

## CAJ briefing note - Positive obligations and the Bill of Rights Bill

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### 1. Overview

The Bill of Rights Bill contains some provisions that are theatrical and legally meaningless, but it also contains provisions that will harm the protection of human rights. One of the more harmful provisions is Clause 5 on positive obligations. The changes could affect those seeking an independent effective investigation into the deaths of family members, victims of domestic violence, child neglect, human trafficking, and victims of crime, among many others.

### 2. What are positive obligations?

'Positive obligations' refers to the idea that to uphold human rights, sometimes the state must do something and not merely refrain from doing anything. When the state bans someone from saying something critical of the government that is a breach of the negative obligations in relation to free expression; where the state has no laws protecting employees' free expression rights in the workplace that is a breach of positive obligations relating to free expression.

The ECHR does not use the phrase 'positive obligations'; for that matter it does not use the phrase 'negative obligations'. In the early years of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) frequently dealt with breaches of negative obligations as a result of action(s) taken by the state (e.g. internment in [Lawless v Ireland](#), judicially mandated corporal punishment in [Tyrell v UK](#)). From the 1970s onwards, the European Court has also had to deal with cases where the problem has been state *inaction*. This has given rise to the case law on positive obligations.

There are three different reasons for recognising these positive obligations:

1. First, several rights in the [ECHR](#) are already expressed in terms that require or presuppose state action. The right to free and fair elections (Article 3, Protocol 1) is expressed as a positive obligation. The right to a fair trial (Article 6) presupposes state action - legislating, creating institutions, providing resources. Similarly, the right to marry (Article 12) cannot be realised without state laws recognising marriage. The right to a private and family life is expressed as everyone "has the right to respect for" their private and family life; 'respect' may entail more than non-interference. The right to life includes a positive obligation – "Everyone's right to life shall be protected by law".
2. Second, the article specifying state obligations is expressed broadly: the states "shall secure to everyone within their jurisdiction the rights and freedoms" in the Convention (Article 1). That language suggests more than merely negative obligations.

3. Third, the ECHR requires that rights be real and effective, not just paper rights. This is the principle of effective interpretation. The effective realisation of rights sometimes requires state action. In contemporary conditions threats to human rights can come from many different sources (including non-state actors, whether they be domestic abusers, paramilitaries, employers, or churches, etc) and so an effective protection of human rights sometimes requires the state to act.

### **3. Who has benefitted from positive obligations?**

As Natasa Mavronicola [notes](#), several different types of positive obligations have been recognised (see also Akandji-Kombe's [handbook](#)).

Sometimes this is a matter of having a legal framework in place that ensures respect for rights. One of the earliest cases on positive obligations held that the state must have legislation in place that recognises the link between an unmarried mother and her child ([Marckx v Belgium](#)). The legal framework must also protect children from physical violence: in a case where a child was beaten by his stepfather using a cane, the ECtHR found that the UK's laws on 'reasonable chastisement' did not adequately protect children's rights in [A v UK](#).

Positive obligations are not just a matter of general laws though. Positive obligations also require measures to ensure rights are realised.

The right to life case law on Article 2 ECHR indicates the scope of positive obligations. Article 2 requires states to refrain from the use of lethal force unless strictly necessary; to investigate deaths; and to protect life in certain circumstances.

Colin Murray, Aoife O'Donoghue, and Ben Warwick have highlighted the centrality of the ECHR and Human Rights Act to the [Belfast/Good Friday Agreement](#). In that context the positive obligation to investigate deaths under Article 2 ECHR (the right to life) has been crucial in a long line of cases. The ECtHR has held that there must be an effective, prompt, independent investigation into deaths. The UK courts have followed this line of case law and applied it in many cases related to the conflict, including the murder of [Pat Finucane](#) and the [Omagh bombing](#).

Worryingly, this positive obligation is under threat both in the Bill of Rights Bill and the government's legacy plans (see this post by [Anurag Deb](#)).

While the duty to investigate emerges in cases involving killings by the security forces, its reach has been extended beyond that to include cases of possible collusion, and other non-natural deaths. The duty to investigate is triggered by suicides in custody ([Keenan v UK](#)), accidental deaths, and deaths also in hospitals and care homes.

