

Equalities, Human Rights and Civil Justice Committee

MCO Inquiry

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1. Introduction

1.1 Minimum Core Obligations (MCO) cannot be understood in isolation from the duty to progressively realise rights under the International Covenant of Economic, Social and Cultural Rights 1966 (ICESCR). This evidence is therefore provided with the caveat that MCO, whilst indispensable to the incorporation of international human rights law, are not sufficient to meet the state's economic, social and cultural (ESC) rights obligations in international law. The duty to progressively realise rights is based on Article 2(1) of ICESCR that instructs states to "achieve progressively" the rights found in the covenant.

1.2 Progressive realisation constitutes a number of integral components including the obligations to take steps to realise rights through concrete strategies; to respect, protect and fulfil rights; to gather and deploy the maximum available resources to realise rights in a way that is effective, efficient, adequate and equitable; to ensure non-discrimination in realisation of the right; **to provide an immediately realisable minimum core of rights**; to refrain from retrogressive steps; to ensure any limitation on the enjoyment of a right can only be justified according to principles of legality, legitimacy and proportionality; and to provide access to an effective remedy if a violation of a right occurs. MCO should be understood within this wider context.

1.3 The minimum core concept emerged following the Limburg Principles (1986) that 'each [ESC] right must... give rise to a minimum entitlement, in the absence of which a State party is in violation of its obligations'.² This led to the development of MCO in the progressive realisation of ESC rights. The UN Committee responsible for observing implementation of ICESCR indicated that where a '*State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education [then the State party] is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être*' (CESCR General Comment 3). The indeterminacy of what constitutes a MCO has not been resolved in the literature. Some argue for a relative standard³ whereas others, more concerned with immediate survival of the most marginalised demand the recognition of an absolute (or universal)

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² Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9 (1987) 352.

³ Katharine Young, '*The minimum core of Economic and Social Rights: A Concept in Search of Content*', (Yale Journal of International Law, 2008)

non-negotiable MCO that enables survival and basic dignity.⁴ Ultimately, both absolute and relative standards can be applicable using a hybrid approach.⁵

1.4 In practice, the UN legal position has been to place the onus on state's themselves to determine what actually constitutes an MCO in any given context dependent on a number of variables such as the right in question, the resources available, the measures taken and the prevailing social, economic, cultural, climatic, ecological and other conditions (CESCR General Comment 12 right to food).⁶ These circumstances should be interpreted alongside UN guidance via General Comments or other sources of international law.

1.5 For example, UN General Comments elaborate on what is required to meet a minimum core threshold in relation to a particular right using various sources, including General Comments as tools of interpretation.⁷ One of the most expansive interpretations is contained in CESCR General Comment 14 (right to health) in which the Committee gives an interpretative list with normative thresholds to define the MCO as follows:

- access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- access to essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- the equitable distribution of all health facilities, goods and services;
- implementation of a national public health strategy and plan of action, *inter alia*.⁸

1.6 This approach seeks to identify obligations of conduct and outcome orientated results⁹ in meeting the MCO of right to health whilst still allowing significant discretion to the state to

⁴ D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (South African Journal on Human Rights, 19 (2003)) 15

⁵ For a discussion on the different disciplinary perspectives on a minimum floor and the use of both absolute and relative standards see K Boyle, 'Constitutionalising a Social Minimum' in Toomas et al (eds) *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Hart 2019)

⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, E/C.12/1999/5 para.7

⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, para.57; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11 para.37; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 12 January 2006, E/C.12/GC/17 para.39; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, para.31; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para.59

⁸ General Comment 14 *ibid* para.43

⁹ A pragmatic approach as alluded to by Paul Hunt as Special Rapporteur, UN Committee on Economic, Social and Cultural Rights, Twenty-Second Session, Summary Record of the 10th Meeting Held at the Palais Wilson, Geneva, UN Doc. E/C.12/2000/SR.10, 4 May 2000, para. 27. (In a previous comment on education the

substantive interpretation and means of provision. In General Comment 19, the Committee stipulates that a minimum right to social security should entail essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.¹⁰ Across these different approaches there is an underlying suggestion that there is indeed a minimum core relative to the state's maximum available resources in addition to an absolute non-derogable minimum that applies despite a state's available resources. The former threshold will adjust on a scale depending on the prevailing circumstances and the latter performs a permanent and absolute baseline from which departure can never be justified.

