

Scotland's National Baseline Assessment on
Business and Human Rights

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1. Introduction

The United Nations formally endorsed the Guiding Principles on Business and Human Rights (UNGPs) in June 2011. The UNGPs reflect a growing recognition within and 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.ⁱ They are a response to the concern about the limitations of domestic and international law in regulating the activities of businesses and corporations to ensure that they do not cause harm to lives, livelihoods and the environment, and the systemic failures in implementing the law and holding violators to account. These principles have received widespread support and the field of business and human rights has continued to move at a rapid pace, with a number of key developments relating to their implementation. Most notably, the European Union (in 2011)ⁱⁱ and the UN (United Nations) Human Rights Council (in 2014)ⁱⁱⁱ 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.^{iv} Scotland's National Action Plan for Human Rights (2013-17) commits to the development of an action plan to implement the UNGPs; this baseline assessment presents evidence of the current state of affairs in Scotland as an essential part of this process.^v

Scotland's National Baseline Assessment on Business and Human Rights (Scotland's NBA) provides a systematic evaluation of Scotland's current implementation of the UNGPs. This evaluation will inform the development of a NAP on business and human rights by helping to identify, prioritise and select a range of measures to be included in it. In this respect, 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. Further, Scotland's NBA will serve as a 'living document'; as initiatives related to business and human rights continue to develop^{vi} and the regulatory environment changes, Scotland's NBA will need to be reviewed and updated periodically.

1.1 Scottish context

Scotland has devolved powers within the UK system of government. The Scotland Act 1998 created a Scottish Parliament, which has the power to pass laws on devolved matters (for example, education and training, environment, health and social services).^{vii} The UK Parliament can pass laws on reserved matters that have a UK-wide or international impact (for example immigration, foreign policy, employment, trade and industry). Scotland's NBA reflects this devolved context i.e. the analysis that underpins this assessment considers both devolved and reserved matters, as well as drawing attention to wider UK guidelines, regulation and soft law instruments that are relevant to business and human rights in Scotland. This is most clearly visible in Annex 1 of Scotland's NBA, where devolved or Scottish specific

issues and initiatives appear in blue.

Scotland's NBA was drafted in the shadow of the referendum on Britain's membership of the European Union held on 23 June 2016. The vote in favour of 'Brexit' has raised a wide range of concerns relating to the potential impact on human rights and welfare legislation and policy in the UK as well as the constitutional role of Scotland in union with England, Wales, and Northern Ireland. The UK's human rights commitments under core UN and Council of Europe international human rights treaties,^{viii} including the European Convention of Human Rights, remain unchanged by the referendum outcome. However, the referendum does create a situation that might bring about a change in policies that have an impact on business and human rights. For example, concerns have been raised about the possibility of labour rights and protection against discrimination being 'watered down' post Brexit.^{ix}

The process to exit the European Union will begin when the UK Prime Minister officially invokes Article 50 of the Lisbon Treaty to start formal negotiations between the UK and the EU. At the time of writing, the UK Government under Prime Minister Theresa May was engaged in discussions with the leaders of the three devolved assemblies on their roles in the negotiating process. On negotiating an exit, the UK will continue separate negotiations on the economic, cultural, and political links with the EU and each of the EU member states. Also on the table for discussion is the suggestion of creating a unique membership for Scotland whereby it could be part of the EU while continuing to be in the UK, creating an even more asymmetric system of the division of powers than exists presently.^x It remains to be seen what role Scotland will play at each stage of these negotiations and to what extent the Scottish Government's policy priorities are reflected in the stance taken by the UK Government.^{xi}

Despite the uncertainty outlined above, there is good reason to feel optimistic about the protection of human rights in Scotland. Notably, the First Minister of Scotland, Nicola Sturgeon, has criticised the Conservative Government's plans to repeal the Human Rights Act 1988 (HRA),^{xii} stating that the Scottish Government will "oppose any weakening of human rights protections – not just in Scotland, but across the whole of the UK". Further, in a speech that outlined the priorities that will guide the Scottish Government over the next five years, the First Minister placed great emphasis on issues of equality, human rights and social justice.^{xiii} In many respects, Scotland's NBA indicates that this high level commitment is reflected in the relatively well-developed policies, legislation and regulation connected to business and human rights in Scotland. Nevertheless, the content of this assessment also draws attention to where gaps exist and where further efforts are required.

