

# Scotland's National Baseline Assessment on Business and Human Rights

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## **Report Authors**

Prof. John Ferguson, University of St. Andrews

Dr. Lucy Wishart, University of St. Andrews

Dr. Edzia Carvalho, University of Dundee

## ANNEX 1: National Baseline Assessment Template

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## List of Acronyms

Acas	Advisory, Conciliation and Arbitration Service
ALEO	Arms-Length External Organisation
ASEAN	Association of South East Asian Nations
BHRRRC	Business and Human Rights Resource Centre
BIS	Department of Business Innovation and Skills
BIT	Bilateral Investment Treaty
CA	Competent Authority
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CFAs	Conditional Fee Arrangements
CI	Care Inspectorate
COMAH	Control of Major Accident Hazards
COPFS	Crown Office and Procurator Fiscal Service
COSLA	Convention of Scottish Local Authorities
CPED	International Convention for the Protection of all Persons from Enforced Disappearance
CPLC	Consumer Protection Legislation
CRC	Convention on the Rights of the Child
CRIA	Child Rights Impact Assessment
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CYPCS	Children and Young People's Commissioner Scotland

DFID	Department for International Development
DIHR	Danish Institute for Human Rights
EA	Environmental Agency
EASS	Equality Advisory Support Service
EBRD	The European Bank for Reconstruction and Development
ECA	Export Credit Agencies
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EIA	Environmental Impact Assessment
EIB	The European Investment Bank
EITI	Extractive Industries Transparency Initiative
ESHR	Environmental, Social and Human Rights
ESOL	English for speakers of other languages
ESPD	European Single Procurement Document
ETI	Ethical Trading Initiative
EU	European Union
FCO	Foreign and Commonwealth Office
GNI	Global Network Initiative
HMICS	Her Majesty's Inspectorate of Constabulary in Scotland
HMIPS	Her Majesty's Inspectorate of Prisons for Scotland
HMRC	Her Majesty's Revenue and Customs
HRA	Human Rights Act 1988

HSE	Health and Safety Executive
ICAR	International Corporate Accountability Roundtable
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICoCA	International Code of Conduct for Private Security Service Providers Association
ICT	Information and Communications Technology
ICVS	Independent Custody Visiting Scotland
IFC	International Finance Corporation
IIA	International Investment Agreement
ILO	International Labour Organisation
JCHR	Joint Committee on Human Rights
KPI	Key Performance Indicator
LASPOA	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LLB	Bachelor of Laws
MA	Modern Apprenticeship
MNEs	Multinational Enterprises
MWCS	Mental Welfare Commission for Scotland
NAP	National Action Plan
NBA	National Baseline Assessment
NCP	National Contact Point

NDPB	Non-Departmental Public Body
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
NRW	Natural Resources Wales
NUS	National Union of Students
NXD	Non-Executive Director
OECD	Organisation for Economic Cooperation and Development
OFSI	Office of Financial Sanctions Implementation
ONR	Office for Nuclear Regulation
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OSDR	Offshore Safety Directive Regulator
PIDA	Public Information Disclosure Act 1998
SCOW	Scottish Commission on Older Women
SDS	Skills Development Scotland
SEPA	Scottish Environmental Protection Agency
SFA	Scottish Football Association
SG	Scottish Government
SGWW	Strategic Group on Women and Work
SHRC	Scottish Human Rights Commission
SMEs	Small and medium-sized enterprises
SNAP	Scotland's National Action Plan for Human Rights
SNH	Scottish Natural Heritage
SPAN	Scottish Procurement Action Notes
SPFM	Scottish Public Finance Manual
SPPN	Scottish Procurement Policy Notes
SPSO	Scottish Public Service Ombudsman

STUC	Scottish Trade Union Congress
SUL	Scottish Union Learning
TULRCA	Trade Union Labour Relations (Consolidation) Act 1992
UDHR	Universal Declaration of Human Rights
UKEF	UK Export Finance
UKHTC	UK Human Trafficking Centre
UN	United Nations
UNCAT	UN Convention Against Torture and other

	Cruel, Inhuman or Degrading Treatment or Punishment
UNGP	UN Guiding Principles on Business and Human Rights
UPR	Universal Periodic Review
VPs/VPS	Voluntary Principles on Security and Human Rights
WB	World Bank
WTO	World Trade Organisation

# THE NATIONAL BASELINE ASSESSMENT TEMPLATE

## PILLAR ONE

1. GUIDING PRINCIPLE 1	
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.	
Commentary to Guiding Principle 1	
<p>States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.</p> <p>The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.</p>	
1.1. International and Regional Legal Instruments - Has the government signed and ratified relevant international and regional legal instruments?	
Indicators	Scoping Questions
International Human Rights Legal Instruments	Has the government signed and ratified relevant international human rights legal instruments, such as ICERD (International Convention on the Elimination of All Forms of Racial Discrimination), ICCPR (International Covenant on Civil and Political Rights), ICESCR (International Covenant on Economic and Social and Cultural Rights), CEDAW (Convention on the

	Elimination of All Forms of Discrimination Against Women), CAT, CRC (Convention on the Rights of the Child), ICMW (International Convention on Protection of the Rights of All Migrant Works and Members of Their Families), CPED (International Convention for the Protection of All Persons from Enforced Disappearance), CRPD (Convention on the Rights of Persons with Disabilities), the core ILO (International Labour Organisation) conventions, and any corresponding protocols?
Regional Human Rights Legal Instruments	Has the government signed and ratified relevant regional human rights legal instruments, such as the African (Banjul) Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and any corresponding protocols?
Other Human Rights Legal Instruments	Are there any other relevant human rights legal instruments that the government has signed and ratified?
<b>Implementation Status</b>	
<p>The UK Government has ratified:</p> <ul style="list-style-type: none"> <li>• ICERD</li> <li>• ICCPR</li> <li>• ICESCR</li> <li>• CEDAW</li> <li>• UNCAT</li> <li>• CRC</li> <li>• CRPD</li> <li>• 8/8 Core ILO conventions and 76/117 technical conventions<sup>1</sup></li> </ul> <p>The UK Government has ratified the ECHR and incorporated it into domestic law through the Human Rights Act 1998, which requires every public authority to act compatibly with specified core Convention rights ("the Convention rights") and enables human</p>	

rights cases to be taken in domestic courts.

- The HRA 1998 (Human Rights Act 1998) explicitly states that the Act was created “to give further effects to the rights and freedoms” of the ECHR, however it is possible for the UK to be in breach of ECHR without being in breach of HRA 1998.<sup>2</sup>
- The HRA 1998 s2 states that any court or tribunal in the UK must take into account decisions of the ECtHR; and s3 states that, as far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with “the Convention rights”.
- The Scotland Act 1998 states that an Act of the Scottish Parliament is “not law” if it is incompatible with any of the Convention rights or with EU (European Union) Law (s29), and no member of the Scottish Government can make any subordinate legislation or do any other act insofar as it is incompatible with the Convention rights or with EU Law (s57). It has been suggested that the link to the ECHR in the Scotland Act would limit the repercussions on Scotland if the UK was to abolish the Human Rights Act.<sup>3</sup>

The UK is also party to:

- EU Charter of Fundamental Rights (2000)
- Convention on Action against Trafficking in Human Beings
- European Charter for Regional or Minority Languages
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- European Social Charter
- Framework Convention for the Protection of National Minorities

## Gaps

The UK Government ‘remains to be convinced of the added practical value to people in the United Kingdom of rights of individual petition to the United Nations’ and so it only supports the rights for an individual to petition the treaty body in CRPD and CEDAW.<sup>4</sup>

Although the UK Government has ratified the European Social Charter (1961), it does not participate in the monitoring process and does not produce reports on the UK’s performance.<sup>Error! Bookmark not defined.</sup> The UK has signed but not ratified the updated charter (1996). This document includes economic, social and cultural rights with application in the sphere of business activities.

The UK has not ratified:

- ICMW
- CPED



- The UK has not yet signed or ratified the Optional Protocol of the ICESCR<sup>5</sup>, which provides a channel through which to communicate a violation to the United Nations Committee on Economic, Social and Cultural Rights. Failure to ratify the Optional Protocol prevents individuals in the UK from seeking redress for a violation of an ESC right at the supranational level – such abuses could relate to the business context.
- Protocol no. 12 of the ECHR (on the basis that the wording which prohibits discrimination on “rights set out in law” is too wide).<sup>6</sup>
- Currently no United Nations’ level human rights treaties are directly incorporated into Scots law. There has been some discussion over whether this should take place. The only precedent for this is the Rights of Children and Young Persons (Wales) Measure 2011,<sup>7</sup> which requires all Welsh Ministers to have due regard to the CRC when exercising any of their Ministerial functions.<sup>5</sup>

The SHRC and civil society organisations in Scotland have undertaken a number of reports on Scotland/UK’s adherence to international instruments.<sup>8 9</sup> In particular, SHRC has called for clarification of the position for the Scottish Government if the HRA was to be repealed, as there is currently no link between these conventions and the Scottish Parliament. It has also recommended that the Scottish Government provide further support to employers to address the issue of equal pay, which was identified as an issue as part of the CEDAW review.<sup>10</sup> It has been noted that availability of data within Scotland on race and ethnic minorities is poor and not comparable to the rest of the UK; yet it has also been suggested that Acts of the Scottish Parliament could have significant consequences for rights protected under CERD.<sup>11</sup>

It has been noted that the Scottish position is briefly reported in UK Periodic Reports to the UN on progress in implementing these Conventions, though the Scottish Government has produced and published a number of parallel statements (for example, ICESCR<sup>12</sup>, ICCPR<sup>13</sup>, CRC<sup>14</sup>, CRPD<sup>15</sup>).

There is currently no established process for the Scottish Parliament to debate/consider Concluding Observations from UN treaty bodies, which presents an opportunity now that the Equal Opportunities Committee’s remit has been extended to include human rights.

1.2. International and Regional Soft Law Instruments - Has the government signed relevant international and regional soft law instruments?

**Indicators**

**Scoping Questions**

International Human Soft Law Rights Instruments	Has the government signed relevant international human rights soft law instruments, such as the UDHR (Universal Declaration of Human Rights), other UN declarations and/or resolutions, and the ILO Tripartite Declaration?
Regional Human Rights Soft Law Instruments	Has the government signed relevant regional human rights soft law instruments, such as the American Declaration of the Rights and Duties of Man and the ASEAN Human Rights Declaration?
Other Human Rights Soft Law Instruments	Are there any other relevant human rights soft law instruments that the government has signed?
<b>Implementation Status</b>	
<p>The UK has ratified:</p> <ul style="list-style-type: none"> <li>• ILO Tripartite Declaration<sup>16</sup></li> <li>• Declaration on Fundamental Principles at work<sup>16</sup></li> <li>• OECD Guidelines for Multinational Enterprises</li> </ul> <p>The UK is also subject to the following Council of Europe human rights initiatives:</p> <ul style="list-style-type: none"> <li>• The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</li> <li>• The Convention on Action against Trafficking in Human Beings</li> <li>• The Framework Convention for the Protection of National Minorities</li> <li>• The European Charter for Regional or Minority Languages</li> <li>• The European Social Charter (UK has ratified 60/72 provisions)</li> </ul> <p><a href="#">In addition, Scotland's two National HR Bodies (ECHR &amp; SHRC) adhere to the Paris Principles.</a><sup>17</sup></p>	
<b>Gaps</b>	

In relation to the European Social Charter, the UK has not ratified 12/72 provisions<sup>18</sup> and has been found in violation of Article 12-1. More specifically, the European Committee of Social Rights recently concluded that “the situation in United Kingdom is not in conformity with Article [12-1] of the Charter on the ground that:

- The minimum levels of short-term and long-term incapacity benefit is manifestly inadequate;
- The minimum level of state pension is manifestly inadequate;
- The minimum level of job seeker’s allowance is manifestly inadequate”.<sup>19</sup>

OECD Watch reports that the UK NCP received 72 complaints between 2001 and 2015. This was the largest number of any NCP and comprises almost 30% of all NCP complaints worldwide<sup>20</sup>. Amnesty International has noted the high rejection and referral of cases by the UK NCP and the high evidential threshold that the UK NCP imposes on complainants that goes beyond the requirements of the OECD’s Procedural Guidance<sup>21</sup>.

There is scope for the Scottish Government to demonstrate support for existing non-binding standards related to business and human rights and to more actively promote the UNGPs as well as the OECD Guidelines to Scottish businesses. For example, one of the leading initiatives in relation to the implementation of the UNGPs is a reporting and assurance framework that is being developed through a joint initiative between the human rights NGO Shift<sup>22</sup> and the accounting firm Mazars<sup>23</sup>. The reporting framework phase of this initiative is complete (<http://www.ungpreporting.org>), and the Scottish Government could take a more active role in terms of promoting this guidance to Scottish businesses<sup>24</sup>.

1.3. UN Guiding Principles on Business and Human Rights - Is the State actively implementing the UNGPs?	
Indicators	Scoping Questions
Formal Statement of Support	Has the State given a formal statement of support for the UNGPs?
Implementation Structures	Has the State put in place relevant structures to ensure implementation of the UNGPs, for example, through the establishment or designation of a body tasked with implementation measures or through the allocation of internal resources?

Capacity-Building	Has the State put in place measures to capacitate government actors and local citizens with knowledge and information on the UNGPs, for example, through workshops, conferences, or other events?
Information	Has the State disseminated information about the UNGPs through public media sources, internal guidance documents, or other materials?
Other UNGPs Implementation Methods	Has the State taken any other measures to implement the UNGPs within the State?
<b>Implementation Status</b>	
<p>In 2013, the UK Government became the first government to issue a National Action Plan for Business and Human Rights, entitled <i>Good Business: Implementing the UN Guiding Principles on Business &amp; Human Rights</i><sup>25</sup>. An updated version of the UK NAP was published in May 2016<sup>26</sup>. The UK Parliament Joint Committee on Human Rights has launched a Human Rights and Business Inquiry<sup>27</sup> that will consider, amongst other things, the UK's implementation of the UNGPs, progress since the launch of the initial NAP in 2013 and issues surrounding access to remedy.</p> <p>Chapter 8 of the UK Foreign and Commonwealth Office's <i>Human Rights &amp; Democracy Report 2014</i> is dedicated to discussing initiatives, developments and case studies of implementation of human rights in business.<sup>28</sup></p> <p>Priority 9 of Scotland's National Action Plan for Human Rights (2013-17) (SNAP) states that Scotland will develop a plan to implement the UN Guiding Principles on Business and Human Rights.<sup>29</sup> A Leadership Panel oversees the implementation of SNAP through a series of Action Groups. The SNAP Better World Action Group initiated the project to develop a baseline assessment for the UNGPs (this project),<sup>30</sup> which marks the research foundations for the development of a National Action Plan to implement the UNGPs in Scotland.<sup>31</sup> The SNAP Project has its own webpage, videos and twitter (@scotrightspan). As of July 2016, the SNAP video on YouTube (which is approximately 3 minutes long) has been viewed 2,000 times, and SNAP has just over 300 followers on twitter.</p> <p>The UNGPs are referred to in Scotland's Trade and Investment Strategy 2016-21 (March 2016)<sup>32</sup> and in statutory guidance on the</p>	

## Selection of Tenderers and Award of Contracts (Oct 2015)<sup>33</sup>.

### Gaps

While the UK Government was the first to develop a National Action Plan, commentators have pointed out that the plan lacked consultation, was not informed by a baseline assessment,<sup>34</sup> and lacked clear incentives or sanctions for business.<sup>35</sup> An updated version of the UK NAP was published in May 2016<sup>36</sup> and commentators have similarly noted that the plan was not informed by a baseline assessment, lacks ambition,<sup>37</sup> and is “largely descriptive and thin on new commitments”<sup>38</sup>. Further, in its recent submission to the UK Parliamentary Joint Committee on Human Rights, the Institute of Human Rights and Business (IHRB) notes that the 2013 UK NAP was a joint initiative led both by the Foreign and Commonwealth Office (FCO) and the Department of Business, Innovation and Skills (BIS), with other government departments consulted in the development process. However, the IHRB observe that “the 2016 update to the UK NAP seems to have fallen mainly to the FCO”, which perhaps suggests a lack of political interest<sup>39</sup>. Further, given that a senior FCO official has recently publically stated that human rights is no longer a priority for his department, locating business and human rights within it would seem a cause for concern<sup>40</sup>.

The SNAP video and webpage refer to the importance of businesses to consider their human rights responsibilities but little elaboration is provided regarding the UNGPs.

Little reference could be found to the UNGP on either the Scottish or UK Government websites outside of the publications outlined above.

1.4. Other Relevant Standards and Initiatives - Is the State supporting or participating in other standards and initiatives relevant to business and human rights?

Indicators	Scoping Questions
Standards	Has the government supported other standards on business and human rights, such as the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, and the UN Global Compact?

Initiatives	Has the government participated in initiatives, multi-stakeholder or otherwise, on business and human rights, such as the Global Network Initiative (GNI), the International Code of Conduct for Private Security Service Providers Association (ICoCA), and the Voluntary Principles on Security and Human Rights (VPs)?
List all relevant State support and/or participation.	Provide comments on the degree to which implementation status results reflect or do not reflect fulfilment of the GP, as clarified in the indicators and scoping questions, taking into account any commentary from stakeholders during consultation processes.
<b>Implementation Status</b>	
<p>In its <i>Guidance to Applicants</i>,<sup>41</sup> the UK Export Finance states that it considers environmental, social and human rights (ESHR) issues when undertaking due diligence in relation to projects to which the exports are to be supplied. This is undertaken in line with the OECD 'Common Approaches', which requires projects to meet international standards: either those of the World Bank Safeguard policies or the IFC Performance Standards.</p> <p><b>OECD Guidelines for Multinational Enterprises</b>  The UK Government has a NCP for the OECD Guidelines based in the Department of Business Innovation and Skills (BIS).<sup>42</sup> The NCP is overseen by a multi-stakeholder steering group and works with FCO and BIS. It promotes the OECD Guidelines to UK businesses. The most recent report covers activity in 2011/12.<sup>43</sup></p> <p><b>UN Global Compact</b>  The Department for International Development (DFID) is a recognised strategic partner of the UN Global Compact UK Network.<sup>44</sup> Guidance on how to participate in Global Compact can be found on the DFID website.<sup>45</sup></p> <p><b>Extractive Industries Transparency Initiative (EITI)</b>  The UK is a recently admitted candidate to the EITI; this means that the government has put in place a public commitment and body to oversee compliance with EITI.<sup>46</sup></p> <p><b>International Code of Conduct for Private Security Service Providers Association (ICoCA)</b>  The UK is a founder member of this initiative.<sup>47</sup></p> <p><b>Voluntary Principles on Security and Human Rights</b></p>	

The UK is a participant in the VPS<sup>48</sup> and from March 2014 to March 2015 was chair of the initiative.<sup>49</sup> Much of the UK's work as chair was to promote the principles to businesses.<sup>49</sup>

### **Kimberley Process**

As part of the EU, the UK participates in the Kimberley Process.

### **Global Network Initiative**

The UK Government highlights the GNI (Global Network Initiative) as an important source in its Business and Human Rights Toolkit.<sup>186</sup>

### **Ethical Trading Initiative**

The UK Government highlights the ETI (Ethical Trading Institute) as an important source in its Business and Human Rights Toolkit.<sup>186</sup>

There is a range of initiatives currently being undertaken by the Scottish Government that are relevant to business and human rights. Several of these are mentioned in the SHRC submission to the UN Committee on Economic, Social and Cultural Rights in advance of the 2016 review of the UK under the International Covenant on Economic, Social and Cultural Rights<sup>50</sup>:

“Prior to the publication of the Summer Budget 2015, the Scottish Government had already adopted the Living Wage scheme, which encourages employers to adopt a sustainable wage for employees. The Scottish Government has urged employers in the private, public and third sectors to follow suit. The Procurement Reform (Scotland) Act 2014 also introduced a mechanism through which paying the Living Wage can inform the procurement tender process (although it is not a binding duty). The recently published Business Pledge is a voluntary scheme introduced by the Scottish Government to encourage businesses to pay the living wage and refrain from entering into adverse practices such as zero contract hours, which impact on financial stability and security”.

### **Gaps**

As noted in relation to Principle 1.2 above, Amnesty International has noted that high rejection and referral of cases by the UK OECD NCP and the high evidential threshold that the UK NCP imposes on complainants go beyond the requirements of the UNGPs.<sup>51</sup>

No reference could be found to the UN Global Compact on Scottish Government Website.

No reference could be found to IFC on UK or Scottish Government website.

### 1.5. National Laws and Regulations - Does the general law of the State provide protection against business-related human rights abuses?

Indicators	Scoping Questions
Constitution	Does the constitution contain wording aimed at human rights protection?
Labour Law	Has the government put in place labour laws and regulations to ensure the protection and promotion of workers' rights?
Environmental Law	Has the government put in place environmental laws and regulations to ensure the protection and promotion of the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?
Property and Land Management Law	Has the government put in place land management laws and regulations to ensure the protection of the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related licensing practices?
Health and Safety Law	Has the government put in place health and safety laws and regulations to ensure the physical and mental health of workers and communities?
Corporate and Securities Law	Has the government put in place corporate and securities laws and regulations to support ethical corporate behaviour and business respect for human rights, such as through financial reporting, incorporation/registration, and stock exchange listing requirements?



