Falkland Islands Constitutional Review - 2023

Thinking about Fundamental Rights and Freedoms

The first topic which the Select Committee on the Constitution would like to discuss is Fundamental Rights and Freedoms – also called "Human Rights".

These are set out in Chapter 1 of the Constitution

You can access the Constitution here: www.legislation.gov.fk/view/lh/2023-06-12/uksi-2008-2846

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Part 3: Questions to think about and how to respond to the Select Committee

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Part 1: What are human rights and how have they developed?

What are human rights?

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.

They apply regardless of where you are from, what you believe or how you choose to live your life.

They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security.

These basic rights are based on shared values like dignity, fairness, equality, respect and independence.

These values are defined and protected by law.

In the Falkland Islands our human rights are mainly protected by the Constitution, but also by some other laws.

How do human rights help you?

Human rights are relevant to all of us, not just those who face repression or mistreatment.

They protect you in many areas of your day-to-day life, including:

- your right to have and express your own opinions
- your right to an education
- your right to a private and family life
- your right not to be mistreated or wrongly punished by the state

Where do human rights come from?

The idea that human beings should have a set of basic rights and freedoms has deep roots in Britain, from which the laws of the Falkland Islands have been derived.

Landmark developments in Britain include:

- Magna Carta - 1215
- the Habeas Corpus Act - 1679
- the Bill of Rights - 1689

See the British Library's website for more information on these and other icons of liberty and progress.

The Universal Declaration of Human Rights

The atrocities of the Second World War made the protection of human rights an international priority.

The United Nations was founded in 1945.

The United Nations allowed more than 50 Member States to contribute to the Universal Declaration of Human Rights, adopted in 1948.

This was the first attempt to set out at a global level the fundamental rights and freedoms shared by all human beings.

What is the Universal Declaration of Human Rights?

The Universal Declaration of Human Rights is a historic document which outlined the rights and freedoms everyone is entitled to.

It was the first international agreement on the basic principles of human rights.

It laid the foundation for the human rights protections that we have today

It formed the basis of the European Convention on Human Rights, which in turn was incorporated in UK law by the Human Rights Act 1998.

Worldwide influence

Nearly every state in the world has accepted the Declaration.

It has inspired more than 80 international conventions and treaties, as well as numerous regional conventions and domestic laws.

It has been the catalyst for improving human rights protections for groups such as disabled people, indigenous peoples and women.

International Bill of Human Rights

The International Bill of Human Rights is an informal name given to the Universal Declaration of Human Rights and the following UN human rights treaties:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

You can find out more about the International Bill of Human Rights in this United Nations factsheet (PDF).

Watch this video on the Universal Declaration of Human Rights.

The European Convention on Human Rights

The Universal Declaration of Human Rights formed the basis for the European Convention on Human Rights, adopted in 1950.

It protects the human rights of people in countries that belong to the Council of Europe, including the UK. The Falkland Islands is within the scope of the Council of Europe through the UK membership.

What is the European Convention on Human Rights?

The European Convention

The European Convention on Human Rights (ECHR) protects the human rights of people in countries that belong to the Council of Europe.

All 47 Member States of the Council, including the UK, have signed the Convention. Its full title is the 'Convention for the Protection of Human Rights and Fundamental Freedoms'. The Convention has been applied to have effect in the Falkland Islands.

What is the Council of Europe?

Formed in 1949, the Council of Europe is completely separate from the European Union and much larger, with 47 members compared to the EU's 28. The UK became a Council member 24 years before it joined the EU. The UK's membership of the Council is unaffected by the UK having left the EU.

The Convention consists of numbered 'articles' protecting basic human rights. The UK made these rights part of its domestic law through the Human Rights Act 1998. A number of the rights have been protected in the Falkland Islands by the Constitution, which has contained a specific Chapter on Fundamental Rights and Freedoms since 1985.

How did the Convention come about?

The Council of Europe was founded after the Second World War to protect human rights and the rule of law, and to promote democracy. The Member States' first task was to draw up a treaty to secure basic rights for anyone within their borders, including their own citizens and people of other nationalities.

The Convention was based on the United Nations' Universal Declaration of Human Rights. It was signed in Rome in 1950 and came into force in 1953.