The Article 2 obligations include not just a duty to investigate deaths but also a duty in certain circumstances to protect people from violations of the right to life. For instance, positive obligations also mean the state must take steps to protect people from harm where the state has information that there is a threat to life, whether due to violence (an unbalanced individual's obsession about a schoolchild in [Osman v UK](#)) or major

environmental risks (e.g. a methane explosion in a dump causing 39 deaths in [Öneryildiz v. Turkey](#)). This duty to protect means that public authorities must protect victims of domestic and intimate partner violence from known threats: [Opuz v Turkey](#) is the landmark case on this and has been followed by many others.

A factsheet from the ECtHR explains the [relevance of the Article 2 duty to investigate](#) in relation to protection of persons from non-state actors, protection from self-harm, protection from industrial or environmental disasters, protection in the context of healthcare, protection in the context of detention, and protection in the context of accidents in public spaces.

Positive obligations extend beyond the right to life and include obligations relating to freedom from torture, inhuman and degrading treatment (Article 3 ECHR), freedom from slavery and similar practices (Article 4 ECHR), the right to respect for family and private life (Article 8 ECHR), freedom from discrimination (Article 14 ECHR), freedom of expression (Article 10 ECHR), and others.

The positive obligations doctrine has, therefore, been of help to victims of different types of human rights abuse. In *Z v UK* the European Court of Human Rights heard a case of [child neglect](#) over many years (mattresses soaked with urine, physical abuse, being forced to rummage in bins for food) and public authorities had failed to act despite knowing of the circumstances. This was a breach of Article 3 ECHR (the right not to be tortured or treated in an inhuman or degrading way).

Positive obligations require the state to have laws to punish slavery, servitude and forced labour, and human trafficking (while not mentioned in the text, the ECtHR has interpreted Article 4 as covering [human trafficking](#)). Positive obligations require investigation of such violations and protection of victims. The Supreme Court recognised this duty to investigate in a case involving a teenager who had been subject to forced labour and trafficking ([MS v Secretary of State for the Home Department](#)). In [VCL and AN v UK](#), the ECtHR dealt with a case of two minors who were arrested on drugs offences but in such circumstances that they appeared to be victims of human trafficking. The ECtHR found that the authorities had failed to take adequate operational measures to protect the victims of trafficking, in breach of Article 4 ECHR (prohibition of slavery and forced labour).

The ECtHR has said that states must have laws that protect people from sexual abuse and rape. In [X and Y v Netherlands](#), Y was a mentally handicapped child residing in residence for such children; she was raped by a relative of the manager. As she was not able to lodge a complaint herself, Dutch law did not allow for a prosecution; this defect in the law breached the ECHR (Article 8 – the right respect for private and family life). It is not just a matter of having appropriate laws on the statute books: the ECHR requires effective investigation and prosecution of such crimes ([EG v Moldova](#), [Sutherland v Her Majesty's Advocate](#)).

The Supreme Court relied on this principle in the [case taken by victims of John Worboys' sexual assaults](#). The courts found that the police had failed to investigate effectively Worboys' attacks on the claimants, violating their Article 3 ECHR right to be free from torture, inhuman and degrading treatment.

Positive obligations are relevant to other rights as well. Positive obligations were central to the case taken by a British Airways employee seeking to wear a small silver cross at work ([Eweida v UK](#)). The ECtHR ruled that the UK had not discharged its positive obligations to protect her right to manifest her religion (Article 9 ECHR).

Recently the ECtHR has started to develop positive obligations that assist persons with disabilities, often relying on the Convention on the Rights of Persons with Disabilities to help interpret the ECHR. For example the ECtHR has ruled there is a positive obligation to facilitate voting by persons with disabilities, to enable them to vote on an equal basis with others ([Toplak and Mrak v Slovenia](#)). It has also held that positive obligations require the state to facilitate the access to education of students with disabilities ([Çam v. Turkey](#) and this [blog](#)).

The state has particular positive obligations towards prisoners and others in places of detention, given that detainees have reduced options to vindicate their rights. So, in these circumstances there can be positive obligations to provide medical treatment or to facilitate religious dietary requirements ([Elrich and Kastro v Romania](#)).

In short, the courts have used positive obligations in many different circumstances, often, in [Alice Donald's words](#), to protect 'people whose rights are most vulnerable to abuse (such as children, victims of sexual violence and people seeking asylum'.