Tax Law	Has the government put in place tax laws and regulations to support ethical corporate behaviour?
Trade Law	Has the government put in place trade laws and regulations to support the protection and promotion of human rights within trade practices?
Disclosure and Reporting	Has the government put in place law to support disclosure and reporting by corporations on human rights, labor rights, environmental impacts, corporate social responsibility, or other ethical issues?
Procurement Law	Has the government put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?
Anti-Bribery and Corruption	Has the government put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?
Human Rights Defender and/or Whistleblower Protection	Has the government put in place laws and regulations aimed at protecting the rights of human rights defenders and/or whistleblowers?
Information and Communications Technologies (ICT) Law	Has the government put in place laws and regulations to ensure the protection of access to information, freedom of expression, privacy, and other information- and communication-based rights, online as well as offline?
Other Laws and Regulations	Has the government put in place any other relevant laws and regulations aimed at protecting and promoting human rights from business-related harms, including torture, genocide, and crimes against humanity? Do such laws and regulations extend extraterritorially, as permitted by the UNGPs and international human rights law?
<b>Implementation Status</b>	
<b>Constitution</b>	

Scotland Act 1998 (s.29) - all Acts of the Scottish Parliament must be compatible with the ECHR.

Human Rights Act 1998 - all secondary legislation should be compatible with the ECHR and all primary legislation should be interpreted in as far as possible with the ECHR. This Act covers legislation made in both the UK and Scottish Parliaments.

### **Labour Law**

See Principle 3.1.

### **Environmental Law**

See Principle 3.1.

### **Property and Land Management Law**

The Scottish Government has implemented the European Directive on Environmental Impact Assessment (EIA) through 11 statutory instruments covering such projects as development (planning), energy consents, trunk roads, infrastructure, ports and harbours, flooding, controlled activities, agriculture, forestry and marine works. The statutory instruments reflect the aim of the Directive to ensure that the authority granting consent for a particular project makes its decision in the full knowledge of any likely significant effects on the environment, including, where relevant, on human beings. The Scottish Government is currently in the process of transposing the 2014 EIA Directive in order to implement it by 2017. Following transposition of the 2014 Directive, references to 'human beings' will be replaced by reference to 'population and human health'.

The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 state that planning applications should not be granted without consideration of the environmental impact. The law surrounding EIA and its interpretation is complex, but according to general principles planning applications for developments which have significant effect on the environment (including hazard to human health and human enjoyment of the landscape) will have to undertake an EIA. As such social impact assessment (including use of the land/ historic value) can be taken into account as part of the EIA.<sup>52</sup>

Scottish Government Planning Circular 6/2011: Compulsory Purchase Orders  
(<http://www.gov.scot/Publications/2011/10/21133522/21>) contains a section on human rights.

The Scottish Government has produced a Planning Advice note on Scotland's Natural Heritage,<sup>53</sup> and Scottish Water, SNH, SEPA (Scottish Environment Protection Agency), Historic Scotland are statutory consultees for planning applications.

Scotland has comprehensive licensing laws for activities that affect water<sup>54</sup> and which involve waste.<sup>55</sup>

See also Principle 3.1.

### **Health and Safety Law**

See Principle 3.1.

### **Corporate and Securities Law**

See Principle 3.1.

### **Tax Law**

The following is a non-exhaustive list of relevant existing UK and Scottish tax laws and regulations:<sup>56</sup>

- Value Added Tax Act 1994 (c 23) - a consumption tax in UK tax law, levied on most goods and services provided by registered businesses in the UK.<sup>57</sup>
- Corporation Tax Act 2010.<sup>58</sup>
- Land and Buildings Transaction Tax (Scotland) - a tax applied to residential and commercial land and buildings transactions (including commercial purchases and commercial leases) where a chargeable interest is acquired.<sup>59</sup>
- Landfill Tax (Scotland) Act 2014 - a tax on the disposal of waste to landfill.<sup>60</sup>

### **Disclosure and Reporting**

See Principle 3.1.

### **Procurement Law**

See Principle 3.1 and Principle 6.1.

### **Anti-Bribery and Corruption**

See Principle 3.1.

### **Human Rights Defender and/or Whistleblower Protection**

See Principle 3.1.

## Information and Communications Technologies (ICT) Law

See Principle 3.1.

### Gaps

The UK does not have a codified constitution; it has a series of conventions. Although all subsequent legislation should be read as compatible with the HRA, the Act itself does not bind future parliaments from legislating against it, in order to retain the convention of Parliamentary Sovereignty. [While all Acts of the Scottish Parliament must be compatible with the ECHR, the ECHR protects primarily civil and political rights, rather than economic, social and cultural rights,– which are particularly relevant in the business context.](#)

Corporate tax avoidance is a high profile issue in the UK,<sup>61</sup> with a number of corporations coming under scrutiny for their tax practices. Increasingly, corporate tax avoidance is being framed as a human rights issue on the basis that “tax abuses have considerable negative impacts on the enjoyment of human rights.... Depriv[ing] governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights”.<sup>62</sup> According to HMRC’s own analysis in 2013-14, there was a corporation ‘tax gap’ (i.e. the difference between the amount of tax that should be collected against what is actually collected) of £3.0bn. It is estimated that £1.0bn of the corporation tax gap is attributable to tax avoidance.<sup>63</sup>

According to a report by the Public and Commercial Services Union, HMRC does not have the resources needed to tackle corporate tax avoidance and existing legislation is not sufficient. The UK Government maintains that it is increasing investment in HMRC’s enforcement capacity, introducing tougher tax legislation and taking an active role in the OECD/G20 Project Base Erosion and Profit Shifting project.<sup>64</sup>

[While the Scottish Government does not control corporation tax, it has been suggested that it can take measures to reduce corporate tax avoidance by including sound tax practice in public sector procurement guidance.<sup>65</sup> Further, the Scottish tax collection agency, Revenue Scotland, has signaled that it will take a tougher line on tax avoidance than HMRC.<sup>66</sup>](#)

1.6. Investigation, Punishment, and Redress Measures - Do relevant State agencies responsible for law enforcement address business and human rights?

Indicators	Scoping Questions
Sector Risk Assessment	Is the State undertaking or supporting any specific activities to identify specific business sectors or activities that may have particularly negative impacts on human rights, such as the extractive, apparel, and other sectors?
Vulnerable Group Assessment	Is the State undertaking or supporting any specific activities to identify specific impacts on particularly vulnerable groups, such as women, children, minorities, and indigenous peoples?
Police	Have police authorities been provided with information and training on issues related to business and human rights? Are the police given statutory authority to address business-related human rights harms?
Labour, Health and Safety	Are relevant labour, health, and safety authorities aware of potential or actual adverse impacts by business on labour, health, and safety? Are such State actors given statutory authority to address business-related human rights harms?
Environment	Have relevant environmental authorities been provided with information and training on issues related to business and human rights? Are such State actors given statutory authority to address business-related human rights harms?
Tax	Have relevant tax authorities been provided with information and training on issues related to business and human rights and connections to local tax laws? Are such State actors given statutory authority to address business-related human rights harms?

Judicial Grievance Mechanisms	Are the judiciary, including civil, criminal, and commercial courts, as well as employment and other administrative tribunals, and those with prosecuting authority informed and trained on issues related to business and human rights? Is the judiciary given statutory authority to address business-related human rights harms, including through civil, criminal, or administrative penalties for business-related human rights harms?
Non-Judicial Grievance Mechanisms	Does the State support and/or participate in non-judicial grievance mechanisms aimed at securing redress for business-related human rights harms, including through entities such as National Human Rights Institutions, OECD National Contact Points, or ombudsmen?
Legal Aid and Assistance	Does the State support legal aid and assistance that aims to address barriers in accessing remedy for business-related human rights harms?
Other Measures	Are there any other measures taken by the State to promote the investigation, punishment, and redress of business-related human rights harms?
<b>Implementation Status</b>	
<p><b>Sector Risk Assessment</b></p> <p>The FCO <i>Human Rights and Democracy Report 2014</i><sup>67</sup> describes human rights initiatives in various sectors by the UK Government including:</p> <ul style="list-style-type: none"> <li>• Garment Workers</li> <li>• Private Security Companies</li> <li>• Extraction of Minerals</li> <li>• Arms Exports</li> </ul> <p>The UK Government gives financial support to the Business Anti-Corruption Portal, which provides advice to businesses on corruption laws.<sup>68</sup></p> <p><b>Vulnerable Group Assessment</b></p>	

The Scottish Government funds several commissions to protect the rights of its most vulnerable citizens.

- Mental Welfare Commission for Scotland - a recent report<sup>69</sup> has been published on developing the human rights and mental welfare agenda in Scotland.
- Children and Young People's Commissioner Scotland.<sup>70</sup>

A number of recent reports investigate human rights issues in relation to particularly vulnerable groups:

- Pregnancy and Maternity<sup>71</sup>
- Cleaners Rights<sup>72</sup>
- Migrant Workers in the Fishing Industry in Scotland<sup>73</sup>

The Fair Work Convention was established by the Scottish Government in April 2015. This was a key recommendation of the Working Together Review published in August 2014.<sup>74</sup>

- The purpose of the Convention is to provide independent advice to the Scottish Government on matters relating to innovative and productive workplaces, industrial relations, fair work, and the Living Wage in Scotland.
- The Convention's Fair Work Framework was published in March 2016<sup>75</sup>. It states that fair work is work that offers effective voice, opportunity, security, fulfilment and respect; that balances the rights and responsibilities of employers and workers and that can generate benefits for individuals, organisations and society.
- In the development of its Framework the Convention undertook an extensive consultation and gathered views from approximately 200 stakeholders, including businesses, business organisations, trade union representatives and stakeholders from a number of sectors.

The Scottish Business Pledge is a voluntary commitment made by companies in Scotland to uphold some of the best in modern business practices, with the goal of boosting productivity, competitiveness, employment, fair work and workforce engagement and development. By making their Pledge companies demonstrate their commitment to key values such as paying the Living Wage, and to deliver them through their actions and future plans. As at 10 August, there were 282 Pledge companies listed on the Business Pledge website.

The Ministerial Strategic Group on Women and Work (SGWW)<sup>76</sup> was formed to monitor the recommendations from the Women's Employment Summit in September 2012, which held commissions on a variety of topics with the aim to improve women's participation in the workforce. Since then, rates of female employment have increased and Scotland's female employment rate has been among the highest in the EU. The gender pay gap in Scotland is also the lowest in the UK. However, although rates of female employment have improved since 2012, the economic position and opportunities for women have not. Women are more likely to

be in low paid work than men, and are also more likely to be underemployed both in terms of hours worked and skills levels. In February 2015, the remit and focus of the Strategic Group on Women and Work was therefore re-aligned to focus on actions that would significantly improve women's position in Scotland's labour market and, in turn, Scotland's economy. These actions have gone on to influence progress in areas such as childcare, flexible working, occupational segregation and women returning to the labour market.

Following publication of the Equality and Human Rights Commission research report into pregnancy and maternity discrimination, which found that up to 54,000 new mothers across Great Britain each year suffer from pregnancy discrimination, the Scottish Government has committed to work with the EHRC as part of continuing work with strategic partners to deliver a more inclusive workforce. The Cabinet Secretary for Fair Work, Skills and Training announced a series of measures, in liaison with EHRC, including the establishment of a working group to create guidelines for employers to ensure best practice in monitoring and reporting on pregnancy and maternity.

The Scottish Government is a partner in – and funds - the Family Friendly Working Scotland Partnership,<sup>77</sup> which includes Working Families (a leading UK work-life balance organisation), Parenting Across Scotland and Fathers Network Scotland, to support and promote the development of family-friendly workplaces across Scotland. The Scottish Government has awarded £178,700 funding to the Partnership for 2016-17.

The Scottish Government has committed to piloting a Returners Project to help bring experienced women back into the workplace after a career break. The Scottish Government will work with employers across the country to pilot the project, which will help women update their skills and knowledge and make a successful return to the workplace. This project is still in the early stages, however it is envisaged that it will target women with STEM related qualifications and especially in sectors experiencing skills shortages, for example digital.

The Early Years Workforce Review, led by Professor Iram Siraj, reviewed Early Learning and Childcare and Out of School Care Workforce in 2014-15 and examines a range of issues including skills and qualifications, career progression, recruitment and retention, and workforce planning. A report of that review was published on 1 June 2015, and the Scottish Government responded in December 2015.<sup>78</sup> The Scottish Government aims to take forward the key recommendations, along with its cross-sectoral expert group, the Workforce and Quality Group, in terms of delivering the expansion in hours of funded early learning and childcare from 600 to 1140 per year, by the end of the current Parliamentary session.<sup>79</sup>



In January 2015, the Independent Advisor on Poverty and Inequality, Naomi Eisenstadt, published her report on tackling poverty, *Shifting the Curve*, which provided a number of recommendations around three main areas: in-work poverty, housing affordability, and young people's life chances.<sup>80</sup>

- The First Minister recently confirmed early action on one of the report's recommendations by announcing £1 million of funding for up to six early learning and childcare trials to test different delivery models.<sup>81</sup>
- The trials will consider how to increase flexibility, better meet the needs of parents and children and meet local requirements.
- The results will be used as part of the expansion of childcare to 1140 hours a year.

The Scottish Government's Partnership for Change, launched on 25 June 2015, is a network of organisations and individuals who share an ambition to improve gender balance and diversity on boards.<sup>82</sup> It encourages public, private, and third sector organisations to set a voluntary commitment for gender balance on their boards of 50/50 by 2020.<sup>83</sup>

Scottish Union Learning (SUL) was established in 2008 to help support unions in offering learning opportunities to their members.<sup>84</sup> SUL works within the structure of the Scottish Trade Union Congress (STUC) to engage with trade unions and to develop a strategy for union-led learning in Scotland. The Scottish Government awarded SUL a grant of £2,262,000 in the financial year 2015-16 to support trade unions in accessing skills and lifelong learning opportunities that contribute to collective prosperity, fairness and equality for workers across Scotland.

The UK Government's Department for Work and Pensions provides guidance in relation to help and support for older workers.<sup>85</sup> The government appointed Dr Ros Altmann as its Business Champion for Older Workers in July 2014. As part of this role, Dr Altmann outlined a number of recommendations for improving the working lives of Britain's over 50s in a report to the government. These include: (i) age friendly policies in the workplace; (ii) mature apprenticeships; (iii) providing support for older women, who are more likely than male counterparts to become careers, and (iv) addressing age discrimination in recruitment.<sup>86</sup>

The Scottish Commission on Older Women's (SCOW) report *'Older Women and Work: Looking to the Future'* gives voice to the varied experiences of women in Scotland over the age of fifty, sets out a picture of policies and workplace practices that do not currently recognise the realities of modern society today, and contains some recommendations for governments, employers and trade unions. The Minister for Youth and Women's Employment met the chair of SCOW to discuss the recommendations in detail and proposed further discussions on the need for more robust data collection on the experiences of older women and employment. Scottish Government analysis of older workers in employment found that most barriers are due to health and/or care issues. Further work is being progressed to consider health support and further research into Pensioner Employment in Scotland is being undertaken.

The Carers (Scotland) Act was passed in February 2016<sup>87</sup> with the aim of contributing towards the improvement of unpaid carers' health and wellbeing, ensuring that they can continue to care, if they so wish, and have a life alongside caring. The Act contributes to the Scottish Government's vision of a healthier and fairer Scotland, and sits within the wider policy landscape including: integration of Health and Social Care; GP contract; new social security powers; and the Fair Work agenda.

In partnership with Carers Scotland, the Scottish Government launched the Carer Positive scheme in June 2014.<sup>88</sup> The scheme encourages organisations in Scotland to have fair, flexible, and supportive working practices for employees who are also unpaid carers, and to help ensure that carers can return to and remain in work alongside their caring role. The Government has set out in its manifesto that it will work to increase use of the Carer Positive scheme to cover at least 30% of employers in Scotland.

The UK Government established the Employers for Carers and Department of Health Task and Finish Group in 2012 to explore ways in which carers can be supported to combine work and care. In a report based on the findings of the group, a series of recommendations outlined: (i) the need for the UK Government and employer bodies to work together in order to promote the case for supporting carers; (ii) the promotion of flexible working hours; (iii) the provision of information that will help employers to understand how they can support carers in their workforce, and; (iv) the need for Government and local authorities to work with the care sector to further develop growth in the care and support market in a way that would enable people to combine work and caring.<sup>89</sup>

In 2010, the Scottish Government and COSLA (Convention of Scottish Local Authorities) developed a Supported Employment Framework to support disabled people who want to and are able to work.<sup>90</sup> Supported employment is an internationally recognised model whereby people learn while in employment, through the support of an employment support worker. The Scottish Government and partners, including the Scottish Qualifications Authority (SQA), have developed a Supported Employment Professional Development Award.<sup>91</sup> In addition, SUSE has, at the Scottish Government's request, produced a set of outcomes for supported employment, which can be used in the commissioning, design, and evaluation of supported employment services<sup>92</sup>.

The Scottish Government's Learning Disabilities Strategy (Keys to Life) outlines a commitment to further employment opportunities for people with learning disabilities.<sup>93</sup>

The Education Scotland strategy on English for Speakers of Other Languages (ESOL) for Adults in Scotland 2015-2020 outlines a commitment to provide work-based ESOL.<sup>94</sup> The Scottish Government has provided funding and support to enhance the participation of minority ethnic people in the labour market through the provision of ESOL employability programmes. Some of

these projects and initiatives are outlined in the Scottish Government report under the International Covenant on Economic, Social and Cultural Rights and include the joint delivery of a venture between Bridges Programmes, Glasgow City College and the Dundee International Women's Centre to develop an ESOL employability programme.<sup>95</sup>

The Scottish Government has commissioned a short project to review and update the recommendations of the 2010 *Scoping Study on Support Mechanisms for the Recognition of Skills, Learning and Qualifications of Migrant Workers and Refugees* within the current context. This work is expected to be completed in August 2016.

The Scottish Government's Youth Employment Strategy, *Developing the Young Workforce*, aims to improve the transition of all young people from education into productive employment. In response, Skills Development Scotland (SDS) published a Modern Apprenticeships (MA) Equalities Action Plan in December 2015.<sup>96</sup> This plan outlines the actions SDS will undertake to improve the participation of under-represented groups within the MA programme, with specific targets to increase MA participation by 2021 by minority ethnic groups, care leavers and disabled people, and to address gender imbalance. Some of these initiatives are outlined in the Scottish Government report under the International Covenant on Economic, Social and Cultural Rights.<sup>97</sup>

### **Police**

Police Scotland's Code of Ethics makes explicit reference to human rights in exercising police duties, including the responsibility of both upholding individual human rights in relation to police actions and ensuring that these human rights are not infringed by third parties. One of the aims of SNAP is to embed human rights in policing in Scotland<sup>98</sup>. Police Scotland is represented on SNAP's Leadership Panel and participates in two Action Groups to take forward work under the Plan.

### **Labour, Health and Safety**

The Scottish Government position statement under ICESCR<sup>99</sup> states:

*"Regulation of occupational health and safety is an issue reserved to the UK Government, as are issues relating to compensation. The Scottish Government provides access to information and advice on a wider range of issues relating to workplace health, safety and wellbeing through the Scottish Centre for Healthy Working Lives. The Scottish Government and the Centre collaborate with a wide range of partners, including the Health and Safety Executive (Partnership on Health and Safety in Scotland), trade unions and employers, to develop a health and safety system for Scotland aimed at producing appropriate outcomes for both employees and employers. In 2009 the Scottish Government published Health Works, a review of the Scottish Government Healthy Working Lives Strategy, which aims to improve health outcomes for workers by encouraging and supporting employers to promote health and wellbeing in and through the workplace".*

A range of organisations are responsible for health and safety at work in Scotland, including the Health and Safety Executive, Local Authorities, Crown Office and Procurator Fiscal Service (COPFS), Scottish Government, STUC.<sup>100</sup>

The HSE (Health and Safety Executive) notes that it is accountable under the ECHR.<sup>101</sup>

### **Judicial Grievance Mechanisms**

To become a qualified Scottish solicitor, applicants must have completed an accredited LLB (Bachelor of Laws). This degree must include teaching on human rights (although not specifically business and human rights).<sup>102</sup> These accreditations have changed over time and solicitors qualifying in other jurisdictions can also work in Scotland (under particular circumstances). So there is no guarantee that all solicitors/advocates/judges will have received human rights training, though when judges undertake induction and continuing training, human rights issues are raised within that training as appropriate to the subject area.

Currently the Human Rights Act 1998 only covers breaches of human rights by public authorities.

### **Non-Judicial Grievance Mechanisms**

The UK has an OECD National Contact Point.<sup>103</sup>

The Scottish Public Service Ombudsman can only look at the actions of public bodies (which includes, but is not limited to, state-owned enterprises, councils, the NHS, prisons, the Scottish Government, colleges and universities). Although its establishing legislation does not mention human rights, the Ombudsman has stated that human rights should fall within its remit.