What rights and freedoms does the Convention protect?

The Convention guarantees specific rights and freedoms and prohibits unfair and harmful practices.

The Convention secures:

- the right to life (Article 2)
- freedom from torture (Article 3)
- freedom from slavery (Article 4)
- the right to liberty (Article 5)
- the right to a fair trial (Article 6)
- the right not to be punished for something that wasn't against the law at the time (Article 7)
- the right to respect for family and private life (Article 8)
- freedom of thought, conscience and religion (Article 9)
- freedom of expression (Article 10)
- freedom of assembly (Article 11)
- the right to marry and start a family (Article 12)

- the right not to be discriminated against in respect of these rights (Article 14)
- the right to protection of property (Protocol 1, Article 1)
- the right to education (Protocol 1, Article 2)
- the right to participate in free elections (Protocol 1, Article 3)
- the abolition of the death penalty (Protocol 13)

Absolute and qualified rights

Some of the rights in the Convention are "absolute" rights – which means that they can never be restricted. These rights are:

- freedom from torture (Article 3)
- freedom from slavery (Article 4)
- the right not to be punished for something that wasn't against the law at the time (Article 7)

Other rights are "qualified" rights – which means they can be restricted in certain circumstances. In most cases the restriction must be: (a) authorised by law; (b) necessary for a legitimate purpose (such as, for example, protection of public health); and (c) proportionate to the stated purpose.

The European Court of Human Rights

The European Court of Human Rights applies and protects the rights and guarantees set out in the European Convention on Human Rights. It interprets the rights in light of the changing context of society. Not everyone agrees that the Court's interpretation of the Convention is right; some believe that the Court has expanded the scope of some rights in ways which those who wrote and agreed the Convention would not have expected. Some believe that some of the protected rights are not "fundamental".

What other Conventions protect human rights

The following table sets out a list of major conventions which protect human rights, including others in addition to those already described, and sets out how they apply in the Falkland Islands.

Key Human Rights Treaties & Conventions applying in the Falkland Islands

Title	Applied to Falkland Islands[1]	Date applied[2]	Reservations etc	Comment
Universal Declaration of Human Rights	N/A – proclaimed by General Assembly of the United Nations 10/12/1948			This is not a multi-lateral convention like those below
Convention on the Rights of the Child	Yes	07/09/1994	Yes	
European Convention for the Protection of Human Rights and Fundamental Freedoms	Yes	23/10/1953 (became permanent on 14/01/2006)	Yes	
Convention on the Prevention and Punishment of the Crime of Genocide	Yes	30/01/1970	No	
International Covenant on Economic, Social and Cultural Rights	Yes	20/05/1976		
International Covenant on Civil and Political Rights	Yes	20/05/1976		
Convention relating to the status of refugees	Yes	25/10/1956		
Convention on the Abolition of Slavery the Slave Trade and Institutions and practices similar to slavery	Yes	18/06/1927		
Convention against torture and other cruel inhuman or degrading treatment	Yes	08/12/1988		
Convention on the rights of persons with disabilities	No			
Convention on the Elimination of All Forms of Discrimination Against Women	Yes	07/05/1986		
Convention on the Elimination of Racial Discrimination	Yes	07/03/1969		

[1] Sources: https://www.gov.uk/guidance/uk-treaties , supplemented by information published by Treaty-administering bodies, such as the United Nations Organisation and its agencies.
[2] Information is correct to best of information and belief, but is subject to correction.

Further information

Further information about human rights is available from the following website:

1. **Examples of the impact of the European Convention on Human Rights by theme:**

https://www.coe.int/en/web/impact-convention-human-rights/#/

2. **Human rights handbooks**

Practical guides to the implementation of the European Convention on Human Rights

Written by experts in the field, each handbook deals with one aspect of the European Convention on Human Rights or its protocols. The handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and particularly judges, in mind, but are accessible also to other interested readers.

https://www.coe.int/en/web/human-rights-rule-of-law/human-rights-handbooks

Part 2: What does Chapter 1 of the Falkland Islands Constitution do?

