

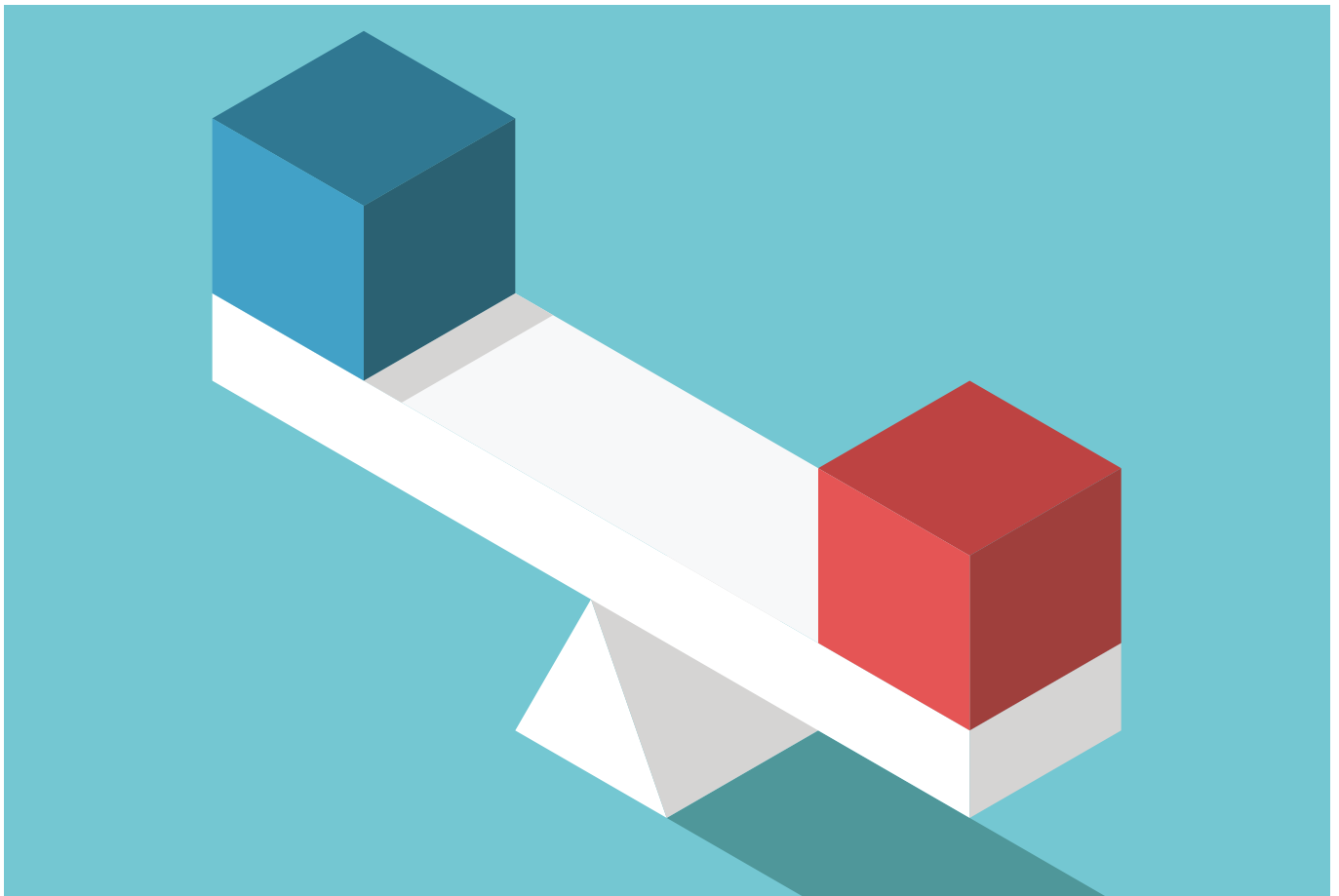
RSE

*The Royal Society
of Edinburgh*

KNOWLEDGE MADE USEFUL

Advice Paper
October 2023, AP23-12

Human Rights Bill for Scotland



Introduction

1. The Royal Society of Edinburgh (RSE), Scotland's National Academy, in conjunction with the Young Academy of Scotland (YAS) and including representative members for the RSE of the UK & Ireland Academies Human Rights Committee (past and present), welcomes the opportunity to respond to the Scottish Government consultation on a Human Rights Bill for Scotland. This response draws on our Fellows and YAS member's expertise on human rights and constitutional law. A working group was formed to contribute to this consultation response, and the comments from the working group have informed this response.

