

Academic Advisory Panel to the National Taskforce for Human Rights Leadership  
The Meaning and Content of Duties to be Considered for Inclusion in the Bill

## **The Meaning and Content of Duties to be Considered for Inclusion in the Bill**

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### **Explanatory Note**

This briefing paper is one of a series written by the Academic Advisory Panel to the National Taskforce for Human Rights Leadership, which was established in 2019 in response to the recommendations made in December 2018 by the First Minister's Advisory Group on Human Rights. The aim of the briefing papers is to consider some of the legal complexities involved in translating international human rights treaties into domestic legislation.

For further information, please go to: <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>

### **1. Executive Summary:**

- This briefing paper explains the different types of duties envisaged as part of the new human rights framework (Recommendation 1) proposed by the First Ministers Advisory Group on Human Rights Leadership (FMAG) and endorsed in the terms of reference of the National Task Force (para.7c-d and para.11).
- Duties can be the link between legislation on paper and transformative change in the real world. It is important to reflect how duties are defined in the Bill as some duties are more transformative in nature than others.
- The duty to have due regard and the duty to comply are examples of duties found in other domestic legislation in the UK. The paper draws on these domestic examples including the public sector equality duty and duties in the Scotland Act 1998 and the Human Rights Act 1998. The duty to have due regard can help to implement and integrate human rights but does not amount to incorporation and only carries very limited procedural protection for the rights holder.
- The duty to comply is a stronger duty and offers a more outcome-orientated right to the right holder. It facilitates incorporation of international rights into the domestic framework by enabling access to a remedy for the violation of a right. However, its reach is dependent on what rights and obligations are contained more broadly in the Bill or in subsequent legislation and who the duty bearers are. For example, should it extend to the legislature, executive, public and private bodies and the court? The paper concludes that it is better to expand the reach of the duty in so far as possible

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and discussion includes whether it is within the competence of the Scottish Parliament to bind itself.

- Progressive Realisation embodies the UK's international obligation to give effect to the International Covenant on Economic, Social and Cultural Rights. It is constituted of multiple sub-duties including the duty to take steps to PR; the duty to respect, protect and fulfil economic, social and cultural (ESC) rights; the duty to ensure non-discrimination in the enjoyment of rights; the duty to generate and allocate the maximum available resources; the duty to ensure non-regression on rights and the duty to provide an effective remedy for a violation. Each of these duties is discussed in turn in relation to both their international content and how they could be deployed domestically under the Bill.
- Access to justice and remedies for violations of the duties set out in the Bill remains an area worthy of further attention. This is particularly important when engaging with economic, social, cultural and environmental (ESCE) rights where court adjudication will require to adapt to collective litigation that can address systemic issues through the deployment of structural remedies. It is beyond the remit of the paper to discuss this here but I have signposted where relevant.

### 2. Introduction and Background:

The guidance in this briefing paper relates to the different types of duties under consideration by the National Task Force (NTF) in relation to the proposed human rights Bill. Consideration of duties, obligations, rights and remedies strike directly at the heart of how the legalisation of rights can lead to transformative change to improve people's daily lives. It is about the journey from legalisation to operation to remedy (i.e. structure, process, outcome). It engages directly with the terms of reference (ToR) in examining what **"contribution Scotland can make in demonstrating human rights leadership [to ensure that] human rights commitments and obligations directly shape and improve the everyday lived experiences of all members of Scottish society"** (para.7.d NTF ToR).

The paper also engages directly with the relationship between duty-bearer and rights-holder in terms of **"how duty-bearers can ensure that they are fully compliant with their human rights obligations and are taking concerted positive action to respect, protect and fulfil human rights"** (para.7.c NTF ToR).

The recommendations presented in December 2018 by the First Minister's Advisory Group on Human Rights Leadership and the ToR of the NTF are guided by the principles of **non-regression; keeping pace; and exhibiting leadership** in the protection and promotion of all human rights. This briefing paper is orientated towards the third principle around global leadership and draws on international best practice to inform the approach Scotland can take. The duties are examined in relation to the **"the relationship between rights-holders and duty-bearers"** and **"wider structural changes... between the courts, the legislature and the executive"** (para.11 NTF ToR).

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### 2.1 Duties and transformative change

Reflection on duties and how they convert into transformative change (or not) are critical to a full understanding on what the Bill can/ cannot or what it should/ should not seek to do. The Briefing paper therefore clarifies and explains the content and meaning of the duties under consideration as well as the reach and transformative nature of the duties for rights holders. A key component of this is understanding that different duties provide different results for rights holders – some offer more robust protection and remedies than others.