1.7 In terms of how states can demonstrate achieving the MCO, the means through which to achieve the standards and what they mean in practice in any given context are to a significant degree left to the state's discretion based on an interpretation of the normative elaboration set out in the various General Comments.¹¹ The nature of the obligation to realise the minimum core can therefore be more easily assessed by reviewing whether the state has taken all necessary measures in order to ensure a basic minimum relative to the country's wealth as well as employing an objective normative threshold as to an immediately enforceable absolute minimum core.

1.8 It may be helpful to note that the concept of the minimum core obligation is derived from international human rights law, however, countries all over the world have developed and applied the concept of a social minimum in different constitutional settings (without necessarily explicitly referencing the MCO) such as Germany (*'existenz minimum'*)¹², Belgium (*'minimex'*),¹³ Switzerland (*'conditions minimales d'existence'*),¹⁴ and Brazil (*'minimo existencial'*)¹⁵. Dignity plays an important interpretative role in how the social minimum is applied in these different constitutional settings. Indeed, the Scottish courts are already equipped to interpret and apply the concept of human dignity (and its

committee had struggled with how to incorporate core content, eventually taking 'the pragmatic approach of defining not the core content but the core obligations incumbent upon States parties', an approach it had decided to adopt in the general comment on health)

¹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19 para.59(a)

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 'each State party must decide for itself which means are the most appropriate under the circumstances' para.4

¹²The German Basic Law guarantees an "Existenzminimum" which means the right to a minimum subsistence level. It is similar to the minimum core provision derived from ICESCR. See BVerfGE 125, 175 (Hartz IV), the court held that the "right to the enjoyment of a minimum subsistence level" is not simply another facet of the right to human dignity, but a stand-alone right of autonomous value, at par.133. See also Trilsch, Mirjal, 'Constitutional protection of social rights through the backdoor: What does the « Social state » principle, the right to human dignity and the right to equality have to offer?', <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-trilsch.pdf>. See also BVerfGE 132 where in 2012 the court went beyond the procedural protection in the previous case and recognised a substantive element to an adequate level of subsistence for asylum seekers relying on Article 9 ICESCR.

¹³ See *Trojani* Case C-456/02 (an EU case guaranteeing access to minimum social assistance under the free movement of workers).

¹⁴ Similarly, the Swiss Federal Court has found that an implied constitutional right to a 'minimum level of subsistence (*'conditions minimales d'existence'*), both for Swiss nationals and foreigners, could be enforced by the Swiss Courts. See Swiss Federal Court, *V. v. Einwohnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121I 367, October 27, 1995.

¹⁵ See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*), RE 436996/SP (opinion written by Judge Celso de Mello), October 26, 2005. The court found that the inefficiency of public managed funds in implementation the constitutional minimum to provide for the needy cannot and should not impede execution of the obligation. This case dealt specifically with the right to education.

potential violation) under the European Convention of Human Rights and the European Charter of Fundamental Rights.¹⁶

2. Establishing MCO

Committee Questions:

- **How the participatory process should be approached and its benefits, what is realistically achievable, and any potential challenges with the process (e.g. areas of contention around certain rights such as health, housing).**
- **How a set of obligations for secondary legislation could be put forward where there is no consensus on MCO.**
- **Examples of good practice.**

