

### 3. Human Rights

This Chapter records feedback, comments and recommendations of participants attending the specialist consultation event on human rights perspectives held on 11/09/08, as well as comments received in response to the web consultation briefing paper on human rights and the specialist consultation event, and in the course of further follow-up discussions and meetings.

In the earlier (foundational) stages of the development of the EMF undertaken by the Equalities Review and the EHRC, an important priority was to ensure that the development of the EMF explicitly built on human rights principles and standards. Building on this earlier approach, during the course of the current project, we aimed to consult as widely as possible on the ways in which human rights standards and principles could be embedded and reflected in the process of indicator selection itself. Two rounds of consultation on human rights (the specialist consultation event on human rights, and the web consultation) were organized in order to explore the views of stakeholder groups and subject experts concerning the process of indicator selection and human rights priorities and concerns.

During the course of these two rounds of consultation, we were particularly keen to identify indicators that participants feel should be included in the EMF because they reflect important human rights concerns. We also asked participants for their views concerning a range of further questions to inform our approach, including (1) the meaning and definition of a human rights indicator, (2) good practice in international human rights monitoring, and (3) good practice examples of human rights indicators in England, Scotland and Wales.

The feedback on human rights from these two rounds of specialist consultation is recorded in this Chapter thematically (under 13 'feedback issues'). A final section setting out our own recommendations is also included.

#### **Feedback Issue (1): The importance of promoting an integrated equality and human rights perspective**

Participants at the specialist consultation event emphasised the importance of ensuring the human rights principles are fully integrated into, and reflected in, the EMF. This principle reflects the integrated mandate of the Commission and its responsibilities to promote both equality and human rights. Participants emphasized that the EMF should explicitly be related to human rights as well as to equality standards.

The ways in which human rights principles and standards are built into the theoretical and conceptual foundations of the EMF were set out in presentations in the specialist consultation event, and were welcomed by many participants. It was suggested that these include:

- **Rationale for the EMF - discharging the duty of the EHRC to monitor social outcomes from the equality and human rights perspective**

Under the Equality Act (2006), the EHRC has a general duty to work towards a society based on equality and human rights. It has specific duties both (1) to monitor the law from the equality and human rights perspective; and (2) to monitor results (or social outcomes) by developing indicators and assessing progress in a triennial report. The EMF will be used to discharge the second of these specific duties and both the equality and the human rights perspectives are central to the development of the monitoring framework.

- **Derivation of the list of central and valuable freedoms**

The human rights perspective played a critical role in identifying the capability list (or list of central and valuable freedoms) that provides the foundation for the EMF. The EMF was derived on the basis of a two-stage procedure involving (1) drawing up a minimum core list of central and valuable freedoms from the international human rights framework (2) supplementation and refinement of the minimum core list through deliberative consultation with individuals and groups at particular risk of discrimination and disadvantage. Stage (2) as well as stage (1) reflects a human rights perspective, since the importance of bottom-up and participatory approaches are intrinsic to the human rights approach.

- **Relationship with the FREDA principles**

The EMF is underpinned by a concept of equal substantive freedom that highlights three critical aspects of inequality: outcomes (the central and valuable things in life that people actually achieve), autonomy (issues of empowerment, choice and control) and process (discrimination and other aspects of unequal treatment, such as lack of dignity and respect). Participants felt it was particularly important to see how these three aspects relate to human rights principles and standards. In particular the EMF provides a system for organizing population survey-based and administrative statistics that relate to the FREDA principles (fairness, respect, equality, dignity and autonomy).

- **Systematic disaggregation of all statistical indicators.** The importance of disaggregating by characteristics is a central principle of good practice in international human rights monitoring (see discussion below). This principle is embedded into the theoretical structure of the EMF, with all indicators disaggregated by ethnicity, age, disability, gender, religion or belief, sexual orientation, transgender. See feedback issue 4 for further discussion.
- **The importance of monitoring the position of the non-household population and other vulnerable groups.** Whilst supplementary mechanisms are required to monitor the equality and human rights position of the non-household and other vulnerable sub-populations, the EMF includes indicators of the equality and position of these sub-populations in a number of domains, and can be used as an advocacy tool where there are data gaps. See feedback issue 5 for further discussion.

Whilst participants at the consultation event and in subsequent follow-up discussions have welcomed the ways in which the EMF builds on and embeds human rights standards and principles, concern was expressed that the links between the EMF and human rights are not always highlighted. It was suggested that the EMF should be explicitly related to human rights principles and standards at every stage of its development, and that the links should be emphasized in internal and external communications exercises by EHRC and GEO, as well as in the theoretical structure of the EMF, and in the process of selection of indicators itself. Comments included:

- Equality and human rights standards should be treated as integrated and complementary systems and approaches that treat these systems as separate and rival systems should be avoided.
- The possibility of re-naming the EMF the “Equality and Human Rights Measurement Framework” to reflect the status of human rights within the framework should be considered. The current name fails to capture the central importance of human rights both for the EMF and for the mandate of the Commission.
- A broader name that includes human rights was thought to be problematic in some respects by some participants. For example, thinking about human rights indicators in the GB context is only at a preliminary stage. Also, the EMF is unlikely to provide a full or exhaustive list of human rights indicators but an “Equality and Human Rights Measurement Framework” might be interpreted in terms of this broader goal.

Participants in the second round of the specialist consultation also welcomed the ways in which the EMF is underpinned by human rights principles and standards. Whilst the Ministry of Justice (MoJ) web consultation response noted some concerns about the approach being put forward, it nevertheless suggested that the approach being proposed '... is an approach we would support, because it rather neatly encapsulates everything MoJ has been saying for some time about human rights underpinning the achievement of equality generally, and the work of the Equality and Human Rights Commission in particular'.

