Written Evidence by the Newcastle Forum for Human Rights and Social Justice (BOR0062)

About the respondent:

The Human Rights and Social Justice Forum is a research group of Newcastle Law School. Its membership is drawn from Newcastle University (primarily Newcastle Law School) and other academic and non-academic institutions. The Forum is a member of the Association of Human Rights Institutes (AHRI).

The members who contributed to this consultation response are active researchers who have collective experience acting in advisory capacities to Parliament, governmental and non-Governmental bodies, the judiciary (domestic and overseas) and international organisations including the United Nations.

Unanswered questions should not be taken as an endorsement of the relevant section of the Bill of Rights Bill.

[Q1] Dr Hélène Tyrrell	Clause 3 may discourage expansive interpretations of the Convention on the part of UK courts but would also discourage domestic courts from keeping pace with the modern interpretation of the Convention given by the ECtHR. This is problematic because, while the UK Supreme Court can be the 'ultimate judicial authority' on Convention rights *in domestic law*, clause 3 cannot change the fact that the authoritative interpretation of the Convention *in international law* is given by the ECtHR. Divergence between the UK and international understanding of Convention rights will make adverse Strasbourg judgments more likely. A further difficulty is posed by the treaty obligation under Article 46 ECHR, which provides that a judgment of the Strasbourg court in a case to which the UK is a party is binding on the UK. Domestic courts are currently able to play a part in discharging the Article 46 obligation by following or critically engaging with judgments against the UK. One result of directing courts to prioritise the text of the convention and preparatory works over a judgment addressed to the UK could be to place the UK in breach of its treaty obligations.
Q2. Dr Hélène Tyrrell	It is difficult to imagine how courts could be certain of such a condition being met but 'reasonable doubt' about the ECtHR interpretation could arise, for example, where the ECtHR has adopted, or would be likely to adopt, a deferential approach in view of differing social and political traditions across the States signatory to the Convention – recognising a 'margin of appreciation'. Such a position tends to be adopted in respect of cases concerning sensitive moral or social questions, for example abortion. It is always possible for the legislature to make an authoritative determination on such issues, but this relies on a political appetite for deliberation on controversial or sensitive topics. Absent the ability for courts to interpret rights in ways that go further than the settled or predictable ECtHR case law, and in cases where there is limited political appetite to take responsibility for the issue, the implication is a reduction in the protection of rights. Limiting

	the interpretative power of domestic courts in such cases would also limit the extent to which UK courts could contribute to the development of Convention rights. In respect of precisely the questions that domestic authorities are considered best placed to decide, UK courts would be tied to the pronouncements of the ECtHR.
Q3. Professor Rhona Smith	Should the UK fail to respect, protect and promote those international (including European) human rights treaties it has voluntarily accepted, then it is in breach of its international obligations. As with many elements of the Bill, clause 24 proposes the UK purportedly asserting its sovereignty by reneging on existing international law.[1] Interim measures are not automatic; they are only granted when there is deemed to be a real risk of imminent and irreversible harm.[2] Their purpose is to protect the rights of potential victims whilst preventing the State violating its international obligations. Aside from the ECtHR, the UK accepts the possibility of interim measures being requested by the ICJ,[3] UN Special Procedures[4] and UN Treaty Bodies.[5] Generally, interim measures issued by international courts are treated as legally binding; [6] those of other human rights monitoring bodies should be treated as such, but are often not.[7] Should the UK government not comply, it risks being found in breach of its international legal obligations. Statistically, only a small fraction of interim measures sought against the UK are granted by the ECtHR,[8] this includes the deportation/extradition cases which appear to be of particular concern to the Government.[9]