### **Legal Aid and Assistance**

Legal Aid is available for parties wishing to raise claims under Scots law. No specific reference is made to human rights but if the business was contravening a Scottish law then action should be available.<sup>104</sup>

Assistance is not provided for human rights claims to the ECtHR.<sup>105</sup>

## **Gaps**

### **Vulnerable Group Assessment**

While there are a considerable number of initiatives aimed at identifying specific impacts on, and providing support to, vulnerable groups, there remains a number of on-going challenges. For example, the Scottish Commission on Older Women (SCOW) report stated that: “There is clear evidence that women in the 50–64 age group face the largest degree of gender-based wage differentials

in the labour market; and are likely to be in lower-skilled positions than their male counterparts”.<sup>106</sup> They call on the government to secure greater pay transparency that will contribute to a narrowing the gender pay gap, and to implement flexible working policies to assist older women with caring responsibilities.

An EHRC report, “Is Scotland Fairer? The state of equality and human rights 2015”,<sup>107</sup> outlined a number of on-going workplace equality issues, including (but not limited to): (i) women are less likely to be in work than men, and those women who are in work are less likely to be in senior positions and more likely to be in part-time work; (ii) unemployment rates increased more for disabled people than for non-disabled people between 2008 and 2013, and; (iii) unemployment rates are significantly higher for people from some ethnic minorities compared with white people.

A petition submitted to the Scottish Parliament urged the Scottish Government to investigate, among other things, the legal status and appropriateness of professional SFA (Scottish Football Association) clubs entering into contracts with children under 16 years of age, as well as ‘compensation’ payments between SFA member clubs for the transfer of young players under the age of 16 years.<sup>108</sup> In particular, the petition argued the ‘transfer market’ breaches the UN Convention on the Rights of the Child. The Public Petitions Committee consulted with a wide-range of stakeholders, including the Children and Young People’s Commissioner Scotland (CYPCS), to review the current registration process from a rights perspective. In undertaking a child rights impact assessment (CRIA), the CYPCS recommended that “professional football clubs need to take greater account of children’s rights within youth football” and called for changes in the registration process.<sup>109</sup> In March 2016, the Public Petitions Committee agreed to include the petition in its legacy paper for consideration by the Session 5 Public Petitions Committee and agreed to write to the Scottish Government regarding regulation.<sup>110</sup>

### **Non-Judicial Grievance Mechanisms**

See Principle 1.2 - OECD Guidelines for Multinational Enterprises: Amnesty International has noted the high rejection and referral of cases by the UK NCP and the high evidential threshold that the UK NCP imposes on complainants that goes beyond the requirements of the OECD’s Procedural Guidance.<sup>111</sup>

## **2. GUIDING PRINCIPLE 2**

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

### Commentary to Guiding Principle 2

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

### Implementation Status

2.2. Implementation of Recommendations from International or Regional Bodies - Has the State received and followed-up on recommendations from international or regional bodies, such as the UN Human Rights Council and UN treaty bodies, regarding steps to prevent abuse abroad by business enterprises domiciled within the State's territory or jurisdiction?

#### Indicators

Human Rights Council Recommendations

#### Scoping Questions

Has the State noted and accepted recommendations from the UN Human Rights Council, such as through the Universal Periodic Review (UPR) process, that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations and has the State monitored its implementation of the recommendations?

UN Treaty Body Recommendations	Has the State noted and accepted recommendations from UN treaty bodies that are relevant to preventing abuses abroad by companies domiciled within the State's territory or jurisdiction? How has the State followed up on these recommendations? Has the State monitored its implementation of the recommendations?
Other International or Regional Body Recommendations	Has the State noted and accepted recommendations by any other international or regional bodies regarding steps to prevent business-related human rights abuses abroad?
<b>Implementation Status</b>	
<p><b>UN Treaty Body Recommendations</b></p> <p>In the Committee on Economic, Social and Cultural Rights' list of issues in relation to the sixth periodic report of the UK,<sup>112</sup> the UK Government was asked to outline the measures being adopted to effectively enforce new regulations to prevent the blacklisting of trade union members, and to provide further information on the adoption and content of the Trade Union Bill and whether it contains any exemptions to the trade union rights contained in the Covenant. The UK Government response states that it is satisfied that the provisions of the Bill are compatible with the ICESCR and that existing legislation (The Trade Union and Labour Relations (Consolidation) Act 1992) prevents discrimination against trade union members in recruitment and dismissal of employees for reasons relating to trade union membership.<sup>113</sup> <a href="#">Further, new regulations in Scotland, to take effect from April 2016, make it a legal requirement that businesses which have been found by a court or tribunal to have blacklisted are excluded from bidding for public contracts.</a></p> <p>In the Committee on Economic, Social and Cultural Rights' list of issues in relation to the sixth periodic report of the UK,<sup>114</sup> the UK Government was asked to outline the measures taken to ensure that corporations respect economic, social and cultural rights throughout their operations, including when operating abroad. The UK Government response refers to the UK's action plan to implement the UNGPs and a range of other Instruments, including: the Bribery Act 2010; the Declaration on Fundamental Principles and Rights at Work, and the 8 core ILO Conventions ratified by the UK on labour standards; the OECD Guidelines for Multinational Enterprises; s.172(1)(d) Companies Act 2006 (Director's duty to promote the success of the company having regard to the impact of the company's operations on the community and the environment); Reports on Payments to Governments Regulations 2014; the Voluntary Principles Initiative; and the export control obligations.<sup>115</sup></p> <p><a href="#">The Scottish Government updates the United Nations on progress towards implementing and observing international human rights standards by contributing to the UK's formal response to UN treaty bodies and also publishing a separate position statement. In its</a></p>	



most recent separate position statement to the UN Committee on Economic, Social and Cultural Rights<sup>116</sup>, the Scottish Government provided information on measures taken to ensure that corporations respect economic, social and cultural rights throughout their operations, including when operating abroad. The report states: “*Scotland’s National Action Plan for Human Rights (SNAP) contains a commitment to develop a coordinated plan of action to implement the UNGPs by Scotland, building on the UK’s Action Plan. In line with internationally recognised best practice, the SNAP Better World Action Group, which includes, amongst others, the Scottish Government, Scottish Human Rights Commission, and Scottish Enterprise, has commissioned a national baseline assessment using a model developed by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable. This will provide an evidence base to underpin the development of the action plan*”.

## Gaps

### UN Treaty Body Recommendations

In its submission to the Committee on Economic, Social and Cultural Rights,<sup>117</sup> Unison, the public services union, noted that employment tribunals currently act as a barrier to remedy for a number of workers. In order to pursue a claim a worker must pay to file a claim and then again to proceed with the claim to a hearing before a judge. Employment tribunal fees were introduced by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, prior to which there were no fees. Workers must pay up to £250 to file a claim and up to a further £950 to proceed to hearing<sup>118</sup>. [The Scottish Government is currently proposing to abolish the fees in Scotland<sup>119</sup>](#), as indicated in the 2015 Programme for Government: “We will abolish fees for employment tribunals, when we are clear on how the transfer of powers and responsibilities will work”<sup>120</sup>. In addition, Unison also raised a number of issues, including the lack of compliance and enforcements around the National Minimum Wage.

A joint submission by Unite and Unison to the Committee on Economic, Social and Cultural Rights outlines trade union concerns relating to the Trade Union Bill and the absence of effective measures to tackle the blacklisting of trade union activists.<sup>121</sup> In relation to the Trade Union Bill, the submission notes that serious concerns have been raised by a range of organisations regarding the negative human rights impact of the bill – including the ILO Committee of Experts, the UK parliamentary human rights scrutiny body JCHR, and the Scottish Government. A particular concern is the Bill’s increased ballot threshold in important public services – a 40 per cent threshold. It was noted that such a high threshold is likely to impede the rights of workers in furtherance and defence of their occupational interests. Likewise, the removal of restrictions on the use of agency workers during strikes undermines workers’ right to strike.

The Trade Union Bill has now become the Trade Union Act 2016. A number of the measures outlined in the Bill were not included in the Act. Notably, the government withdrew plans to ban check-off, restrictions to facility time were not imposed and restrictions on the right to picket and protest were not imposed. Further, the removal of the ban on employers being able to hire agency staff to



provide essential cover during strikes has been dropped by the government for the time being. However, it is worth noting that a number of the Bill's measures remain intact, including: (i) that ballot mandates for industrial action must now include a simple majority turnout of eligible balloted members, and; (ii) in essential public services (health, education, fire, transport, nuclear), there will also be the requirement that at least 40% of all those entitled to vote must also vote for action, meaning that non-voters are treated as 'no' voters.

In relation to blacklisting, the Unite and Unison submission highlights a range of the difficulties faced by blacklisted workers – including the issue of agency workers who, under current rules, are not entitled to legal protection against blacklisting (or if they were employed by so-called 'umbrella companies'). [The Unite and Unison submission, as well as other reports, draw attention to the continued blacklisting of workers in Scotland and that the Scottish Government continues to issue contracts to known blacklisting companies. For example, the submission refers to the companies Balfour Beatty and Carillion, both of whom have Scottish Government contracts and both have found to have blacklisted Scottish workers<sup>122</sup>. However, it should be noted that a company which has been found to breach, or that has admitted to breaching The Employment Relations Act 1999 \(Blacklists\) Regulations 2010 must be excluded from public procurement exercises unless it can demonstrate to the satisfaction of the contracting authority that it has taken sufficient appropriate remedial steps. Further, the maximum period of exclusion allowed by Article 57\(7\) of the European Directive on Public Procurement is three years. Therefore, it may be acceptable to award contracts to companies that have been found to breach, or have admitted to breaching, Blacklisting Regulations, if sufficient remedial action has been taken, or the time limit on exclusion has expired.](#)

### 3. GUIDING PRINCIPLE 3

In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

### **Commentary to Guiding Principle 3**

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures—national and international, mandatory and voluntary—to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families. National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A

requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

### 3.1. Development and Enforcement of Relevant Laws and Regulations - What laws and regulations exist that directly or indirectly regulate business respect for human rights?

Indicators	Scoping Questions
Corporate and Securities Law	Has the State put in place corporate and securities laws and regulations to support ethical corporate behaviour and business respect for human rights, such as those relating to financial reporting, articles of incorporation, registration, corporate board, director, and stock exchange listing requirements?
Labour Law	Has the State put in place labour laws and regulations to ensure business respect for workers' rights?
Environmental Law	Has the State put in place environmental laws and regulations to ensure business respect for the rights of its citizens to health, a healthy environment, and livelihoods including, for example, clean water, clean air, and cultivatable land?
Property and Land Management Law	Has the State put in place land management laws and regulations to ensure business respect for the rights of its citizens, including the recognition of customary land rights and the incorporation of human rights considerations into environmental and social impact assessments and related

	licensing practices?
Health and Safety Law	Has the State put in place health and safety laws and regulations to ensure business respect for the physical and mental health of workers and communities?
Consumer Law	Has the State put in place consumer laws and regulations to ensure business respect for human rights and to promote consumer interest in the human rights impacts of purchased products and services?
Non-Discrimination Law	Has the State put in place anti-discrimination laws and regulations to support ethical corporate behaviour and business respect for human rights?
Tax Law	Has the State put in place tax laws and regulations to support ethical corporate behaviour and business respect for human rights?
Trade Law	Has the State put in place trade laws and regulations to support business respect for human rights within trade practices?
Privacy and Technology Law	Has the State put in place information security and privacy laws and regulations to support ethical corporate behaviour and business respect for human rights?
Disclosure and Reporting	Has the State put in place laws and regulations to support disclosure and reporting by corporations on human rights, labour rights, environmental impacts, corporate social responsibility, or other ethical issues?
Procurement Law	Has the State put in place laws and regulations to support the incorporation of human rights considerations into the procurement by the State of goods and services from the private sector?

Anti-Bribery and Corruption	Has the State put in place laws and regulations aimed at promoting anti-bribery and combatting corruption within and across governments?
Human Rights Defender and/or Whistleblower Protection	Has the State put in place laws and regulations aimed at supporting business respect for the rights of human rights defenders and/or whistleblowers?
Criminal Law	Has the State put in place criminal laws and regulations to ensure that corporate crimes that are related to human rights are investigated, prosecuted, and properly sanctioned?
Civil Law	Has the State put in place civil laws and regulations to ensure investigation, punishment, and redress of business-related human rights harms?
Other Law	Has the State put in place any other laws and regulations to ensure business respect for human rights?
<b>Implementation Status</b>	
<b>Corporate and Securities Law</b> Companies Act 2006 <ul style="list-style-type: none"> <li>• Companies House, the UK's Registrar of Companies, keeps details on directors, shareholdings, articles of association, annual return (including changes to company structure) and annual accounts.</li> <li>• s172 of the Act requires that directors in their actions for the company have regard for the following: <ul style="list-style-type: none"> <li>– long term consequences</li> <li>– company's employees</li> <li>– business relationships</li> <li>– community and the environment</li> <li>– reputation for high standards of business conduct</li> <li>– need to act fairly between members of the company</li> </ul> </li> <li>• Quoted companies must also provide reports on the environmental, employees and social, community and human rights consequences of their activities (s413 of Act).</li> </ul>	

## **Labour Law**

### **Employment Rights Act 1996**

- Source of the majority of workers rights
- All employees working for more than 1 month are given written particulars to their rights to holidays, pay, hours, sick-pay, notice periods, disciplinary and grievance procedures
- Employees cannot be unfairly dismissed from their roles for example by asking for their statutory entitlements, flexible working or for identifying health and safety breaches

### **Maternity and Parental Leave etc. Regulations 1999**

- Permits maternity leave for up to 52 weeks within a range of unpaid/paid criteria.
- Paternity leave is granted by Additional Paternity Leave Regulations 2010 (allowing up to 26 weeks if transferred by the mother)

### **Working Time Regulations 1998**

- Gives workers a statutory right of 5.6 weeks of holiday per year, 20 minutes rest per 6 hour shift and the right not to work more than 48 hours per week over a 4 week period.

### **National Minimum Wage Act 1998**

- Sets a minimum wage for workers over 21, between 18-21, and under-18 having finished full-time education.
- From April 2016, this will be supplemented by a National Living Wage for workers over 25.

### **Employment Act 2002**

- Extends maternity leave, grants paternity leave, and gives employees the right to request flexible working

### **Agency Workers Regulations 2010**

- After 12 weeks of working agency workers are given some similar protection to direct employees in relation to hours, pay, time-off for parenting and discrimination

### **Trade Union and Labour Relations (Consolidation) Act 1992**

- Provides employees rights to enter in unions for trade purposes and to engage in collective bargaining

#### Equality Act 2010

- States that it is unlawful to discriminate against employees for reasons of age, sex, race, religion or belief, sexual orientation, disability, pregnancy and maternity, gender reassignment, and marriage and civil partnership
- Employers must make reasonable adjustments for employees with a disability

#### **Environmental Law**

##### Control of Major Accident Hazards (1999) Regulations

- Requires businesses to take all necessary measures to prevent major accidents involving dangerous substances.

##### Environment Act 1995

- Outlines responsibilities to parties (public and private) for the remediation of land which has been contaminated by harmful practices, and established the Scottish Environment Protection Agency (SEPA).

##### Environment Protection Act 1990

- Regulates emissions to the environment through authorisation of prescribed substances or processes. Also makes provision in relation to the disposal of waste, contaminated land, statutory nuisances and litter. The definition of waste is given in Waste Framework Directive (75/442/EEC)

##### Pollution Prevention and Control Act 1999 and Pollution Prevention and Control (Scotland) Regulations 2012

- Ensures an integrated approach to the regulation of certain industrial activities by regulating emissions to air, water and land together to protect the environment and communities.

##### Radioactive Substances Act 1993 & Radioactive Substances Exemption (Scotland) Order 2011

- Regulation for the controlling and disposing of radioactive waste to protect the environment and communities.

##### Water Environment and Water Services (Scotland) Act 2003 & Water Environment (Controlled Activities) (Scotland) Regulations 2011

- Regulation of activities affecting the water environment (such as discharges, abstractions and impoundments) to protect the environment and communities.

#### Waste Management (Scotland) Licencing Regulations 2011

- Consolidates waste management licencing and exemption systems to regulate the handling, processing and disposal of waste to protect the environment and communities.

#### Flood Risk Management (Scotland) Act 2009

- Creates a more joined up and coordinated process to manage flood risk at a national and local level.

#### Regulatory Reform (Scotland) Act 2014

- Enables creation of new enforcement powers and a single authorisation framework for SEPA, as well as creating a new significant environmental harm offence and new powers for courts in relation to environmental offences. This will help create a “level playing field” for business and ensure a proportionate, risk-based approach, to environmental protection.

SEPA is Scotland's principal environmental regulator. Its purpose is to protect and improve the environment (including managing resources in a sustainable way) and, as far as possible, promote health and wellbeing and sustainable economic growth. SEPA enforces the majority of environmental regulations in Scotland.

#### The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011

- Prohibits the granting of planning permission without an EIA.

### **Property and Land Management Law**

#### Land Registration (Scotland) Act 2012

- Created a system of Register of Title in Scotland which identified the owner and provided a map of the land owned.

#### Land Reform (Scotland) Act 2003

- Gives everyone right of access to land for recreational and education purposes, as well as the right to cross land responsibly.

#### Land Reform Bill (Scotland) 2015

- Addresses land rights in Scotland across various issues.
- Increases the rights of inheritance for certain agricultural holdings.



## **Health and Safety Law**

### Health and Safety at Work Act 1974

- Sets out overarching duties for employers to ensure the health and safety of their employees, as far as reasonably practicable, at work. These duties are elaborated on in further regulations.

## **Consumer Law**

### Consumer Rights Act 2015

- States the quality of goods that consumers are entitled to (satisfactory). This includes the safety of the product, fitness for purpose and durability
- S49 of the act states that a person providing services must do so with the skills expected of someone in their trade and profession
- The Act prohibits unfair contract terms including excluded liability (particularly for death or personal injury).<sup>123</sup>

### Consumer Protection Act 1987

- Introduced strict liability for manufacturers whose product has caused harm, however, safety is relative and may be negated with warning and instructions. This has been further supplemented by General Product Safety Regulations.

### Common Law

- Requires that if warnings are given, then they must be adequate, precise and appropriately placed.<sup>123</sup>

## **Non-Discrimination Law**

### Equality Act 2010

- Prohibits discrimination based on the protected characteristics of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation
- Introduced the public sector equality duty i.e. public authorities must have regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not.

### The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

- Placed specific duties on listed Scottish public authorities to enable the better performance of the public sector equality duty, including:

- gather and publish employee diversity data, including on recruitment, development and retention; and use this information to better perform the equality duty;
- publish, every two years, gender pay gap information;
- publish, every four years, statements on equal pay that include information on occupational segregation – starting with gender and, from the second statement onwards, also covering disability and race;
- consider equality within award criteria and conditions in relation to public procurement;
- set equality outcomes every 4 years and report on progress every 2 years;
- undertake equality impact assessment of new or revised policies and practices;
- report every 2 years on how the public sector equality duty is being mainstreamed within the authorities' functions.
- In March 2016 the duties were amended so that listed public authorities with more than 20 employees (reduced from 150 employees) are now required to publish details of their gender pay gap every two years and statements on equal pay and occupational segregation every four years.

### **Tax Law**

*See Principle 1.5.*

### **Trade Law**

Export Control Agency<sup>124</sup>

- Requirement for businesses to apply for export licences for various trades (including arms) in certain countries. Potential human rights abuses are a justification for the refusal of the licences.

### **Privacy and Technology Law**

Data Protection Act 1998

- Personal data may not be used without permission unless for the interests of the data subject or for legal requirements.
- Personal data may only be obtained for lawful purposes (adequate, relevant, and not excessive).<sup>125</sup>

### **Disclosure and Reporting**

Management of Health and Safety and Work Regulations 1999

- Regulations require that risk assessments are carried out on risks that the businesses pose to health and safety.

Modern Slavery Act 2015

- Regulations require large businesses (with a turnover of above £36 million) to prepare a slavery and human trafficking statement for each financial year, setting out the steps the organisation has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business.

#### Companies Act 2006

- The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, introduced requirements that companies produce a strategic report which includes information on environmental, social and community, employee and human rights matters.<sup>126</sup>
- The reporting requirements differ according to company size:
  - small companies are exempt: small enterprises account for 43% of private sector employment and 26% of private sector turnover<sup>127</sup>
  - large companies have requirements relating to the reporting of principal risks and non-financial KPIs,
  - quoted companies must include: a description of their strategy and business model; to the extent necessary for an understanding of the company's development, performance or position, information on the main trends and factors likely to affect the future development, performance and position of the company's business, and information on employee, environmental and social, community and human rights matters; and a breakdown of employee numbers by gender and role.

