

**Developing a capability list: Final Recommendations
of the Equalities Review Steering Group on
Measurement**

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Editorial Note

Tania Burchardt is a Senior Research Fellow in the Centre for Analysis of Social Exclusion, and Polly Vizard is a CASE Associate. This report was commissioned by the Equalities Review. The views expressed in this report are those of the authors, not necessarily those of the Equalities Review.

Abstract

In October 2007, a unified Commission on Equality and Human Rights (CEHR) will begin operation in Britain. The Commission will have responsibility for monitoring and promoting human rights and equality on the grounds of gender, ethnicity, disability, age, sexual orientation, transgender status, and religion/belief. As a precursor to the Commission, the Prime Minister established the Equalities Review, an independent, high-level, investigation of the causes of persistent inequality and disadvantage in British society. Its final report, *Fairness and Freedom*, in February 2007 adopted the capability approach as its measurement framework and recommended that all public bodies use the framework to “agree priorities, set targets, and evaluate progress towards equality” (p.110). In particular, the Review recommended that the framework be used by the CEHR to inform its regular ‘state of the nation’ report.

This paper, and its companion, *Definition of equality and framework for measurement: Final Recommendations of the Equalities Review Steering Group on Measurement* (CASEpaper 120) were prepared as background papers to assist in the development of the measurement framework for the Equalities Review. The companion paper discusses the key challenges involved in translating capability theory into a practical measurement tool in the context of measuring inequality in Britain in the 21st century. This includes the definition of equality, a procedure for generating and revising a list of central and valuable capabilities, a measurement framework for monitoring trends in inequality, exploring the causes of inequality, and identifying possible policy interventions, and, finally, the types of information and analysis which are required.

The current paper focuses in more detail on the need for a list of central and valuable capabilities in terms of which inequality in Britain can be conceptualised and appraised (a ‘capability list’). The paper sets out a methodological framework for developing a capability list involving (1) derivation of a core capability list from the international human rights framework; (2) supplementation and refinement of the core list through democratic deliberation and debate. As part of the process of developing a capability list, the Equalities Review commissioned Ipsos-MORI to undertake a deliberative consultation on the development of a capability list with the general public and individuals and groups at risk of discrimination and

disadvantage. The paper discusses the results of the deliberative consultation and recommends a capability list based on ten domains of central and valuable capabilities.

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Preface

Following consultation on its Interim Report, the Equalities Review commissioned the authors of this report, Tania Burchardt and Polly Vizard (both at the Centre for Analysis of Social Exclusion, London School of Economics), to take forward the development of a framework for monitoring equality in Britain based on the capability approach. A Steering Group was established to advise this work, consisting of Sandra Fredman (Professor of Law, University of Oxford), Ian Gough (Professor of Social Policy, University of Bath), Julie Litchfield (Senior Lecturer in Economics, University of Sussex), Uma Moorthy (Equalities Review team), Katherine Rake (Director, the Fawcett Society), and Giovanni Razzu (Equalities Review team). The authors are very grateful for the considerable time and effort that members of the Steering Group have so generously contributed to this project.

At the same time, and in consultation with the Steering Group, the Equalities Review commissioned Ipsos-MORI to carry out intensive deliberative research with members of the general public, and with individuals and small groups of people at particular risk of experiencing discrimination or disadvantage. The purpose of this deliberative consultation was to supplement and refine a list of central and valuable capabilities, an essential step in the application of the capability approach to the contemporary British context. The deliberative consultation is reported in detail in Ipsos-MORI (2007), and the main findings are incorporated into this report.

A companion paper ('paper 1') summarises the recommendations of the Steering Group on Measurement, and outlines the measurement framework, proposed techniques for analysis, and data needs. This paper (hereafter referred to as 'paper 2') focuses on a key aspect of the framework: the specification and justification of a list of the central and valuable freedoms in terms of which inequality between individuals and groups in Britain is to be conceptualised and measured. It is intended that the papers be read in conjunction with one another.

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Developing a Capability List: Final Recommendations of the Equalities Review Steering Group on Measurement

Recommendation 1: List of valuable capabilities derived from the international human rights framework and deliberative consultation

- A list of valuable capabilities should be derived in a way that is open to scrutiny.
- The core list of central and valuable capabilities should be derived from the international human rights framework, supplemented and refined by democratic consultation and debate.
- Beyond the core, the list is open to revision through a range of methodologies.

Elaboration of Recommendation 1

R1.1 General Methodological Recommendations

The paper recommends that, in moving towards an agreed capability list, the Equalities Review adopt a number of general methodological principles that have been developed in the broader literature on the capability approach. These aim to avoid selection bias and to ensure that open, fair and participatory methods of capability selection are adhered to. Two key methodological principles are highlighted. These are:

- **R1.1.1 Explicit specification and justification of capability lists.** The formulation of capability lists should not be viewed as a technocratic exercise to be undertaken by experts, but as a transparent exercise that is open to public scrutiny and debate. Therefore, both the capability list adopted by the Equalities Review, and the methodology for deriving the capability list, should be explicitly specified and justified. The capability list and the methodological framework should also be available for public examination and discussion.
- **R1.1.2 The specification of the capability list should *not* be driven by data availability.** Capability lists should initially be drawn up so that *all* of the capabilities that are viewed as important for the purposes at hand are specified. For example, if bodily integrity is viewed as important it should be included in the capability list – notwithstanding the possibility of data limitations relating, for example, to domestic violence.

R1.2 The proposed methodological framework

The paper recommends a two-stage procedure for developing a capability list involving (1) derivation of a core capability list from the international human rights framework; (2) supplementation and refinement of the core list through democratic deliberation and debate.

- **R1.2.1 The Equalities Review should adopt the international human rights framework as a pragmatic starting point for the development of a core capability list.**

The paper places particular emphasis on the ways in which existing international human rights commitments can provide a pragmatic starting point for development of human rights-based capability lists. A human rights-based capability list based on the broad range of human rights codified in international human rights law is set out for this purpose.

- **R1.2.1.1** The paper recommends that the international human rights framework (rather than the British Human Rights Act 1998 alone) as an appropriate starting point for the development of a capability list by the Equalities Review.
 - **R1.2.1.2** The paper recommends that the Equalities Review should view a human rights-based capability list of the type suggested in R1.2.1.1 as constituting the *irreducible core* of a suitable capability list.
 - **R1.2.1.3** The paper recommends that, beyond the irreducible core, supplementation, refinement and revision of the capability list is possible through a range of additional methods discussed in the literature (e.g. philosophical reasoning, participative methods, social scientific research, other types of pragmatic consensus).
- **R1.2.2 The development of a capability list by the Equalities Review should be firmly embedded in broader processes of democratic deliberation and debate.**

Both the theoretical conception and practical application of the capability approach reserve a key role for democratic deliberation and debate, and the importance of developing open, fair and participatory processes with respect to the selection and justification of central and valuable capabilities has been highlighted in the broader literature. The paper recommends that these principles are developed and applied in the British context and that the process of selecting and justifying a list of central and valuable capabilities is embedded in a process of deliberative consultation with the general public and with individuals and groups at high risk of experiencing discrimination and disadvantage.

- **R1.2.3 The capability list derived from the international human rights framework should be supplemented and refined using the results of the Equalities Review deliberative consultation.**

The paper recommends that the core list derived from the international human rights framework is supplemented and refined using the results of the Equalities Review deliberative consultation. The latter involved a programme of public consultation with the general public and individuals and groups at risk of discrimination and disadvantage, and aimed to elicit in-depth attitudinal information about what the public think about the central and valuable capabilities that should be included in a capability list. Supplementation and refinement using the results of the Equalities Review deliberative consultation is intended to enhance both the *legitimacy* and the *substantive* content of the proposed capability list. It means that the general public and those at risk of discrimination and disadvantage are given a defining role in identifying and justifying the selection of central and basic capabilities. It also ensures that the capability list reflects the conditions of 21st century Britain.

- **R1.2.4** Periodic supplementation and revision of the capability list
The paper recommends that the deliberative exercise, or other research approaches to identify central and valuable capabilities, will need to be repeated periodically to ensure that the capability list retains its relevance.

Recommendation 2: Ten domains of central and valuable capabilities

The paper sets out how the methodological framework for developing a capability list detailed in Recommendation 1 provides a basis for the selection and justification of a capability list. A list of central and valuable capabilities that have been selected and justified through the two-stage procedure examined above (i.e. a core capability list derived from the international human rights framework, supplemented and refined by deliberative consultation) is proposed. The paper recommends that this capability list be adopted as a basis for the conceptualisation and measurement of inequality in Britain.

The proposed capability list (core list of central and valuable capabilities derived from the international human rights framework, supplemented and refined through deliberative consultation)

10 domains of central and valuable capabilities

The capability to be alive

including, for example, being able to:

- avoid premature mortality through disease, neglect, injury or suicide
- be protected from arbitrary denial of life

The capability to live in physical security

including, for example, being able to:

- be free from violence including sexual, domestic and identity-based violence
- be free from cruel, inhuman or degrading treatment or punishment
- be protected from physical or sexual abuse
- go out and to use public spaces safely and securely without fear

The capability to be healthy

including, for example, being able to:

- attain the highest possible standard of physical and mental health, including sexual and reproductive health
- access to timely and impartial information about health and healthcare options
- access healthcare, including non-discrimination in access to healthcare
- be treated medically, or subject to experiment, only with informed consent
- maintain a healthy lifestyle including exercise and nutrition
- live in a healthy and safe environment including clean air, clean water, and freedom from pollution and other hazards

The capability to be knowledgeable, to understand and reason, and to have the skills to participate in society

including, for example, being able to:

- attain the highest possible standard of knowledge, understanding and reasoning
- be creative
- be fulfilled intellectually
- develop the skills for participation in productive and valued activities, including parenting
- learn about a range of cultures and beliefs and acquire the skills to participate in a multicultural society
- access education, training and lifelong learning that meets individual needs
- access information and technology necessary to participate in society

The capability to enjoy a comfortable standard of living, with independence and security

including, for example, being able to:

- enjoy an adequate and secure standard of living including nutrition, clothing, housing, warmth, social security, social services and utilities
- have personal mobility, and access to transport and public places
- live with independence, dignity and self-respect
- have choice and control over where and how you live
- enjoy your home in peace and security
- access green spaces and the natural world
- share in the benefits of scientific progress including information and technology

The capability to engage in productive and valued activities

including, for example, being able to:

- undertake paid work
- care for others
- have rest, leisure and respite, including holidays
- choose a balance between paid work, care and leisure on an equal basis with others
- work in just and favourable conditions, including health and safety, fair treatment during pregnancy and maternity, and fair remuneration
- not be forced to work in a particular occupation or without pay
- not be prevented from working in a particular occupation without good reason

The capability to enjoy individual, family and social life

including, for example, being able to:

- develop as a person
- develop your moral outlook and other beliefs
- formulate and pursue goals and objectives for yourself
- hope for the future

- develop and maintain self-respect, self-esteem and self-confidence
- have a private life, including protection of personal data
- access emotional support
- form intimate relationships, friendships and a family
- celebrate on special occasions
- be confident that your primary relationships will be treated with dignity and respect
- spend time with, and care for, others
- enjoy independence and equality in primary relationships including marriage
- be free in matters of reproduction
- enjoy special support during pregnancy and maternity, and during childhood

The capability to participate in decision-making, have a voice and influence

including, for example, being able to:

- participate in decision-making
- participate in the formulation of government policy, locally and nationally
- participate in non-governmental organisations concerned with public and political life
- participate in democratic free and fair elections
- assemble peacefully with others
- participate in the local community
- form and join civil organisations and solidarity groups, including trade unions

The capability of being and expressing yourself, and having self-respect

including, for example, being able to:

- have freedom of conscience, belief and religion
- have freedom of cultural identity
- have freedom of expression (so long as it doesn't cause significant harm to others)
- communicate, including using ICTs, and use your own language
- engage in cultural practices, in community with other members of your chosen group or groups (so long as it doesn't cause significant harm to others)
- have self-respect
- live without fear of humiliation, harassment, or identity-based abuse
- be confident that you will be treated with dignity and respect
- access and use public spaces freely

The capability of knowing you will be protected and treated fairly by the law

including, for example, being able to:

- know you will be treated with equality and non-discrimination before the law
- be secure that the law will protect you from intolerant behaviour
- be free from arbitrary arrest and detention
- have fair conditions of detention

- have the right to a fair trial
- access information and advocacy as necessary
- have freedom of movement, and be free to choose where you live
- have the right to name and nationality
- own property and financial products including insurance, social security, and pensions in your own right
- know your privacy will be respected and personal data protected

Summary and Overview

This paper has been commissioned by the Equalities Review to consider how the capability approach can be developed and applied as a basis for the conceptualisation and measurement of inequality in Britain.¹ It is one of two papers that jointly set out an analytical framework and report the key recommendations of the Equalities Review Steering Group on Measurement. The first paper (paper 1, Burchardt and Vizard 2007) sets out the key recommendations regarding the measurement framework, proposed techniques for analysis, and data needs. This second paper focuses on the question of how to specify and justify a capability list – that is, a list of the central and valuable freedoms in terms of which inequality between individuals and groups in Britain is to be conceptualised and measured. It is intended that the papers be read in conjunction with one another.

