

BUSINESS AND HUMAN
RIGHTS NATIONAL
ACTION PLANS:
COMPARATIVE REVIEW
OF GLOBAL BEST
PRACTICE

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Contents

1. INTRODUCTION	1
Methodology	1
2. THE NAP DRAFTING PROCESS	2
Conducting an NBA	3
The role of NHRIs in the preliminary process	5
Stakeholder consultation	6
3. THE CONTENT OF NAPS	11
4. IMPLEMENTATION OF NAPS	13
The role of business in NAP implementation	16
5. MONITORING, EVALUATION AND REVIEW OF NAPS	18
Prerequisites for effective monitoring and evaluation	19
The importance of additional government oversight: Parliament and the judiciary	23
The importance and emergence of multi-stakeholder monitoring	26
Assigning a third-party independent monitoring body to review and evaluate the NAP	27
Reporting to regional and international Human rights bodies	29
6. CONCLUSION	31
Review and monitoring	32

1. INTRODUCTION

National Action Plans on Business and Human Rights (NAPs) are the vehicles through which states endorsing the United Nations Guiding Principles (UNGPs) commit to their practical implementation. How well NAP processes function is therefore of great significance to the protection of human rights worldwide. The Scottish Human Rights Commission (SHRC) commissioned a comparative review of best practice in relation to the drafting, implementation, monitoring, review and evaluation of NAPs with the aim of developing a set of recommendations to inform and assist the development of the Scottish NAP process. The review was conducted by the secretariat of the European Coalition for Corporate Justice together with its UK member, the Corporate Responsibility (CORE) Coalition.¹

Methodology

This report is based on an analysis of 21 published NAPs from around the world, together with various NAPs in the development stage. The review analysed relevant documentation obtained from the Danish Institute for Human Rights Globalnaps website² and information from civil society organisations working on business and human rights in respective countries. The NAPs were benchmarked against guidance on NAPs produced by the United Nations Working Group on Business and Human Rights (UNWG) and a NAP toolkit developed by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights. This provided a coherent framework for assessment and recommendations.

¹ <https://corporate-responsibility.org/about-core/>

² Available at: <https://globalnaps.org/>

2. THE NAP DRAFTING PROCESS

For the sake of legitimacy and effectiveness, the assessment and drafting stages of a NAP must include empirical research and broad, formalised stakeholder input. It should also be transparent. The central objective is that after this phase, 'the main adverse business-related human rights impacts and the gaps in Government and corporate responses will have been identified'.³ A thorough understanding of the issues and 'protection gaps' based on sound and comprehensive analysis is what makes a NAP process worthwhile. In the absence of a commitment to undertake a meaningful assessment, the NAP process is at serious risk of perpetuating platitudes. Essential steps to a meaningful assessment, which are necessarily inter-related, include:

- ▶ Conducting a national baseline assessment (NBA);
- ▶ Stakeholder consultation (in person through conferences, written submissions);
- ▶ Establishment of an advisory body to the NAP drafting process;
- ▶ Publishing of consultation terms of reference and drafting timelines.

One major weakness identified in the NAPs included in the review is a general lack of transparency regarding the assessment and drafting process. In general, governments have failed to provide a timeline for their NAP drafting processes or to publish terms of reference. While some, such as the United States, publish terms of reference and a timeline for public consultation, they do not provide further information about the timeline for the drafting process. Chile is so far the only government to publish information about the budget set aside for the NAP process, giving stakeholders confidence in the government's current and longer term commitment to the process.

³ UN Working Group Guidance, p7

Conducting an NBA

An NBA is a method developed in order to analyse systematically state and business implementation of the UNGPs.⁴ When properly done, such an exercise to map adverse business human rights impacts and study their correlation with government policies and laws, as well as business practices and policies, produces crucial data to inform the NAP. An added benefit of the NBA process is that it has the potential to create data and information that is comparable between states, and to foster and exchange best practice through dialogue. A proper NBA is the best preliminary step to addressing the task outlined in the UNWG guidance:

6) Identify gaps in State and business implementation of the UNGPs

Government should outline the various laws, regulations and policies it has in place in relation to the Guiding Principles addressing States in pillars I and III (Guiding Principles 1-10, 25-28, 30 and 31) and identify respective protection gaps. The same should be done with regard to business enterprises active or based in the country's territory and their performance in regard to pillars II and III (Guiding Principles 11-24 and 28-31). This includes assessing to what extent business enterprises carry out human rights due diligence and provide effective remedy through operational-level grievance mechanisms.⁵

Despite the significance and value of this preliminary step to the overall NAP process, only half of existing NAPs are based on a comprehensive study or analysis that could be said to amount to an NBA.⁶ Only the governments of Norway, Italy, the Czech Republic, Chile, Germany, Georgia,⁷ Scotland, South Korea, Thailand, Tanzania, Kenya, Mexico have committed to the

⁴ NAP toolkit; see pp25-32 as well as Annex

⁵ UN Working Group guidance p7

⁶ Preliminary studies, surveys, internal mappings, background memorandum, or 'stock-takings' were undertaken as part of the NAP processes in countries including The Netherlands, Finland, United States, Belgium and Colombia. These documents were limited in scope, however, and could not be described as comprehensive NBAs. The governments of Ireland and Sweden have stated the intention to produce an NBA, despite having already adopted a NAP. Despite having produced a second iteration of the NAP, the UK government has not yet committed to a comprehensive NBA.

⁷ In fact, the Georgian NAP is an overarching human rights NAP which includes a clear and distinct section on the UNGPs.

production of a comprehensive NBA. Most of these countries have only recently produced their NAP (since 2016) or are currently in the process of developing a NAP. This suggests a positive trend in the seriousness and sophistication with which NAPs are being developed. While the NBAs may vary significantly in length (from 10 to 350 pages) and detail, all are based on proper stakeholder consultation and represent a meaningful analysis of existing government laws and policies; business behaviours; corresponding human rights impacts; and how they correspond to the respective UNGPs. As intended, they identify gaps in UNGP implementation. They also specifically address the principles related to Pillar III about access to judicial and other remedy for victims of business harm. They represent a solid basis from which governments can then proceed (the Chilean NAP, based on a comprehensive NBA, contains 158 actions cutting across numerous state institutions).

NBAs have been conducted by relevant government personnel, external specialist experts from universities or relevant independent institutes, and national human rights institutions (NHRIs). In order to ensure the credibility of the NBA, the UNWG explicitly encourages governments to collaborate with or assign responsibility for the NBA to their NHRIs or with independent external experts.⁸ Similarly, the NAP toolkit states that the task of developing an NBA should be allocated to an organisation or entity with 'relevant expertise and competence . . . independent from political affiliation and corporate interests, such as the NHRI or academic research institution'.⁹ States that have followed this recommendation include Germany, Korea, Kenya and Georgia. Whereas Germany and Korea gave their respective NHRIs sole responsibility for undertaking the NBA, Kenya and Georgia got the NHRI to coordinate the process with a government agency and/or civil society specialist (in Kenya, the NHRI worked with the Department of Justice and the Kenyan National Commission on Human Rights). Such NBAs are guaranteed to be independent and underwritten by the relevant human rights expertise. The German NBA is very thorough, and while it does not formulate concrete recommendations, it gives a broad and detailed overview of every conceivable relevant piece of government legislation

⁸ UNWG Guidance, p.8.