Chapter 1 of the Constitution has three main effects:

1. You can seek justice in a Falkland Islands court

It incorporates the rights set out in the European Convention on Human Rights (ECHR) into Falklands law. This means that if your human rights have been breached, you can take your case to a Falklands court rather than having to seek justice from the European Court of Human Rights in Strasbourg, France.

2. Public bodies must respect your rights

It requires all public bodies (like courts, police, hospitals, publicly funded schools, and other parts of the Falkland Islands Government), and other bodies carrying out public functions, to respect and protect your human rights.

3. New laws are compatible with Convention rights

In practice it means that the Legislative Assembly will always try to make sure that new laws are compatible with the rights set out in the European Convention on Human Rights. The courts will also, where possible, interpret laws in a way which is compatible with Convention rights.

Protection of Fundamental Rights and Freedoms of the Individual

Chapter 1 of the Constitution sets out certain "fundamental rights and freedoms", and the framework within which these operate.

The rights and freedoms directly limit the actions that can be taken by the Government, including the laws which can be made in the Falkland Islands.

The fundamental rights translate international convention rights into rights which are directly enforceable by persons in the Falkland Islands.

Most important are the provisions of the European Convention on Human Rights (ECHR)[3]. Also of general application is the International Covenant on Civil and Political Rights (ICCPR). A list of the core Human Rights treaties and conventions which apply in the Falkland Islands is set out above.

[3] European Convention on Human Rights and Protocols – note: not all rights contained in the protocols have been applied to the Falkland Islands.

Summary of Sections in Chapter 1 of the Constitution:

A number of the rights have been interpreted to impose positive obligations on the government to take steps, not merely obligations not to do certain things. The various rights are listed below.

Section 1 - Fundamental rights and freedoms of the individual

This section sets the broad context for the provisions which follow it. This includes provision that "every person in the Falkland Islands" is entitled to the protections afforded.

It also emphasises the importance of the right to self-determination – for the people of the Falkland Islands to determine their political status and freely pursue their economic, social and cultural development.

Section 2 – Protection of right to life

This section provides protection for the right to life.

This is one of the rights where there is a mix of negative and positive obligations on the Government to protect the right.

However, Section 2 as currently framed fails to fully translate the provisions of the Convention, and it is believed this was an oversight, rather than deliberate choice. The substantive omission is in the first sentence of Article 2, paragraph 1, of ECHR, which reads "Everyone's right to life shall be protected by law." This has been construed as imposing a positive obligation on a state or territory.

Section 2 derives from Article 2 ECHR and Article 6 ICCPR.

Section 3 – Protection from inhuman treatment

This section provides an absolute prohibition against torture and inhuman or degrading treatment.

This is a right which has effect to impose positive obligations on the government, for example to ensure that effective official investigations are undertaken, where an individual raises an arguable claim of breach, and

also to take measures in particular to protect children and vulnerable adults.

Section 3 derives from Article 3 of ECHR and Article 7 ICCPR.

Section 4 – Protection from slavery and forced labour

This section provides an absolute prohibition against slavery, and provides some protections against forced labour. But "forced labour" does not include requirements to perform certain activities, including labour, required in consequence of a sentence or order of a court.

Section 4 derives from Article 4 of ECHR and Article 8 ICCPR.

Section 5 – Protection of right to personal liberty

This section provides that persons may not be deprived of their liberty except as may be authorised by law in certain specified cases, including as a result of a sentence of a court.

Section 4 derives from Article 5 ECHR and Article 9 ICCPR

Section 6 – Provisions to secure protection of law

This section contains detailed rights which apply in relation to the charging and trial of criminal allegations. These are reflected in the detailed local laws made in relation to crimes and criminal procedure. The section also provides that in relation to the determination of the existence or extent of civil rights and obligations, a person has a right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law.

This section derives from Articles 6 & 7 ECHR and Articles 14 & 15 ICCPR.

Section 7 – Protection of rights of prisoners to humane treatment

This section provides absolute protection for persons deprived of their liberty of the right to be treated with humanity and with respect for the inherent dignity of the human person.

This section derives from Article 10 ICCPR.

Section 8 – Protection of freedom of movement.

This is a qualified right for persons to move freely throughout the Falkland Islands etc. It is possible for restrictions to be put in place by law restricting movement, including where required in the interests of defence, internal security, public safety, public order, or public health.

