

March 2017

Joint Submission

Report to the Scottish Human Rights Commission on A
Business and Human Rights National Action Plan

4 of 4 joint submissions.

Joint submission from deafscotland, Glasgow Council for the Voluntary Sector and Voluntary Action Scotland to Scottish Government on the Socio Economic Duty.

The three organisations have collaborated on a project about the duty to respect, protect and fulfil our human rights. We are also working to build knowledge and capacity on human rights within the third sector so that human rights fulfil their potential to make Scotland fairer. Whilst this submission is directed to the SHRC and the Scottish Government, it will be widely circulated amongst the Third Sector so is deliberately written to inform as well as make recommendations on the content and impact of Scotland's National Action Plan on Business and Human Rights. This is one of a series of joint submissions.



deafscotland is the lead for all matters concerning deaf people and their issues in Scotland, representing organisations working with and on behalf of deaf people: deaf/Sign Language users, deafblind, deafened, and hard of hearing people. Deaf Scotland's membership provides an effective working partnership between the third, public and private sectors and the Scottish Government. For more information: www.scod.org.uk

This submission was submitted under the legal name Scottish Council on Deafness.



GCVS is the main development agency and advocate for voluntary and community organisations in Glasgow and one of the largest Councils for the voluntary sector in the UK. We are also one of four key partners that form Glasgow's Third Sector Interface, the partnership that supports and represents the third sector in Glasgow and through which the Scottish Government engages with the third sector. For more information www.gcv.org.uk



Voluntary Action Scotland is the national network of Third Sector Interfaces and we champion, connect and develop Scotland's Third Sector Interfaces to support the voluntary and community sector locally. Voluntary Action Scotland gives a national voice to the Third sector Interfaces local impact. We advocate for best possible environment in which the third sector locally can thrive and contribute to better and fairer outcomes for the people we service. For more information: www.vascotland.org

1. Executive Summary

Human rights matter in Scotland: they are guiding principles of government policy, underpinned by legal obligations in the Scotland Act 1998 and in international law. There is no hierarchy of rights but economic and social rights are particularly important in empowering individuals and families to access services, leave poverty, achieve in education, improve physical and mental health and be active in public service. On 25th May 2016 in a statement to the Scottish Parliament, the First Minister committed to establishing “an agreed set of social and economic rights for all Scotland’s citizens” to make Scotland fairer.

Whilst international law places duties on governments to respect, protect and fulfil our human rights, pragmatically the private sector has a key role to play too directly through its employment of workers, in its supply chain and how it operates e.g. the materials it uses and its operational impact on the environment. Furthermore, a number of UN Treaties which the UK has ratified, meaning all our laws and policies should comply, already expect specific actions from private sector companies directly or via government:

- Convention on the Rights of the Child (UNCRC): Article 3 (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. How private companies should interpret this duty if covered in some detail in General Comment 14 produced by the UN Committee on the Rights of the Child.¹
- Convention on the Rights of People with Disabilities (UNCRPD): Article 22 State shall urge “private entities that provide services to the public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities”
- International Covenant on Economic, Social and Cultural Rights (ICESCR) repeatedly requires Government to regulate public, private and Third Sector employers eg Article 7 is the right of everyone to the enjoyment of just and favourable conditions of work which ensure: (a) Remuneration which provides all workers, as a minimum, ‘Fair wages and equal remuneration for work of equal value without distinction of any kind’ and ‘Safe and healthy working conditions’.

In November 2015, the Scottish Government commissioned a baseline assessment on ‘Business and Human Rights’ which is a precursor to developing a national action (NAP). The NAP will give effect to the UN’s global ‘Guiding Principles on Business and Human Rights’ (UNGPs). The purpose of this submission is to inform the NAP which is being developed by the Scottish Human Rights Commission (SHRC) as part of the ‘Better World’ strand of Scotland’s National Action Plan on Human Rights (SNAP).

GVCS, *deafscotland* and VAS are happy to work with the SHRC and with the Scottish Government to ensure the NAP provides a framework which delivers on the UNGPs and meets the criteria in the soon to be finalised draft ‘General Comment on Business and Human Rights’ from the UN Committee on Economic, Social and Cultural Rights, as well as meet the approved General Comment from the UN Committee on the Rights of the Child.

¹ Available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en

This submission is being shared with colleagues in the voluntary sector as we build support for a greater focus within the Scottish NAP of the importance of public procurement in respecting and protecting human rights, and in remedying human rights abuses in Scotland, and beyond. We believe Scotland can become a model of international best practice by delivering a NAP that enables business success, fair rewards for workers and respectful services for people. There is also a role for the Third Sector as employers, service deliverers and as procurers of goods, facilities and services and we undertake to work to increase awareness across our networks.