Each of the relevant duties are dealt with separately in order to explain their meaning and content as well as how they engage with both domestic and internationally understood concepts. Duties directly relate to what kind of actions must be taken by a duty bearer (also referred to as the decision maker) when exercising their authority under the proposed framework. It is important to set out what the decision maker's obligation is under each separate duty as well as what the remedy would be if the decision maker fails to comply with said duty. The National Task Force have requested explanations of the following:

- **the duty to have due regard**
- **the duty to comply**
- **the duty to progressively realise (PR) economic, social and cultural rights**
- **the duty to use maximum available resources (MAR)**
- **the duty to meet the minimum core obligation (MCO)**

In addition the paper also covers the following related duties that arise under the progressive realisation (PR) duty as understood in international law:

- **The duty to 'take steps'**
- **The duty to respect, protect, fulfil rights**
- **Non-discrimination duty**
- **Limitations and non-regression**
- **Duty to provide an effective remedy**

### 3. Legal framework:

#### 3.1 Domestic obligations

##### 3.1.1 The duty to have due regard

The FMAG recommendations propose that there "must be an initial duty to "pay due regard" to the rights provided for under the Act. This duty will apply to all public bodies, including the Scottish Government. A schedule within the Act will outline the duty's requirements."<sup>1</sup>

Due regard is what is known as a procedural duty which confers the right to a process. When decision makers are asked to comply with the duty to have due regard it means that they must take into consideration, or take into account, a particular matter as part of the decision making process. It provides the right holder with a right that a particular process will occur:

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<sup>1</sup> FMAG Recommendations p.33

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i.e. that the decision maker has regard to the rights in question as part of the decision making process. Domestic examples of the due regard duty include section 149 of the Equality Act and section 1 of the Children and Young Persons (Wales) Measure 2011 implementing UNCRC as a relevant factor in decision making. If the decision maker has had due regard as part of the decision making process then the duty will be dispensed with, even if this results in no substantive change to the outcome in favour of the rights holder. The duty is concerned with the lawfulness of the process and not the lawfulness or the adequacy of the outcome.

The content of the due regard duty has been developed in domestic case law.<sup>2</sup> For example, public sector equality duty in the UK requires that a decision maker has due regard to promote equality of opportunity between different disadvantaged groups (section 149 Equality Act 2010). This is not a duty to achieve the outcome of equality of opportunity, but rather, a duty to have due regard to the need to achieve this outcome. The court has defined the domestic content of the duty as follows:

“The duty is not a duty to achieve a result, namely to eliminate unlawful ...discrimination or to promote equality of opportunity and good relations between persons of different ... groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. [...] What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged [group] that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.”

The judiciary has quashed economic decisions where equality impact assessments have not been carried out correctly under the public sector equality duty, i.e. where due regard has not been exercised.<sup>3</sup> This is a procedural safeguard to take into consideration the impact of measures on protected groups as opposed to imposing a duty to secure substantive equality.

It is a right to a process, not a right to an outcome. Criticism of the weakness of this approach has been noted by the Equality and Human Rights Commission who concluded that there was limited evidence of positive change through the implementation of the public sector equality duty. One of the reasons provided was because there is a tendency to focus on outputs rather than outcomes.<sup>4</sup>

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<sup>2</sup> *R (Baker) -v- Secretary of State for Communities & Local Government and the London Borough of Bromley* [2008] EWCA Civ 141 as the case in which the original elaboration of the duty was explained.

<sup>3</sup> For example see the case of *Harjula v London Borough Council* [2011] EWHC 151 (QB) in which the judge quashed the decision of the council for failing to consider its obligations under s71 Race Relations Act 1976, section 76A Sex Discrimination Act 1976 and section 49A Disability Discrimination Act 1995 (these provisions have been replaced by section 149 of the Equality Act 2010). See also the 2011 case against Birmingham Council for failing to have due regard to equality duties by failing to consult. Held: the budgetary re-allocation of funds was declared unlawful, *on the Application of W,M,G & H v Birmingham City Council*, [2011] EWHC 1147 Admin

<sup>4</sup> <https://www.equalityhumanrights.com/en/publication-download/effectiveness-psed-specific-duties-scotland>

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It is important to note that while the duty to have due regard might be helpful as a means of implementing, or integrating, ESC rights into decision making processes this duty does not incorporate the rights into domestic law because there is no remedy for a failure to comply with the rights framework. The duty would not be transformative in nature and if implemented alone would fall short in terms of the principles of keeping pace and global leadership.

### **3.2 The duty to comply**

The FMAG Recommendations indicate that there must be a “duty to comply” with the rights in the Bill after a specified period. This would operate as a “sunrise clause” within the Act which would trigger the duty at a later date. The duty to comply can be understood as a duty to not act incompatibly with the rights set out in the Bill. The duty to comply can be compared to the domestic approach to ECHR incorporation through the Scotland Act 1998 and the Human Rights Act 1998. Section 6(1) of the Human Rights Act or section 29(2)(d) of the Scotland Act both compel duty-bearers to not act incompatibly with ECHR rights. This type of duty is one that incorporates the rights into the domestic framework by ensuring that there is a remedy in place for a breach. It is a much stronger duty than due regard and places a more intensive duty on the decision maker to act in a human rights compatible way.