2.1 Participation is an ethos embedded in the international human rights framework and a prerequisite of the fulfilment of civil, political, economic, social and cultural rights. Best practice suggests that participation requires to be genuinely free, inclusive, meaningful and equal. It requires to take account of intersectional barriers and must reach beyond consultation to citizen-led participation. This substantive form of participation, where decisions and processes are genuinely inclusive, provides an important foundation for autonomy and dignity for those engaged in the process. Examples of different forms of participation in relation to economic, social and cultural rights are employed across different jurisdictions and settings, often in the context of trying to address an outstanding violation.¹⁷ Using a participative model to help develop the core content of rights, including the minimum core, is novel in the sense that it embeds the expertise of lived experience in giving meaning and content to the rights from the outset. Scotland has the opportunity to lead in building a genuinely inclusive participatory process enabling both empowerment and ownership in the process. Lessons can also be learned from other countries that have undergone participatory models of constitutional change including British Columbia, the Netherlands, Iceland, Ireland and most recently the Chilean Constitutional Convention process. Likewise lessons from countries employing participation-led remedies will be useful, such as the structural remedies used in South Africa, Colombia, Kenya and India.

2.2 All human rights are interpreted in different contexts and settings every day in circumstances where consensus may be missing. Consensus building is an important part of a participatory framework, indeed consensus building can be an output of a successful participatory process. Nonetheless, the human rights framework accounts for different interpretations of rights. For example, when rights are qualified or derogable in nature (i.e. interference can be justified in certain circumstances or in the balancing of different rights), the human rights framework uses tests of reasonableness and proportionality to help develop an interpretation of the content of the right or whether an interference is justified in the particular circumstances. For absolute unqualified rights (non-derogable rights) a supervisory body, such as a court or another state-appointed

¹⁶ In the context of art 3 and freedom from degrading and inhumane treatment, see *Napier, Re Petition for Judicial Review* [2004] Scot CS 100 (26 April 2004); in relation to art 4 ECHR and art 1, EU Charter of Fundamental Rights, see *Opinion of Lord Armstrong in the Petition JB (AP) for Judicial Review of a Decision of the Secretary of State* [2014] ScotCS CSOH_126 (14 August 2014); in relation to the precedent set down by *Limbuela, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 66 (3 November 2005), see *Nyamayaro, (First) Natasha Tariro Nyamayaro and (Second) Olayinka Oluremi Ok against the Advocate General and the Commission for Equality and Human Rights* [2019] ScotCS CSIH_29 (07 May 2019).

¹⁷ Katharine Young, *Constituting Economic and Social Rights* (CUP 2012)

body, can perform an important role in clarifying the meaning and content of the right. Indeed, the multi-institutional approach proposed as part of the National Taskforce and First Minister Advisory Group recommendations enables a participative and deliberative approach to interpreting and giving meaning to rights by facilitating dialogue between institutions.

3. Minimum Core in Practice

Committee Questions:

- **What might MCO be, and how would they work in practice? Are all rights to be treated equally?**
- **General Comments made by the Committee on ICESCR, what the rationale would be for making these binding in Scots Law, and what the introduction of these rights would mean practically for local authorities.**
- **Views on the potential risk that setting the level of MCO too low may limit their impact. Also, that setting the level too high may limit authorities' ability to meet MCO.**
- **Are MCO relative or universal? Might it be necessary for MCO to be somewhat flexible to allow for both relative and universal obligations?**
- **The degree to which MCO apply to other treaties (e.g. CEDAW, CRPD, CERD).**

3.1 International civil, political, economic, social and cultural rights are interdependent and indivisible. The fulfilment of each right is dependent of the enjoyment of all others. For example, in 2018, the Human Rights Committee explained that the right to life (a civil and political right) requires measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation (engaging the minimum core of ESC rights). The human rights framework can be understood as decision-making framework that at times requires balancing between different rights in different settings. Some rights are non-derogable (absolute), meaning that interference with the right cannot be justified (for example freedom from torture is non-derogable) and some rights are derogable – they can be qualified in certain circumstances. The minimum core obligation can be considered a non-derogable component of a particular right – i.e. a level below which no-one should fall.

3.2 General Comments are an indispensable tool required for the interpretation of rights. In other words, the international human rights framework cannot be fully understood or applied correctly without reference to the supporting material that elaborates on what the rights mean in practice. The treaties provide a skeletal framework and General Comments provide further elaboration on how this framework should be understood with definitions of the minimum core (often leaving discretion to the state to fully interpret what this means in practice).

