Rights & Security International's submission to the Joint Committee on Human Rights' call for evidence on the Bill of Rights Bill

Summary:

- Rights & Security International (RSI) believes that the Bill of Rights Bill should be scrapped in its entirety. We have identified particular concerns regarding clauses 5, 7, 14-16 and 18, which would unduly and unjustly restrict everyone's human rights whilst creating unaccountable powers. Each of these clauses will likely place the UK in breach of its international obligations, including under the European Convention on Human Rights (ECHR).

- Clause 5 unjustly limits the scope of human rights protection in the UK based on irrelevant considerations that only benefit the government and public bodies, potentially exacerbating inequalities and creating impunity. Clause 5(2)(d) will also close down legal avenues available to victims of the period of conflict frequently referred to as 'the Troubles' who wish to challenge the government's proposed sweeping amnesty for serious conflict-related crimes.

- Clause 18 limits a victim's practical ability to enforce their human rights, while in many cases allowing public bodies to violate rights without suffering any penalty.

- Clause 14 removes the application of human rights laws to overseas military operations, meaning that the UK will leave civilians, service personnel and veterans without redress when the government violates their rights. This clause would also mean that the UK operates against international best practice when it comes to the application of human rights laws in this context.

- The Bill, if enacted, would also likely violate the Belfast/Good Friday Agreement (B/GFA), placing the already fragile Northern Ireland peace process in jeopardy.

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

No, we do not believe that clause 5 would comply with the UK's obligations under the ECHR. We also believe the government's proposed approach would have negative consequences for accountability and justice.

If enacted, clause 5 would restrict the application of positive obligations created after the Bill passes in the UK courts,[1] and would also limit the application of pre-existing positive obligations based on a

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

range of factors that militate against applying them.[2] Each of these factors tends to discourage the application of positive obligations, and we believe they are not – themselves or jointly – legitimate reasons for restricting an individual's human rights. Instead, we believe that the government has disregarded the importance of positive obligations, such as the obligation to effectively investigate potentially serious human rights violations, the obligation to protect bodily integrity through criminal sanction, and the obligation to recognise and protect personal identity.[3] Without these obligations, human rights are meaningless.

We recall that positive obligations such as the obligation to effectively investigate potentially serious human rights violations are essential to avoiding impunity. It is an unfortunate fact of life that individuals in authority, groups of such individuals or even entire institutions, sometimes engage in violence, cruelty or exploitation.[4] One of the foundational European Court of Human Rights (ECtHR) cases on this topic demonstrates that these problems can and do occur in the UK: in *Osman v UK*, the Court addressed the case of a teacher who stalked, threatened and attacked a young student, killing the student's father.[5] Pretending these abuses by people in positions of power do not happen will not make this fundamental problem – which all societies face – go away. Instead, failing to investigate official wrongdoing erodes democracy and heightens violence and inequality.

We have particular concern about clause 5(2)(d), which would limit the obligation to effectively investigate serious human rights abuses, requiring the courts to consider – alongside the other factors listed in clause 5 – whether mandating an investigation is 'reasonable'.[6] In fact, we believe the ECtHR already adopts a reasonable, baseline approach to evaluating whether an effective investigation has occurred or remains necessary: for serious human rights violations, independence, adequacy, transparency and promptness are foundational for it to consider that the authorities have conducted an investigation effectively. The courts should consider any investigation – or failure to investigate – which does not meet these essential standards to also be unreasonable.

It also appears likely that the government will use clause 5(2)(d) to remove accountability for its continued failure to implement human-rights-compliant investigations into Troubles-related human rights violations. The UK courts and the ECtHR have repeatedly held the UK to be in violation of this obligation in cases stemming from the conflict.[7] Such violations remain ongoing, with many cases yet

---

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

[3] Application Number 7229/75, *X and Y v. the United Kingdom*, Judgment, 15 December 1977 (protecting bodily integrity through criminal sanctions); Application Number 18131/91, *Stjerna v. Finland*, Judgment, 25 November 1994 (recognising and protecting personal identity). Generally, see Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights', Human rights handbooks, No. 7 (Council of Europe, 2007).

[4] There are many examples of this worldwide; for example, the Chicago Police Department disappeared and tortured people for years between the 1970s and 1990s: see Sam Charles, 'New 'Chicago Police Torture Archive' details acts of Jon Burge and underlings' (*Chicago Sun Times*, 3 February 2021).

[5] Application Number 23452/94, *Osman v. the United Kingdom*, Judgment, 28 October 1998.