[1] Rule 39 of the Rules of Court. See also Article 34 ECHR requiring the state not to hinder the exercise of rights.
[2] There are differing evidential requirements before different bodies; usually requests are of the utmost urgency, ie the deportation, termination of life etc is imminent.
[3] Indeed, the UK has sought interim measures from the International Court of Justice, for example, perhaps the most well known is in UK v Iceland (Fisheries Jurisdiction Case) 1972, see the government request at https://www.icj-cij.org/public/files/case-related/55/10701.pdf.
[4] For example, the request of interim measures to stop the alleged imminent deportation of Stanislav Dzgoev to the Russian Federation, Urgent Appeal from UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 21 September 2017, UN Doc GBR 6/2017. The UK Government response of 27 September 2017 was that the deportation did not breach the European Convention on Human Rights. This noted that an application to the ECtHR for interim measures had been refused.
[5] Eg, Committee on the Rights of Persons with Disabilities, Rules of Procedure, UN Doc CRPD/C/1/Rev.1, at Rule 64: 'Interim measures 1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.'
[6] Article 41 Statute of the International Court of Justice: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.". See also, Rosalyn Higgins, 'Interim Measures for the Protection of Human Rights' (1998) 36(1-2) Columbia Journal of Transnational Law 91-108;
[7] See, for analysis, George Letsas, 'International Human Rights and the Binding Force of Interim Measures' (2003) 5 European Human Rights Law Review 527-538; Gino Naldi, 'Interim measures in the UN Human Rights Committee' (2004) 53(2) International and Comparative Law Quarterly 445-454 on a State being found in serious breach of its obligations by ignoring interim measures requested (to not proceed with the death penalty in a case); Jo Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38(1) Vanderbilt Journal of Transnational Law 1-49.
[8] Seven out of 131 applications in respect of the UK were successful in the period 2019-2021. The statistics are available from the European Court of Human Rights, see https://echr.coe.int/Documents/Stats_art_39_01_ENG.pdf.
[9] Bill Memorandum of Understanding, 1.h. See also Karin Zwaan, 'Urgency in Expulsion Cases Before the European Court of Human Rights and the UN-Committees: A Bird's Eye View' in Eva Rieter and Karin Zwaan (eds) Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures, The Hague: Asser, 2020.

	A possible solution, to maintain national autonomy, would be a process by which the government response to any interim measures could be swiftly (within hours) made public.[10] National courts could then be instructed to take into account any interim measures which the government has indicated it would accept.
Q.8 Professor Rhona Smith	Clause 5 is not compatible with the UK's obligations under the Convention and risks eroding the effectiveness of rights and freedoms accepted by the UK. The UK will remain bound by 'new' positive obligations and can be found in violation of them by the ECtHR. It should also be recalled that the UK has accepted UN and other European treaties with similar obligations. Accordingly, the UK could still be held accountable for breaching positive obligations before the ECtHR, the UN Treaty Bodies and Special Procedures. Human rights instruments contain both positive and negative obligations. Moreover, they are living instruments,[11] constantly evolving to reflect societal changes and strengthening protections.[12] The ECHR reflects minimum obligations and it has always been open to states to provide higher levels of protection. Arguably the UK has done this in some areas.[13] Moreover, the UK has argued for positive obligations to be recognised by other states.[14] Arguably, many positive obligations are implicit in existing rights and therefore not 'new', merely rendered explicit by the ECtHR exercising its supervisory jurisdiction. For 'pre-commencement' positive obligations, the clause, as drafted, is vague. First, there is not always a clear distinction between positive and negative obligations, as the European Court itself acknowledges.[15] Second, almost any interpretation of human rights should have 'an impact on the ability of the public authority to perform its functions'.[16] Given clause 5(2), it appears that the focus is not on restricting the horizontal effect of positive obligations, but rather limiting the imposition of restrictions on the activities of the State which infringe the rights and freedoms of individuals.
Q 11&12	The new admissibility requirement in Clause 15(3) of the Bill of Rights[17] und