What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

2. The RSE agrees that recognition of human dignity is inherent in human rights law as set out in Barak's *Human Dignity: The Constitutional Value and the Constitutional Right*. The concept is explicitly referred to in the Preamble and Article 1 of the Universal Declaration of Human Rights 1948. The German Basic Law opens with a statement that "human dignity is inviolable" and then lists "basic rights [that] bind the legislature, the executive and the judiciary as directly applicable law".¹ Human dignity is not among them, but the "radiating" effect of the opening statement in German law has been considerable.²
3. However, the RSE has concerns that the application of the concept could be a problematic interpretive test for the courts to apply without careful application. McCrudden (2008) raised concerns about whether the concept of dignity increases rather than decreases judicial discretion.³ We believe that the government should apply caution in introducing the concept as a **right** in legislation. Great care should be taken in framing and defining the term in the Bill to avoid uncertainty.
4. The RSE recommends that the Scottish Government should examine the application of dignity in countries where the concept has already been applied in a judicial context for guidance. The South African Constitution refers to human dignity as one of the fundamental "values" that underpins the Republic of South Africa (Article 1; see also Article 7), but it has a further specific article headed "Dignity" (10) in its Bill of Rights (Chapter 2 of the Constitution). This provides that "Everyone has inherent dignity and the **right** to have their dignity respected and protected" (*emphasis supplied*). The concept of "dignity" as a right

has played a significant role in the development of South African human rights law, especially in relation to social and economic rights for groups (rather than individuals).⁴ It has been mobilised where some violation has occurred but has not been captured other rights. One example is *S v Jordan* 2002 (6) SA 642 (CC) (discussed in Chris McCrudden 2008), that case related to a sex worker's treatment by the police and the economic conditions that led to them to engage in sex work.⁵ It shows that dignity can be given valuable judicial life rather than a stand-alone concept.

Q2: What are your views on our proposal to allow for dignity to be a key threshold for defining the content of Minimum Core Obligations (MCOs)?

5. The RSE urges caution in making 'dignity' the key interpretive test. That is because it is an open-textured term. As noted above, its use as an interpretative tool tends to increase judicial discretion and encourage opportunistic or politically motivated litigation. That may lead to difficulties. Courts may be asked to trespass (a) into the political arena, for example, in the case of the right to clean air, and (b) into questions that might be better left to moral philosophers, such as abortion. We suggest that it is not necessary to go any further than a legislative provision requiring the courts to interpret and apply specific rights with regard to the protection of human dignity.
6. There is another issue to address: devolved legislative competence. The Scottish Parliament can legislate to incorporate international rights, but it cannot impinge on reserved areas. The UK Supreme Court has held that in certain respects (in particular, its application to UK institutions and other UK legislation), the Rights of the Child (Incorporation) (Scotland) Bill was outside devolved competence.⁶ It is understood that the

¹ Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt https://www.gesetze-im-internet.de/gg/art_1.html

² Aharon Barak (2015) *Human Dignity: The Constitutional Value and the Constitutional Right* [online] available at: <https://doi-org.ezproxy.is.ed.ac.uk/10.1017/CBO9781316106327>; Webb, P, Gattini, A & Garciandia Garmendia, R (eds) (2021), *Human Dignity and International Law*. Brill. [online] Available at: <https://kclpure.kcl.ac.uk/portal/en/publications/human-dignity-and-international-law>

³ McCrudden (2008) Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law*, Volume 19, Issue 4 (September 2008), pp 655–724 [online] Available at <https://doi.org/10.1093/ejil/chn043>

⁴ South African Government (1996) 'Constitution of the Republic of South Africa, 1996' [online] Available at: <https://www.gov.za/documents/constitution-republic-south-africa-1996> (Accessed 15/09/2023).

