

## **Finance and Public Administration Pre-budget scrutiny: Scotland's Public Finances in 2022-23 and the impact of COVID**

**August 2021**

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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.

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## Introduction

The Commission welcomes the opportunity to respond to the Finance and Public Administration Committee's pre-budget scrutiny with a particular focus on the impact of COVID-19 on the Scottish Government's Budget 2022-23.

Given the indivisible link between rights and recovery, it is important that decisions about economic and social recovery from COVID-19 in the forthcoming 2022-23 budget are informed by and rooted in a comprehensive and robust rights-based analysis.

This submission focuses on issues raised in the first three questions of the Committee's call for views:

- How should the Scottish Government's Budget for 2022-23 address the need for a fair and equal recovery from the Covid crisis?
- How should the Scottish Government's Budget address the different impacts of the pandemic across age, income and education groups and across places?
- In 2022-23, it is likely that there will be reduced levels of available Covid-related financial support for the public and private sector. Given this, what should be the priorities for the Scottish Government's Budget?

With regard to the specific questions on the Fiscal Framework and its forthcoming review, the Commission has previously commented on the impact of COVID-19 on the public finances and the Fiscal Framework<sup>1</sup>, and there are other institutions better placed to answer the specific

questions in more depth. We further suggest that our response to Question 3 could inform the question of what next for the Fiscal Framework with regards to revisiting the Scottish Approach to Taxation.

Previous submissions and publications by the Commission provide further detail on a range of areas relevant to this call for views and we suggest that these should be considered alongside this submission.

- Human Rights Budget Work: What, Why and How?: [Collated Briefing Papers](#)
- Submission to Scottish Government [consultation on devolved taxes](#)
- Submission to the Finance Committee: [A Scottish Approach to Taxation](#)
- COVID–19 Briefing Paper : [Implications for the Human Right to Social Security in Scotland](#)
- Submission to Scottish Parliament Finance Committee Inquiry: [Impact of COVID-19 on public finances and Fiscal Framework](#)
- Submission to Advisory Group on Economic Recovery: [Human Rights and Economic Recovery](#)
- Summary Report: [Open Budget Survey Results for Scotland's 2017- 18 Budget \(Summary\)](#)
- Finance and Constitution Committee: [Pre-budget scrutiny 2021-22](#)

## **Question 1: How should the Scottish Government's Budget for 2022-23 address the need for a fair and equal recovery from the COVID crisis?**

At the point of the Commission's submission to the Legacy Committee's pre-budget scrutiny last year<sup>2</sup>, it was already clear that the COVID-19 pandemic was exposing the harmful effects of enduring and persistent inequalities and indirect discrimination on people's rights in Scotland — especially their economic and social rights. It was also clear that the chronic underinvestment in economic and social rights and the public infrastructures that support them, as a result of over a decade of austerity policy, had left Scotland lacking some of the necessary resilience to withstand the full impacts of this pandemic.

The UN Secretary-General has noted that the promotion and protection of economic and social rights in economic recovery processes needs to be viewed as a critical aspect of a future prevention and preparedness strategy<sup>3</sup>.

The Commission has long advocated that the best way to ensure that fairness and equality are cornerstones of the budget process is by taking a human rights based approach (HRBA) to the budget. For the benefit of the members new to this Committee, a HRBA attempts to realise international human rights law, in a way that respects and supports human rights values. The Commission's working definition of a HRBA is one which:

*“gives people greater opportunity to participate in shaping the laws, policies and practices that impact on their human rights; increasing the ability of those with the responsibility for fulfilling rights to recognise and respect those rights; and making sure they can be held to account. It also means ensuring non-discrimination, equality and the prioritisation of the most marginalised”<sup>4</sup>.*

The acronym PANEL is commonly used in Scotland to define and explain the discrete elements of a HRBA:

**Participation** - People should be involved in decisions that affect their rights.

**Accountability** - There should be monitoring of how people’s rights are being affected, as well as remedies when things go wrong.

**Non-discrimination and equality** - All forms of discrimination must be prohibited, prevented and eliminated. People who face the biggest barriers to realising their rights should be prioritised.

**Empowerment** - Everyone should understand their rights and be fully supported to take part in developing policy and practices which affect their lives.

**Law** - Approaches should be grounded in the legal rights that are set out in domestic and international laws.

Taking a HRBA to the budget process helps to embed fairness, transparency and people’s participation in financial decision making

around resource generation, allocation and spend, as well as monitoring and accountability<sup>5</sup>.

In taking a HRBA to the budget, it is useful to think of two processes:

- human rights standards shape the goals of a budget,
- human rights principles of participation, accountability, transparency and non-discrimination shape the budget process, in all of its stages.

## **Human Rights Standards**

In terms of human rights standards, the UK has ratified a number of international treaties containing human rights which the UK Government and, in turn, the Scottish Government must respect, protect and fulfil, through the development and implementation of laws, institutions, policies and plans and through public budgets. Ensuring that the budget is shaped by international human rights standards will help to make Scotland more equal, reduce poverty and disadvantage, and help people live better lives with dignity and respect.

Human rights law is clear that even in times of severe resource constraints – whether caused by a process of economic adjustment, recession or a pandemic induced economic crisis – vulnerable members of society must be protected and the government must ensure certain minimum levels of enjoyment of rights (for example, protection against hunger (related to the right to food), access to basic health care (the right to health), and universal, free primary education (the right to education)).