#### EU Non-Financial Reporting Directive

- The European Union adopted changes to its Accounting Directive in 2014, which require public-interest entities with more than 500 employees to disclose non-financial information, including social and environmental matters, in the management report section of the annual report.<sup>128</sup> The Directive (2014/95/EU) came into force on 6 December 2014 and Member States have two years to transpose it into national legislation. Article 29a of the Directive contains the following provisions:

*“(1) Public-interest entities which are parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year shall include in the consolidated management report a consolidated non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:*

*(a) a brief description of the group's business model;*

*(b) a description of the policies pursued by the group in relation to those matters, including due diligence processes*

*implemented;*

*(c) the outcome of those policies;*

*(d) the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;*

*(e) non-financial key performance indicators relevant to the particular business.*

*Where the group does not pursue policies in relation to one or more of those matters, the consolidated non-financial statement shall provide a clear and reasoned explanation for not doing so”.*

- The UK began consulting on the implementation of the Directive in February 2016.<sup>129</sup> The consultation notes that The EU disclosure requirements “broadly reflect the UK narrative reporting framework introduced in October 2013”, although some differences are noted.

## **Procurement Law**

*See Principle 6.1*

### **Procurement Reform (Scotland) Act 2014**

- Regulations require that risk assessments are carried out on risks that the businesses pose to health and safety.
- The sustainable procurement duty contained in the Act requires that, before a contracting authority buys anything, it must think about how it can improve the social, environmental and economic wellbeing of the area in which it operates, with a particular focus on reducing inequality. Statutory guidance for public bodies on the sustainable procurement duty was published in March 2016.

### **The Public Contracts (Scotland) Regulations 2015**

- Where the public body finds that an organisation has breached environmental, social or employment law obligations then that organisation can be excluded from bidding.

## **Anti-Bribery and Corruption**

**Bribery Act 2010**

- Prohibits any form of advantage in functions of a public nature or relating to any business activity which is obtained

- through financial or benefit in kind bribes.
- Relates to matters undertaken both within and outwith the UK.<sup>130</sup>

### **Human Rights Defender and/or Whistleblower Protection**

#### Equality Act 2010

- Victimisation is unlawful i.e. treating somebody detrimentally because they have made a complaint or raised an issue concerning unlawful discrimination.

#### Public Interest Disclosure Act 1998

- Protects whistleblowers from detrimental treatment from their employers.

### **Criminal Law**

#### Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced the idea that corporations may be held accountable for deaths which occur as a result of their actions.

#### Human Trafficking and Exploitation (Scotland) Act 2015

- Makes it an offence in Scotland to hold a person in slavery or servitude.

### **Gaps**

#### **Labour Law**

See Principle 2.2 in relation to the negative human rights impact of the Trade Union Act 2016 and issues related to blacklisting.

There is some discrepancy between those classified as workers and those as employees: “Under the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA), the rights for ‘workers’ and ‘employees’ differ - with workers having no rights to claim unfair dismissal. While laws exist to protect employees...individuals employed by an agency or by an umbrella company are regarded as workers, and are therefore not covered and [are] not able to take a claim to an employment tribunal”.<sup>131</sup> Workers are not given a written statement of contract, have no entitlement to flexible working, redundancy or paternal leave.

Workers who have not finished full time education have no right to a minimum wage. The minimum wage for under-18s is currently £3.87; for 18-20 year olds it is £5.30; and for those between 20 and 25 it is £6.70. This is below the proposed National Living Wage of £7.20.

There is currently no law preventing zero hours contracts for workers.

Labour law is a devolved matter. Differences may occur in case law – in part because evidence rules are different in a Scottish context.

### Trade Law

While potential human rights abuses are a justification for the refusal of export licences, concerns have been raised that licenses continue to be granted to arms dealers who trade with regions where known human rights violations occur<sup>132</sup>.

3.2. Relevant Policies - Have policies that seek to foster business respect for human rights been adopted and publicly communicated by the State?

Indicators	Scoping Questions
NAPs	Has the State introduced and/or implemented policies to help facilitate business respect for human rights through the adoption of NAPs on business and human rights, corporate social responsibility, development, anti-discrimination, government transparency, women's rights, or human rights in general?
Sector-Specific Policies	Has the State introduced and/or implemented sector-specific policies to help facilitate business respect for human rights within particularly high-risk industries, such as the extractive, apparel, and other sectors?
Other Policies	Have other policies been adopted by the State that aim to foster business respect for human rights?

### Implementation Status

#### National Action Plans (NAPs)

*See Principle 1.3 on state implementation of UNGPs*

#### National Action Plan on Women, Peace and Security 2014-2017<sup>133</sup>

- The UK Foreign and Commonwealth Office has issued a NAP on protecting the rights of women in conflict zones, which covers their relationships with other Governments and the private sector.

#### National Action Plan on Open Government 2013-15

- National Action plan with 20 points to make government more transparent including: fiscal transparency; natural resource use; open data.
- [The Scottish Government particularly stated it would action a more open policy for procurement contracts.](#)<sup>134</sup>

#### Good Business - Implementing the UN Guiding Principles on Business and Human Rights 2013

- UK Action Plan for Business and Human Rights.
- [Scotland's National Action Plan for Human Rights 2013-2017.](#)<sup>31</sup>

### **Sector-Specific Policies**

The UK Government has stated its continued support for the guidance from a number of international sources including:

- International Code of Conduct for Private Security Providers<sup>135</sup>
- European Commission Good Practice Guidance for:
  - ICT Sector<sup>136</sup>
  - Employment and Recruitment<sup>137</sup>
  - Oil & Gas<sup>138</sup>
- The Equality and Human Rights Commission (EHRC) has produced guidance on discrimination for the following:<sup>139</sup>
  - Businesses selling goods, such as shops and petrol stations
  - Banks and other financial services providers
  - Builders, other trades people and companies providing similar services
  - Estate agents, letting agents and property management companies
  - Gyms, health clubs and sporting activity providers
  - Hairdressers, barbers and beauty salons
  - Hotels, restaurants, cafés and pubs

- Theatres and other entertainment venues
- Designers and manufacturers of goods – who are only covered in specific circumstances.

### 3.3. Corporate Reporting and Public Communications - What type of reporting and public communications by business enterprises on how they address their human rights impacts is required by law?

Indicators	Scoping Questions
Financial Reporting	Is corporate financial reporting required the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the economic performance of the reporting company?
Non-Financial Reporting	Is corporate non-financial reporting required and enforced by the State? Is the law clarifying that, in some cases, human rights impacts are “material” to the performance and operations of the reporting company?
Public Consultations	Are there legal requirements for companies to have public consultations before, during, and after the commencement of a major project that may impact local communities? Is there a requirement for the free, prior, and informed consent (FPIC) of impacted communities? Is there a mandatory public release of environmental and social impact assessments by companies?
Other Public Communications	Are there any other legal requirements on companies in terms of public communications?

#### Implementation Status

Under the Companies Act 2006 quoted companies must provide reports on the environmental, employees and social, community and human rights consequences of their activities which may affect their economic performance (s417 of Act).

[The Town and Country Planning \(Environmental Impact Assessment\) \(Scotland\) Regulations 2011](#) prohibit the granting of planning permission without consideration of an EIA for certain developments likely to have a significant effect on the environment.



3.4. Guidance and Incentives. Does the State provide guidance and incentives for companies in terms of business respect for human rights?	
Indicators	Scoping Questions
Guidance based on industry sectors, human rights issues and company size	Has the State developed guidance for businesses on respecting human rights that is appropriate to different industry sectors (for example, high-risk sectors such as extractives), particular human rights issues (for example, working conditions, discrimination), and different types of corporations (for example, MNEs (Multinational Enterprises), SMEs)?
Guidance on expected outcomes and best practice	Has the State provided indicators of expected human rights outcomes, information regarding relevant national laws and regulations, and examples of best practice and due diligence methods?
Incentives	Has the State provided incentives for business respect for human rights, such as favourable treatment following non-mandatory self-reporting by companies of human rights policies and practices?
Implementation Status	
<b>Industry Sectors</b> <i>See Section 3.2.</i>  <b>Labour</b> The Equality and Human Rights Commission has produced a Statutory Code <sup>140</sup> of practice for employers, which can be used in Tribunal cases.  <b>Transparency in Supply Chain</b> <ul style="list-style-type: none"> <li>The UK Government has provided guidance on the Transparency in the Supply Chain element of the Modern Slavery Act 2015.<sup>141</sup></li> </ul>	
Gaps	

Much guidance is available but there is no definitive way to determine what is authoritative and appropriate to specific business size, sector and situation. Some kind of government or non-governmental service might be useful.	
3.5 National Human Rights Institutions (NHRIs). Has the State formally recognized and supported the role of NHRIs in promoting implementation of the UNGPs?	
Indicators	Scoping Questions
NHRI Establishment, Recognition and Support	Has the State established a NHRI? If so, how was the NHRI established, and what kind of recognition and support does the State provide for the NHRI?
NHRI Focus on Business and Human Rights	Does the NHRI's mandate include business and human rights? Does the State finance NHRI activities within the field of business and human rights? Does the State support the NHRI in providing guidance on human rights to business enterprises? Does the State support the NHRI in monitoring the national business and human rights situation and to provide access to justice for victims of corporate-related human rights abuses? Has the role of the NHRI in promoting implementation of the UNGPs been formally recognized, and, if so, does the State support the NHRI in that role.
Implementation Status	

### **NHRI Establishment, Recognition and Support**

#### **Scottish Commission for Human Rights Act 2006**

- Created the Scottish Human Rights Commission, which was given powers to:
  - conduct inquiries into the policies and practices of public authorities
  - provide education, training and awareness raising, including publishing research
  - recommend changes to Scottish law, policy and practice
  - intervene in some civil court cases, where relevant to human rights and where there is a public interest
  - enter some places of detention, as part of an inquiry<sup>142</sup>
- The powers of the SHRC only relate to public bodies in Scotland working on devolved matters.

#### **Equality Act 2006**

- Created the Equality and Human Rights Commission (EHRC). The EHRC has sole responsibility for equality law across the UK and shares a human rights remit with the SHRC in respect of Scotland, where EHRC's powers are restricted to reserved human rights issues.
- The EHRC has to consult with the SHRC when proposing to conduct work on devolved human rights issues<sup>143</sup>.
- The EHRC has the power to issue guidance to both private and public bodies.

### **NHRI Focus on Business and Human Rights**

- *See Principle 1.3 on State implementation of UNGPs.*
- *See Principle 3.2 on National Action Plans.*

### **Gaps**

#### **NHRI Focus on Business and Human Rights**

- See Principle 1.3 on State implementation of UNGPs.
- See Principle 27.2 on the role of the NHRI and non-judicial mechanisms.

## **4. GUIDING PRINCIPLE 4**

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official

investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

#### **Commentary to Guiding Principle 4**

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

4.1. Businesses Owned or Controlled by the State - Does the State exercise special measures to support the human rights performance of State-owned or -controlled business enterprises?

**Indicators**

**Scoping Questions**

Human Rights Due Diligence Requirements	What types of human rights due diligence measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of human rights performance information in management reports to relevant State agencies)?
Supply Chain Management Requirements	What types of supply chain management measures by State-owned or -controlled business enterprises are required by the State? How do associated government departments ensure that effective supply chain management is being carried out? What type of scrutiny and oversight do such government departments have over these enterprises (for example, inclusion of supply chain information in management reports to relevant State agencies)?
Other Measures	Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?
<b>Implementation Status</b>	
<p>There are a range of different types of NDPBs in Scotland, including 4 public corporations: Caledonian Maritime Assets Ltd; Glasgow Prestwick Airport; Scottish Canals, and; Scottish Water. The functioning of NDPBs is aligned with the Scottish Government's National Performance Framework,<sup>144</sup> which includes a range of indicators, including living wage and the gender pay gap.<sup>145</sup> The Scottish Government provides a range of guidance to NDPBs on governance and accountability,<sup>146</sup> including a Non Executive Director Toolkit<sup>147</sup> and <i>On Board - Guide for Board Members of Public Bodies in Scotland</i>.<sup>148</sup> <i>On Board</i> refers to issues of diversity, equality and gender pay, and explicitly discusses human rights and the requirements of the Human Rights Act 1998. In relation to the latter, the guide notes, "Under the Human Rights Act 1998, it is unlawful for a public body to act in a way that is incompatible with a right under the European Convention on Human Rights".</p> <p>The NDPBs have to operate within the terms of the Scottish Public Finance Manual (SPFM) procedures for financial control, internal and external audit arrangements and effective risk management procedures.<sup>149</sup> Further, NDPBs must reflect the Scottish</p>	

Government's policy on "Best Value" which refers to "a contribution to sustainable development" as one the nine characteristics of the concept.<sup>150</sup>

In 2014, the Scottish Government held a development event for "Non-Executive Directors (NXDs) and those of its Executive Agencies, Non-Ministerial Departments and Executive Non-Departmental Public Bodies." Participants were encouraged to "take steps to tackle inequalities" and "ensure an ongoing and proactive approach to diversity".<sup>151</sup>

In 2015, the Scottish Government held, in partnership with the Non Departmental Public Bodies Equality Forum, an event on the Programme for Government Partnership for Change Gender Balanced Board Commitment (50/50 by 2020). Participants with a working interest in diversity were encouraged to identify collaborative working opportunities with the Scottish Government on the issues of board diversity and succession planning for Public Body Boards<sup>152</sup>.

In 2016, the Scottish Government held a Governance Development Event for Board Chairs, Board members and Chief Executives of Non Departmental Public Bodies. Participants had the opportunity to discuss and share experiences of Board Development and Board Diversity and Succession Planning<sup>153</sup>.

## Gaps

While the Scottish Government provides a range of guidance in relation to the governance and accountability of NDPBs, much of the guidance is for NDPBs in general and there appears to be an absence of guidance that is explicitly aimed at 'public corporations'. Further, while some of the guidance addresses issues that might fit into a human rights framework, much of the guidance does not explicitly address 'human rights'. For example, the National Performance Framework addresses equality and gender pay, but does not explicitly include human rights. Similarly, the SPFM does not explicitly contain measures related to human rights<sup>154</sup> and, while the Best Value guidance refers "a contribution to sustainable development", it does not explicitly refer to human rights. *On Board* is the only source that could be found that contains an explicit discussion of human rights in relation to the governance and performance of NDPBs.

4.2. Businesses Receiving Substantial Support and Services from State Agencies - Does the State exercise special measures to support the human rights performance of businesses receiving substantial support and service from State agencies (for example, export credit agencies, public banks, public pension funds, official investment insurance or guarantee agencies, development agencies, or development finance institutions)?

<b>Indicators</b>	<b>Scoping Questions</b>
Human Rights Considerations	Has the State required that businesses receiving substantial support and services from State agencies take into account human rights considerations?
Human Rights Due Diligence Requirements	What types of human rights due diligence measures by State-supported businesses are required by the State? How do associated government departments ensure that effective human rights due diligence is being carried out? What type of scrutiny and oversight do such government departments have over these businesses?
Other Measures	Has the State set out any other special measures to support the human rights performance of State-owned or -controlled business enterprises?
<b>Implementation Status</b>	
In 2014, the Scottish Government held a development event for "Non-Executive Directors (NXDs) and those of its Executive Agencies, Non-Ministerial Departments and, Executive Non-Departmental Public Bodies." Participants were encouraged to "take steps to tackle inequalities" and "ensure an ongoing and proactive approach to diversity" <sup>155</sup> .	

<b>5. GUIDING PRINCIPLE 5</b>
States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
<b>Commentary to Guiding Principle 5</b>
States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

5.1. Public Service Delivery - Does the State ensure that human rights are protected in situations where private enterprises provide for government services that may impact upon the enjoyment of human rights?

Indicators	Scoping Questions
Legislative or Contractual Provisions	Has the State adopted legislative or contractual protections for human rights in delivery of privatized services by the central or local government, for example, for the provision of services related to health, education, care-delivery, housing, or the penal system? Do such protections include a State-performed human rights impact assessment of the potential consequences of a planned privatization of provision of public services, prior to the provision of such services? Do public procurement contracts clarify the State's expectation that businesses respect human rights in delivering services and comply with human rights standards?
Awareness-Raising	What measures does the State take to promote awareness of and respect for human rights by businesses that the State commercially contracts with?
Screening	What kind of screening processes does the State have in place to promote business respect for human rights? Does the State engage in selective processes that give preferential treatment to companies that demonstrate respect for human rights? Does the State exclude from the bidding process those companies that have demonstrated poor respect for human rights (such as poor and hazardous working conditions, as well as excessive use of force or maltreatment of individuals receiving care)?



Monitoring and Oversight	Do relevant State agencies effectively oversee the activities of the enterprises that provide services on behalf of the State? Does the State provide for adequate independent monitoring and accountability mechanisms of the activities of the private providers? Does the State provide for specific oversight of high-risk services, such as those related to health and security?
Other Measures	Is the State a party to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict? If so, how does it incorporate commitments into national laws? Is the State party to the International Code of Conduct for Private Security Providers, and if so, how does it incorporate commitments into national laws and procurement processes? Is the State party to the Voluntary Principles on Security and Human Rights? If so, how does it incorporate commitments into national laws, including around the provision of public security? Has the State put any other measures in place to ensure that public service delivery by private enterprises does not have any negative human rights impacts?
<b>Implementation Status</b>	
<b>Legislative or Contractual Provisions</b>	
<p>Where private organisations conduct “functions of a public nature” (for example in prison services), case law<sup>156</sup> suggests that these organisations should be considered as hybrid public authorities, subject to s6(3) of the Human Rights Act 1998.</p> <p>The Equality Act 2010 Part 3 deals with the provision of services to the public and the exercise of public functions. It applies to private, public and third sector organisations.</p> <p>Health Care</p>	

#### Patient Rights (Scotland) Act 2011

- Outlined the rights of patients to access health care and required the Scottish Ministers to produce a Charter of Patient Rights and Responsibilities.

#### Mental Health Care

- The SHRC and Mental Welfare Commission for Scotland have produced a comprehensive report on how to better include human rights within current mental health legislation. It recommends that all organisations involved in mental health are aware of the human rights implications of their work. Error! Bookmark not defined.

#### Education

##### Education (Scotland) Act 1980

- All independent schools in Scotland must be registered. All schools must provide information on health and safety and child protection provisions.

#### Care Delivery

##### Public Services Reform (Scotland) Act 2010

- Requires that care providers are registered in Scotland. They must also complete annual returns on their service provision. These relate to rights but the link to human rights is not explicitly made.

#### Housing

##### Housing (Scotland) Act 2010

- Sets out the requirements to be registered as a social housing landlord. States that the Scottish Government will provide guidance on required standards. No direct link to human rights, however, creates the Scottish Housing Regulatory to promote the interests of tenants.

##### Housing (Scotland) Act 2014: Part 4, Letting Agents

- Will see the introduction of mandatory national registration for all letting agents in Scotland and introduce a new Statutory Code of Practice, which will include compliance with equalities legislation. This is expected to come into force in early 2018.

##### Private Housing (Tenancies) (Scotland) Act 2016

- The Act will see the creation of a new private residential tenancy in Scotland. The overall aim of the new tenancy is to

improve security and stability for tenants, balanced with safeguards for landlords, lenders and investors. It is anticipated that the new tenancy will commence in December 2017.

#### Penal System

The UK is a signatory to the UN Optional Protocol to the Treaty against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which requires a State to establish a National Preventive Mechanism (NPM) to monitor conditions in detention. OPCAT applies to places of detention, including those operated by private providers. [An independent body was created in 2015 to supplement the service provided by HMS Prison Inspectorate. Both bodies use input from the Scottish Human Rights Commission.](#)<sup>157</sup>

#### Awareness-Raising

##### Mental Health Care

[A review of good practice guides from MWCS found that the majority directly referenced human rights and all had an implicit reference to human rights of those receiving mental health care.](#)<sup>158</sup>

##### Education

[Guidance for Independent Schools](#)<sup>159</sup> links to the Scottish Human Rights Commission.

##### Care Delivery

[National Care Standards for Care Homes do reference human rights as relevant to the provision of care home services.](#)<sup>160</sup> The standards which apply to registered services are being reviewed and will have a defined focus on human rights and personal outcomes<sup>161</sup>.

##### Housing

[The Scottish Social Housing Charter](#)<sup>162</sup> uses rights-based language to communicate to social housing landlords their responsibilities. It makes reference to human rights.

#### Penal System

[In 2015 new prison standards were adopted by HMIPS \(Her Majesty's Inspectorate of Prisons for Scotland\),](#)<sup>163</sup> which state that private, public, and third party providers of prison services must adhere to prisoners' rights as promoted by human rights treaties.

## Monitoring and Oversight

In addition to specific regulatory bodies, the Scottish Ombudsman has stated that they will consider human rights in their reviews of public practices.<sup>164</sup>

### Health Care

The Mental Welfare Commission for Scotland was created in 1960 and has the statutory power to investigate both the Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000, and those providing care under those acts.

### Education

All Schools are subject to Education Scotland inspections.

### Housing

The Scottish Housing Regulator requires annual reports from social housing landlords on key indicators.<sup>165</sup> None of these key indicators explicitly links to human rights, however the links to safety, community and wellbeing can be identified within the indicators.