This section derives from Article 12 ICCPR (although the ECHR provision has not been adopted by the UK nor extended to the Falkland Islands).

Section 9 – Protection for private and family life and for privacy of home and other property

This section provides a right to respect for a person's private and family life and their home and correspondence. This is a qualified right, so laws may provide for interference with the right on specified grounds (similar to those referred to in section 8).

This appears to be a broad right, but interpretation of Article 8 of ECHR by the European Court of Human Rights is the subject of argument that the Court has broadened the intended scope of protected matters.

This section derives from Article 8 ECHR and Article 17 ICCPR.

Section 10 – Protection of right to marry and found a family

This section provides that every man and woman of marriageable age has the right to marry. It also provides that no person shall be compelled to marry. Again, it is a qualified right. "marriageable age" is a matter to be determined by law.

This section derives from Article 12 ECHR and Article 23 ICCPR

Section 11 – Protection of freedom of conscience

This is another qualified right, which protects freedom of conscience, including thought, religion and belief.

This section derives from Article 9 ECHR and Article 18 ICCPR.

Section 12 – Protection of right to education

This section provides the right to a primary education, which (subject to certain qualifications), must be free of charge.

This section derives from Protocol 1(2) ECHR.

Section 13 – Protection of freedom of expression

This section provides a right of freedom of expression, which includes freedom to:

a. hold opinions, without interference;

b. to receive information and ideas, without interference;

c. to disseminate information and ideas, without interference.

This is, again, a qualified right, where laws can interfere with the right on specified grounds.

This section derives from Article 10 ECHR Articles 19 & 20 ICCPR.

Section 14 – Protection of freedom of assembly and association

This is a qualified right which protects the right of persons to assemble and associate with others, in particular to form trade unions or other associations for the promotion and protection of interests.

This section derives from Article 11 ECHR, Articles 21 & 22 ICCPR.

Section 15 – Protection from deprivation of property

This section protects against compulsory acquisition of property, except as provided by law. The applicable law must operate in a way which provides for prompt payment of adequate compensation. The law must also give a right of access to the Supreme Court to determine matters such as the legality of the "taking" of the property and the amount of the compensation payable.

This section derives from Protocol 1(1) ECHR.

Section 16 – Protection from discrimination

This section provides for protection from discrimination by persons acting by virtue of written laws, and from persons performing the functions of public office or of a public authority. This is a qualified right, with a number of exceptions permitted in specified circumstances.

This provision differs from the version which appeared in the 1985 Constitution. It is not clear whether the change in wording was intended to convey a different meaning, or whether both instruments were intended to mean the same. The issue has been raised with the FCDO.

This section derives from Article 14 ECHR and Articles 2,3 & 26 ICCPR.

Section 17 – Derogations from fundamental rights and freedoms under emergency powers

This allows certain (but not all) protected rights to be overridden temporarily under emergency powers during a public emergency. The relevant provisions for emergency powers are set out in the Emergency Powers (Overseas Territories) Order 2017.

Section 18 – Protection of persons detained under emergency laws

This section sets out procedural safeguards when persons are detained under emergency laws.

Section 19 – Enforcement of protective provisions

One of the obligations under the ECHR is that a government must provide for a person to obtain an effective remedy before an appropriate national authority. This section provides for direct access to the Supreme Court, and gives the court appropriate powers to give a remedy. It also sets the framework for consideration of such matters, including a requirement to "take into account" "any judgment, decision, declaration or advisory opinion of the European Court of Human Rights", as well as other matters.

This section derives from Article 13 ECHR.

Section 20 – Proceedings which might affect freedom of conscience

This section provides that where a court is determining any question under Chapter 1 which might affect the exercise by a religious organisation (or its members) of the right protected by section 11, it must have "particular regard to the importance of that right."

Section 21 – Proceedings which might affect freedom of expression

This includes specific provisions in relation to court proceedings which might affect the exercise of the right to freedom of expression. Again, it is to have "particular regard to the importance" of that right. It contains specific provision in relation to journalistic, literary or artistic material.

Section 22 – Interpretation.

This section contains provisions for the interpretation of Chapter 1. Section 22 is a critical section as it defines key concepts, such as who belongs to the Falkland Islands – who has (or may be granted) Falkland Island Status – that is beyond the scope of this note (it will be considered by the Select Committee in a different session).