The key difference between the duty to have due regard and the duty to comply is that the latter can amount to incorporation because it requires compliance with the rights framework as well as offering a remedy for a violation. One of the key issues that remains outstanding is what kind of remedy/ remedies the Bill might provide if a violation of the duty to comply occurs. This will be dependent on what rights are provided for in the Bill and how the rights are articulated either in the Bill or in subsequent legislation (providing for further normative elaboration of the rights).

The Task Force may also wish to reflect on who the duty bearers will be under the proposed framework. The FMAG recommendations envisioned that the duty to comply would create a framework where incorporation of international rights would be embedded into domestic law and would apply across the parliament, the executive and the judiciary (a multi-institutional approach to incorporation). This would require pre-legislative scrutiny of proposed legislation in order to build compliance into the legislative process (learning from other jurisdictions such as the Finish Constitutional Law Committee as well as adopting and building on the proposals of the Equality and Human Rights Committee of the Scottish Parliament<sup>5</sup>); that regulatory and inspectorate bodies would play a key role in monitoring whether public and private bodies were complying with the rights framework (ensuring operationalisation and accountability closer to the decision maker without the need to seek recourse in the court); and ultimately that the court would offer a route to remedy if other mechanisms fail (how the court can act as a means of last resort and what kind of changes are required to accommodate adjudication of and remedies for of economic, social, cultural and environmental (ESCE) rights). One of the key issues remaining is whether or not it is within the devolved competence of the Scottish Parliament to impose a duty to comply with the Rights in the Bill on itself (discussed further below).

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<sup>5</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106453.aspx>

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### 3.2.2 Signposting other issues for consideration under the duty to comply:

- Who is bound by the duty? Will it be the Scottish Parliament, the courts, the Scottish Government, public authorities and private bodies? What about cross-border bodies exercising reserved and devolved functions? One of the challenges will be to reflect on how the duty can be operationalised within the Bill for each of the duty bearers, and key to this, what remedies will be offered to a rights holder if any of these different duty bearers fail to comply with the rights under the Act? The more expansive the duty to comply the more transformative in nature it will be.
- What guidance will be offered to duty bearers? Duty bearers will require guidance and support in how to ensure their decision making meets the requirements of the duty to comply, or in other words, the duty to not act incompatibly. One of the challenges in relation to this will include balancing obligations under different rights regimes. For example, balancing compliance with a right under the ECHR framework which may appear incompatible or at odds with an ESCE right under the proposed Bill. How will decision makers navigate these different rights regimes and across reserved and devolved functions? The indivisibility principle allows for a balancing of rights and using tests such as proportionality to achieve legitimate aims. The more expansive reasonableness test discussed below will help decision makers strike the right balance between competing rights.
- The NTF may wish to reflect on how this duty might operate in relation to both public and private bodies. Will private bodies performing public functions be bound by the duty to comply (c.f. section 6(3) of the HRA)? Will private bodies performing private functions be regulated under the framework? This engages with the horizontal reach of the new framework. International best practice suggests that the private sector should be regulated with a view to ensuring compliance with human rights.<sup>6</sup> It may be a challenge to regulate the privatisation of public functions. How will the new duty to comply regulate both public and private bodies?
- The duty to comply can operate as both a right that gives rise to an immediate outcome as well as a right to a policy to achieve an outcome. For example, the Housing (Scotland) Act 2003 and Housing (Scotland) Act 1987 impose a duty to secure accommodation for homeless persons – this is a duty that gives rise to an immediate outcome. Similarly the Social Work (Scotland) Act 1968 imposes a duty to provide care following an assessment of needs. This is also an example of an immediately enforceable outcome. This can be contrasted with duties that require policies to be in place to achieve an outcome, such as those discussed below under Progressive Realisation. In South Africa, for example, the right to adequate housing was interpreted as a right to have a reasonable policy to achieve adequate housing. I.e. The duty is about reasonable steps to achieve an outcome rather than an immediately enforceable right. The former of these approaches means that remedies can be more outcome orientated. The latter of these approaches means that remedies will focus

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<sup>6</sup> UN Guiding Principles on Business and Human Rights (2011)

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on reasonableness and proportionality review and policy orientated remedies. International best practice suggests that duties should range from weak to strong obligations and weak to strong review of compliance to allow for a sensible and balanced approach to incorporation of rights. Strike down powers can be reserved for the most serious of violations (such as violation of minimum core/ dignity discussed below).<sup>7</sup>

- And this leads to questions over what remedies will be available to rights holders and what guidance will be provided to the judiciary on what constitutes an effective remedy if the duty to comply with rights in the Act is not met? How will access to justice be managed for systemic issues? If there are issues arising at tribunal level then how could these cases be grouped together as a collective complaint? Again, lessons can be learned from other jurisdictions as to how best manage social rights adjudication. There is much more scope for this to be explored in the context of access to justice and appropriate remedies in response to different types of obligations. There is a consultation underway in Scotland on how group-proceedings might operate under a renewed collective litigation framework led by the Scottish Civil Justice Council. The FMAG recommendations included consideration of structural remedies drawing on comparative and international experience (Colombia, South Africa, Argentina, Germany, Canada etc). It might be helpful for the National Task Force to engage with the Scottish Civic Justice Council over potential changes to how the justice system operates (particularly in relation to reform of the 'sist and test' approach of group proceedings and the need to facilitate collective litigation under the Bill).
- Finally, while the above questions raise potential challenges, these challenges are not insurmountable – they are intended to offer guidance on some of the outstanding issues to be addressed.