### Penal System

- Her Majesty's Inspectorate for Prisons Scotland produces an annual report on prisons in Scotland (Private and Public) including the protection of legal rights.
- In 2015 new prison standards were adopted by HMIPS which state that private, public and third party providers of prison services must adhere to prisoners' rights as promoted by human rights treaties.
- From 2015 the Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order came into force on prison reviews.
- The Scottish Human Rights Commission accompanies HMIPS to prison visits<sup>66</sup>.
- Under OCPAT, the UK government is required to create a National Preventive Mechanism (NPM) to monitor the provision of various services which limit liberty. In the UK the NPM has been delegated to various bodies. In Scotland those bodies are HMIPS; Her Majesty's Inspectorate of Constabulary for Scotland (HMICS); SHRC; MWCS; Care Inspectorate (CI); and Independent Custody Visitors Scotland (ICVS).

### Other Measures

The UK Government is supportive of the following:

- The Montreux Document
- International Code of Conduct for Private Security Providers
- The Voluntary Principles on Security and Human Rights
- In 2014/15 the UK Chaired the Voluntary Principles. As part of this chairmanship it undertook initiatives to communicate the principles to UK missions abroad and to UK companies.<sup>166</sup>

Scottish Enterprise applies an equality impact assessment (EQIA) methodology to all its programmes, policies and projects<sup>167</sup>. Following an awareness session with the Scottish Human Rights Commission, the impact assessment approach was altered to reflect human rights.

### Gaps

Scottish Commission Human Rights (Scotland) Act 2006

Can only review the policies and processes of Scottish public organisations but no explicit reference made to other organisations.

### Legislative or contractual services

The Scottish Government submission to the ICESCR<sup>12</sup> acknowledges that there is a lack of certainty regarding private providers of public services.

### Penal System

A recent report by the UK NPM found that staff in prison facilities (no mention of public/private) did not have sufficient knowledge of prisoners' rights.<sup>168</sup>

## 6. GUIDING PRINCIPLE 6

States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

### Commentary to Guiding Principle 6

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States—individually and collectively—with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.

#### 6.1. Public Procurement - Which types of requirements or incentives to respect human rights can be found in legislative measures or in terms of public procurement?

Indicators	Scoping Questions
Planning for Procurement Needs and Risks	Have State agencies decided whether their contractors must comply with specific human rights or protect against defined human rights harms as a contract obligation? If so, have State agencies made an effort to expand the scope of protection and clarify specific human rights definitions to resolve vagueness?
Providing Notice During Bid Solicitation	Do State agencies notify potential contractors when there is a significant risk of a human rights violation that undermines fair competition? Does such notice trigger specific disclosure and compliance obligations?
Screening and Selection	In addition to evaluating price and capacity, do State agencies evaluate whether potential contractors are responsible, based on integrity and business ethics and on compliance with domestic law that protects the safety and health of workers and communities? Do State agencies engage in selective or targeted public procurement, such as preferential award to discriminated groups (for example, ethnic minorities) or to companies working to achieve specific human right objectives (for example, gender equality)? Do State agencies require contractors to certify that they know their subcontractors, including specific locations of production or supply, and that they have management systems to ensure compliance? Do State agencies exclude companies with commercial contracts in high-risk countries or a bad human rights record from public procurement?

Award Stage	Do State agencies have criteria and sub-criteria for what constitutes the most economically advantageous tender, including human rights criteria? Have State agencies taken steps to clarify how human rights standards and policies might be used to form part of the award criteria for a particular contract? Do State agencies require contractors to disclose information on their supply chain, including specific subcontractors and the addresses of factories or sites of supply? Do State agencies confirm a contractor's assurances and required development of compliance plans during the award stage?
Contract Terms	Is the State taking steps to ensure that human rights requirements, material to the procured good or service, are a part of contractual performance clauses? Have State agencies inserted compliance obligations into contract terms? When a State agency identifies a risk of harm or human rights violations, does it authorize contract officers to insert into the contract an obligation to comply with the domestic law of the country of production or supply?
Auditing and Monitoring	Do State agencies have information systems to audit and monitor contractors to ensure that the contractor meets its performance or compliance obligations and does not adversely impact human rights? Do such systems respond to work complaints? Are such systems independent from, yet accountable to, the State?

Enforcement of Contract Terms and Corrective Action	Do State agencies dedicate staff to enforcement of the contract terms and provide them with detailed policies? Have State agencies put in place procedures to correct adverse human rights impacts identified, such as financial or other remedies if a contractor violates human rights? Do the procedures favour changing the behaviour of the contractor to improve their human rights performance rather than simply terminate the relationship? Do State agencies provide for due diligence as both a defence and as a remedy for breach of compliance standards?
Other Measures	Have State agencies put any other measures in place to ensure that public procurement complies with human rights protection?
Implementation Status	
<p><b>Legislation</b></p> <p><a href="#">Public Contracts (Scotland) Regulations 2015</a></p> <p><a href="#">Procurement (Scotland) Regulations 2016</a></p> <p><b>Planning for Procurement Needs and Risks</b></p> <p>The Independent Assurance process put into place during every stage of a project requires a review-based scrutiny of supply chain relationships.<sup>169</sup></p> <p>The Sustainable Procurement Duty is a key part of the Procurement Reform (Scotland) Act 2014 and requires a contracting authority to consider how it can improve the social, environmental and economic wellbeing of the area in which it operates, with a particular focus on reducing inequality, and to act on this in the procurement process.</p> <p>Section 9 of the Procurement Reform (Scotland) Act 2014 creates a duty on procurement contractors to uphold social wellbeing through sustainable procurement practices.<sup>170</sup> Under Section 9, a contracting authority can contribute towards improving the social wellbeing element of its sustainable procurement duty by adopting policies to promote fair work practices in relevant public contracts. <a href="#">Statutory guidance</a> was published on 5 October 2015 under the Procurement Reform (Scotland) Act 2014, providing guidance to public bodies on how to evaluate fair work practices, including the Living Wage when selecting tenderers and awarding</p>	



contracts.

These regulations are supplemented by a Joint Note on Environmental Issues in Purchasing produced by the Office of Government Commerce Department for Environment, Food & Rural Affairs in 2003 and the note on Social Issues in Procurement produced by the Scottish Procurement Directorate.<sup>171</sup> Social issues are defined as “a range of issues including equalities issues (i.e. age, disability, gender, race, religion and sexual orientation), training issues, minimum labour standards and the promotion of SMEs, including black and minority ethnic enterprises and the third sector including social enterprises”.

Section 29 of the Act also states that the guidance to be published on the awarding of contracts and tenders should specify how and in what ways the following factors will be taken into account when selecting contractors:

“(i) the recruitment, remuneration (including payment of a living wage) and other terms of engagement of persons involved in producing, providing or constructing the subject matter of the regulated procurement, and  
(ii) employee representation including trade union recognition”.<sup>172</sup>

### **Screening, Selection and Award**

Public Contracts (Scotland) Regulations 2015 list convictions due to bribery, corrupt practices, human trafficking and fraud among the criteria for rejecting potential contractors.<sup>173</sup> The Procurement (Scotland) Regulations 2016 contain similar grounds for exclusion.<sup>174</sup>

The note on Social Issues in Procurement produced by the Scottish Procurement Directorate reiterates that contractors “comply with all relevant employment legislation, maintain acceptable standards of health and safety and comply fully with all legal obligations, meet all equal opportunities legislation, respect the environment and take appropriate steps to ensure that they minimise their environmental impact”, among other regulations.<sup>175</sup>

Statutory guidance published by the Scottish Government on procurement requires contractors “who deliver public contracts to adopt policies which demonstrate how they comply with relevant employment, equality and health and safety law, human rights standards”.<sup>176</sup>

Child labour and other forms of human trafficking

Under [regulation 58\(1\)\(i\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(5\)\(a\) of The Procurement \(Scotland\) Regulations 2016](#), a contracting authority must exclude from the procurement process an economic operator convicted by final judgment of the criminal offence of child labour and other forms of trafficking in human beings, unless it proves that it has taken

measures sufficient to demonstrate its reliability despite the ground of exclusion.

### **Tax**

For EU-regulated contracts, under [regulation 58\(3\)\(a\) of The Public Contracts \(Scotland\) Regulations 2015](#), a contracting authority must exclude an economic operator from the procurement process where it has been subject to a binding decision (judicial or administrative) and which is found to be in breach of its legal obligations to pay tax or social security.

In respect of regulated contracts, under [regulation 58\(4\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(2\) of The Procurement \(Scotland\) Regulations 2016](#), a contracting authority can also exclude an economic operator where it establishes by any appropriate means that the economic operator has breached its tax or social security obligations. This means that where there is evidence which falls short of a judicial or administrative decision, a contracting authority still has the option of excluding an economic operator where it thinks it is appropriate to do so.

### **Blacklisting**

The Scottish Government has gone further than any other part of the UK to tackle blacklisting in public procurement. [Regulation 58\(3\)\(b\) of The Public Contracts \(Scotland\) Regulations 2015](#), and [regulation 9\(1\) of The Procurement \(Scotland\) Regulations 2016](#) require public bodies to exclude from competition any businesses which have been found to have breached [The Employment Relations Act 1999 \(Blacklists\) Regulations 2010](#), or which have admitted to doing so, until such time as they have taken appropriate remedial measures or a period of three years has elapsed, the longest period of exclusion allowed under EU law.

### **Environmental, social and labour laws**

Under [regulation 58\(8\)\(a\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(5\)\(a\) of The Procurement \(Scotland\) Regulations 2016](#), an economic operator may be excluded from the procurement process where a contracting authority can demonstrate that the economic operator has breached any obligations in the fields of social, environmental and labour law. This exclusion ground is discretionary and it is therefore for the contracting authority to decide if exclusion is appropriate.

### **Equality**

Specific duties made by Scottish Ministers at section 149 of the [Equality Act 2010 \(Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012\)](#) require contracting authorities to have due regard to whether both award criteria and contract performance conditions should include considerations to enable the better performance of the public sector equality duty. Scottish specific duties go further than the specific duties in England, which do not contain a procurement duty. These Scottish specific duties apply to public procurement covered by the [Public Contracts \(Scotland\) Regulations 2015](#).

The Scottish Government has a detailed interactive tool on procurement that can be used to support procurement across the Scottish public sector.<sup>177</sup> The tool contains advice regarding the use of a sustainability checklist to consider the potential social, economic, and environmental impact associated with procurement as well as fair work practices. The tool provides links to 'statutory guidance on the selection of tenderers and award of contracts - addressing fair work practices, including the Living Wage, in procurement'.<sup>178</sup> The tool also includes guidance on exclusion criteria (including, the fulfilment of obligations to pay tax, blacklisting and breaches of environmental, social and labour law) which are included as part of the European Single Procurement Document (ESPD).<sup>179</sup>

Under regulation 69 of Public Contracts (Scotland) Regulations 2015 any abnormally low bid must be rejected where it has been established that the tender is abnormally low because it does not comply with environmental, social or labour law. While this is not a requirement for regulated procurements below the EU contract threshold values, this approach is best practice.

### **Contract Terms**

Public Contracts (Scotland) Regulations 2015 stipulate that a contracting authority may lay down special conditions relating to the performance of a contract, including environmental, social, or employment-related considerations, provided that they are linked to the subject-matter of the contract.<sup>180</sup>

Under regulation 73 of Public Contracts (Scotland) Regulations 2015 a contracting authority can terminate a contract in the event of failure by the contractor to comply with its legal obligations in the fields of environmental, social or employment law. The Scottish Government's standard terms and conditions have been updated to provide for termination under these circumstances.

Scottish Procurement Policy Note SPPN 9/2016 was issued to promote measures in the Public Contracts (Scotland) Regulations 2015 and the Procurement (Scotland) Regulations 2016 aimed at ensuring contractors' compliance with environmental, social, and labour laws when performing public contracts, and provide contract conditions that contracting authorities may wish to adapt for their own use.

### **Auditing and Monitoring**

The Procurement Reform (Scotland) Act 2014 requires any contracting authority that spends £5 million or more in any financial year to have an organisational procurement strategy that sets out how it intends to ensure that its procurement activity delivers value for money and contributes to the achievement of the authority's broader aims and objectives, in line with Scotland's National

Outcomes. A contracting authority must, in its annual procurement report, record and publicise its performance and achievements in delivering its strategy. The first strategies are required by Dec 2016. A contracting authority must include as a minimum in its procurement strategy a statement of its general policy on:

- the use of community benefit requirements (section 15(5)(b)(i) of the Act)
- the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements (section 15(5)(b)(iii) of the Act)
- promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. (section 15(5)(b)(iv) of the Act)
- the procurement of fairly and ethically traded goods and services (section 15(5)(b)(v) of the Act)

According to the Scottish Procurement Policy Handbook (which is currently being updated), state agencies should establish systems for internal and external audit. There is no specific mention of these systems for the audit of human rights impacts<sup>181</sup>. The Scottish Government 'procurement journey' portal provides a range of tools to manage and monitor suppliers' performance, including environmental, social or employment-related performance. A Balance Scorecard is provided which includes corporate social responsibility as a criteria and the portal also notes that monitoring must "ensure that the practice of blacklisting does not occur in public contracts".<sup>182</sup>

## Gaps

Much of the Scottish Government's procurement policy and guidance addresses a number of issues that are linked to, or overlap with, human rights – such as equality and sustainable development. However, 'human rights' is not explicitly addressed in much of this guidance. For example, while the Scottish Procurement Policy Handbook contains a section on corporate social responsibility,<sup>183</sup> and refers to economic, social and environmental issues in public procurement and contains links to guidance on how to incorporate social issues in public procurement, none of this guidance explicitly refers to 'human rights'. Likewise the Scottish Government's guidance on 'best value' in public services includes the two cross-cutting themes of equality and sustainability - but does not include human rights.<sup>184</sup>

6.2. Other Commercial Activities - Has the State taken measures to promote awareness of and respect for human rights by other enterprises with which the State conducts commercial activities?

## Indicators

## Scoping Questions

Business Partnerships	Does the State take measures to promote respect for human rights among other businesses with which it engages in commercial relationships, such as through business partnerships for economic development and innovation (for example, growth funds, or strategic support for innovation in certain sectors, such as green energy or medical technology)?
<b>Implementation Status</b>	
The Scottish Government has introduced the Scottish Business Pledge, which is “a voluntary commitment made by companies in Scotland to uphold some of the best in modern business practices”. The Pledge has nine components: “paying the living wage, not using exploitative zero hours contracts, supporting progressive workforce engagement, investing in youth, making progress on diversity and gender balance, committing to an innovative programme, pursuing international business opportunities, playing an active role in the community, committing to prompt payment”. <sup>185</sup>	

## 7. GUIDING PRINCIPLE 7

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current practices, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

### Commentary to Guiding Principle 7

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself—where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighbouring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

#### 7.1. Guidance - Does the home State play a role in assisting both corporations and host States to ensure that businesses are not involved with human rights abuse in conflict-affected areas?

Indicators	Scoping Questions
<b>Host State Relationship</b>	Does the State seek to ensure that it is informed of the role of corporations headquartered within its jurisdiction in conflict-affected areas? Does the home State engage with the host State in ensuring that businesses are respecting human rights?
<b>Business Guidance</b>	Does the State provide guidance for companies operating in conflict-affected areas on what specific human rights issues that the companies should be aware of and pay specific attention to in their due diligence process (such as gender and sexual violence, discrimination, and contributing to conflict through finance)?
<b>Implementation Status</b>	
<p>Business and Human Rights Toolkit</p> <p>The Foreign and Commonwealth Office has created a toolkit on "How UK overseas missions can promote good conduct by UK Companies".<sup>186</sup> This includes advice on:</p> <ul style="list-style-type: none"> <li>• Working with host governments to promote human rights and encourage adoption of international treaties.</li> <li>• Raising awareness generally within a country.</li> <li>• Providing support to UK-based businesses within the host country.</li> </ul>	

The Foreign Office operates a webpage to offer advice to businesses operating overseas, containing links to high risk areas, economic reports, and human rights issues including:<sup>187</sup>

- List of current arms embargos and other trade restrictions<sup>188</sup>
- Crime and fraud prevention advice including due diligence advice for bribery<sup>189</sup>
- Annual updates on human rights issues in certain countries<sup>190</sup>
- Business Risk Reports on a range of countries including specific sections on human rights and business.

## 7.2. International Frameworks and Initiatives - Has the State officially supported or implemented international frameworks and initiatives on the private sector role in conflict-affected areas?

Indicators	Scoping Questions
Promotion of Initiatives	Does the State participate in and/or promote relevant initiatives (for example, the Voluntary Principles or the International Code of Conduct for Private Security Service Providers)?

### Implementation Status

*See Principle 5.1 and Principle 1.4.*

## 7.4. Gross Human Rights Abuses - Has the State put in place measures for addressing the risk of business involvement in gross human rights abuses?

Indicators	Scoping Questions
Early-Warning Procedures	Has the State put in place procedures to warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas?
Cross-Unit Cooperation	Has the State put in place efforts with the aim of fostering closer cooperation among its development assistance agencies, foreign and trade ministries, and export finance institutions in its capitals and within its embassies, as well as between these agencies and host State actors?



Civil and/or Criminal Liability	Has the State introduced civil or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses, including abuses outside of its territorial jurisdiction, as permitted by the UNGPs and international human rights law?
Multilateral Approach	Has the State engaged in multilateral approaches to prevent and address acts of gross human rights abuses? Does the State accept the jurisdiction of the International Criminal Court (ICC)?
<b>Implementation Status</b>	
<p>The Foreign Office has a Minister on Human Rights and a Human Rights Advisory Group whose purpose is to give the Foreign Secretary “the best possible information about human rights challenges; and for the Foreign Office to benefit from outside advice on the conduct of its policy”.<sup>191</sup></p> <p>The Bribery Act 2010 (see <i>Principle 3.1</i>) covers overseas actions.</p> <p><a href="#">Under the International Criminal Court (Scotland) Act 2001 the Scottish Government will arrest and surrender those wanted for trial in the ICC.</a></p>	
7.5. Role of Export Credit Agencies and Insurance Agencies - Does the State ensure that Export Credit Agencies and Insurance Agencies do not contribute or financially benefit from negative human rights impacts and abuse?	
<b>Indicators</b>	<b>Scoping Questions</b>
Special Measures	Has the State put in place special measures to ensure that export credit agencies and insurance companies are not contributing to, or financially benefitting from, negative human rights impacts and abuse? Are there rules and incentives for such institutions to take human rights impacts into consideration in their financing and investment procedures?
<b>Implementation Status</b>	
The UK Export Finance (UKEF) published its “Policy and practice on Environmental, Social and Human Rights due diligence and monitoring” in March 2016. The policy sets out the UKEF’s policies, commitments, roles, and responsibilities in respect of the	

management of ESHR risks and impacts in relation to the overseas projects it supports.<sup>192</sup>

#### Gaps

ECA Watch report that UKEF has backed major oil and gas developments, including BP's Baku-Tbilisi-Ceyhan pipeline, which have been associated with a range of human rights abuses, including violations in procedures governing expropriation of land. UKEF has also supported the Lesotho Highlands Water Project, which involved the forced displacement of affected communities.<sup>193</sup>

## 8. GUIDING PRINCIPLE 8

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

### Commentary to Guiding Principle 8

There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices—including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour—to be informed of and act in a manner compatible with the Governments' human rights obligations.

8.1. Policy Coherence - Have efforts been made within the State to support knowledge and understanding for human rights and business and the State duty?

#### Indicators

#### Scoping Questions

Clear Commitment	Has the State developed a firm written commitment to business and human rights, and has this commitment been communicated to governmental departments? Further, does this commitment help to clarify the role of different departments (for example, labour, business, development, foreign affairs, finance, or justice)?
Roles and Responsibilities	Has the State developed a clear division of responsibilities to help coordinate human rights and business issues between and across different government agencies and departments?
Resources	Has the State provided the responsible entity or office with adequate resources in terms of economic funding and political backing, in order for it to work actively in contributing to meeting the duty of the State to protect human rights within individual areas of responsibility and expertise?
Guidance and Training	Has the State developed guidance material and training to help clarify the roles of different departments in promoting and protecting human rights with regard to the role of business? Does this guidance include specific information on protection of human rights and how this relates to international and regional obligations and commitments (for example, UN, OECD, and regional obligations and commitments)? Does this guidance include specific information on the protection of human rights in trade, with an emphasis on the role of regional bodies and international organizations (for example, the WTO (World Trade Organisation), IFIs (WB, IFC, etc.), and regional IFIs (EBRD, EIB, etc.))? Further, does the guidance provide information on the roles and responsibilities across ministries or agencies (for example, enterprise, labor, development, foreign affairs, agriculture, environment and climate change, financial sector, health, information society policy, and national financial institutions and funds)?
<b>Implementation Status</b>	
<i>See Principle 1.3</i>	
<b>Trade &amp; Investment Strategy</b> In March 2016 the Scottish Government published <i>Global Scotland: Scotland's Trade and Investment Strategy 2016-2021</i> , which outlines various actions around trade, sustainable development and responsible business. Specific reference is made to Scotland's National Baseline Assessment:	

*“Following consideration of the baseline assessment and engagement with business and other stakeholders we will develop further proposals, including, for example:*

- Action to raise awareness among businesses, and those who advise them, of their legal obligations in relation to human rights;*
- Development of advice, training and support for Scottish businesses, in order to help identify and implement enterprise-appropriate actions which support and promote human rights in Scotland and overseas*
- Inclusion of key information on human rights responsibilities and good practice in to our Digital First approach to supporting exporters; and*
- Mechanisms to support sharing of good practice across the business community”<sup>194</sup>.*

The Strategy recognises that the EU’s ‘Trade for All’ Strategy commits to using trade policy to:

- Promote inclusive and sustainable growth in developing countries;
- Ensure responsible management of supply chains;
- Promote fair and ethical trade schemes;
- Promote and defend human rights;
- Fight against corruption and promote good governance.