From our work, so far, we make seven recommendations:

1. A consultation event for the Third Sector should be held in May 2017 so that the context and content of the Scottish NAP can be better understood and discussed. We are happy to host and facilitate this meeting.
2. To inform discussions, the SHRC should provide a briefing on the timeline and progress on developing the NAP and its relationship with the UK NAP, which should accompany the Executive Summary of the Baseline Assessment.
3. A meeting should be convened with those businesses which are publicly owned, social enterprises, Development Trusts as well as ALEOs and Registered Social Landlords (RSLs), to discuss how delivery of the Scottish NAP can be realistically rolled out across Scotland and for them to provide best practice examples which inspire the private sector to adopt the Scottish NAP.
4. The Scottish NAP should include a statement that ‘complying with the UNGPs will aid business success and enhance reputations’ and require a commitment to comply with the 31 guiding principles. Support should be actively sought from across the private sector including those organisations owned and funded by the public sector which are responsible for spending millions of pounds of public money every year contracting with and procuring services from, the private sector.
5. The Scottish NAP can monitor the deliberate and concrete action by the Scottish Government to ensure compliance with human rights law in all public procurement. The Scottish NAP can also monitor the impact e.g. because of e.g. evidencing how Scotland is fairer, inclusion increased and the Third Sector thriving through fairer opportunities.
6. The Scottish NAP should require periodic reports from Scottish Enterprise, Highlands and Islands Enterprise, Skills Development Scotland, Visit Scotland on their work in promoting the benefits of a Scottish NAP to business in general as well as to representative bodies such as Chambers of Commerce, Federation of Small Business and CBI Scotland.
7. The Scottish NAP is the right framework to provide information to the Third Sector, ALEOs, social enterprises, RSLs and Development Trusts, on why and how to identify and purchase from those business entities which comply with the UNGPs.

Section 1- Why Human Rights Matter

Human rights are central to our concept of inclusive growth – the concept we have put at the heart of our strategy of building a stronger economy and a fairer society ... the protections offered by the HRA and the ECHR should represent a floor rather than a ceiling. We should be looking to go further... In fact, the key challenge for progressive governments ... is finding ways to embed those responsibilities across different areas of policy. That's what Scotland's National Action Plan does.

Nicola Sturgeon, 2015²

Human rights law establishes the minimum human rights that are needed to have a peaceful and fair world. The rights are defined in international law e.g. through the United Nations' treaties and in regional mechanisms such as the European Convention on Human Rights (ECHR). These human rights should be equally enjoyed by our staff and management Boards, our volunteers and those we serve. The obligation to respect, protect and fulfil these rights falls on the UK state and the Scottish Government but the private sector in Scotland has a role and duties too.

The recently published poverty figures provide evidence of the scale and perniciousness of the unfairness and unequal society that we live in:

- 17% of people in Scotland were living in relative poverty before housing costs Before Housing Costs (BHC) in 2015/16, approximately 880,000 people. This compares to 15% in 2014/15.
- After housing costs (AHC), 20% of people in Scotland were living in relative poverty in 2015/16 representing 1.05 million people. This compares to 18% in 2014/15.
- 19% of children in Scotland, approximately 190,000, were living in relative poverty BHC in 2015/16. This compares to 17% the previous year.
- After housing costs, 26% of children in Scotland were living in relative poverty, approximately 260,000 children. This compares to 22% the previous year.
- 16% of working age adults in Scotland were living in relative poverty BHC in 2015/16, this equates to 520,000 working age adults. This compares to 15% in 2014/15.
- AHC, 20% of working age adults (650,000) in Scotland were living in relative poverty. This compares to 19% in the previous year.
- 16% of pensioners in Scotland were living in relative poverty BHC in 2015/16, approximately 170,000 pensioners. This compares to 15% the previous year.
- After housing costs, 13% of pensioners in Scotland (around 140,000) were living in relative poverty. This compares to 12% the previous year.
- In 2015/16, 62 % of working age adults in poverty BHC were living in working households, as were 66% of children in poverty.
- AHC 64% of working age adults in poverty were living in working households, as were 70% of children.³

Being poor creates a range of disadvantage and exclusion. Therefore, being poor negatively impacts on our human rights including the right to enjoy the highest attainable standard of physical and mental health, the right to education and therefore life chances, the right to an adequate standard of living, the right to food and clothing, the right to a home, the right to form an opinion, the right to be heard on matters that affect us and the right to 'just and favourable' conditions of work. The

² A speech on 9th December 2015 delivered by Nicola Sturgeon at Dynamic Earth in Edinburgh in advance of International Human Rights Day.

³ 'Poverty and Income Inequality in Scotland: 2015/16' a National Statistics Publication for Scotland pub 16th March 2017 at <http://www.gov.scot/Resource/0051/00515392.pdf>

problems are immense but the Third Sector makes high level political commitments a reality locally, and on key areas such as children's rights.

However existing approaches are not working as quickly and as expected and this coincides with cuts to Third Sector funding, capacity and services. Although the above statistics are for one year and cannot be interpreted as a trend, they are nonetheless very worrying given the number of children, families and pensioners negatively impacted at a time when deliberate and concrete measures are underway. The evidence also points to groups of people being disproportionately affected such as disabled adults.