⁹ NAP Toolkit, p.29.

with a noteworthy impact on rights, explaining how and why respective legislation is relevant for rights fulfilment. In Zambia, a country with no formal government commitment to a NAP process, the NHRI undertook to conduct and publish a comprehensive NBA¹⁰ in an effort undoubtedly intended to spur and underpin effective government action on business and human rights. Such examples highlight the valuable role of NHRIs as independent catalysers to government action within and outside the NAP process.

The role of NHRIs in the preliminary process

Even if they have not been assigned responsibility for the NBA, NHRIs – where they exist – are commonly consulted during the preliminary process (for example, in Chile and Scotland). Other governments have also specifically mandated key roles to NHRIs for assessment and drafting NAPs, even if they have not made explicit commitments to undertaking an NBA. Indonesia, Malaysia and France, for example, have all mandated principle responsibility for drafting or providing key input to assessments upon which the NAP is based to their respective NHRIs. This further illustrates what is implicit in the UNWG recommendation, namely the appropriateness of NHRIs as key, independent bodies to the NAP development process. NHRIs established according to the Paris Principles are intended to undertake precisely the type of work involved in a NAP pre-assessment, including consultation on human rights and society and independent analysis of relevant government (and business) policies, laws and behaviours. The level of responsibility assigned to NHRIs varies, but where they exist, NHRIs are typically assigned key roles in the development process. For instance, the German NHRI was responsible for undertaking the NBA and produced a neutral ‘scoping study’ which explored potential avenues for action, while the French NHRI produced a normative document containing significant and wide-ranging recommendations which fed directly into a first draft of the NAP. The French document strongly recommends comprehensive and mandatory supply chain due diligence for transnational companies based in France or with French dealings, alongside new forms of corporate liability to ensure judicial access

¹⁰ Zambia, see: www.globalnaps.org/country/zambia/

to remedy for victims of transnational corporate malpractice.¹¹ On the basis of these recommendations, the French inter-ministerial group developed a first draft of the NAP, which was then subject to a process of diverse multi-stakeholder consultation including business participation.

Stakeholder consultation

Both the UNWG guidance and the NAP toolkit state that NAPs should be developed through inclusive and transparent processes. A key means of doing this is through a multi-stakeholder working group or advisory committee. Such groups are an effective mechanism to ensure a participatory process relevant to a wide range of stakeholders. Moreover, business participation is crucial to the overall effectiveness of the process, as businesses are less likely to support state actions which affect them if they have not been involved in the process. There is a trend toward ‘progressive’ business names and associations explicitly supporting mandatory due diligence measures in countries such as Switzerland and Finland; the latter even petitioning the European Commission for EU-wide legislation to “level the playing field” for responsible businesses.¹² Much of the specialised knowledge and insight into the problems of transnational business comes from organisations and groups outside of government including non-governmental organisations (NGOs), civil society groups and trade unions.

The German NAP prescribes a comprehensive steering committee comprising representatives of the six major ministries, the German NHRI, the German business association for sustainable development, three representatives from Germany’s largest trade association, a civil society representative from the Human Rights Forum, a trade union representative, and a civil society representative. The NHRI is responsible for coordinating the meetings. Similar multi-stakeholder steering groups are prescribed in other NAPs, with varying degrees of diversity. It is crucial that the views of steering group members are not assumed to be representative or indicative of the general stakeholder group they represent. There is a wide range of views among

¹¹ Available at: http://www.cncdh.fr/sites/default/files/13.10.24_avis_entreprises_et_droits_de_lhomme_0.pdf

¹² See, for example: <http://corporatejustice.org/news/9039-civil-society-and-companies-call-finland-to-adopt-mandatory-hrdd-legislation>

businesses and different civil society organisations on business and human rights issues and while a multi-stakeholder steering group can be effective as a forum for general consultation, it is important to recognise that such groups are not fully representative. Consultation is required.¹³ It is therefore crucial that efforts are made for broader consultation beyond the steering group itself.

A continuing trend across NAP processes is the inclusion of some form of stakeholder consultation in the assessment and drafting stages. While some consultations appear more comprehensive and inclusive than others, stakeholder engagement appears to be increasing overall in the NAP processes reviewed in this report. For example, out of 11 NAPs produced by August 2017 and reviewed in English translation, Four (Denmark, Finland, Colombia, and Italy) involved stakeholder advisory committees or steering groups of one form or another. Five of these NAPs – those of Finland, Sweden, Colombia, Switzerland, and Italy – provided stakeholders with the opportunity of commenting on a draft version prior to adoption of the final NAP.¹⁴ The trend toward increasing stakeholder involvement has continued with NAPs produced in 2018. Typically, questionnaires, open written submissions and bilateral interviews are used for consultation while training workshops or multi-stakeholder consultation days including conferences are less common.

In basically all consultations it has been common and essential for business to be consulted in a meaningful manner. Crucially, not only traditional business associations ought to be involved in the drafting stages. A broad cross-section of business representations is ideal to ensure that a 'lowest common denominator' position of business and industry is not repeated, but rather that the diverse and where existing, progressive-driven, voices of business are also heard and amplified.

Participation of disempowered or at-risk stakeholders in consultation is less common in the reviewed NAPs. For instance, while the German NAP process involved a series of 12 thematic workshops, three plenary conferences and

¹³ For example, the French draft NAP was criticised for not including the views of certain civil society organisations in the appendix.

¹⁴ ECCJ/ICAR NAPs critical assessment August 2017. Available at: <http://corporatejustice.org/news/2245-a-critical-assessment-of-national-action-plans-on-business-and-human-rights-2017-update>

a multi-stakeholder steering group, limited efforts were made to facilitate the participation of small NGOs and disempowered or at-risk stakeholders such as workers in the supply chains of German companies in consultation. In fact, a key criticism of NAP development processes to date is 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 example, indigenous communities, workers in the high tiers of the supply chain, especially women or child workers).¹⁵ Notable exceptions include the NAPs of Finland, Italy, and Colombia, which take into special consideration various vulnerable groups, such as children, women, indigenous people, people with disabilities, and lesbian, gay, bisexual, transgender, and intersex people. Other NAPs, such as those of the United Kingdom, United States, and Switzerland, mention vulnerable or excluded groups, but to a lesser extent.

The direct participation of vulnerable or at-risk groups, in particular indigenous people, may make the process more difficult and costly. Nonetheless, the entire NAP process has been established by the international community precisely to protect the interests of these groups and facilitating their participation should be a priority. Measures to facilitate effective participation may include: confidential or anonymous submissions; financial support (for travel or other specific outreach measures); translation and interpretation of materials and proceedings into foreign and minority languages; government assurances of protection.¹⁶ Sadly, NAPs developed before the end of 2017 – about half of current NAPs – did not include specific provisions to facilitate participation of vulnerable groups. This raises concerns about countries/ jurisdictions in which there are numerous ongoing allegations of serious transnational corporate misconduct, many of which have been upheld in the courts and after appeal proceedings.¹⁷ Related to this, capacity building measures are important to ensure that vulnerable groups understand the UNGP process and are able to engage and contribute to it. Chile stands out having delivered training about business and human rights specifically

¹⁵ See ECCJ/ICAR critical assessment of NAPS iteration Dec 2017.

¹⁶ NAP Toolkit, p.24.