Part 3: Questions to think about and how to respond to the Select Committee

Questions to think about

You may like to ask yourself the following questions when thinking about the fundamental rights and freedoms in the Constitution:

Do you think that your human rights are adequately protected?

Are there any rights which you think are not adequately protected?

Do you think that there is a proper balance between:

- individuals' rights;
- personal responsibility;
- the public interest?

Thinking about one or more of the protected rights and freedoms:

- what would life be like without that right?
- would you be able to live as freely as you do now?
- in what ways could not having this right affect your life on a daily basis?
- how would not having this right affect the community?
- do you know of any countries where citizens don't currently have this right – what do you think their lives are like?

Are there some "rights", which others think should be protected, but you do not?

Potential areas of focus for the Select Committee on Chapter 1

The Select Committee on the Constitution will consider any issues raised for discussion, but the Committee may decide to focus on the following areas:

- **Whose rights and freedoms?**

  The starting point of the Constitution is that the fundamental rights and freedoms apply to every person in the Falkland Islands – reflecting the essence of human rights: they belong to everyone.

  Q Is this adequately understood – or is there a common misunderstanding that the Constitution only protects, for example, persons with Falkland Island status?

- **What about the <u>exceptions</u> to the fundamental rights and freedoms?**

  A number of the rights and freedoms are subject to exceptions (for example, which may relate to the interests of defence, internal security, public safety etc).

  Q Is more discussion needed to understand what these exceptions are likely to involve in the circumstances of the Falkland Islands? (for example relating to our population size, our geographic remoteness, our political circumstances?)

  Q Do we get the balance right when applying these exceptions or is more guidance needed in the Constitution, or to supplement it?

- **Are the protections from discrimination appropriate? (section 16)**

  The protection from discrimination is a broad right with "discriminatory" defined as follows (we have emphasised some words to help with understanding of the effect of this definition):

  > "discriminatory" means affording different treatment to different persons on **any grounds** <u>such as</u>:
  >
  > sex
  > sexual orientation

race
colour

language
religion or political or other opinion
national or social origin
association with a national minority,
property
birth
or other status

Q Is it clear what discriminatory means under the Constitution? Is it the right definition?

Q Should any other groups be explicitly listed in the definition (eg disabled persons)?

Q In practice how do the areas where the Government discriminates stack up against the Constitution (eg who can vote, immigration status, eligibility for pensions or travel credits, or entitlement to health care)?

Q What about people other than the Government who discriminate (individuals, businesses, clubs etc)?

- **Should the right to education be extended? (section 12)**

  The right to education (which should be provided free by the Government) is limited to primary education.

  Q Should the right to free education be extended to secondary education?

  Q What about any other aspect of the right to education?

- **Do the protections from deprivation of property get the balance right? (section 15)**

  The protections against deprivation of property are qualified to enable the compulsory acquisition of property in certain circumstances.

Q Do the provisions strike the right balance to protect individuals and to enable the Government to compulsorily acquire property in the public interest?

- **Should assisted dying be allowed under the Constitution if the Legislative Assembly wants to enable that under our law? (section 2)**

  Protection of the right to life is absolute. European human rights case law suggests that the protection of the right to life does not prevent assisted dying (it is lawful in some parts of Europe). However, the Falkland Islands criminal law currently makes it a criminal offence.

  Q Should assisted dying be permitted under the Constitution, or should the Constitution prevent it being introduced in the Falkland Islands?

- **Should other rights be protected under the Constitution**?

  Q Should there be additional or explicit protection in the following areas under the Constitution: freedom of the press, right to human dignity, right to petition, right to information, rights of children, economic rights (eg intellectual property), right of matrimonial equality, protection of consumers, environmental rights?

You are invited to give your views to the Select Committee

You are invited to give your views to the Select Committee about Chapter 1 of the Constitution – Fundamental rights and freedoms.

You can address any of the issues raised above, and/or raise any other issues relevant to Chapter 1.

You can make a **written submission** in any format, but you may like to use the dedicated form of response (the form is available at www.falklands.gov.fk/assembly/the-constitution/select-committee).