Human rights are an empowering solution which need to be mainstreamed rather than seen as a benefit available for some. They are strong rights which belong to people equally, and place obligations on the government to deliver. We need to move to a different culture, a rights respecting culture, so they can be asserted and delivered in tandem with specific measures such as the Child Poverty (Scotland) Bill⁴, which includes statutory targets to bring numbers down, and the anticipated 'Good Food Nation Bill'⁵, promised in the Scottish Government's 2016 'Programme for Government' and follows on from the Scottish Government's 'Good Food Nation' initiative.⁶

Human rights matter in how we do our job:

- As membership based organisations, the Third Sector wants people to be treated with the human rights values of fairness, respect, equality, dignity and autonomy.
- From practice, **we know** that delivering peoples economic, social, cultural, civil, political and environmental rights changes their relationship with each other and with public services to one of empowerment.
- These rights and values underpin the services which we deliver, and that is part of the reason for our support and success.
- We recognise that the State's failure or omission to respect, protect and fulfil rights creates the need for our services in the first place. We accept that our services can help people achieve their rights.
- The status quo is not working for us all so the case for transformational change is won and we believe we have a part to play in achieving the shared goal of fairness and equality of outcomes.

The Third Sector is widely understood to have an empowering function and that includes enabling people to exercise and enjoy their human rights although we have not been using the language of human rights in a consistent or informed way.

Our broad work includes:

- The promotion and support of accessible information, inclusive communication and inclusion more broadly.
- The delivery of information and advocacy services which can be a gateway to people achieving their rights.
- The provision of language and communication support which enables people to be included, have their opinion heard and for their views to be considered when decisions are made about service provision; community planning and empowerment.

⁴ A Bill for an Act of the Scottish Parliament to set targets relating to the eradication of child poverty; and to make provision about plans and reports relating to the targets, introduced 9th February 2017

<http://www.parliament.scot/parliamentarybusiness/Bills/103404.aspx>

⁵ A campaign supported by Nourish Scotland

⁶ More information available at <http://www.gov.scot/Topics/Business-Industry/Food-Industry/national-strategy/good-food-nation>

- Working with the public and private sector to increase recruitment of those who are vulnerable and/or have additional support needs.

Conclusion

Too often people think of human rights as an optional add-on to their daily work and something that can be ignored in organisational development, policy planning and service design. This operational culture applies to all level within the public sector, from those who govern to those who are under pressure to deliver front line services. Culture and practice can dramatically shift if there is an understanding that rights empower people and are an entitlement rather than an act of benevolence. The Third Sector in Scotland needs to be more specifically and mainstream human rights language and standards in how they describe and deliver this work. We must collectively work to make Scotland a 'right respecting society' which has, as a priority, equally delivering our economic and social rights which means working collaboratively with the third, private and public sectors.

Section 2 – Defining Human Rights In Scotland

Understanding human rights law, knowing who are the duty bearers and who are the rights holders, finding good practice examples of how human rights have improved lives in Scotland, remains a challenge. Yet we know that there is a substantial body of law which clearly sets out obligations and duties:

- Scottish Government Ministers are obliged by Section 57 of the Scotland Act (1998) to positively comply with the ECHR.
- The Scotland Act 1998 also places obligations on Ministers to comply with other international human rights treaties that have been “ratified” by the UK. Therefore, the Scottish Parliament can pass legislation which specifically includes duties on international ratified treaties e.g. the Children and Young People’s Commissioner Scotland (2003) included functions on promoting the UNCRC and the Scottish Commission for Human Rights Act (2006) places duties on the SHRC in respect of internationally ratified treaties.
- The Human Rights Act 1998 (HRA) delivers obligations eg Section 6 requires all public bodies and those delivering services of a public nature to comply with the ECHR. Bodies covered by the HRA include housing departments and housing associations, social work services, schools and nurseries, the police, the courts and health services.⁷

The operation of these laws has gradually and subtly impacted on the work of the Third Sector including:

- Understanding the obligations which arise from the HRA, as S6 requires compliance from organisations that are delivering services of a public nature.
- Nature of contractual obligations for services delivered for central and local government, public bodies and Arms-Length External organisations (ALEOs), which may include a standard term on duties under the HRA. For example: “The **Provider** shall in its implementation of this **Contract** comply with the requirements of the Human Rights Act 1998 (“the 1998 act”) and all secondary legislation made under the 1998 Act as though the **Provider** were a public authority for the purposes of the 1998 Act.”

Human rights are about process as well as about subjects. For example, the right to form an opinion by receiving and imparting information depends on people getting information in a format they understand and being able to culminate their opinion so that they are heard. This is a right which is unequally enjoyed by those who are deaf and hard of hearing. Whilst the British Sign Language (Scotland) Act 2015 will help, lots of people will not benefit as their communication needs are different:

- There are an estimated 1,012,000 people in Scotland with some degree of hearing loss (of whom approximately 546,000 are over the age of 60)
- According to the 2011 Census, 350,492 of the Scottish population aged 3 and over listed deafness or partial hearing loss as a long-term health condition.
- According to the census there are 12,533 people who use BSL at home in Scotland; of these, 3,729 have deafness or have a partial hearing loss listed as a long-term health condition; and 5,640 have no deafness or partial hearing loss.