2. Background

The potential and actual benefits of business and trade across the world are varied and wide-ranging. From the creation of jobs and livelihoods to the promotion of individual and group innovation in sectors as varied as engineering and agriculture, businesses at every level of a capitalist economy prove immeasurably valuable to the promotion of human achievement and well-being. Yet human rights abuses by businesses across the world, including businesses in Scotland, have been well documented. Alleged abuses include (but are certainly not limited to): the use of

forced, child and 'sweatshop' labour; the lack of health and safety controls across global supply chains; damage inflicted on the health, environment and livelihoods of local communities living close to mines or pipelines; and, in the most egregious cases, complicity in the murder of trade union members or activists.

2.1 UN Guiding Principles on Business and Human Rights

With the objective of addressing such abuses, the UN Human Rights Council unanimously endorsed the UNGPs in 2011. The UNGPs operationalise the UN 'Protect, Respect and Remedy' Framework, a document adopted by the UN Human Rights Council in 2008. The two UN documents articulate a three-pillar framework.

Pillar I: The **state duty to protect** against human rights abuses by third parties, including business. This is to be achieved through policies, legislation, regulations, and adjudication. More specifically, in promoting corporate respect for human rights, the UNGPs identify concrete actions for States to meet their duty to protect human rights in the context of business operations. These include enacting and enforcing laws that require businesses to respect human rights; creating a regulatory environment that facilitates businesses' respect for human rights; and providing guidance to companies on their responsibilities. The UNGPs also stipulate that States should ensure that policies are coherent across departments and functions, and that their participation in multilateral institutions is aligned with their human rights obligations.

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. The UNGPs are clear that the responsibility to respect human rights relates to **all** internationally recognised human rights –no attempt is made to identify a specific sub-set of human rights that business must respect. Further, the responsibility of business to respect human rights exists "over and above legal compliance", and effectively constitutes a global standard of expected conduct applicable to all businesses in all situations, irrespective of whether or not local laws protect human rights.^{xiv} To this end, the UNGPs identify mechanisms for corporations to adopt in order to "embed" respect for human rights within and throughout their operations, including: (i) a policy commitment; (ii) human rights due-diligence processes, and; (iii) grievance mechanisms.

Pillar III: **Access to an effective remedy**, judicial and non-judicial, for victims of any business-related human rights abuses. This includes a duty on the State to take appropriate steps to ensure that State-based judicial mechanisms are able to effectively address business-related human rights abuses, and do not erect barriers (for example, due to the costs of bringing a claim or the difficulty in securing legal representation) that prevent victims from raising their cases. The UNGPs specify that access to remedy should also provide effective and appropriate non-judicial grievance mechanisms with the capacity to hear and adjudicate business-related human rights complaints as part of a comprehensive State-based system for remedy. Further, access to remedy does not only apply to States: the UNGPs stipulate that business enterprises should provide for, or participate in, effective mechanisms for fielding and addressing grievances from individuals. Such "non-State-based grievance mechanisms" refer to mechanisms administered by "a

business alone or with stakeholders, by an industry association or a multi-stakeholder group.”

2.2 National Action Plans

“Government-drafted policy documents that articulate state priorities and indicate future actions to support implementation of legal obligations or policy commitments on a given topic.”^{xv}

The UN Working Group on Business and Human Rights (UNWG) defines a NAP as an:

“Evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights.”^{xvi}

The UNWG considers four essential criteria as indispensable for effective NAPs:

1. NAPs need to be founded on the UNGPs and underpinned by the core human rights principles of non-discrimination and equality.
2. NAPs need to be context-specific and address the country’s actual and potential business-related human rights abuse.
3. NAPs need to be developed in inclusive and transparent processes.
4. NAP processes need to be regularly reviewed and updated.