¹⁷ See section on the United Kingdom at www.bhrinlaw.org.

targeting indigenous people and trade unions in the country's three macro geographical zones. Such a commitment to actively engage vulnerable and affected groups, those most seriously affected by corporate behaviour, entails an acknowledgement of the reality that the most vulnerable typically do not have a sophisticated or incorporated voice, at least not in forms commonly received by government policy-makers.

While it may be the case that the views of vulnerable groups are represented through the involvement of NGOs or specific interest groups in the NAP process, it is good practice to involve these groups directly. NHRIs can have an important role in investigating allegations of business-related human rights abuse through outreach activities with vulnerable groups. The National Human Rights Commission of Indonesia (Komnas HAM), Commission on Human Rights of the Philippines, the South African Human Rights Commission or the Office of the Public Defender in Peru (Defensoría del Pueblo) have all interpreted their mandates to empower them to do this. In the absence of an NHRI, it may fall to the government department responsible for foreign affairs to undertake outreach work with vulnerable groups or with third sector organisations and trade unions. In transnational instances this requires reaching out to said vulnerable groups where there have been relevant allegations of serious corporate misconduct. Such a role is, again, within the mandated scope of NHRIs acting in and founded according to the Paris Principles. Indeed, several NHRIs such as the National Human Rights Commission of Indonesia (Komnas HAM), Commission on Human Rights of the Philippines, the South African Human Rights Commission or the Office of the Public Defender in Peru (Defensoría del Pueblo) have all interpreted that their mandates empower them to investigate business-related human rights abuse allegations. In the absence of such an NHRI, it may fall on the Ministry of Foreign Affairs to undertake such outreach, or other, aforementioned interest groups. The above highlights the reality that different stakeholders will require different forms of engagement.

The NBA conducted to inform the Scottish NAP paid explicit attention to engagement with vulnerable stakeholder groups, including children and young people, and also involved engagement with representatives of third sector organisations. Following face to face group consultation, young people

identified and produced a meaningful and detailed account of business and human rights together with suggestions for action and improvement for the government and business sectors. Main themes included working conditions, corporate environmental impact, as well as an acknowledgement of the global responsibility of business to act responsibly.¹⁸ The third sector contributed information on the relationship between business operations and poverty, social exclusion and discrimination to the NAP process.¹⁹

BEST PRACTICE:

- ▶ Commit to a *bona fide* NBA undertaken by an independent body other than government. While this may be an independent expert, NHRIs established and operating in accordance with the Paris Principles are highly appropriate groups to undertake this role given their competence and mandate.**
- ▶ Establish a multi-stakeholder advisory committee including standing representatives from civil society, trade unions, relevant business and human rights organisations, business (where possible 'progressive business associations' in contrast to traditional) and representatives of at risk or vulnerable groups (people from other countries impacted by the operations of home country companies; indigenous people; women; children).**
- ▶ Extra resources should be allocated and effort made to consult with at risk and vulnerable groups. Information concerning all these processes should be made clearly and publicly available.**

¹⁸ A full briefing of the consultation is available at: www.snaprights.info/wp-content/uploads/2018/08/Children-and-young-people-engagement-event-record-of-comments-August-2018.docx

¹⁹ A full list of relevant consultation reports is available at: <http://www.snaprights.info/action-areas/better-world/business-and-human-rights>

3. THE CONTENT OF NAPS

NAPs should contain a “smart mix” of both forward-looking regulatory and non-regulatory measures to address business and human rights issues identified in the NBA.²⁰ It is clear that NAPs should respond to the national context, as well as the overseas impacts of the companies hosted in their jurisdictions.²¹ The degree of severity of human rights impacts should guide the prioritisation of commitments. Regarding form, best practice is to link the commitment with the particular gaps identified in the NBA, or otherwise explain what protection gap the action is meant to address or rectify. The Italian NAP is an example of good practice, as each action point is clearly linked to the corresponding issue identified in the NBA, as recommended in the NAP toolkit.²² Linking assessment of the problem with the recommended action to address the problem also facilitates the monitoring process.

In order to facilitate implementation, commitments or actions identified in the NAP should be specific, measurable, achievable, relevant and time-specific (SMART). 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. Without this level of specificity, NAP commitments are at risk of being postponed, delayed or otherwise unfulfilled by government ministries and/or agencies. Specificity helps a NAP to survive changes of government, as well as facilitating monitoring and reporting.

A general criticism of NAPs to date is that they have not adequately responded to the above requirements. The first European NAPs developed in 2015 focused primarily on describing current or previous government actions rather than forward-looking action plans. While more recent NAPs continue to review past actions, an increasing number also contain future-oriented commitments including Italy, Colombia, Norway, France and Germany. However, forward-looking action points are often vague, committing the state to ‘continue exploring’ or ‘monitoring’ pertinent issues. The lack of SMART criteria poses a risk to implementation of NAPs if progress

²⁰ UNWG Guidance, p.iii.

²¹ NAPs must ‘address the full scope of the state’s jurisdiction’: NAP Toolkit, p.33.

²² NAP Toolkit, p.23.

toward the commitments within them cannot be measured or there is no particular timeframe from implementation. NAPs often focus primarily on awareness-raising, training, research and other voluntary measures, rather than regulation. Regulatory measures are more likely to be effective in addressing existing governance gaps.

BEST PRACTICE: Content should be linked to the NBA elements; it should be forward-looking; adhere to SMART criteria; and include a “smart mix” of both regulatory and non-regulatory measures.

4. IMPLEMENTATION OF NAPS

The UNGPs acknowledge the significant, cross-cutting impact of business operations on all areas of the economy, society and the environment. It is therefore positive that all 21 existing NAPs recognise this through broad, cross-government participation. Cross-government involvement occurs most frequently at the drafting and implementation stages and sometimes also for monitoring and review. For most NAPs, cross-government participation is formalised through an inter-ministerial working group and a lead ministry or government department is assigned overall responsibility for overseeing and coordinating the NAP process.²³ Appointing a 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.

In almost all cases, the NAP lead or coordinating role has been assigned to the department responsible for foreign affairs, with some countries (Spain: Human Rights Office; Ireland: Human Rights Unit; United Kingdom: Human Rights and Democracy Department; Belgium and Chile: Human Rights Directorate) indicating that relevant human rights teams within these departments should take on the lead role. The NAP toolkit acknowledges, however, that ‘the capacity of Foreign Ministries to lead a robust NAP process is somewhat limited in that their mandates to operate *within* the state are usually minimal when compared to institutions with stronger internal mandates’.²⁴ In the United States, the National Security Council, the principal foreign affairs advisory body to the President, was designated the lead role to coordinate the NAP. The approachability of such a lead body by stakeholders is a real issue, as well as the issue of transparency. For these reasons, at least a joint lead with an appropriate internal ministry can be considered as best practice for the establishment of a NAP governance framework.

²³ In-line with the UNWG Guidance, which provides the following (p.5): “**2) Create a format for cross-departmental collaboration and designate leadership:** Once the Government (or a specific ministry, as the case may be) has formally committed to engage in a NAP process, it should set up a format for coordination and regular communication between relevant Government entities. One option is to create a formal cross-ministerial or cross-departmental working group within which the work on NAP development takes place. One or several dedicated Government entities should be designated to lead the process. The mandate of the leading entity should include, amongst other things, coordinating collaboration within Government and with non-governmental stakeholders, as well as leading the drafting process.”

²⁴ NAP Toolkit, p.19. [Emphasis added].