⁷ See EHRC website <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>

From experience, we know that the range of rights which can improve people's lives in Scotland is extensive, particularly in respect of economic and social rights which are contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR):

- The right to food which is both an individual and communal rights and requires availability, adequacy, accessibility and sustainability. We recognise that this right enables the right to life as well as enabling the equal enjoyment of other rights such as a child's right to education. Providing food is dependent on many sizes of commercial operation from small local farmers to large supermarket chains. The growth of food banks in Scotland indicates the size of the problem faced by our member organisations and individuals.
- The right to an adequate standard of living and we recognise that progress is being made in this regard by a number of actions including the work of the Agricultural Wages Board⁸, the accreditation of living wage employers which is actively promoted by the Scottish Government⁹, the Fair Work Convention¹⁰ and the plans for the delivery of welfare using the new and additional devolved powers¹¹. (Article 11)
- The right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. (Article 6)
- The right to just and favourable conditions of work (Article 7)
- The right to join a trade union. (Article 8)
- The right to social security which includes social insurance (Article 9)
- The right to the highest attainable standard of physical and mental health (Article 12).

ICESCR places obligations on the Scottish Government "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." As a number of the rights relate to the behaviour of private companies, we know that action is need by the Government via the framework of a Scottish NAP.

Understanding that it is a right to live free from poverty, for adults as well as children, is a cultural change in Scotland. Understanding that we should be a 'rights respecting' society is a quite different approach from welcoming benevolence from Government and public services and "charitable" actions from private and third sectors. A range of measures are currently in the pipeline to effect change for the most vulnerable but there has not been the emphasis on existing human rights and the consequent obligations on the Scottish and UK Government to achieving fairness.

Conclusion

Setting targets and monitoring impact are increasingly seen by the Scottish Government to force change and that should be the approach for the delivery of human rights too. The Third Sector has a role to play in respecting as well as delivering our human rights. However, the private, public and third sector needs to secure a better understanding of what human rights legal duties are, to give them daily effect.

⁸ The SAWB exists to set minimum rates of pay and other conditions of service for agricultural workers in Scotland <http://www.gov.scot/Topics/farmingrural/Rural/business/18107>

⁹ For more information see <http://scottishlivingwage.org/> and <http://slw.povertyalliance.org/about>

¹⁰ For more information see <http://www.fairworkconvention.scot/>

¹¹ The Scottish Government has stated "Our overarching aim is to create a social security system in Scotland that is based on dignity, fairness and respect. This will be system that helps to support those who need it and when they need it." Recruitment is also underway for 'Experience Panels' <http://www.gov.scot/Topics/People/fairerscotland/Social-Security>

As organisations with budgets, we have significant purchasing power and we would like our spend to be focused on those companies and organisations which are compliant with human rights and with international standards on private companies and human rights which are known as the UN's Guiding Principles on Business and Human Rights (UNGPs). However insufficient information is available to us to enable informed choices to be made and we consider this should be rectified as a matter of urgency.

We receive public funding and we would like to fulfil our responsibility to procure and purchase goods and services which help Scottish public authorities and the Scottish Government meet its obligations under the UNGPs and it will also assist in delivering the Scottish National Action Plan on Business and Human Rights which is yet to be drafted. We also recognise that upholding human rights delivers on Scotland's National Action Plan on Human Rights (SNAP) which was launched in December 2013¹².

¹² SHRC website at <http://www.scottishhumanrights.com/actionplan>

Section 3 – Business In Scotland

A strong, vibrant and diverse economy is essential to our national prosperity and in creating the wealth to support high quality public services. Ensuring that growth is shared and sustainable is the key to unlocking all of Scotland's potential and strengthening our greatest asset – the people of Scotland.

Creating greater prosperity and fairness is a shared national endeavour. Only by working in partnership with the wider public sector in Scotland, the third sector, trade unions, businesses and communities, will we be able to create a society where the benefits of economic growth are shared more equally and where future economic growth is stronger and more sustainable. Nicola Sturgeon, 2015¹³

...the growing international evidence is clear. Promoting competitiveness and addressing inequality are important interdependent ambitions; reducing inequality in itself is beneficial for economic growth. It is also a moral imperative in its own right which sits at the heart of Scotland's commitment to social justice and international responsibilities on human rights.¹⁴

The diversity, influence and purchasing power of business in Scotland creates a capacity to exert change in how business operates. This potential for driving change needs to be realised.

Scottish Enterprise is funded by the Scottish Government and is “Scotland's main economic development agency and a non-departmental public body of the Scottish Government”¹⁵, so we are pleased that it is a key driver in the SNAP ‘Better World Action Group’ and in the development of the NAP. The networks and financial resources available to Scottish Enterprise have the capacity to transform how the private sector operates in relation to the public and third sector in Scotland. Other key drivers for change are Highland and Islands Enterprise, Skills Development Scotland and Visit Scotland.