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*’.^{xvii} The *Toolkit* regards NBAs as an essential preliminary phase in the NAP process; in this regard, the *Toolkit* details a robust methodology for undertaking an NBA by providing a template for evaluating a State’s implementation of the UNGPs and other relevant business and human rights frameworks. The DIHR/ICAR NBA template has formed the basis of a number of baseline assessment projects, including Chile,^{xviii} South Africa,^{xix} US,^{xx} and Zambia,^{xxi} and is used as the basis for informing Scotland’s NBA.

3. Scotland’s National Baseline Assessment: Methodology

Scotland’s NBA is based on the DIHR/ICAR template, which reflects the content of the UNGPs. The template is made up of a set of tables and indicators under Pillars I and III of the UNGPs and assigns a concrete piece of information that can be examined, at the national level, as a marker of the State’s compliance with the UNGP in question. Further guidance is provided in the template in the form of scoping questions for each indicator, allowing the researcher to establish whether or not a given indicator is met.

In terms of implementing the NBA process, as guided by the template, the overall approach was undertaken in three phases:

Phase 1: Following the format of the DIHR/ICAR template, desk-based research was undertaken to provide a mapping of (amongst other things): (i) the relevant

international human rights legal instruments ratified; (ii) existing policies, legislation, and regulations already in place; and (iii) relevant human rights soft law instruments.

Phase 2: In conjunction with the desk-based research, Scotland's NBA also sought input from a wide range of stakeholders. According to both DIHR/ICAR and De Felice and Graf (2015)^{xxii} such stakeholder consultation is essential to the wider NAP process as it provides: (i) knowledge exchange and key insights from significant stakeholder groups; (ii) engenders a participatory approach to the development of the NBA; (iii) maintains the legitimacy and integrity of the process, and – perhaps most importantly; (iv) allows for the assessment of Pillar II criteria. In order to inform the development of the Scottish NBA, a range of stakeholders were consulted, including businesses, government, public bodies and local authorities, and civil society organisations.

Consultations took a variety of formats and included one-to-one conversations with 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 businesses (of different sizes and from a range of sectors), and a survey of public bodies and local authorities. See Annex 2 for an overview of these consultations, the methods employed, and a summary of the findings from this phase of the assessment.

Phase 3: Following the initial draft of the Scottish NBA, further consultation was undertaken with a range of stakeholders in order to verify the findings and generate an additional opportunity to provide input.

4. Key Findings and Recommendations

4.1 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 business-related human rights abuse, 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 Parliament has competence to “observe and implement” commitments under international treaties ratified by the UK^{xxiii}. Moreover, 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.

In September 2013, the UK Government became the first government to issue a National Action Plan for Business and Human Rights, entitled *Good Business: Implementing the UN Guiding Principles on Business & Human Rights*.^{xxiv} An updated version of the UK NAP was published in May 2016.^{xxv} Scotland's National Action Plan for Human Rights (SNAP) contains a commitment to develop a coordinated plan of action to implement the UNGPs, building on the UK's Action

Plan. This baseline assessment represents the first stage of fulfilling that commitment.

While the above provides grounds for optimism in relation to the Scottish and wider UK position vis-à-vis the UNGPs, there remain a number of significant gaps and challenges. These are outlined below.

Guiding Principles 1 and 3 – International instruments; laws and regulations

Groups at risk of vulnerability and marginalisation

While there is a wide range of initiatives related to the rights of groups at risk of vulnerability and marginalisation in Scotland, there remain a number of serious issues regarding equality in the workplace and employment practice. In particular, a recent Equality and Human Rights Commission (EHRC) report, *Is Scotland Fairer? The state of equality and human rights 2015*^{xxvi} highlights significant barriers for women, persons with disabilities and ethnic minorities in accessing employment. Of particular note, unemployment rates increased for disabled people between 2008 and 2013.