Background

The ways in which the capability approach can provide foundations for the work of the Equalities Review was addressed in Burchardt (2006a) and the Equalities Review Interim Report and the various responses to the Interim Report. These exchanges provide recognition of the ways in which the capability approach could take the equalities agenda forward in Britain, whilst highlighting some of the complications, and raising some particular concerns. Following on from these exchanges, the role of the capability approach was given further consideration by the Equalities Review Panel. Given the limitations of traditional approaches, the Panel decided to move forward on the basis of a definition of equality based on the 'capability approach'. However, the Panel also highlighted the need for further background work addressing the conceptual and measurement issues involved.

Why does the equalities review need to reach explicit agreement regarding the use of a capability list?

The current paper takes these discussions forward by examining how agreement might be reached vis-à-vis an appropriate list of central and valuable capabilities. The need to explicitly specify and justify the use of capability lists was raised in Burchardt (2006a), the Equalities Review Interim Report and reflects the 'constructive role' reserved for democratic deliberation and debate in the theoretical conception and practical application of the capability approach. Before the capability approach can be applied in practice in any particular context, agreement is required both in terms of procedure (i.e. the process of generating a capability list) and substantive content (i.e. the nature and scope of the capabilities that are to be included). This means that, in taking the capability approach forward as a basis for conceptualising and measuring inequality in Britain, the Equalities Review needs to develop an explicit procedure for selecting the key capability-freedoms in terms of which inequalities between individuals and groups can be examined and appraised. To quote the Interim Report, the freedom to live a long and healthy life is more salient than the freedom to play golf. There is a need to address the basis on which value judgements of this type are to be made.

The options

The paper sets out a methodological framework for the Equalities Review to develop an agreed list of central and valuable capabilities. It reviews the ways in which capability lists have been developed in the broader literature on the capability approach and sets out key recommendations concerning both process and substance. The key possibilities for developing capability lists discussed in the literature include:

- Philosophical/ethical reasoning from first principles;
- Social scientific/empirical methods, for example using large scale surveys or observation aiming to elicit information about the values and priorities of the population or particular sub-groups within it;
- Democratic and deliberative methods aiming at agreement or consensus, including different types of deliberative and participative mechanisms, and different kinds of national, regional and local consultative exercises
- Invoking a pre-existing 'pragmatic agreement' or 'consensus' such as that provided by the international human rights framework.

In reviewing the options and developing a framework for the selection of central and valuable capabilities, the paper draws on two of these options. These are (1) the method of 'pragmatic consensus' (as evidenced by internationally recognised human rights) and (2) deliberative/participative methods aiming to elicit in-depth attitudinal information about what the general public and individuals and groups at particular risk of discrimination and disadvantage think should be included in a list of central and basic capabilities.

1 The Equalities Review is an independent investigation of the causes of persistent discrimination and inequality in British society. It is charged with analysing the causes of disadvantage; making policy recommendations; and informing the modernisation of equality legislation/development of the Commission for Equality and Human Rights. See Equalities Review (2006: Section 1).

The proposed methodological framework (Recommendation 1)

The paper sets out a two-stage procedure for developing a capability list. It recommends that a core list of central and valuable capabilities be derived from the international human rights framework, supplemented and refined by democratic deliberation and debate. In recommendation 1.1, the paper further recommends that the Equalities Review adopt a number of the general methodological principles that have been developed in the broader literature on the capability approach. These aim to avoid selection bias and to ensure that open, fair and participatory methods of capability selection are adhered to.

Stage 1: The role of the international human rights framework

The paper places particular emphasis on the ways in which existing international human rights commitments can provide a pragmatic starting point for generating human rights-based capability lists. A human rights-based capability list based on the broad range of human rights codified in international human rights law is set out for this purpose. It is argued that a human rights-based capability list of this type provides appropriate foundations for the work of the Equalities Review by providing the basis of a 'pragmatic consensus' with respect to the constituent elements of freedom. The paper recommends that a human rights-based capability list of this type is viewed as constituting the *irreducible core* of a capability list that is suitable for the conceptualisation and measurement of inequality in Britain.

The proposed human rights-based capability list has a number of advantages. Procedurally, it has the advantage of drawing on established processes of international consensus-building around the central and basic freedoms that are of value in human life and that are at least in part deliberative and democratic (rather than being purely of an "expert" or "technocratic" nature). In addition, the proposed human rights based capability list addresses some of the concerns raised in a number of responses to the Equalities Interim Report. These include the concern that the framework adopted by the Equalities Review be linked more directly to the idea of human rights, linking in with the human rights as well as the equalities remit of the Commission for Equality and Human Rights (CEHR), as well as to on-going efforts to invoke human rights legislation to promote equality in Britain.

The paper moves forward here by highlighting the important role that human rights can play in the conceptualisation and measurement of inequality in Britain. By emphasising the links between the capability approach and human rights, the paper demonstrates how the theoretical development and practical application of the capability approach by the Equalities Review can engage with, and be shaped by, human rights standards and principles. In this way, the paper highlights how the capability approach and human rights can be mutually reinforcing and supportive (rather than mutually exclusive or alternatives) and how the capability approach can contribute to the development of an overarching framework for the equalities and human rights functions of the CEHR. The paper includes a series of feedback and consultation sections. These have been introduced to clarify the relationship between the capability approach, human rights and the British Human Rights Act (1998).

Stage 2: The Equalities Review deliberative consultation

Whilst emphasising the ways in which existing international human rights commitments can provide a pragmatic starting point for the development of a capability list, the paper also recognises the possible drawbacks of an exclusively human rights-based approach. These relate not only to procedural imperfections but also to the issue of “minimalism” (i.e. whether the human rights based approach is overly restrictive in terms of both dimensions and thresholds). The limitations of this possible interpretation underlie the recommendation in the paper that a capability list derived from the international human rights framework be viewed as the *irreducible core* of a capability list that would be suitable for the work of the Equalities Review. Beyond this irreducible core, the paper recommends that supplementation, refinement and revision of the capability list are possible through a range of additional methods discussed in the literature (e.g. philosophical reasoning, participative methods, social scientific research and other types of pragmatic consensus). This possibility of supplementation, refinement and revision is intended to ensure that the capability list has, and continues to have, full relevance to the conceptualisation and measurement of inequality in 21st century Britain.²

A key issue here concerns the *defining* role that democratic deliberation and debate should play in the development of a capability list. Both the theoretical conception and practical application of the capability approach reserve a central role for broader processes of democratic deliberation and debate; and the importance of open, fair and participative exercises aiming at the selection and justification of a list of central and valuable capabilities is a key recommendation highlighted in the broader literature on the capability approach. The paper recommends that these principles are developed and applied in the British context. The Equalities Review should ensure that the process of selecting and justifying a list of central and valuable capabilities is embedded in a process of deliberative consultation, both with the general public, and with individuals and groups at high risk of experiencing discrimination and disadvantage.

The need to develop open, fair and participative exercises aimed at the selection and justification of a list of central and valuable capabilities was discussed in the Equalities Review Interim Report. The Equalities Review subsequently commissioned Ipsos-MORI to undertake a deliberative consultation on the selection of central and basic capabilities with the general public, and individuals and groups at high risk of discrimination and disadvantage. The deliberative consultation involved a programme of workshops with the general public and individuals and groups at risk of discrimination and disadvantage, as well as more in-depth interviews with selected individuals and groups. It aimed to elicit in-depth attitudinal information regarding central and valuable capabilities, with participants discussing and reflecting upon what is needed for a person to flourish and to have the freedom to lead a life that they value and would choose.

2 The paper nevertheless recognises that *minimalist* interpretation of human rights (with human rights equated exclusively with minimum thresholds rather than a full/substantive equality perspective) has been widely challenged. For further clarification, see section (3.3).

The paper recommends that, beyond the irreducible core, the capability list derived from the international human rights framework is supplemented and refined using the results of the Equalities Review deliberative consultation with the general public and individuals and groups at high risk of discrimination and disadvantage. This procedure is intended to enhance both the *legitimacy* of the process of developing a capability list and the *substantive* content of the capability list that is proposed. The procedure reflects the principle that the general public and those individuals and groups at particular risk of discrimination and disadvantage have a role in identifying and defining the domains of human freedom that are to be treated as 'important' for the conceptualisation and measurement of inequality. It also reflects the need for the capability list to go beyond the 'irreducible core' and to be fully specified and relevant in the context of 21st century Britain.

The proposed capability list (Recommendation 2)

The paper finally sets out the substantive recommendations of the Equalities Review Steering Group on Measurement regarding the nature and scope of the central and valuable capabilities that should be included in a capability list. A capability list setting out ten central and valuable capabilities that have been selected and justified through the above two-stage procedure is proposed. The paper recommends that this capability list be adopted by the Equalities Review as a basis for the conceptualisation and measurement of inequality in Britain. The proposed capability list (more fully specified under Recommendation 2, and referred to in the text as List 3) covers the following ten domains:

- Life;
- Physical security;
- Health;
- Education;
- Standard of living;
- Productive and valued activities;
- Individual, family and social life;
- Participation, influence and voice;
- Identity, expression and self-respect;
- Legal security.

The process of scrutiny and feedback

The methodological framework being proposed has been subjected to scrutiny in a number of different ways. Key issues concerning the development and application of the capability approach and its relationship to human rights were raised in feedback to the Equalities Review Interim Report. Some of these issues are discussed in the current paper; others are considered in paper 1 (Burchardt and Vizard, 2007). The Equalities Review Steering Group on Measurement has advised on the development of the framework and scrutinised the proposals at every stage. The recommendations and discussions of the Steering Group (as they relate to the development of the capability list) are recorded in this paper. Finally, the proposal that a core capability list should be derived from the international human rights framework was subjected to scrutiny at a Seminar convened by the Equalities Review. The Equalities Review Seminar on the Capability Approach and Human Rights represented an opportunity to bring together and consult with experts on both human rights and the capability approach – both to examine the advantages and limitations of the proposed approach, and to advise on practical steps in moving forward. Feedback from this event (and further clarification of key issues raised and discussed) constitutes an important element of this paper.

Overview

The paper is divided into three main parts. Part 1 provides an analytical overview of the capability approach and the ways it can contribute to the British equalities agenda. Part 2 sets out the two-stage procedure for developing a capability list being proposed by the Equalities Review Steering Group on Measurement (Recommendation 1) and provides details of how the framework has been applied to generate a proposed capability list (Recommendation 2). Part 3 focuses on feedback and clarification following the Equalities Review Seminar on the Capability Approach and Human Rights.

1 The ‘value added’ of the capability approach for the conceptualisation and measurement of inequality in Britain

The decision of the Equalities Review to adopt the capability approach as a basis for the conceptualisation and measurement of inequality in Britain was set out in the Equalities Review Interim Report. This section provides an analytical overview of the capability approach and the ways it can contribute to the British equalities agenda. Section 1.1 provides a general introduction to the capability approach. Section 1.2 examines the ‘value added’ of the capability approach for the conceptualisation and measurement of inequality. Section 1.3 discusses the ‘value added’ of the capability approach in the context of the British equalities agenda.³

1.1 How does the capability approach provide a framework for conceptualising and measuring the real or substantive freedoms that people are able to enjoy?

The capability approach has been developed by Sen and others⁴ as a major new framework for analysing the position of individuals, groups and nations that focuses on human freedoms (broadly defined, to include individual substantive freedoms such as the ability to avoid premature mortality and ‘excess’ morbidity, to have access to adequate education, to participate in and influence public life, and to enjoy self-respect) rather than other informational focuses widely adopted in economics and philosophy (such as income, growth, utility, negative liberty and ‘primary goods’). The framework is motivated by dissatisfaction with dominant traditions in twentieth century philosophical and economic thought (including dissatisfaction with utilitarianism, libertarianism and Rawlsianism, as well as with standard models in theoretical and empirical economics that focus on income, growth and utility). This dissatisfaction is rooted in the failure of standard theories to take adequate account of forms of deprivation and inequality associated with poverty, hunger and starvation; with entrenched disadvantage and discrimination; and with health related conditions such as chronic illness and disability. The capability approach aims to overcome these limitations and provides an alternative point of departure that focuses on the expansion of substantive human freedoms in the form of human capabilities – the central and basic things in life that people can actually *do* and *be*.

3 The ways in which the capability approach provides foundations for the work of the Equalities Review are examined in detail in Burchardt (2006) and the Equalities Review Interim Report. This section is intended as supplementary and provides a response to some of concerns about the capability approach raised in the responses to the Equalities Review Interim Report.

4 See, for example, Sen (1984, 1985, 1987ab, 1992, 1993a, 1999, 2004ab).

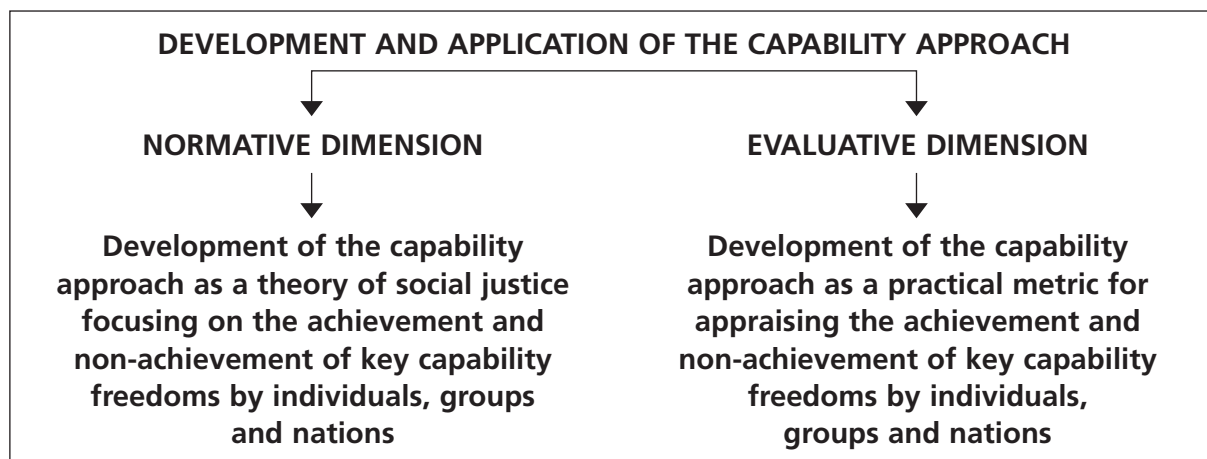
Box 1: What is the capability approach?