[6] See Bill of Rights Bill, clause 5(2)(d), which asks the court to pay particular regard to whether imposing a positive obligation would 'require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances'. For the content of this obligation, see Rights & Security International, 'Northern Ireland Legacy: How to Uphold International Human Rights Law' (18 August 2021).

[7] 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*,

to be sufficiently investigated after decades of waiting.[8] There is a possibility that in some cases, the government is failing to investigate or cooperate with investigations in order to avoid embarrassment, which is not a democratic consideration.[9]

Coupled with the proposals outlined in the Northern Ireland Troubles (Legacy and Reconciliation) Bill[10] – which we believe would not comply with the obligation to investigate, if enacted – the effect of clause 5 is to remove accountability for a rights violation in which the government officially plans to engage.[11]

We believe 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 UK. This would have a particular impact on victims of the Troubles who are still seeking justice and accountability. It would also likely have a particular impact on groups throughout the UK that have always disproportionately faced violence from, and exploitation by, people in positions of power – including children.

For these reasons, we recommend that clause 5 be removed from the Bill.

13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages?

No, we do not believe that the law should require the courts to consider the claimant's conduct and the remedy's impact on public services when awarding damages for any human rights violations, as this will create unjust outcomes and potential bias.[12] The law is the law, and the very concept of a 'law' demands that courts, the executive and other authorities apply the rules in the same way to everyone. Equality before the law is also a fundamental human right found in the ECHR and other

---

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.

[8] 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.

[9] See Rory Winters, 'New figures reveal scale of unsolved killings from the Troubles' (*The Detail*, 9 April 2018); for example, see Police Ombudsman for Northern Ireland, 'Statutory Report: Investigation into police handling of loyalist paramilitary murders and attempted murders in South Belfast in the period 1990-1998' (8 February 2022).

[10] Northern Ireland Troubles (Legacy and Reconciliation) Bill.

[11] Rights & Security International, 'Rights & Security International's Response to the JCHR Call for Evidence: 'Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill'' (21 June 2022).

[12] For more information, see Rights & Security International, 'Rights & Security International's Response to 'Human Rights Act Reform: A Modern Bill of Rights' (March 2022), pp. 1-2, 10-12.

treaties.[13] By contrast, legal regimes that treat some human beings as more deserving of remedies or other justice than others are features of apartheid or other discriminatory states, not democracies.[14]

Firstly, clause 18(5)(a) would require the courts to consider – with particular attention – any of the victim's relevant conduct when deciding whether to award damages and how to quantify this award. We have identified multiple concerns with this clause, which authorises the government to act *de facto* unlawfully and without consequence, because an individual has – in its view – not achieved a preferred standard of conduct before bringing their claim.

While concepts such as contributory negligence are available in tort law, they are relevant to an assessment of whether lawbreaking took place and what degree of responsibility the offending party bears for the resulting injury; they do not rest on any evaluation of the injured party's moral worthiness.[15] Moreover, human rights are not tort law: where the government violates human rights, it is responsible for that violation and is obligated under the ECHR to provide an effective remedy. The idea that no one deserves to experience a human rights violation is foundational to all human rights treaties. It is also fundamental to racial, gender and other equality.

Clause 18(3)(a) suggests that some people are less deserving of human rights, whether because they have committed a criminal offence, or because of some other action. On a conceptual level this is unjust. Human rights apply to all of us by virtue of our humanity; rather, the government proposes to limit rights based on the fulfilment of its preferred standard of conduct, hearkening back to eras and places in which legislators have deemed people unworthy of justice because of their skin colour, and courts have deemed women who survived sexual assaults as deserving of harm because of the way they dressed or their supposed sexual histories.[16]

The government is also seeking to authorise its unlawful acts by removing the possibility of a remedy for many human rights violations it commits. We believe this is unjust and could violate the rule of law, by placing the government beyond legal accountability.[17]

If enacted, clause 18(3)(a) would likely fail to comply with the UK's obligations under the ECHR. Article 13 of the ECHR provides individuals with the right to a remedy when the state has violated their rights.[18] While the state does not have to grant damages *per se* for every human rights violation,[19] it must ensure that remedies are 'sufficient and accessible' – meaning that claimants are able to obtain

---

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, entered into force 3 September 1953, 213 UNTS 221, Article 14; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 177, Rome, 4 November 2000. Generally, see Stephanie Farrior, *Equality and Non-Discrimination under International Law* (London: Routledge, 2015).

[14] For an overview, see David Mitchell, 'The Great Aim of the Struggle for Liberty Has Been Equality before the Law: Is Race the Only Issue?' (*Independent Institute*, 4 November 2005).