#### **4. What is the government proposing in relation to positive obligations?**

The [Bill of Rights Bill](#) in its Clause 5, proposes two changes:

1. First, the courts may not recognise any new positive obligations (one not already recognised in judicial interpretations) (Clause 5 (1)).
2. Second, when considering existing positive obligations, the courts "must give great weight" to the need to avoid impacting on the ability of public authorities to discharge their functions; to avoid conflicting with the public interest in public authorities using their own expertise to decide on finances and other resources; to avoid requiring the police to protect individuals involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities; to avoid requiring an inquiry or investigation to be conducted to a standard higher than what is reasonable; and to avoid affecting the operation of primary legislation. (Clause 5 (2)).

The interpretation of these clauses, should they become law, is not entirely clear but the intent appears to be to prevent future positive obligations from being recognised by the courts and to discourage the enforcement of existing positive obligations.

#### **5. Why does the government want to make these changes?**

The government had commissioned an independent panel to produce an [Independent Human Rights Act Review](#). The report of this panel does not offer any systematic discussion of positive obligations. This is unsurprising because the [terms of reference](#) for the review did not refer to positive obligations. The absence of this from the terms of reference means we

do not benefit from the analysis of the panel. In the event the government has largely ignored the independent report it commissioned.

The government's [consultation paper](#) on Human Rights Act reform quotes from several academics highlighting that positive obligations were not always apparent from the text of the ECHR (paras 51-53). The consultation paper does not seem to acknowledge that there is textual basis in the ECHR also for positive obligations.

According to the consultation paper positive obligations have given rise to "considerable legal uncertainty" (para 133). The Consultation then goes on to discuss one example of a positive obligations case. This is *Rabone*, where the Supreme Court dealt with a suicide in a hospital; the Supreme Court decided that the duty to protect life applied not just to detained patients but also to voluntary patients. The consultation paper also footnotes a reference to a second case where the High Court considered the scope of this positive obligation.

The reference to one Supreme Court case and one High Court case does not indicate any great level of judicial uncertainty. The examples given seem a typical exercise of deciding whether existing principles apply to new fact situations. That is the job courts are expected to do. The lower courts in *Rabone* had decided that the duty to protect did not apply to voluntary patients. The Supreme Court ruled unanimously that the duty to protect did apply to voluntary patients. The ECtHR has subsequently reached the same conclusion as the Supreme Court in *Rabone* - that voluntary patients are also protected by right to life positive obligations ([Fernandes de Oliveira v. Portugal](#)).

While the consultation paper does not examine the case law thoroughly, the positive obligations doctrine is an evolving one and so the case law does consider different arguments about the extent of positive obligations. The UK case law on positive obligations engages with the Strasbourg jurisprudence and so helps to clarify the doctrine and foster a dialogue with the ECtHR in Strasbourg.

The [consultation paper](#) later gives the example of Threat to Life notices. According to the Consultation these impose significant burdens on the police, requiring them to devote resources to deal with threats against the lives of people involved in criminal activity, and diverting the police from other activities (e.g. protecting law-abiding citizens) (paras 145-150).

These operations are presumably based on the principle that, in certain circumstances, the state must protect people from threats to their life (*Osman v UK*), but the consultation paper gives no indication that the operations discussed were the result of specific judicial decisions, nor does it consider the public interest in preventing all serious unlawful violence. Public safety is not promoted by stepping aside when criminals attack other criminals.

The consultation paper later says that positive obligations is one reason why "many questions of public policy have come to be decided by the courts, rather than Parliament" (para 167), but this is unconvincing. The examples given in the paper relating to positive

obligations don't show the courts interfering with parliamentary decisions, and Parliament always has the option to legislate specifically if it chooses.

The government's own [Consultation Response](#) document suggests there is little support for the changes related to positive obligations proposed by Clause 5 of the Bill of Rights Bill. The consultation paper asked how the Bill of Rights could address the expansion of positive obligations. According to the response document, 1,596 respondents said no change was necessary; 1,265 said that positive obligations could protect vulnerable persons; and 874 indicated this was not a genuine issue (Para 63). A total of 12,783 people responded to the consultation and the government has sight of all those responses. Despite that the consultation document does not cite any figures for the people who supported the government position on positive obligations!