### **Feedback Issue (2): The importance of linking the EMF to domestic human rights law and jurisprudence**

Participants raised the question of the relationship of the EMF to domestic human rights law. The rationale for adopting the international human rights framework (rather than the HRA – the Human Rights Act) as the starting point for the derivation of a list of central and valuable freedoms is discussed in Chapter 1 and goes into the exclusion of a broad range of social and economic rights from the HRA.

Nevertheless, the HRA is of critical importance both for the fulfilment of EHRC's statutory duties and for the development and legitimacy of the EMF itself. The following points were highlighted by participants in this context:

- The HRA, as well as the international human rights framework, provides a foundation for the EMF, increases its legitimacy and is central to the statutory duties of the EHRC (Equality Act section 9). Many elements of the EMF (including life, physical security, education, self-respect for the individual, family life, expression, and legal security) are given explicit protection by the HRA (Articles 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and the protocols) and others (for instance participation and voice) represent fundamental principles underlying the statute and how it has been interpreted.
- Using the HRA, and the accompanying Strasbourg and growing domestic jurisprudence on it, offers guidance for the development of the EMF. Judicial interpretations of Articles 8, 3 and 2 have connected dignity and self-respect with autonomy.
- This suggests that autonomy is a more complex concept than the choice and control formulation suggests, and extends to issues of dignity and respect.

### **Feedback Issue (3): The importance of disaggregating on the basis of all prohibited discrimination characteristics**

Participants at the human rights specialist consultation emphasized that a key human rights objective is to secure disaggregated statistical information that captures and reflects the position of disadvantaged and vulnerable groups. Aggregate data can disguise the position of disadvantaged and vulnerable groups in population averages, and the importance of disaggregation for human rights monitoring has been highlighted in a range of recent analyses (for instance General Comments of the UN Committee on Economic, Social and Cultural Rights, Häusermann and Landman (2003), Hunt (2003), Turku Report (2005), UN HRI/MC/2006 and UN HRI/MC/2008/3). However, many countries do not have adequate data for disaggregated analysis and an important human rights priority is to ensure that disaggregated data is collected and reported by official data systems (Chapman 2000). This remains the case in England, Scotland and Wales and the persistence of data gaps partly motivates the current project.

A suggestion in the broader literature on international human rights monitoring is that all data should be systematically disaggregated on the basis of all prohibited grounds of discrimination. The EMF reflects this principle and insists that, at the very minimum, all data should be systematically disaggregated on the basis of all of the prohibited discrimination characteristics recognized in the Equality Act (2006) (age, gender, transgender status, ethnicity, religion and belief, sexual orientation and disability)<sup>1</sup>. Participants recognized that this principle is already built into the EMF, but emphasized that where disaggregation by the equality characteristics is not currently possible, the EMF should function as an advocacy tool to ensure that new data is made available in the future.

### **Feedback Issue (4): The EMF should be used to put the spotlight on the equality and human rights position of the non-private household population and other vulnerable groups**

Statistical approaches summarise information about the attributes of population groups. Information about individual cases can be lost or missing - even when the disaggregated approach to indicators discussed above is applied. In addition, few systems of data collection cover the most marginalized and vulnerable groups (for instance gypsies and travellers, homeless, people with mental and learning disabilities living in institutions, older people in care homes, the prison population, and marginal and vulnerable workers). Sometimes this is because of the nature of social surveys (with sampling frameworks that exclude, for example, people in many

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<sup>1</sup> The Human Rights Act provides a more general prohibition of discrimination under Article 14.

forms of residential institution and other people without a permanent address). Sometimes, the population groups may be covered by the sampling framework, but difficulties arise because of differential non-response between different population groups, or because of small sample size. In yet other cases, activities that we would like in principle to monitor from the equality and human rights perspective may be illegal, concealed and unreported<sup>2</sup>.

Human rights principles can be applied in the selection of supplementary spotlight indicators that focus attention on vulnerable groups who might otherwise be inadequately covered by the EMF. This principle is already built into the analytical structure of the EMF, since the selection of sub-domains is driven by human rights principles (for example, being free from forced labour). However, human rights concerns may also help in putting the spotlight on the situation of a particular vulnerable group (for instance lack of nutritional support within hospitals, lack of support in the labour market for people with learning difficulties, deaths in custody, differential gaps in the achievement of gypsies and travellers, and so on). The official recognition and listing of vulnerable groups is in itself an important exercise and a key human rights concern (UN DOC HRI/MC/2008/3). A number of vulnerable groups came to our attention as part of the specialist consultation process, and the importance of taking forward monitoring arrangements to ensure coverage of these groups is the subject of a number of project recommendations.

Many participants reinforced the importance of monitoring the equality and human rights position of the non-household population and of vulnerable groups. The following comments and suggestions were representative:

- Human rights principles and standards suggest that the EMF should cover the non-private household population that is not well covered by routine statistical monitoring, as well as population sub-groups that are well covered.

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<sup>2</sup>Legal Services Commission (2007) provides a particularly insightful discussion of the treatment of the non-private household population in general population surveys and of the implications of gaps in coverage in routine statistical monitoring. Groups highlighted include: students in residential halls; people in mental health institutions; elderly people in residential care (people living in medical and care establishments); prisoners and detainees (covering Immigration centres, those detained without trial and people detained without their consent in mental health institutions); military personnel living in defence establishments; gypsies and travellers; homeless people and people living in local authority temporary accommodation (bed and breakfast, hostel, refuges); members of the “hidden population” e.g. immigrants / those without a visa).

- Groups that are not well covered include many vulnerable population sub-groups and it is critical that the equality and human rights position of these groups is monitored and tracked by the EHRC.
- Population groups that may be missed from routine statistical monitoring in surveys include gypsies and travellers, elderly people living in residential care, people living in medical establishments and people being detained in prisons.
- The transgender population is also not well captured in standard population surveys.
- Data collection by Inspectorates such as the Care Quality Commission and the Prisons Inspectorate are critical in monitoring the position of the non-household population.
- An attempt should be made to draw and integrate these data sources to develop cross-cutting indicators (for instance an indicator of death through non-natural causes in different institutions and establishments for which the state has responsibility / a duty of care; and a similar indicator for physical security for the non-private household population).