[15] See Law Reform (Contributory Negligence) Act 1945, s1; *Barclays Bank plc. v. Fairclough Building Ltd.* [1994] EWCA Civ 3.

[16] See Francesca Klug, 'Who deserves human rights?' (*The Guardian*, 25 March 2010); James Welch, 'Why do human rights apply to convicted criminals?' (*The Guardian*, 14 September 2009); Sara Margery Fry, 'Protecting the human rights of prisoners' (2018) 4 UNESCO Courier.

[17] Although commentators diverge on the precise content of the rule, there is agreement that it requires that everyone be subject to the same law: see House of Lords Select Committee on the Constitution, Sixth Report of Session 2006-2007, 11 July 2007, Appendix 5: 'Paper by Professor Paul Craig: The Rule of Law'.

[18] See further, European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy' (31 December 2021).

[19] Application number 22729/93, *Kaya v. Turkey*, Judgment, 19 February 1998, para. 106.

the available remedies, and that the remedies must correspond with the severity of the rights violation.[20] Clause 18 would significantly reduce or remove a damages award for a victim of a human rights violation; in such circumstances, the only remedy available to the victim would be the court's declaration that a public body has infringed their rights. The ECtHR has consistently held that having this remedy alone amounts to a violation of the Article 13 right.[21]

We likewise believe that the courts should not consider the possible impact on public services when considering a damages award, as the government proposes to do in clause 18(7). We believe that this factor is irrelevant: when rights are at issue, the only legal questions at hand are whether the state has violated a person's rights and if so, what remedies are necessary to make that person whole and/or prevent a recurrence of the situation. Damages do indeed impact resources, and this is what makes them effective as an incentive in favour of ensuring rights-respecting behaviours and a deterrent against rights-violating ones. Where public authorities are concerned, damages and their resulting impacts are one of the few incentives available, in practical terms. Public bodies should therefore view the risk of damages as a means of promoting the 'rights culture' that the Human Rights Act 1998 (HRA) helped to create.[22] Additionally, as noted above, the Article 13 right to an effective remedy requires a damages award to be 'sufficient and accessible'; if clause 18 is enacted, however, then courts will only be able to award many claimants insufficient remedies in comparison to the harm they have faced.

We therefore recommend that clause 18 be removed from the Bill.

16. Clause 14 introduces a total ban on individuals bringing a human rights claim, or relying on a Convention right, in relation to overseas military operations, subject to the Secretary of State being satisfied that this is compatible with the UK's obligations under the Convention. Does this comply with the UK's obligations under the ECHR and international law? If not, what would need to be amended to ensure clause 14 is consistent with the UK's obligations under the Convention?

No, we do not believe that the approach outlined in clause 14 – if enacted – would comply with the UK's international law obligations, including under the ECHR.

We argue that clause 14, if enacted, would remove access to justice for civilians, service personnel, and veterans seeking to challenge violations of their human rights, whilst lowering UK military standards by removing its culture of human rights compliance. We further argue that the government's rhetoric around the application of the ECHR to overseas military operations is

[20] Application number 12742/87, *Pine Valley Developments Ltd. and others v. Ireland*, Admissibility, Decision, 3 May 1989; Application number 58698/00, *Paulino Tomás v. Portugal*, Decision, 27 March 2003; Application number 44093/98, *Çelik and İmret v. Turkey*, Judgment, 26 October 2004, para. 59.

[21] Application number 44647/98, *Peck v. the United Kingdom*, Judgment, 28 January 2003, para. 102; Application number 75529/01, *Sürmeli v. Germany*, Judgment, 8 June 2006, para. 113; Application number 37411/02, *Abramiuc v. Romania*, Judgment, 24 February 2009, para. 128.

[22] I. Stephanie Boyce, 'Letter: Legal changes will put UK rights culture in peril' (*Financial Times*, 21 January 2022); Joint Committee on Human Rights, Sixth Report, Session 2002-03, 3 March 2003, paras. 13-35.

misleading, whereas the law in its current form has untold benefits for access to justice, accountability, and military best practice.[23]

Rather than severely limiting the efficacy of military operations, the ECHR only authorises legal claims arising out of the UK's overseas military operations in limited circumstances: people can seek redress in the UK courts only when a public body exercises 'state agent authority and control' over an individual or 'effective control' over the territory, and these are not easy tests to meet.[24] The treaty standards for allowing people overseas to bring human rights claims in these limited circumstances help prevent impunity for massacres, torture, rape as a tool of war and other gross violations: for example, a foreign state could not create a legal 'black hole' for torture by inviting the UK to come in and run a secret prison.