3.3 Problems over setting the minimum core too high or too low can be resolved by reflecting on different types of remedies depending on the level of minimum core engaged. This issue also relates to exercising flexibility in relying on both absolute and relative standards for a MCO. For example, an absolute universal level would relate to basic survival and dignity. When this is breached, the remedy would be a strong one in which the court or adjudication body offers a resolution that immediately restores the applicant's dignity. At the same time, the court or adjudication body could look at the process and policies relating to a relative standard using appropriate data that relates to the prevailing circumstances and the right in question – ensuring for example that the

decision maker has enough data to ensure a relative standard, including aggregated and intersectional data that provides a clearer picture for diverse groups as well as ensuring policies and processes are reasonable and that the decision making has been fair.

3.4 A helpful example of both absolute and relative standards is available in the *Hartz IV* case where the German Constitutional Court scrutinised whether the legislature followed the appropriate procedure to set the level of unemployment and welfare assistance and declared the outcome of that process unlawful for failing to meet the social minimum required for a dignified life.¹⁸ It was found that the legislature had erred in the method adopted to calculate the social minimum and so failure to comply with a legitimate process had rendered the outcome unlawful. The law-makers were directed to reassess using correct empirical data.¹⁹ However, the German Constitutional Court went further and declared that the substantive outcome of the flawed process failed to meet a minimum threshold to ensure a right to dignity. The court's approach therefore took on both procedural and substantive components engaging with both absolute and relative thresholds. The absolute threshold was measured against the concept of dignity and the relative threshold was measured with reference to the process of calculating a minimum relative to a number of variables, including using correct country specific empirical data.

3.5 Minimum core obligations apply across all treaties. Different treaty bodies have referenced the MCO as part of their work. For example in 2022 the Committee on the Rights of Persons with Disabilities emphasised that there is an immediate, minimum core obligation to ensure the satisfaction of the minimum essential levels of the rights of persons with disabilities to work and employment.²⁰ Likewise, the Committee on the Rights of the Child has a number of times referenced the minimum core and reiterated that the MCO of children's rights should be protected, even in times of economic crises.²¹

3.6 A key issue to be aware of in relation to MCO is that a state may appear to be meeting, even surpassing, an MCO and fulfilling progressive realisation in relation to that right, however, disaggregated data reveals that certain groups or individuals have fallen through the safety net. A key response to this issue is that collecting, measuring, monitoring and analysing disaggregated data is a critical component of ensuring the MCO is being met substantively on the ground on an equal basis.

4. Non-legal and legal remedies

Committee Questions:

- **How should non-legal remedies operate in a new system? How will groups/individuals be able to challenge breaches of their economic, social and cultural rights and potential issues around access to justice.**
- **Assisting public bodies to understand the scope of new rights and to implement them in practice.**

¹⁸ *Hartz IV* case – 'existenzminimum' BverfG, 1 BvL 1/09 vom 9.2.2010, Abstaz-Nr. (1-220): www.bverfg.de/entscheidungen/ls20100209_1bv100109.html. For further discussion of the case see A Nolan and M Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?', [2010] 3 *European Human Rights Law Review*, 280-289; 286.

¹⁹ *ibid.*

²⁰ UN Committee on Rights of Persons with Disabilities, General comment No.8 (2022) on the right of persons with disabilities to work and employment, 9 September 2022, CRPD/C/GC/8 para.63

²¹ UN Committee on the Rights of the Child (CRC), General Comment 19 (2016) on public budgeting for the realization of children's rights (art. 4), 20 July 2016, CRC/C/GC/19 para.31

- **Legal impact on rights holders. Could they take the Scottish Government/public bodies to court if a minimum core obligation is not met? How this could work (existing judicial procedures/a more general right of challenge?).**
- **How might difficulties in defining the scope of minimum core obligations impact the ability of courts to judge such cases?**
- **Who should be responsible for addressing systemic breaches of ESC rights? Should legal or non-legal remedies be used?**