## 9. GUIDING PRINCIPLE 9

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

### Commentary to Guiding Principle 9

Economic agreements concluded by States, either with other States or with business enterprises—such as bilateral investment treaties, free- trade agreements or contracts for investment projects—create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

## 10. GUIDING PRINCIPLE 10

States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

### **Commentary to Guiding Principle 10**

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

## 25. GUIDING PRINCIPLE 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

### **Commentary to Guiding Principle 25**

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and

understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

**25.1. Redress for Business-Related Human Rights Abuses - Has the State put in place measures to ensure redress for business-related human rights abuses?**

<b>Indicators</b>	<b>Scoping Questions</b>
Sanctions	Has the State put in place mechanisms that introduce civil liability, criminal sanctions, and administrative sanctions, such as fines or limited access to government funding, for human rights abuse
Financial or Non-Financial Compensation	Has the State put in place mechanisms that introduce compensation, such as fines or restoration of livelihoods, for human rights abuses
Prevention of Harm	Has the State put in place mechanisms that introduce processes for the prevention of harm, such as injunctions or guarantees of non-repetition, for human rights abuses?
Apologies	Has the State put in place mechanisms to promote apologies for human rights abuses?



State-Based Mechanisms	Has the State put in place judicial and non-judicial, criminal and civil mechanisms where grievances can be raised and addressed? Has the State identified and removed barriers (financial, legal, practical, and evidentiary) to accessing those mechanisms? Are such mechanisms available to address extraterritorial harms, as permitted by the UNGPs and international human rights law?
Non-State-Based Mechanisms	Has the State supported non-State based mechanisms
Other Measures	Has the State put in place other measures to ensure redress for business related human rights abuses?
<b>Implementation Status</b>	
<p><b>Sanctions</b></p> <p>It is important to recognise that there is a distinction between a sanction (such as a fine) and a remedy to the victim – as McCorquodale (2015, p.3) notes, “a fine or other sanction against a business enterprise... without any reparation to the victim is <i>not a remedy...</i>”.<sup>195</sup></p> <p>The UK Government regularly employs economic sanctions as a ‘political trade tool’. The Office of Financial Sanctions Implementation (OFSI), which is part of the HM Treasury, has overall responsibility for the UK’s implementation and administration of international financial sanctions in effect in the UK. The OFSI maintains a consolidated list of asset freeze targets designated by the United Nations, European Union, and the United Kingdom.<sup>196</sup></p> <p>Under the Public Contracts (Scotland) Regulations 2012, which implement EU procurement directives, a public authority is required to exclude a company from the tendering process if the company has committed any of a limited range of specific offences. A public authority is also, optionally, permitted to exclude a company on a number of other grounds, including “grave professional misconduct”.<sup>197</sup></p> <p>The Scottish Government provides guidance on the exclusion from public contracts of companies that engage in blacklisting. It states: “Any company which engages in or has engaged in the blacklisting of employees or potential employees should be considered to have committed an act of grave misconduct in the course of its business and should be excluded from bidding for a</p>	

public contract unless it can demonstrate that it has taken appropriate remedial steps”.<sup>198</sup>

## **State-Based Mechanisms**

### **Tort/Delict**

The abuse of a human right by a business enterprise is likely to arise under the tort of negligence (England, Wales and Northern Ireland) or delict (Scotland). In order to establish a claim in negligence, the claimant has to satisfy a number of requirements, including:

- That the defendant owed a duty of care
- The defendant breached that duty of care
- The breach of the duty of care by the defendant caused the damage the claimant has suffered, and
- That the damage caused was not too remote.

The law may impose a duty of care on a parent business in relation to the health and safety of its subsidiary employees.<sup>199</sup>

McCorquodale (2015, p.3) outlines a number of statutory torts that can be used against a business enterprise that has acted negligently:<sup>200</sup>

### **Employers Liability (Defective Equipment) Act 1969**

- If an employee suffers injury as a result of a defect in equipment supplied by the employer and the defect is due to the fault of a third party, the injury is deemed attributable to the negligence of the employer.

### **Occupiers' Liability (Scotland) Act 1960**

- An ‘occupier’ of land/premises has a duty to show care towards people on that land so that people do not suffer injury or damage.

### **Environmental Protection Act 1990**

- Can extend to nuisances.<sup>201</sup>

### **Contract**

The UK Corporate Manslaughter and Corporate Homicide Act 2007, (“the 2007 Act”) created a new offence of corporate homicide

in Scotland (corporate manslaughter elsewhere in the UK).

Most of the Act came into force on 6 April 2008. An organisation is guilty of the corporate homicide offence if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a duty of care to the deceased.

Criminal liability lies with the organisation, however a substantial part of the breach must have been in the way activities were managed by senior management. "Senior management" is defined to mean persons who play significant roles in making management decisions across the whole or a substantial part of the organisation's activities, or in actually managing the whole or a substantial part of the organisation's activities. The structure of any organisation will need to be considered on a case by case basis to determine if the failure has occurred at a sufficiently senior level.

Although the Act does not create a new offence for individual directors who contribute to deaths, they can already be charged with culpable homicide or with other offences under the Health and Safety at Work etc. Act 1974. The Act left the Scots common law of culpable homicide unaltered.

The new offence applies where the organisation concerned owed a duty of care in the law of negligence to the victim. This may include duties of care owed to employees, as an occupier of premises, in connection with supply of goods and services, construction and maintenance and commercial services, and the use of plant, vehicles etc., as set out in section 2 of the Act.

An organisation guilty of the offence will be liable to an unlimited fine. The Act also provides for courts to impose an order requiring the organisation to remedy the breach, or a publicity order requiring the organisation to publicise details of its conviction and fine.

In September 2011, the final provisions in the 2007 Act came into force so that custody providers, such as prisons, secure hospitals, police and juvenile detention facilities, are covered by the corporate homicide offence.<sup>202</sup>

The Bribery Act 2010 is UK-wide legislation sponsored by the UK Ministry of Justice and applies across all of the UK, including Scotland. The Act reformed the criminal law in Scotland as well as the rest of the UK, providing a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad.

The principal provisions of the Act include:<sup>203</sup>

- two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to

receive or accepting of a bribe (passive bribery) (sections 1 and 2);

- a discrete offence of bribing a foreign public official in order to obtain or retain business or an advantage in the conduct of business (section 6);
- an offence which can be committed by commercial organisations which fail to prevent bribery committed on their behalf (section 7);
- extra-territorial jurisdiction to enable the prosecution in the UK of bribery committed abroad by persons ordinarily resident in the UK as well as British nationals, and UK corporate bodies; and
- raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment. The maximum sentence for an offence committed by a corporate body is an unlimited fine.

Two further pieces of legislation create criminal offences that can be committed by business enterprises:<sup>204</sup>

- The Serious Crime Act 2007, which includes business activity offences
- The Modern Slavery Act 2015 empowers a court to discharge a slavery and trafficking reparation order against a convicted person/business enterprise – which requires the payment of compensation to the victim for any harm.

### Employment Law

The primary judicial remedy in the UK in this area is provided by employment tribunals. Claims for which a remedy can be sought include:

- Unfair dismissal
- Payment claims e.g. for unpaid wages, salary and redundancy payments
- Breach of contract
- Working conditions, including reasonable adjustments to help disabled employees in the work place
- Protection from discrimination<sup>205</sup>

The Equality Act 2010 legally protects people from discrimination in the workplace. Under this Act, it is against the law to discriminate against anyone because of:

- age
- gender reassignment
- being married or in a civil partnership
- being pregnant or having a child

- disability
- race, including colour, nationality, ethnic or national origin
- religion/belief or lack of religion/belief
- sex
- sexual orientation

Remedy may be sought either through a 'mediation' or 'alternative dispute resolution' route, or by making a claim in a court or tribunal.

### **Non-State-Based Mechanisms**

The OECD Guidelines for Multinational Enterprises include guidance on human rights, due diligence and business relationship management.<sup>206</sup> States adhering to the OECD Guidelines (which includes the UK) are required to set up National Contact Points (NCP) to promote and implement the guidelines and to contribute to the resolution of issues that arise from the alleged non-observance of the guidelines. The UK NCP is based in the BIS.

There is a wide range of ombudsman offices created by legislation, including the Scottish Public Services Ombudsman (SPSO). These offices only have the power to address complaints against the conduct of a business enterprise if the business is performing a public function. The SPSO can take complaints about arms-length external organisations (ALEOs).<sup>207</sup>

See Principle 27.2, which outlines the role of NHRI and non-judicial mechanisms.

### **Gaps**

#### **Sanctions**

It has been suggested that neither Scottish regulations, nor the EU directives they are based on, provide a clear definition of "grave professional misconduct." As a result, public authorities have been reluctant to invoke this provision of procurement law. It has been suggested that the lack of clarity on this issue "led to the General Register Office of Scotland giving a key contract for the 2011 Scottish census to CACI, a company involved in human rights abuses at Abu Ghraib prison in Iraq".<sup>208</sup>

Unite, the union, has obtained evidence that the blacklisting of workers continues in Scotland and that the Scottish Government continues to issue contracts to known blacklisting companies. It reports, "A recent example is the construction of the Aberdeen Western Peripheral Road, a Scottish Government project being undertaken by Balfour Beatty and Carillion. Both companies were found to have blacklisted Scottish workers and have not taken remedial action or accepted their role in blacklisting workers".<sup>209</sup>

### State-based Mechanisms

As McCorquodale (2015, p.20) notes, “Most criminal offences do not extend to a business enterprise, as they are designed for natural persons and not legal persons. Part of the reason for this is the difficulty of proving the intent (*mens rea*) of a business in contrast to that of an individual”. To date only a few corporations have been convicted and fined.<sup>210</sup>

Employment tribunal fees were introduced by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, as prior to that time there were no fees. The current total to the claimant of an issue fee and a hearing fee is between £390 and £1,200, depending on the nature of the claim.<sup>211</sup> The Scottish Government is currently proposing to abolish the fees in Scotland.<sup>212</sup>

### Non State-Based Mechanisms

OECD Watch reports that the UK NCP received 72 complaints between 2001 and 2015. This was the largest number of any NCP and comprises almost 30% of all NCP complaints worldwide. There are a number of barriers to remedy through the NCP route. These include: (i) there is no appeal against the initial assessment of the NCP not to proceed with a claim; (ii) the NCP may lack the power to compel a business in relation to which a complaint has been raised to produce relevant documentation; (iii) there exists a high standard of proof on the complainants; and (iv) decisions are not binding and businesses may choose to ignore the NCP’s recommendations.<sup>213</sup>

25.2. Roles and Responsibility within States - Has the State defined clear roles and responsibilities within the State on access to effective remedy?

Indicators	Scoping Questions
Competent Authorities	Has the State defined competent authorities to investigate allegations of business-related human rights abuse? If so, are these authorities equipped with the knowledge necessary in order to attribute the abuses to the relevant redress mechanism?

### Implementation Status

See Principle 27.2, which outlines the role of NHRI and non-judicial mechanisms.

Modern Slavery Act 2015 – competent authorities are the UK Human Trafficking Centre (UKHTC), within the National Crime Agency, and the Home Office.<sup>214</sup>

The HSE has been designated as the competent authority for the purposes of a number of European laws, including the prevention

of major industrial accidents (jointly with the Environment Agency and the Scottish Environment Protection Agency).<sup>215</sup>

Control of Major Accident Hazards (COMAH) regulations ensure that businesses, “Take all necessary measures to prevent major accidents involving dangerous substances...limit the consequences to people and the environment of any major accidents which do occur”. COMAH 2015 is enforced in Great Britain by the COMAH competent authority (CA). This comprises five public bodies working in partnership:<sup>216</sup>

- the Environment Agency (EA);
- SEPA;
- Natural Resources Wales (NRW);
- the HSE; and
- the Office for Nuclear Regulation (ONR).

The Offshore Safety Directive Regulator (OSDR) is the CA responsible for implementing the requirements of the EU Directive on the safety of offshore oil and gas operations.<sup>217</sup>

25.3. Public Information-Sharing and Accessibility - Has the State developed measures through which to inform about grievance mechanisms available, grievances received, and relevant processes?

Indicators	Scoping Questions
Public Information on the Mechanism	Has the State made efforts to promote public awareness and understanding of remediation mechanisms, including how they can be accessed and their accessibility? Does the State inform about the outcome of grievances and actions for follow-up when systemic issues are identified?
Accessibility	Does the State ensure that the mechanisms are available to all affected stakeholders (including, for example, women, peoples with disabilities, children, and indigenous peoples)? This includes providing services such as legal aid and legal counseling, as well as support to, for example, the NHRI, CSOs (Civil Society Organisations), or trade unions that work to ensure greater accessibility within grievance mechanisms.

## Implementation Status

Information on Scottish Government policy related to human rights is available at: and promoting human rights at <http://www.gov.scot/Topics/Justice/policies/human-rights>

The above link provides further guidance and information on:

- Scotland's National Plan<sup>218</sup>
- Respecting human rights domestically<sup>219</sup>
- Promoting human rights internationally<sup>220</sup>
- Human Rights Act<sup>221</sup>
- Scotland Act 1998<sup>222</sup>
- Scottish Commission for Human Rights Act 2006.<sup>223</sup>

The Scottish Government initiative, *One Scotland*, provides a platform to support the “the full potential of human rights in all areas of life”. The platform provides guidance on a wide range of sources of guidance on seeking remedy.<sup>224</sup> The *Fly the Flag* campaign forms part of the *One Scotland* programme, and aims “to raise awareness of the benefits of human rights for everyone”.<sup>225</sup> The dedicated web page for the *Fly the Flag* campaign includes links to sources of advice on seeking remedy – including the Equality Advisory and Support Service, Citizens Advice Scotland, the Scottish Public Service Ombudsman, the Law Society and the Legal Aid Board.<sup>226</sup>

The SHRC, while not able to support individual cases, provides a range of resources on human rights, including on seeking remedy.<sup>227</sup>

The Equality Advisory Support Service (EASS) provides advice and assistance on issues relating to equality and human rights across England, Scotland and Wales.<sup>228</sup> The EASS website provides an extensive list of further sources of support, including:

- Citizens Advice Bureau: [www.cas.org.uk](http://www.cas.org.uk)
- Law Society for Scotland: [Lawscot.org.uk](http://Lawscot.org.uk)
- Scottish Child Law Centre: [www.sclc.org.uk](http://www.sclc.org.uk)
- Ethnic Minority Law Centre: [www.emlc.org.uk](http://www.emlc.org.uk)
- Scottish Legal Aid Board: [www.slab.org.uk](http://www.slab.org.uk)
- Scottish Public Services Ombudsman: [www.spso.org.uk](http://www.spso.org.uk)
- Scottish Information Commissioner: [www.itspublicknowledge.info](http://www.itspublicknowledge.info)



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## 26. GUIDING PRINCIPLE 26

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

### Commentary to Guiding Principle 26

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee

structures), or other means;

- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

26.2. Barriers for Access to Judicial Remedy - Has the State taken measures to ensure that there are no barriers to access to judicial remedy for addressing business-related human rights abuses?

**Indicators**

**Scoping Questions**

Legal Barriers	Has the State taken measures to ensure that there are no legal barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring that it is possible to hold corporations accountable under domestic criminal and civil laws, meaning that liability exists under the law; (2) ensuring that all members of society can raise complaints, including indigenous peoples, migrants, women, and children, and are afforded the same legal protection as for the wider population; (3) ensuring that extraterritorial harms can be addressed within the courts, as permitted by the UNGPs and international human rights law; and (4) ensuring that issues such as conflicts of law, statutes of limitations, parent company liability, and standards of liability do not result in barriers to victims of business-related human rights harms in accessing the courts?
Practical and Procedural Barriers	Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being brought before the courts? This includes: (1) ensuring financial support, (2) providing legal representation or guidance, (3) providing opportunities for class-actions and multi-party litigation; (4) allowing for recovery of attorneys' fees; (5) preventing retaliatory actions against claimants; (6) reforming access to evidence; and (7) providing training for prosecutors and judges

<b>Social Barriers</b>	Has the State taken measures to ensure that there are no social barriers to prevent legitimate cases from being brought before the courts? This includes: (1) addressing imbalances between the parties, (2) targeted awareness-raising among vulnerable groups (for example, women, indigenous people, and children), (3) availability of child-sensitive procedures to children and their representatives, (4) legal aid and other type of assistance, (5) efforts to combat corruption, and (6) protection of human rights defenders.
<b>Implementation Status</b>	
<p>McCorquodale (2015) provides an overview of the procedural barriers related to obtaining and gathering evidence in relation to access to remedy for victims of human rights abuse by business enterprises.<sup>229</sup></p> <p>In relation to evidence, McCorquodale (2015) notes that the corporate structure of business enterprises can make it difficult to identify the correct defendant. Two difficulties arise: (i) a parent and subsidiary are separate legal entities, meaning that a parent is not generally liable for the actions of a subsidiary; and (ii) if parent and subsidiary are incorporated in different States, they will have different nationalities under international law.</p> <p>In relation to the first difficulty, it has been noted that the courts are reluctant to lift the ‘corporate veil’, and this “represents a barrier to accessing remedies”.<sup>230</sup> Further, the corporate structure of businesses enterprises may present a barrier in relation to evidence because the disclosure of relevant documents will be important for claimants “in establishing which corporation had the requisite control of the particular corporation that abused human rights” (McCorquodale, 2015, p.18). “However, as the court has discretion in ordering disclosure, there are two potential risks: that the claimant will not ask for relevant documents as they are unaware that they exist; and that the court may exercise its discretion not to order disclosure. As the courts have noted, without disclosure of documents there is a ‘very great risk that the claimants will be contesting jurisdiction at an unfair disadvantage” (McCorquodale, 2015, p.18).</p> <p>Further, while McCorquodale (2015, p.23) acknowledges that some legislation specifically creates corporate criminal liability, relatively few cases have actually been brought and “none of these concerned actions occurring overseas”. Prosecution must be brought by an enforcement agency (such as the Crown Prosecution Service, the Serious Fraud Office and the Health and Safety Executive). McCorquodale (2015, p.24) notes that, “In all cases to date when inquiries about the bringing of a criminal claim against</p>	

a business enterprise for human rights abuses overseas have been made, no action has been taken as the various relevant prosecuting authorities refused to investigate. It is unclear if this lack of action on the part of the enforcement agencies is due to lack of resources to investigate these matters or a lack of specialist knowledge of this area. In any event, it creates a major barrier to a remedy for the victims”.<sup>231</sup>

The Bribery Act contains barriers in relation to parent and subsidiary enterprises (McCorquodale, 2015).<sup>232</sup> The guidance on the Bribery Act states: “A bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company”.<sup>233</sup>

In a briefing on the UK’s commitment to business and human rights, the Business and Human Rights Resource Centre outline a number of practical and procedural barriers to access to remedy.<sup>234</sup> In relation to legal fees, the briefing notes:

*“In 2012 the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) was passed, which was enacted with the stated aim of bringing down legal aid costs and discouraging unnecessary litigation. Unfortunately this act also contained provisions affecting Conditional Fee Agreements (CFAs) that critics argue significantly undermine the ability of victims of corporate abuses abroad to achieve justice.... The LASPOA made two main changes to CFAs that make accessing justice more difficult for victims:*

- The success fee (still 100% except in cases of personal injury, capped at 25%) must now be paid from the compensation awarded to the victims of abuse.*
- The costs incurred by the winning side’s legal team, which are recoverable from the losing side, must now be “proportionate” to the amount awarded in compensation.*

*...This is compounded by the Rome II Regulation, which provides that compensation awarded in UK courts must be at the levels awarded by the local courts. This makes it increasingly unlikely that the UK legal costs will be determined as proportionate when compared to compensation awarded at a local level”.<sup>235</sup>*

The UK introduced fees for bringing an employment tribunal claim through the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013. The current total to the claimant of an issue fee and a hearing fee is between £390 and £1,200, depending on the nature of the claim.<sup>236</sup> [The Scottish Government is currently proposing to abolish the fees in Scotland.](#)

[In November 2014, the Law Society’s Legal Aid Committee published a discussion paper on legal assistance in Scotland<sup>237</sup>. The discussion paper notes declining expenditure on legal assistance in real terms and that the Scottish Government’s budget](#)

allocation has failed to keep pace with inflation.

