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Response to Scottish Government Consultation on

Devolved taxes: a policy framework

June 2019

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

Introduction

The Commission welcomes the commitment from the Scottish Government to being more open and accessible to Scotland’s people; to provide public information about the decisions it makes; to support people to understand and influence those decisions, and to value and encourage accountability.

The principles of transparency, participation, empowerment and accountability alongside equality and non-discrimination are the corner stones of a human rights based approach, and they are integral to the development of a devolved taxes policy framework that is shaped by Scotland’s existing international human rights obligations.

The Commission, therefore, welcomes the opportunity to respond to the Devolved Taxes: a policy framework Consultation and hopes the following comments provide a helpful basis for supporting the establishment of a human rights based approach to the process by which changes to the fully devolved taxes are made.

This submission first sets out a short briefing[[1]](#footnote-1) to contextualise the relevance of looking at taxation through the lens of human rights and how this can enhance the devolved taxes policy framework in a number of ways, before responding to the specific consultation questions.

Human Rights based Approach to Taxation

Taxation is a crucial contributing component of the realisation of human rights. A human rights based approach to taxation requires governments to look at public finances in a new way. Taxation is an important tool that States can employ to comply with their international human rights obligations on both fulfilment and promotion sides.

Tax revenues are the main source of income for governments to facilitate the execution of their legal obligations to protect, respect and fulfil human rights - ranging from the right to a fair trial, the right to housing, the right to health, the right to education and social security, and the principles of transparency, participation and accountability.

In Scotland, the Scottish Parliament and Ministers have a responsibility to observe and implement international obligations, including international human rights treaties within the areas of its devolved competence. A rights-based approach to taxation would therefore require fiscal policymakers to take into account those standards and a number of practical elements when designing and implementing taxation. These include the right to participation and principle of transparency, the right to equality and non-discrimination and the principle of accountability.

* Right to participation and transparency

Political and public participation rights play a crucial role in the promotion of democratic governance, the rule of law, social inclusion and economic development. The right to directly and indirectly participate in public life is important in empowering individuals and groups, and is one of the core elements of human rights based approaches aimed at eliminating marginalisation. Many human rights treaties emphasise the right to participation. Article 25 of the International Covenant on Civil and Political Rights includes the right of all people to take part in the conduct of public affairs, including people living in poverty. Other international human rights instruments contain similar provisions.[[2]](#footnote-2) Meaningful participation, and not only information, must be implemented throughout the policy cycle, from design of budgets and tax codes to allocation of expenditure, implementation and evaluation.

Human rights principles are essential components of effective and democratic government.[[3]](#footnote-3) Transparency and accountability are key principles of a human rights based approach to policy making across all domains, and specifically in fiscal policy and public finance management. Some of the measures that can enhance transparency are: the adoption of laws ensuring the public’s access to information on governmental processes, decisions and policies as well as institutional reforms on operating procedures and decision-making processes. Transparency is an important human rights principle that supports efficiency, especially in relation to both the design and greater disclosure of information over tax incentives. Accessible mechanisms for complaints and redress should also be put in place as part of both transparency and accountability principles.

* Right to equality and non-discrimination

It is a key principle that the enjoyment of economic, social, cultural, civil and political rights should be secured without discrimination on any grounds. Revenue collection is a vital tool for States in redressing discrimination and ensuring equal access to human rights. The way in which revenue is raised plays an important role in the realisation of human rights. Regressive tax systems indirectly discriminate or disproportionately negatively impact the most vulnerable in society, increasing inequality. It is crucial that taxes are raised and collected in human rights-compliant ways, where those who can least afford it are not asked to pay more.

The concept of progressive realisation (in the International Covenant on Economic, Social and Cultural Rights[[4]](#footnote-4)) implies that any retrogressive measures, including on taxation, would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR.[[5]](#footnote-5) States should evaluate the differential impact of existing and proposed fiscal policies on different groups, in particular those whom historically have experienced from discrimination, marginalisation or inequalities.

In addition, Scottish and UK Government efforts to promote human rights are meaningless without an adequate effort to collect the necessary funds to provide for basic public services. A State or devolved administration that does not take strong measures to combat tax abuse is not allocating the maximum available resources to the realisation of rights. Such allocation is required by international human rights law.

Moreover, human rights law is clear that even in times of severe resource constraints − whether caused by a process of economic adjustment or recession – vulnerable members of society must be protected. Therefore, fiscal policy should ensure equality, through being progressive and assisting the most disadvantaged individuals and groups in society.

* Principle of accountability

The promotion of accountability for meeting obligations is continuous in a human rights based approach. Accountability means monitoring, review and oversight of what is actually going on. A human rights compliant fiscal framework requires accountability mechanisms that are both *proactive* - allowing participation at the point of design and *reactive* – allowing for aggrieved parties to raise their concerns regarding tax law and policy. Accountability also means judicial and non-judicial remedies (within and out-with the court system) and these are only useful if people know they can use them, and have effective access to them.

Fiscal policies are perceived to be inaccessible to most people. Public participation in formulating policy - on tax and spending - contributes to a more open relationship between government and civil society and can lead to both a more balanced distribution of public resources and greater accountability.

