

SHRC

Scottish
Human Rights
Commission

Business and Human Rights National Action Plans: Comparative Review of Global Best Practice

SUMMARY AND RECOMMENDATIONS

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1. Introduction

On 16 June 2011, the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles for Business and Human Rights (UNGPs), making the framework the first corporate human rights responsibility initiative to be endorsed by the United Nations.

The UNGPs are based on three pillars:

- ▶ Pillar I clarifies the state duty to protect human rights;
- ▶ Pillar II describes the corporate duty to respect human rights; and
- ▶ Pillar III focuses on the need to provide proper access to remedy for victims of business harm.

The UNGPs provide a framework for states, business and civil society to jointly implement a new culture and level of human rights protection. The European Union and the United Nations Human Rights Council called for the development of national action plans (NAPs) to support the implementation of the UNGPs. A number of governments have developed NAPs.

Scotland's National Action Plan for Human Rights, published on 10 December 2013, committed to the development of an action plan to implement the UNGPs.¹ How well our NAP processes function is of great significance to the protection of human rights in Scotland.

To inform this work, the Scottish Human Rights Commission commissioned a comparative review of best practice in relation to the drafting, implementation, monitoring, review and evaluation of NAPs. The review was carried out by the secretariat of the European Coalition for Corporate Justice together with its UK member, the Corporate Responsibility Coalition (CORE). The full review has been published as a companion to this summary report and is available at www.scottishhumanrights.com or www.snaprights.info.

¹ For more information see www.snaprights.info

In this summary report, we set out the key findings of the comparative review and make a set of practical recommendations to the Scottish Government and those engaged in developing the NAP to implement the UNGPs. We look forward to working with all concerned to take forward these recommendations.

2. NAP Drafting Process

KEY FINDINGS

General

The assessment and drafting stage of a NAP must include empirical research and broad formalised stakeholder input. Transparency and communication are key to the process. The central objective is that ‘the main adverse business-related human rights impacts and the gaps in Government and corporate responses will have been identified.’²

One major weakness across assessed NAPs at this stage is a general lack of transparency regarding the assessment and drafting process. Overall, there has been a general failure by governments to provide a timeline for their NAP drafting processes or to publish terms of reference.

Conducting a national baseline assessment

A national baseline assessment (NBA) is a methodology which has been developed in order to systematically analyse state and business implementation of the UNGPs.³ The purpose is to map business human rights impacts and study their correlation with government policies and laws.

Roughly half of existing published NAPs are not based on a comprehensive study that amounts to an NBA. However, the following countries have committed to producing comprehensive NBAs: Norway, Italy, the Czech Republic, Chile, Germany, Georgia,⁴ Scotland, South Korea, Thailand, Tanzania, Kenya and Mexico.

² UN Working Group Guidance, p 7.

³ NAP toolkit. See pp.25–32 as well as Annex.

⁴ In fact, although the Georgian NAP is an overarching human rights NAP, it has a clear and distinct section on the UNGPs.

The evidence highlights that it is important to engage with national human rights institutions (NHRIs) in conducting an NBA. This guarantees that they are independent and underwritten by relevant human rights expertise. NHRIs are also typically assigned key roles in the development process of the NAP. For example, NHRIs:

- ▶ have a coordinating role (Germany, Kenya and Scotland);
- ▶ were consulted during preliminary NAP processes (Chile and Scotland);
- ▶ conducted the NBA (Germany);
- ▶ produced the first draft of the NAP (France).

Stakeholder consultation

NAPs should be developed through inclusive and transparent processes. A key means of doing this is to establish a multi-stakeholder working group or advisory committee. Such groups are an effective mechanism to ensure a participatory approach process relevant to a wide range of stakeholders. Moreover, business participation is crucial to the overall effectiveness of the process, as industry is likely to be reticent to support state actions which will affect them without their involvement. Much of the specialised knowledge and insight into the problems of transnational business come from organisations and groups outside of government such as non-governmental organisations (NGOs), civil society groups and trade unions.