Scotland has a legal aid system that maintains wide access to justice for both criminal and civil cases. It is a 'demand led' fund and has a high eligibility rate. This means that, although there is a budget set for the Legal Aid Fund, this is not cost limited and all who meet the legibility criteria will have access to publicly funded legal assistance. In times of financial constraint there is a need to make most effective use of the overall legal aid budget, and the Scottish Government has asked the Scottish Legal Aid Board to identify opportunities to streamline, simplify and modernise the legal aid system (<http://slab.org.uk/providers/reforms/other/Streamlining.html>).

Further, the Law Society discussion paper notes that the legal assistance system is overly complex, and quote the response made by the consumer group Which? to the Scottish Civil Courts Review launched in 2007: "The system is currently too complex and difficult for people to find their way through. It is too formal and often so prohibitively expensive that this must act as a barrier for many sections of the community looking for justice<sup>238</sup>."

In a research report aimed at identifying gaps and priorities for Scotland's National Action Plan, the SHRC highlights a number of barriers in relation to legal aid – some of which could be considered relevant to access to remedy for victims of human rights abuse by business enterprises<sup>239</sup>. For example, in relation to legal aid and the public interest, whereby public interest litigation concerns the wider public (and not only the individual or organisation involved), the report notes: "Traditionally, in order to bring a case before a Court in Scotland one must have 'title and interest' to do so". As an example of the barrier that Scottish system of 'title and interest' presents, the report refers to the case of *Forbes v Aberdeenshire*, which "was raised by a resident in the area of Aberdeenshire in which Donald Trump wished to develop a golf course. It was claimed that the development would have a significant impact on an area of Special Scientific Interest. However, Mrs Forbes' claim was denied as she lived a kilometre away from the proposed site". The report also acknowledges that in relation to access to environmental justice, the Gill Review (a judicially led review of the Civil Justice System)<sup>240</sup> recognises that "the threat of having to pay the opposing party's costs can present a major hurdle to litigants in public interest cases, acting as a deterrent to accessing legal remedies to environmental problems". The Gill Review called for a clearer system of operation for Protective Expenses Orders in Scotland and the limiting of the financial liability of claimants<sup>241</sup>.

There have also been concerns that legal aid rules for children require parental income to be included and that is a barrier to children accessing a remedy – see Commissioner for Children and Young People report on youth football registration <https://www.cypcs.org.uk/ufiles/Youth-football-report.pdf>

Gaps	
26.3. Remedy for Abuses Taking Place in Host-States - Has the State taken measures to address the issue of access of victims to judicial remedy for abuses by domiciliary companies in host States?	
Indicators	Scoping Questions
Remedy of Extraterritorial Effect	Has the State put in place measures to promote access to remedy of claimants (including vulnerable groups such as indigenous peoples, women, and children) that have been denied justice in a host State, enabling them to access home State courts?
Forum Non-Conveniens	Does the State allow a court considering a forum non conveniens motion to consider factors against dismissal in addition to factors in favour of dismissal?
Implementation Status	
<p>In a briefing on the UK's commitment to business and human rights, the Business and Human Rights Resource Centre (BHRRC) provides some examples for how victims of abuses by UK multinationals abroad have been able to access the UK courts to seek redress.<sup>242</sup> The briefing refers to The Brussels I Regulation, which mandates the national courts of the EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State.<sup>243</sup> The BHRRC states:</p> <p><i>“Under Brussels I regulation victims of abuses by UK multinationals abroad have been able to access the UK courts to seek redress. This led to a number of high profile lawsuits against (largely extractive) UK companies including Monterrico Metals, BP and companies with a ‘sufficient presence’ in the UK like Trafigura. These cases led to monetary settlements for the communities affected”.</i><sup>244</sup></p>	
Gaps	
While Brussels I may provide redress for victims of abuse by businesses domiciled in the European Union, “The question of courts’ jurisdiction over businesses that are not domiciled in the European Union, such as foreign subsidiaries of European businesses, remains to be regulated by law of the Member States, which have a diverging approach to this issue. Combined with the barriers posed by complex corporate structures and the principle of limited liability, there are still many obstacles for victims to bring their	

claims to courts in the European Union”.<sup>245</sup>

See Principle 26.2 ‘Barriers for Access to Judicial Remedy’ in relation to LASPOA and Rome II.

## 27. GUIDING PRINCIPLE 27

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

### Commentary to Guiding Principle 27

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalisation.

## 27.1. Types of Non-Judicial Mechanisms - Has the State provided effective and appropriate non-judicial grievance mechanisms?

### Indicators

### Scoping Questions



Mediation-Based Mechanisms	Does the State provide access of claimants to mediation-based non-judicial mechanisms such as National Contact Points under the OECD Guidelines? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
Adjudicative Mechanisms	Does the State provide access of the claimant to adjudicative mechanisms such as government-run complaints offices? Can these mechanisms be used for remedying business-related human rights abuses? Do these mechanisms meet the effectiveness criteria set out in UNGP 31?
<b>Implementation Status</b>	
<p>Advisory, Conciliation and Arbitration Service (Acas) offers an ‘early conciliation service’ which provides an opportunity for claimants to settle a dispute without going to court.<sup>246</sup></p> <p>The STUC (2014, p.14) has recently noted: “Increasingly, Employment Judges will offer parties the opportunity, in appropriate cases, for Judicial Mediation. That is where a trained employment judge will act as the impartial mediator at the judicial mediation to try to help the parties resolve their dispute. The process differs from a Hearing where evidence and arguments are heard and the judge decides in favour of one party. Rather in mediation there is an attempt to reach an agreement to end the dispute which is acceptable to both sides”.<sup>247</sup></p> <p>See 25.1 (State based mechanisms) and 25.1 (Non-State based mechanisms) for discussion of mediation-based mechanisms offered by EHRC, SHRC and OECD.</p>	
27.2. Role of the NHRI - Has the State provided specific competency to the NHRI to perform the role as a non-judicial mechanism for addressing grievances?	
<b>Indicators</b>	<b>Scoping Questions</b>
Complaints-Handling Role	Has the State given the NHRI the mandate that allows it to receive and handle complaints relating to corporate human rights abuses?

Supportive Role	Has the State given the NHRI the mandate that allows the NHRI to be in a supportive role to claimants, such as through mediation, conciliation, expert support, or legal aid?
Awareness-Raising	Has the State given the NHRI the mandate to promote awareness on remedy to and redress for corporate human rights abuses?
Training	Has the State given the NHRI the mandate to provide training of relevant stakeholders on their access to remedy for corporate human rights abuses?
Counselling	Has the State given the NHRI the mandate to provide counselling on which remedy to access?
<b>Implementation Status</b>	
<p>See Principle 3.5 for information on Scotland's national human rights institutions.</p> <ul style="list-style-type: none"> <li>• The Equality and Human Rights Commission has some limited powers in relation to judicial matters – for example it can bring judicial review proceedings on the basis of breaches of the Human Rights Act 1998, and it can intervene in human rights proceedings taken by others (including in the European Court of Human Rights).<sup>248</sup></li> <li>• The EHRC does not take up individual cases in human rights issues and it does not have the power to mediate in human rights issues.<sup>249</sup></li> <li>• The Scottish Human Rights Commission has the power to: <ul style="list-style-type: none"> <li>○ conduct inquiries into the policies or practices of Scottish public authorities working to deliver a particular service, or public authorities of a particular description;</li> <li>○ enter some places of detention as part of an inquiry;</li> <li>○ intervene in civil court cases where relevant to the promotion of human rights and where the case appears to raise a matter of public interest.</li> </ul> </li> <li>• The SHRC cannot provide assistance to any person in connection with a legal claim. Assistance includes advice, guidance, and grants.</li> <li>• The Children and Young People's Commissioner Scotland raises awareness and understanding of children's rights and</li> </ul>	

helps children to assert their rights. The CYPSC has powers to undertake investigations in respect of whether service providers have regard to the rights, interests and views of groups of children and young people in taking decisions or actions that affect them. Provisions in the Children and Young People (Scotland) Act 2014 will empower the Commissioner to conduct such investigations on behalf of individual children.

Scotland's National Action Plan (2013-17)

Priority 9 states that Scotland will develop a plan to implement the UNGPs.<sup>250</sup>

27.3. Barriers for Access to Non-Judicial Remedy - Has the State taken measures to ensure that there are no barriers to access to non-judicial remedy for addressing business-related human rights abuses?

Indicators	Scoping Questions
<b>Practical and Procedural Barriers</b>	<p>Has the State taken measures to ensure that there are no practical or procedural barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent procedural barriers include:</p> <ol style="list-style-type: none"> <li>1. Financial support;</li> <li>2. Providing guidance;</li> <li>3. Ensuring that the information on the mechanism is provided in a language that is understandable to potential claimants;</li> <li>4. Ensuring accessibility despite geographical issues or difficulties (for example, long distances).</li> </ol>
<b>Other Barriers</b>	<p>Has the State taken measures to ensure that there are no other barriers to prevent legitimate cases from being heard by non-judicial mechanisms? Measures to prevent other barriers include:</p> <ol style="list-style-type: none"> <li>1. Addressing imbalances between the parties;</li> <li>2. Targeted awareness-raising among vulnerable groups (such as women, indigenous peoples, or children);</li> </ol>

	3. Expert advice or type of assistance; 4. Efforts to combat corruption; 5. Protection of human rights defenders.
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## 28. GUIDING PRINCIPLE 28

States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

### Commentary to Guiding Principle 28

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

28.1. Facilitating Access to Mechanisms - Has the State supported access to effective non-State-based grievance mechanisms dealing with business-related human rights harms?

Indicators	Scoping Questions
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Business-Based Grievance Mechanisms	Has the State supported access to business-based grievance mechanisms (such as whistleblower mechanisms or project-level grievance mechanisms) through efforts such as dissemination of information and support for access (for example, through guidance documents and tools)?
Multi-Stakeholder Grievance Mechanism	Has the State supported access to multi-stakeholder grievance mechanisms through efforts such as dissemination of information and support for access?
Organisational-Based Grievance Mechanism	Has the State supported access to organizational-based grievance mechanisms (including the union systems) through efforts such as dissemination of information and support for access?
International Grievance Mechanisms	Has the State supported access to international grievance mechanisms through efforts such as dissemination of information, support for access (for example, through legal aid) as well as support for establishing contact between the claimant in international system?
Regional Grievance Mechanisms	Has the State supported access to regional grievance mechanisms through efforts such as dissemination of information and support for access (for example, through legal aid)?
Other Mechanisms	Has the State supported access to other grievance mechanisms through efforts such as dissemination of information and support for access?
<b>Implementation Status</b>	
The Public Interest Disclosure Act 1998 (PIDA) was created by the UK Parliament to protect whistleblowers from detrimental treatment or victimisation from their employers after they have made a qualifying disclosure – i.e. information about malpractice, which might include: criminal offences, failure to comply with legal obligations, miscarriages of justice, threats to health and safety of an individual, damage to the environment and a deliberate attempt to cover up any of the above. The Act covers all workers	

including temporary agency staff, persons on training courses and all persons working for the NHS but it does not cover volunteers.

The Prescribed Persons Order 2014 (PPO) sets out a list of over 60 organisations and individuals that a worker may approach outside their workplace to report suspected or known wrongdoing.<sup>251</sup>

Audit Scotland, the Accounts Commission, and the Auditor General are 'prescribed persons' under the PPO. Whistleblowers (employees) can raise issues of concern with Audit Scotland regarding fraud, corruption or wrongdoing within the public bodies audited by Audit Scotland.<sup>252</sup> PIDA provides protection for "workers, contractors, trainees, agency staff, homeworkers, police officers, everyone in the NHS" and includes "workers within the public, private and voluntary sectors"<sup>253</sup>. Audit Scotland provides a range of guidance on whistleblowing in general<sup>254</sup> as well as in the public sector.<sup>255</sup>

### 31. GUIDING PRINCIPLE 31

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

### **Commentary to Guiding Principle 31**

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term “grievance mechanism” is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

- (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;
- (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;
- (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;
- (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;
- (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary;
- (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;
- (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism

to identify and influence policies, procedures or practices that should be altered to prevent future harm;

(h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.



## ANNEX 2: Stakeholder Consultations – Methodology and Summary of Findings

### 1. Introduction

Consultations took a variety of formats and included one-to-one conversations with the Scottish Government and the Scottish Human Rights Commission, a focus group session with civil society groups, a survey of businesses signed up to the Scottish Business Pledge, telephone interviews with business (of different sizes and from a range of sectors) and a survey of public bodies and local authorities. A description of the methods employed in relation to the key stakeholder consultations are discussed in section 2 below, while section 3 provides a summary of the findings from these consultation sessions.

### 2. Methods

#### 2.1 Surveys of Business and Local Authorities

A survey instrument was developed for Scottish businesses in order to gain some insights into issues that are more related to Pillar II of the UNGPs, in terms of corporate responsibility to respect human rights. While the DIHR/ICAR Baseline Assessment 'Template' provides extensive coverage of Pillars I and III, Pillar II is not covered. Therefore, it was deemed necessary to supplement the 'Template' with a survey instrument that would provide some understanding of: (i) how Scottish businesses perceive human rights; (ii) the human rights issues encountered by Scottish businesses; (iii) the processes being put in place to manage human rights; and (iv) how Scottish businesses are currently informed, or would like to be informed, about business and human rights issues. Further, the survey was used as a basis for recruiting participants for the telephone interview stage of the consultation.

The content of the Scottish business survey was informed by two recent studies related to business and human rights – *Fairness, dignity and respect in SME workplaces* by the Equality and Human Rights Commission, and *The road from principles to practice: today's challenges for business in respecting human rights* by the Economist Intelligence Unit. A number of survey questions were derived from these studies, with modifications to reflect both the Scottish context and the aims of the stakeholder engagement.

An online version of the survey was developed and a link to the survey was provided in the invitation to participate. Invitations for participation were sent to organisations signed up to the *Scottish Business Pledge*<sup>256</sup> - a voluntary code of practice that asks businesses to make a commitment to address a range of issues, including the living wage, zero-hours contracts and the gender pay gap. This group was targeted primarily on the basis of convenience and the survey sample should not be considered representative of the wider business community in Scotland. More specifically, as a Scottish Government initiative, signatories to the pledge could be readily identified and contact information easily accessible. Further, at the point of conducting the survey, 265 businesses had signed up to the Pledge, which was considered to be a suitable sample size given the exploratory stakeholder engagement aims of the survey.

The survey was sent out to signatories of the *Scottish Business Pledge* on 1<sup>st</sup> March 2016 with a reminder sent out on 1<sup>st</sup> April 2016. There were 32 responses to the survey, representing a 12% response rate.

In addition to the business survey, a survey was also developed for local authorities. This was considered important in terms of providing insights into the State's engagement with business through public procurement – an issue of added relevance given the relatively large size of the Scottish public sector.<sup>257</sup> An online version of the survey was developed, and a link to the survey was provided in the invitation to participate. Invitations for participation were sent to the Chief Executives of all 32 Scottish Local Authorities on 10<sup>th</sup> May 2016 with a reminder sent out on 27<sup>th</sup> May 2016. There were 6 responses to the survey, representing a 19% response rate.

## *2.2 Focus Group with CSOs*

A focus group session was undertaken with CSOs on 18<sup>th</sup> February 2016, in order to elicit their views on business and human rights in Scotland. In particular, the focus group sought to explore what CSOs felt were the main human rights challenges related to Scottish business activity and the groups they felt were vulnerable. Further, the focus group also sought to consider issues around awareness raising and sources of information relating to business and human rights.

To recruit CSO participation in the focus group session, an advert was posted on the Human Rights Consortium Scotland website, inviting people to register for participation. Six CSO participants took part in the session.

## *2.3 Interviews with Scottish Businesses*

Four telephone interviews were undertaken with representatives from four Scottish business organisations. In total, five participants took part in these interviews – with two participants from one organisation being present for one of the interviews. As noted in 2.1 above, participants in the survey were invited to indicate whether they would be interested in taking part in a further information sharing session with other businesses. The information session could not be scheduled for logistical reasons and the telephone interviews were arranged as an alternative. In addition to the respondents to the survey who indicated a willingness to participate in a follow up session, an interview was undertaken with an investment firm (over 250 employees) that had not participated in the survey. The other businesses that took part in the survey included a construction company (2500 employees), an IT services company (175 employees) and a marine transport company (30 employees).

Interviews were undertaken between 4<sup>th</sup> May and 18<sup>th</sup> May 2016. Interviews lasted between 30 and 45 minutes and were recorded.

# **3. Summary of Findings**

## *3.1 Civil society*

During the focus group session with CSOs, procurement, employment practice, workers' rights, and equality in the workplace were highlighted as salient issues in relation to the Scottish context. In particular, workers' rights vis-à-vis the State's

commercial transactions with business enterprises were raised. For example, it was noted that the blacklisting of employees is a “current... not an historical issue” in Scotland and that, contrary to its own guidelines, the Scottish Government continues to award contracts to companies known to have blacklisted employees. While it was acknowledged that the Scottish Government guidelines in relation to procurement and companies known to have blacklisted were “quite good, it was felt that they had not been sufficiently implemented, rendering the guidelines “meaningless”.

#### *Trade Union Bill*

A range of concerns were raised in relation to the potential impact of the Trade Union Bill (the Bill received Royal Assent on 4 May and now is the Trade Union Act 2016). In particular, CSOs expressed concern regarding the proposed increased ballot threshold contained in the Bill and the removal of restrictions on the use of agency workers during strikes. It was suggested that such a measure would undermine the workers’ right to strike.

While it was acknowledged that the Bill has been challenged in the Scottish Parliament, it was also suggested that the Scottish Government would have limited capacity to successfully challenge the Bill. As one participant stated: “So the question there is what can the Scottish Government do... I think we will find in the end... not a lot”.

Since the CSO engagement session took place, the Trade Union Act 2016 has become law. A number of the measures outlined in the bill were not included in the Act (See Guiding Principle 2.2. in Annex 1)

#### *Awareness and Guidance*

It was acknowledged during the stakeholder consultation with CSOs that there is a wide range of Scottish Government-led initiatives related to the rights of vulnerable groups. However, it was noted that: (i) the initiatives appear ad-hoc and lack a general coherence, and (ii) much more is required in terms of improving the visibility and promotion of these initiatives.

For example, one of the CSOs consulted observed:

*“When I think of people I know who have had things happen to them in their work... it wouldn’t cross their minds to think about it as a human rights issue. There is a need to increase awareness that we have rights within a business setting. A huge awareness raising job needs to be done”.*

Relatedly, while CSOs recognised that there had been some attempt by the Scottish Government to raise awareness of human rights through the *One Scotland* platform and the *Fly the Flag*<sup>258</sup> campaign, it was generally felt that these initiatives lacked impact. In this regard, it was indicated that if a business and human rights awareness raising campaign were to be successful, it would need to build on a more general human rights campaign that had made an impact.

In relation to guidance on business and human rights, CSOs generally expressed the view that there was a need for clear and accessible guidance. One participant summed up the issue in the following way:

*“What I would like to see is something that has really concise, clear and...easily accessible... [followed by] guidance as to where to go next. There are places you can go to for legal representation... but for me, what is missing is something that is really accessible and for business and ordinary folks to get to the nub of things. When you go through regulatory bodies, sometimes the information can be overwhelming”.*

While there was no consensus on where such information should be made available or who should be responsible for providing it, it was indicated by most participants that the Scottish Government should be a repository of some information and guidance, “because it sends out the signal ‘this is how we [Scotland] do business”.

### **3.2 Business Organisations**

One of the key issues that emerged from the telephone interviews was how human rights were conceived by or in relation to each of the business organisations. With the exception of the investment firm, participants tended to view human rights as either an employment issue or somehow reflecting their interactions with customers. For example, one interviewee stated that, for their business, human rights were about “how you treat people and the people you engage with... we like to think we treat our people correctly and therefore that they treat our clients [well]”. Similarly, another interviewee noted that in terms of human rights, their company “want[s] to be seen to be doing our bit for ensuring jobs for local community”.

However, beyond employment and customer interaction, human rights were not perceived to be of much relevance (again, with the exception of the investment firm). For example, one interviewee stated that human rights were “not a day to day issue... I really find it hard to find an issue where it would relate to us particularly”. Relatedly, within the context of business interactions, it was noted that human rights were not high on the agenda of suppliers or customers. For example, one interviewee noted that, “we never use the term human rights... I have never heard customers [big retailers] use the phraseology”.

Nevertheless, a number of issues that could be linked to, or overlap, with human rights were considered pertinent – quite often as the result of accreditation requirements or the audit processes associated with accreditation. For example, one interviewee highlighted how the health and safety of employees was a priority area, stating:

*“We work with gas and electricity... so we need to have the quality assurance... we need to show how we can work safely in these areas. There are a lot of external audits that we do.”*

The drive for accreditation appeared to be motivated by a number of factors, including the desire to appear responsible and reflect the values of the company, as a response to pressure from business stakeholders, or as an industry/regulatory requirement. For example, one interviewee stated that their company sought accreditation primarily because “we just like being a nice company... and want to be seen as a responsible company”. The same interviewee also noted that ISO 18001

was increasingly a requirement in some of the work they were seeking contracts to undertake.