The Third Sector in Scotland is hugely diverse including some organisations with a several hundreds of pounds in the bank to those with multi-million pound turnovers. Their legal status also varies including:

- Un-constituted bodies
- Those registered as Charities. The Scottish Charity Regulator has registered 24,053 charities which are estimated to handle “over £12.5 billion a year”.¹⁶ It is useful to remember that charities must be for public benefit and have charitable purposes which includes “the advancement of human rights”.¹⁷ A Scottish Charitable Incorporated Organisation (SCIO) is a legal form unique to Scottish charities and requires a separate application process.
- Companies Limited by Guarantee.

There are many categories of body which recruit staff and have significant purchasing power. According to Social Enterprise Scotland “Social enterprises trade in many markets - selling goods and services to individual consumers, local authorities, government and private businesses. Social enterprises aim to make a profit just like any private sector business. However, 100% of their profits

¹³ ‘Scotland’s Economic Strategy’ in the Forward, pub 2015

¹⁴ Pg. 35 Ibid.

¹⁵ For more information

¹⁶ Scottish Charity Regulator at <http://www.oscr.org.uk/>

¹⁷ For more information see page 55 of the OSCR “Meeting the Charity Test Guidance for applicants and existing charities “ pub August 2015 at http://www.oscr.org.uk/media/2342/v51_meeting-the-charity-test-guidance_final_published.pdf

or surpluses are always reinvested back into their social and/or environmental purpose.”¹⁸ There are over 400 in Scotland and examples of the more well-known categories are co-ops, credit unions, Registered Social Landlords (RSLs) and developments Trusts as well as specific ones including The Big Issue, Social Bite, The Wise Group, Cornerstone, Kibble Education and Care Centre and the Isle of Eigg Heritage Trust. Collectively they have huge spending power:

- There are over 100 credit unions in Scotland with over 280,000 members and assets of over £300m.
- There are around 160 Housing Associations and co-operatives in Scotland providing more than 277,000 homes and over 5,000 places in supported accommodation.
- There are over 200 Development Trusts in Scotland and they are owned and managed by the local community, are independent but seek to work in partnership with other private, public and third sector organisations.¹⁹

The Scottish Government wholly owns a number of companies including Caledonian Maritime Assets Limited²⁰, Scottish Futures Trust²¹ and Scottish Water.²² In addition the public sector in Scotland has set up a number of Arms-Length External Organisations (ALEOs). Audit Scotland has been unable to confirm how many ALEOs operate but OSCR has reported that 64 of them are registered charities with a joint income of over £550million. They “vary in their size, structure and type of activity” e.g. the income ranges from £15,000 to over £110 million.²³

Conclusion

It is possible for the Scottish Government, using its wealth to fund and purchase, to influence how private and publicly owned companies operate in Scotland. The framework of a Scottish NAP can be the catalyst for recording and promoting models of good practice and to champion methods of working e.g. partnerships between the Third and private sectors which deliver the UNGPs.

The collective purchase power of the Third Sector in Scotland could also be used to drive up compliance with the UNGPs by companies based in Scotland and those wishing to do business in Scotland.

We believe that is a great opportunity to ensure that the human rights of people in Scotland are better acknowledged, respected, protected and fulfilled. However, we need the NAP to set out a robust framework and ensure progress to delivering the UNGPs is monitored.

¹⁸ <http://www.socialenterprisescotland.org.uk/>

¹⁹ See Development Trusts Association Scotland website <http://www.dtascot.org.uk/>

²⁰ <http://www.cmassets.co.uk/about-us/>

²¹ <http://www.scottishfuturestrust.org.uk/about-us/>

²² <http://www.scottishwater.co.uk/about-us>

²³ ‘ALEOs’ pub January 2015 <https://www.oscr.org.uk/media/1778/2015-01-09-oscr-aleo-report.pdf>

Section 4 – The UNs Guiding Principles in Scotland

The global ‘Business and Human Rights’ framework is being given effect in Scotland through the development of a National Action Plan for Scotland (NAP). This will supplement the UK NAP launched in 2013 and updated in 2016. The NAPs are underpinned by the UN’s Guiding Principles on Business and Human Rights (UNGPs) which is understood to be a voluntary and therefore non-binding framework.

The Scottish Government’s commitment is part of the movement to build a global environment in which adverse business impacts are minimised, and opportunities for business to make a positive contribution to human rights are realised. It believes that companies should implement the UNGPs to promote behavioural change and the recognised benefits for businesses include “greater trust with stakeholders” and “enhanced reputation”. All that is achieved through reporting and audit mechanisms to ensure transparency and accountability.

In June 2014, the UN Human Rights Council (UNHRC) called on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts. This development followed similar requests to Member States made by the European Union (EU) in 2011 and 2012 and by the Council of Europe (CoE) in 2014.

The UNGPs are divided into three pillars, underpinned by 31 detailed Guiding Principles, to make it easier to draft and assess the performance of NAPs:

- **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 UK government has stated its belief that all UK companies should implement the UNGPs to promote behavioural change. In May 2016, the UK government reaffirmed its commitment to the implementation of the UNGPs and stated the Foreign Office “focuses on encouraging other governments to take similar steps to implement the UNGPs, creating a predictable and fair environment for UK businesses”.