Capabilities are substantive human freedoms or real opportunities (such as the ability to avoid premature mortality, to be adequately nourished, to have access to adequate health, social services and education, to participate in and influence public life, and to enjoy self-respect) that people value and have reasons to value. The capability approach is an analytical framework for examining the achievement (and lack of achievement) of basic human freedoms of this type.

1.1.1 Normative and evaluative dimensions of the capability approach

The capability approach proposes that a key aspect of human freedom relates to the substantive opportunity that a person has to live a life that they value and choose (and have reasons to value and choose) and that social and economic arrangements ought to be evaluated and judged from this perspective. This central and overarching idea provides the focus for the development of (1) a normative framework for thinking about social justice and equality and (2) an evaluative framework for assessing the position of individuals, groups and nations. Accordingly, the theoretical development and practical application of the capability approach has a normative dimension (relating to the justification and elucidation of the capability approach as a critical element of a theory of social justice) and an evaluative dimension (relating to the development of a capability space as a practical metric to be adopted for the purposes of measurement and comparison) (Box 2). In normative terms, the capability approach emphasises the importance of the achievement and non-achievement of key ‘capability freedoms’ by individuals, groups and nations for the development of a vision of a just society. This includes the normative importance of both (1) the achievement and non-achievement of key ‘capability freedoms’ by individuals, groups and nations below a ‘minimum threshold’ and (2) the importance of the equitable fair distribution and advancement of key ‘capability freedoms’ in overall processes of economic growth and development. In evaluative terms, the capability approach provides a formal system for appraising ‘how well’ individuals, groups and nations are doing in terms of the key ‘capability-freedoms’ that they enjoy. This involves the examination and comparison of (1) “basic capability sets” representing combinations of personal states of ‘being’ and ‘doing’ (or ‘functionings’) that are within a persons reach and (2) the functionings that are realized or achieved by individuals, groups and nations in practice. These range from elementary personal states and activities (such as achieving adequate nutrition or being literate) to complex personal states and activities (such as political participation and self-respect).

Box 2: Development and application of the capability approach



1.1.2 How has the capability approach been developed and applied internationally to focus attention on inequalities in the substantive freedoms achieved by individuals, groups and nations?

The theoretical development and practical application of the capability approach by Sen and others has had a major impact in bringing the question of the achievement (and lack of achievement) of key ‘capability freedoms’ by individuals, groups and nations to the forefront of international debates. Sen’s research agenda has addressed the underlying normative issues and has spearheaded the theoretical development and the practical application of the capability approach as a ‘freedom focussed’ framework for economic analysis that concentrates on the achievement (and lack of achievement) of human capabilities (rather than other focal variables such as income, growth, production and utility). His work has put the proposition that income and growth are not intrinsically valuable, but rather have instrumental value in supporting the expansion of the capability of people to live the lives that they value and choose (and have reasons to value and choose) at the forefront of international debates – resulting in the development of new criteria for evaluating economic efficiency and success in academia and beyond. The capability approach has been the driving force behind new paradigms and approaches in theoretical and empirical economics and in a range of other disciplines in the social sciences (including development, poverty and inequality analysis, social policy, gender studies, political theory and philosophy) that concentrate on the appraisal of the achievement and non-achievement of central and basic ‘capability freedoms’. This has resulted in new theoretical and empirical insights the achievement and lack of achievement of the key ‘capability freedoms’ by individuals, groups and nations and has expanded knowledge and understanding in areas of critical concern including hunger and starvation, premature mortality and “excess” morbidity, illiteracy and inadequate educational achievement, and gender-based and group-based inequality. Beyond academia, the capability approach is associated with the emergence of new ‘capability-focussed’ criteria for appraising economic and national success by key international organisations (as reflected, for example, in the UN’s ‘Human Development Index’).

Box 3: Which evaluative exercises can be undertaken using the capability approach?

The capability approach can be adopted as an analytical framework for a range of different types of evaluative exercises concerning the substantive freedoms enjoyed by individuals and groups. It can be adopted, for example, as a basis for the examination of poverty and inequality; for the evaluation of quality of life and human development; for the appraisal of the efficiency and fairness of processes of trajectories of economic growth; and for the assessment of human rights.

1.2 What is the ‘value added’ of the capability approach for the conceptualisation and measurement of inequality?

Theories of equality are often distinguished in terms of their differential responses to the question ‘*Equality of What?*’ The capability approach is distinctive in that it focuses on equality and inequality of *human capability* (the central and basic things that people can *do* and *be*) rather than alternative focal or target variables such as income, subjective well-being (as in utility based models widely adopted in welfare economics, with utility often interpreted in terms of happiness and/or preference satisfaction), liberty (or ‘negative freedom’) and/or Rawlsian ‘primary goods’ (Box 4). This approach is motivated by the failure of dominant frameworks for thinking about equality to take adequate account of the full range of inequalities associated with poverty, hunger and starvation; with entrenched disadvantage and group based discrimination; and with health related conditions such as chronic illness and disability. By directly focussing on individual substantive freedoms, the capability approach avoids certain limitations associated with standard theories of equality.

- The capability approach focuses attention on intrinsically valuable ends, rather than instrumentally valuable means (such as *income* and *resources* – as in standard frameworks for assessing economic growth and development).
- The capability approach focuses on the central and valuable things that people can actually do and be (rather than on subjective wellbeing, happiness and preference-satisfaction – as in standard utility-based models in welfare economics).
- The capability approach focuses on what it is actually *feasible* for a person to do and be and recognises the importance of a broad range of *constraints* for the analysis of individual freedom (including socio-economic and structural processes as well as immunity from intentional interference, as in standard models of negative freedom).

- The capability framework also departs from the Rawlsian social justice framework in key respects. Unlike the Rawlsian framework, the capability approach is sensitive to forms of inequalities that can arise in the central and valuable things that people can do and be even with the same set of primary goods. Variations of this type can arise for a variety of reasons, including (1) physical or mental heterogeneities among persons (related, for example, to disability or illness); (2) variations in non-personal resources (variables such as the nature of public institutions and community cohesion); (3) environmental diversities (such as climatic conditions, or varying threats from disease or from local crime); or (4) different relative positions vis-à-vis others (concerning, for example, the phenomenon of relative deprivation) (Sen 2005: 154).

Box 4: Equality of what?

Theory	Focal variable
Capability approach	Individual substantive freedoms (valuable things that people can do and be)
Standard models of economic growth and development	Income
Models of subjective wellbeing applied in standard welfare economics	Utility (happiness/preference satisfaction/ 'revealed choice')
Negative freedom	Individual negative liberty (immunity from intentional interference)
Rawlsian justice	Primary goods

1.2.1 'Value added' for the treatment of differences in needs

The approach set out above has significant 'value added' in establishing the relevance of differences in need (e.g. interpersonal variations attributable to chronic ill-health and disability) to the conceptualisation and measurement of inequality. In moving beyond the Rawlsian framework, Sen has argued that if the object is to concentrate on a person's *real opportunity* to pursue her objectives (as Rawls suggests), then account should be taken not only of a person's access to primary goods (as in the Rawlsian framework) but also of a person's *real opportunities* in the form of the valuable things that people can actually *do* and *be*. In practical terms, the capability approach focuses attention on the fact that people can need more or different resources to achieve the same substantive freedoms. Society can systematically fail to take into account variations in needs – including, for example, in areas such as the provision of care and access to transport and the built environment.

1.2.2 'Value added' for the treatment of a person's situation and context

As well as taking account of interpersonal variations in need, the capability concept makes explicit analytical space for examining a broad range of contextual variables that capture the *situation* of individuals and groups. This is achieved, for example, through the sensitivity of the framework to variations in the capabilities of individuals and groups associated with positional variables (such as relative and contingent elements of the capability to have an adequate standard of living and the capability to enjoy self-respect) and non-personal resources (such as underlying structural processes, the operation of institutions and the legal system, the degree of societal integration, and the nature of community relations). The sensitivity of the capability approach to contextual variables of this type represents a further departure from the other standard frameworks highlighted in Box 4. In practical terms, this means that the capability approach focuses attention on the need to go beyond the elimination of overt discrimination, to tackle the underlying economic, political, legal, social and physical conditions that can constrain people's achievements and result in variations in the central and valuable things that people can do and be.

1.2.3 'Value added' for examining the *constraints* on individual choice

The capability approach also has significant 'value added' for bringing the analysis of the constraints on individual choice into inequality analysis. The departure from standard models of 'free and rational choice' is evident in three key respects. First, the focus is on individual *goals* rather than *choices* in a simplistic sense. For example, rather than relying on information about revealed choices, there is recognition of the need for information about counterfactual choices (i.e. what people would choose, given the choice). Second, explicit analytical space is made for examining the phenomenon of adaptive expectations – the ways in which individuals and groups can adapt their expectations (and choices) to their situation. Third, the capability approach makes analytical space for examining the *constraints* on individual choice – on what is *feasible* for the individual, given their needs and situations – and the *adequacy* of the options from which a person can choose. These departures from standard 'free and rational choice' models are reflected in the framework for measuring inequality set out in paper 1 (Burchardt and Vizard, 2007). Central emphasis is placed, for example, on the evaluation of *personal autonomy* – that is, the evaluation of the degree of choice and control that an individual has in achieving the things that they value (c.r. paper 1, Recommendation 6, sections 4.3 and 5).⁵

5 The measurement framework recognises that information about the opportunity aspect of freedom (a person's ability to achieve valued outcomes) may require supplementation with information about process freedom (i.e. whether valued outcomes are arrived at through the free decisions of the person involved). C.r. section 1.3.2. (especially f.n. 7) and f.n. 20; also see paper 1 (Burchardt and Vizard, 2007) Recommendation 6 and sections 4.3 and 5.

1.3 How can the capability approach help to take the british equalities agenda forward?

The Equalities Review is charged with examining the causes of persistent discrimination and inequality in British society with particular reference to non-socioeconomic characteristics (gender, ethnicity, disability, age, sexual orientation, transgender status, and religion/belief). A key challenge in undertaking this work is to identify an overarching framework for conceptualising and measuring the constituent elements of human freedom in terms of which the positions of the different population groups identified by these characteristics can be coherently evaluated and judged. This involves formulating and elucidating a comprehensive analytical framework that covers and integrates all seven strands and captures and formalises the most important aspects of inequality between and within population groups.

1.3.1 'Value added' for the work of the Equalities Review

The ways in which the capability approach provides foundations for the work of the Equalities Review are discussed in Burchardt (2006a) and the Equalities Review Interim Report. The focus of capability approach on the *substantive freedom* or *real opportunity* that individuals have to live the kind of life that they value and would choose (and have reasons to value and choose) is viewed as providing an overarching basis for conceptualising and measuring inequality in a contemporary multicultural democracy that avoids the limitations associated with traditional frameworks. A central issue here relates to the treatment of choice and diversity. Respect for the value of individual freedom of choice and diversity is axiomatic to the capability approach. As a freedom focussed model, the central aim is to capture and measure the *substantive freedom* or *real opportunity* that people have to live the kind of life that they value and would choose (and have reasons to value and choose), rather than outcomes or achievements *per se*. This focus avoids the limitations of traditional models of equality of *outcome* (with inadequate attention to the diversity of values, preferences and choices of individuals and groups). At the same time, the capability approach many of the limitations associated with traditional notions of equality of *opportunity* (with inadequate attention given, for example, to the adequacy of options, and to the ways in which social, economic, legal and cultural processes and institutional frameworks shape the nature and scope of options and choices).

In addition, the capability approach reflects many of the 'desirable' features of an equalities framework highlighted in consultative exercises undertaken by the Equalities Review following the publication of its Interim Report. Key issues include, for example, the need for a link with a vision of a good society; to adjustment for personal needs; to sensitivity to outcomes as well as to opportunities; to the recognition of the barriers and constraints on free and rational choice; to the need to cover non-market activities (e.g. care within families); and to sensitivity to inequalities above a 'minimum threshold'. Box 5 provides an overview of how the capability approach addresses these concerns.⁶

⁶ For further analysis of issues raised in the Equalities Review consultation, see paper 1 (Burchardt and Vizard, 2007) section 2.2.

Box 5: Summary of the ‘value added’ of the capability approach for the conceptualisation and measurement of inequality in Britain

Respect for choice and diversity

Respect for individual freedom of choice and diversity is axiomatic to the capability approach. The central aim is to capture and measure the *substantive freedom* or *real opportunity* that individuals have to live the kind of life that they value and would choose, and have reasons to value and choose – rather than simply the functioning-achievements of individuals and groups. This focus means that the capability approach avoids the limitations of traditional outcome-orientated frameworks (especially the failure of frameworks to take adequate account of choice and diversity) and provides an appropriate basis for conceptualising and measuring in a contemporary multicultural democracy.