Without state control over an individual or effective control over a territory, the ECHR's protections do not apply to overseas military operations, meaning that many such claims – whether brought by civilians, service personnel, or veterans – would not succeed on human rights grounds.[25]

While the government's proposals stand in direct contrast to the ECHR's rules on the application of the Convention to overseas military operations, clause 14 also goes against international best practice on this issue. Whilst each of the regional and international human rights treaties includes limits on its jurisdiction, each does so based on whether a state in fact has power over territory or persons, in either a similar or a more expansive way than the ECHR.[26] For instance, the International Covenant on Civil and Political Rights requires that the UK government respect the human rights of anyone 'within [its] power or effective control', including during military and peace-keeping operations.[27] The ICCPR takes this approach as it would be 'unconscionable' to allow states to violate rights outside of their

---

[23] Ceasefire Centre for Civilian Rights and Rights & Security International, 'Bill of Rights, Clause 14: Removing access to justice for civilians, service personnel, and veterans' (August 2022).

[24] For more information, see: Rights & Security International, 'Rights and Security International's Submission to the Joint Committee on Human Rights: Call for Evidence on the Independent Review of the Human Rights Act' (2021).

[25] For service personnel, see *Multiple Claimants v. Ministry of Defence* [2003] EWHC 1134 (QB); Application number 1573/11, *Pritchard v. the United Kingdom*, reported 8 September 2011 (the claimant was unsuccessful before the UK legal system, however the government settled this case prior to trial before the European Court of Human Rights) and for other individuals, see *K, A and B v. Secretary of State for Defence and another* [2014] EWHC 4343 (Admin).

[26] See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011), pp. 40-41. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 118; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 108-111; African Commission on Human and Peoples' Rights, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', November 2015, para. 14; Report No. 112/10, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, Admissibility, Inter-State Petition IP-02, 21 October 2010, OEA/Ser.L/V/II.140, paras. 88-102.

[27] International Covenant on Civil and Political Rights, New York, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; United Nations Human Rights Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10; United Nations Human Rights Committee, 'General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life', 30 October 2018, CCPR/C/GC/36, para. 63; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 216-217.

territory, where acting in the same way inside of its borders would be unlawful.[28] Stated succinctly, the UK should not have the ability – or incentive – to create its own Guantánamo.[29]

The government also appears to recognise that its proposals will likely violate international law. While other clauses of the Bill will come into effect on entry into force or on a date set in regulations, clauses 13(8) and 14 will only do so 'if the Secretary of State is satisfied… that doing so is consistent with… the Convention.'[30] We believe that the government realises that – on the basis of international law as it currently stands – clause 14 would be unlawful. Instead, the government has signalled its intent to instigate negotiations with the Council of Europe to reduce the extraterritorial scope of the ECHR.[31] Knowingly introducing provisions that would break the law if implemented is an abuse of the legislative process.

Regardless of whether it intends to enter into negotiations with the Council of Europe on amending the treaty, clause 14 indicates the government's lack of good faith in performing its obligations under the ECHR – itself a breach of international law.[32]

In any case, applying to human rights laws to overseas military operations does not harm the UK; in fact, it ensures that victims of human rights violations can access justice – a baseline democratic value – and will often lead to beneficial systemic changes. For instance, several cases before the UK courts have given justice to families of UK soldiers killed as a result of faulty equipment,[33] while others have led to the illumination and amendment of systemic flaws in training and guidance around the treatment of detainees in conflict zones.[34] Instead, clause 14 would allow the government to act with impunity in overseas military operations.

For these reasons, RSI believes clause 14 cannot be amended to comply with international law; rather, it should be removed from the Bill.

---

[28] Communication 52/1979, *Lopez Burgos v. Uruguay*, 29 July 1989, CCPR/C/13/D/52/1979, para. 12.3.

[29] Marie Forestier, Yasmine Ahmed and Adriana Edmeades Jones, 'Europe's Guantanamo: The indefinite detention of women and children in North East Syria' (Rights & Security International, 2020); Emily Ramsden and Alison Huyghe, 'Abandoned to Torture: Dehumanising rights violations against women and children in northeast Syria' (Rights & Security International, 2021).

[30] Bill of Rights Bill, clause 39(3).

[31] Ministry of Justice, 'Consultation outcome: Human Rights Act Reform: A Modern Bill of Rights – consultation' (12 July 2022), paras. 279-281.

[32] This is often termed the *pacta sunt servanda* principle, as codified in Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, Article 26. Although the Vienna Convention entered into force after the ECHR, the principle has been a customary norm of international law for over a century: see Jean Salmon, 'Volume I, Part III Observance, Application and Interpretation, s.1 Observance of Treaties, Art. 26', in Oliver Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press, 2011).