Consultation Questions

**Question 1:** Do you welcome the use of the DTC as an annual tax forum and agree

with its stated purpose?

**Question 2:** Do you have any other preferences as to how the Scottish Government

should carry out engagement on the fully devolved taxes?

The Commission agrees with the proposal to reintroduce the Devolved Tax Collaborative in order to facilitate discussions about the effectiveness of the tax system and make commentary and proposals regarding emerging policy priorities. However, in order for this to be an effective means by which the desired ‘wider’ audience can engage, the Commission would like to encourage transparency over the process of membership of this collaborative.

The consultation document notes the potential involvement of a broad range of businesses, interest groups and individuals which, whilst open-ended, is also non-specifically generic. The Commission would like to see further details on how the Scottish Government will reach out to ensure that the Collaborative contains those voices which are often excluded from key decision making processes. This issue is likely to be even more acute given the subject matter of taxation and finance is often presented as a concern only of ‘experts’ rather than central to economic stability of many, particularly low-paid workers, carers, disabled people, and women, especially Black and minority ethnic women.

Facilitating meaningful engagement with those who have relevant lived experience of the impact of decisions on taxation and those who are perhaps not as familiar with the subject matter requires thoughtful consideration and resources. Whilst the consultation document refers to accessibility - this is limited to information on using the consultation hub. In setting up the proposed DTC, the Scottish Government must ensure that they are fulfilling their procedural legal obligation of participation of individuals in decision making, and meeting the Public Sector Equality Duty requirements to consult with different groups. This will mean setting out a clear participation policy that addresses all potential accessibility issues, including both physical and financial, as well as ensuring access to accessible information in any required format. This is especially important given the potential complexity of information.

Given that taxation is a crucial contributing component of the realisation of all human rights, the Commission would also like to express an interest in participation within the DTC.

**Question 3:** Do you support the Scottish Government’s proposed approach to tax

consultations, in particular consulting on issues collectively rather than on an

individual basis?

The Commission welcomes the Scottish Government’s aim to taking a collaborative approach to its tax policy development to ensure that it is fit for purpose and its likely impacts are fully understood. It is important that opportunities to engage are provided at the appropriate times throughout the process of making and implementing tax policy decisions in order to maximise transparency and appropriate levels of scrutiny. Therefore, a balance will need to be struck between over consultation, under consultation and timely consultation. Consulting on a collective basis, whilst seemingly more efficient, should not come at the expense of consultation on an individual but important aspect that does not conform to the timeframe for an agreed consultation process.

In order for the consultation process to be as meaningful as possible, the Commission would also recommend due consideration is given to the [Consultation Charter’s 7 Principles of Best Practice](https://www.consultationinstitute.org/consultation-charter-7-best-practice-principles/) of:

* Integrity
* Visibility
* Accessibility
* Transparency
* Disclosure
* Fair Interpretation
* Publication

This would further support the Scottish Government to fulfil its obligation is relation to participation.

**Question 4:** What are your views on the proposed policy and legislative cycle?

**Question 5:** What are your views on how frequent the cycle should occur - annually

or every two years?

The five year policy and legislative cycle as summarised on page 18 of the consultation document appears to provide a sensible phased focus and appropriate timeframe for the process of development, implementation and review. Phases 1-3 cover a 2 year period of discussion, research, consultation, development and legislative implementation with Phase 4 as post-implementation review phase 3 years after that. Given that that time frame it would appear to make sense to commence the second Phase 1-3 Cycle after the completion first. I.e. in the current schematic 1st Phase 1-3 (May 2020-April 2022) and then 2nd Phase 1-3 (May 2022-April 2024). However, the DTC should meet at *least* annually, and possibly more often. The impacts of tax policy will not be contained within the proposed policy development cycle, and so there needs to be a mechanism to be constantly, or at least regularly, informed on the impacts of policy across diverse experiences.There would also be value to specific consultation with the DTC during the Phase 2 consultation phase as part of that process.

**Question 6:** Do you consider the existing documents that are published, and the

Scottish Government’s approach to drafting them, as a sufficient means of clarifying

the intention and impacts of a policy?

The Commission welcomes the recognition of the importance of the accompanying documents to support the policy intentions behind the relevant legislation. As noted in relation to questions 1 & 2 – these supporting documents should also be fully accessible to all in order to support participation. This means making all documentation available in alternate forms (on and offline) including easy read, BSL etc.

In relation to the subject matter concerned, the Commission agrees with a particular focus being placed on tax avoidance (and evasion). In order to maximise the government’s available resources tackling tax evasion and tax avoidance is critical. Given that tax evaders and avoiders end up paying less than taxpayers with the same or less capacity to pay, both tax evasion (illegal) and tax avoidance do not only undermine the fiscal base, but the principles of equality and non-discrimination.