While a form of multi-stakeholder steering group can be an effective feature of the NAP process, it must by no means develop into a form of ad hoc 'representative body' replacing 'overall consultation'.⁵ Where a steering group has been established, it is crucial that efforts are also made for broader bona fide consultation. Switzerland and Finland involve businesses in stakeholder working groups developing NAPs. Scotland has adopted this approach through the Better World Action Group for Scotland's National Action Plan for Human Rights, which oversees the development of the NAP and overall consultation.

⁵ For example, the French draft NAP was criticised for not including the views of certain civil society organisations in the appendix.

A key criticism of NAP development processes to date has been the lack of direct consultation with marginalised, at-risk or vulnerable groups, in many cases those whose rights are most likely to be violated by business conduct, be it within the jurisdiction of the country in question, or in the global supply chains of companies in these countries (for examples, indigenous communities, workers in the high tiers of the supply chain, especially women or child workers).⁶

There are a number of countries that are exceptions to this approach, including Finland, Italy and Colombia, which take into special consideration various vulnerable groups, such as children, women, indigenous people, disabled people, and lesbian, gay, bisexual, transgender, and intersex people.

A welcome trend across NAP processes is the inclusion of some form of consultation with stakeholders in the assessment and drafting stage. While some consultations appear more comprehensive and inclusive than others, stakeholder engagement appears to be increasing overall. Countries which have utilised stakeholder advisory groups or steering groups are Denmark, Finland, Colombia, and Italy. The following countries also provide stakeholders with an opportunity to comment on the draft NAP prior to adoption of the final version: Finland, Sweden, Colombia, Switzerland and Italy.

RECOMMENDATIONS

Recommendation 1:

A meaningful NAP process should include:

- a. Conducting an NBA
- b. Stakeholder consultation throughout the NAP process, including drafting
- c. Establishment of an advisory body to oversee NAP drafting
- d. Publishing terms of reference for consultation and drafting timelines

Recommendation 2:

An NBA should be undertaken by an independent body other than government, including, for example, an independent expert or NHRI (established and operating in accordance with the Paris Principles).

⁶ See ECCJ/ICAR critical assessment of NAPS iteration December 2017.

Recommendation 3:

Governments should collaborate and consult with their NHRIs or other independent experts when assigning responsibility for NBAs.

Recommendation 4:

A multi-stakeholder working group or advisory committee should be established to include representatives from civil society, trade unions, area experts, NHRIs and business enterprises, as well as at-risk groups from other countries impacted by the operations of home companies.

Recommendation 5:

The government should allocate specific resources for the NAP process and consultation with these groups

Recommendation 6:

All information should be accessible to all stakeholder groups and made publicly available in different formats.

3. NAP Content

KEY FINDINGS

NAPs should include a ‘smart mix’ of both forward-looking regulatory and non-regulatory measures.⁷ They should respond to the national context, as well as the overseas impacts of the companies hosted in their jurisdictions.⁸ As a minimum, the NAP should clearly specify who within government is responsible for undertaking each commitment/action and the timeframe for implementation for each commitment. The most effective NAPs are specific and forward-looking (overly vague or backward-looking policy commitments are often of little practical value).

The Italian NAP provides an example of best practice as it specifically links actions to gaps identified in the NBA. A number of states specify future oriented actions in their NAPs, including Italy, Colombia, Norway, France and Germany.

NAPs often focus primarily on actions that involve awareness raising, training, research and other voluntary measures, with limited focus on the development of regulatory actions. Regulatory actions are important as they are more likely to address existing gaps in governance.

Legislative changes

While most countries have enacted wide-ranging legislation protecting human rights in the business context, including workers’ rights, health and safety and data protection, only a few have adopted laws in the context of NAPs. The French National Assembly adopted a corporate ‘duty of care’ law, which makes it compulsory for large French companies to establish and implement a diligence plan to identify and prevent the occurrence of human rights and environmental risks resulting from their activities. Germany, Switzerland and the Netherlands are also considering proposals for mandatory due diligence.

⁷ UN Working Group Guidance, p iii.

⁸ NAPs must ‘address the full scope of the state’s jurisdiction’: NAP Toolkit, p 33.

