example is the investigation into the murder of defence lawyer, Pat Finucane, which has yet to be the subject of an Article 2-compliant investigation: see [Re Geraldine Finucane’s Application for Judicial Review](#) [2019] UKSC 7; Council of Europe Committee of Ministers, [‘Supervision of the execution of the European Court’s judgments: H46-38 McKerr group v. the United Kingdom \(Application No. 28883/95\)’](#), CM/Del/Dec(2021)1398/H46-38, 11 March 2021, para. 4.

⁵ This obligation arises from the *Osman* case: Application Number 23452/92, [Osman v. the United Kingdom](#), Judgment, 28 October 1998. The Bill defines a positive obligation as ‘an obligation to do any act’: see [Bill of Rights Bill](#), clause 5(7).



laws remain practical and effective; without such positive obligations, human rights – in many situations – would just be theoretical.⁶

7. Clause 5 of the Bill distinguishes between ‘pre-commencement’ and ‘post-commencement’ obligations. ‘Pre-commencement’ positive obligations are those already recognised by ECtHR, whereas the reference to ‘post-commencement’ obligations pre-empts further legal developments at the Strasbourg court.⁷ If enacted, clause 5 would restrict the application of ‘post-commencement interpretation... positive obligation[s]’ in the UK courts,⁸ and would also limit the application of ‘pre-commencement’ positive obligations based on a range of factors which tend against applying the positive obligation.⁹

8. When considering whether to apply the long-recognised positive obligation, the UK courts would – if the Bill is enacted – be required to consider: the ‘impact [of an investigation] on the ability of the public authority or of any other public authority to perform its functions’, any ‘conflict with... allowing public authorities to... allocate the financial and other resources available to them’, and whether imposing the obligation would ‘require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances’.¹⁰
9. Each of these factors tend against requiring an effective investigation, and we believe they are not – themselves or jointly – legitimate reasons for restricting the obligation to investigate serious human rights violations. Instead, we believe that the government underestimates the importance of investigations into potentially serious human rights violations. Firstly, while we recognise that resourcing constraints may be relevant considerations in some circumstances, in the context of serious human rights violations – to which Articles 2 and 3 apply – these should not take precedence over justice and accountability. Secondly, we believe the ECtHR already adopts a sensible and reasonable approach to ordering effective investigations; for serious human rights violations, independence, adequacy, transparency and promptness are foundational for investigations to be conducted ‘reasonably’.
10. It appears likely that clause 5(2)(d) will be used to remove accountability for the UK government’s continued failure to implement human rights-compliant investigations into Troubles-related human rights violations. Coupled with the proposals outlined in the Northern Ireland Troubles (Legacy and Reconciliation) Bill¹¹ – which we believe would not comply with the investigation obligation, if enacted¹² – the effect of clause 5 is to remove accountability for a rights violation that the government is intending to legislate for.
11. We believe that the approach of restricting positive obligations as proposed by clause 5 would limit the application of the ECHR to significantly reduce the degree of human rights protection throughout the

⁶ For instance, see Application Number 6289/73, *Airey v. Ireland*, Judgment, 9 October 1979, p. 7.

⁷ [Bill of Rights Bill](#), clause 5(3-5).

⁸ [Bill of Rights Bill](#), clause 5(1).

⁹ [Bill of Rights Bill](#), clause 5(2).

¹⁰ [Bill of Rights Bill](#), clauses 5(2)(a), 5(2)(b), and 5(2)(d) respectively.

¹¹ [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#).

¹² See Rights & Security International, [‘Rights & Security International’s Response to the JCHR Call for Evidence: ‘Legislative Scrutiny: Northern Ireland Troubles \(Legacy and Reconciliation\) Bill’](#) (2022); Rights & Security International, [‘The Human Right to Effective Investigations and Northern Ireland ‘Legacy’ Cases: A Legal Explainer’](#) (16 September 2021). For similar reasons, the provisions provided by the Bill would likely violate the UK’s other international human rights obligations: see Rights & Security International, [‘Rights & Security International’s Submission to the United Kingdom of Great Britain and Northern Ireland’s Universal Periodic Review \(4th cycle, 2022\)’](#) (2022), pp. 3-6.

UK. This would have a particular impact on victims of the Troubles who are still seeking justice and accountability.

The Bill as a whole: undermining the peace agreement

12. Under the B/GFA, the UK is under an international obligation to ‘complete incorporation into Northern Ireland law of the ECHR, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.’¹³ The UK government has repeatedly reiterated support for the B/GFA in the various institution-building agreements for Northern Ireland, which it has agreed with the Irish government.¹⁴ The Human Rights Act 1998 (HRA) is also central to the consequential devolution arrangements under the Northern Ireland Act 1998.¹⁵

13. The draft Bill is replete with clauses that, if implemented, would restrict access to the courts and to remedies for many claimants alleging human rights violations, in contradiction of the B/GFA. We wish to touch on three pertinent clauses.