### 3.3 International obligations

#### 3.3.1 Progressive realisation (PR)

The duty to progressively realise, or to progressively achieve, economic, social and cultural (ESC) rights is derived from international law. The UK has signed up to a number of international treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2(1) of ICESCR states that

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to **achieving progressively** the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (emphasis added)

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<sup>7</sup> Boyle (2020)

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The progressive realisation (PR) obligation entails that states must take steps to the maximum available resources to achieve ESC rights without delay. The nature of state party obligations has been further elaborated in documents supplementary to the treaty, in particular General Comment 3 (1990) on the nature of states parties' obligations and the Limburg Principles (1986). PR can be understood as constituting a multitude of interlinked duties:

### 3.3.2 Duty to 'take steps'

First and foremost, Article 2(1) requires states to 'take steps' towards the full realisation of ESC rights. Whilst progressive realisation implies by its definition that there is a journey towards full realisation over time there are also immediate obligations that are neither progressive nor subject to available resources – they are immediate and absolute. Taking steps can be understood as a duty to design strategies and programmes to achieve the full realisation of ESC rights.<sup>8</sup> Steps taken must be deliberate, concrete and targeted.<sup>9</sup> This is a process based duty. In other words, the obligation gives rise to the right to a process and the development of a policy to achieve an outcome. Whilst the immediate realisation of a particular right might not always be possible, a component of the duty to progressive realisation is that there is a plan in place to achieve fulfilment (a process/policy duty to achieve an outcome). A violation of this right might amount to a failure to reasonably plan, strategise and implement policies/ programmes to achieve a right. A remedy might amount to an order that compels the duty bearer to design a plan/ strategy that could be viewed as reasonable. Courts that review whether or not the duty has been met would require to deploy a more expansive test than the UK '*Wednesbury* reasonableness test'.<sup>10</sup> International law requires reasonableness to go further than irrationality. The UN Committee on ESC Rights has for example developed reasonableness as a test that takes into consideration the following factors:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.
- Whether the State party adopts the option that least restricts Covenant rights.
- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.

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<sup>8</sup> General Comment No.3 para.2

<sup>9</sup> *ibid*

<sup>10</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. The bar for reasonableness in the UK context is much weaker than the international test. Under *Wednesbury* reasonableness a duty must be "so outrageous and in defiance of logic...that no sensible person who had applied his mind to the question ... could have arrived at it".



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- Whether policies have prioritised grave situations or situations of risk.
- Whether decision-making is transparent and participatory.<sup>11</sup>

### 3.3.3 Duty to respect, protect, fulfil

The steps that states must take are often categorised along a 'sliding slope' of realisation where there are what can be understood as 'waves of duties' where the general trend is upwards on an ever progressive scale.<sup>12</sup> States must **respect, protect and fulfil** rights.<sup>13</sup> This means states should take concrete steps progressively improve the ESC rights to the maximum of their available resources (i.e. the amount of revenue the state generates).

- **The duty to respect:**

The State must take steps to refrain from acting in a way that would undermine the right – i.e. take any action that results in reducing the right;

- **The duty to protect:**

the State must also take action to prevent others from interfering with enjoyment of the right, including private third parties that may be responsible for operationalising the right, for example in relation to housing this would extend to private landlords or building contractors, or in the care sector both public and private care providers and so on – this duty directly engages with the horizontal reach of duties/rights; and

- **The duty to fulfil:**

the State must facilitate, promote and provide for rights by taking the necessary steps to ensure ESC rights can be enjoyed by all to the maximum of its available resources. Fulfilling ESC rights imposes a duty on states to adopt "enabling strategies" to ensure that the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the **maximum of available resources**.<sup>14</sup>

### 3.3.4 Duty to gather and deploy the maximum available resources (MAR)

The duty to gather and deploy the maximum available resources (MAR) to achieve progressive realisation can be broken down into sub-categories. First, there is an expectation that states will prepare and plan budgetary allocation in advance in order to realise ESC rights. This does not mean that a state must use all of its resources on meeting ESCR but rather that it must use the maximum amount of resources that can be expended for a particular purpose without sacrificing other, essential services.<sup>15</sup> In order to meet the obligation states must ensure that resources are generated in a manner that reflects national economic growth. In other words,

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<sup>11</sup> Bruce Porter (2015) p.6, UN An Evaluation of the Obligation to Take Steps to the Maximum Available Resources (2007); Langford (2009)

<sup>12</sup> Koch (2005) at 101

<sup>13</sup> This categorisation first developed by Asbjørn Eide (1989) and adopted in General Comment 12 at para.15

<sup>14</sup> General Comment 4, para.14

<sup>15</sup> O'Connell et al (2016) and Alston et al (1987) at 178

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there is a correlation between overall national wealth and the generation of revenue through tax resources. If, for example, government spending on the realisation of ESC rights is dropping relative to GDP or other government expenditures, this is a 'strong indication that there are available resources but that a particular right has not been prioritised'<sup>16</sup> thus falling short of the obligation.