In an environment where there are financial constraints, once the minimum core is fulfilled, a human rights framework can then provide objective guidance which will assist balanced decision making on the use of resources. This is particularly relevant for Budget 2022-23 as it addresses and sets the path for longer term social and economic recovery from COVID-19 in a financially constrained context. These criteria, as derived from Article 2(1) of the International Convention on Economic, Social and Cultural Rights<sup>6</sup>, for resource allocation include:

- prioritising the fulfilment of basic levels of rights enjoyment for all (**Minimum Core**);
- a general increase in allocation of resources, in line with increased revenue, to achieve the further realisation of rights (**Progressive Realisation**); and
- no unjustified reduction in allocation leading to regression in the realisation of rights (**Non-regression**).
- identifying and using the **maximum available resources** for the progressive realisation of rights, and allocating resources in a way that reduces inequalities by meeting the needs of vulnerable and marginalised groups (**Non-discrimination**).

For the benefit of the Committee, these obligations are set out in brief detail below.

### **Minimum Core**

The government has a duty to ensure the satisfaction of “minimum essential levels” of each right, regardless of their level of economic development, commonly referred to as the “Minimum Core”. Minimum

core obligations are intended to protect a person's right to an adequate standard of living, which is interconnected and interdependent on other rights including the rights to health, social security, education, work and housing. The minimum core is intended to ensure that a person can live with human dignity. These requirements are immediately realisable, not subject to progressive realisation and the government is obligated to provide this essential level of protection at all times.

Failure for a government to provide the minimum core amounts to a presumption that a government is in violation of the Covenant. This is unless a government can demonstrate that "*every effort has been made to use all resources that are at its disposition*" to prioritise reaching those minimum levels. In relation to realising the right to an adequate standard of living, the minimum core would include for example, access to basic housing and freedom from starvation. The current levels of homelessness and poverty, including food poverty, in Scotland means that we can say that Scotland is failing to provide minimum levels of protection as covered by the immediately realisable minimum core of economic, social and cultural rights. Therefore, priority number one for the Scottish Government's budget needs to be addressing these concerns, along with any other failures to provide minimum protection.

Guidance is provided by the UN Committee on Economic Social and Cultural Rights on what would be necessary to meet the minimum threshold in relation to certain rights through the issuing of General Comments (e.g. relation to an adequate standard of living and the rights to housing, health and education<sup>7</sup>). Critically, this must not be considered as a ceiling of achievement, but rather it is a basic floor of provision upon which a government must build.



## **Progressive realisation**

When considering how to apply this obligation practically in relation to budgeting, this can take many forms. What is key to understand is that progressive realisation is not an option or a duty that can be delayed. It is an ongoing obligation on governments, independent from economic growth, which requires that a government makes the best use of its maximum available resources to give further effect to the rights.

Governments must prove that they are making every effort to progress economic, social and cultural rights with the available resources.

Evidence that the principle of progressive realisation has been applied to the budget occurs when a government takes positive measures or steps that further develop preceding efforts. Applying the principle of progressive realisation within the budget can involve a range of different activities, including:

- direct funding,
- application of other resources,
- introducing new programmes,
- reducing restrictions on certain entitlements/programmes, or
- changing policy direction to strengthen the rights of marginalised groups<sup>8</sup>.

## **Non-retrogression**

“Progressive realisation” obliges governments to move as efficiently and expeditiously as possible towards the full realisation of economic, social and cultural rights. Governments also have an obligation to refrain from

taking deliberately retrogressive measures. Any policies adopted that decrease people's enjoyment of a right must be:

- Temporary
- Necessary and proportionate (other options more detrimental)
- Not discriminatory and mitigate inequalities
- Ensure the protection of minimum core content of rights
- Considers all other options, including financial alternatives.

Therefore, when developing their budget a government must ensure that any and all proposals comply with the principle of non-retrogression.

This final bullet point obliges governments to explore revenue-raising alternatives prior to making any cuts that would (directly or indirectly) affect the enjoyment of rights. This includes cuts within the public sector, including the provision of public services or delivery of social security, which has significant and clear implications for budgeting.

To achieve these outcomes, governments must "take steps". i.e. it must take action. These include legislative, administrative, budgetary, judicial, social and educational measures. In particular, "steps taken" by the Government should:

- use the maximum of their available resources to realise rights (Maximum Available Resources),
- increase the availability, accessibility, acceptability and quality of goods and services and address non-discrimination and equality.

## **Assessing the rights: Are they Available, Acceptable, Accessible and Quality (AAAQ)?**

It's not enough for a government just to say they will take steps or action, they must also do what they say they are going to do effectively, which includes sufficient resourcing. International human rights discourse analysing the way in which effectiveness can be unpacked has developed within these four criteria, which are often abbreviated as AAAQ.

The idea is that the goods and services that are necessary for the realisation of rights should be increasingly available, accessible, acceptable and of quality. These are really useful indicators to benchmark progress against and a lot of international work has already been done on this, especially by the Office of the High Commissioner for Human Rights<sup>9</sup>. When considering applying the AAAQ criteria to budgets, it is useful to think of the following:

**Availability:** Relevant infrastructure, goods and services must be available in sufficient quantities. Having determined what relevant infrastructure, goods and services are required and what would be considered sufficient quantity - what resources would be necessary to make these available? This must then be reflected within the budget priorities.

**Accessible:** Infrastructure, goods and services must be physically and economically accessible without discrimination and people must have access to information. For accessibility to be universal, this may require certain infrastructure, goods and services to be tailored to specific

groups. For example, housing should be accessible to everyone without discrimination.