The link with a vision of the good society

The capability approach contends that a just and fair society requires adequate recognition of the importance of human freedoms, which include capability freedoms. The goals of a just society include the expansion of individual substantive freedoms in the form of the capability that people have to live the lives that they value and choose (and have reasons to value and choose). Social and economic arrangements should be evaluated and judged in terms of the expansion of human capabilities rather than other focuses such as economic growth, subjective wellbeing (utility/happiness/preference satisfaction) and negative liberty.

Adjustment for differences in need

The capability approach is distinctive in that personal heterogeneities associated with differences in need are treated as a form of inequality that is of central importance for the development of a theory of social justice and to the appraisal of the position of individuals and population groups. If the object is to concentrate on a person’s *real opportunity to pursue* then account should be taken of variations in the things that people can do and be (i.e. their capabilities) with the same resources or ‘primary goods’. For example, a disabled person may need more or different resources in order to gain access to the same opportunities for employment, participation in social events or social engagement.

Sensitivity to barriers, constraints and structural processes

The capability approach departs from standard individualistic models by highlighting a person’s *situation* to the analysis of inequality and provides analytical space for examining contextual variables (including underlying structural processes and the operation of institutions and the legal system). In this way, the capability approach provides a yardstick for evaluating the underlying processes and structures that result in variations in the things that people can do and be, and for tackling the economic, political, legal, social and physical conditions that constrain people’s achievements and limit their substantive freedom.

Recognition of the importance of adequate opportunities

The notion of capability provides an elucidation of the idea of the *substantive freedom* or *real opportunity* of a person to live a life that he or she has reason to value and would choose, taking account of (1) the nature and scope of the opportunities offered (2) their relation to individual objectives and goals. Expanding the freedom that people have to lead the kind of lives that they value (and have reasons to value) requires addressing the adequacy of options that people face and ensuring that people have adequate opportunities from which to choose.

continued

Sensitivity to both opportunities and outcomes

The capability approach recognises the importance of both *opportunities* and *outcomes* for a theory of social justice. Sensitivity to *real opportunities* is achieved through the analysis of “capability sets” – the combinations of valuable states of ‘being’ and ‘doing’ that are within the reach of individuals and groups, and that are therefore in principle feasible and available, and from which an individual can in principle choose. Sensitivity to *outcomes* is achieved through the analysis of “achieved functionings” – the states of ‘being’ and ‘doing’ that people and groups actually realize in practice (after all choices have been made, and taking account of the diverse constraints and influences on choices and behaviour). This analytical structure challenges the assumption that a theory of social justice must focus exclusively *either* on “equality of opportunity” *or* on “equality of outcome”. It takes the equality debate in Britain forward by transcending positions that emphasise a rigid divide in this respect and by recognising that both opportunities and outcomes are relevant to a theory of social justice.

Sensitivity to inequalities above a ‘minimum threshold’

The focus of the capability approach on the achievement and non-achievement of key ‘capability freedoms’ by individuals, groups and nations relates to *both* the achievement *and* non-achievement of key ‘capability freedoms’ below a ‘minimum threshold’ *and* to the equitable distribution and relative advancement of key ‘capability freedoms’ in overall processes of economic development and growth. The capability perspective therefore covers evaluative exercises that focus on ‘minimal thresholds’ *and* evaluative exercises that focus on the fair distribution and relative advancement of ‘capability freedoms’ between individuals, groups and nations.

1.3.2 'Value added' in encapsulating the objectives of British equalities legislation

It will be argued below that British equalities legislation can be analysed in terms of a formal equality principle (FEP) (a minimalist understanding of equality, prohibiting differences in the treatment of individuals and groups on the grounds of social identity characteristics) and a substantive equality principle (SEP) (establishing the objective of equal substantive freedom, or equality with respect to the central and basic things that people can do and be) (Box 6). This analysis is reflected in the characterisation (in Box 6) of a full equality principle (FuEP) as a *composite* of the formal equality principle (FEP) and the substantive equality principle (SEP) reflects the understanding that the assessment of a person's overall situation involves the assessment of two plural and irreducible elements – a first element, reflecting the formal equality principle (and prohibiting differences in treatment based on social identity-characteristics); and a second element, reflecting the substantive equality principle (permitting adjustments in the treatment of individuals and groups that are required to promote substantive equality due to variances in, for example, needs and situations). An approach of this type (which views a full equality principle as a composite of two plural and irreducible elements) recognises that different aspects of a person's situation that are relevant to the overall assessment of equality; and that these can feasibly move in opposite directions.

Consider, for example, the case of a man from a Pakistani background being denied a job for no other reason than that the employer was racist. Even if the man eventually ends up with a job that he prefers (an expansion of opportunities and a favourable outcome), the man has been subjected to illegal discrimination and a violation of basic human rights. Similarly, consider a person who is refused accommodation in a B&B on the basis of sexual orientation, who subsequently finds better B&B accommodation elsewhere. Discrimination in the provision of goods and services has occurred, notwithstanding the favourable outcome ultimately achieved. These examples illustrate that, in moving towards a capability-based definition of equality, therefore, it is important not to lose the insights of the minimalist equality principle. Overt discrimination will often result in a diminution of opportunities; but even where it does not, it represents an important manifestation of inequality, as well as a form of unlawful action and a violation of human rights, and should continue to be given appropriate weight in equalities analysis.

- 7 This understanding reflects Sen's (1993a, 2002: 9-13, 583-695; 2004b; 2005: 152-3) characterisation of freedom as a complex and pluralist concept involving irreducible elements that relate to: (1) the process aspect of freedom and (2) the opportunity aspect of freedom. The process aspect is concerned with whether or not a person is free to take decisions his or her self, taking note of (1.1) immunity from interference by others and (1.2) the scope for autonomy in individual choices. The opportunity aspect focuses on the actual freedom a person has to achieve those things she has reason to value, taking note of (2.1) the nature and scope (or adequacy) of the opportunities offered and (2.2) their relation to individual objectives and goals. Individual preferences are relevant for both of these perspectives. However, the assessment of the process aspect of freedom can involve going beyond the importance that a person may attach to processes that are critical for her own freedom and take into account the procedural relevance of social concerns such as rights and justice.

The capability approach provides an elucidation of the opportunity aspect of freedom. Whilst the two categories are not independent, and processes can enter into the evaluation of opportunity-freedom, Sen nevertheless insists on the importance of process-freedom as an irreducible element of an overall freedom concept. This principle is reflected in the measurement framework set out in paper 1, which proposes that information concerning the ability of people to achieve the things they value and choose is supplemented by process orientated information (for example, on non-discrimination, and autonomy, choice and control). C.r section 1.3.1 (especially f.n.5) and f.n. 20; also see paper 1 (Recommendation 6 and sections 4.3 and 5).

Box 6: Towards a full equality principle

(Full equality principle FuEP = Formal equality principle (FEP) + substantive equality principle (SEP))		
	Formal equality principle (FEP)	Substantive equality principle (SEP)
Objective	Formal equality (identical treatment)	Substantive equality (capability interpretation – equality in the central and valuable things that people can do and be)
Associated principle of equal treatment	Minimalist equal treatment principle (prohibition on differences in treatment of individuals and groups on the grounds of identity-characteristics)	Capability-based equal treatment principle (differences in the treatment of individuals and groups may be necessary because of, for example, differences in needs and situations)

1.3.3 British equalities legislation and the principle of substantive equality

Both the formal equality principle (FEP) and the substantive equality principle (SEP) discussed above are reflected in British equalities legislation.⁸ The earlier wave of British anti-discrimination legislation went beyond the minimalist understanding of equality reflected in the Formal Equality Principle (FEP), with indirect discrimination recognised in the earlier wave of anti-discrimination legislation. For example, the Sex Discrimination Act 1975 and the Race Relations Act 1976) recognised that equal treatment (understood as identical treatment) might be discriminatory and the original Disability Discrimination Act has a duty of reasonable adjustment (Fredman, 2002; 2006). However, the departure from the Formal Equality Principle (FEP) is more clearly articulated and further developed in the second wave of British equalities legislation (the ‘positive duties legislation’). The positive duties legislation (1) recognises that in order to avoid discrimination and achieve equality, it can be necessary to treat people differently in order to facilitate differences in the needs and situations of individuals and groups; (2) requires public authorities to adopt positive measures to eliminate discrimination (Fredman, 2005, 2006; Butler, 2005: 20). This second wave of legislation therefore both moves beyond a complaints and litigation driven model of formal equality, and supports the objective of promoting substantive equality through the adoption of positive, pro-active policies and programmes. For example, the Disability Discrimination Act 2005 establishes a duty on public authorities to take steps to take account of disabled persons’ disabilities, and recognises that this can involve treating disabled persons differently to other persons in order to take account of their different needs.

8 The following legal principles correspond to the formal equality principle (FEP) and the substantive equality principle (SEP): formal equality, legal principle – prohibited forms of differential treatment based on identity characteristics are unlawful; substantive equality, legal principle – differences in the treatment of individuals and groups that reflect adjustments for needs and situations and that are necessary to avoid discrimination and to achieve full equality are lawful.

Disability Discrimination Act 2005

Chapter 13: 3 Duties of public authorities (General Duty)

Every public authority shall in carrying out its functions have due regard to-

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life.

(Emphasis added)

The Equality Act 2006, which establishes the statutory duties of the new Commission on Equality and Human Rights, also explicitly recognises that in order to avoid discrimination and ensure equality in practice it can be necessary to recognise and facilitate the different needs of different individuals and groups. The equality standard that can be deduced from the Act not only prohibits discrimination in the form of differences in the treatment of individuals and groups based on a series of social identity characteristics, but also explicitly establishes that in order to avoid discrimination and to achieve full equality it may be necessary to treat some individuals and groups differently by recognising and making provision for their different needs.

Equality Act 2006:

8 (3)

In promoting equality of opportunity between disabled persons and others, the Commission may, in particular, promote the favourable treatment of disabled persons 8 (3).⁹

⁹ Details of legislation are given in the References section.

1.3.4 'Value added' of the capability approach for monitoring and measurement

The analysis above suggests that in monitoring the implementation of British equalities legislation there is a need for an overall measurement framework that relates not only to the absence of discrimination in the minimalist sense, but also to full equality in the central and valuable things that people can actually do and be. The capability approach has value added in developing an overall measurement framework for monitoring the implementation of equalities legislation that gives appropriate weight to substantive equality (defined in capability space, and evaluated from the substantive freedom perspective) as well as to processes. In terms of the second wave of British equalities legislation, the capability approach has 'value added' both in relation to the move towards a more fully articulated substantive equality principle, and in relation to the transition from a complaints-based to a proactive (promotional) equalities model. By focusing attention on the valuable things that people are actually able to do and be (and on the range of interpersonal variations and contextual variables that should be taken into account), the capability approach provides a basis for elucidating and further developing the full equality concept already embedded in British equalities legislation (indirect discrimination, reasonable adjustment, and favourable treatment of disabled people) by giving appropriate weight to the substantive equality principle (SEP), and for monitoring implementation (by putting the concept of capability at the centre of a measurement framework). For example, the Disability Rights Commission has emphasised the 'independent living concept' in terms of what people with disabilities need to achieve the same choice, control and freedom as other citizens at home, at work and as members of the community – so that they can achieve the same substantive freedom as everyone else (DRC 2006). It is precisely the understanding that people can require more and different resources in order to achieve the same levels of substantive freedom – and that policy must address diverse needs and situations and tackle the economic, political, legal, social and physical conditions that constrain people's achievements and limit their substantive freedom – that the capability approach captures, formalises and puts at the centre of a measurement framework.¹⁰

¹⁰ For details of the proposed measurement framework and a survey of relevant data, see paper 1. The links between the capability approach and human rights are discussed in section 3.3. For the argument for a new outcome orientated public duty of equality, see Fredman and Spencer 2006).

2 Developing a Capability List: The proposed methodological framework

The Equalities Review Steering Group on Measurement has recommended the adoption of a two-stage procedure for developing a capability list involving (1) the derivation of a core capability list from the international human rights framework; (2) supplementation and refinement of the core list through democratic deliberation and debate (Recommendation 1). This part of the paper examines the theoretical underpinnings of the proposed framework and provides details of how the proposed framework has in practice been developed and applied. Section 2.1 examines why, in operationalising the capability approach, the Equalities Review needs to reach explicit agreement concerning the use of a capability list. The various methodologies for developing capability lists that have been discussed in the broader literature on the capability approach are reviewed; and current thinking about 'good practice' in relation to the development of capability lists is highlighted. Section 2.2 provides details of stage (1) of the proposed two-stage procedure for developing a capability list (i.e. the derivation of a core capability list from the international human rights framework). The theoretical underpinnings of 'human rights-based capability lists' are examined. Equalities Review scrutiny and feedback exercises relating to the first-stage of the development of the proposed capability list are then discussed. Section 2.3 moves on to consider the details of stage (2) of the proposed two-stage procedure for developing a capability list (i.e. the supplementation and refinement of the core list through democratic deliberation and debate). The results of the Equalities Review deliberative consultation with the general public and individuals and groups at high risk of discrimination and disadvantage are reported. The ways in which the results of the Equalities Review deliberative consultation have been used to supplement and refine the capability list derived from the international human rights framework are then set out. Finally, Section 2.4 provides details of the final form of the capability list proposed by the Equalities Steering Group on Measurement in Recommendation 2.

2.1 Operationalising the capability approach: why does the equalities review need to reach explicit agreement regarding the use of a capability list?