4.1 The international human rights framework defines access to justice as constituting accessible, affordable, timely and effective processes that have the realistic prospect of reaching an effective remedial outcome. In short, access to justice can be understood as access to effective remedies. Effective remedies can include many different outcomes²², including apologies, restitution (restoring enjoyment of the right/ the applicant's dignity) and ensuring that the violation does not happen to anyone else. Economic, social and cultural rights require a step-change in how our justice system operates. For example, violations of ESC rights are often clustered and systemic in nature. This requires remedial responses that offer collective justice – addressing justice for many, rather than a system that over-relies on an individual case – placing an unfair burden on an applicant. There are countless examples of ESC rights adjudication that adopts collective and structural remedies to address systemic violations. For example, during Covid the South African Constitutional Court issued a structural remedy to ensure that the provision of free school meals continued after the state temporarily suspended their provision with the closure of schools. The court found this was a breach of the rights to food, nutrition and education and issued a structural order that reinstated the programme and required regular reports to demonstrate that the programme was being implemented.²³ In Colombia, the Constitutional Court ordered a wide-reaching structural order that required various different state bodies to work together to help realise the 'minimo-vital' of internally displaced people, including establishing the rights to food, education, health, land and housing recognising both the clustered and systemic nature of the violation.²⁴

4.2 In order to make this work in practice the following, inter alia, would be required:

- **A wide definition of sufficient interest (standing in legal cases) that enables both public interest litigation and collective class actions (in relation to the latter, the Scottish multi-group proceedings framework could be adapted to ensure its efficacy in the case of ESC rights in addition to disputes between private parties).**
- **Legal aid that supports public interest and collective ESC cases.**
- **Co-located access to advice for people experience (clustered) ESC violations i.e. access to advice sector in schools, doctor surgeries, libraries, food banks etc.**

²² For discussions on what constitutes an effective remedy see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

²³ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306

²⁴ Case T025-04 – for a discussion on the operation of structural orders in different settings see Katie Boyle, Academic Advisory Panel Briefing Paper, Access to Remedy – Systemic Issues and Structural Orders, November 2022, available at <https://dspace.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf>

- **The violation of an ESC right as a grounds for challenge (this could operate across all tiers of adjudication similar to the operation of a ‘devolution issue’ with the ability of lower courts to refer the issue up to the Inner House).**
- **A broader reasonable test to interrogate rights compliance (*Wednesbury* reasonableness is too restrictive). Proportionality-inflected reasonableness is the test deployed by the UN Committee on Economic, Social and Cultural Rights.**
- **The court to engage with structural remedies depending on the circumstances. The remedies available to the Scottish judiciary already enable wide-reaching responses to violations of human rights.²⁵ In this sense, the existing remedies could be combined as an aggregate of remedies in some cases in order to deploy a structural interdict. The courts could also use supervisory orders to ensure implementation of judgments, similar to structural orders in other constitutional settings. In other words, the existing system is well placed for development in this area.**
- **An education programme for adjudicators (both judicial and non-judicial) to help support decision making in relation to MCO compliance and the broader ESC rights framework.**
- **A legal curriculum in Law Schools that includes ESC rights and areas of social welfare law.**

4.3 Judicial routes to remedy are considered a pre-requisite for the domestic protection of ESCER.²⁶ The availability of a judicial remedy for a violation of ESCER remains an indispensable requirement of international human rights law, particularly if other mechanisms fall short. The UN Committee on Economic, Social and Cultural Rights explains “whenever a right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”²⁷ Judicial remedies may be better understood as a means of last resort, however, they are indispensable to the access to justice framework.

4.4 Non-judicial routes to remedy may include administrative law mechanisms that are designed to hear complaints without the need for legal representation or a court. It may be possible that the right to an effective remedy is achieved without the need to resort to court,²⁸ so long as those administrative mechanisms uphold international human rights norms and a judicial remedy remains available as a last resort. For example, the role and remit of ombuds, tribunals, regulators and inspectorates, as well as internal complaints mechanisms and alternative dispute resolution should be adapted to include ESC rights compliance. This must include interrogating ESC rights as rigorously as civil and political rights and the ability to offer an effective resolution to a case.²⁹

4.5 Non-judicial mechanisms can create an extremely complex justice framework. If the remit and procedure of the non-judicial mechanism can be adapted to provide accessible, affordable, timely and effective remedies, including appropriate reparations

²⁵ Remedies available to the judiciary include reduction, declarator, suspension and interdict, specific performance or specific implement, liberation, interim orders, damages.