[33] *Smith and others v. Ministry of Defence* [2013] UKSC 41; *R (on the application of Long) v. Secretary of State for Defence* [2015] EWCA Civ 770, paras. 29-33 (although this claim was ultimately unsuccessful as the court concluded that the Secretary of State had discharged its obligation to effectively investigate the incident).

[34] *Alseran and others v. Ministry of Defence* [2017] EWHC 3289 (QB); *Al-Skeini and others v. Secretary of State for Defence* [2007] UKHL 26; Sir William Gage, 'The Baha Mousa Public Inquiry Report', HC 1452-III (2011), pp. 1314-1318; Elizabeth Stubbins Bates, 'The British Army's Training in International Humanitarian Law' (2020) 25(2) Journal of Conflict and Security Law 291.

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

As indicated above, we firmly believe that the Bill will diminish human rights protections in the UK as a whole and will be unlawful under international law, and that it has specific implications for Northern Ireland (on which we focus, as the area of our expertise).

We are particularly concerned that the Bill places the hard-won human rights and political framework for the peace process under threat. 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.'[35]

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.[36] The HRA – and in turn the ECHR – is also central to the consequential devolution arrangements under the Northern Ireland Act 1998.[37] Most recently, Article 2 of the Ireland/Northern Ireland Protocol painstakingly agreed with the European Union requires no diminution of rights, safeguards or equality of opportunity in Northern Ireland.[38]

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 therefore believe that, if the UK government enacts this Bill, it will breach international law.[39]

Notwithstanding our position that the government should withdraw the Bill in its entirety, we will touch on three pertinent clauses.

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.[40] While we believe this provision alone would violate the B/GFA – as many claimants would be left without a remedy if Parliament legislated to breach the ECHR – we

---

[35] Belfast/Good Friday Agreement, 'Rights, safeguards and equality of opportunity', para. 2.

[36] 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.

[37] 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).

[38] Protocol on Ireland/Northern Ireland (2019), Article 2.

[39] Which would allow the Irish government and the European Union to take enforcement measures: see International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', Yearbook of the International Law Commission, 2001, vol. II (Part Two), Articles 28-33.

[40] Bill of Rights Bill, clause 7.

must consider this clause alongside 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.[41] Although this latter provision means that the courts would likely issue declarations of incompatibility more frequently, clause 7 means the courts would not grant a declaration in most of these cases.

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. These clauses would mean that the Northern Ireland courts would be unable to offer adequate redress for claimants.

While **clauses 15 and 16** – in their current form – do not risk infringing the B/GFA in the same way as clauses 7 and 18, anticipated amendments could risk non-compliance with the Agreement. 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.[42] For civil claims in the Northern Ireland courts, clause 16 will only authorise claims made by a victim, omitting the additional permission stage and the 'significant disadvantage' requirement.[43] 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. By contrast, any attempt to reconcile this two-tier system by imposing clause 15 across the UK would infringe 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 claimants alleging 'serious' ECHR violations could litigate before the Northern Ireland courts, excluding a wide range of human rights violations from accountability. To ensure parity in rights protection across the UK, and to comply with the B/GFA, we believe clauses 15 and 16 must be removed from the Bill.

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.[44] As noted above, we believe the Bill gives too much weight to these considerations. Incorporating factors relevant to the public authority's resources and ability to act is unjust and 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.[45]

---

[41] Bill of Rights Bill, Schedule 5, paragraph 2.

[42] Bill of Rights Bill, clause 15.

[43] Bill of Rights Bill, clause 16(2); see clause 16(4) for Scotland. Although this admissibility requirement is also present for claims to the ECtHR – requiring that a claimant show they have suffered a 'significant disadvantage' – the Strasbourg court introduced this due to its backlog of cases, while recognising that individuals would still be able to enforce their rights before domestic courts: see Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Council of Europe Treaty Series No. 194 (2004, entered into force 2010), Article 12; European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (30 April 2022), para. 315. The government cannot rely on this justification to support its proposals.

[44] Bill of Rights Bill, clause 18.

[45] 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

Clause 18 stands in contradiction of the B/GFA and must be removed. Whereas the 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, which compounds the criticisms we have outlined above regarding the Legacy Bill.

For these reasons, RSI recommends that the Bill be scrapped in its entirety.

About Rights & Security International

Rights & Security International is a London-based NGO working for the last 30 years to hold governments to account for human rights violations committed in the context of national security.

For more information, see our website.