The need for the Equalities Review to reach explicit agreement on the use of a specific ‘capability list’ was raised in Burchardt (2006a) and the Equalities Review Interim Report and reflects the importance of broader processes of moral reflection, and of democratic deliberation and debate, in both the theoretical conception and practical application of the ‘capability approach’. The capability approach is distinctive in that it provides an “analytical space” for conceptualising and measuring equality *without* specifying in advance a fixed and pre-determined list of central and basic capabilities (i.e. a fixed and predetermined list of the central and basic things that people can do and be). The question of *which* capabilities are to be included in a ‘capability list’ for any particular evaluative exercise is approached as being *open* and *flexible*, rather than fixed and pre-determined. This analytical structure reflects the proposition that the value judgements made in the course of social scientific analysis should be explicit and transparent (rather than implicit and disguised) and debated and agreed (rather than un-reflected upon, and un-discussed). The capability approach is innovative in that the ‘social scientific’ exercise of assessing human equality is not treated as a value-neutral process of detachment and disengagement, but is firmly embedded in broader processes of moral reflection and democratic deliberation and debate regarding the appropriate list of central and basic capabilities (the appropriate ‘capability list’) that should be adopted in different contexts and for different purposes. There is in this sense recognition of the “universal value of democracy” and the *constructive* role that public discussion and dialogue should play in specifying and justifying the elements of human freedom that are adopted for evaluative purposes in the social sciences.¹¹

Box 7: Why is it necessary to develop an agreed capability list?

A capability list is a list of the central and basic capabilities in terms of which the wellbeing of individuals and groups can be examined and appraised. Having decided to adopt the capability approach, the Equalities Review needs to reach agreement concerning the nature and scope of the capabilities to be included in a capability list.

¹¹ In technical terms, this openness and flexibility is reflected in the fact that the value structure of the capability approach is ‘substantially incomplete’. See below this section.

2.1.1 Why has Sen been reluctant to endorse a specific list of central and basic capabilities?

Sen has been notoriously reluctant to endorse a specific (“final” or “fixed”) list of central and basic capabilities on the basis of which the capability approach can be extended and applied. This position is best understood in the context of his defence of the “incomplete value structure” of the “capability approach” discussed above. The interpretation of the capability approach as “substantially incomplete” means that capability space is consistent and combinable with different capability lists, and that there is no theoretical necessity for agreement on the question of capability lists to be resolved *prior* to an agreement on the choice of capability space as the relevant ‘space’ in which the position of individuals, groups and nations is to be evaluated and judged.¹² As discussed above there are two key issues here. The first relates to the principle that the formulation of a capability list should be firmly embedded in ongoing processes of democratic deliberation and public reasoning, and therefore as engaging with broader processes of moral reflection and public participation. Capability list formulation ought not, therefore, to be viewed as a technocratic process or a matter for ‘pure theory’ – but as one open to challenge and revision, and in which democratic deliberation and participatory decision-making have a central and prominent role. Second, different lists of central and basic capabilities may be suitable for different purposes (evaluating poverty and inequality, measuring human development, specifying certain basic human rights, appraising injustices etc.) and in different contexts (to take account, for example, of scientific advances such as information and computer technology). Public reasoning and discussion are necessary for selecting relevant capabilities and weighing them against each other in each context.

The problem is not with listing important capabilities, but with insisting on one predetermined canonical list of capabilities, chosen by social theorists without any general social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why (Sen 2004a, 77).

¹² More formally, the interpretation of the capability approach as “substantially incomplete” means that capability space is consistent and combinable with different several different substantive theories of value. This means that, in developing and applying the capability approach, it is possible to combine the capability approach with a range of different ‘background’ or ‘supplementary’ ethical and social theories and approaches. Section 3 of this paper addresses the ways in which a background or supplementary theory of international political and/or legal obligation in the field of human rights provides a possible theory of this type.

Sen's position does not, however, preclude the possibility of listing important capabilities. Whilst defending the interpretation of the capability approach as 'substantially incomplete', Sen has repeatedly emphasised the importance of a number of central and basic capabilities including the freedom to be adequately nourished (unaffected by endemic hunger and starvation), the freedom to enjoy adequate living conditions (with access to adequate shelter), the freedom to lead normal spans of life (unaffected by premature mortality); the freedom to live disease free lives (unaffected by "excess" morbidity); the freedom to read and write (unconstrained by illiteracy and inadequate educational provision); the ability to move around (taking account of the impact of disability on personal mobility); and the freedoms to participate in public life, and in the social life of the community.¹³ The importance of developing a 'pragmatic consensus' in relation to a small number of highly valuable capabilities of this type – and the role that the idea of human rights can play in this respect – has been a recurring theme in Sen's work (c.r. section 3.1.1). Significantly, however, in linking the capability approach to the idea of human rights, Sen has emphasised that human rights selection should itself be viewed in terms of an ongoing process of democratic deliberation and public reasoning rather than in terms of a fixed and final list. Further, in order to guide this process, a theory of 'objective public reasoning' under free and fair conditions is required (Sen 2004b, 2005).

2.1.2 Overview of Nussbaum's list

The work of the philosopher Martha Nussbaum provides a key reference point for the theoretical development and practical application of the capability approach and has been particularly influential in relation to the question of the formulation of capability lists. Nussbaum has argued that Sen's position in relation to this question is too vague and that both the theoretical development and practical application of the capability approach require the endorsement of a specific capability list. In driving debates in this area forward, Nussbaum has developed a framework for extending and applying the "capability approach" on the basis of a list of basic and central capabilities based on philosophical reasoning from first principles. The resulting list (see Box 8) has been extremely influential in the broader literature on the capability approach and is the stated basis of many attempts to apply the capability approach in practice. Nussbaum's earlier contributions explore the possibility of a unique list of basic and central capabilities of this type in the context of an Aristotelian approach to moral philosophy (e.g. 1993, 1995). Her more recent contributions focus on the possibility of a list of basic and central capabilities that is explicitly introduced for political purposes (without any grounding in metaphysical ideas of the type that divide people along lines of culture and religion that is combinable with different comprehensive theories of the good; and that could form the core of an "overlapping consensus" of the Rawlsian type (2003: 42, 2004).

13 Sen (2004a: 78; 2005: 157-159) states that some basic capabilities will no doubt figure in every list of relevant capabilities in every society. However, the exact list to be used will have to take note of the purpose of the exercise. Key capabilities highlighted as being of general relevance to any theory of justice and in social assessment include: the freedom to be well nourished, to live disease free lives, to be clothed and sheltered, to be able to move around, to be educated, to participate in public life, and to have the power to participate in the social life of the community.

Box 8: Nussbaum's List (central human functional capabilities)

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. **Bodily Integrity.** Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason - and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.
5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.)
7. **Affiliation.** A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

continued

8. **Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. **Play.** Being able to laugh, to play, to enjoy recreational activities.
10. **Control over One's Environment.** A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. B. Material. Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.

Source: Nussbaum (2000,78-80)

2.1.3 Nussbaum's list and the question of democratic legitimacy

Nussbaum's List is by far the most widely cited established list cited in the broader literature and has been adopted as a foundation for many empirical studies on the capability approach. Nevertheless, various concerns have been expressed in the literature regarding the construction of Nussbaum's List. These relate both the substantive content of the List – with various concerns being expressed about the broad nature of the List (with the inclusion, for example, of “relationships with other species” and “play” as core entitlements) – as well as concerns regarding the focus on philosophical derivation, and the lack or absence of democratic legitimacy and participation. Crocker (2004, 2005) has emphasised that Sen's capability approach requires democracy conceived as democratic deliberation rather than standard models of free and fair elections. The ideal of democratic deliberation should enter into capability list formulation at a number of stages (including the critical role of democratic discussions in constructing shared values and reaching agreement about needs and thresholds in particular contexts and for particular purposes). Further, this ideal relates to the evolution of preferences and values through processes of democratic engagement, reflection and debate (rather than, for example, the straight-forward identification and aggregation of existing views and preferences). Robeyns (2003, 2005) suggests that, given the links between Nussbaum's List and the Anglo-American philosophical tradition, the List might be inappropriate in particular contexts (including in the selection of quality of life indicators) and might lack the legitimacy required for political and policy decisions. There is, Robeyns suggests, a valid analytical distinction between Lists that are identical in substantive terms, but that are derived under different procedural conditions. Furthermore, there is a need for the development of new approaches that focus not on the specification and justification of final substantive lists, but rather on procedural sensitivity and conditions of fair representation and democratic deliberation under which lists of this type should be agreed (2003, 2005: 9-11). Robeyns goes on to set out four key principles that can serve as a general guide for capability list selection (Box 9).

Box 9: Quality criteria for selecting capabilities set out in Robeyns (2005: 15)

- **Explicit formulation of capability lists.** The capability list should be made explicit, discussed and defended.
- **Methodological justification.** The method by which a list is generated should be clarified and open to scrutiny.
- **Different levels of generality.** Lists should be drawn up in at least two stages that explicitly differentiate (1) the ideal list required and (2) the list after adjusting for feasibility constraints (especially data constraints but also relating to other types of political and economic feasibility).
- **Exhaustion and nonreduction.** The capabilities on the list should include all elements that are important: no dimensions that are relevant should be left out. For example, those capabilities related to the non-market economy should also be included in economic assessments.

2.1.4 Overview of the range of methodologies for the development of capability lists adopted in the broader literature

The wide range of methodologies adopted as a basis for capability selection in the broader literature on the capability approach are reviewed in Alkire (forthcoming). The plurality of methods for capability selection in different applications and contexts (including the appraisal of injustices and the assessment of poverty, inequality, quality of life and human development) is viewed as a key strength of the capability approach. These can, Alkire suggests, be analysed under five key categories. The first method – existing data or assumptions – can involve the selection of capabilities because of convenience or a convention that is taken to be authoritative, or because there is only data available that have the required characteristics. In Alkire’s view, considerations regarding data availability and adequacy are not sufficient basis for capability selection; and Robeyn’s fourth criterion (regarding two stage process and first and second best) should be invoked as basis for capability selection in the context of data constraints. The second method – normative assumptions – involves selection based on implicit or explicit assumptions about what people do value or should value. These are commonly the informed guesses of the researcher; they may also draw on convention, social or psychological theory, philosophy, religion and so on. The third method – ongoing deliberative participatory processes – relates to the selection of capabilities on the basis of ongoing purposive participatory exercises that periodically elicit the values and perspectives of stakeholders. This approach has had application in the development field, particularly in the context of participatory processes involving the beneficiaries (or potential beneficiaries) of particular projects. The fourth method – empirical evidence regarding peoples values – relates to attempts to base the selection of capabilities on the results of empirical examinations of data on values, or data on consumer preferences or behaviours, or studies of which values are most conducive with respect to some individual or social benefit. Alkire highlights surveys such as the World Values Survey and the Voices of the Poor (which gathered and synthesized data regarding the views of poor people about issues relating to poverty, wellbeing and institutions. The fifth method – public consensus- involves the selection of capabilities in terms of a list that has achieved a degree of legitimacy due to public consensus (such as the Millennium Development Goals, and universal human rights).

2.2 Stage 1: The role of the international human rights framework

The methodological framework that has been proposed by the Equalities Review Steering Group in Recommendation 1 combines two approaches to the development of capability lists: pragmatic consensus (as evidenced by universally recognised human rights) and deliberative/participative methods (as reflected in the Equalities Review deliberative consultation). This section discusses the ways in which the international human rights framework can be invoked as a pragmatic starting point for developing a core capability list. Section 2.3 then sets out how the core capability list has been supplemented and refined using the results of the Equalities Review deliberative consultation.

2.2.1 How does the international human rights framework provide a pragmatic starting point for the development of a core capability list?

The ways in which the international human rights framework can be invoked as the basis of a 'pragmatic consensus' for reaching agreement on the nature and scope of a capability list are discussed in Vizard (2006, forthcoming). Whilst building on the emphasis on the links between the capability approach and the idea of human rights in the recent work of Sen and Nussbaum, the proposed approach places more direct and explicit role that the *actual* international human rights framework can play in the specification and justification of the list of basic and central capabilities, and of a corresponding list of obligations and duties to protect and promote basic and central capabilities, and of associated sets of duties on governments, international organisations and other obligation-holders (both at the individual level, and collectively – through international co-operation). The key idea here is that the international human rights framework provides a basis for the specification and justification of internationally agreed/authoritatively recognised capability lists that can have legitimacy in many circumstances. 'Human rights based capability lists' can be adapted and applied for different purposes and contexts and are intended as a pragmatic starting point for the development of more extensive capability lists.

2.2.2 Clarification of the idea of a human rights based capability list¹⁴

A 'human rights based capability list' can be defined as a capability list where the selection and justification of central and basic capabilities makes reference to a background theory of human rights. Although the background theory of human rights does not necessarily refer to the international human rights framework, the international human rights framework can be invoked as a pragmatic tool for the development of a capability list of this type. Human rights based capability lists are suitable for human rights advocacy purposes – when a minimal list of central and basic capabilities with universal validity is required. In addition, human rights based capability lists have a more general application in providing a pragmatic point of departure for the development of more extensive capability lists. They could be usefully viewed, for example, as providing the 'minimum irreducible core' of other (acceptable-comprehensive) capability-lists,¹⁵ and as a point of departure for developing capability lists that are suitable in a wide range of contexts and for a wide range of applications and purposes. This approach to the development of lists of central and basic capabilities has the advantage of building on established processes of international consensus-building that are already in part deliberative and democratic, and could be potentially combined with and/or supplemented by other processes and methods (e.g. philosophical, social scientific, participatory and/or democratic and deliberative processes and methods, and/or by invoking other types of pragmatic consensus).