Second, according to the international framework, the allocation of resources must be effective (achieve its aim), efficient (achieve the highest quality with minimum waste/effort), adequate (sufficient to meet the thresholds of dignity/ PR) and equitable (prioritisation of the most vulnerable with the aim of achieving substantive equality).<sup>17</sup> Adequacy can be further broken down to sub-categorisations of availability, adequacy, acceptability and quality (the AAAQ framework). Third, an important point to note here is that resources are not only financial, but also human, technological, information, natural and administrative resources. States can demonstrate how each of these resources are deployed as part of any national strategy/ policy.

The means through which meeting this obligation is assessed is not fully fleshed out in international law. Compliance with the duty is largely left within the discretion of state parties to demonstrate what steps it has taken to deploy resources to realise ESC rights. Assessment of whether the state is meeting its obligation would be dependent on whether the state can demonstrate and justify that its approach is reasonable. In Scotland, it could be assessed against whether the state is taking reasonable steps using the more expansive reasonableness test described above.

In Scotland there is already significant progress in setting out appropriate benchmarks and indicators, both in terms of budgetary allocation and assessment of progress for a number of national targets, including compliance with human rights.<sup>18</sup> The National Performance Framework offers an opportunity to demonstrate how the state is meeting its resource allocation obligations across each of the rights covered by the Bill. If executed using the principles of effectiveness, efficiency, adequacy and equity as part of both budget generation as well as allocation then the Scottish Government would be well placed to demonstrate that it is meeting its MAR obligations under ICESCR through the NPF. This would require including ESC rights explicitly as an outcome accompanied with appropriate structure, process, outcome indicators.<sup>19</sup> For example, the fulfilment of rights could be set out as an outcome itself and appropriate indicators could include how the state has taken steps to respect (structure), protect (process) and fulfil (outcome) the rights with a particular emphasis on how budget allocation is deployed from the outset to achieve effectiveness, efficiency, adequacy and equity in the delivery of services. Dr Alison Hosie of the Scottish Human Rights Commission has led on this area at the domestic level over a number of years and would be

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<sup>16</sup> O'Connell et al at 76

<sup>17</sup> ibid

<sup>18</sup> <https://nationalperformance.gov.scot/national-outcomes/human-rights>

<sup>19</sup> See UN Human Rights Indicators: A Guide to Implementation and Measurement (2012)  
[https://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](https://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)

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well placed to provide further evidence/ guidance to the NTF on how best to implement international obligations in relation to the allocation of resources.<sup>20</sup>

### 3.3.4 The duty to ensure non-discrimination

States must ensure **non-discrimination** so that access and delivery of rights occurs in a way that does not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system. Before designing and implementing an inclusive system to deliver/ provide a right decision makers should explore and understand who are the disadvantaged and excluded social groups and what their needs and vulnerabilities are.<sup>21</sup> This means gathering and generating disaggregated data across various characteristics including gender, age, geographic location, ethnicity, health status, economic status etc. It is important that a reliable evidence base is developed to ensure that people are not denied access to the system or inadvertently excluded from the government's strategy. This approach means that 'a deeper evidence base can improve the understanding of how programmes can best address structural and societal power imbalances, while also encouraging greater equity and empowerment for society's most disadvantaged members.'<sup>22</sup> The operation of the 'benefit cap' under the UK's welfare reform provides an example of how vulnerable groups are disproportionately impacted by a system that has not been developed to address societal power imbalances or to create greater equity amongst vulnerable groups. The benefit caps amount to a violation of international law not sufficiently protected in domestic law<sup>23</sup> in these cases disproportionately impacting the disabled, children and single mothers.

The Task Force will be aware that 'equal opportunities' is a reserved matter under the Scotland Act 1998 (Schedule 5 para.L.2). This reservation is subject to exceptions, including the promotion or encouragement of equal opportunities and potentially supplementing the requirements of the Equality Act 1998 by introducing further equality duties so long as the operation of the Equality Act 2010 is not modified.<sup>24</sup> Further consideration is required to establish whether the exception to the reservation acts as a ceiling or a floor for more progressive non-discrimination and substantive equality measures.