[10] As above, the UK has tended to dismiss interim measures requested by quasi judicial formations such as Treaty Bodies and Special Procedures, including on the basis that the ECtHR has already refused a request in the same case.
[11] Tyrer v UK, Application No. 5856/72, Judgment 25 April 1978, para 31. https://hudoc.echr.coe.int/eng?i=001-57587.
[12] Since the entering into force of the European Convention, significant changes include the abolition of the death penalty (permitted under Article 2, now prohibited in all states by virtue of Protocol 13) and the extension of freedom of expression, correspondence, and such like to include online media.
[13] Aspects of disability rights and discrimination in the UK predate the relevant UN human rights treaty.
[14] For example, see recommendations made by the UK to state under review in the UN Human Rights Council during working group dialogues on universal periodic review in the field of trafficking/modern slavery, sexual orientation and gender identity rights and discrimination, and indigenous peoples. On traditional positive obligations, the recommendations of the UK on access to justice, detention and education. The UK has also spoken out on selected aspects of human rights and climate change, arguably implying new positive obligations on states.
[15] For example, on Article 8 ECHR, see Keegan v Ireland, Application no. 16969/90, Judgment 26 May 1994, at para 49. https://hudoc.echr.coe.int/eng?i=001-57881
[16] Clause 5(2)(a) Bill
[17] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights: A Consultation to Reform the Human Rights Act 1998 (CP 588, 2021) page 65, para 221-222; Human Rights Joint Committee, Call for Evidence Legislative Scrutiny: Bill of Rights Bill' (*Human Rights Joint Committee*, 2022) <https://committees.parliament.uk/call-for-evidence/2690 > accessed 18 July 2022.

Dr Tanya Krupiy	ermines the ability of the UK to meet its obligations under the ECHR including in cases where public authorities employ artificial intelligence technology to produce decisions concerning individuals. The requirement is incompatible with the obligation on states in Article 13 ECHR to ensure that all individuals who experienced violations of fundamental rights shall have an effective remedy before a national authority.[18] By requiring individuals to demonstrate "significant disadvantage" to be able to bring a claim,[19] the government is precluding individuals from obtaining redress for discrimination in the context where the public authority used artificial intelligence technology during a stage of the decision-making process. The United Nations Special Rapporteur on the rights of persons with disabilities Gerard Quinn noted that it is extremely difficult to challenge the decisions produced by an artificial intelligence decision-making process in the absence of an admissibility test.[20] These systems are so complex that any individual would find it difficult to understand how the system produced a particular decision.[21] Hin-Yan Liu expresses a related concern. He argues that the experience of harm can become "imperceptible" because the use of the artificial intelligence decision-making process affects each individual in a distinct way.[22] My research demonstrates that there will be many cases where it is impossible to prove the existence of a connection between a particular input variable and the possession of a protected characteristic.[23] As a result, individuals will find it challenging to prove that they suffered adverse treatment and discrimination. The admissibility test exacerbates individuals' difficulty in proving that they suffered harm. Therefore, it makes it very challenging to demonstrate that the public authority had violated their rights. The second limb of the permission test of claimants being able to bring a claim if the matter touches on "overriding public importance"[24] does not overcome this problem. Since it is the nature of artificial intelligence technology which creates challenges to adducing proof that harm had occurred, claimants will have difficulty showing that matters of great public importance are at stake. The phrase "overriding public importance" creates a very high threshold resulting in many individuals facing barriers to accessing justice. Consequently, it is recommended that the government not require claimants to satisfy an admissibility test to be able to bring a claim.

[18] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 13.
[19] Ministry of Justice (n 17) page 65, para 221-222.
[20] Special Rapporteur on the Rights of Persons with Disabilities Gerard Quinn, 'Report of the Special Rapporteur on the Rights of Persons with Disabilities on Artificial Intelligence and the Rights of Persons with Disabilities' (2021) A/HRC/49/52, para 27 <https://www.ohchr.org/en/calls-for-input/2021/report-special-rapporteur-rights-persons-disabilities-artificial-intelligence> accessed 18 July 2022.
[21] Ibid.
[22] Hin-Yan Liu, 'AI Challenges and the Inadequacy of Human Rights Protections' (2021) 40(1) Criminal Justice Ethics 2, page 15.
[23] Tetyana (Tanya) Krupiy, 'Meeting the Chimera: How the CEDAW Can Address Digital Discrimination' (2021) 10(1) International Human Rights Law Review 1, page 13 <https://brill.com/view/journals/hrlr/10/1/article-p1_1.xml?language=en> accessed 18 July 2022.
[24] Ministry of Justice (n 17) page 65, para 223.

