

Scotland's National Baseline Assessment on Business and Human Rights

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Executive Summary

The United Nations formally endorsed the Guiding Principles on Business and Human Rights (UNGPs) in June 2011. The UNGPs reflect a growing recognition among states and international organisations of the impact of the wide range of activities of businesses and corporations on individual lives and on local communities. They operationalise the UN 'Protect, Respect and Remedy' Framework, a document adopted by the UN Human Rights Council in 2008. This articulates a three-pillar framework:

Pillar I: The state duty to protect against human rights abuses by third parties, including business.

Pillar II: The corporate responsibility to respect human rights, that is, to act with due diligence to ensure that businesses avoid infringing on human rights and address any adverse impacts.

Pillar III: Access to an effective remedy, judicial and non-judicial, for victims of any business-related human rights abuses.

The European Union (in 2011) and the UN (United Nations) Human Rights Council (in 2014) have called for the development of National Action Plans (NAPs) to support the implementation of the UNGPs. Since 2011 a number of governments have developed NAPs, with the UK being the first. Scotland's National Action Plan for Human Rights (2013-17) commits to the development of an action plan to implement the UNGPs. Scotland's National Baseline Assessment on Business and Human Rights (Scotland's NBA) is the first stage of a wider consultative process and serves as the basis for opening up dialogue with a range of stakeholders about Scotland's priorities in relation to business and human rights.

Methodology of Scotland's National Baseline Assessment

Key guidance on implementing NAPs on business and human rights was developed by the Danish Institute for Human Rights (DIHR) and the International Corporate Accountability Roundtable (ICAR) in 2013 – in the form of a NAP 'Toolkit'. Scotland's NBA is based on this template, which is made up of a set of tables and indicators under Pillars I and III of the UNGPs. The overall approach to the NBA was undertaken in three phases:

Phase 1: Desk-based research was undertaken to provide a mapping of international, UK, and Scottish law and policy.

Phase 2: Input was sought from a wide range of stakeholders including businesses, government, public bodies and local authorities, and civil society organisations.

Phase 3: Further consultation was undertaken with a range of stakeholders in order to verify the findings and generate a further opportunity to provide input.

Key Findings and Recommendations

Pillar I: State Duty to Protect

On the whole, policies, legislation and regulation that have a connection to business and human rights are relatively well developed in both the Scottish and wider UK context. Existing UK legislation provides for wide-ranging protection against potential impacts on people's human rights arising from business operations, while the Scotland Act 1998 requires that all legislation passed by the Scottish Parliament complies with the Human Rights Act (1998) and, through it, core rights contained in the European Convention on Human Rights (ECHR). The Scottish Government has developed a host of policies and initiatives that contribute to protecting human rights in the business context, related to (among other things) the living wage, equality and diversity in the workplace, and the consideration of social issues in the procurement process. There remain a number of significant gaps and challenges.

Guiding Principles 1 and 3

Groups at risk of vulnerability and marginalisation

Significant barriers to women, persons with disabilities and ethnic minorities in accessing employment, according to a 2015 Equality and Human Rights Commission report.

Concerns from stakeholders related to the rights of agency workers and workers employed through 'umbrella companies'.

Concerns from stakeholders about the widespread impact of business and corporations on the rights of children, from marketing and advertising, through to ensuring that parents and caregivers have access to family-friendly working conditions.

Concerns from stakeholders about the inadequacy and lack of visibility of Scottish Government-led initiatives.

Recommendation

- Improve awareness-raising of rights and remedies, human rights education related to business activity.
- The inclusion of 'insider groups' such as accountancy and human resources professionals to ensure the success of business and human rights campaigns.

Tax

Tax avoidance constitutes a human rights issue in so far as it deprives governments of resources required to uphold and give effect to rights.

Recommendation

- Scottish Government can take measures to reduce corporate tax avoidance by including sound tax practice in public sector procurement guidance through engagement with the accounting profession and including the requirement that companies seeking public contracts are signatories of the Fair Tax Mark initiative.

Guiding Principle 4

While the Scottish Government provides a range of guidance in relation to the governance and accountability of Non-Departmental Public Bodies and Arm's-Length External Organisations in general, there appears to be an absence of guidance that is explicitly aimed at 'public corporations'.

Some of the guidance addresses issues that might fit into a human rights framework (for example, in relation to equality and diversity, whistleblowing procedures, etc.). However, much of the guidance does not explicitly address 'human rights'.

Recommendation

- Develop specific guidance for public corporations and for guidance to all NDPBs and ALEOs to more explicitly address human rights in a business context with explicit reference to implementing the UNGPs.