Other countries, such as Finland and Denmark, have assigned the lead coordinating role to the Ministry of Employment and the Economy and to the Ministry of Industry, Business and Financial Affairs together with the Ministry of Foreign Affairs respectively. While assigning the lead role and ‘ownership’ of the overall NAP process to a ministry with responsibility for business promotion has advantages in reaching and engaging directly with business, steps should be taken to ensure that the relevant human rights expertise and understanding is also involved in guiding and directing what is an inter-governmental process in almost all cases. In Belgium, the Ministry of Foreign Affairs (Human Rights Directorate) leads the NAP process together with the Ministry for Energy, Environment and Sustainable Development.²⁵ In the Czech Republic, the Ministry of Foreign Affairs shares ‘ownership’ together with the Ministry of Human Rights.

While the issue of who leads an inter-ministerial group is relevant, experience has proven that even more crucial to the effective development and implementation of a NAP is high-level political “buy-in” and participation in the process from across government.²⁶ Officials from the ministry for justice, Attorney-General or analogous legal bodies, including relevant ombudspersons, are not always explicitly included as part of the inter-governmental group. The input and engagement of people with legal and judicial experience is a prerequisite to progress and development with regards to Pillar III of the UNGPs: access to remedy (sometimes described as ‘access to justice’) for victims of business harm. By endorsing the UNGPs, states have made an explicit commitment to reviewing judicial mechanisms, laws and policies to better facilitate judicial and non-judicial remedy for victims of business harm, within their territorial jurisdictions and beyond in cases concerning harm caused elsewhere by businesses based in their jurisdictions. Examples of how seriously governments take their commitments under

²⁵ More specifically, within the ministry, this is dealt with by the Federal Institute for Sustainable Development, which also chairs the Interdepartmental Commission for Sustainable Development concerning government implementation of the sustainable development goals.

²⁶ See CORE Coalition’s “Submission to the Joint Committee on Human Rights’ inquiry into human rights and business – June 2016”, , p.4, available at: https://corporate-responsibility.org/wp-content/uploads/2016/07/JCHR-human-rights-and-business-inquiry_CORE-submission_July2016.pdf. See also corresponding endorsement of these views by the Joint Committee on Business and Human Rights in its 6th Report of Session, p.6, available at: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>

Pillar III of the UNGPs include Thailand, where the Rights and Liberties Protection Department of the Ministry of Justice leads the NAP process within government,²⁷ and the Department of Justice in Kenya also has a lead a role in the development of the Kenyan NAP. In Chile, the inter-governmental group specifically includes the government agency providing the OECD National Contact Point.

In order to implement, monitor and review NAPs effectively, it is essential that coordinating and lead bodies are properly resourced and funded. Best practice dictates that government funding is available and transparent: governments should provide a breakdown of relevant costs including staff salaries, consultation, expert opinion and studies. As mentioned previously, to date Chile is the only government to have publicly released information about its budget for the NAP. Business funding (aside that derived from taxation) must not form part of NAP financing. However, it is entirely appropriate that business initiatives to promote human rights due diligence (as law or in the sharing of best practice through business events, associations or otherwise) and other aspects of business and human rights should be promoted and encouraged by government.

BEST PRACTICE: Governments should formally establish an inter-governmental/inter-ministerial working group to coordinate input to the NAP from all relevant parts of government. This body must include representatives from the Department of Justice or an analogous agency/ department. A lead body should be identified to oversee the NAP process and implementation by the inter-governmental group, ideally a joint lead between the government department with responsibility for and experience of dealing with human rights issues. Most importantly, high-level political leadership is essential to guaranteeing effective NAP development and implementation.

²⁷ During its May 2016 Universal Periodic Review at the UN, the Thai government received a recommendation to develop and enact a NAP, which it accepted by authorizing said agency to begin development.

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. According to the UNGPs, these requirements, responsibilities and expectations should link directly to both regulatory (mandatory) and non-regulatory (voluntary) measures. NAPs will vary on the requirements and responsibilities they place on the business sector, ideally according to the findings of any NBA, and will typically cover gaps in human rights protection arising in areas such as employment, working conditions and environmental impacts. While domestic protection gaps and responses will vary, the key responsibility of business is its commitment to undertake human rights due diligence as outlined in Pillar II of the UNGPs. Human rights due diligence is the practice and process of business identifying and responding to the human rights risks present in its business operations. There is a growing trend toward making human rights due diligence mandatory. France passed the so-called business ‘vigilance law’ requiring the largest French companies to undertake human rights due diligence throughout their global supply chains. Germany’s NAP states that if less than 50% of German businesses are not undertaking due diligence by 2020, the passage of a law will be considered. Switzerland and the Netherlands are also considering proposals for mandatory due diligence laws. In order to create a ‘level playing field’ and an environment of fair competition for companies that undertake human rights due diligence, progressive business associations in these countries, and also most recently in Finland,²⁸ have come together to support mandatory laws on human rights due diligence in their jurisdictions.²⁹ Progressive businesses have called on government to introduce legislation that would bring clarity on their legal responsibilities while promoting a culture and industry of human rights due diligence. Governments, business and civil society have begun working together through the NAP process, notably in France and Germany, to elaborate what due diligence means, particularly for companies with global supply chains, and how it operates in practice.

²⁸ See, for example: <https://ykkosketjuun.fi/en/>

²⁹ For an overview of the growing number of human rights due diligence regimes being legalised worldwide, visit: <http://www.bhrinlaw.org/>

Small and medium-sized enterprises also have a responsibility to undertake human rights due diligence in a manner that is proportionate to their size and capacity. The European Commission has published the guide *My business and human rights: A guide to human rights for small and medium-sized enterprises*.³⁰ The United Nations Global Compact also launched guidance to assist small and medium-sized enterprises with limited resources to regularly disclose progress on sustainability within their means.³¹ This is reflected in numerous NAPs.³² While much of the guidance to business is better suited to large corporates, a number of NAPs make efforts to develop materials and guidance aimed particularly at SMEs, with the aim of raising their awareness, building capacity and understanding the advantages of respecting human rights, including reducing costs, retaining and attracting the best staff, improving productivity and performance, and safeguarding the business' reputation. The role of small and medium-sized enterprises is already recognised in Scotland's National Action Plan for Human Rights and the UK Equality and Human Rights Commission has developed a series of guides tailored to the specific needs of small and medium-sized businesses.³³

³⁰ European Commission, *My business and human rights: A guide to human rights for small and medium-sized enterprises*.

³¹ Available at: <https://globalnaps.org/issue/small-medium-enterprises-smes/>

³² The UK 2013 NAP, for instance, notes in relation to *Government expectations of business* that: "We recognise that different businesses will need to take different approaches to embedding this approach [human rights due diligence]; that implementation will be progressive; and in particular that implementation will need to be compatible with the resource limitations of small and medium-sized enterprises." (p.14).

³³ <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-small-businesses-and-human-rights>

5. MONITORING, EVALUATION AND REVIEW OF NAPS

Essential to the legitimacy and effectiveness of the NAP process is monitoring and evaluation of ongoing government implementation, while the overall NAP process should be periodically reviewed. Devising a detailed government implementation plan, formalising ongoing stakeholder involvement, as well as assigning an independent body with monitoring, reporting and review responsibilities, ensures government accountability for NAP implementation. This increases the likelihood of NAP commitments being delivered and also ongoing development and updating of the NAP over time. A robust monitoring, review and evaluation process gives real effect to Pillar I of the UNGPs, the duty of the state to protect against human rights violations by business, as appropriate groups and bodies are empowered to hold government to account for failure to act on this duty.