Your written submission should be received by **14 July 2023** to enable the Select Committee to consider your submission at its meeting of 20 July (the Committee may consider any submission received after this date at the meeting on 20 July, but that cannot be guaranteed).

Please submit your response form:

- by emailing it to: constitutionalreview@sec.gov.fk (this method is strongly recommended); or

- by placing it in the box provided in the Post Office in Stanley; or

- by sending by post to Gilbert House, Stanley

See further guidance below about making a written submission.

You can also make an **oral submission** to the Committee on the afternoon of 20 July 2023.

You can include a request to make an oral submission when you make your written submission; or

You can make a request to make an oral submission by e-mailing constitutionalreview@sec.gov.fk or by calling Gilbert House on 27451.

Your request should be received by **14 July 2023** to enable the clerk to the Committee to schedule all oral submissions to be made at the meeting of 20 July.

Making a submission of written evidence to the Select Committee for the review of the Falkland Islands Constitution

The following guidance is about making a submission to the Select Committee. It also discusses what happens once your submission is received by the Committee.

How to make a submission

A box will be available in the Post Office for the return of written submissions, but you are strongly encouraged to submit your comments electronically via email: constitutionalreview@sec.gov.fk

How many submissions can I make?

The Select Committee will review the Constitution by subject area. Each subject area will be discussed at a meeting which is held in public. The Committee will invite submissions on each subject area by reference to the meeting scheduled to discuss that particular subject. You can make a submission to one or more meetings.

When do I make a submission?

Invitations for submissions will be regularly published in the Penguin News and online (www.falklands.gov.fk/assembly/the-constitution/select-committee). The invitation in connection with Chapter 1 of the Constitution is set out above at page 20.

What if I only want to make one submission - just covering the areas of the Constitution that I am interested in?

You can make a submission at any time covering any area of the Constitution and the Committee will endeavour to consider that submission, regardless that it is not received in connection with a particular meeting.

What a submission should look like

You can make up your own format for a submission or you can use the standard form of response - see:

www.falklands.gov.fk/assembly/the-constitution/select-committee

Submissions of written evidence should:

- Be in Word or PDF
- Comprise a single document. If there are any annexes or appendices, these should ideally be included in the same document (although that may not be possible if you are using the standard form of response).
- State clearly who the submission is from, i.e. whether from yourself in a personal capacity or sent on behalf of an organisation.
- Be concise – we recommend no more than 3,000 words in length.
- Include any factual information you have to offer from which the committee might be able to draw conclusions, or which could be put to other witnesses for their reactions.
- Include any recommendations for action by the Government or others which you would like the committee to consider.

It also assists the committee if those submitting evidence adhere to the following guidelines. Although not essential, your submission should ideally:

- Begin with an executive summary in bullet point form of the main points made in the submission.
- Have numbered paragraphs

Those making a submission should note the following:

- Material already published elsewhere should not form the basis of a submission, but may be referred to within or attached to a submission, in which case it should be clearly referenced.
- You should be careful not to comment on matters currently before a court of law, or matters in respect of which court proceedings are imminent. If you anticipate such issues arising, you should discuss with the clerk of the Committee how this might affect the written evidence you can submit (email constitutionalreview@sec.gov.fk).
- Select Committees do not normally investigate individual cases of complaint or allegations of maladministration.

What happens to the evidence once submitted?

- The Select Committee will publish most of the written evidence they receive on the internet with the transcript of the proceedings.
- **If you do not wish your submission to be published**, you must clearly say so and explain your reasons for not wishing its disclosure. The Committee will take this into account in deciding whether to publish. If you wish to include private or confidential information in your submission to the Committee, please contact the clerk of the Committee to discuss this.
- A Committee is not obliged to accept your submission as evidence, nor to publish any or all of the submission even if it has been accepted as evidence. This may occur where a submission is very long or contains material to which it is inappropriate to give parliamentary privilege.
- Once submitted, no public use should be made of any submission prepared specifically for the committee unless you have first obtained permission from the clerk of the Committee. If you are given permission by the Committee to publish your evidence separately, you should be aware that you will be legally responsible for its content.

(Adapted from the House of Commons Guide for Witnesses giving written or oral evidence)