Guiding Principle 6

There is much evidence of good practice and achievements of the Scottish Government's policy and practice in relation to procurement and human rights. However, concerns have been raised about the implementation of procurement guidelines.

'Human rights' is not explicitly addressed in much of the Scottish Government's procurement policy and guidance which addresses a number of issues that are linked to, or overlap with, human rights – such as equality and sustainable development.

Concerns from stakeholders that the Scottish Government continued to award contracts to companies that have been implicated in blacklisting employees.

Recommendation

- Procurement guidance to make more explicit reference to human rights and the UNGPs, and for human rights criteria to be reflected more prominently in the public procurement process.

Pillar II: Corporate Responsibility to Respect

Awareness

The Scottish businesses that were consulted as part of the present baseline assessment identified a range of business and workplace issues as having a human rights dimension – including a safe working environment, ensuring working hours are not excessive, and that there is no discrimination in the workplace. But they were somewhat less likely to identify freedom for staff to join a union as a human rights issue.

They were also less inclined to view such human rights issues as relevant to their own business.

Recommendation

- Escalate awareness raising efforts that would highlight the relevance of human rights to specific businesses and industry.

Corporate Reporting

While corporate reporting in the UK on human rights has increased, much of this practice pertains to issues of health and safety and diversity. Reporting on issues such as child and forced labour, collective bargaining, and the living wage is considerably less prevalent.

This reporting also excludes long-term plans on improving human rights performance by businesses.

Consultation with Scottish businesses showed that just under a third of respondents viewed gross human rights abuse as relevant to their business.

Corporate reporting on human rights is generally perceived as inconsistent due to the absence of common indicators and the diversity of measurement frameworks.

Recommendation

- Promote and support existing initiatives that aim to develop more consistent and rigorous methodologies to measure and report the human rights impacts of business organisations.

Pillar III: Access to Remedy

Guiding Principle 25

State-based judicial mechanisms

Few corporations have been convicted or fined for violations of various human rights related legislation because:

- It is difficult to prove the *intent* of a business;
- Scots law adopts the “identification” model of corporate fault;
- Prosecution must be brought by an enforcement agency which may not be aware of or have the resources to prosecute violations overseas.

State-based non-judicial mechanisms

The UK NCP (National Contact Point) imposes on complainants a high evidential threshold that goes beyond the requirements of the OECD’s Procedural Guidance. It lacks certain powers, and the decisions it makes are not binding and businesses may choose to ignore the NCP’s recommendations

Recommendation

- The Scottish Baseline Assessment supports McCorquodale’s (2015) recommendation to extend the scope of the UK NCP, including the power to implement sanctions and capacity to check compliance with recommendations.
- That the UK NCP shares the results of any investigations with bodies that have responsibility for public procurement.

Guiding Principle 26

The nature of the corporation form and the reluctance of UK and Scottish Courts to 'lift the corporate veil' is a procedural barrier to access to remedy for victims of human rights abuse by business enterprises in the UK and Scotland.

Employment tribunal fees of between £390 and £1,200, depending on the nature of the claim, may act as a deterrent to access remedy.

Legal fees must now be paid from the compensation awarded to the victims of abuse. Successful claimants and their lawyers incur expenses that cannot be paid by the defendant.

The Scottish Government's expenditure on legal assistance has considerably diminished in the last 10 years. The threat of having to pay the opposing party's costs can present a significant barrier to bringing such cases.

Recommendation

- The Scottish Baseline Assessment supports Scottish Government proposals to abolish employment tribunal fees in Scotland.
- The Scottish Baseline Assessment supports the recommendations of the Gill Review, in recognising the need for the development of a clearer system of Protective Expenses Orders in Scotland in order to limit the financial liability of claimants.

General Recommendations

- Develop a webpage dedicated to business and human rights aimed at Scottish businesses, including tailored guidance for SMEs (small and medium-sized enterprises).
- Encourage trade/industry associations to develop tailored guidance on the UNGPs, drawing attention to human rights risks associated with their specific industry and providing examples of best practice.
- The Scottish Government and the SHRC could raise awareness about, and provide support for, human rights measurement and reporting initiatives.
- The Scottish Government could potentially play an important role in encouraging firms to participate in established soft law codes that have a business and human rights dimension.
- Business and human rights could be introduced as a standing issue for the Equal Opportunities Committee.
- Introduce the annual or biennial monitoring of state activities and progress in relation to business and human rights in conjunction with an annual or biennial forum, which would allow for the dissemination of progress and for engagement with a range of stakeholders including Government, the business community and civil society.