**Feedback Issue (5): The particular importance of including an indicator of physical security for vulnerable people in institutions**

Participants felt strongly that given the continuing concerns about care of vulnerable people in institutions (and proliferation of shocking reports of abuse), it will be a key priority for the EHRC and GEO to have a clear indicator to track and deal with this pressing social problem (compare with recommendations in physical security and Ch 15).

**Feedback Issue (6): The role of administrative data sources and data generated by Inspectorates and Audit bodies**

In the indicator selection exercise, administrative data sources are likely to be particularly important for monitoring the equality and human rights position of population groups not effectively covered by general population surveys. Data collected by Inspectorates and Audit Bodies, such as the Healthcare Commission and the Social Care Inspection Commission (and their successor the Care Quality Commission) and the Prisons Inspectorate, are likely to be particularly important. In some cases, the position of key sub-populations is already being monitored by the Inspectorates on a regular basis (for instance NHS patient surveys, the 'Count Me In' Census). The quality of life in prisons is also monitored by the Home Office, although the data is not generally externally shared. In other cases, high quality models for monitoring have been established on a one-off basis (for instance the health status of gypsies and travellers, and transgender people).

An important recommendation to emerge from the consultation so far is that monitoring the equality and human rights position of the non-private household population raises important challenges in a number of domains. Beyond the individual inspectorates, there is a need for overarching monitoring and reporting using indicators that pick up the cross-cutting equality and human rights issues in areas such as deprivation of life and serious physical violence and abuse. Cross-cutting equality and human rights indicators of this type could feasibly draw on and integrate data from the Home Office and a range of other data sources including the Inspectorates. This approach is being explored in particular in relation to the development of an indicator of non-natural deaths in a range of institutional settings for which the state has responsibility and a duty of care (for instance prisons, police cells, care homes, medical establishments). The development of a similar cross-cutting indicator of physical violence and abuse that covers the non-private household population in a range of similar contexts is also being explored as part of the specialist consultation process.

**Feedback Issue (7): Ensuring that human rights standards and principles are adequately reflected at the domain-specific level, and in the portfolio of indicators as a whole**

A key priority at the current stage of the development of the EMF – the selection of indicators – has been to ensure that human rights principles and standards are fully reflected in the portfolio of indicators that will be used to populate the EMF. The selection criteria that have been developed as a basis for identifying suitable indicators that can be used as part of the Framework include two specific criteria that relate to human rights. Of the criteria that apply to single indicators, essential criteria (1) is: “relevance for assessing equality and human rights”. This implies that each indicator used with the Framework should focus attention on a key equality and human rights concern; and should allow this concern to be monitored and tracked.

In addition, in order to ensure human rights concerns are fully reflected in the EMF, a human rights-focused indicator selection criterion that relates to the portfolio of indicators as a whole has been specified. This states that, across the portfolio of indicators as a whole, indicators that reflect particular human rights concerns should be included. The implication is that indicators that put the spotlight on particular human rights concerns such as lack of dignity and respect in treatment by public services, and the exercise of care in relation to population groups detained or living in institutions for which the state has responsibility, are of central importance in the development of the framework<sup>3</sup>.

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<sup>3</sup> For full details of the selection criteria, see the Overall Project Briefing Paper (Burchardt, Clark and Vizard, 2008).

This selection criterion was introduced following the first round of specialist consultation, in response to the views of participants at the human rights specialist consultation event.

### **Feedback Issue (8): Build on existing lists of human rights indicators in England, Scotland and Wales**

- Participants suggested that many organisations currently lack specific lists of human rights indicators; some organizations are working on the development of human rights indicators.
- Northern Ireland provides a possible good practice example in this area. This may include a role for direct participation in the identification and agreement of a set of human rights indicators.
- In one of the small discussion groups at the consultation event, participants were not making use of any indicators that they would specifically describe as “human rights indicators”.
- Dignity and respect indicators – there was a general feeling that these could reasonably be classified as “human rights indicators”.
- No references to existing lists or major existing HR indicator initiatives.
- Feeling that work needs to be done in order to agree a set of HR indicators for use in England, Scotland and Wales.
- British Institute of Human Rights is going to take work forward in this area.
- The Convention on the Rights of the Child (CRC) is more widely used as a general basis for monitoring of public policy in Wales.

### **Feedback Issue (9): Build on the good practice use of human rights indicators in England, Scotland and Wales**

Participants focussed our attention on two key examples of good practice examples in relation to the development of human rights indicators in the GB context.

- Mersey Care NHS Trust could provide a good practice example of the development of human rights indicators in the GB context.

#### **Examples of human rights indicators: Mersey Care Trust**

Mersey Care NHS Trust has developed a human rights strategy for the period 2008-2011 (Mersey Care NHS Trust 2007) and is developing a human rights-based approach to public service delivery that aims to mainstream human rights principles and standards at all levels of the organisation. Work to date includes:

- Service user and carer involvement programme

- Integration of human rights standards and principles within the Trust's Learning Disability service, including a benchmarking tool for developing human rights progress indicators with local agencies caring for people with learning disabilities
- Development of inpatient questionnaire within the Trust's Learning Disability Service explicitly based on human rights standards and principles. Questions cover outcomes as well as activities and procedures, and explicit questions on dignity and autonomy are included
- Development of Keeping Me Safe and Well Risk Screen and Guidelines within the Trust's Learning Disability Service
- Development of the 'Human Rights Joint Risk Assessment and Management Plan' (HR JRAMP) (for joint use between the Trust and Liverpool PCT for that small number of people with Learning Disabilities at serious risk to themselves or others), and
- Participation in the Department of Health's *Human Rights in Healthcare Project*.