Further, stakeholder consultation undertaken for this baseline assessment highlighted concerns related to the rights of agency workers and workers employed through 'umbrella companies', including the lack of protection in relation to unfair dismissal, the use of zero-hours contracts and lack of transparency in relation to contract and pay.

Concerns have been raised around the impact of business on children's human rights. Children are impacted by almost all areas of business activity, including human resources (work environment, workplace conditions, family-friendly work policies, women's employment), supply chain management (supplier standards, monitoring), government affairs (policy development, lobbying), marketing (responsible advertising/marketing practices), and research and development (product safety, distribution). There has been increasing recognition of this impact at an international level, including the development of a General Comment^{xxvii} from the UN Committee on the Rights of the Child and Children's Rights and Business Principles from UNICEF and Save the Children^{xxviii}. Stakeholders have raised concerns that there has been little scrutiny of this impact at a Scottish level.

A further concern in the Scottish context relates to the rights of children who enter into contractual arrangements with Scottish football clubs, for example regarding the legality of such contracts with children under 16 years, and that 'compensation' payments between football clubs for the transfer of young players under the age of 16 years creates a 'transfer market' for children.

As stated above, there is a wide range of Scottish Government-led initiatives related to the rights of vulnerable groups. However, it was noted during the stakeholder consultation phase of the assessment 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.

Of particular importance in this context is the duty of the Scottish Government under Pillar 1 of the UNGPs to promote human rights education and raise awareness among stakeholders of their rights and remedies for violation. 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*^{xxxix} 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. It would also need to involve not just those who are at the ‘consumer end’ of the business but ‘insider groups’ such as accountancy and human resources professionals.

Tax

Corporate tax avoidance is a high profile issue in the UK and a number of corporations have come under scrutiny for their tax practices. It has been suggested that tax avoidance constitutes a human rights issue in so far as it deprives governments of resources required to uphold and give effect to rights.^{xxx} According to HMRC’s (Her Majesty’s Revenue and Customs) own analysis, it is estimated that there is a £1.0 billion corporation tax gap that is attributable to tax avoidance.^{xxxi}

Within the wider UK context, it has been noted that HMRC does not have the resources needed to tackle corporate tax avoidance and that existing legislation is not sufficient.^{xxxii} 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 through engagement with the accounting profession in establishing norms of proper tax disclosure.^{xxxiii} One approach might be to require that companies seeking public contracts are signatories of the Fair Tax Mark initiative.^{xxxiv}

Guiding Principle 4 – Businesses controlled by the State and State-owned enterprises

There is a range of different types of Non-Departmental Public Bodies (NDPBs) in Scotland, including four public corporations: Caledonian Maritime Assets Ltd, Glasgow Prestwick Airport, Scottish Canals, and Scottish Water. In addition, many councils use Arm’s-Length External Organisations (ALEOs) to provide a wide range of services.^{xxxv} An ALEO is a body that is formally separate from a council but is subject to its control and influence. ALEOs usually take the form of companies or trusts, although they can register as charities if they have a charitable purpose. ALEOs are quite a significant presence in Scotland, including around 130 major organisations; figures for 2012-13 suggest that ALEOs spend approximately £1.3 billion and employ around 25,000 people.^{xxxvi}

While the Scottish Government provides a range of guidance in relation to the governance and accountability of NDPBs and ALEOs in general, 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 (for example, in relation to equality and diversity, whistleblowing procedures, etc.) much of the guidance does not explicitly address 'human rights'.^{xxxvii}

Therefore, there is scope to develop specific guidance for public corporations and for guidance to all NDPBs and ALEOs to more explicitly address human rights in a business context, especially given that public bodies have obligations under the Human Rights Act 1998. Further, guidance should make explicit reference to the UNGPs and encourage the effective implementation of human rights due diligence.