Similarly, an interviewee from another company highlighted the range of motivations surrounding accreditation:

*“We have sought [accreditation] independently... they show that you have processes... that you have checks and balances. Yes there is a business need and it is good to put them to tenders but we believe it shows that what we do is important and should be done correctly. If it is not done correctly, we then have process to deal with it... comes back to the ethos of the company”.*

The investment firm tended to view human rights as something which was much more central to their operations. For example, one of the interviewees from the firm explained how considering human rights was an important component in their investment decisions:

*“We try to identify better investments... will this information help us identify a higher quality company... Over the years, it has been shown to be true that companies that manage human rights within their own employees in the supply chain are actually higher quality businesses. That's one reason why we look at [human rights]. It helps the investment outcome”.*

In order to assess how human rights were managed, the interviewees from the firm outlined the importance of undertaking an engaged process and establishing links with a range of relevant actors. For example, following the collapse of the Rana Plaza factory building in Bangladesh, the interviewees explained that they made visits, along with NGOs (Non-Governmental Organisations), in order to “identify what had happened, what needed to change to make sure that it never happens again”. This involved meeting with workers, government organisations and NGOs - an aspect of their work that they viewed as essential in terms of accessing relevant information. Related to this point, one of the interviewees explained:

*“Its really important for us to build up a network of people so that we can pick up the phone... or ideally, before we have to pick up the phone, they will let us know what's going on around the world”.*

Interviewees were asked about reporting for human rights and CSR (Corporate Social Responsibility) reporting more generally. For some of the interviewees, reporting on human rights was not considered important, primarily because it wasn't something they were required to do because they were a small company and/or were not listed on the stock exchange. For example, one interviewee stated, “we are private equity backed... so reporting is not required”. The same interviewee also observed that CSR reporting in general was “not consistent across sectors” and that “some sectors protest too much”. Other interviewees noted the perceived inconsistency in reporting, with some companies emphasising employee relations, while others focus almost exclusively on the environment. As one of the interviewees from the investment firm observed, “reporting and disclosure on human rights is patchy... at best it is anecdotal... and ill defined”. Nevertheless, the same

interviewee also stated that the UNGPs and reporting initiatives being developed around the UNGPs are useful and could potentially bring a greater degree of clarity.

## ANNEX 3: Stakeholder Consultations – Survey Data

### A. Survey of Scottish Businesses

As part of the Scottish National Baseline Assessment on Business and Human Rights, a survey was distributed to organisations that have signed up to the Scottish Business Pledge.

#### 1. What does your organisation do?

	Number	%
Construction	1	3
Consumer goods	4	13
Education/Training	3	9
Healthcare and pharmaceutical	1	3
IT and technology	8	25
Legal	4	13
Manufacturing	1	3
Professional services	8	25
Transportation, travel and tourism	2	6

#### 2. How many staff are employed in your organisation?

Number of Staff	Number	%
1-9	6	18
10-19	4	13
20-49	10	31
50-99	1	3
100-249	4	13
Over 250	7	22

#### 3. How far, geographically, do you operate? (for example, local, regional, national, international)

	Number	%
Local/Regional	6	19
National	8	25
International	18	56

#### 4. Where is your organisation headquartered/registered?

Glasgow	6
Edinburgh	6
Scotland	5
Isle of Arran	2
Isle of Mull	1
Orkney	1
Aberdeenshire	1
East Kilbride	1
Lanark	1
Falkirk	1

Hamilton	1
Elgin	1
Grangemouth	1
Hemel Hempstead	1
Uxbridge, England	1
Milton Keynes	1
US	1

**5. Does your organisation source materials from overseas?**

Yes	13	41%
No	18	56%
Not Sure	1	3%
Total	32	100%

**6. Does your organisation supply materials/products/services overseas?**

Yes	23	72%
No	9	28%
Not Sure	0	0%
Total	32	100%

**7. Is your organisation a subsidiary of another organisation?**

Answer	Response	%
Yes	6	19%
No	26	81%
Not Sure	0	0%
Total	32	100%

**8. What position do you hold within the organisation?**

	Number	%
Managing Director/CEO	12	38
Board/Senior Management	8	25
Human Resources	3	9
Finance	2	6
Marketing Communication	2	6
Partner	4	13
Other	1	3

**9. 'Human Rights' can be difficult to define and some people have different opinions on what it means. We are interested in what you think would be included under the description of Human Rights. Listed below are a number of business and workplace issues. Please tick the box beside the issue to indicate whether or not you think it is a Human Rights issue.**

Question	Yes	%	No	%	Not Sure	%
Having a work environment that is safe	32	100	0	0	0	0



Ensuring working hours are not excessive	31	97	1	3	0	0
Ensuring fair wages are paid	31	97	1	3	0	0
Ensuring staff are free to join a union if they wish	24	77	4	13	3	10
Ensuring that staff are not discriminated against	32	100	0	0	0	0
Ensuring personal details and staff privacy is safeguarded	29	91	3	9	0	0
Ensuring staff are able to practise their religion or belief	30	94	1	3	1	3
Ensuring men and women are paid the same for work of equal value	30	94	1	3	1	3
Ensuring staff are able to raise concerns or grievances	29	91	2	6	1	3
Ensuring workers are not subjected to exploitation or coercion	32	100	0	0	0	0
Ensuring workers are not subjected to exploitation or coercion in the supply chain	30	94	1	3	1	3
Ensuring the fair payment of tax	25	78	5	16	2	6

**10. From the following categories of human rights related issues, please indicate whether they are relevant to your business operations?**

	Yes	%	No	%	Not Sure	%
GROSS HUMAN RIGHTS ABUSES (eg, freedom from torture, cruel and inhumane treatment, including slavery and genocide)	9	31	17	59	3	10
ADEQUATE STANDARD OF LIVING (eg, right to physical and mental health, right to food, right to housing)	19	66	7	24	3	10
PRIVATE LIFE (eg, right to privacy, right to family life)	25	86	1	4	3	10
RIGHTS RELATED TO LAND (eg, right to livelihood, right to own property, right to participate in cultural life)	11	38	16	55	2	7
CIVIC LIFE AND PARTICIPATION (eg, freedom of expression, right to political expression, right to peaceful assembly, right to information)	22	76	4	14	3	10
ACCESS TO JUSTICE (eg, right to effective remedy, right to fair trial before the law, right to due process)	18	62	8	28	3	10
INTELLECTUAL, SPIRITUAL AND CULTURAL LIFE (eg, freedom of thought and opinion, freedom of religion, right to participate in cultural life)	22	76	5	17	2	7
RIGHTS RELATED TO THE ENVIRONMENT (eg, right to clean water and sanitation, right to environmental health, right to clean air)	20	69	5	17	4	14

EDUCATION AND ACCESS TO TECHNOLOGY (eg, right to education, right to enjoyment of technological process, access to training and development)	25	86	1	4	3	10
CONDITIONS OF WORK AND EMPLOYMENT (eg, health and safety at work, discrimination, fair wage and equal pay, child labour, periods of rest and/or holiday leave)	29	100	0	0	0	0
WORKPLACE DIALOGUE (eg, freedom of association, collective bargaining, right to join a trade union)	23	79	5	17	1	4

**11. Has a client or supplier ever asked about your business practices related to any of the above issues?**

Answer	Response	%
Yes	13	45%
No	14	48%
Not Sure	2	7%
Total	29	100%

**12. If yes, can you tell us in which areas these questions were raised?**

Comments
Conditions of work and employment, rights related to the environment
Training and Development, Health and Safety
Series of questions in relation to framework applications
Conditions and education
Freedom of religion
Appropriate conditions of work is a key criteria for any participation in government frameworks
Conditions of work and employment
Scottish Enterprise - Conditions of employment/workplace dialogue
All of the areas above are regularly questioned when we renew contracts with some customers e.g. NUS
In terms of business opportunities and the ethos of the company. They wish to work with like minded companies
Most areas in public sector tendering
Procurement

**13. Have you ever asked a client or supplier about their business practices related to any of the above issues?**

Answer	Response	%
Yes?	10	34%
No	16	55%
Not Sure	3	10%
Total	29	100%

**14. If yes, can you tell us in which areas these questions were raised?**

Conditions of work and employment, rights related to the environment
--

Health and Safety Issues
Training and Development, Health and Safety
We carry out a PESTAL analysis of key suppliers
Do They pay the living wage
Freedom of religion
Conditions of work and employment
All of those area are monitored and managed by us as part of our UN Global Commitments and Supplier Guiding Principles
Procurement process and face to face meetings
We require all our suppliers to reach the same high standards in all the areas above - we expect them to treat their staff in the same way we treat ours

**15. Have you ever received any internal complaint in relation to any of the above issues?**

Answer	Response	%
Yes	2	7%
No	25	86%
Not Sure	2	7%
Total	29	100%

**16. If yes, can you tell us in which areas these questions were raised?**

<b>Comments</b>
Freedom of religion
I am not aware of any internal challenges arising from the areas above.
In one or two Employee related complaints with regard to potential discrimination and also in more general terms in the employee consultation forum.

**17. Has your organisation ever done any of the following?**

	Yes	%	No	%	Not Sure	%
Explored what human rights issues might be relevant for your organisation and/or its suppliers	11	41	14	52	2	7
Discussed managing your organisations human rights impact at board or senior management level	12	45	13	48	2	7
Developed a human rights policy	8	31	16	61	2	8
Supplied information on your organisation's approach to human rights to a client, potential client or supplier	12	44	12	44	3	12
Signed the Scottish Government's business pledge?	24	92	2	8	0	0
Signed up to any other pledges or initiatives that have a human rights component?	9	33	16	59	2	8
Offered training to staff on human rights	9	33	16	59	2	8
Consulted with stakeholders, including workers and local communities, on issues related to human rights	9	33	15	56	3	11
Communicated to internal stakeholders about human rights	11	41	12	44	4	15
Communicated to external stakeholders about human	5	19	18	67	4	15

rights						
Carried out a human rights impact assessment on your services/products/supply chains	4	15	20	74	3	11

**18. If your organisation has developed a human rights policy, please answer the following question (if not, please skip to the next question)**

	Yes	%	No	%	Not Sure	%
Is this a "stand alone" policy	2	33	4	67	0	0
Is it part of policy in another area (for example, CSR or sustainability?)	5	63	3	37	0	0
Is your organisation's human rights policy publicly available?	2	25	6	75	0	0

**19. Who (i.e. what position) in your organisation has responsibility for the human rights policy, including ensuring compliance with it?**

Managing Director/CEO	6
Board/Senior Management	2
Human Resource Manager	1
Other	

**20. Which of the following, if any, are the biggest barriers your business faces in addressing human rights?**

	Yes	%	No	%	Not Sure	%
Lack of understanding about what our responsibilities are in the area of human rights	8	33	15	63	1	4
Lack of available internal organisation resources	9	36	15	60	1	4
Lack of training and education for all company employees	8	32	16	64	1	4
Inconsistency between national law and international standards	4	17	12	50	8	33
Poor enforcement of local laws	0	0	21	88	3	12
Human rights are too political/contentious	2	8	20	84	2	8
Addressing human rights would reduce profit margins	0	0	22	92	2	8
Lack of intra-industry collaboration	6	24	18	72	1	4
Lack of training and education for employees at trading partners/suppliers	5	21	17	71	2	8
Business culture does not place a high value on the issue	2	8	20	84	2	8
Lack of support from investors	1	4	21	88	2	8
Lack of communication and trust with civil society actors	3	13	16	70	4	17

Fear of increasing risk of reputational damage	1	4	21	88	2	8
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## 21. Other (please specify)

Comments
People believe that 'Human Rights' is about extreme issues - detached from our work and home lives
[We] have an overarching Credo that all employees and managers use as their guide document in all areas of the business

## 22. Please indicate whether or not you agree with the following statements

	Yes	%	No	%	Not Sure	%
Respecting human rights is a matter for governments, not for business	0	0	25	100	0	0
Human rights are relevant to every business, regardless of their size.	23	92	2	8	0	0
Human rights are mainly a consideration for those operating overseas or with overseas suppliers.	2	8	20	80	3	12

## 23. Has your organisation made use of any published guidance on the UNGPs

		%
Yes	1	4%
No	19	79%
Not Sure	4	17%
Total	24	100%

## 25. What support or guidance would you think would be useful for your organisation in order to help it respect human rights in its operations?

Comments
Information on Government human rights policy/directives with potential client countries
Help to formulate an impact statement and a quick way of understanding the extent of human rights abuses in other countries.
Example policy document
Some kind of auditable standard such as IIP
Useful if this came via our accreditation body, which in our case is the British Council
Government assistance , both in guidance and monetary assistance
n/a: it is already built into our culture and products
Common sense plain English understanding of what Human Rights means to business
Checklist of tasks to undertake to increase awareness.
Franchisor is already involved at the highest levels within the UN.
Simple, direct and easy to implement policies
Not sure
To know exactly what we have to comply with and how

**26. From whom would you like to receive advice regarding business and human rights?  
(for example, trade association, enterprise agencies, legal advisors, other)**

Comments
All of the above
The UK Government
Scottish Executive
Enterprise Agencies
As above
Scottish Government
We'd look to Scottish Enterprise for any additional guidance considered may help close business knowledge or practice gaps
No preference
Relevant experts
Scottish Enterprise
Government

## B. Survey of Local Authorities

### 1. In which region of Scotland does your organisation function?

	Number
North East Scotland	1
Fife	1
Central	1
Orkney	1
Dumfries and Galloway	1
South West	1

### 2. How many employees does your organisation have?

Number of Employees	Number of Organisations
2000-5000	3
5001-10000	2
Over 10000	1

### 3. What is the main function/service your organisation provides?

	Number
Local Authority	6

### 4. What position do you hold in the organisation and what are your primary responsibilities?

HR Adviser	1
Policy Co-ordinator/Advisor	3
Procurement Manager	1
Other	1

**5. Human Rights can be difficult to define and some people have different opinions on what it means. We are interested in what you think would be included under the description of Human Rights. Listed below are a number of business and workplace issues. Please tick the box beside the issue to indicate whether or not you think it is a Human Rights issue.**

Question	Yes	%	No	%	Not Sure	%
Having a work environment that is safe	6	100	0	0	0	0
Ensuring working hours are not excessive	5	83	0	0	1	17
Ensuring fair wages are paid	5	83	0	0	1	17
Ensuring staff are free to join a union if they wish	6	100	0	0	0	0
Ensuring that staff are not discriminated against	5	83	1	17	0	0
Ensuring personal details and staff privacy are						

safeguarded	5	83	0	0	1	17
Ensuring staff are able to practise their religion or belief	6	100	0	0	0	0
Ensuring men and women are paid the same for work of equal value	4	66	1	17	1	17
Ensuring staff are able to raise concerns or grievances	4	67	0	0	2	33
Ensuring workers are not subjected to exploitation or coercion	6	100	0	0	0	6
Ensuring workers are not subjected to exploitation or coercion in the supply chain	6	100	0	0	0	6

**6. Does your organisation engage in procurement activity (if you answer no, please skip to next page)**

		%
Yes	5	100%
No	0	0%
Not Sure	0	0%

**7. Please indicate whether or not your organisation gives consideration to human rights issues in the following stages of the procurement process.**

	Yes	%	No	%	Not Sure	%
Advertising/tender	5	83	0	0	1	17
Award	3	50	0	0	3	50
Supplier identification/screening	2	33	1	17	3	50
Post-award monitoring	3	50	0	0	3	50

**8. Has your organisation adopted a policy to promote human rights in relevant public contracts?**

	Response	%
Yes	0	0%
No	3	50%
Not Sure	3	50%

**9. Does your organisation require tenderers and/or service providers to undertake their own human rights due diligence monitoring?**

Answer	Response	%
Yes	0	0%
No	2	33%



Not Sure	4	67%
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**10. How much weight does your organisation attach to human rights when making procurement decision (for example, compared to quality and cost of contract)?**

Human rights issues have little impact on procurement decisions	3	50%
Human rights issues have a moderate impact on procurement decisions	2	33%
Human rights issues have considerable impact on procurement decisions	1	17%
Total	6	100%

**11. Has your organisation ever excluded a tenderer from bidding for a contract based on any of the following human rights issues?**

Question	Yes	%	No	%	Not Sure	%
PRIVATE LIFE (eg, right to privacy, right to family life)	0	0	3	50	3	50
ACCESS TO JUSTICE (eg, right to effective remedy, right to fair trial before the law, right to due process)	0	0	3	50	3	50
INTELLECTUAL, SPIRITUAL AND CULTURAL LIFE (eg, freedom of thought and opinion, freedom of religion, right to participate in cultural life)	0	0	3	50	3	50
RIGHTS RELATED TO THE ENVIRONMENT (eg, right to clean water and sanitation, right to environmental health, right to clean air)	0	0	3	50	3	50
CONDITIONS OF WORK AND EMPLOYMENT (eg, health and safety at work, discrimination, fair wage and equal pay, child labour, periods of rest and/or holiday leave)	0	0	3	50	3	50
WORKPLACE DIALOGUE (eg, freedom of association, collective bargaining, right to join a trade union)	0	0	3	50	3	50

**12. Has your organisation ever done any of the following?**

	Yes	%	No	%	Not Sure	%
Explored what human rights issues might be relevant for your organisation and/or its suppliers	2	40	2	40	1	20
Discussed managing your organisations human rights impact at senior management level	3	60	1	20	1	20

Offered training to staff on human rights	3	60	1	20	1	20
Developed a human rights policy	0	0	5	100	0	0
Consulted with stakeholders, including employees and local communities, on issues related to human rights	4	80	1	20	0	0
Communicated to internal stakeholders about human rights	3	60	2	40	0	0
Communicated to external stakeholders about human rights	2	40	3	30	0	0
Carried out a human rights impact assessment on your services and/or supply chains	2	40	3	30	0	0

**13. If your organisation has developed a human rights policy, please answer the following question (if not, please skip to the next question)**

Question	Yes	No	Not Sure
Is this a "stand alone" policy	0	1	0
Is it part of policy in another area (for example, CSR or fair work?)	0	1	0
Is your organisation's human rights policy publicly available?	0	1	0

**14. Please indicate whether or not any of the following present a barrier to your organisation in addressing human rights?**

	Yes	%	No	%	Not Sure	%
Lack of understanding about what our responsibilities are in the area of human rights	3	60	1	20	1	20
Lack of available internal organisation resources	4	80	0	0	1	20
Lack of training and education for all employees	4	80	0	0	1	20
Inconsistency between national law and international standards	2	40	0	0	3	60
Human rights are too political/contentious	2	33	3	50	1	17
Lack of training and education for employees at tendering organisations	2	40	1	20	2	40
Fear of increasing risk of reputational damage	0	0	5	100	0	0

**15. Other (please specify)**

Comments
Lack of Regulation & Policy at a national level in relation to procurement Practices

**16. Is your organisation aware of the following sources of guidance in relation to human rights in procurement?**

	Yes	%	No	%	Not Sure	%
The Scottish Government's Sustainable Procurement Action Plan	5	100	0	0	0	0
The Scottish Government's 'Procurement Journey' web portal	4	80	1	20	0	0
The Scottish Government's Scottish Procurement Policy Notices (SPPN)	5	100	0	0	0	0
The Scottish Government's Scottish Procurement Action Notes (SPAN)	4	80	1	20	0	0
Statutory Guidance under the Procurement Reform (Scotland) Act 2014	4	80	1	20	0	0

**17. Has your organisation made use of any published guidance on human rights?**

		%
Yes	1	20%
No	2	40%
Not Sure	2	40%

**18. If so, can you tell us what published guidance your organisation has consulted?**

Comments
Guidance on SHRC and EHRC web sites

**19. What support or guidance do you think would be useful for your organisation in order to help it respect human rights?**

Comments
Central portal of registered and compliant suppliers.
Regulated policy clarifying the procurement position in relation to human rights

**20. From whom would you like to receive advice regarding business and human rights? (for example, EU, UK Government, Scottish Government, legal advisors, etc)**

Comments
Scottish Government
Scottish Government

**21. Does your organisation provide advice and/or support to other organisations related to human rights?**

	Response	%
Yes	1	25%
No	2	50%
Not Sure	1	25%

**22. If yes, can you tell us what kind of support you provide? (for example, legal, raising awareness, training, etc)**

Comments
We provide Human Resources support and advice to small businesses and this can incorporate elements of Human Rights

**23. Do you or the other relevant persons providing this support receive training or assistance from the Scottish Government or relevant bodies set up by the government?**

	Response	%
Yes	0	0%
No	4	100%
Not Sure	0	0%

**24. Have any businesses approached you for advice on how to incorporate human rights into their operations or improve their observance of human rights standards?**

	Response	%
Yes	0	0%
No	4	100%
Not Sure	0	0%
Total	4	100%

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<sup>1</sup> ILO UK Ratifications, available at:

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