RECOMMENDATIONS

Recommendation 7:

NAP actions should be linked to the NBA findings.

Recommendation 8:

NAP actions should be forward looking and specific, measurable, achievable, relevant/realistic, time-related (i.e. SMART).

Recommendation 9:

NAP actions should include a 'smart mix' of both regulatory and non-regulatory measures.

4. NAP Implementation

KEY FINDINGS

A key element of the NAP is national implementation as it establishes a coordination structure to ensure that the actions take place. This includes assigning clear roles and responsibilities to the government, parliament, business and other key stakeholders. The implementation process should help to set priorities, coordinate actions, simplify decision-making and track progress. Inclusive processes will facilitate successful implementation of the NAP. It is clear that high-level political leadership within government is essential to guaranteeing effective NAP development and implementation.

It is also important to have an implementation strategy in place.

An implementation plan is a document detailing the respective NAP commitments in line with the pertinent SMART criteria needed in order to measure their fulfilment.

Coordination of NAP implementation

In almost all cases examined, the NAP lead or coordinating role has been assigned to a ministry. For example, in Spain, Ireland, United Kingdom, Belgium and Chile, responsibility for the NAP has been allocated to the equivalent of a ministry of foreign affairs or a human rights unit.

Some countries, including Finland and Denmark, have assigned the coordinating role to the ministry with responsibility for employment, the economy, industry, business or financial affairs. While this has advantages in terms of reaching and engaging directly with business, steps should be taken to ensure that the most relevant human rights expertise and understanding is also present in guiding and directing what is an inter-governmental process in almost all cases.

While the issue of who leads in an inter-ministerial group is relevant, experience has proven that high-level political 'buy-in' and participation in the process from across government is crucial to the effective development and implementation of a NAP.⁹

⁹ See "Submission to the Joint Committee on Human Rights' inquiry into human rights and business – June 2016" in the UK by CORE Coalition, page 4, available at: https://corporate-responsibility.org/wp-content/uploads/2016/07/JCHR-human-rights-and-business-inquiry_CORE-submission_July2016.pdf. See as well corresponding endorsement of these views by the Joint Committee on Business and Human Rights in its 6th Report of Session, page 6, available at: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

Specifying a lead ministry or body, assigned responsibility for overseeing and coordinating the overall NAP process, is a welcome general trend identified in NAPs around the world. The lead ministry provides a centralised point of reference which helps to promote efficiency in respect of the internal workings of the group and accountability to non-governmental stakeholders.

The role of business in NAP implementation

The role of business in implementing NAPs must be clarified and requirements, responsibilities and expectations outlined within the document.

In order to meet their responsibilities for human rights, businesses are expected to undertake human rights due diligence. Human rights due diligence is the practice and process of businesses identifying and responding to the human rights risks present in their business operations.

Small and medium-sized enterprises also have an important role to play in undertaking human rights due diligence in a manner that is proportionate to their size and capacity.¹⁰

RECOMMENDATIONS

Recommendation 10:

An inter-governmental/inter-ministerial group should be established to oversee implementation of the NAP, enabling input from all relevant parts of government. This body must include representatives from ministries of justice and business or analogous agencies or departments.

Recommendation 11:

A lead or coordinating body should be identified for the inter-governmental group, ideally a joint lead between the ministry with responsibility for human rights and the ministry in charge of business and/or employment.

Recommendation 12:

The NAP should include a strategy and an implementation plan which specifies measures to enable effective monitoring, reporting and review.

¹⁰ The European Commission has published the guide *My business and human rights: A guide to human rights for small and medium-sized enterprises*. The role of small and medium-sized enterprises is already recognised in Scotland's National Action Plan.

5. NAP Monitoring and Evaluation

KEY FINDINGS

Essential to the effectiveness and accountability of the NAP process is monitoring and evaluation of ongoing government implementation, while the overall NAP process should be periodically reviewed.