Business and human rights NAP processes are best conceived of as ongoing policy processes. The NAP toolkit and UNWG guidance advises that a NAP must be drafted based on input from all relevant and affected stakeholders, while the plan itself must properly reflect that input. Similarly, 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. Monitoring and evaluation help to identify best practice in business, civil society and the broader human rights field, as shortcomings and successes are recorded, publicised and compared. 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. For instance, countries such as Lithuania, the Netherlands, United

States, Sweden and Denmark do not include sufficient information on their NAP monitoring and review processes, so it must be assumed that any monitoring is ad hoc or improvised. Many NAPs contain vague commitments to monitoring and review and do not specify methods or timeframes. This undermines their effectiveness. When it comes to evaluation, monitoring and reporting, current practice does not offer the level of accountability and legitimacy anticipated in the guidance. Nonetheless, there are useful examples of good practice.

In this section, as per the Office of the UN High Commissioner for Human Rights (OHCHR) Handbook on Human Rights NAPS, “monitoring” refers to the ongoing process of assessing the effectiveness of a plan, while “evaluation” refers to the plan’s overall assessment and the results achieved.

Prerequisites for effective monitoring and evaluation

Government implementation plan

A government *implementation plan* has been recommended as best practice in both the UNWG guidance and the NAP toolkit as it facilitates effective monitoring, reporting and review. Essentially, an implementation plan is a document detailing the government’s NAP commitments in line with the pertinent SMART criteria needed in order to measure their fulfilment (also outlined above).

Specific: The commitment/action must address a specific protection gap or issue; responsibility for implementation of the action/commitment must be allocated to one or more specific and relevant government bodies/agencies/departments;

Measurable: Where appropriate, the NAP must specify how implementation of a commitment/action will be measured or assessed;

Achievable: It must be realistic and capable of fulfilment;

Relevant: Actions/commitments must relate to business and human rights and the UNGPs;

Time-specific: A clear timeframe or deadline must be specified for implementing and/or reviewing the action or commitment.

The monitoring and review processes benefit from the specificity of any implementation plans contained in the NAP. In its NAP, the Chilean government has stated that in order to “ensure effective implementation ... a supplementary document containing indicators has been prepared detailing the institutions responsible for each measure, indicators, as well as the [timeline] defined for that purpose.”³⁴ Other NAPS, such as the Swiss, include an appendix table providing an implementation overview, illustrating which NAP commitments relate to which UNGP and listing the specific action to be undertaken. Such approaches make use of the clear and succinct table provided in the UNWG guidance,³⁵ which reflects other advice on best practice in NAP development in line with general guidance on human rights NAPs provided by the OHCHR.³⁶

The NAP toolkit outlines processes for monitoring and reviewing NAPs at the national, regional and international levels (see Figure 5.1).

Establishing or designating a monitoring and evaluation body

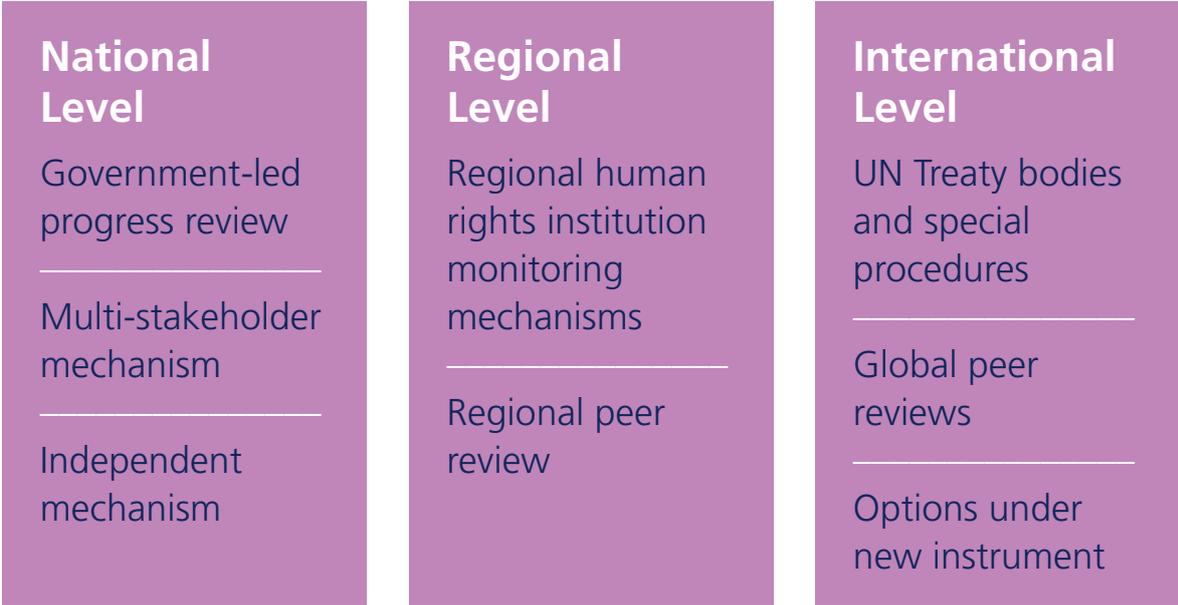


Figure 5.1: Monitoring and review of NAPs

Source: NAP toolkit, p. 37

³⁴ Chilean NAP, available at: <https://globalnaps.org/country/chile/>
³⁵ A copy of the table is provided in Annex II of the UNWG, p.16.
³⁶ OHCHR Human Rights NAP Handbook, p.75. Available at: <https://www.ohchr.org/Documents/Publications/training10en.pdf>

Of the various NAPs that include a commitment to formalising a monitoring body and procedure, government-led monitoring and review is by far the most common approach. However, none of these approaches are mutually-exclusive, and can be considered complementary when appropriately combined.

One approach is a government-led monitoring body supervised by a pre-existing or purpose-made multi-stakeholder group. The Chilean NAP has adopted this model in which the “Inter-Ministerial Committee on Human Rights and Business” takes the primary role of both implementing and monitoring implementation of the NAP. As part of its monitoring duties, an executive secretariat of the committee must coordinate and prepare an annual report on compliance measures and commitments achieved. The implementation report is submitted to a multi-stakeholder advisory group consisting of representatives from civil society, trade unions, indigenous groups, academia, business and the NHRI,³⁷ for response, comment and recommendations. Likewise, the Swiss NAP sets out a relatively strong framework for monitoring, updating and revision. It commits to the creation of a multi-stakeholder monitoring group prior to updating the NAP in 2020, to comprise representatives from business, civil society and academia.³⁸ The group will collaborate on implementation and be invited to comment on NAP status reports to be produced by the Swiss government (similar to the secretariat to the Chilean ministerial committee). In Italy, an Inter-ministerial Committee for Human Rights, which led the NAP consultation and drafting processes, is also responsible for implementation of the NAP. The Italian NAP also established a government Working Group on Business and Human Rights, involving ministers and personnel from relevant parts of government, assisted by a consultative body with representatives from civil society. As of November 2018, the consultative body had met the government working group only once, despite the fact that the government working group had met frequently to conduct a mid-term NAP review. Members of the civil

³⁷ According to a review from 2012, the Chilean NHRI has the status of “A” designating it as in full-compliance with the Paris principles.