In Scotland, progress is slow. The Minister, Angela Constance, explained in a letter to the Equalities and Human Rights Committee of the Scottish Parliament that the Scottish Government is not leading the process of developing the NAP. Rather “The lead role in taking forward the commitment lies with the SNAP Better World Action Group, which includes the Scottish Human Rights Commission, the Equality and Human Rights Commission, Scottish Enterprise, Amnesty International, Engender, Together, and others, alongside the Scottish Government.”²⁴

As part of its contribution, the Scottish Government directly commissioned the Baseline Assessment on Business and Human Rights in November 2015 at a cost of approximately £30,000 a process

²⁴ Letter sent by the Committee appears at http://www.parliament.scot/S5_Equal_Opps/General%20Documents/20161011_Letter_to_Cab_Sec_on_Business_and_HR.pdf Response appears of 24th October 2016 at http://www.parliament.scot/S5_Equal_Opps/General%20Documents/10.pdf

which follows the Danish Institute of Human Rights Model of Best practice. The consultation on the Baseline Assessment as well as what should be in the Scottish NAP continues and the voice of the Third Sector in that process needs to be stronger.

In addition, the Companies Act 2006 was amended to require reporting by quoted companies (those in the FTSE) on their human rights performance “to the extent necessary for an understanding of the development, performance or position of the company’s business.’ As it became effective in October 2013, annual reports dated 31st December 2013 should have included sufficient information to comply with this requirement. Again, there is a need for information on what impact this has made.

Another opportunity arises in the Procurement Reform (Scotland) Act 2015 as all contracting authorities with an annual regulated procurement spend above or equal to £5 million had to produce a procurement strategy by 31st December 2016 and 130 were received by the Scottish Government. The recently published update on procurement strategies and annual procurement reports will offer some guidance on how far the UNGPs are within the horizons of those authorities.

Conclusion

Despite the UK NAP, it is unclear what impact it has made on business activities in the UK and in Scotland and it would be useful for more information to be made available on what change it has delivered which could be used to inspire other businesses to act. This could inform the Scottish NAP to make it more effective.

A Scottish NAP would provide the framework to co-ordinate action across a variety of different initiatives in the UK and Scotland. GCVS, SCoD and VAS would be happy to serve on the Better World Action Group with the specific objective of harnessing the energy and interest of our networks, expediting progress and pressing for enabling resources to facilitate wider engagement and more co-ordination between departments and sectors.

Section 5 – The Relevance of General Comments

A further driver and framework to consider in developing a Scottish NAP is the UN process of General Comments. When they relate to a Treaty which the UK has ratified, and therefore all our laws and policies should comply, they are significant in directing our precise action in respect of the right on which they focus.

General Comment 16 ‘State obligations regarding the impact of the business sector on children’s rights’ was produced by the UN Committee on the Rights of the Child in 2013 because it recognised:

“the business sector’s impact on children’s rights has grown in past decades because of factors such as the globalized nature of economies and of business operations and the ongoing trends of decentralization, and outsourcing and privatizing of State functions that affect the enjoyment of human rights. Business can be an essential driver for societies and economies to advance in ways that strengthen the realization of children’s rights through, for example, technological advances, investment and the generation of decent work. However, the realization of children’s rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children’s rights.”²⁵

The General Comment reminds governments that they “have obligations regarding the impact of business activities and operations on children’s rights” and adopts a broad definition of business “including all business enterprises, both national and transnational, regardless of size, sector, location, ownership and structure.” It is useful to note that the General Comment “also addresses obligations regarding not-for-profit organizations that play a role in the provision of services that are critical to the enjoyment of children’s rights.”²⁶

In terms of the scope and application of the general Comment, the UN Committee states “all businesses must meet their responsibilities regarding children’s rights and States must ensure they do so. In addition, business enterprises should not undermine the States’ ability to meet their obligations towards children under the Convention and the Optional Protocols thereto.” Unlike the UNGPs which are voluntary, Scottish Government obligations to adopt a framework for action in respect of the private sector is obligatory under the UNCRC, and consistent with their duties to give effect to a ratified UN Treaty.

A further driver to inform and expedite action in Scotland is the draft General Comment under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ produced by the UN Committee on Economic, Social and Cultural Rights²⁷. At a ‘Day of General Discussion’ in Geneva on 22nd February 2017 governments, including the UK, and NGOs from around the world had the opportunity to analyse the framework and discuss the detail of the draft document. The purpose of the document is to “clarify the nature and scope of the relationship between State obligations under ICESCR and the role and impact of the business sector on the implementation of economic, social and cultural rights.”²⁸ The definition of business activities

²⁵ Para 1 at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en

²⁶ Ibid paras 2-3

²⁷ Version drafted on 17th October 2016.