Priority should be given to the most marginalised including homeless people and those who are inadequately housed, and special measures should be taken to ensure adequate housing for disabled people, older people, those living in areas vulnerable to natural disasters and others who require them. Therefore budgetary decisions that affect these priorities can make rights more or less accessible to people in relation to restrictions within law, policy and/or in terms of finance.

Accessibility of goods and services may also require appropriately trained public servants and delivery personnel - implementing budgetary decisions therefore may also have cost and resource implications which requires consideration if rights are to be accessible in practice.

Accessibility is also about affordability. Therefore, in developing the budget a key question to ask is whether any decisions taken will make access to a right unaffordable. Whilst a government can for example, means test or make fees payable without violating rights, attention must be given as to the impact on the accessibility of rights.

For example, when a Fees Order<sup>10</sup> was introduced requiring an issue fee to be paid when a claim form was presented to an Employment Tribunal, and a hearing fee prior to the hearing of the claim, the Supreme Court unanimously agreed that the Fees Order was unlawful because it had the effect of preventing access to justice. Consideration was given to whether the fees could reasonably be afforded and the Court concluded that the fees could not be regarded as affordable because households

on low to middle incomes could only afford the fees by forgoing an acceptable standard of living<sup>11</sup>.

Certain groups may also be disproportionately affected by the same measure. Given that the right to non-discrimination (in law and in practice)<sup>12</sup> is non-derogable, i.e. it is not allowed to be suspended or limited for any reason, budgetary decisions must be scrutinised *before* implementation to ensure a state is not in violation of this principle.

Where cost could present a barrier to accessing rights, it may be that forms of tax relief or exemptions from fees could increase affordability for people with limited resources. However, implementing a system with caveats requires a well-informed delivery service which requires staff training, information and guidance – all of which must also be provided for when the government is making budgetary decisions to safeguard human rights.

**Acceptability and Adaptability:** Infrastructure, goods and services must be culturally and socially acceptable, sensitive to marginalised groups and adapted to the local context. This criteria plays a particular role with regard to non-discrimination and equality.

From a budgetary planning perspective questions must therefore be asked about what adaptations to policies or programmes may be required in order that they are acceptable to all.

Taking a Human Rights Based Approach supports and challenges those making budgetary decisions on the delivery of goods and services, to ensure that they are acceptable by all, not a one-size-fits all.

**Quality:** Infrastructure, goods and services must be appropriate and adequate in standard and safety. Quality also extends to the way in which people are treated e.g., with dignity and respect. When exploring quality and adequacy in relation to the budget it helps to define exactly what is meant. Defining “adequacy and quality” of provision will depend on the situation of a given country. Exploring a range of issues, including the following can help to understand country-specific elements of “adequacy”:

- Are sufficient fiscal and other resources (human, natural, technological, etc.) available?
- Does a budgetary measure require legislation?
- Have any new policies been introduced or removed by legislation on a particular right?
- For any new policy and practice, have sufficient budgetary provisions been allocated for the training of the staff whose job it will be to ensure the right is protected and enjoyed?

When considering each of these issues, posing the question “is it adequate?” will help to provide an answer as to whether the proposed measure is compliant with human rights.

### **Maximum Available Resources**

In her report to the United Nations, the then UN Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda Carmona stated that:

*States must devote the “maximum available resources” to ensure the progressive realization of all economic, social and cultural rights*

*as expeditiously and effectively as possible, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession or other factors. This principle should guide the State's decisions and priorities in generating, mobilizing and allocating resources in order to permit the realization of human rights<sup>13</sup>.*

States are granted a “wide measure of discretion” to determine the resources to be set aside to promote the realisation of rights. Nevertheless, “due priority” should be given to the realisation of rights in allocating resources and resources should be allocated in a way that is “equitable and effective”.

Designing a budget which complies with a government's human rights obligations is not just about how existing resources are allocated, it is also about what effort has been made to generate additional resources and if those efforts are adequate and equitable? This is explored in more depth in answer to Question 3.

## **Human Rights Principles**

In terms of the process involved, taking this approach asks us to consider whose voices are heard in relation to, and how different groups are affected by, a government's ongoing fiscal decisions, with reference to human rights standards in order to make that assessment<sup>14</sup>. Ensuring that the process for taking fiscal decisions engages those affected by those very decisions, is a vital aspect of human rights budget work.

*“International human rights law guarantees people the right to participate in public affairs and have access to relevant government information. With regard to the budget this means:*

*Government should establish and support channels and forums by which ordinary people, as individuals or through organizations and institutions, can have a say in the formulation, enactment, execution and audit of the public budget.*

*In order to participate in an informed and effective manner, people need information. The government should make publicly available important budget documents in a format that is readily understandable to a broad range of people. It should at the same time gather and make available key data necessary to understand the implication of the budget for individuals and groups in society.”<sup>15</sup>*

In 2020, the Commission published research<sup>16</sup> which assessed the Scottish Government’s budget process against the criteria set out in the Open Budget Survey (OBS)<sup>17</sup>, which is used to produce the Open Budget Index (OBI). This is the only global, independent, comparative measure of budget transparency of national governments. It uses internationally accepted criteria developed by multilateral organisations and is recognised as authoritative by the International Monetary Fund (IMF), the World Bank and the Organisation for Economic Co-operation and Development (OECD). The survey covers 117 countries<sup>18</sup>, encompassing all regions of the world and all income levels, and has been going for 14 years (seven cycles).



Countries covered by the OBS are assessed and compared with regard to three components:

- public availability and transparency of budget information (available in eight key documents in accordance with international good practice standards),
- opportunities for public participation in the budget process,
- the role and effectiveness of formal oversight institutions.