The [impact statement](#) accompanying the Bill of Rights Bill is equivocal on the benefits of the proposed changes to positive obligations. For instance, the statement says that the changes "**could** reduce the need to adopt a risk-averse approach to decision-making, allowing for greater flexibility in resource allocation" (emphasis added), but goes on to say it is "not possible to quantify the impact of this change" (paras 75-76). While much of the discussion is very general, the statement then goes on to give statistics about the number of Threat to Life notifications issued by some police forces (para 77) and to cite statistics that "**may** show that the burden on police forces **could** be impacting their ability to prosecute offences, and that reducing this through restricting the creation of future positive obligations **may** prevent future resource burdens from being imposed" (emphasis again added, para 78). Three comments about this argument:

1. First the qualified language ('may', 'could', 'may' all in one sentence) is a sign of how uncertain this argument is.
2. Second, this is the only relatively specific part of the impact statement's discussion about positive obligations and it is all about how positive obligations supposedly protect people engaged in criminal activity. As the cases discussed above demonstrate, this is a partial and misleading account of the purpose of positive obligations. Such partial and misleading accounts are nothing new, as Merris Amos has [blogged](#).
3. Third the impact statement misuses the statistics: it cites statistics from one six-month period about offences not having an outcome assigned to them, without explaining the significance of this, why this particular six-month period was selected, and whether there were any changes over time. The impact statement does not explain in any way how this statistic is caused by the law on positive obligations. In fairness the statement does say that the pandemic might explain the statistic, but the statement does not take seriously that caveat.

## 6. Why are the government's proposals problematic?

The proposals seem likely to introduce legal uncertainty, increase the likelihood of the UK being found to have violated the ECHR at the European Court of Human Rights in Strasbourg and deny protection to victims of human rights violations.



First, there is a serious risk the proposals will increase legal uncertainty. Remember the text of the ECHR does not explicitly use the terms ‘positive obligations’ and ‘negative obligations’. In effect, whichever approach is taken, the ECtHR is concerned about striking a fair balance between the interests of the individual and the interests of the community as a whole, subject to the state’s margin of appreciation ([Palomo Sánchez v Spain](#), para 62). Baroness Hale has commented in relation to Article 3 that the distinction between positive and negative obligations may sometimes be a false dichotomy and unhelpful ([Limbuela paragraph 92](#)). Imposing the Bill of Rights Bill approach to positive obligations risks creating litigation and legal uncertainty.

For instance, what does it mean to say the courts must give “great weight” to the need to avoid undermining public authorities in Clause 5(2)? The courts already give great weight to these considerations. The case law is replete with cases where the courts have recognised a wide margin of appreciation (i.e. shown deference to public authorities) in cases involving the judgement of public authorities and in particular the police (Osman itself, the [Holy Cross case](#)). Does clause 5(2) merely recognise this? Or is it meant to change the nature of the judicial reasoning process? If so, to what extent does it move the balance in favour of the public authorities?

Clause 5(7) of the Bill defines “positive obligation” as meaning “an obligation to do any act”. As the ECHR does not use the term, there is no definition in the ECHR of “positive obligation”; and similarly, the ECtHR case law has not given that sort of statutory definition. The phrase “do any act” encompasses obligations to take operational measures to protect rights, but does it also include obligations to have in place an appropriate legal framework?

Furthermore, some of the Convention rights are either explicitly set out as positive obligations or necessarily include positive obligations - free and fair elections, the right to a fair trial, the right to marry, the first sentence of the right to life. Does Clause 5 limit any enforcement of new interpretations of these rights? Similarly respect for the right to non-discrimination in Article 14 will sometimes require positive action – provision of assistance for school children with autism for instance ([GL v Italy](#)); is Clause 5 meant to restrict the right to non-discrimination in such cases?

Second, the proposals (like others in the Bill of Rights Bill) seem likely to increase the number of cases going to the European Court of Human Rights in Strasbourg and likely to increase the number of cases where the UK loses in Strasbourg. In recent years the number of cases where the ECtHR has found the UK to have violated rights has been relatively small, among the [lowest in the Council of Europe](#) (2 in [2017](#), 1 in [2018](#), 5 in [2019](#), 2 in [2020](#), 5 in [2021](#)). Adopting a different approach to positive obligations will likely lead to more cases going to Strasbourg and more violations.

Third, and most seriously, the proposals risk thwarting efforts by victims of human rights violations to vindicate their rights. Positive obligations, like human rights generally, protect everyone’s rights. Clause 5 of the Bill of Rights Bill undermines everyone’s rights and will risk denying protection to (among others) victims of crime, domestic violence, child neglect, child abuse, and human trafficking.

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