### 3.3.5 The duty to provide a minimum core

The **minimum core obligation (MCO)** acts as a basic minimum threshold below which no one should fall. It is the absolute minimum criteria that is immediately applicable to all states in the fulfilment of ESC rights. It should be understood as complementary to progressive realisation rather than an alternative to PR. Critics of the MCO doctrine are concerned that by setting minimum criteria states will be concerned with achieving minimum standards rather than reaching beyond minimum criteria to progressive standards. Those in favour of the doctrine argue that it is required to ensure that, at the very least, minimum criteria are in place to avoid destitution. There is also disagreement as to what the MCO constitutes in both

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<sup>20</sup> For example see <https://www.scottishhumanrights.com/economic-social-cultural-rights/human-rights-budget-work/>

<sup>21</sup> Sepúlveda (2017) at 37

<sup>22</sup> *ibid*

<sup>23</sup> See the cases of *SG and Others v SSWP* [2015] UKSC 16 and *DS and Others v SSWP* [2019] UKSC 21

<sup>24</sup> Para.5.L.2 Schedule 5 Scotland Act

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the literature and practice. By way of brief summary, these arguments centre around whether the obligation requires all states to meet the same minimum absolute standards (such as basic survival and the provision of shelter, food, water and sanitation).<sup>25</sup> Others argue for a relative standard to apply.<sup>26</sup> So for example, is the MCO relative to the wealth and resources of the state in question meaning a wealthier nation will be held to higher standards than a state with less resources at its disposal?<sup>27</sup> International law suggests that 'minimum core' is legally binding and most likely non-derogable (meaning states cannot justify non-compliance).<sup>28</sup> However, what it actually means in practice is not necessarily always clear. Some of the UN General Comments elaborate on what is required to meet a minimum core threshold in relation to a particular right.<sup>29</sup> In practice, the UN legal position has been to place the onus on states 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.<sup>30</sup>

Best practice would suggest that states adopt both absolute and relative criteria to assess MCO compliance. Again, measurement and indicators for minimum core obligations could feature as part of a National Performance Framework in Scotland.

By way of example, in relation to the right to food, an absolute standard might be that everyone has food security. Failure to comply with this obligation would be a *prima facie* breach of the MCO obligation.<sup>31</sup> A relative standard would require states to go further where minimum criteria would include strategies of ensuring sustainable farm to fork policies that negate reliance on food banks beginning with prioritisation of the most vulnerable. Progressive realisation would go further again where policies and strategies would aim to develop progressive improvement through food strategies that prioritise nutrition and quality of produce beyond minimum standards across the population. These different approaches can be viewed as the 'waves of duties' that PR imposes – where the MCO is a non-derogable (non-negotiable and immediately enforceable) duty that works alongside progressive realisation beyond minimum criteria.

In some countries the minimum core obligation is closely linked to the constitutional right to a social minimum. It is part of the constitutional arrangements in Germany (*Existenzminimum*), Switzerland (*conditions minimales d'existence*), Colombia (*minimo vital*) and Brazil (*mínimo existencial*). The key determining factor is whether or not the **dignity of the right holder has been violated**. Should the provision of basic essentials to ensure the dignity of the person be undermined there is a breach of the social minimum doctrine. There is an opportunity to link

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<sup>25</sup> Bilchitz (2003) at 15

<sup>26</sup> Young (2008)

<sup>27</sup> *ibid*

<sup>28</sup> Müller (2009) at 654.

<sup>29</sup> UN Committee on Economic Social and Cultural Rights, General Comment No. 13 para.57; General Comment No. 14; General Comment No. 15 para.37; Comment No. 17 para.39; General Comment No. 18 para.31; General Comment No. 19 para.59

<sup>30</sup> General Comment No. 12 para.7

<sup>31</sup> General Comment No. 3

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the FMAG recommendation to embed dignity at the core of the proposed Bill by linking it to the international MCO obligation. Dignity can act as a threshold for minimum compliance criteria and provides an example of a potential duty to comply that would give rise to an immediately enforceable obligation (i.e. if dignity is violated then remedies can be more outcome orientated rather than focussing on reasonable policies/ strategies).

### **3.3.6 Limitations and non-regression**

States are under a duty to avoid measures which reduce access to or delivery of the right (**non-regression**). The principle of 'non-regression', also referred to as the duty not to take retrogressive steps, is key to decision making frameworks for governments. It imposes a duty on states to ensure that there is no 'backsliding' on rights provision. In other words, that PR is not subject to periods of decline, even in the most difficult of circumstances, including national or international crises.<sup>32</sup> Indeed, it is in times of crisis that states must do all they can to avert any backsliding in the realisation of economic and social rights as failure to do so can result in longer term damage.<sup>33</sup>

The UN Committee on Economic, Social and Cultural Rights suggests that retrogressive measures that amount to a "general decline of living and housing conditions directly attributable to policy and legislative decisions by State Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant."<sup>34</sup> In other words, backward steps in the provision of rights are counterproductive to PR. In international law any deliberate retrogressive requires measure the most careful consideration.<sup>35</sup> Any violation of a right as a result of a deliberate retrogressive measure can only be justified in the most exceptional of circumstances and States must be able to explain that the action is reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered.<sup>36</sup>