The results showed that Scotland performed well when it came to budgetary oversight, scoring 85/100 overall, 77/100 on legislative oversight and 100/100 on auditory oversight. However, when it came to fiscal transparency and public participation, Scotland fell significantly short of globally recommended standards (identified as 61+/100), scoring only 43/100 and 20/100 on these key measures.

Some of the main reasons for these low scores included:

- the Scottish Government routinely only publishes four of the eight key budget documents (as defined by international best practice<sup>19</sup>).
- no citizens' versions of any of the key documents were produced despite best practice recommendations that these should be published and at the same time as the key documents, to facilitate engagement with the Budget when it matters.
- there are limited opportunities for the public and civil society to participate in budget scrutiny at all stages of the Budget.

- legislative oversight is focused at the pre-budget stage rather than an equal focus during the implementation stage of the Budget cycle.

The research was completed prior to the emergence of COVID-19. However, its findings and recommendations will be particularly important as budgetary decisions are made to respond to the pandemic and to plan for recovery. The lack of transparency and lack of opportunities to participate in fiscal decisions prevents us from realising the potential benefits of greater openness of fiscal policies. These decisions will have significant impacts on the ways in which resources are generated, allocated and prioritised, and the extent to which people's rights are respected, protected and fulfilled.

Human rights relate to all aspects of a State's budget-related decisions, from legislation, through to policy, practice and outcomes. Human rights budgeting on its own is not sufficient for realising rights, it must be part of a larger process. Preceding the development of the budget must be the development of laws, regulations, policies and plans that are sensitive to human rights norms and standards.

This is why the process of how choices are discussed and made is critical in determining the extent to which different human rights obligations are or are not met. Thinking in this way about what the human rights implications are of different budget decisions, helps to ground those budget decisions in the experience of rights-holders.

## **Question 2: How should the Scottish Government's Budget address the different impacts of the pandemic across age, income and education groups and across places?**

Ensuring that equality and human rights considerations are embedded into the policies, practices, procedures and priorities of both government and public bodies is vital to ensure that the budget addresses the many differential impacts of the pandemic. A mechanism that has the potential to support these processes are pre and post - equality and human rights impact assessments (EQHRIAs)<sup>20</sup>. Both parts of this mechanism are equally important. A pre-assessment ensures that the best available evidence informs the decision making process, whilst a post-assessment ensures that these decisions are examined for their intended and unintended consequences.

EQHRIAs can also encourage individuals and communities to participate in decision making processes, giving them ownership of decisions and transforming institutional cultures and decision making.

A number of UN human rights committees have proposed the use of human rights impact assessments to support better policy making and fiscal decisions<sup>21</sup>. As Ms Sepúlveda noted:

*[Governments should] “conduct human rights assessments of fiscal policy periodically and with broad public participation, including analysis of the distributional consequences and tax*

*burden borne by different income sectors and disadvantaged groups”.*<sup>22</sup>

In January 2019, Juan Pablo Bohoslavsky, the Independent Expert on foreign debt and human rights issued new [Guiding Principles on Human Rights Impact Assessments of Economic Reforms](#)<sup>23</sup>. Within the guidance he highlights that human rights need to be a central factor of good policymaking if economic reforms are to “*help advance societies, rather than hinder people’s lives*”.

He goes on to talk about the role of a State’s human rights obligations in economic policymaking as obligations that States simply cannot ignore. These decisions have consequences and those consequences must be identified before not after a policy has been implemented:

*“Any economic policy measures – whether fiscal austerity, structural adjustment reforms, privatisation of public services, deregulation of financial and labour markets, or changes in taxation – all have human rights consequences... Governments at all levels - including local and subnational governments - must properly take into account their human rights obligations when designing and formulating economic reforms. Human rights impact assessments are key to this process... such assessments should pay particular attention to potential and cumulative impacts of economic measures on specific individuals and groups, such as women and persons with disabilities.”*<sup>24</sup>

Human rights impact assessments are not widely used, however, they should be standard practice in the preparation of budgets. Such assessments enable fair and transparent decision making and provide a practical method to support governments to avoid disproportionately affecting some groups more than others with their policy and budgetary decisions.

The Commission recommends approaches to human rights impact assessment are further explored by the Scottish Government as an overarching or integrated framework or guiding tool for the proliferation of impact assessment methodologies. Good practice has been developed on Equality and Human Rights Impact Assessments by the [Scottish Human Rights Commission \(SHRC\)](#)<sup>25</sup> and [Equality and Human Rights Commission \(EHRC\)](#)<sup>26</sup> – with a dedicated website which sets out, for example:

- An explanation of the [added value of the human rights dimension](#).<sup>27</sup>
- The [10 Good Practice Building Blocks for Assessing Impact](#).<sup>28</sup>

## **Timely access to accurate information and disaggregated data**

A further important component of ensuring an effective impact assessment is the availability of appropriate data. The only way to ensure that the different impacts of the pandemic across age, income and education groups and across places (as well as gender, disability, ethnicity and other protected characteristics) are understood, is if there

is a free flow of accurate, timely, factual and disaggregated data, readily available to be interrogated.

A lack of availability of the necessary data, disaggregated data in particular, is not a new issue, but one that has been further highlighted as a result of the pandemic. In order to ensure effective human rights and equality monitoring, various UN Treaty Body Committees have repeatedly called on the UK (and Scotland) to put in place a system to better collate disaggregated data<sup>29</sup>. This is further supported by the call for better data disaggregation as part of the delivery of the SDGs, in order to match the ambition that “*no one should be left behind*” and “*no target should be met, unless met for all groups*”<sup>30</sup>. However, there continues to be a lack of available official disaggregated data, especially on intersectionality, which would provide vital information on individuals affected by multiple discrimination and allow policy and legislation to be shaped to address those.