¹⁴ Subsections 2.2.2-2.2.4 draw heavily on Vizard (forthcoming).

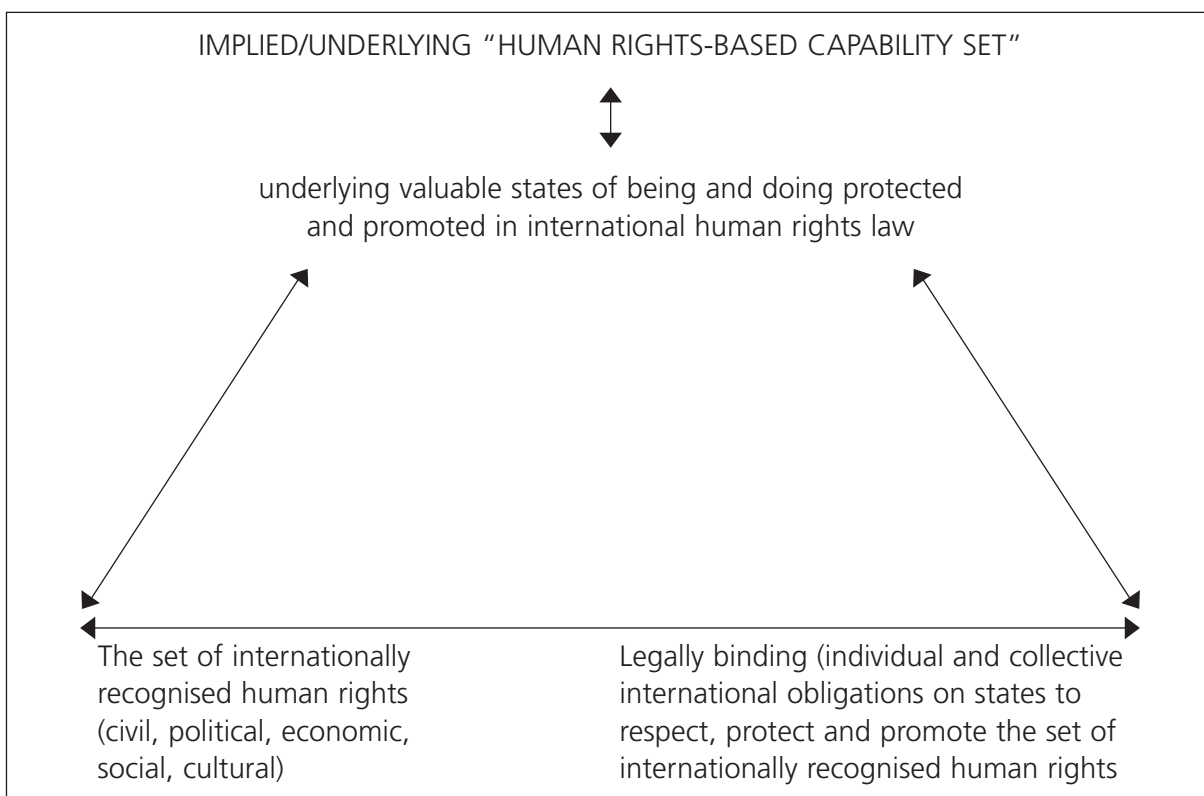
¹⁵ The focus here is on how the international human rights framework can assist in the development of a *comprehensive* (or first-order) capability list analogous to that set out by Nussbaum. The discussion of the minimum irreducible core relates to the minimum core of a capability list of the comprehensive type. It is particularly relevant in the current context because the aim of the Equalities Review is to develop a comprehensive capability list type that can provide an overall foundation for the conceptualization and measurement of inequality in Britain. This approach is not, of course, intended to preclude the specification of shorter capability lists for particular evaluative purposes – when a comprehensive capability list is not required.

2.2.3 Towards an internationally recognised/authoritatively agreed capability list

Where maximum universality is required, the Universal Declaration of Human Rights (1948) provides a possible point of departure for specifying and justifying the relevant domains of human freedom (see Box 11). Where legally binding international instruments are adopted as the basis for the identification and justification of a set of central basic capabilities, it is possible to move towards the idea of a “legally significant” basic capability set. International treaties including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All of Forms of Discrimination Against Women create legally binding international obligations on state parties under international human rights law (both individually and collectively through international assistance and co-operation) and have been adopted by the vast majority of states, with the number of state parties approaching quasi-universal and universal levels by 2006 (Box 12). “Human rights-based capability lists” that are specified and justified on the basis of legally binding international treaties of this type should not be viewed as “fixed” or “final” lists, since the international human rights framework reflects an on-going process of inter-governmental negotiation and evolution. Furthermore, different “human rights-based capability sets” may be derived from different international human rights instruments. Other variables include the degree of universality required (in terms of the number of countries that have signed and ratified international human rights instruments); population group focus (with different international instruments generating lists of central and basic capabilities relevant, for example, to women and children); context focus (with different contexts demanding a concentration on different sub-sets of central and basic capabilities); and regional and national application (with different national and regional human rights regimes guiding the development and application of ‘human rights-based capability lists’ in different jurisdictions).¹⁶

16 Particular issues raised by the nature and scope of the British human rights regime are discussed in section 3.

Box 10: Combining “capability space” with a background/supplementary theory of international human rights law



Box 11: Universal Declaration of Human Rights (1948)

Index of articles

- 1-2 Human dignity, equality and non-discrimination
- 3 Life, Liberty and Security
- 4 Slavery and Slave Trade
- 5 Torture and Cruel/Inhuman/Degrading Treatment or Punishment
- 6-11 Legal Rights
- 12 Arbitrary Interference
- 13 Freedom of Movement and Residence
- 14 Asylum
- 15 Nationality
- 16 Marriage
- 17 Property
- 18-19 Freedom of Thought/Conscience/Religion/Opinion/Expression
- 20 Peaceful Assembly and Association
- 21 Political Rights
- 22 Social security and general recognition of socio-economic rights
- 23-24 Employment, Trade Union and Rest
- 25 Adequate standard of living
- 26 Education
- 27 Cultural Life
- 28 International order
- 29 Limitations (Morality/public order/general welfare)

2.2.4 Specifying the elements of a human rights-based capability list

A list of central and core capabilities derived from the two major international human rights treaties that create legally binding international obligations for states parties – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – is given below (Table 1). These two key treaties require states to fulfil civil and political rights and to progressively implement the human rights to life, to adequate food and nutrition, to safe water and sanitation, to adequate health care facilities and to education, and can be viewed as providing the basis for the identification and justification of a core list of central and basic capabilities that are critically important for a life based on equal dignity and worth. For example, international recognition of the human right to an adequate standard of living under Article 25 of the Universal Declaration, Article 11 of the International Covenant on Economic and Social Rights and Article 27 of the Convention on the Rights of the Child provides a basis for the inclusion in a list of central and basic capabilities of the capability to achieve a standard of living adequate for human survival and development. This capability can then be viewed as being protected and promoted in international human rights law by complex clusters of negative and positive rights and correlative duties (claims, immunities, liberties, powers etc.) that characterise the relevant prohibitions on actions, as well as the positive actions that should be performed by governments and other international obligation holders (though positive support, assistance and aid).

Box 12: Key international treaties in the field of human rights

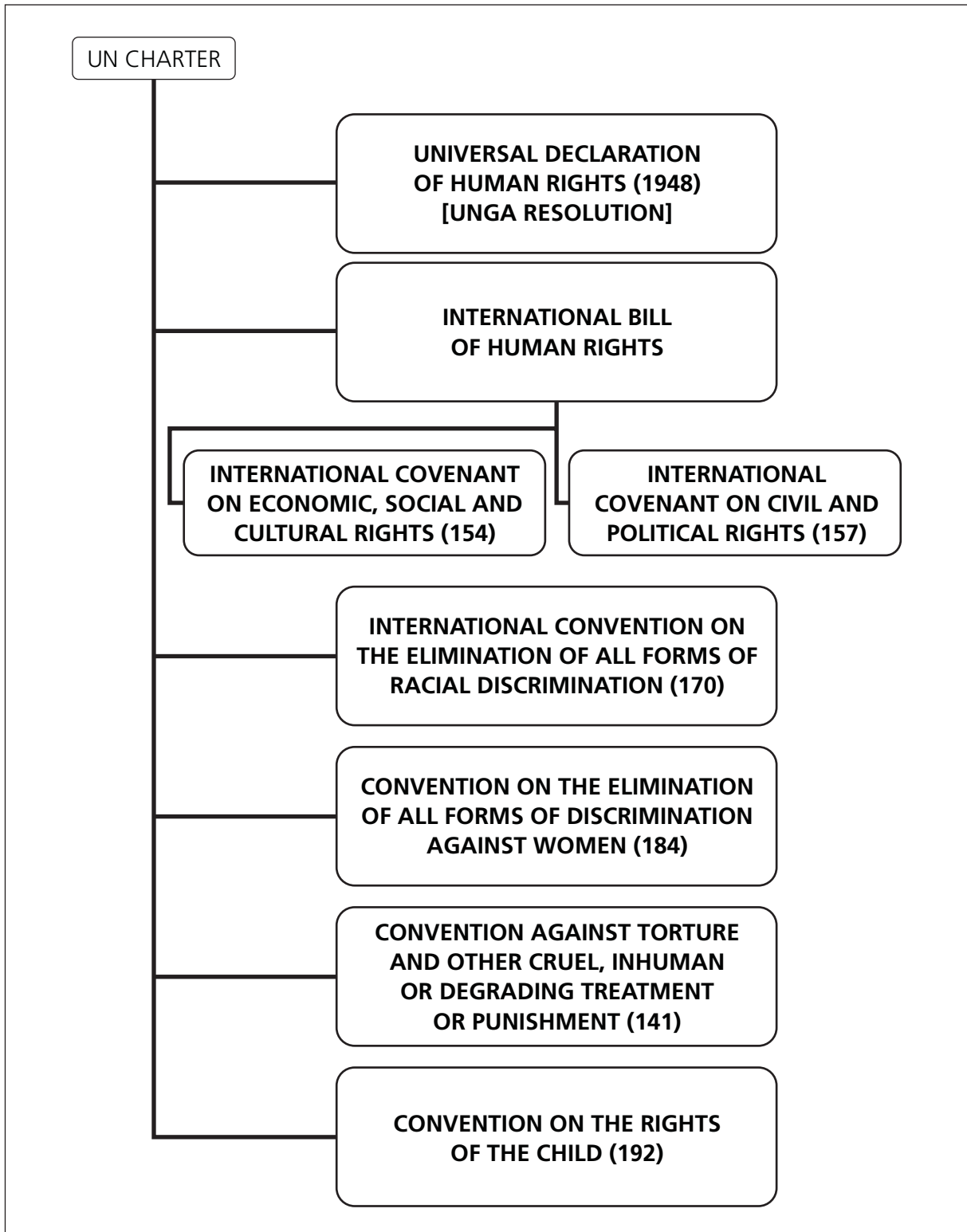


Table 1: List 1 (human rights based capability list)

List of central and valuable beings and doings, based on the International Covenant on Civil and Political Rights and the International Covenant Economic, Social and Cultural Rights		
General objectives and principles		
	Preamble	Recognition of respect for human dignity as the object and purpose of international human rights law
	Non-discrimination article 2 ICCPR/ICESCR Equal rights of men and women article 3 ICCPR/ICESCR	Establishment of non-discrimination and equality as general objectives
Legally binding international instrument	Internationally recognized human rights	Underlying states of being and doing that are protected and promoted in international human rights law
ICCPR	Article 6 right to life	Life
ICCPR	Article 8 abolition of slavery and the slave trade/abolition compulsory labour	Self-ownership
ICCPR	Article 7 freedom from cruel, inhuman or degrading treatment or punishment	Bodily integrity
ICCPR	Article 9–11 abolition of arbitrary arrest and detention; regulation of conditions of arrest and detention; fair court proceedings Article 14 equality before the courts Article 15 no retrospective convictions Article 16 recognition of personhood before the law Article 26 equality before the law/equal protection of law Article 12 liberty of movement and freedom to choose residence; country exit and entry Article 13 regulation of conditions of expulsion Article 24 right of child to protection of law + protection of name and nationality	Legal security
ICCPR	Article 17 prohibitions on arbitrary interference with privacy, home, correspondence, family, honour, reputation	Private and family life

continued

	General objectives and principles	
ICCPR/ ICESCR	Article 19 ICCPR right to opinion and expression Article 18 ICCPR freedom of thought, conscience and religion Article 20 ICCPR prohibition of advocacy of national, racial or religious hatred	Identity, expression and belief
ICCPR/ ICESCR	Article 15 ICESCR right to cultural life Article 27 ICCPR linguistic freedom	Cultural freedom
ICCPR/ ICESCR	Article 10 ICESCR/Article 23 ICCPR right to marriage and family; marriage by free consent; equality during marriage and at dissolution	Primary-relationship autonomy
ICESCR	Article 13 right of everyone to education Article 14 right to compulsory and free primary education	Knowledge, education and skills
ICESCR	Article 12 right to the highest attainable standard of physical and mental health	Health
ICESCR	Article 11 right to freedom from hunger right to adequate food, clothing, water, housing and social services Right to continuous improvement of living conditions Article 9 social security Article 10 protection and assistance for families with dependent children, and special measures for the protection and assistance of mothers and children	Adequate standard of living
ICESCR	Article 6 right to work Article 7 right to just and favourable conditions of work; Article 8 right to form and to join trade union	Work
ICCPR	Article 25 free and fair elections Article 21 peaceful assembly Article 22 freedom of association	Participation, political influence and voice

2.2.5 Human rights-based capability lists: Scrutiny and feedback

The suitability of the adoption of the international human rights framework as a basis for selecting central and basic capabilities, and the ways in which List 1 (the pragmatic starting point list) might be further developed for the purposes of the Equalities Review, were discussed in detail at the second meeting of the Equalities Review Steering Group on Measurement and at the Equalities Review Seminar on the Capability Approach and Human Rights. At the Steering Group there was a general consensus that the international human rights framework provides an appropriate starting point for the development of a capability list by the Equalities Review, and a number of specific practical suggestions were made concerning the ways in which L1 might be further developed and presented at the Equalities Review deliberative consultation. Broad support for the ways in which the international human rights framework can provide a basis for the development of a capability list was also expressed at the Seminar. Participants at this event also made a number of important practical suggestions regarding the orientation and further specification of L1. In addition, a number of concerns regarding the proposed methodological framework were expressed at the Seminar from both the human rights perspective and the capability perspectives. These included the issue of 'minimalism' and the question of the relationship of the proposed framework to the British Human Rights Act (1998).