³⁸ The multi-stakeholder group comprises two representatives from government, two from business, one from an NGO, one trade union representative and one academic (who is meant to consult with another two academics). As yet, Switzerland does not have a NHRI that complies with the Paris Principles, however, there is a university network serving as a pilot NHRI.

society consultative body are frustrated by the level of consultation as well as a lack of disclosure concerning the actual composition of the government working group. The lack of a clear and concise government implementation plan which clearly assigns responsibility to relevant government departments and agencies has also been a key source of frustration.³⁹ Monitoring NAP implementation in the UK is led by a cross-departmental steering group without any civil society involvement.

The majority of government NAPs that have committed to formalising monitoring, reporting and review have opted for a government-led monitoring process, often with multi-stakeholder groups. Unfortunately, however, many do not include the key elements of government-led review set out in the NAP toolkit,⁴⁰ including the involvement of a multi-stakeholder group in at least an advisory capacity and the inclusion of the legislative and judicial branches of government in the reviewing the implementation of the NAP.

Poland and the Czech Republic have established government-led monitoring and review – typically an inter-ministerial or inter-departmental working group – without any form of engagement with a multi-stakeholder group, or mandatory oversight from the legislature or the judiciary. In Poland there is no formal stakeholder engagement in the follow-up and review mechanism. There will be a mid-term review in 2018 and a full revision in 2020. The review reports will be prepared by the Ministry of Foreign Affairs together with relevant departments and governmental institutions. There are also no indicators specified in the NAP on how to measure implementation. The Polish ombudsman (Poland does not have a NHRI) is not specified as a party to the process.

³⁹ Interview with Italian participants to the NAP monitoring consultative body, Human Rights International Corner, Italy.

⁴⁰ “A government may itself lead a periodic review of progress in fulfilling the commitments made in a NAP. Typically, the body that coordinated the development of the NAP would undertake a progress review in conjunction with an inter-governmental working group and/or a multi-stakeholder steering committee, where one is established. It is also advisable to include the legislative and judicial branches of government in the process of reviewing the executive branch’s implementation of the NAP.” NAP Toolkit, p.37.

These examples, together with those of Lithuania, the Netherlands, United States, Sweden and Denmark, which do not satisfactorily specify any monitoring arrangement, do not embody the spirit of a NAP as an ongoing, democratic and participatory process. There is no underpinning commitment to the independent review of government action, fostering accountability, efficacy and, ultimately, legitimacy. Although a separate department or ministry may be responsible for monitoring and reviewing action by another department or ministry, it remains part of the same institution of government and in some cases, the same inter-ministerial working group is responsible for both implementation and monitoring. This model of accountability or oversight cannot be considered wholly legitimate or effective because of its lack of independence. The Czech NAP, for instance, allocates responsibility for monitoring NAP to the government commissioner for human rights (formally the Minister for Human Rights, Equal Opportunities and Legislation) who, despite retaining a human rights portfolio, is an executive officer within the Office of Government itself.⁴¹ While there is scope to correspond informally with stakeholders, this is not mandatory, which means that monitoring may be susceptible to political partiality, from which other approaches are far better insulated.

The importance of additional government oversight: Parliament and the judiciary

Parliamentary oversight

Mandatory reporting to parliament on progress with implementation and meeting NAP commitments is an important means of ensuring democratic accountability. In Spain, Belgium and Georgia, the government is required to submit monitoring reports to some form of parliamentary scrutiny (parliamentary committees or otherwise). The fact that these are among the most recently produced NAPs may suggest that dissemination of good practice in the NAP process is having an impact. The regularity with which these reports are made and how they are compiled (e.g. from stakeholder

⁴¹ On the other hand, it must be commended for providing detail on the timeline for review. The Ministry of Human Rights is tasked with running checks on the implementation of the Action Plan and assessing developments in the field of human rights in business with a running deadline, and producing an interim and final report on the implementation of the NAP by the end of 2020 and 2022 respectively.

consultation or through independent review) varies. Reporting in Spain and Belgium is annual, however the time period is not specified in Georgia. The Spanish NAP requires some form of consultation with a pre-existing multi-stakeholder body in the preparation of the monitoring reports, but no information is provided in the Belgian and Georgian NAPs on how the reports should be compiled.

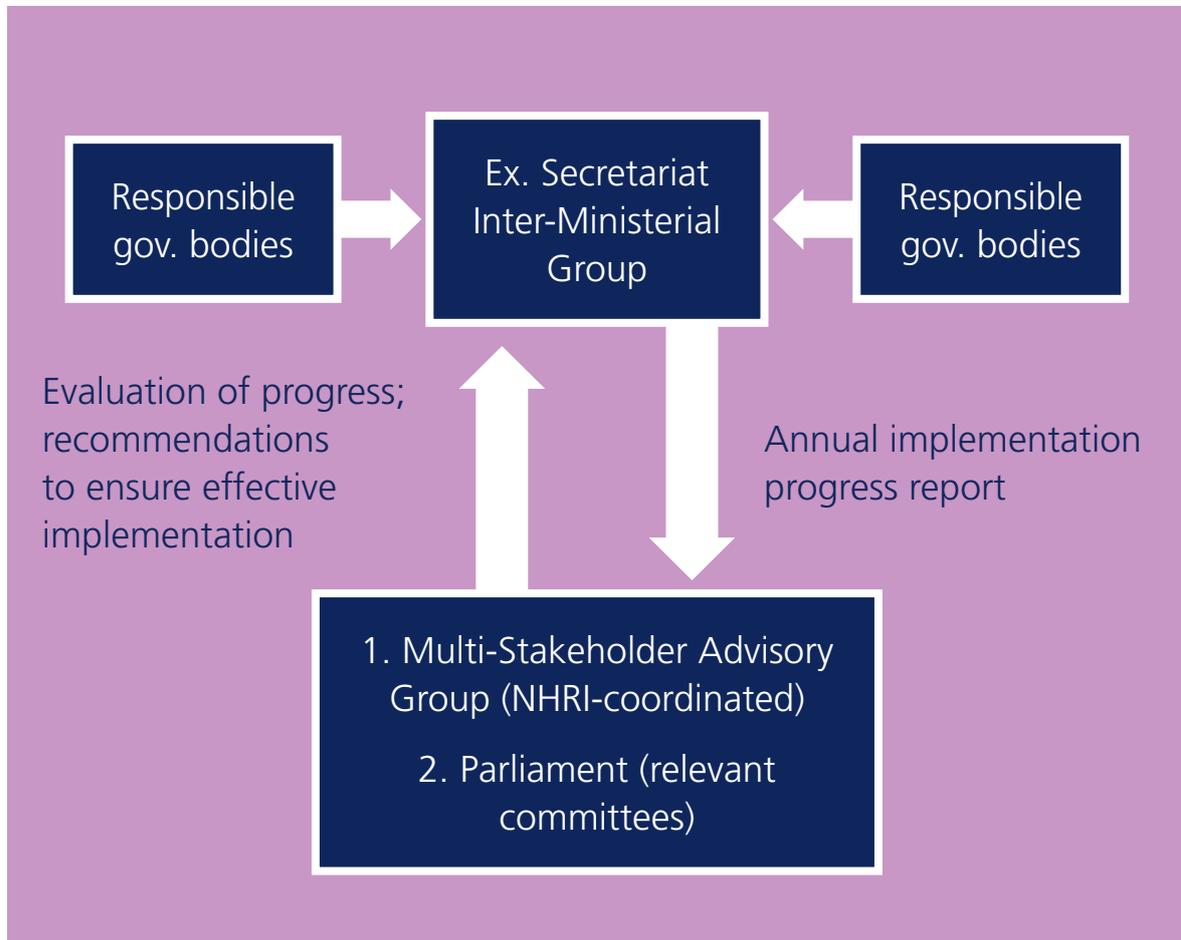
Parliamentary oversight of NAP monitoring reports provides another level of democratic accountability, which can act as an incentive to deliver and improve on commitments. It also creates another forum for discussion of business and human rights issues. Ideally, politicians can act as active conduits between government and their constituents, offering members of the public an opportunity to become more actively included in business and human rights policy and discussion. This can stimulate more discussion of these issues in society at large. Finally, generally members of parliament (or more specifically those in the relevant committees) quite often themselves retain valuable experience, expertise and viewpoints necessary to further invigorate the NAP policy process.