A number of organisations<sup>31</sup> have already noted a range of data gaps that are emerging around COVID-19 and its impact on social, health and economic issues, in particular related to a lack of Scottish specific data (as opposed to only UK wide data). Some surveys have not been able to proceed as normal due to the face-to-face nature of their collection methods. For other data, the timing lag from collection to dissemination makes it difficult to understand the extent of impact in real time, which makes taking informed critical time-bound decisions difficult for the government. This is especially true of data that has to be extrapolated from UK wide data sources.

Moving forward, it will be important for the Scottish Government to address the long-standing issue of data gaps. This could build on the findings of the innovative work undertaken by local governments to change the way that they worked with data in the first six months of the crisis. Research<sup>32</sup> by the Urban Big Data Centre at the University of Glasgow explored the data needs, capabilities and uses by Local Government during COVID-19 that enabled local authorities to respond as quickly as they could to the quickly changing landscape. For example, to understand the local impacts of the crisis and deliver support, local authorities collected new types of data and made greater use of mapping and visualisation tools. An increase in sharing across the public sector, especially between the NHS and local government was also undertaken in order to better identify patterns of vulnerability<sup>33</sup>. The research concluded that the pandemic has created a 'shared sense of purpose' in local government and necessitated the fast acceleration of the development and adoption of new ways of working and collaborating (including between the public, third and private sectors). It has acted as a catalyst for change towards better joined-up data practices with focus on public benefits<sup>34</sup>.

The Commission also recommends that the Scottish Government explore and adopt a human rights based approach to data, as set out in a recent guidance note by the UN Office of the High Commissioner for Human Rights<sup>35</sup>. This approach sets out six basic principles for a human rights-based approach to data collection and use, namely:

- the participation of population groups, in particular the marginalized in the data collection process;

- the disaggregation of data to prevent discrimination based on sex, age, ethnicity, disability, sexual orientation or religion, which is prohibited by international human rights law;
- self-identification, without reinforcing further discrimination of these groups;
- transparency to guarantee the right to information;
- respecting the privacy of respondents and the confidentiality of their personal data; and
- accountability in data collection and use.

**Question 3: In 2022-23, it is likely that there will be reduced levels of available Covid-related financial support for the public and private sector. Given this, what should be the priorities for the Scottish Government's Budget?**

### **Maximising Available Resources**

A key priority for the Scottish Government budget, prior to an assessment of its policy priorities, is to examine whether it is complying with Article 2(1) of the International Convention on Economic, Social and Cultural Rights<sup>36</sup>, in ensuring first, that it has generated the “maximum of its available resources” to fund the realisation of rights through its policy agenda. This explicit obligation is also contained within the UN



Convention of the Rights of People with Disabilities and the recently incorporated UN Convention on Rights of the Child<sup>37</sup>.

The importance of this specific obligation is that developing a budget through a human rights lens is not just about ensuring that the government is using its existing resources efficiently, effectively and without discrimination, it is also about ensuring that the government is making the necessary effort to generate additional resources and whether those efforts are adequate and equitable.

The obligation to maximise available resources means that governments need to be imaginative and consider innovative ways in which it is in their power to raise funds. For example, we have seen this drawn out in an example where the Scottish Government had sought novel ways to raise revenue for affordable housing. The Scottish Government worked with the Scottish Futures Trust and a number of Councils to develop and deliver options of the original National Housing Trust initiative, which had levered over £200 million of development by 2015<sup>38</sup> to support the delivery of over 2,000 additional homes for affordable rent<sup>39</sup>.

Another key area of focus when a government is exploring whether it has maximised its available resources, is the country's system of taxation.

Tax policy in Scotland is framed around the principles of the 'Scottish Approach to Taxation' based solidly in the legacy of Adam Smith and set out by Revenue Scotland<sup>40</sup>.

- **“Certain:** The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of

payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person."

- “**Convenient**: Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay...”
- “**Efficient**: Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state...”
- “**Proportionate** to the taxpayer’s ability to pay: The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities.”

These principles have some alignment with a human rights based approach to taxation. The obligation to use the maximum of available resources to realise rights means that a government must be efficient in relation to revenue collection, as inefficiency leaves a government without the necessary resources to realise rights. Government expenditures must also be effective. In other words, the impact of the expenditures must be such as to actually help realise rights. In addition, if a government has not spent all allocated funds as intended – or has done so in a way that is inefficient or wasteful - then it has not made full use of maximum available funds. Finally, connected to the principle of proportionate ability to pay, the human rights principle of non-discrimination would necessitate identifying who resources are generated from, whether this is done proportionately and whether any particular groups are unjustly impacted through taxation.

Further work to bring the Scottish principles fully in line with a HRBA is, however, required. The Legacy Report of the Finance and Constitution Committee<sup>41</sup> recommended the exploration of a HRBA to taxation as part of revisiting the Scottish Approach to Taxation, and that this should feature in this new parliamentary term. The starting point of this approach is to firstly question, is the budget as big as it could be?, rather than accepting a budget total as given. Is the taxation system raising the maximum available funds that it can? Has the government made use of all taxation options available to it? Further questions then include: are all of the government's current (and proposed) taxation options progressive?; who are resources generated from?; is this done fairly, or are particular groups impacted unjustly?; and what is being done to tackle tax evasion, avoidance and debt? All of which are an inefficient use of available resources, and therefore, a failure to tackle evasion, avoidance and debt, is a failure to comply with this obligation<sup>42</sup>.