Full records of issues raised at these events are given in Burchardt (2006b) and OPM (2006). The discussion in this section focuses on issues relating to the suitability and further development of L1. The underlying theoretical issues examined at both the Steering Group and the Seminar (including further details of the debate around 'minimalism', and the question of the relationship of the proposed framework to the British Human Rights Act 1998) are discussed more fully in section 3 under 'feedback and clarification'.

- **Scrutiny Issue 1: The general approach.** There was broad support at the Steering Group for the proposition that the international human rights framework provides a useful starting point, and represents a pragmatic consensus, regarding the specification and justification of the central and basic 'domains' of human freedom. However, there may be gaps that need to be addressed. Other supplementary methodologies may be therefore necessary. There was recognition that the Equalities Review deliberative consultation event would take this process forward. However, further supplementary methodologies e.g. social scientific may be necessary to further orientate and specify a capability list in the medium term.
- **Scrutiny Issue 2: The nature and scope of the capabilities to be included.** The Steering Group felt that a number of important capabilities are absent or under-represented/not sufficiently visible in L1. Particular concerns were addressed around environmental security, freedom from pollution, the capability to care, and the benefits of a 'well-functioning' state. In addition, physical security of the person, e.g. protection from crime, should be captured; significant primary relationships other than marriage and family should be fully supported. Other capabilities discussed related to community participation and the importance of the ability of individuals to join groups (e.g. a women's group).

- **Scrutiny Issue 3: The interaction of a capability list with the equality strands, and the need to further specify capabilities for each group.** The need to develop a more specific capability list for groups at high risk of discrimination and disadvantage was also discussed at the Steering Group. There was general agreement that it would be necessary to develop group specific lists highlighting the variations in ‘inputs’ necessary for different groups to enjoy similar achievements in the space of substantive freedoms. For example, a specific list orientated towards the different needs of disabled people, or older people or other particular groups might be necessary.
- **Scrutiny Issue 4: The treatment of children.** Another key issue examined at the Steering Group related to the treatment of children. The question of whether a general capability list should include a specific children’s capability was also discussed. A number of advantages could result from the inclusion of a specific children’s capability in the main headers of a capability list. However, it was also suggested that the most general form of a capability list should be of universal relevance (within the British context) and ought not in the first instance to make specific reference to particular groups. This said, whilst the most general form of a capability list can be viewed as universal for adults across individuals and groups in Britain (in other words, the same list could be used for thinking about inequality between men and women, between different ethnic groups, and so on), children might be more adequately covered by a separate capability list with different or additional elements. As under Scrutiny Issue 3, it was felt that a constructive way forward here would be to develop specific capability lists for specific groups. Given the particular issues raised in the context of children’s capabilities, this process could usefully begin with the development of a capability list specifically for children.
- **Scrutiny Issue 5 Resource and measurement constraints.** The Steering Group emphasised that constraints such as resources and data availability should not limit the compilation of a first-order (comprehensive) capability list of the Nussbaum type. Capability lists should initially be drawn up so that *all* of the capabilities that are viewed as important for the purposes at hand are included. Therefore, important capabilities should not be omitted from the capability list developed by the Equalities Review on the grounds of data limitations. For example, if bodily integrity is viewed as an important capability that should be included within a capability list, then the capability list should be specified as including bodily integrity. Data limitations relating to domestic violence should not be taken to limit the nature or scope of a ‘first-order’ capability list.

- **Scrutiny Issue 6: The issue of minimalism.** The issue of minimalism was discussed at both the Steering Group and the Seminar. The proposition that the human rights approach should be adopted in relation to *dimensions* rather than *levels* was discussed at both consultation events. At the Steering Group participants emphasised the possibility of minimalism and emphasised that inequality should be understood in terms of distribution (where appropriate to the capability in question), not just whether equal proportions of different groups reach a threshold or minimum level. At the Seminar, some experts addressing the proposal from the capability perspective felt that key capabilities discussed in the broader literature on the capability approach (e.g. the capability to care for a dependent relative) might be ‘lost’ by adopting a human rights based procedure for capability selection. From the human rights angle, whilst some participants argued that a human rights approach is about the legal enforcement of minimum standards, others emphasised the objective of substantive equality and the variety of ways in which human rights can be invoked to support a full equality principle in a developed democracy. The debate here was not so much whether human rights provide a ‘core’ of an equality principle, but whether this view should be viewed only as a ‘minimum core’. Practical examples of human rights being invoked to support a ‘fuller’ equality concept included the ‘dignity and respect’ agenda in Britain and the UN Disability Rights Convention (see section 3 for further details). Other examples include the focus on attention and care in the Convention on the Rights of the Child.
- **Scrutiny Issue 7: The practical presentation of the capability list.** A number of concerns were expressed concerning the potential for ‘reductionism’ (c.r. Scrutiny Issue 5). Nevertheless, some participants felt that L1 was overlong and that the categories should be regrouped into a smaller number of broad headings. The practical example of the ‘Every Child Matters’ Agenda was cited here. In addition, before taking a human rights based capability list forward as a basis for consultation with the public and groups at high risk of discrimination, a ‘plain English’ version of the list would be required. Subheadings should also be developed. The role of the subheadings should be to orientate and further specify the most general capability list for 21st century Britain. In addition, the subheadings should illustrate the ways in which a capability list can be further orientated and specified for particular groups at high risk of discrimination and disadvantage.
- **Scrutiny Issue 8: The revision process.** Prior to receiving the results of the deliberative public consultation, the list should be treated as a working list, open and revisable. A procedure should also be established for further specifying and updating the list post-consultation.
- **Scrutiny Issue 9: The range of values that ought to be reflected.** Participants at both the Steering Group and the Seminar raised the need to further develop L1 in a way that emphasises the overarching values of non-discrimination and substantive equality with respect to each capability, as well as the need to bring in the full range of free standing principles established in the human rights framework (e.g. dignity, worth, self-respect and autonomy). More traditional equality concerns, e.g. concern with income equality and traditional forms of discrimination (and established methodologies for measuring these), should also be given appropriate weight.

- **Scrutiny Issue 10: The range of human rights instruments that are relevant to the development of human rights based capability lists.**

The Steering Group and a number of participants at the Seminar expressed the view that the development of a capability list by the Equalities Review should reflect the entire range of British Human Rights commitments. Capabilities should be specified with reference, for example, to the Human Rights Act (1998), the EU Charter of Fundamental Rights, the European Social Charter and European Union instruments as well as the full range of international human rights treaties (including the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of all forms of Racial Discrimination and the Convention on the Rights of the Child) should be adopted as reference points. New and emerging international human rights instruments (e.g. the UN Convention on the Rights of Persons with Disabilities) may also be of assistance in the development of group specific capability lists.

2.3 Stage 2: The role of the Equalities Review deliberative consultation

The Equalities Review Steering Group has suggested in Recommendation 1.2.1 that a human rights-based capability list can provide a pragmatic starting point for the development of a capability list. This approach provides a basis for conceptualising and measuring inequality in a broad range of dimensions that are of relevance to the work of the Equalities Review; and has the advantage of drawing on existing processes of international consensus-building around the central and basic freedoms that are of value in human life and that are at least in part deliberative and democratic (rather than being purely of an “expert” or “technocratic” nature). However, the human rights based capability list has a number of possible important limitations (to be discussed in more detail in section 3). Key issues here concern the question of “minimalism” (i.e. whether the human rights based approach is overly restrictive in terms of both dimensions and thresholds) and how to ensure that the proposed capability list fully reflects the conditions of 21st century Britain. Furthermore, as discussed in section 2.1, the capability approach itself invites public discussion and dialogue (by placing emphasis on constitutive role of democratic deliberation and debate in the selection and justification of central and valuable capabilities, and on the need for open, fair and participative methods for developing capability lists). Recommendation 1.2.2 therefore proposes that the core list of central and valuable capabilities derived from the international human rights framework should be firmly embedded in a broader process of democratic deliberation and debate. Other open, fair and participative exercises aiming at the development of an “agreed” capability list are required; and the core list of central and valuable capabilities derived from the international human rights framework should be supplemented and refined through a process of democratic consultation and debate.

2.3.1 The Equalities Review deliberative consultation

The need to develop open, fair and participative exercises aiming at the selection and justification of a list of central and valuable capabilities was recognised by the Equalities Review in its Interim Report. The Equalities Review subsequently commissioned Ipsos-MORI to undertake a deliberative consultation on the selection of central and basic capabilities with the general public and individuals and groups at high risk of discrimination and disadvantage. The stated objective was to identify a basket of capabilities that can be measured and tracked over time. The exercise was constrained by the time scale and resources available, but nevertheless incorporated a programme of interviews with around a hundred participants, including both the general public and individuals and groups at high risk of discrimination and disadvantage. The details of the programme of public consultation are given in Ipsos-MORI (2007) and are summarised in Table 2 below. The interviews were preceded by a pilot and include a series of focus-group interviews with the general public and individuals and groups at high risk of discrimination and disadvantage, as well as more in-depth interviews with selected individuals and groups.

Table 2: Details of Ipsos-MORI deliberative consultation

Fieldwork	Date/location	Main features of the sample
Pilot – extended focus group	30th November, 2 to 3 hours, London	10 x General public, mixed male/female
General Public workshop	Saturday 2nd December, all day, London	30 x General public, mixed male/female. Specific quotas on attitudes to inequalities.
General Public workshop	Saturday 6th January, all day, Edinburgh	30 x General public, mixed male/female, including quota on parents to explore children's capabilities. Mostly from rural areas
Group with lesbian/gay/bisexual people	11th December, 2 hours London	8 x lesbian, gay, bisexual, mixed male/female
Group with mobility impaired people	3rd January, one and an half hour, Bristol	8 x participants with a physical disability (except sight/hearing impairment), mixed male/female.
Group with teenagers	3rd January, one and an half hour Bristol	8 participants aged 13-16, mixed male/female
Group discussion with ethnic minority groups	8th January, two hours, Birmingham	8 participants, spread of different ethnicities, mixed male/female
Depth interviews with people from different religions/faiths	Throughout the first half of January, at least an hour each, London	Sikh woman Muslim man Jewish woman Muslim woman (interview awaiting)
Depth interviews with disabled people	18th January, at least an hour each, Kent	Blind woman Hearing impaired man Dyslexic woman

2.3.1.1 Methodological framework

An important advantage of deliberative consultation as opposed to other methods is that it is designed to access participants' considered values and beliefs, based on discussion with others and impartial information provided by the facilitators. This contrasts with the outputs from focus groups or survey data on public attitudes, which represent the immediate reactions of the public to an idea or viewpoint. The results of a deliberative consultation are therefore not as superficial as an opinion poll, and are a better indication than can be gleaned from other methods of the underlying values of the public, given relevant information, and time and encouragement to reflect and discuss. The methodological framework developed by Ipsos-MORI for the purposes of the Equalities Review public consultation reflected the objective of deliberative consultation (rather than straight-forward elicitation of information about existing preferences, in the unexamined and un-reflective sense) in a number of important ways. Rather than aiming of the elicitation of preferences as immediately expressed, the methodological framework developed by Ipsos-MORI aimed at the elicitation of preferences arrived at through discussion and examination of the issues. This was achieved in two key ways.

- **The role of reflection and discussion.** The general format of the interviews reflected the objective of eliciting more in-depth responses from participants through reflection and discussion (rather than unconsidered and unexamined immediate responses). Workshops and in-depth interviews enable a cross-section of respondents to participate in an informal and interactive discussion, with generous time built in for reflection and discussion. In addition, in-depth interviews facilitated the elicitation of information relating to the *reasons* and *experiences* underlying the valuation of different capabilities.
- **Provision of information and materials as an entry-point/stimuli for reflection and discussion.** The reflective and discursive processes were encouraged through the provision of both general information and specific materials. This included (1) illustrative case-study material on experiences of inequality in Britain; (2) the human rights based capability list (L3).

A full discussion of what can and cannot be learnt from the research exercise, and of issues around the interpretation of qualitative research – are provided in Ipsos-MORI (2007). Critically, the methodological research exercise was intended to shed light on *why* people have particular views and *how* these views relate to demographic characteristics and the experiences of the respondents concerned. Qualitative research of this type aims to provide in-depth information about attitudes rather than statistically significant data. The results of the deliberative consultation should therefore be viewed as illustrative rather than statistically reliable.