Guiding Principle 6 - Government contracting and public procurement

There is much to be positive about in relation to Scottish Government policy and practice in relation to procurement. For example, new regulations that transpose (European Union) public procurement directives make it a legal requirement that businesses which have been found by a court or tribunal to have blacklisted workers are excluded from bidding for public contracts. Further positive aspects of procurement practice in Scotland have been recently noted: in a commentary on Ireland's working outline for a national plan on business and human rights, Claire Methven O'Brien states:

"One good example [of procurement practice] comes from Scotland, where meetings are held periodically that allow public authorities such as the police and healthcare providers to discuss specific upcoming tenders with the national human rights institution and others with relevant expertise to identify what human rights safeguards might be needed".^{xxxviii}

Further evidence of good practice includes guidance on the commissioning and procurement of health and social care. As part of SNAP, a Human Rights Action Group on Health and Social Care has been established. It has developed a programme of work that includes putting human rights at the centre of guidance, including on the commissioning of health and social care.^{xxxix}

However, concerns have been raised about the implementation of procurement guidelines and several of the CSOs that were consulted as part of this baseline assessment noted that the Scottish Government continued to award contracts to companies that have been implicated in blacklisting employees.^{xl} Although 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 the Blacklisting Regulations, if sufficient remedial action has been taken or the time limit on exclusion has expired.

As with Guiding Principle 4 above, 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' are not explicitly addressed in much of this guidance, which may mean that public authorities are not adequately informed about potential human rights risks attached to their procurement of goods and services e.g. individual health and social care where the human rights of vulnerable service users need to be safeguarded, for instance in connection with residential care or personal support services.

Therefore, there is scope for 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 – including pre-qualification, evaluation and monitoring of awards.

4.2 Pillar II: Corporate Responsibility to Respect

Pillar II of the UNGPs is not covered in the DIHR/ICAR baseline assessment template. This Pillar was addressed in Scotland's National Baseline Assessment by consulting with business, in the form of a business and human rights survey and through follow-up interviews and stakeholder consultation. Further, the assessment of Pillar II was informed by recent research undertaken by Kelly Kollman and Alvis Favotto at the University of Glasgow, which includes an analysis of UK companies' corporate social responsibility (CSR) reports over a 20 year period, as well as interviews with the CSR managers of large UK firms.^{xii} In addition, recent reports by the EHRC^{xiii} and the Economist Intelligence Unit^{xiiii} informed the survey undertaken as part of Scotland's National Baseline Assessment as well as providing a further evidence base to inform the assessment.

Awareness

There is evidence of growing awareness and engagement with business and human rights issues. As Kollman and Favotto (2016) point out, this has been driven, in part, by the emergence of influential international codes and reporting frameworks that focus on business and human rights, for example the Global Reporting Initiative, the UN Global Compact, the OECD Guidelines for Multi-national Enterprises (2011) and ISO 26000 (2010). Further, in the UK context, recent legislation (including the Companies Act 2006, the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, and the Modern Slavery Act 2015) requires companies to disclose human rights risks in their operations and supply chains.

In keeping with this growing 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 (see Table 9, Annex 3). Nevertheless, Scottish businesses were somewhat less likely to identify freedom for staff to join a union as a human rights issue, despite this being explicitly recognised in the International Labour Organisation's *Declaration on Fundamental Principles and Rights at Work* and Article 23 of the Universal Declaration of Human Rights.