The Commission acknowledges that not all fiscal levers are within the Scottish Government's gift. Some efforts that would generate progressive changes and substantial resources, would require a UK led approach<sup>43</sup>. However, the Scottish Government must also exercise its own powers in relation to a number of progressive tax measures that it could choose in and of its own right, with which to approach COVID-19 economic and social recovery. For example, the current government and previous governments before it have repeatedly failed to take the opportunity to make substantial and progressive changes to certain aspects of taxation – such as local taxation<sup>44</sup> - even when successive consultations and Commissions<sup>45</sup>, which have been set up to deliberate

on this subject, have concluded that it is both recommended and necessary.

During the last Parliamentary cycle (even before the arrival of COVID-19) the government had begun to focus discussion on the need for both changes to the system of taxation and the necessity for informed public discourse on the role of taxation in Scotland to inform and support this. It is important that the government's obligation to deliver on Maximum Available Resources is highlighted and reinforced through the budget scrutiny performed by all Parliamentary Committees (not limited to this Committee or to the Equality, Human Rights and Civil Justice Committee) to support these discussions and to hold government to account for progressing this agenda.

COVID-19 has provided both the necessity and the renewed appetite to take the opportunity for truly transformational change. It has also reinforced the importance of the Finance and Public Administration Committee following through on the Legacy Report recommendation<sup>46</sup> to revisit their previous inquiry on a Scottish approach to taxation with a view to exploring how COVID-19 has impacted on the taxation system and considering options for a restructuring of the taxes which are devolved including taking a human rights based approach.

In exploring progressive tax measures to realise rights as countries recover from COVID-19, the Centre for Economic and Social Rights and the Tax Justice Network<sup>47</sup> have highlighted that systems of taxation should be asking proportionately more from those most able to pay. They suggest the following:

- “Ending over-reliance on ‘indirect’ taxes like sales tax and VAT, which tend to take a larger proportion from the income of poorer people;
- Increasing rates of ‘direct’ taxes on high incomes and the most profitable businesses,
- Introducing or boosting taxes on assets like property, wealth, inheritance and income from investments,
- Cracking down on tax evasion and avoidance by wealthy individuals and powerful corporations...”<sup>48</sup>.

Much domestic expertise has been developed on the taxation options available to Scotland in recent years by the likes of the Fraser of Allander Institute<sup>49</sup>, CPAG<sup>50</sup> and the Institute for Public Policy Research<sup>51</sup>, amongst others. Ideas include exploring the potential offered by: further amendments to Income Tax; reforming Scottish property taxes; new taxes – including Local Wealth Taxes; excluding tax avoiders from government bailouts and leveraging tax as a tool for behavioural change. Taking the opportunity to explore these ideas with these experts through a human rights lens would afford the Committee the possibility for a timely multi-stakeholder learning opportunity focusing on both the benefits of taking a HRBA to taxation coupled with a thorough analysis of the taxation options that are fully within the remit of the Scottish Government.

## **Identifying Budget Priorities**

Human rights budgeting needs to be embedded into a broader rights-based policy process. Before the development of the budget comes the development of laws, policies and plans that are also shaped by human rights standards. The budget should then be developed to directly realise these laws, policies and plans, using the maximum of its available resources to do so.

This involves:

- examining a country's human rights international human rights obligations and commitments;
- analysing the human rights concerns facing different groups within and across different social sectors (e.g. housing, health, social care, education etc);
- designing (with impact assessment) policies that respond to those concerns;
- generating adequate resource to fund those policies;
- allocating adequate budget to implement those policies;
- monitoring of whether the money was spent as planned, what was delivered and to whom; and
- evaluating whether the policy was implemented and what impact it had.

Allocating resources in a way that enables a government to fulfil its human rights obligations requires consideration of that government's specific human rights obligations as set out in the human rights treaties it has signed and ratified. Extensive guidance on how those commitments translate into policy objectives on the ground is then set out in a number of places, including for example: General Comments and concluding

observations and recommendations provided by the various UN Treaty Body Committees<sup>52</sup> and reports from Special Rapporteur on specific issues.

At present the Scottish Government does not take a human rights based approach to its budgeting or its more general policy development processes and the budget is not routinely scrutinised through a rights lens. Developing such processes will help future administrations to progressively realise human rights.

Good rights based laws and policies can also still result in unacceptable experiences of rights holders if they are not properly resourced. Human rights budget work can help identify where this is the case. Taking human rights standards into account when developing the budget can help the right questions to be asked that support effective, transparent, fair and accountable use of national resources; ensure that the government is meeting its obligations of delivering a minimum core of rights, and support the progressive realisation of rights in Scotland through the use of the maximum of its available resources.

END

# Endnotes

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<sup>1</sup> See [20\\_05\\_fincom\\_covid\\_publicfinances\\_humanrights\\_vfinal.pdf](https://www.scottishhumanrights.com/files/20_05_fincom_covid_publicfinances_humanrights_vfinal.pdf) (scottishhumanrights.com)

<sup>2</sup> See [fcc-pre-budget-scrutiny-shrc-final.pdf](https://www.scottishhumanrights.com/files/fcc-pre-budget-scrutiny-shrc-final.pdf) (scottishhumanrights.com)

<sup>3</sup> UN Secretary-General Report, 'Human Rights and COVID-19: we are all in this together' see: [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf)

<sup>4</sup> SHRC, 2019, Participation Strategy 2018-2020, Edinburgh.