### **3.3.7 Access to an effective remedy**

States are under a duty to provide and effective remedy if there is a failure to meet the obligations imposed by PR. This includes facilitating access to a legal remedy in court if necessary.<sup>37</sup> What constitutes an 'effective remedy' may include administrative, judicial and legislative remedies. It would also be appropriate to explore the possibility of facilitating collective litigation in situations involving multiple complainants and multiple duty bearers.<sup>38</sup> This is because social rights adjudication requires a nuanced approach given the collective nature of the rights. Consideration of innovative remedies includes exploring how best to address systemic issues and whether courts can act as an intermediary between different

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<sup>32</sup> O'Connell et al p.70

<sup>33</sup> *ibid*

<sup>34</sup> General Comment No.4 para. 59

<sup>35</sup> General Comment No.3 para.9

<sup>36</sup> Committee on Economic, Social and Cultural Rights, 'Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis', 16 May 2012

<sup>37</sup> General Comment 4 para.17

<sup>38</sup> *ibid*

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rights holders and duty bearers to find an effective remedy that requires multiple duty bearers to respond as part of a structural interdict.

### 4. Substantive issues for Scotland:

#### 4.1 Limitations of devolution and the legislature's duty to comply

In terms of models of incorporation there are limitations as to the reach of the duty to comply under a devolved framework. This can best be explained by comparing the two approaches to the 'constitutionalisation' of ECHR rights at the devolved and national level. Westminster legislation can bind the Scottish Parliament, or in other words it can limit the competence of the Scottish Parliament to not act incompatibly with rights. On the other hand it is disputed whether or not the Scottish Parliament can legislate to bind itself – i.e. whether it has the legislative competence to impose a duty on itself to comply with a rights framework.

The Scottish Parliament has the competence to incorporate international human rights law into domestic law<sup>39</sup>, however, it is not within the competence of the Scottish Parliament to modify protected Acts, including the Scotland Act 1998 and the Human Rights Act 1998. It is disputable whether or not restricting the competence of the Scottish Parliament beyond section 29 would amount to a modification of section 29 of the Scotland Act 1998.<sup>40</sup>

Section 29(d) of the Scotland Act limits the competence of the Scottish Parliament in so far as any Act passed that is incompatible with Convention rights is not law (the Courts can declare said Acts void with immediate effect). Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* if it is in breach of ECHR or EU law (section 57). Similar provisions constitute the devolved settlements in Northern Ireland<sup>41</sup> and Wales.<sup>42</sup> In each of the devolved jurisdictions if there is a breach of ECHR the act or omission is considered to be *ultra vires* (outwith the power of the decision maker and therefore null and void). This obligation applies to the Scottish Parliament and so the courts can deem particular provisions within Acts of the Scottish Parliament null and void if they breach section 29 of the Scotland Act 1998. This is a very robust remedy and meets the requirements of an effective remedy in international law.<sup>43</sup>

If the Bill adopts a similar framework this means that the Scottish Parliament, the Scottish Government and all public bodies, including the courts, are under a duty to comply with the

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<sup>39</sup> Schedule 5 para.7.2.a

<sup>40</sup> Constitutionally it is not clear whether the Scottish Parliament has the power to impose self-regulation by limiting its own competence, binding the Scottish Parliament in relation to subsequent legislation unless expressly repealed (discussed above). The answer lies in the interpretation of 'modification'. The Scotland Act prohibits modification of the Scotland Act 1998 (Schedule 4). The Scotland Act sets out the Scottish Parliament's competence (section 29). Changing or adding to the list of areas that are beyond the competence of SP does not necessarily 'modify' s29. For a discussion on this see judgment by the Supreme Court EU Continuity Bill case [2018] UKSC 64(13 December 2018) para.50-51 'the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.'

<sup>41</sup> See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly)

<sup>42</sup> See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly)

<sup>43</sup> Boyle (2020)

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proposed rights framework. This form of incorporation ensures that all those exercising state power are required to abide by the same framework – it amounts to a form of constitutionalisation.

Another example of domestic incorporation of international norms is the Human Rights Act 1998 (HRA). Section 6(1) of the Human Rights Act 1998 requires that public authorities must not act in a way which is incompatible with the ECHR. Notably the duty to not act incompatibly applies to courts but not to either House of the UK Parliament. Section 3 of the Human Rights Act requires courts to interpret legislation in 'so far as it is possible to do so' in a manner compatible with European Convention rights. Where this is not deemed possible, section 4 provides that the courts (High Court and above) can make a 'declaration of incompatibility' between UK primary legislation and the Convention. If the UK Parliament acts incompatibly with the ECHR the law is not null and void, the statute remains in place until Parliament addresses the breach through subsequent legislation. The declaration of incompatibility does not currently meet the threshold of an effective remedy according to Strasbourg jurisprudence and the HRA does not incorporate A13 ECHR (right to an effective remedy) into domestic law. The Strasbourg court alludes to the potential for such a declaration to amount to an effective remedy at a 'future date' but only if the UK Government Ministers develop a 'long-standing and established practice' of giving effect to the courts' declarations of incompatibility by remedying the incompatible legislation.<sup>44</sup>

If the Bill proceeds on a model that mirrors the declaration of incompatibility remedy (rather than the *ultra vires* strike down power) then further consideration to the effectiveness of this approach should be considered. There is an indication from the European Court of Human Rights that a declaration of incompatibility, rather than an *ultra vires* declaration, may meet the threshold of an effective remedy under the new human rights framework for Scotland if there is an established practice of the Scottish Parliament giving effect to the courts' declarations. What may require further consideration is how to manage competing legislation when declarations of incompatibility are not quickly resolved.