Whilst Mersey Care Trust is using a number of indicators that can evidence some good human rights practice, the work has not been developed to the point where the Trust currently has a comprehensive set of human rights indicators. The need to develop a systematic set of human rights indicators on the basis of which human rights policies and practices can be evaluated underpins the Trust's approach (Source: Dyer 2009). Further commitments in this area set out in the Trust's Human Rights strategy include:

- From April 2009: All Directorate Business Plans to demonstrate how they protect and enhance human rights of service users, carers and staff.
- From April 2010: Incorporate human rights quality indicators into Trust services, monitoring and evaluations (Mersey Care Trust 2007:6-7).

More generally, a recent survey of a number of organisations developing human rights strategies concluded that in most instances such organizations are not collecting detailed information on the costs and benefits of human rights activities in a systematic way (OPM 2008). The Report concluded that at the present time, indicators being used to track progress tend to be concerned with processes or activities – such as the numbers of policies that have integrated human rights or the numbers of staff who have received human rights training – rather than outcomes. Office for Public Management (OPM) further highlighted the need for the systematic development of human rights-based performance frameworks to provide a basis for the assessment of the outcomes of human rights policies and practices. Human

rights-based performance frameworks of this type would include a range of indicators to measure performance including:

- Indicators related to service outcomes that link to articles in the HRA – for instance mortality and injury rates in care etc.
- Indicators related to the FREDA principles – for example perceptions of treatment by public service organizations.
- Indicators designed to measure progress in delivering key activities in a human rights plan – for instance numbers of front line staff who have received training, numbers of impact assessments carried out.
- Indicators designed to measure the outcomes of this activity – for instance percentages of staff who have found training to be useful, improvements in levels of understanding as a result of training, evidence of changes to service design and delivery linked to training activity.
- Indicators linked to complaints and legal challenges – for instance numbers of complaints brought against the organisation involving human rights, numbers of complaints upheld, numbers of complaints brought by different groups etc.

(Source: OPM 2008: 93)

Another possible model highlighted by participants is the Expectations publication by HM Inspectorate of Prisons, relating to the conditions in prisons and the treatment of prisoners (HMIP 2008). Participants highlighted that this could provide another good practice example of the development of human rights indicators in the GB context.

### **Feedback Issue (10): Domain-specific recommendations**

#### **Life domain: death from non-natural causes for people resident or detained in private and public institutions**

We consulted on the development of an indicator for the life domain that captures non-natural deaths for people resident and / or detained in public and private institutions. One existing data source for this indicator focuses on deaths from non-natural causes for people in prison and custody. However, participants at the human rights consultation event, and the life and health specialist consultation event, emphasized the importance of going beyond deaths in prison and custody, and of covering deaths through non-natural causes in private and public institutions. An indicator of this type could draw together cross-cutting information gathered by the various Inspectorates and through systems of notifiable incidents.

**Legal security domain: quality of life in prisons**

The second measure proposed under Indicator 4 of the legal security domain reflects the fact that we ourselves are concerned about a gap in relation to sub-domain D – conditions of detention (see Chapter 7). We are at the early stages of thinking about how an indicator of the quality of life in prisons could be included as an element of overall monitoring in this domain

In considering the possibility of developing an indicator of prison quality of life, we've identified a Home office publication 'Measuring the Quality of Life in Prisons' (2002), with a pilot survey covering dignity, respect, privacy, safety, and unusual and degrading treatment or punishment – something that participants highlighted as an important gap in the physical and legal security indicators. The 'quality of life' gap for Black and Minority Ethnic Groups (BME) and white individuals in prison in key areas such as access to regime facilities and personal safety is also being monitored by ethnicity under PSA 24 (HM Government 2007).

However, although there are regular surveys conducted by the Home Office on prison quality of life, currently these are not generally shared externally.

In Scotland, the situation appears to be entirely different, with a regular and public prison survey which measures prisoners' experiences with their prison, including personal safety (cell, toilets and showers, corridors and stairwells and bullying) as well a range of other variables, such as the prison's atmosphere, visits from family and friends, food, the canteen, the prison's cleanliness, accessing facilities for personal hygiene and cleanliness, and access to healthcare. However, the data in the main survey report is currently not disaggregated by any of the equality strands. We are undertaking follow up work to identify whether disaggregation is possible.

**Legal security domain: coverage of civil justice**

Participants at the human rights and legal security domains emphasized that it would be important for the EMF to cover information, advocacy and civil justice dimensions. This recommendation is reflected in the revised legal security indicators (see legal security domain, Indicator 4).

**Physical security domain: physical security for people resident or detained in private and public institutions**

We consulted on the possible development of an indicator covering physical violence in a variety of institutions and establishments such as care homes for the elderly, mental health institutions and within prisons. This would be an overarching indicator bringing together multiple data sources, including data from the Healthcare

Commission, the Commission for Social Care Inspection (and their successor the Care Quality Commission) and the Prisons Inspectorate. This proposal reflects the feedback comments and suggestions made by a number of subject experts and stakeholders at the physical security domain event and the human rights event. (For our final recommendations on this indicator, see Chapter 6, Physical security, Indicator 4; and Chapter 15, Final recommendations).

### **MoJ web consultation response**

The MoJ web consultation response included a number of points relevant to the development of indicators:

- It is important that any proposals recommended for measuring the equality PSA take into account data already available and for MoJ to ensure that for physical security, National Offender Management Service ( NOMs) data and any statistics collected for children and old people's homes are made available and included as a source for information.
- The Human Rights Division has established the UK's National Preventive Mechanism required by the Optional Protocol to the Convention against Torture (OPCAT). MoJ is the custodian of OPCAT's requirement for regular independent inspection of all places of detention. The protocol stipulates that the NPM can be composed of one or several bodies. The UK intends the domestic requirements of the Protocol to be fulfilled by the collective action of existing statutory inspection bodies, which are empowered to carry out unrestricted visits to places of detention (for example, HM Inspectorate of Prisons, the Care Quality Commission and others). Similarly, the bodies designated as part of the NPM will continue to carry out their normal programmes of inspection but in addition they will now operate under an international standard – the UN Convention Against Torture. The co-ordination role for the NPM is being carried out by HM Inspectorate of Prisons who will ensure communications flow back and forth to the UN. The flow of information between the bodies and co-ordinator of the NPM will look at the deaths from non-natural causes for people resident or detained in institutions such as prisons and police cells, which could act as a source for Life and Health indicators.