⁵ McCrudden (2008) Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law*, Volume 19, Issue 4 (September 2008), pp 655–724 [online] Available at: <https://doi.org/10.1093/ejil/chn043>

⁶ The Supreme Court (2021) *Reference by the Attorney General and Advocate General for Scotland: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2022 SC (UKSC) 1 [online] available at: <https://www.supremecourt.uk/cases/uksc-2021-0079.html>

Scottish Government has now drafted amendments, however, the amendments have not yet been agreed by the UK Government.⁷ Before more general legislation incorporating human dignity is advanced, it needs to be shown that the lessons of the UK Supreme Court decision have been successfully absorbed. Any Bill must comply with the constraints provided by the Scotland Acts and be fully compatible with UK legislation on human rights.

7. The concept of dignity is thus cautiously welcomed as an underpinning value and one that can be incorporated in law as a value (rather than as a right). However, its definition and scope of application should be clearly delineated, the role of judges in interpreting and applying this concept should also be set out clearly, and care should be taken to ensure the Bill falls squarely within devolved competence.

Q3: What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

8. The RSE contends that the list of international instruments for incorporation appears uncontroversial, given that the UK has ratified all of them. How far existing UK legislation (e.g. the Equality Act 2010) already gives effect to the rights provided by the international instruments and whether devolved legislation can lawfully add to or displace its UK counterpart should be carefully considered. There is also great difficulty in enshrining socio-economic rights as positive obligations which the state must honour. Comparative examples show that decisions concerning the use of resources should often be left to the legislature or the executive.
9. Also related to Q5. The RSE would like to seek further clarification on how the proposed bill intends to give legal effect to the economic, social and cultural rights and the role of the courts in doing so. We would like

to understand what kind of duties this will impose on public bodies and how the courts are intended to give effect to these rights, bearing in mind the broader, general principle of dignity.

Q4: What are your views on the proposed model of incorporation?

10. The RSE endorse the direct text treaty approach; that is, the inclusion of the texts of the relevant treaties in a schedule to the proposed Bill. This is manifestly the best route to avoid uncertainty as to the content of the rights. In a comparative study, Chris McCrudden has observed that the use of CEDAW in domestic courts does not appear to have given rise to major difficulties or differences for or between jurisdictions.⁸
11. The Scottish Government should be alerted to potential drafting issues in any editing of the international texts to transpose them into domestic law consistent with the devolution settlement in the Scotland Acts. Editing these texts could easily give rise to complex issues of devolved competency, especially where the UK Parliament has already legislated in the field in question. The instruments are generally couched as obligations on State Parties rather than as individual rights-conferring texts, with enforcement being by way of those parties regularly reporting to the United Nations and an international committee of experts commenting on these reports. Reconciliation between these systems and decisions made in domestic courts will not be straightforward, and whether legislation on the matter is within devolved competence must be uncertain.
12. The RSE welcomes the proposed direct text treaty approach to avoid uncertainty as to the content of rights. However, we again would like to seek clarification on how these rights can be given legal effect and whether the Scottish Government intends these rights to be individually enforceable before the courts and, if so, how.

⁷ For further information, see: <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/correspondence/2023/reconsideration-of-the-unrcr-incorporation-scotland-bill-13-september-2023>.

⁸ McCrudden C (2015) Why Do National Courts Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW, *American Journal of International Law* 109 (534–50).

Q5: Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.

13. The RSE believes there is great difficulty in enshrining socio-economic rights as positive, judicially enforceable obligations placed on the state. It is difficult to make such rights enforceable before the courts. The proposed legislation will impose duties on public bodies and raise very difficult questions about how the courts are intended to give effect to these rights while also bearing in mind the broader, general principle of dignity. We are concerned about whether this chapter of the legislation will provide workable law. It would be unfortunate if the provisions constituted no more than a statement of aspiration.
14. The RSE advises that a core aim for the government should be to produce clear, accessible, and workable laws and also not to set unrealistic expectations, such as the entrenchment of social and economic rights which are not then meaningfully enforceable.