<sup>5</sup> See <https://www.scottishhumanrights.com/projects-and-programmes/human-rights-budget-work/>

<sup>6</sup> See <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

<sup>7</sup> For example see: Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003). Committee on Economic, Social and Cultural Rights, 'General Comment No. 4: The Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23 para 7. Committee on Economic, Social and Cultural Rights, 'General Comment No. 14, The right to the highest attainable standard of health' U.N.Doc.E/C.12/2000/4 (2000) paragraph 43. Committee on Economic Social and Cultural Rights, 'General Comment No. 4, The Right to Adequate Housing' U.N. Doc. E/1992/23 annex III at 114 (1991) paragraph 13. See also the Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted By States Parties under Article 16 and 17 of the Covenant' U.N.Doc.E/C.12/GBR/CO/5 (2009).

<sup>8</sup> [https://www.flac.ie/download/pdf/flac\\_briefing\\_on\\_human\\_rights\\_approach\\_to\\_budgeting.pdf](https://www.flac.ie/download/pdf/flac_briefing_on_human_rights_approach_to_budgeting.pdf)

<sup>9</sup> For example see:

[https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq/aaaq\\_international\\_indicators\\_2014.pdf](https://www.humanrights.dk/files/media/dokumenter/udgivelser/aaaq/aaaq_international_indicators_2014.pdf) ; <https://www.who.int/gender-equity-rights/knowledge/aaaq-infographic/en/> ; <http://phrtoolkits.org/toolkits/medical-professionalism/the-human-rights-basis-for-professionalism-in-health-care/aaaq-framework/> ; [http://www.healthscotland.scot/media/1276/human-rights-and-the-right-to-health\\_dec2016\\_english.pdf](http://www.healthscotland.scot/media/1276/human-rights-and-the-right-to-health_dec2016_english.pdf)

<sup>10</sup> Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 ("the Fees Order")

<sup>11</sup> See [R \(on the application of UNISON\) \(Appellant\) v Lord Chancellor \(Respondent\)](https://www.supremecourt.uk/cases/20160113.html) (supremecourt.uk) for a summary of this case.

<sup>12</sup> The state has an obligation to eliminate **de jure** (in law) discrimination by abolishing "**without delay**" any discriminatory laws, regulations and practices. **De facto** (in fact) discrimination, occurring as a result of the unequal enjoyment of rights, should be ended "**as speedily as possible**".

<sup>13</sup> Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, pg7 Available online at [http://www.justiciafiscal.org/wp-content/uploads/2014/06/A\\_HRC\\_26\\_28\\_ENG.pdf](http://www.justiciafiscal.org/wp-content/uploads/2014/06/A_HRC_26_28_ENG.pdf)

<sup>14</sup> See Corkery, A. Introduction to Human rights budget work, slide 6 [PowerPoint Presentation](https://www.scottishhumanrights.com/files/PowerPoint%20Presentation%20Introduction%20to%20Human%20Rights%20Budget%20Work.pdf) (scottishhumanrights.com)

<sup>15</sup> See <https://www.scottishhumanrights.com/media/1706/human-rights-budgeting-and-budget-analysis-oct-2015-vfinal.doc>

<sup>16</sup> See [scotland-2019-obi-report-vfinal.pdf](https://www.scottishhumanrights.com/files/scotland-2019-obi-report-vfinal.pdf) (scottishhumanrights.com)

<sup>17</sup> See: [https://www.internationalbudget.org/sites/default/files/2020-04/2019\\_Guide\\_and\\_Questionnaire\\_EN.pdf](https://www.internationalbudget.org/sites/default/files/2020-04/2019_Guide_and_Questionnaire_EN.pdf)



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<sup>18</sup> Although the UK Government's budget process is assessed by the OBS, as a sub-national government, Scotland's devolved budgeting processes are not specifically subject to assessment. Therefore, the Commission's project, supported and reviewed by the International Budget Partnership (IBP), replicated the detailed OBS methodology for Scotland.

<sup>19</sup> The 8 recommended documents are noted here – in bold are the missing documents for Scotland: **Pre-Budget Statement**; Executive's Budget Proposal and supporting documentation; Enacted Budget; **Citizens Budget**; **In-Year Reports**; **Mid-Year Review**; Year-End Report; Audit Report.

<sup>20</sup> See <http://eqhria.scottishhumanrights.com/>

<sup>21</sup> Committee on Economic, Social and Cultural Rights, General Comment 2, International technical assistance measures (Fourth session, 1990), U.N. Doc. E/1990/23, annex III at 86 (1990) & Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) & Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) & Committee on Economic, Social and Cultural Rights, General Comment 17, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), U.N. Doc. E/C.12/GC/17 (2006) & Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) & Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), U.N. Doc. E/C.12/GC/21 (2009) & General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) pg 21 "Implement rights-based budget monitoring and analysis, as well as child impact assessments on how investments, particularly in the health sector, may serve the best interests of the child".