### **Feedback Issue (11): Indicators of dignity and respect should 'count' as human rights indicators for the purposes of the project**

We asked participants whether they felt that human rights-consistent indicators, such as statistical indicators of dignity and respect, can be meaningfully conceptualized /

classified as 'human rights indicators. In general, participants felt that statistical indicators that capture and reflect a human rights issue, such as lack of dignity and respect, **can** be meaningfully classified as human rights indicators<sup>4</sup>.

Participants raised the following issues in connection with this question:

- It will be particularly important to build on the work of the inspectorates and regulators in this area. Potential sources for possible indicators of self-respect/dignity include the Commission for Social Care Inspection, the Healthcare Commission (especially the core standards framework) and their successor the Care Quality Commission, and the Prison Inspectorate.
- The Prisons Inspectorate match their assessment against convention rights. This could provide an important good practice example.
- There is a danger of minimalism with dignity and respect monitoring; whilst violations are wrong and systems can certainly take dignity and respect away, what is needed is to achieve maximum dignity and respect; that is, it is important to view dignity and respect standards as a floor not a ceiling.
- In health, using components of patient experience (for instance nutrition support) rather than the overall question on dignity and respect may be more revealing / less subject to conditioned expectations.
- Public service consultations at community level might also cover dignity/respect.
- Even if we measure all aspects of self-respect, we may still miss the cause.
- The main transsexual issue is that dignity is undermined and transsexual people cannot relate to society in the gender in which they live. There is a lot of exclusion of transsexuals in leisure domain (for instance using swimming pools). Also, there is a lot of self-exclusion that statistics do not pick up.
- Report on lesbians' experience of the health service by Stonewall: lack of dignity and respect were key themes that emerged from details of reported experiences.
- Some groups have heightened conditioned expectations, for instance religious groups expecting special treatment and feeling discriminated against.

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<sup>4</sup> The counter-argument, set out, for example, in some discussions in the literature on human development and human rights, is that the obligations perspective must be built into a statistical indicator in order for that indicator to 'count' as a human rights indicator. According to this viewpoint, indicators that describe socioeconomic situations are indicators of progress and development. However, human rights correspond to obligations, and the 'value added' of human rights indicators is to 'bring in' statistical measures of obligation.

### **Feedback Issue (12): The need to build on international good practice in relation to the development of human rights indicators**

The section that follows draws out some of the key insights on the development of human rights indicators. The aim is to provide an exploration of the extent to which the current stage of the development of the EMF - the selection of three to five spotlight indicators for each domain – has drawn on international best practice and on the key insights and methodologies being discussed at the international level.

#### **Definition of a human rights indicator**

A human rights indicator is a statistical indicator that is explicitly rooted in the international human rights framework and that facilitates international monitoring of (1) the achievements of individuals and groups; (2) the fulfilment of international obligations by states. A recent report setting out the Office of the High Commissioner for Human Rights (OHCHR) Indicators Framework suggests the following definition:

[H]uman rights indicators are specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights. (HRI/MC/2006/7)

The proposed definition draws on the formulation used by Special Rapporteur Paul Hunt in his various reports to the Commission on Human Rights (for instance A/58/427, section II). Hunt argues that a right to health indicator derives from, reflects and is designed to monitor the realization or otherwise of specific right to health norms, usually with a view to holding a duty bearer to account. Following the Human Development Report 2000 on Human Development and Human Rights, an important debate has arisen in relation to the distinction between human rights indicators on the one hand, and general indicators of socio-economic progress and development on the other. An infant mortality rate is widely used as an indicator of socio-economic progress and development. However, it is not a measure of legal obligation. Is it also a human rights indicator, and if so, is there anything to distinguish a human rights indicator from more general indicators of this type? Hunt, Nowak and Osmani respond in the following way in the context of developing indicators of the human right to health:

[W]hat tends to distinguish a right to health indicator from a health indicator is less its substance than (i) its explicit derivation from specific right to health norms; and (ii) the purpose to which it is put, namely right to health monitoring

with a view to holding duty-bearers to account. (Hunt, Nowak and Osmani 2002, para.37)

Participants generally thought that the above is a useful definition of a human rights indicator for the purposes of the project. However, it was suggested that there might be an element of circularity that could usefully be addressed.

### **Comments on the UN Committee on Economic, Social and Cultural Rights (CESCR) Monitoring Framework**

Details of the CESCR monitoring framework are given in Appendix 1. Participants highlighted the following points:

- Indicators should build on the CESCR monitoring framework, which is relevant to civil and political rights as well as economic and social rights.
- The distinction between obligations to respect, protect and fulfil is relevant to the EMF, and indicators relating to three tiers of obligation should be developed.
- Selected indicators should cover the dimensions of availability, accessibility, affordability, quality and adaptability set out by CESCR.

### **Comments on the OHCHR Indicators Framework**

Details of the OHCHR indicators framework are given in Appendix 2. Participants highlighted the following points:

- The OHCHR Indicators are well thought out and it is problematic that in the current indicator selection exercise the focus is on outcomes and processes, and structures (using the terminology of the OHCHR) are being excluded from the terms of reference of the project.
- It is critical that the outcome indicators selected in the current research exercise are related to sets of indicators of policy instruments (including security to redress mechanisms) and to underlying structures.
- It is essential to move beyond the description of the nature and scope of inequality and disadvantage, and incorporate the analysis of institutions and structures and what can be done – to a ‘systems approach’.
- For example, people now have the right to have a death in custody investigated. An indicator that measures deaths in custody would fail to record this progress (although of course it may be that the presence of this policy instrument in place may impact on the number of deaths in custody over time).