Q6 and Q7: Do you agree or disagree with our proposed basis for defining the environment? If you disagree, please explain why.

15. The RSE believes that the issue of environmental protection, and indeed human rights in general, is, by definition, not exclusively a territorial one. The fundamental purpose of the post-war human rights settlement in Europe was to identify human rights values that transcend national boundaries. The proposal should consider the UK-wide and international dimensions of the proposal and seek to situate the proposal within wider UK developments to ensure a joined-up approach that pursues human rights and environmental protection in a coordinated and cooperative way.
16. The environment and environmental protection are devolved matters. But there are also issues of environmental protection that are UK-wide concerns. The proposed bill should take full account of the UK

Environment Act 2021 and other relevant UK-wide legislation to ensure not only that the bill remains within competence but operates in a compatible way with UK law. The RSE recommends that this part of the proposal be the subject of intergovernmental discussion with UK ministers and ministers from the other devolved administrations to ensure a joined-up UK approach on issues of environment and public health.

17. While it is clear that a right to a healthy environment is one that might appropriately be framed in law, the concepts in this part of the proposal and the proposed rights and duties are very broad. The substantive and procedural aspects of the consultation papers' proposals raise fundamental questions about how these can be legally enforceable. We believe that very careful consideration should be given to framing these in a realistic way, explaining what is legally enforceable and how.

Q12: Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?

18. Recommendation 1(a) is that the rights protected by the Human Rights Act 1998 should be re-stated in the Human Rights Bill for Scotland. Concern is expressed in the Consultation Paper that attempting to re-state the rights protected by the 1998 Act could be seen to have an effect on those rights and place the Bill at risk of challenge on legislative competence grounds. It states that consideration is nevertheless to be given as to how best to recognise rights as indivisible, interrelated and interdependent within current constraints.
19. It was recognised by the Supreme Court in *Reference on the UN Convention on the Rights of the Child* [2021] UKSC 42, para 4, that the decision as to whether to incorporate rights in treaties to which the UK is a signatory is a matter for the Scottish Parliament.⁹ At first sight, therefore, it would seem to be open to the

⁹ The Supreme Court (2021) *Reference by the Attorney General and Advocate General for Scotland: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, 2022 SC (UKSC) 1 [online] available at: <https://www.supremecourt.uk/cases/uksc-2021-0079.html>

Scottish Parliament simply to re-state the Convention rights in the Bill as set out in Schedule 1 to the 1998 Act. The question is whether this might impinge on matters which lie outside the competence of the Scottish Parliament, with the consequences which, as the Consultation Paper makes clear, the Scottish Government would prefer to avoid.

20. In the RSE's view, there is a significant risk that a simple restatement of the Convention rights on their own would have that effect. This is because it could lead to a different interpretation being given to the Convention Rights by the application of the ordinary rules of interpretation than that mandated for its own purposes by section 3 of the Human Rights Act 1998.¹⁰ That would mean that public authorities which are obliged by that Act not to act in a way which is incompatible with a Convention right would be subjected by the Bill to a different regime in Scotland in relation to those rights. That would be likely to be regarded as a modification of the 1998 Act, which, as that is a reserved matter, an Act of the Scottish Parliament cannot do.
21. The problem might have been avoided by a restatement in the Bill of the provisions of the Human Rights Act itself as to how the Convention rights are to be interpreted and applied. But to do that would in itself give rise to a real risk of legal challenge on the ground that extracting some provisions of that Act for restatement in the Bill without restating the whole of it would amount to a modification of that Act (see *Reference on the UN Convention on the Rights of the Child*, para 11).¹¹ And it is, to say that least, open to question whether it would be within the legislative competence of the Scottish Parliament to re-enact the 1998 Act within the Bill in view of the protection given to that Act by its reservation in Schedule 5 of the Scotland Act 1998.¹²
22. Against the background of these constraints, we suggest that the only way that signalling that the Convention rights as set out in the Human Rights Act 1998 form a core pillar of human rights law in Scotland could be achieved without a challenge to legislative competence would be for the Bill simply to contain a declaration to that effect. That could form part of a preamble to the entire Bill, consistent with the wording of its short title. Any attempt to give legislative effect to those rights in the Bill itself should

be avoided, in view of the risks that this would give rise to.