<sup>22</sup> Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona see here, [http://www.justiciafiscal.org/wp-content/uploads/2014/06/A\\_HRC\\_26\\_28\\_ENG.pdf](http://www.justiciafiscal.org/wp-content/uploads/2014/06/A_HRC_26_28_ENG.pdf)

<sup>23</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/443/52/PDF/G1844352.pdf?OpenElement>

<sup>24</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24090&LangID=E>

<sup>25</sup> <http://eqhria.scottishhumanrights.com/index.html>

<sup>26</sup> <http://www.equalityhumanrights.com/>

<sup>27</sup> <http://eqhria.scottishhumanrights.com/eqhrialpaddedvalue.html>

<sup>28</sup> <http://eqhria.scottishhumanrights.com/eqhriagoodpractice.html>

<sup>29</sup> ICESCR 2016 [Treaty bodies Download \(ohchr.org\)](#)

CAT 2019 [Treaty bodies Download \(ohchr.org\)](#)

ICERD 2016 [Treaty bodies Download \(ohchr.org\)](#)

CRC 2016 [Treaty bodies Download \(ohchr.org\)](#)

CEDAW 2019 [Treaty bodies Download \(ohchr.org\)](#)

CRPD 2017 [Treaty bodies Download \(ohchr.org\)](#)

<sup>30</sup> See: <http://www.undatarevolution.org/report/> and

<https://www.ohchr.org/Documents/Issues/HRIndicators/DataDisaggregation.pdf>

<sup>31</sup> For example see:

<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2020/02/additional-poverty-statistics-2020/documents/economic-impact-of-coronavirus-led-labour-market-effects-on-individuals-and-households/economic-impact-of-coronavirus-led-labour-market-effects-on-individuals-and-households/govscot%3Adocument/Covid-19%2B-%2BLabour%2BMarket%2B-%2BEconomic%2BImpact%2Bof%2BCoronavirus%2Bon%2BIndividuals%2Band%2BHouseholds%2B-%2BSummary%2Bfor%2Bpublication.docx> ; [What do the latest indicators tell us about the impact of the coronavirus on the Scottish Economy? | FAI \(fraserofallander.org\)](#) ; [Coronavirus | FAI \(fraserofallander.org\)](#) ; [Inequalities in a crisis reinforce the need for a gendered lens in policy making – Centre for Economic Justice \(caledonianblogs.net\)](#)

<sup>32</sup> See [Scottish Local Government during COVID-19: Data Needs, Capabilities, and Uses \(ubdc.ac.uk\)](#)

**33**

<sup>33</sup> Cretu. C (2020), A Catalyst for Change, What COVID-19 has taught us about the future of local government. Report, Nesta, Retrieved from [https://media.nesta.org.uk/documents/A\\_Catalyst\\_for\\_Change.pdf](https://media.nesta.org.uk/documents/A_Catalyst_for_Change.pdf)

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<sup>34</sup> Cretu. C (2020), A Catalyst for Change, What COVID-19 has taught us about the future of local government. Report, Nesta, Retrieved from [https://media.nesta.org.uk/documents/A\\_Catalyst\\_for\\_Change.pdf](https://media.nesta.org.uk/documents/A_Catalyst_for_Change.pdf)

<sup>35</sup> See [GuidanceNoteonApproachtoData.pdf \(ohchr.org\)](#)

<sup>36</sup> See <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

<sup>37</sup> The obligation to maximise available resources to take steps to realise rights is explicitly mentioned in these three UN treaties and is an implicit condition of all other treaties – the realisation of all rights require resources.

<sup>38</sup> Blyberg states: that the government pioneered the use of the Charitable Bond mechanism in Scotland as a channel for loan investment to support the financing of more affordable homes and to generate grants for the funding of regeneration projects by charitable organisations. See <https://www.scottishhumanrights.com/media/1706/human-rights-budgeting-and-budget-analysis-oct-2015-vfinal.doc>

<sup>39</sup> See <https://www.scottishhumanrights.com/media/1706/human-rights-budgeting-and-budget-analysis-oct-2015-vfinal.doc>

<sup>40</sup> <https://revenue.scot/taxes/scottish-approach-tax>

<sup>41</sup> See [Pre-budget scrutiny 2021-22 \(azureedge.net\)](#)

<sup>42</sup> See <https://www.scottishhumanrights.com/media/1706/human-rights-budgeting-and-budget-analysis-oct-2015-vfinal.doc>

<sup>43</sup> See [Let's Talk About Tax | CPAG](#) for a thorough overview of current and potential tax options in the UK, including a section focusing on Scotland by David Eiser.

<sup>44</sup> See discussion by David Eiser “Devolved Taxation: Scotland” in Bradshaw, J. 2019, *Let's Talk About Tax* [Let's Talk About Tax | CPAG](#)

<sup>45</sup> For example, the *Burt Review* in 2006 and the *Commission on Local Tax* in 2015.

<sup>46</sup> See [Pre-budget scrutiny 2021-22 \(azureedge.net\)](#)

<sup>47</sup> See CESR and the Tax Justice Network, 2020, Recovering Rights Series, Topic Three - [https://www.cesr.org/sites/default/files/Brief%203%20Progressive%20Tax\\_.pdf](https://www.cesr.org/sites/default/files/Brief%203%20Progressive%20Tax_.pdf)

<sup>48</sup> See CESR and the Tax Justice Network, 2020, Recovering Rights Series, Topic Three - [https://www.cesr.org/sites/default/files/Brief%203%20Progressive%20Tax\\_.pdf](https://www.cesr.org/sites/default/files/Brief%203%20Progressive%20Tax_.pdf)

<sup>49</sup> See [Fraser of Allander Institute - The Scottish and UK Economy](#) ;

<sup>50</sup> See for example [Let's Talk About Tax | CPAG](#)

<sup>51</sup> See for example [1568730565\\_local-tax-in-scotland-sept19.pdf \(ippr.org\)](#)

<sup>52</sup> For other examples see CESCR General Comment No. 4: [The Right to Adequate Housing \(Art. 11 \(1\) of the Covenant\)](#); CESCR General Comment No. 13: [The Right to Education \(Art. 13\)](#) ; CESCR General Comment No. 14: [The Right to the Highest Attainable Standard of Health \(Art. 12\)](#); CESCR General Comment No. 19: [The right to social security \(art. 9\)](#)