- Where there are no outcome data (for instance human trafficking), process data (in the OHCHR sense) should not be ruled out; for instance whether police forces have, and have effectively implemented, policies for out-reach to potentially trafficked women.
- Complaints data also provide an important potential information base for the EMF and consideration should be given to their inclusion (\*compare the indicator of police complaints in handling, in legal security).

### **Feedback Issue (13) The importance of the obligations perspective**

Some participants also raised the importance of the obligations perspective (the value added of human rights) vis-à-vis the capability perspective (focussing on the central and valuable things in life that people can do and be).

- In developing the EMF it will be important to go beyond descriptions of capability inequality (inequality in the central and valuable things in life that people can do and be) and to link the EMF to the obligations perspective.
- This will include the development of indicators of ‘what can be done’ and underlying structures and systems and policy programmes and instruments.
- It is particularly important in this context to include indicators of complaints mechanisms and possibilities for redress.

In further discussions in a related seminar organized by the British Institute of Human Rights, a number of participants suggesting that the EMF could provide a core set of indicators for a broader indicators framework that related to the ‘obligations’ dimension of human rights, as well as the ‘individual achievements’ dimension. An important priority for the Commission in taking forward the development of the EMF would be to relate the EMF to obligations indicators; with the notion of obligations being ‘unpacked’ using internationally recognized systems, especially the ‘respect, protect and fulfil’ criteria set out in the General Comments of CESCR (see above and Appendix), with each of these dimensions further elaborated by the notions of availability, accessibility, affordability, quality and adaptability<sup>5</sup>

We recommend that, as the development of the EMF is taken forward in the future, further research is commissioned to ensure that (1) the EMF is fully mapped to underlying human rights, principles and standards; (2) indicators of obligations (as well as results) are fully developed; (3) indicators are developed with a view to covering all three types set out in the OHCHR best practice document. The need for

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<sup>5</sup> This view was expressed by a number of participants at the British Institute of Human Rights Policy Seminar Series, Seminar 2: Measuring human rights, 28 May 2009, Kings College London.

a full set of human rights indicators in England, Scotland and Wales emerged during the course of the specialist consultation, and should also be addressed.

### Summary of recommendations

We recommend:

- The development of the EMF by EHRC, GEO and the devolved administrations continues to be informed by human rights principles, including systematic disaggregation by vulnerable groups, robust coverage of the non-household and vulnerable sub-populations and by supporting the use of the EMF as an advocacy tool where there are data gaps (for instance in relation to the development of an indicator of elder abuse, including in the institutional context).
- EHRC ensures that the ways in which the EMF builds on and embeds human rights principles as well as equality principles are emphasized in internal and external communications exercises.
- A full set of human rights indicators is developed to use with the EMF and to discharge EHRC's obligation to monitor the position of individuals and groups from the equality and human rights perspective, including by developing indicators and reporting triennially to Parliament.
- In taking the development of the EMF forward, EHRC, GEO and the devolved administrations should fully examine the obligations perspective, and a tool should be developed which maps the EMF to the duties recognized in domestic and international law.
- We agree with participants at the human rights event that in order to build on the international practice set out in the OHCHR Indicators Framework, it is necessary to develop three types of indicators. In the OCHRC terminology, these are:
  - **Structural indicators** (focusing on the ratification/adoption of legal instruments and the existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned);
  - **Process indicators** (focusing on the steps undertaken by the primary duty-bearer, the state, to meet human rights obligations, including public programmes and specific interventions);

- **Outcome indicators** (focusing on achievements from the perspective of rights-holders).
- In the terminology of the OHCHR, the current data set focuses on outcome indicators. We recommend that EHRC supports the development of a full set of human rights indicators that can be used with the EMF. The objective here would be to retain the full set of outcome indicators, but to expand the indicator set by covering the OHCHR categories of structural and process indicators.
- In line with international human rights monitoring good practice, a list of vulnerable groups that are covered by the EMF should be developed and made publicly available by EHRC, GEO and the devolved administrations.

## Appendix 3.1 The CESCR monitoring framework

### The framework developed by the UN Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights (ESCR) has focused international attention on the importance of statistical indicators for evaluating of the human rights position of individuals and groups and in developing benchmarks in terms of which progress can be evaluated. The following concepts developed by the Committee in its General Comments and elsewhere underpin this approach:

- *de jure v de facto* realization of human rights;
- obligations of conduct v obligations of result;
- obligations to respect, protect and fulfil human rights;
- progressive realization / maximum available resources / minimum core threshold approach / immediate obligations; and
- availability, accessibility, affordability, quality and adaptability.<sup>6</sup>

**These concepts have important implications for thinking about the role and development of the EMF. For example:**

#### De facto v de jure

The analytical distinction between *de facto* and *de jure* human rights monitoring is relevant to thinking about the role that the EMF might play in relation to human rights monitoring. The EHRC has specific legal duties both to monitor the law from an equality and human rights perspective, and to monitor results (or social outcomes) from an equality and human rights perspective (by developing indicators and assessing progress in a triennial report). The purpose of the EMF is to enable the EHRC to discharge the second of these legal duties, but not the first. The focus is therefore on the *de facto* rather than the *de jure* situation of individuals and groups.

#### Obligation of conduct v obligation of result

The CESCR has tended to classify obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) as involving obligations of result as well as obligations of conduct. This approach gives states a relatively wide margin of appreciation in terms of policies and programmes that can be undertaken by states, and emphasizes the development of benchmarks and targets, in terms of which the

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<sup>6</sup>See for example UN Committee on Economic, Social and Cultural Rights General Comment 15 (the right to water), General Comment 14 (right to highest attainable standard of health), 13 (right to education), 12 (right to adequate food), <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

obligation of ‘progressive realization’ under Article 2 of the ICESCR can be assessed (by enabling progress to be evaluated and making it possible to assess when policy adjustments are required). The development of benchmarks and targets in turn requires the development of human rights indicators, and a core concern of the Committee has been to ensure that adequate statistical information is made available for international monitoring in this area<sup>7</sup>.