²⁸ Para 3 Ibid.

includes “any business entity whether fully privately owned or state owned”²⁹. The issues which were discussed were all relevant to the development of a Scottish NAP including:

- The advisability of replicating the UNGPs framework of duties to ‘respect, protect and fulfil’;
- The pros and cons of National Human Rights Institutions leading the process, as opposed to governments leading;
- What measures should be available to governments to oblige the private sector to comply with economic and social rights;
- What sanctions and penalties should exist where business actors breach human rights;
- The duty on governments to ensure that growing privatisation does not lead to ‘economic segregation’ and that access to ‘quality services’ remains available to all’.
- How to ensure that governments fulfil their duty to prevent human rights abuses by private actors as well as providing an effective and accessible remedy framework for ‘victims’. This resonates with general concerns in Scotland about access to justice.

It is expected that the final version will be agreed at the June 2017 session of the Committee.

Conclusion

General Comments provide additional direction on the content of a Scottish NAP and consequently enable the Scottish Government, as the duty bearer, to comply with its duties under ratified, international treaties. There needs to be greater discussion amongst the Third Sector, about the detail and intended impact of the General Comments relating to the actions of the private sector. Drawing on people’s experience as well as obtaining their opinions will make the Scottish NAP more relevant and robust.

²⁹ Para 5 *ibid.*

Section 6 – Analysis of the Baseline Assessment

The completion of the Baseline Assessment is a precursor to developing and finalising a NAP. In the UK, the NAP was developed by the Government and in Scotland the NAP is being developed by the SHRC, the Scottish Government and others as part of SNAP.

The conclusions, published on 3rd November 2016, resonate with the experiences of the Third Sector including highlighting groups at risk of vulnerability and marginalisation including women, persons with disabilities and ethnic minorities in accessing employment. Also, we share concerns about the repeated use of agency workers and workers employed through ‘umbrella companies’ which we know impacts on people’s general ability to exercise their economic and social rights e.g. in the social care sector. Additionally, we understand the growing concerns around zero hour contracts, breaches of working directives hours’ limitations for locum and second job activity within NHS/across NHS and private healthcare and the increase of part-time and temporary contracts across all the sectors.

We agree with the recommendations and welcome:

- In respect of UNGPs 1 and 3, improve awareness-raising of rights and remedies, human rights education related to business activity.
- In respect of UNGP 4 “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.
- In respect of UNGP 6 “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.”
- In respect of UNGP Pillar 2 “Escalate awareness raising efforts that would highlight the relevance of human rights to specific businesses and industry” and “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.” *We recommend that social care is an industry which should be prioritised and the public procurement process informed by awareness of human rights standards. Nursery and childcare is another sector deserving of attention.*
- In respect of UNGP 25 support the 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.
- In furtherance of UNGP 26, endorse the recommendation to support Scottish Government proposals to abolish employment tribunal fees in Scotland, as well as supports the recommendations of the Gill Review, to develop a clearer system of “Protective Expenses Orders in Scotland to limit the financial liability of claimants”.

There is agreement with the General Recommendations:

- Develop a webpage/hub dedicated to business and human rights aimed at Scottish businesses, including tailored guidance for SMEs (small and medium-sized enterprises). *However, there is also a need for one for those wishing to purchase from companies that support the UNGPs.*

- 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.
- A role agreed for the Third Sector infrastructure and its ability to generate change locally.
- The Scottish Government and the SHRC could raise awareness about, and provide support for, human rights measurement and reporting initiatives. *This requires a timeline.*
- 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. *However, this should not be an alternative to adopting the UNGPs.*
- Business and human rights could be introduced as a standing issue for the Equal Opportunities Committee. *The Committee remit has now changed and the Equalities and Human Rights Committee has been urged to progress this matter in their workplan by several organisations already including Unite the union and the Jimmy Reid Foundation.*
- 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. *Excellent idea.*

There are however omissions such as the need for regulators such as Audit Scotland, SSSC, HMIE, Prisons Inspectorate, Scottish Housing regulator to look at how services are contracted and impact of purchasing/procurement on delivering the UNGPs. More omissions will be identified through consultation with the Third Sector and drawing on their experience.

Conclusion

The Baseline Assessment recognises some of the issues faced by the Third Sector, and makes some sensible suggestions on how to make Scotland fairer by ensuring that the private sector complies with international human rights standards. Overall, we believe the greatest impact can be achieved by a five-pronged approach:

- adopting a robust Scottish NAP that is regularly evaluated for impact;
- the Scottish Government and public authorities using the public procurement mechanism to drive up human rights compliance in the private sector;
- working with the Third sector to enable it to reward rights respecting private companies with contracts;
- ensuring ALEOs and publicly owned companies use their procurement process to ensure the private sector comply with human rights law as well as giving effect to the Scottish NAP across its business activities and thus serving as a role model for other businesses to replicate;
- the need for scrutiny/evaluation/reporting or impact to inspire others and evidence that complying with UNGPs should not compromise business success, rather enhance it.

Section 7 – Our Experience of Public Procurement

Public procurement should be a tool which achieves fairness for all; workers, service users and the public. Local authorities procure care services, Universities procure construction services, health boards procure cleaning services, ALEO's procure Health and Safety services and the Police Service and Fire Service purchase uniforms. All of them have a role to play in ensuring that the process does not infringe the human rights of workers in this country, in the supply chain and avoids environmental damage. These are issues that have been taken up effectively elsewhere e.g. the City of Madison in Wisconsin has a cooperative contract with 'Sweat Free Purchasing Consortium' to address human rights risks in procurement for apparel & uniforms.