The Equalities and Human Rights Committee of the Scottish Parliament made a formal recommendation in November 2017 that parliamentary time should be committed to debate issues pertinent to Scotland's NAP, of which the business and human rights NAP forms a part.⁴² The committee recommendation further requests practical advice from the SHRC on how to promote a culture of human rights in and between the parliament and society at large.

Figure 5.2 illustrates good practice in parliamentary oversight of the NAP monitoring process and is based on examples from Chile, Switzerland, Spain, Belgium and Georgia.

⁴² "Recommendation 13: We commit to holding an annual evidence session on Scotland's National Action Plan and a Parliamentary debate, parliamentary time permitting. We also ask the Parliament, its committees and Members to take a more proactive role in working with Scotland's National Action Plan and its principles to build alliances between organisations, politicians and citizens to help build a culture of human rights. We ask the SHRC to suggest practical ways in which this could be done. Short term 1-3 years." Available at: <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3>

Figure 5.2: Good practice in parliamentary oversight of the NAP monitoring process.



Judicial oversight

Despite the UNWG guidance that the judiciary should be involved, the role of the judiciary in the monitoring process is not specified in any current NAP. Judicial monitoring could involve the judicial review of government decision-making in relevant instances. The possibility of judicial review for government decisions made pursuant to a NAP depends upon administrative and other law in the countries involved. In countries where social, cultural and economic rights are constitutionally enshrined, there is greater potential for citizens to challenge executive action on rights protection. To date, the researchers are not aware of any judicial processes or decisions relating to NAP implementation and monitoring. This reflects the lack of involvement of the judiciary in the NAP process as a whole and means that there are no current good practice examples on which to build.

The importance and emergence of multi-stakeholder monitoring

Of the three approaches to monitoring identified in the NAP toolkit (see Figure 5.1), the UNWG advises the adoption of an independent multi-stakeholder monitoring group, with defined modalities of monitoring.⁴³

12) Set up a multi-stakeholder monitoring group and define modalities of monitoring⁴⁴

In order to ensure continued multi-stakeholder involvement in, and oversight of, NAP implementation, **Governments should consider setting up an independent multi-stakeholder monitoring group.** Such a group should be composed of legitimate representatives from all relevant stakeholder groups, and might build upon the group created in step 3 [Create a format for engagement with non-governmental stakeholders⁴⁵].

Effective monitoring requires transparency in relation to Government activities. The Government should therefore consider reporting on progress relating to NAP implementation to the multi-stakeholder monitoring group on a regular basis and take its recommendations into account. Also, a Government focal point should be designated to respond to requests and concerns regarding NAP implementation of non-governmental stakeholders.

Governments should therefore create a format for engagement with non-governmental stakeholders which may become the central platform for exchange about the national implementation of the UNGPs. In many cases, it may be most effective to build on existing dialogue platforms and invite broader stakeholder participation. Governments should invite all interested stakeholders to take part in the process. In addition, they might consider proactively identifying relevant stakeholders. These may include civil society organisations, NHRIs, trade unions, business enterprises and associations, as well as representatives of population groups that may be particularly exposed to the adverse effects of business-related human rights abuse, such

⁴³ UNWG Guidance, p.12

⁴⁴ UNWG Guidance, p.10

⁴⁵ "3) Create a format for engagement with non-governmental stakeholders
Engagement with relevant non-governmental stakeholders throughout the process is essential for the effectiveness and legitimacy of a NAP." UNWG Guidance,

as children, women, indigenous people, ethnic minorities and persons with disabilities. Wherever possible, people impacted by business-related human rights harm, or actors legitimately representing their views, should be able to participate in the process.

Despite evidence of limitations to government implementation plans including a lack of specificity and commitment to legislative oversight and involvement, there is an increasing trend toward establishing multi-stakeholder groups as part of the monitoring process. In certain countries, NHRIs and/or a relevant ombudsman have also been given an official monitoring role alongside or as part of the multi-stakeholder group. In Chile and Spain, the NHRI and relevant ombudsman respectively form part of the multi-stakeholder monitoring group, providing expert opinion on the government's progress with NAP implementation. NHRIs are increasingly involved in emerging NAP processes in countries such as Indonesia, Malaysia, Korea and Kenya (for instance, in undertaking the NBA), and it is likely that this trend will continue in the future.

Assigning a third-party independent monitoring body to review and evaluate the NAP

The third mechanism proposed in the NAP toolkit is that of establishing or mandating an independent national monitoring body such as an NHRI to review the NAP.⁴⁶ The toolkit makes reference to the UN Convention on the Rights of Persons with Disabilities, one of the most recent human rights protection treaties brought into force. The treaty specifically requires the establishment by state parties of a framework to promote and monitor the implementation of the treaty, which must include one or more “independent mechanisms”. The Convention on the Rights of Persons with Disabilities (CRPD) makes specific reference to NHRIs that comply with the Paris Principles in this context. Monitoring of human rights by NHRIs has been welcomed as an innovation in human rights treaty implementation, which has traditionally suffered from the well-known pitfalls of government self-reporting to UN treaty bodies.⁴⁷

⁴⁶ NAP Toolkit, p.39.

⁴⁷ See discussion in *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, pp.701–706. Available at: https://www.jstor.org/stable/40784059?newaccount=true&read-now=1&seq=13#page_scan_tab_contents

Progressive discussions during the CRPD negotiations highlighted the adaptability of monitor-reporting models already employed by various international institutions (such as the International Monetary Fund, the World Trade Organisation and the OECD), in particular reverse reporting whereby an entity other than the state under scrutiny prepares a report reviewing country compliance commitments based on dialogue between the reviewing body/authority and the government concerned. “In this way reporting moves beyond self-reporting and self-certification to forms of external monitoring”,⁴⁸ which may better facilitate and spur implementation through independent, specialised review. The practice of reverse reporting, facilitates independent review of government practice and delivery on policy commitments, should be acknowledged as a progressive development in human rights and public policy monitoring. Not only does it bring credibility and legitimacy which is lacking in self-reporting mechanisms to the overall monitoring and reporting process, it also enables another avenue of specialised – constructive – feedback to the policy implementation process. It is therefore easy to understand why this practice is increasing. In guidance on institutional monitoring for general human rights NAPs, the Office of the UN High Commissioner has also indicated that NHRIs are appropriate bodies to be entrusted with the monitoring and review function.⁴⁹ The UNWG also states that NHRIs should be entrusted with evaluating NAPs, thereby expanding and promoting the best practice of reverse reporting in national business and human rights fields.⁵⁰

NHRIs have begun to be included as a monitoring stakeholder in recent business and human rights NAPs, where they exist, and they have also been entrusted with the role of evaluating overall NAP implementation. France is one country that has entrusted its NHRI with a clear and what appears to be exclusive mandate to monitor and also review its business and human rights NAP. Given the known pitfalls of executive government ‘self-reporting’,

⁴⁸ Ibid. p.705

⁴⁹ OHCHR Handbook on Human Rights NAPS, p.94.