Q13: How can we best embed participation in the framework of the Bill?

23. The RSE does not see how participation in meaningful decisions about the enforcement or supervision of the duties imposed on public authorities by the Human Rights Act 1998 could be achieved without this being seen as a modification of that Act. It is stated in the Consultation Paper that other pieces of legislation have participation requirements. But requirements of that kind, which may be found in legislation by the Scottish Parliament that applies only to Scotland, are not a sound guide as to what can be achieved in the case of legislation which it is not open to the Scottish Parliament to modify.

Q25: What are your views on the right to a healthy environment falling under the same duties as economic, social, and cultural rights?

24. The RSE encourages a clear and balanced outline of substantive and procedural aspects of the right to a healthy environment. The right to a healthy environment is recognised in many countries through various means, including constitutional provisions, dedicated legislation, or by becoming signatories to relevant international agreements. Nevertheless, the scope and utility of this right remain subjects of ongoing debate.
25. The consultation document's separation between substantive aspects—pertaining to global, often transboundary challenges like clean air, water, and a safe climate—and procedural aspects, which focus on local, smaller-scale actions like awareness-raising, is notable. This gap may require further clarification. The document's mention of "suitable policies, planning, and action" may need to be further elaborated (including their intersection/relation to the existing environmental/planning legislation).

¹⁰ Human Rights Act (1998) 'Interpretation of legislation.' [online] Available at: <https://www.legislation.gov.uk/ukpga/1998/42/section/3>

¹¹ The Supreme Court (2021) Reference by the Attorney General and Advocate General for Scotland: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [2021] UKSC 42, 2022 SC (UKSC) 1 [online] available at: <https://www.supremecourt.uk/cases/uksc-2021-0079.html>

¹² Scotland Act (1998) 'Schedule 5: Reserved matters' [online] Available at: <https://www.legislation.gov.uk/ukpga/1998/46/schedule/5>

We suggest that these policies be more clearly defined, especially in the context of addressing broader challenges such as the climate emergency, and within the framework of a new human right that can be enforced in courts.

26. Additionally, we welcome the development of guiding principles to assist stakeholders in interpreting this right. Given its broad scope, we support the proposed alignment of this right with existing duties and procedural aspects related to economic, social, and cultural rights. This would facilitate not only the effective delivery of various aspects of this right (which need to be unambiguously defined) but also its accountability and enforceability in legal settings.

Q27–37 (Part 8): Ensuring Access to Justice for Rights Holders

27. The consultation paper's proposals with regard to access to justice do three things:
- a) They set out a political and social process to increase rights awareness. More than this, they also propose a participatory process to iteratively develop a generalised understanding of the content of the minimum core of various rights (set out in sections 7 and 9 of the consultation paper).
 - b) They identify at a high level the roles of a range of justice institutions that are non-judicial but competent to hear complaints, provide recommendations, engage in advocacy, and provide some process in the first instance.
 - c) They set out a role for courts in ensuring rights are upheld and enforced – with particular regard to some fundamental procedural and substantive issues.
28. Together, this section of the paper implies a rich and complex institutional and sociopolitical scheme. The RSE provides some overarching comments:
- **Accountability:** While the paper emphasises remedies, the RSE working group was concerned that the full remit of rights and obligations should be made clear, as well as matters of enforceability. The accountability of duty-holders, in particular, needs to be explicitly delineated.