The emphasis at the current stage of the development of the EMF is on achievement by individuals and groups rather than on the evaluation of state conduct. The focus is on the position of individuals and groups (evaluated in terms of results or social outcomes) rather than on the evaluation of state conduct and / or the adoption of specific policies and programmes. Nevertheless, process indicators, which reflect discrimination and forms of unequal treatment such as lack of dignity and respect, are of potential relevance to the assessment of state conduct. For example, certain aspects of the position of individual groups – such as deprivations in longevity when non-natural deaths occur in police custody and in prisons – can help to put the spotlight on the fulfilment (or non-fulfilment) of duties of care.

### Respect, protect and fulfil

The Committee has further emphasized the importance of statistical information that makes it possible to assess the extent to which states are fulfilling their obligations to respect, protect and fulfil human rights. The interpretative framework developed by the Committee (for instance in its General Comments) defines these three tiers of obligation as follows:

- The obligation to respect human right requires that the state does not actively violate human rights (for instance in relation to the right to housing, through arbitrary forced evictions).
- The obligation to protect human rights requires states to take reasonable action to protect individuals and groups from violations by third parties (for instance by the establishment of a legal and institutional framework that prevents violations and ensures appropriate action is taken by the state when violations occur – such as investigations, monitoring, remedies and relief).

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<sup>7</sup> It is relevant to note that even when international human rights obligations are more narrowly viewed in terms obligations of conduct (for instance Chapman’s ‘violations approach’) rather than in terms of obligations of result, the development of accurate statistical information remains an important priority. For example, Chapman emphasizes the necessity of statistical information on the policies and practices of legal and administrative entities and the conduct of state officials. Statistical information may also be necessary to evaluate the achievement of minimum essential levels of human rights (Chapman, 2000).

- The obligation to fulfil human rights requires states to take legislative, budgetary, administrative and other measures to promote the achievement of human rights (for instance by the adoption of policies and programmes) and by directly providing for the fulfilment of human rights (for people whose human rights would otherwise be denied).

The current stage of the development of the EMF is focusing on the evaluation of the achievements of individuals and groups (rather than directly on the fulfilment of state obligation, and the role and efficacy of particular policies and programmes in effecting change). Nevertheless, indicators that are relevant to all three tiers of obligation are admissible in the indicator selection process. For example, in relation to the capability for longevity:

- Indicators of arbitrary deprivation of life by the state are admissible as process indicators and are relevant to the evaluation of the obligation to 'respect' human rights.
- Indicators of intimate partner homicide are admissible as outcome indicators, and are relevant to the obligation of states to 'protect' human rights (protection from third party violations).
- Indicators of life expectancy are admissible as outcome indicators, and are relevant to the obligation of the state to "fulfil" human rights.

## Appendix 3.2 The OHCHR indicators framework

The Human Rights Indicators Framework developed by OHCHR also raises a number of important issues for thinking about the role that human rights can play in the development of the EMF, both at the current stage, and beyond. A list of illustrative human rights indicators that can be used with the OHCHR Indicators Framework has recently been published (HRI/MC/2008/3) and provides a good-practice model for the development of human rights indicators.

### Coverage of structures, processes and outcomes

The distinction between structural, process and outcome indicators builds on the work of Paul Hunt as Special Rapporteur on the Human Right to Development. Hunt (2003) elaborates as follows in the context of international monitoring of the human right to health. **Structural indicators** address whether or not key structures, systems and mechanisms are in place in relation to a particular issue (for instance whether or not the right to health is codified in a constitution / and whether or not the state has a national human rights institution with a mandate that covers the right to health). Taken together, **process and outcome** indicators are designed to help a state monitor the variable dimension of the right to health that arises from the concept of progressive realization. **Process indicators** provide information on the process by which a health policy is implemented and are used to monitor **effort** rather than **outcomes**. They measure the degree to which activities that are necessary to attain certain health objectives are carried out, and the progress of those activities over time (for instance percentage of births attended by skilled health personnel / percentage of people with advanced HIV infection receiving antiretroviral combination therapy). **Outcome indicators** measure the results achieved by health-related policies. They show the ‘facts’ about people’s health, such as maternal mortality, prevalence of HIV, prevalence of rape, and so on (for instance under five mortality rate, percentage of women who have undergone female genital mutilation, percentage of young people - 15-24 years - who are infected with HIV).

Hunt argues that all three types of indicator are essential elements of international human rights monitoring. He also suggests that outcome indicators are of limited use when used alone; and that process and outcome indicators are most useful when used in conjunction with **benchmarks** that measure the variable nature of ‘progressive realization’ under the ICESCR; and that a key function of statistical information in the context of international human rights monitoring is to facilitate the development of benchmarks of this type.

As discussed above, the current stage of the development of the EMF focuses on the evaluation of the position of individuals and groups (rather than on underlying structures and policy instruments). Benchmarks and targets are also beyond the remit of the current indicator selection exercise.

#### Official v non-official data sources

The OHCHR indicators framework emphasizes the critical role of both official and non-official data sources in international human rights monitoring. Official socio-economic indicators are essential in monitoring the compliance of states with their treaty obligations under international human rights law (including enabling the reporting obligations of states to be discharged); but it is also essential to make use of information collected by non-governmental sources in international human rights monitoring. This argument reflects the more general principle that the state's own description of the human rights situation in a country ought not to be the sole evidence-base in terms of which international monitoring proceeds.