⁵⁰ “Any NAP update should be based on a thorough evaluation of the effectiveness of the previous NAP in regard to its actual impact in relation to preventing, mitigating, and remedying adverse business-related human rights impacts. When measuring progress, evaluators should refer to the performance indicators defined by the Government in the NAP as one of the benchmarks for the evaluation (see annex II). This evaluation should be conducted by an independent entity such as the NHRI, or other experts, and should include consultations with relevant stakeholders.” UNWG Guidance, p.10 [emphasis added].

together with the risk that a multi-stakeholder group may not be properly incorporated, resourced or otherwise able to provide coherent reporting on its own accord (given the diversity of stakeholders), the added value of NHRI institutional capacity and expertise to the monitoring and review process is clear.⁵¹ See the summary explanation of the role of the French NHRI on the Danish Institute for Human Rights NAPs website.

One criticism of the French NAP is that the details of the NHRI's role in monitoring and reviewing the NAP are not clearly specified. For instance, the NAP does not specify the frequency of 'periodic reporting', nor does it clarify how the body is meant to engage with government or multi-stakeholder bodies and at what frequency.

Reporting to regional and international Human rights bodies

In addition to the 'downward' advantage of designating a NHRI a key role in not only monitoring but evaluating government NAP performance (independence, competence, impartiality, expertise) there are also 'upward' advantages; namely those which contribute to the advancement of business and human rights discourse at the regional and international level through 'reverse reporting'.

Similar to general human rights NAPS, the UNGPs were instituted as a collective, international policy effort, a means by which all states could strive to the same human rights advancements, while sharing respective lessons learnt from their own context. Essential to this theory of change is that states actually commit to candidly sharing their implementation experiences. NHRIs are typically the bodies most competent to do this. The available fora for the exchange of experience are the various UN treaty bodies and special procedures which touch on business and human rights (potentially all of them) as well as the UN Universal Periodic Review process.

⁵¹ "The Plan includes a mechanism for monitoring and evaluating the recommendations. It expands the mandate of the CNCDH [French NHRI] to allow it to monitor and evaluate the implementation of the National Action Plan for Human Rights and Business. Convinced that companies have an essential role in asserting human dignity, the CNCDH will work as an independent administrative authority, in line with the recommendation issued by the UN, to advise, monitor, and evaluate the government to accompany it in the construction of public policy. Policy implementation will be evaluated through periodic reporting." See France page of globalnaps website: <https://globalnaps.org/country/france/>

Of particular importance to the European context is the Council of Europe (CoE). In a March 2016 recommendation, the Committee of Ministers of the CoE recommended that European member states:

‘share plans on the national implementation of the UN Guiding Principles on Business and Human Rights (“National Action Plans”), including revised NAPs and best practice concerning the development and review of National Action Plans in a shared information system, to be established and maintained by the Council of Europe, which is to be accessible to the public’.⁵²

The CoE also recommended the examination “within the Committee of Ministers [of] the implementation of this recommendation no later than five years after its adoption [i.e. 2021], with the participation of relevant stakeholders.”⁵³ This provides opportunities to establish a strong review mechanism. Stakeholders have recommended that such a review could also build on existing approaches for peer review at OECD, EU, or UN levels.⁵⁴

⁵² Press Release, Council of Europe, Committee of Ministers Adopted Recommendation on Human Rights and Business (7 March 2016), www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-business-1?desktop=false; Council of Europe, Recommendation on Human Rights and Business, CM/Rec(2016)3, at 7 (Mar. 2016), <https://edoc.coe.int/en/fundamentalfreedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>.

⁵³ Ibid.

⁵⁴ The Danish Institute for Human Rights, *Business and Human Rights in Europe: Next Steps in Strengthening Implementation and Accountability* (2 December 2016). Available at: https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/projects_docs/coe_hrb_workshop_copenhagen_021216_report_final.pdf.

6. CONCLUSION

There is much to praise concerning the Scottish Government's commitment to undertaking a business and human rights NAP. The business and human rights NAP falls within a more general policy approach to securing human rights protection, specifically through a commitment to develop a NAP on human rights. The government should be commended for affording the business and human rights agenda its own resources, space and commitment to develop within this broader human rights agenda.

The status of the responsible government working group to take ownership of the NAP process within the Scottish Government should be clearly elaborated. Experience has shown that high-level political "buy-in" is essential to the NAP process, which acts to encourage, motivate and prioritise the work on business and human rights. The government inter-ministerial group should strive to include personnel from the judiciary, or executive judicial agencies such as the advocate general, in order to ensure progress on Pillar III of UNGPs – access to justice for victims of business harm.

The establishment of the Better World Action Group, a multi-stakeholder group representing a cross-section of Scottish stakeholders is to be commended. Its membership and participation should be kept open to potentially interested parties – it should not be considered as a representative body (of each respective sector/interest group) but rather an access point for participation in the NAP process.

The Scottish NBA, undertaken by independent experts, is a thorough study on which to base the development of a Scottish NAP. The development of NAP actions and government commitments should explicitly refer to the NBA. The NAP actions and commitments should be SMART and include a mix of regulatory and non-regulatory measures. Given that the NBA should be seen as a living document – an ongoing assessment of progress with implementing business and human rights actions which informs their future development – the government should consider giving the Scottish NHRI ownership over this ongoing assessment process, in view of its institutional capacity and in order to retain the 'institutional memory' of the process.

Review and monitoring

Independent monitoring and review of NAP implementation is an integral aspect of the overall policy process and is to be taken seriously. Proper monitoring and review of the NAP is far more likely to ensure actual compliance and delivery of current commitments, while at the same time ensuring that the process continues with dynamism as new and independent specialised input is fed into the process. While it is lamentable that so many states have overlooked this important stage altogether, it should be seen as a sign of hope and emerging best practice that so many NAPs with monitoring mechanisms do provide for meaningful consultation (at least in a supervisory role) with multi-stakeholder groups. Without such ongoing and inclusive monitoring, the NAP process is liable to stagnation, in particular given the extremely limited instances in which parliamentary monitoring and review is specified. However, it should be emphasised that these mechanisms are only as effective as the government implementation plans which they are designed to monitor. Likewise their own monitoring and reporting modules need to be specific.

Another welcome development stemming from recently released NAPs has been the inclusion of NHRIs in the process of not only monitoring NAPs (typically as party of a multi-stakeholder group) but also having responsibility for review of the NAP. In the latter case, NHRIs are uniquely placed to offer a legitimate report on progress and share experience in international and regional business and human rights fora. In many cases, these NHRIs already contribute to best practice discussions, generating a body of policy know-how in regards to other human rights instruments.

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