In our experience of public procurement, there are omissions and failings which we believe we all want to be addressed:

- Public procurement is not rewarding companies that recognise human rights such as the right to join a trade union, those who provide permanent contracts for staff with the resultant benefits e.g. maternity and sickness pay.
- Public procurement is not increasing equality amongst workers e.g. reducing the gender stereotyping in certain occupations such as construction.
- Communication needs for deaf and other people with communication difficulties are not part of the tender document so there are insufficient funds to provide good quality communication support to staff and services users. The impact is that services are not inclusive which leads to unequal outcomes.
- The finance to procure services outwith the public sector can fall short of what is needed to deliver the service to the required standard. The private and Third sector are expected to tender and take the responsibility for low wages, uncertain career prospects and to subsidise what should be a public service.
- Short term contracts are awarded which results in an increase in contract workers in the Third Sector.
- Consultation on service development and design prior to the procurement process, is inadequate leading to flawed procurement and dissatisfied customers in less than effective services.
- Engagement with the Third Sector, on a range of issues including changes to the services delivered to their clients, is not empowering or robust. The result is a sense of 'tokenism'.

Conclusion

The Scottish Government commissioned Baseline Assessment on Business and Human Rights rightly raises issues about the, so far, missed opportunity of public procurement to make Scotland fairer. The Scottish NAP should develop a specific and monitored framework to use public procurement to make Scotland fairer.

It is possible to survey our members to elicit their precise experiences of the public procurement system so that the NAP addresses evidenced based problems. We would be happy to work with the Better World Action Group on such a survey report.

Section 8 – Conclusions & Recommendations

Implementation plans to give effect to the UNGPs have also been produced by Denmark, the Netherlands, Finland, Sweden and Lithuania as well as the UK. Several other countries are in the process of developing their own action plan in addition to Scotland.

We note that the Minister stated in her letter to the Equalities and Human Rights Committee of the Scottish Parliament that:

“Given their breadth and scope, successful implementation of the UNGPs requires public authorities, the private sector and civil society to collaborate closely to ensure that law and policy properly reflect international human rights obligations, and that practical guidance and support is available to enable businesses to be aware of their obligations, to have effective mechanisms in place to prevent negative human rights impacts and to be in a position to remedy matters promptly and satisfactorily should problems nonetheless occur” and

“The Better World Action Group has, I understand, also been exploring the scope for follow up actions, which are likely to include the convening of a series of events to raise awareness of the baseline assessment, together with more focused discussions with representatives from businesses, trade unions, public authorities and civil society. This will help to identify the priority areas to address, and will lead in turn to the formation of a dedicated working group tasked with drafting a national action plan during 2017.”

We are keen to ensure that the NAP is developed promptly to address the problems faced by the Third Sector in Scotland and to make Scotland fairer. We would welcome the opportunity to discuss the operational and resource implications of a Scottish NAP and to serve on the ‘Better World Action Group’ of SNAP and then feedback information and report on progress to our networks.

In developing an inclusive approach to agreeing the Scottish NAP which meets the needs of the Third Sector and civil society in Scotland as well as delivers a framework which meets international standards, our seven recommendations are:

1. A consultation event for the Third Sector should be held in May 2017 so that the context and content of the Scottish NAP can be better understood and discussed. We are happy to host and facilitate this meeting.
2. To inform discussions, the SHRC should provide a briefing on the timeline and progress on developing the NAP and its relationship with the UK NAP, which should accompany the Executive Summary of the Baseline Assessment.
3. A meeting should be convened with those businesses which are publicly owned, social enterprises, Development Trusts as well as ALEOs and Registered Social Landlords (RSLs), to discuss how delivery of the Scottish NAP can be realistically rolled out across Scotland and for them to provide best practice examples which inspire the private sector to adopt the Scottish NAP.
4. The Scottish NAP should include a statement that ‘complying with the UNGPs will aid business success and enhance reputations’ and require a commitment to comply with the 31 guiding principles. Support should be actively sought from across the private sector

including those organisations owned and funded by the public sector which are responsible for spending millions of pounds of public

5. [The Scottish NAP can monitor](#) the deliberate and concrete action by the Scottish Government to ensure compliance with human rights law in all public procurement. The Scottish NAP can also monitor the impact e.g. as a result of e.g. evidencing how Scotland is fairer, inclusion increased and the Third Sector thriving through fairer opportunities.
6. [The Scottish NAP should require periodic reports](#) from Scottish Enterprise, Highlands and Islands Enterprise, Skills Development Scotland, Visit Scotland on their work in promoting the benefits of a Scottish NAP to business in general as well as to representative bodies such as Chambers of Commerce, Federation of Small Business and CBI Scotland.
7. [The Scottish NAP is the right framework](#) to provide information to the Third Sector, ALEOs, social enterprises, RSLs and Development Trusts, on why and how to identify and purchase from those business entities which comply with the UNGPs.

[For further information and to take forward these recommendations please contact:](#)

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