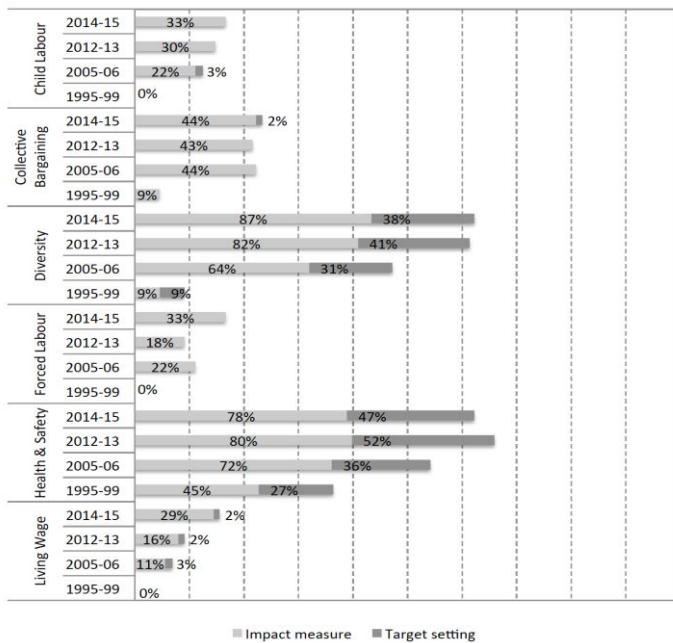
Despite a general awareness of business and human rights issues, the Scottish businesses that were consulted as part of the present baseline assessment were less inclined to view such issues as relevant to their own business. For example, in a comment that was echoed by other business participants in this assessment, 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 by another business stakeholder that human rights were not high on the agenda of suppliers or customers (see also Table 9 and Table 11, Annex 3A).

While it would seem that Scottish businesses are becoming more aware that human rights are a relevant business issue, there would appear to be a need to escalate awareness raising efforts that would highlight the relevance of human rights to their own specific business and industry. This might be achieved by establishing links with trade/industry associations in order to develop tailored guidance on the UNGPs, drawing attention to human rights risks associated with their specific industry and providing examples of best practice.

Corporate Reporting

Corporate reporting on human rights by UK businesses has increased considerably over the past 20 years. As noted above, this trend is driven, at least in part, by the emergence of influential reporting frameworks that include a business and human rights component (for example, the GRI and the OECD Guidelines for Multi-national Enterprises) as well as the emergence of mandatory reporting requirements (for example, the human rights reporting requirements under the EU Non-Financial Reporting Directive,^{xliv} the Companies Act 2006,^{xlv} and the Modern Slavery Act 2015^{xlvi}).

In analysing corporate human rights reporting trends in the UK since 1995, Kollman and Favotto (2016)^{xlvii} note that while reporting on human rights has increased, much of this practice pertains to issues of health and safety and diversity. Table 1 below highlights how reporting on issues such as child and forced labour, collective bargaining, and the living wage is considerably less prevalent amongst UK companies. Further, according to Kollman and Favotto (2016),^{xlviii} outside the areas of health & safety and diversity, “UK firms’ reporting on future improvement goals for human rights performance remains almost non-existent”.



Source: Kollman and Favotto (2016)^{xlix}

These reporting trends were reflected in the stakeholder consultation with Scottish businesses that was undertaken as part of the Scottish Baseline Assessment. For example an examination of Table 10, Annex 3 indicates that whilst 100% of respondents viewed conditions of work and employment (including health and safety, equality and diversity) as relevant to their business, only 31% considered gross human rights abuse as relevant. This way of framing human rights was also apparent in the interviews with Scottish businesses, where human rights were predominantly represented as an employment issue.

During the consultation sessions, Scottish businesses were asked about their views on reporting for human rights in particular, as well as CSR reporting more generally. For some of the businesses that were consulted, reporting on human rights was not considered important, primarily because it wasn't something they were required to do - either because they were a small company and/or were not listed on the stock exchange. A number of other businesses highlighted that corporate reporting on human rights was generally inconsistent and "not consistent across sectors". For example, it was noted that some companies tend to emphasise employee relations, while others focus almost exclusively on the environment. One investment firm that was consulted observed that, "Reporting and disclosure on human rights is patchy... at best it is anecdotal... and ill defined".