There are, of course, a number of reasons to doubt official accounts of the situation at hand. Human rights violations may represent illegal activities by the state - these activities may be underground or covert, and data collection may become almost impossible. Furthermore, data on questions of torture, arbitrary disappearances and extrajudicial killings, is less likely to be available, and more likely to be biased, manipulated and concealed, in more closed and repressive societies. Limitations of this type can make official statistical information of limited value in human rights monitoring, and can introduce systematic statistical biases into human rights comparisons and measurement. These problems underlie the sceptical position on the application of quantitative methods in human rights analysis (for instance as discussed in Jabine and Claude, 1992:9-30; Goldstein 1991:47-48; Cingranelli (1988); Lopez and Stohl 1991; Barsh 1993).

The focus in the current stage of the development of the EMF is on socio-economic data from population survey and administrative data sources. However, the EMF could also be used as a basis for human rights monitoring drawing on a broader range of sources, including non-official sources and events-based monitoring, in the future.

#### Rejection of composite indicators and cross-country comparison approaches

The OHCHR indicators framework also rejects the use of composite statistical indicators (where more than one indicator is combined in a single statistical measure) and the use of a cross-country approach. The first objection reflects the fact that where a single measure methodology is used, differential achievement in

regard to individual indicators may be submerged by the exercise of conflating these indicators into a single index. In effect, a low performance in one indicator may be 'compensated' for by a high performance in another. The second objection reflects the political critique of simplistic country-ranking methodologies as well as the underlying statistical limitations of such approaches (for instance systematic biases resulting from data limitations of the type discussed above).

The rejection of single indicator approaches has also been reflected in the development of the EMF, which emphasises a matrix rather than a single composite indicator approach. Part of the rationale for avoiding a single composite indicator approach is in fact the limitations of exercises based on simplistic cross-country rankings.

### **Appendix 3.3      Questions tabled during the specialist consultation process as a basis for discussion**

In order to build up an information base about the ways in which human rights principles can guide the process of indicator selection, we asked participants for their feedback and comments on a number of specific issues. Participants were asked to provide concrete examples of the good practice use of human rights indicators in official statistical monitoring systems and in everyday work. The following questions were also put forward for consideration:

#### **Q1 Definition of a human rights indicator**

- Q1.1 Do you have an agreed definition of a human rights indicator that you use in your everyday work / organization?
- Q1.2 Do you agree with the definition of a human rights indicator suggested in this paper?

#### **Q2 Identification of good practice examples of human rights indicators already being used in England, Scotland and Wales**

- Are you aware of agreed lists of human rights indicators that are being used for monitoring purposes in England, Scotland and Wales?
- Are you aware of good practice use of human rights indicators within official statistical monitoring systems?
- Do you have examples of human rights indicators from your everyday work / organization on which we could draw?
- Do you have any further suggestions or comments regarding statistical indicators that we could include in the shortlists of indicators in domain, that are particularly important from a human rights perspective?

#### **Q3 Description of existing indicators as 'human rights indicators'**

- Do you agree that human rights consistent indicators (for instance indicators of dignity and respect) used, for example, by Inspectorate bodies should be described as 'human rights indicators'?

#### **Q4 Developing cross-cutting human rights indicators from multiple data sources**

- Are you aware of attempts to bring together data from a number of sources (for instance from data provided by Inspectorates, the Home Office, the police and other sources) on cross-cutting human rights issues?
- Do you think the development of human rights indicators that take forward this approach would be useful?

- For the life domain, would you support the development of indicators picking up overarching human rights issues in relation to loss of life through non-natural causes in a range of institutions and contexts for which the state has responsibility and a duty of care (for instance prisons, police cells, care homes, medical establishments, including mental health establishments)? Do you have any comments and suggestions about how we should do this?
- For the physical security domain, would you support the development of an indicator picking up overarching human rights issues in relation to physical violence and abuse in a range of institutions and contexts for which the state has responsibility and a duty of care (for instance prisons, police cells, care homes, medical establishments, including mental health establishments)? Do you have any comments and suggestions about how we should do this?
- For the legal security domain, would you support the development of a measure capturing quality of life in prisons, taking account of the standards set out in HMIP (2008)? Do you have any comments and suggestions about how we should do this?

**Q5 Other possibilities for taking the human rights perspective forward**

- Do you have any suggestions or comments about additional ways in which we could draw on human rights principles and standards in taking the development of the EMF forward?

### OHCHR Human Rights Indicators Framework

- A common approach to identifying indicators for monitoring civil and political rights, and economic, social and cultural rights;
- The development of quantitative as well as qualitative statistics
- Coverage of three types of indicator:
  - **Structural indicators** (focusing on reflect the ratification/adoption of legal instruments and the existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned);
  - **Process indicators** (focusing on the steps undertaken by the primary duty-bearer, the state, to meet human rights obligations, including public programmes and specific interventions;
  - **Outcome indicators** (focusing on achievements from the perspective of rights-holders).
- The essential role of two categories of data-generating mechanisms:
  - **Official socio-economic data** (Official statistical information disseminated by the State through its administrative records such as civil registration and benefit systems and statistical surveys. The use of a standardized methodology and covered in principle by standard requirements of statistical reliability and validity.)
  - **Non-official events-based data** indicators or information compiled by non-governmental sources and human rights organizations focusing on alleged violations reported by victims, witnesses or NGOs (such as the alleged incidence of arbitrary deprivations of life, enforced or involuntary disappearances, arbitrary detention and torture) and processed in a standardized manner (for instance by United Nations special procedures / HURIDOCs format). Data of this type may not be internationally comparable or satisfy standard requirements of statistical validity and reliability.
- An emphasis on efforts to keep the identified indicators simple, based on objective and transparent methodology, and a rejection of methodologies based on (1) a common list of indicators to be applied across all countries irrespective of context; (2) a single global measure aiming at cross-country comparisons and rankings;
- An emphasis on disaggregation of identified indicators by type of prohibited discrimination (for instance sex, ethnicity, disability, etc) and by vulnerable or marginalized population groups.

Source: Malhotra and Fasel (2007); HRI/MC/2006/7; HRI/MC/2008/3).