The former [UN Independent Expert on Extreme Poverty and Human Rights](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_28_ENG.doc) noted that tax abuse is:

‘*not a victimless practice; it limits resources that could be spent on reducing poverty and realizing human rights, and perpetuates vast income inequality’.* [[6]](#footnote-6)

We know for example from [2012 research](http://cesr.org/sites/default/files/FACT_SHEET_SPAIN.pdf) undertaken with tax inspections and the Centre for Economic and Social Rights in Spain, that a reduction of tax evasion and tax avoidance by 10% (in line with EU standards) would have resulted in the generation of 38 million euros, exceeding the total austerity budget cuts for Spain in 2012.

The consultation documents state that the Scottish Government intends to undertake various assessments as part of the policy making process (e.g. Equality Impact Assessments; Business and Regulatory Impact Assessments & Data Protection Impact Assessments). Given that tax revenues are the main source of income for governments to facilitate the execution of their legal obligations to protect, respect and fulfil human rights and therefore the key role of taxation policy – the Commission would argue of the critical importance of a human rights impact assessment. Rather than adding another assessment to those above, the Commission recommends that the Scottish Government engage in an [Equality and Human Rights Impact Assessment](http://eqhria.scottishhumanrights.com/) process, the value of which (and guidance to undertake) has already been developed collaboratively between the Scottish Human Rights Commission and the Equality and Human Rights Commission.

This work has been endorsed by the UN Independent Expert on foreign debt and human rights who explored this particular work when developing his recently published [Guiding Principles for Human Rights Impact Assessments for Economic Reform Policies](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/57). The aim of these guiding principles is to provide effective and practical guidance and tools for assessing economic reform policies on the basis of existing human rights standards.

*Based on the existing human rights obligations and responsibilities of States and other actors, the guiding principles underline the importance of systematically assessing the impact of economic reforms on the enjoyment of all human rights before decisions are taken to implement such reforms, as well as during and after their implementation. Economic policymaking must be anchored in and guided by substantive and procedural human rights standards, and human rights impact assessments are a crucial process that enables States and other actors to ensure that economic reforms advance, rather than hinder, the enjoyment of human rights by all.[[7]](#footnote-7)*

The Commission strongly advises that the Scottish Government review all of the guiding principles with a view to informing both the content and process of development of the developed taxes policy framework.

Specifically in relation to the basis and purposes of a human rights impact assessment, the guiding principles (Principle 17) state:

States and creditors should carry out human rights impact assessments of economic reform policies considered and taken in response to acute economic and financial crises that are likely to cause adverse human rights impacts. States should also carry out regular and periodic human rights impact assessments of short-, medium- and long-term economic reform processes in less challenging economic times. A human rights impact assessment of economic reform policies should:

(a) Prompt investigation of and analyse the extent to which the proposed measures, in combination with other economic measures and policies being or to be implemented, could contribute to fulfilling the State’s human rights obligations or potentially undermine them;

(b) Serve to demonstrate how proposed measures, jointly with other economic measures and policies being or to be implemented, could impact the human rights of the whole population, particularly the individuals and groups most disenfranchised or at risk;

(c) Identify any prima facie retrogressive measure as well as alternative economic policy options that could be the least restrictive of human rights and avoid any impermissible retrogression;

(d) Establish a (non-exhaustive) list of preventive and mitigating measures to ensure conformity of the economic reform policies considered with the State’s human rights obligation

**Question 7:** Do you agree with the Scottish Government’s approach to the

circumstances set out in this section?

The Commission acknowledges that there may be occasions where minor technical changes are required to be made to policy and systems of practice without advance consultation. The Commission’s view on this would in part depend on the types and extent of changes that are being suggested.

As standard, however, introducing policy and legislative changes without appropriate consultation means that there will be a lack of appropriate scrutiny which introduces a due process accountability gap. Every effort must be made to ensure that decisions taken by government are done so in a clear and transparent manner and crucially, any changes that are to have any potential impact on taxpayers in Scotland are required to undergo a process of equality & human rights impact assessment.

The Commission urges caution and limited use of this proposed practice, and the use of emergency legislation should be avoided.

End

Scottish Human Rights Commission

1. Drawn from previous evidence to the Scottish Parliament Finance Committee (September 2016). See [here](http://www.scottishhumanrights.com/media/1697/shrc-submission-to-finance-committee-sep2016.doc) for the more detail submission. [↑](#footnote-ref-1)
2. These include the Universal Declaration of Human Rights (art. 21); the International Covenant on Economic, Social and Cultural Rights (art. 8); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (c)); the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7 and 8); the Convention on the Rights of the Child (art. 15); the Convention on the Rights of Persons with Disabilities (arts. 4 (3), 29, 33 (3)); the International Convention on the Protection of All Migrant Workers and Members of Their Families (arts. 41 and 42); [↑](#footnote-ref-2)
3. Human Rights institutions are also key to democratic governments. [↑](#footnote-ref-3)
4. International Covenant on Economic, Social and Cultural Rights (ICESCR)<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [↑](#footnote-ref-4)
5. ICESCR General Comment No 1 (1989) [↑](#footnote-ref-5)
6. Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona. A/HRC/26/28 [↑](#footnote-ref-6)
7. <https://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/DebtAndimpactassessments.aspx> [↑](#footnote-ref-7)