These observations are shared by Kollman and Favotto (2016)^l, who report that UK CSR managers tend to view reporting on corporate environmental sustainability practices as more developed and consistent than reporting on human rights. Despite the emergence of reporting frameworks in the area of business and human rights,

Kollman and Favotto (2016) report that business engagement with human rights issues “is hindered by a lack of common indicators and the difficulty of measuring firms’ human rights impacts.” For example, the CSR managers that the researchers interviewed indicated that they would welcome more standardized methodologies for measuring and monitoring issues such as the living wage and labour rights in their supply chains.

The above discussion in relation to existing trends and attitudes amongst UK and Scottish businesses towards reporting on business and human rights would suggest that there was an opportunity for the Scottish Government to 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.

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 and the accounting firm Mazars (Mazars, 2015^{li}; Shift, 2014^{liii}). 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.^{liiii}

Further, the Scottish Government could support the development and promotion of industry specific measurement and reporting guidance. Echoing Kollman and Favotto (2016)^{liv}, the Scottish Baseline Assessment finds that there is scope for the Scottish Government to partner with companies from key sectors of the Scottish economy to develop industry specific guidance on measurement and reporting, increase awareness and share best practice.

4.3 Pillar III: Access to Remedy

McCorquodale (2015)^{lv} presents a recent analysis of the provision of access to remedy in the UK for business related human rights abuse and thus provides an appropriate foundation for the assessment of access to remedy in the Scottish context. The Scottish Baseline Assessment, therefore, draws on McCorquodale’s analysis, supplementing it where appropriate for Scottish-specific issues.

Guiding Principle 25 – Judicial grievance mechanisms

Sanctions

As noted above in relation to Guiding Principle 6, concern has been expressed in relation to the implementation of sanctions, in the form of exclusion from bidding for public contracts. More specifically, that the Scottish Government continues to issue contracts to known blacklisting companies, thus failing to implement its own procurement guidance.

State-based judicial mechanisms

Some legislation does specifically provide for the criminal prosecution of a business enterprise, including the Corporate Manslaughter and Corporate Homicide Act 2007, the Bribery Act 2010, and the Modern Slavery Act 2015. However, it has been noted that few corporations have been convicted or fined - in part because it is difficult to prove the intent (*mens rea*) of a business in contrast to that of an individual.^{lvi}

Further, Scots law adopts the “identification” model of corporate fault, meaning that to find a corporation guilty of a crime, the court must find that the crime or act was committed or sanctioned by its “directing mind.”^{lvii} It has been suggested that the identification model is overly restrictive, and makes it much more difficult to prosecute large and more complex organisations.^{lviii}

Another reason that has been highlighted for the low number prosecutions, especially those concerning actions overseas, is that prosecution must be brought by an enforcement agency (such as the Serious Fraud Office the Health and Safety Executive or the Crown Office and Procurator Fiscal Service (COPFS) in Scotland). McCorquodale (2015, p.24) suggests that, in relation to overseas cases, the relevant prosecuting authorities tend not to investigate either because of a lack of resources or a lack of specialist knowledge.^{lix} Further, prosecution for corporate crime in Scotland rests almost exclusively with COPFS, which has ultimate discretion to proceed or not with a prosecution. It has been suggested that COPFS does not provide detailed reasons for its decisions to prosecute or not and its decisions are not subject to judicial review.^{lx}

State-based non-judicial mechanisms

OECD (Organisation for Economic Cooperation and Development) Watch reports that the UK NCP (National Contact Point) received 72 complaints between 2001 and 2015. This was the largest number of any NCP and comprises almost 30% of all NCP complaints worldwide. However, 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.^{lxi} Further, it has been noted that the UK NCP lacks certain powers and that the decisions it makes are not binding and businesses may choose to ignore the NCP’s recommendations.^{lxii}

The Scottish Baseline Assessment supports McCorquodale’s (2015) recommendations in relation to extending the scope of the UK NCP, including the power to implement sanctions and capacity to check compliance with recommendations.^{lxiii} Further, the UK NCP should share the results of any investigations with bodies that have responsibility for public procurement.