Q15. Dr Vicky Kapogianni	The Bill explicitly curtails the rights of foreign criminals by restricting the conditions under which human rights can be employed to challenge deportation orders. In this context, clause 8 constrains courts to find deportation provisions to be incompatible with Article 8 ECHR, save manifest harm to a qualifying child or dependent is so extreme that the harm would override paramount public interest. By defining 'extreme harm' as 'exceptional', 'overwhelming' and 'irreversible' the standards are raised to such extent that the applicability of Article 8 ECHR is being severely restricted. The Government asserts that it aims to facilitate foreign criminals' deportation by allowing future laws to constrict circumstances in which, invoking Article 8 ECHR, would be able to trump public safety and abuse the system.[25] In this vein, clause 20 further truncates human rights by limiting courts' power to allow appeals against deportation on Article 6 grounds.[26] The clause provides that the relevant tribunal must presume that the assessment of the assurances of the Secretary of State is correct and thus treat them as determinative of the appeal unless it could not reasonably conclude that the ad hoc assurances would be sufficient to prevent a breach of the right to a fair trial so fundamental as to amount to a nullification of that right. Therefore, it prevents the Courts from properly assessing whether the individual might risk suffering a flagrant denial of a fair trial in the receiving country.[27] Conclusively, both clauses work contrariwise to the ECHR mindset and the relevant Strasbourg case law. Human rights are inherent to all human beings and thus they must be afforded the opportunity to accessing the justice system. Raising the standards to unreachable thresholds and limiting courts' powers in conducting a balancing exercise and proportionality assessment for each case does not seem to be compatible with the ECHR.
Q 16. Dr Conall Mallory	Clause 14 is likely to result in the UK being in breach of its international obligations. Pursuant to clause 39(3), clause 14 is only to be enacted in circumstances where the Secretary of State is satisfied that doing so would be consistent with the UK's obligations under the ECHR. The key question for the SoS will be whether the Convention applies to the relevant military operation. The Convention's application is limited to instances where a Contracting Party exercises jurisdiction through either effective control over a territory, or where state agents exercise authority and control over an individual.[28] These circumstances cover a range of overseas military engagements, from occupation to detention; from policing and security operations to investigations of unlawful killings.[29] Indeed, there are few instances where it

[25] Bill of Rights to Strengthen Freedom of Speech and Curb Bogus Human Rights Claims, (22 June 2022) https://www.gov.uk/government/news/bill-of-rights-to-strengthen-freedom-of-speech-and-curb-bogus-human-rights-claims
[26] Bill of Rights: European Convention on Human Rights Memorandum, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084551/bill-rights-echr-memo.pdf
[27] *Tomic v United Kingdom,* 17837/03, Council of Europe: European Court of Human Rights (14 October 2003) 12
[28] Al-Skeini and Others v United Kingdom (2011) 53 EHRR 18.
[29] Jaloud v the Netherlands App no 47708/08 (ECtHR, 20 November 2014); Al-Jedda v United Kingdom App no 27021/08