- **Systemic interactions:** the system of access to justice should be considered within the context of

the broader set of institutions and sociopolitical processes the report highlights – especially in sections 7 and 9. We would like further clarification on how, for example, will the “participatory process” to define MCOs (section 9) relate to both the advocacy processes and the courts, as set out in section 8. And accountability processes that might emerge from the discussion in section 7.

29. More broadly, the system set out on p36 of the consultation paper, involves a range of different institutions. Clearly, it will be a complex implementation matter to have them pull in the same direction. This complexity will be compounded as feedback emerges different institutions within the proposal. Clarity about how this will be managed – questions of coordination, competence, and cost – could be elaborated in sections 8 and 9.
30. **Cost:** as noted, there may be significant cost implications arising from this section. Given that many of the rights could have significant implications for public bodies and possibly private agencies or organisations, the RSE questions what audit has been done to monitor the potential impact of the proposals. And, if the rights are to be individually enforceable, whether an audit has been done on the potential impact upon the courts, which already face significant resource constraints and backlog. And whether resources will be available to litigants, given the challenges facing the legal aid budget.
31. **Competence:** As reflected elsewhere in these comments, further elaboration would be valuable to understand the extent and limits of the court's competence when it comes to the substance and justiciability of concepts of dignity, economic rights, right to food and the like. This also relates to the question of the relationship between the courts and the process for the elaboration of MCOs.

Q33: What are your views on our proposed approach to ‘standing’ under the Human Rights Bill? Please explain.

32. The RSE questions whether it is necessary for the Bill to say anything about standing to ensure that rights-holders in Scotland have access to justice in relation to the rights that will be incorporated in the Bill. The narrow test, which is set out in section 7 of the Human Rights Act 1998, the “victim test”, has the disadvantages to which the Consultation Paper

refers. However, it would not be within the legislative competence of the Scottish Parliament to attempt to modify that test in relation to the application of the Convention rights in Scotland. In any case, if the advice we have given in answer to Question 12 is accepted, that issue will not need to be faced.

33. As for the other rights, the position in Scots law is sufficiently clear. It is not in need of restatement. In *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, the UK Supreme Court held that the appropriate test for those who seek to vindicate a public right in judicial review was to ask whether the person was “directly affected” by the issue that has been raised.¹³ Added to that is the fact that, as the Consultation Paper points out, the current test for standing for judicial review proceedings in the Court of Session is whether the person has a “sufficient interest” in the subject matter of the application. It is clear that the “victim test” will have no application in the case of these other rights.

Q39: What are your views on our proposals to establish MCOs through a participatory process?

34. The RSE has concerns that the full remit of rights and obligations should be made clear, as well as matters of enforceability. The accountability of duty-holders, in particular, needs to be explicitly delineated.

Q41: What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

35. The practice of requiring bills to be accompanied by statements of compatibility was introduced by section 19 of the Human Rights Act 1998. Another more recent example is to be found in section 20 of the Environment Act 2021, where the Minister must make a statement to the effect that the Bill will not have the effect of reducing the level of protection provided for by existing environmental law or, if that is not the case, that the Government nevertheless wishes the House with the Bill. The RSE notes that, as has long been recognised, these statements have no legal effect. They are made only for the purposes of the scrutiny of the legislation that is before The Scottish Parliament.
36. The question of whether it would be desirable to require *all* Public Bills before the Scottish Parliament to be accompanied by a statement of the kind referred to in the Consultation Paper cannot be sensibly answered without an assessment of the resources that would be needed to put that measure into effect. That is a matter on which the Scottish Parliament, as the Paper is right to point out, will need to be consulted. The more far-reaching the Bill is, the more will be the demands on those resources if the standard of accuracy that is to be expected before the Minister can responsibly make the statement is to be achieved. A more selective approach should perhaps be taken to the Bills that will need to be accompanied by such a statement.

Additional information

Any enquiries about this advice paper should be addressed to Stephanie Webb, Policy Advice Officer (swebb@these.org.uk).

¹³ The Supreme Court (2011) *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 paras 62-64, 170-175 [online] 2012 SC (UKSC) 122; Available at: <https://www.supremecourt.uk/cases/uksc-2011-0108.html>



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