Guiding Principle 26 – Barriers to accessing remedy

There is a range of practical and procedural barriers to access to remedy for victims of human rights abuse by business enterprises in the UK and Scotland. These include issues related to the nature of the corporation form – namely, that (i) parent and subsidiary are considered separate legal entities^{lxiv} and (ii) there is reluctance for UK and Scottish Courts to ‘lift the corporate veil’.

Employment tribunal fees were introduced by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 - prior to that time there were no fees. The current total cost to the claimant of an issue fee and a hearing fee is between £390 and £1,200, depending on the nature of the claim.^{lxv} The Scottish Government proposes to abolish the fees in Scotland.^{lxvi}

In relation to the legal costs of bringing a claim, the Legal Aid, Sentencing and

Punishment of Offenders Act 2012 (LASPOA) requires that legal fees must now be paid from the compensation awarded to the victims of abuse. This constitutes a barrier because such cases can be very costly to bring and may mean that successful claimants and their lawyers incur expenses that cannot be paid by the defendant.^{lxvii} This barrier is amplified for cases involving human rights abuse overseas due to the Rome II Regulation, which stipulates that damages awarded in UK courts must be at the levels awarded by the local courts where the harm occurred.^{lxviii}

A barrier more specific to the Scottish context relates to legal assistance in Scotland. In particular, the Scottish Government's expenditure on legal assistance has diminished in the last 10 years and the system has been described as overly complex.^{lxix} The Scottish Human Rights Commission (SHRC) has also highlighted issues in relation to legal assistance involving public interest cases, where the threat of having to pay the opposing party's costs can present a significant barrier to bringing such cases.^{lxx} In this respect, the Gill Review recognises the need for the development of a clearer system of Protective Expenses Orders in Scotland in order to limit the financial liability of claimants.^{lxxi}

General Recommendations

A number of other general recommendations can be made, drawing on best practice or planned activities in other jurisdictions.

- Develop a webpage dedicated to business and human rights aimed at Scottish businesses. This could provide resources to business, including accessible guidance on: (i) the UNGPs; (ii) developing and implementing a human rights policy; (iii) developing and implementing due-diligence processes, and; (iv) reporting practice. The website could also provide more tailored guidance for SMEs (small and medium-sized enterprises). One approach to developing a website and coordinating the production of guidance could be through the establishment of a cross-government initiative that serves as a focal point for business and human rights.^{lxxii}
- 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.
- Existing approaches to the measurement and reporting of business human rights related issues remains relatively underdeveloped compared to other areas of corporate reporting (for example environmental sustainability)^{lxxiii}. In developing a Scottish National Action Plan on Business and Human Rights, the Scottish Government and the SHRC could raise awareness about, and provide support for, human rights measurement and reporting initiatives (for example, the UN Guiding Principles Reporting Framework - <http://www.ungpreporting.org>) as well as sharing and promoting examples of best practice.
- Related to the above point, 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. For example, the Scottish Government could help disseminate information about high-profile corporate social responsibility initiatives and standards such as the Global Reporting Initiative (GRI), ISO 18000, ISO 26000 and SA 8000.
- On 1 June 2016 the Scottish Parliament voted to extend the remit of the Equal Opportunities Committee to include human rights. Business and human rights could be introduced as a standing issue for this committee.
- Introduce the annual or biennial monitoring of state activities and progress in relation to business and human rights. This could be undertaken in conjunction with an annual or biennial forum, which would allow for the dissemination of progress and allow for engagement with a range of stakeholders including Government, the business community and civil society. The forum might also include a National Business Responsibility Award, in order to recognize the achievements of organisations that have made considerable progress in terms of implementing the UNGPs.

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