	can conclusively be stated that a state will not owe a Convention obligation when on an overseas operation.[30] British Ministers have tended to restrictively interpret the scope of the Convention's application.[31] In respect of both the Iraq and Afghan conflicts, this produced a swathe of litigation where the Convention was found to apply in multiple instances. Were the total ban in clause 14 to be triggered in circumstances where the UK exercised jurisdiction, any potential victim would be deprived of the Right to an Effective Remedy under Article 13 of the Convention. This provision requires 'an effective remedy before a national authority', and yet the clause will necessitate any challenges to be brought directly to the ECtHR. Not only would enacting the total ban then lead to potential violations of the Convention but it would also reduce the influence of domestic judges in interpreting the scope of the state's obligations. Domestic courts have played a constructive role in clarifying the UK's extraterritorial obligations under the Human Rights Act 1998, and their dialogue with the Strasbourg judiciary has been a valuable addition to the development of the jurisprudence. Beyond the situation under the Convention, Clause 14 is also likely to result in breaches of the International Covenant on Civil and Political Rights where the extraterritorial application of rights is understood in a broader sense. The ICCPR applies where a state exercises its 'power or effective control'[32] and actions which have 'a direct and reasonably foreseeable impact on the right to life of individuals outside their territory'.[33]
Q 20. Professor Colin Murray	This evidence focuses on consequences of the Bill of Rights Bill for Northern Ireland. The Belfast/Good Friday Agreement's Rights, Safeguards and Equality of Opportunity provisions committed the UK Government to incorporate the ECHR into Northern Ireland law and to ensure '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'.[34] The extent of these human rights obligations is thus not purely an outworking of human rights obligations but was explicitly envisaged as part of foregrounding human rights in Northern Ireland's post-1998 constitutional arrangements. In order to fulfil the 1998 Agreement's requirement of "incorporation", any UK human rights reform must be benchmarked against the Human Rights

(ECtHR, 7 July 2011); Hassan v United Kingdom App no 29750/09 (ECtHR, 16 September 2014 and Hanan v Germany App no 4871/16 (ECtHR, 16 February 2021).

[30] Georgia v Russia [II] App no 38203/68 (ECtHR, 21 January 2021) [126].

[31] Iraq Invasion: HC Deb vol 42(87) col 487-488 17 May 2004 (Jack Straw); HC Deb vol 421v col 1083-1084 19 May 2004. Afghan Conflict: HL Debs vol 749 col 416-417 7 November 2013.

[32] UN Human Rights Committee, *General comment no. 36,* Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 [63].

[33] Ibid [22]

[34] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para. 2.

	Act. No case has as yet been made by the UK Government that the Bill of Rights Bill's provisions fulfils the 1998 Agreement's incorporation requirements, and indeed it would be impossible to make any such case on the Bill as introduced. The erosion of the degree of incorporation to the bare text of the rights is not compatible with the 1998 Agreement commitments. The lack of clarity over the impact of the Bill on the litigation powers of the Northern Ireland Human Rights Commission further illustrates a worrying lack of attentiveness to the structures established under the 1998 Agreement.[35]
Q 21. Professor Colin Murray	The Sewel Convention is a significant constitutional protection for the law-making competences of the devolved legislatures. Under its terms, the UK Parliament 'will not normally legislate with regard to devolved matters without the consent'. Westminster has repeatedly legislated notwithstanding an absence of legislative consent in the context of the legislation associated with Brexit. But, as the UK Government noted at this time, the 'circumstances of our departure from the EU, following the 2016 referendum, are not normal; they are unique'.[36] The UK Government has stated that its intention for the Bill of Rights Bill is that it will apply to the 'whole of the UK' on the basis that it 'has a clear mandate to reform the UK's human rights framework, under the terms of its manifesto commitment'.[37] The UK Government can use this reasoning to attempt to persuade the devolved legislatures to grant it consent. But if they are not convinced, then it must be remembered that there have long been different rights commitments across the UK's domestic jurisdictions. A manifesto commitment to reform the Human Rights Act being applied to justify its repeal is not comparable to the outworkings of the Brexit referendum vote. The UK Government is constitutionally obliged to recognise that the devolved legislatures are able to exercise a say over the extent to which this Bill affects their competences.

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[35] See Aoife O'Donoghue and Colin Murray, 'The Bill of Rights Bill: Playing Fast and Loose with the Belfast/Good Friday Agreement (Again)' (Oxford Human Rights Hub Blog, 24 June 2022). Available at: https://ohrh.law.ox.ac.uk/the-bill-of-rights-bill-playing-fast-and-loose-with-the-belfast-good-friday-agreement-again/.

[36] Michael Gove, 'Written Statement: EU (Withdrawal Agreement) Bill' (23 January 2020) HCWS60

[37] UK Government, *Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998* (2021) CP 588, para. 35.