²⁶ For a comprehensive discussion on issues of justiciability and enforcement of economic, social and cultural rights see Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (SHRC 2018) available at

https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf

²⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 para.9

²⁸ General Comment No 9 *ibid*, para.9; UN Basic Principles n26 para.12

²⁹ The Maastricht Guidelines suggest such bodies must interrogate ESCER as rigorously as civil and political rights, International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, para.25

for ESCER, a judicial remedy may not be necessary. If it is not possible to adapt the remit and procedure of a non-judicial mechanism to comply with international human rights law then it may further delay and exacerbate the access to justice journey inevitably becoming another barrier to justice. All routes to remedy should be evaluated in this context.

4.6 The multi-institutional framework recommended by the National Taskforce requires that all avenues to justice be irrigated to enable access to effective remedies for violations of ESC rights. This means the parliament should be proactive in enabling remedies, the government should play a role in streamlining access to justice, all of the administrative decision making bodies, including complaints mechanisms, regulators, ombudsmen and tribunals should be recalibrated to enable access to effective remedies for ESC rights and ultimately the court should be available as a means of last resort.

5. Competence

- **How might the equality clause proposed for the Scottish Government's Human Rights Bill be implemented in line with devolved competencies?**

5.1 Equal opportunities is a reserved matter (L2, Schedule 5 Scotland Act 1998) with the exception of encouraging and implementing equal opportunities. This could include adding a new ground for protected status, such as socio-economic status. The Equality Act is also a protected enactment (Schedule 4, para.2(2)(a) SA), meaning it is unlawful to modify this Act. The Supreme Court defined modification as follows:

“Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.”³⁰

5.2 One of the tests the UK Supreme Court applied to establish modification is to ask whether a protected enactment would require to be read differently as a consequence of an ASP so that it would read “subject to...” the operation of the ASP.³¹

5.3 International human rights law requires a move beyond a formal equality approach to intersectional and substantive equality. This ethos is evident across all the human rights treaties. Intersectional discrimination has been the subject of case law in jurisdictions where ESC rights are constitutionalised.³² For example, in South Africa, the Constitutional Court reflected on the importance of addressing intersectional discrimination as follows:

“This brings to the fore the need to consider patterns of group disadvantage and discrimination along intersectional lines. Multiple axes of discrimination

³⁰ *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) (rev 2)* [2018] UKSC 64 (13 December 2018) para.51

³¹ Above para.52

³² See for example the seminal intersectional discrimination case in South Africa that acknowledged the decades of harm suffered by black women during and following apartheid issuing a structural remedy in this particular case involving domestic workers exclusion from compensation from harm at work *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24

*are relevant to the case of domestic workers. Domestic workers experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes.[92] The application of an intersectional approach helps us to understand the structural and dynamic consequences of the interaction between these multiple forms of discrimination.*³³

5.4 The questions before the Committee on competence are therefore:

- Should the equal opportunities reservation be read as a ceiling or a floor? I.e. is it possible to go beyond formal equality measures and introduce substantive equality measures using the reservation as a baseline below which protections should not fall?
- Would adding substantive equality measures to the equal opportunities framework modify the operation of the Equality Act 2010? In other words, would the new provision require the Equality Act to be read as “subject to the operation of the ASP....”?

5.5 If possible to frame an obligation that enhances equality provisions and does not modify the operation of the Equality Act then any issues around competency would be resolved by the power (or competence) to ‘implement and observe international obligations’ (Schedule 5, para.7(2)(a) SA). If not possible to frame an obligation without modifying the operation of the protected enactment then a section 30 Order could be sought to devolve competence to implement the state’s international obligation to observe substantive equality under the treaty framework.

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³³ Ibid, para.90