An independent stakeholder monitoring and evaluation process ensures both the legitimacy and effectiveness of NAPs. Monitoring refers to the ongoing assessment of the effectiveness of the plan, while evaluation refers to the plan's overall assessment and the results achieved. This approach has the added benefit of contributing to the invigoration of regional and global NAP processes, as lessons learnt are incorporated into practice in the context of the 'protect, respect, remedy' framework.

Given the significance and potential of monitoring, reporting and review mechanisms, it is regrettable that many governments have failed to establish any form of evaluation, monitoring and reporting for their respective NAPs. Many NAPs contain implementation monitoring and review commitments and requirements that are overly vague – they do not specify any particular methods or timeframes – which seriously undermines their effectiveness. A few NAPs, such as those of Chile and Switzerland, contain implementation monitoring and review commitments.

NAPs are best conceived of as ongoing policy processes. There are a number of approaches to monitoring and reviewing NAPs. These include:

- ▶ government-led progress reviews;
- ▶ multi-stakeholder mechanisms; and
- ▶ independent mechanisms.

These approaches are not mutually exclusive, and can be considered complementary when properly combined. The UNWG advises the adoption of an independent multi-stakeholder monitoring group with defined modalities of monitoring. In this model, NHRIs play a key role in assessing and evaluating the effectiveness of the NAP implementation.

The majority of government NAPs that have committed to formalising monitoring, reporting and review have opted for a government-led monitoring process, often with some input from multi-stakeholder groups. However, the involvement of multi-stakeholder groups is limited. For example, the UK set up a cross-departmental steering group, to monitor the NAP but without any civil society involvement. In some jurisdictions, including Chile and Spain, NHRIs or ombudspersons have been given the formal role of monitoring NAPs.

The Italian and Chilean NAPs offer good examples of a hybrid approach with a government-led progress review and a multi-stakeholder group that monitors implementation.

It is also crucial that oversight is independent and includes the legislature in the process of reviewing government implementation of the NAP. The Czech NAP, for instance, allocates responsibility for NAP monitoring to the government's Commissioner for Human Rights (formally the Minister for Human Rights) who, despite retaining a human rights portfolio, is an executive officer within the Office of Government itself.

There are robust political, legal and cultural benefits of reporting NAP implementation to parliament. It is also the role of parliament to hold the government to account for its progress in implementing the NAP. Requirements for government-led monitoring reports to be submitted to some form of parliamentary scrutiny (parliamentary committees or otherwise) are found in the NAPs of Spain, Belgium and Georgia. In November 2017, the Equalities and Human Rights Committee of the Scottish Parliament formally recommended that parliamentary time should be allocated to debate issues pertinent to the country's general human rights NAP, of which the business and human rights NAP forms a part.

Reporting to regional and international human rights bodies

State commitment to international accountability and sharing implementation experiences with other countries is essential to the NAP process. While NHRIs play a key role in this through their international reporting mandate, state reports should also cover this area in their various UN treaty and special procedures obligations and as part of their involvement in the UN universal periodic review process. In addition, and of particular importance in the European context, is the Council of Europe

recommendation (CoE Rec (2016)3)¹¹ that European member states should 'share plans on the national implementation of the UN Guiding Principles on Business and Human Rights ("National Action Plans"), including best practice'.¹²

RECOMMENDATIONS

Recommendations 13:

The NAP should include measures to enable effective monitoring, evaluation and reporting.

Recommendation 14:

An independent multi-stakeholder monitoring group, including representatives from the inter-government body-led, civil society and NHRI should be established.

Recommendation 15:

The government should create mechanisms for engagement with non-governmental stakeholders and business and/or build on existing dialogue platforms to facilitate broader stakeholder participation and dissemination of best practice.

Recommendation 16:

The parliament and/or a relevant parliamentary committee should scrutinise NAP implementation periodically.

Recommendation 17:

The government should encourage and support the active participation of stakeholders, including the private sector, in national and international accountability mechanisms.

¹¹ Council of Europe (CoE Rec (2016)3)

¹² The recommendation also provides for examination 'within the Committee of Ministers [of] the implementation of this recommendation no later than five years after its adoption (2021), with the participation of relevant stakeholders'.

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