Clause 7

14. Clause 7 would require the courts to strongly defer (giving the ‘greatest possible weight’) to Parliament when assessing whether to declare a piece of legislation incompatible with the UK’s human rights obligations under the ECHR.¹⁶

15. While we believe this provision alone would violate the B/GFA – as many claimants will be left without a remedy if Parliament legislated to breach the ECHR – this argument is strengthened when coupled with the effect of Schedule 5, paragraph 2, which removes judges’ power to alter the interpretation of an Act of Parliament so that it complies with human rights obligations.¹⁷ The removal of judges’ powers to interpret legislation in line with the ECHR means that declarations of incompatibility would likely be used more frequently; however – as noted above – clause 7 means that no such declaration will be granted in most cases.

16. It is not possible to interpret these clauses compatibly with the B/GFA. Rather than providing access to the courts and remedies for violations of the ECHR, the Bill would instead provide a remedy in a very small number of cases. Even though the ECHR would have been violated, many claimants will be left without redress in the Northern Ireland courts.

Clauses 15 and 16

¹³ [Belfast/Good Friday Agreement](#), ‘Rights, safeguards and equality of opportunity’, para. 2.

¹⁴ For instance, see [Agreement between the Government of Ireland and the Government of Great Britain and Northern Ireland on Police Co-operation](#), Belfast, 29 April 2002, Preamble; [Joint Declaration by the British and Irish Governments](#), April 2003, in its entirety, but particularly paras. 5-8; [Agreement at St Andrews](#), October 2006, paras. 3, 12.

¹⁵ Under which the Northern Ireland Assembly at Stormont cannot pass legislation which is incompatible with the ECHR: see Northern Ireland Act 1998, section 6(2)(c)-(d). In [Robinson v. Secretary of State for Northern Ireland](#) [2002] UKHL 32, Lord Bingham Stated that the Act ‘... does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution’ (at para. 11). In [Re Application for Judicial Review by the Northern Ireland Human Rights Commission](#) [2015] NIQB 96, Horner J stated that ‘In Northern Ireland the Good Friday Agreement... was built on foundations, one of which was a guarantee of “rights, safeguards and equality of opportunity”’ (at para. 51). Additionally, the Northern Ireland Human Rights Commission has stated ‘...the Human Rights Act is well crafted and both reflects and is embedded in our constitutional arrangements’ (Northern Ireland Human Rights Commission, [‘The 2014 Annual Statement: Human Rights in Northern Ireland’](#) (2014), p. 57).

¹⁶ [Bill of Rights Bill](#), clause 7.

¹⁷ [Bill of Rights Bill](#), Schedule 5, paragraph 2.



17. While clauses 15 and 16 – in their current form – do not risk infringing the B/GFA in the same way as the other clauses referenced in this section, anticipated amendments could risk non-compliance with the agreement.

18. Clause 15 would incorporate an additional ‘permission stage’ to the legal process, when the claim is for judicial review in England and Wales, while also introducing a ‘significant disadvantage’ requirement for the claimant to satisfy.¹⁸ For civil claims in the Northern Ireland courts (similar provisions would apply in Scotland), clause 16 will only authorise claims made by a victim, omitting the additional permission stage and the ‘significant disadvantage’ requirement.¹⁹

19. This generates a two-tier system of human rights protection, whereby victims of human rights violations in England and Wales are subject to more stringent eligibility requirements and additional procedural hurdles in order to enforce their rights.

20. By contrast, any attempt to reconcile this two-tier system by imposing clause 15 across the UK would not be possible without infringing on the B/GFA. As noted above, the B/GFA requires that the UK government ensure access to the Northern Ireland courts for violations of the ECHR; patently, applying the test elucidated in clause 15 would mean that only ‘serious’ ECHR claims could be litigated before the Northern Ireland courts, excluding a wide range of human rights violations from accountability.

21. To ensure parity in rights protection across the UK, and to comply with the B/GFA, we believe that clauses 15 and 16 must be removed from the Bill.

Clause 18

22. Clause 18 would significantly reduce the available remedies to many victims of human rights violations, by requiring the court to consider a range of factors which tend against the granting of damages.²⁰ These include the claimant’s prior conduct, as well as the impact a damages payment would have on a public authority’s ability to conduct its work, and the effect on other public bodies should a legal precedent be established.

23. We believe that the Bill gives too much weight to these considerations. Incorporating factors relevant to the public authority’s resources and ability to act is unjust – as it means that a claimant may receive inadequate redress – but it could also lead to poor practices within public bodies. With limited consequences for breaching the ECHR, the culture of rights compliance among authorities could deteriorate or even become non-existent.²¹ Additionally, we believe that the courts should not consider the claimant’s prior conduct as part of this assessment; rather the Bill seeks to mitigate the illegality of a public body’s actions by reference to the claimant’s – lawful or unlawful – conduct.

24. Again, clause 18 stands in contradiction of the B/GFA. Whereas the peace agreement requires that human rights violations generate a remedy in the Northern Ireland courts, the Bill instead seeks to significantly limit the availability of remedies available for many victims.

¹⁸ [Bill of Rights Bill](#), clause 15.

¹⁹ [Bill of Rights Bill](#), clause 16(2); see clause 16(4) for Scotland.

²⁰ [Bill of Rights Bill](#), clause 18.

²¹ See Jeremy Croft, [‘Human Rights and Public Authorities: A Report prepared for the Joint Committee on Human Rights’](#), Session 2002-2003 (January 2003), sections 4-5.