### **4.2 Why is this distinction important?**

The distinction is important because it will directly impact on how future legislation subsequent to enactment of the Bill will be treated. If a future Act of the Scottish Parliament is incompatible with the new human rights framework there will be no mechanism to disapply the subsequent incompatible Bill (unless an *ultra vires* declaration is available to the court). There is therefore a danger of future regression under subsequent administrations. On the other hand, a declaration of incompatibility can help highlight any future legislation that is incompatible. Compliance and observation of the duty to comply will be wholly dependent on the Scottish Parliament as to whether or not that incompatibility is addressed.

Outstanding issues for consideration relate to how the Scottish Parliament could establish procedures for responding to declarations of incompatibility if this model is adopted.

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<sup>44</sup> *Burden v UK* Application No 13378/05, Judgment, 12 December 2006 at para.36

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Further, it would be important to manage the expectations of rights-holders if the model that is adopted does not go as far as what is possible under the Scotland Act.

### 5. Discussion

Each of the duties considered in this paper can confer different types of correlated rights. The distinctions matter because some duties are more transformative than others, meaning expectations of their reach will require to be carefully managed. Transformative duties help to make the journey between structure (legislation), process (operationalisation) and outcome (improving people's lives) happen in practice. This is evident for example on the different responses to the transformative potential of the post-apartheid South African constitution. On the one hand, the court interpreted the right to housing as a judicially enforceable right meaning long-term symbolic and incremental material change. On the other hand, its interpretation of that right was that the state was under a duty to implement a reasonable policy to achieve the right to housing, rather than provide the applicant in the seminal case, *Mrs Grootboom*<sup>45</sup>, an immediate right to adequate housing. The types of duties and the remedies available will differ depending on whether the obligation or duty in question confers the right to a process (for ex. due regard); the right to a policy (for ex. taking steps under progressive realisation); or the right to an outcome (for ex. duty to comply/ minimum core/ dignity).

One of the easiest ways of describing the importance of these distinctions is to think about engagement with the new proposed framework from the perspective of the rights holder. If someone is experiencing poverty, is experiencing inadequate housing, cannot access sufficient resources to pay for food or fuel, does not have access to adequate drinking water, is unable to access appropriate health care – where does that person turn to and what can they do to address the violation? How does the framework help transform daily life?

The National Task Force may wish to consider how best to deploy different types of duties (what are they and who is responsible?), obligations (what is the content and extent of the duty), rights (what right is engaged and how enforceable is it) and remedies (what remedies can courts deploy for violations of the right, how intense is the level of judicial scrutiny, how rights-orientated are the remedies?). Reflecting on these issues can help to ensure that expectations are both managed and met when engaging with the wider public through participatory processes and in the development and delivery of the Bill.

### 6. Conclusions and Recommendations

- The duty to comply is at its most effective when it applies to the legislature, executive, public and private bodies and the courts.
- Duties can be weak, moderate or transformative in nature. International best practice suggests that a renewed human rights framework should deploy a range of duties and a range of remedies.

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<sup>45</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)



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- Whilst due regard can be a helpful means of integrating or implementing rights into decision making processes it is insufficient to meet the threshold of incorporation and can inadvertently raise and fail to meet expectations of rights holders (there is no remedy for failing to reach a human rights compliant outcome).
- The minimum core obligation is closely linked to the concept of dignity. It is possible to develop this link by using dignity as a minimum threshold when developing indicators, benchmarks and measurement of the MCO in Scotland. The National Performance Framework offers a suitable vehicle to demonstrate compliance with this obligation.
- Operationalisation of the Bill will require detailed guidance to support decision makers on how to comply with duties early on in decision making processes.
- The operationalisation of compliance duties can be supported through a robust accountability framework where regulators and inspectorates are responsible for day to day oversight.
- International human rights obligations allow for a degree of domestic interpretation in how they are fulfilled – Scotland can act as a global leader by developing a framework that places compliance at the heart of government, parliament and decision making processes across public administration and actions of private actors where appropriate. It can also build and develop benchmarks and indicators for compliance with minimum and progressive criteria. In being held to account it should utilise the more robust and expanded form of reasonableness test for progressive realisation which includes elements of proportionality. The Bill may also wish to recognise that some elements of ESCE rights are non-derogable (for example MCO) and in this case may wish to indicate where more interventionist measures are appropriate when developing judicial remedies under the Bill.
- There is more scope to explore and develop the potential transformative nature of remedies that are most suitable to collective or systemic issues around ESCE rights, including whether the court system can better adapt to collective litigation for systemic issues and structural remedies when there are multiple rights holders and multiple duty bearers.

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