2.3.1.2 Results of the Equalities Review deliberative consultation

Respondents participated in two key research exercises. The first exercise aimed at the spontaneous and unprompted elicitation of a list of capabilities through deliberative methods. The second aimed at the elicitation of responses to the human rights-based capability list (L3) through deliberative methods.

Exercise 1: Elements of human flourishing and a good life (elicitation of the participants spontaneous and unprompted responses)

This exercise aimed to generate spontaneous ideas about capabilities. It provided a sense of which capabilities are important for people, and the language they use to describe them. Participants were invited to describe a world in which they would be able to flourish and have a good life. Participants were asked to build their ideal world, i.e. to draw a world in which they felt they would be able to flourish and have a good life. Participants discussed and reflected upon what was needed for a person to flourish and lead the kind of life they want to. In the depth interviews, participants also discussed the capabilities that they had had/had not had in life and what impact this had on them so far. Participants were given a large flipchart on which they were asked to draw, stick pictures, and write. In the middle of the chart a person had been drawn, and participants were asked to provide him/ her with all the things he/she needs to have a good life.

The results of exercise 1 were collated, interpreted and presented by Ipsos-MORI using a mapping technique and summary table (see Box 13 and Table 3 below). The summary of 'capabilities' listed in Table 3 is therefore based on participants' unprompted responses, i.e. the ideal world exercise when they had to draw a map with all the things someone needs to have to flourish are provided below. As well as the 19 categories identified and reported as spontaneously generated capabilities by Ipsos-MORI (listed in Table 3), two "meta" capabilities that help to preserve both personal freedoms and social justice were also reported as being included in spontaneous and unprompted responses. These were: the capability to have choices in things in general; the capability to enjoy the same capabilities, to the same degree, as others in society.

Box 13: Ipsos-MORI mapping of the elements of human flourishing

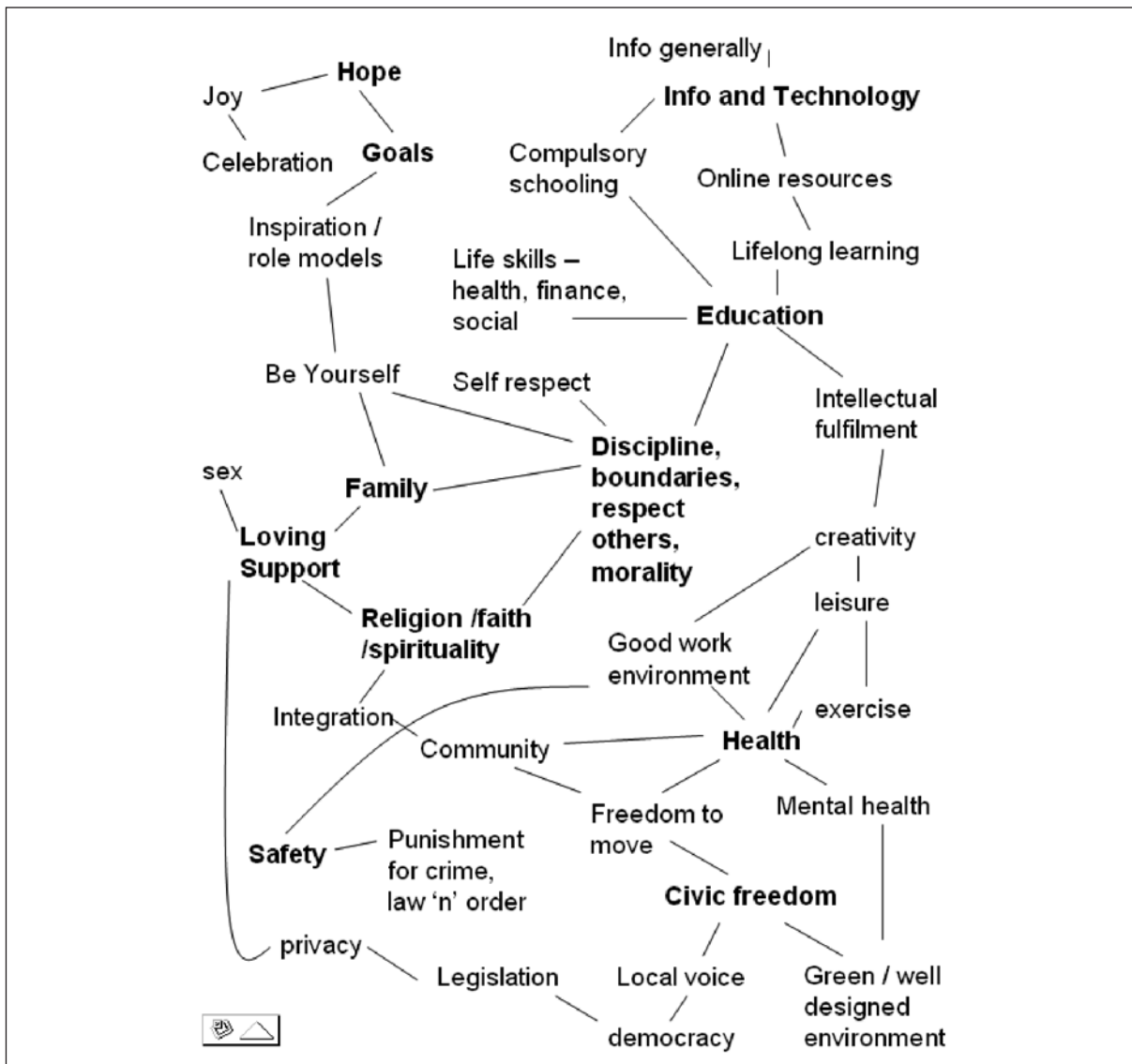


Table 3: Ipsos-MORI summary of spontaneously generated capabilities

Capability	Sub-Domains	Preferences across groups
Healthiness	Exercise Medicine Information and support	All
Education	Schooling and getting qualifications Lifelong learning, ability to continually learn so you are flexible Parenting – capabilities for you and your children	All; particular focus on discipline, boundaries, respect as well as formal schooling
Safety	Physical safety, law and order, Informed about safety	All
Law	Legislation (but rather fossilised) Equality Law and order	All (though most sceptical in older Right wing group in London about the reality of legal equality)
Civic freedoms	Owning public spaces – peaceful assembly Freedom of movement/choose residence	All
Democracy and Participation	Participation, being able to change things Local voice	All
Loving support	Ongoing and ad hoc daily support Family Sex	All
Community	Building local groups Integrating different cultures	Especially most urban participants
Solidarity	Ability to band together behind a vision	Especially LGB
Privacy	Right to private life and confidentiality Protection of personal information	Minority groups, especially religious groups
Hope and happiness	Hope Goals and life skills Inspiration Joy and celebration	All
Information and technology	Access to online/digital resources Information	All, especially youngest (pointing out older don't have this)
Good Environment	Minimum income Well designed built environment Clean air, water, and close to nature	All, especially youngest
Being Yourself	Self respect	All, especially young

continued

Capability	Sub-Domains	Preferences across groups
Respect and tolerance	Respect from others Protection against intolerance	Especially disabled and different ethnic groups
Independence	Right to live independently	Especially older, with disabilities
Good working conditions	Safety Creativity and challenge Not being forced to work Lifelong learning	All – disabled groups focus on not being forced to work
Faith, religion and spirituality	Ability to follow a religion, or having a spiritual dimension to life, benefits the individual Integration of many faiths in society benefits society	Religious participants believed that the capability to be taught faith should be compulsory – others that it should be an opportunity all are given
Leisure, relaxation and mental health	Leisure activities Indulgence and treats Relaxation and calm	All, especially urban participants, felt this was vital in modern life and in hard-working UK work culture. Youngest especially like treats

Exercise 2: Elicitation of responses to the human rights-based capability list

Following the exercise based on unprompted responses, participants were presented with a draft list of central and valuable capabilities derived from the international human rights framework. List 2 below was prepared as a stimulus for this Exercise. In line with comment of the Equalities Steering Group on Measurement (Scrutiny Issue 6 discussed above), this list was intended to as a shorter, 'plain English' version of L1, and provides illustrative sub-elements relating to each core capability. Prompted reactions to List 2 are summarised Ipsos-MORI (2007). When prompted, there was a broad consensus across groups that the capabilities represented in List 2 are of central importance. The only exception related to trade union membership. When participants were shown the human rights based capability list and prompted for their responses (How important is that? Is it relevant in the UK today? etc), the right to form or join a trade union was not highly valued relative to other elements of the list. Prompting with respect to the importance of trade union membership elicited a similar response (i.e. this right is not essential), whatever the demographic make up of the group.

List 2 (refined list, with illustrative group references, e.g. to special protection during childhood, personal mobility; plain English version).

Overall purpose: substantive equality and autonomy

by gender, ethnicity, disability, sexual orientation, transgender, age, and religion/belief in the following 10 domains

Domains of equality

Being alive

Keeping safe

including for example:

- being able to go out without fear
- freedom from violence including sexual, domestic and gender-based violence
- freedom from cruel, inhuman or degrading treatment or punishment

Being healthy

including, for example:

- attaining the highest possible standard of physical and mental health, including sexual and reproductive health
- having access to healthcare
- living in a non-hazardous environment
- not being affected by pollution

Being knowledgeable and having a good understanding

including, for example:

- compulsory and free primary and secondary education
- fulfilling educational potential
- lifelong learning

Living comfortably and securely

including, for example:

- having adequate nutrition, clothing and shelter
- being able to improve your living standards
- having access to social security
- being able to live with dignity and self-respect
- independent living (eg for disabled people)

Working or being employed in good conditions

including, for example:

- access to paid work
- being able to care for others
- having just and favourable conditions of work, including health and safety

- being able to form and join a trade union

Having a good family life

- being forming intimate relationships and a family
- being able to spend time with, and care for, others
- special protection for mothers and children

Participating in decision-making, having a voice and influence

including, for example:

- participating in decision-making
- participating in free and fair elections
- being able to assemble peacefully with others
- being able to form and join civil organisations

Having self-respect, being able to be yourself, having independence

including, for example:

- having self-respect
- being able to think what you like
- being able to believe what you like about right and wrong, including being able to follow a religion
- being able to say what you like (so long as it doesn't cause significant harm to others)
- being able to get married by free consent
- being free to have children, or not have children, as you choose
- not being forced to work in a particular occupation or without pay
- being able to engage in cultural activities (so long as it doesn't cause significant harm to others)
- being able to communicate in your own language

Knowing you will be treated fairly by the law

including, for example:

- freedom from arbitrary arrest and detention
- right to a fair trial
- equality before the law
- freedom of movement
- freedom to choose residence
- right to name and nationality

2.3.2 Supplementation and revision of the human rights-based capability list to reflect the results of the Equalities Review deliberative consultation

In Recommendation 1.2.3, the Equalities Review Steering Group on Measurement has proposed that the capability list derived from the international human rights framework is supplemented and refined to incorporate the results of the Equalities Review deliberative consultation. Three key principles have been applied to facilitate this process. These are:

(1) Support and endorsement. Overlapping and common elements between the capability list generated through the Equalities Review deliberative consultation and the human rights based capability list L3 are taken to support and endorse the pre-existing list. Box 14 gives details of (1) spontaneous expressions of support and endorsement for the pre-existing list (inferred from Exercise 1) and (2) prompted expressions of support for the pre-existing list (inferred from exercise 2).

(2) Supplementation and refinement. Additional elements of human flourishing identified and specified through the deliberative consultation are taken to expand the pre-existing list. That is, where participants suggested additional elements to the pre-existing list or more specific or fully developed or relevant categories, the capability list has been appropriately modified. Full details of the modifications of the final list (List 3) attributable to the deliberative consultation are given in Box 15. Important changes resulting from the deliberative consultation include supplementing the education domain to reflect creativity and intellectual fulfilment, recognising the importance of the opportunity to do things with others (whether family, friends or community); incorporating personal development, self-esteem and the ability to hope for the future; and broadening the work domain to reflect the importance of care (i.e. the introduction of 'other valued activities'. The importance of access to information and technology across a number of different domains was also clarified.

In addition, the results of the deliberative consultation raise important questions about the treatment of variables such as social integration and the nature of community relations. Participants highlighted the importance, for example, of a cluster of issues around tolerance, community cohesion, community relations, multiculturalism and solidarity. The capability list being proposed has also been supplemented and refined to reinforce and incorporate these elements (with re-specification of group-level variables that have been identified as important in the deliberative consultation as elements of individual capabilities where necessary). As a result of the deliberative consultation, for example, List 3 includes a greater emphasis on the capability to form and be a member of civil organisations and solidarity groups. The emphasis on tolerance has also resulted in important modifications to the final form of the proposed capability list (with the introduction of additional and reinforcing elements under, for example, self-respect and legal security, including the inclusion of elements relating to the use of public spaces). However, it is important to note that a range of group-level variables can be appropriately captured in capability analysis as forms of non-personal resources and conversion factors. As well as figuring in the modification process discussed above, variables such as the extent of social integration and the nature of community relations are reflected in the measurement framework among the variables that can influence capabilities and result in their unequal distribution (see this paper (section 1.2) and paper 1 (Burchardt and Vizard, 2007, figure 1).

(3) The principle of the minimum core In line with recommendation R 1.2.1.2, where there is conflict between a human rights based capability list and a deliberative consultation, the principle of the 'irreducible core' is applied. That is, where there is a conflict, a human rights based capability list is taken to trump the results of a deliberative consultation. This third principle was applied in relation to the ability to form and join a trade union, with trade union formation and membership retained in the final form of the capability list proposed in section 2.4, notwithstanding this element being viewed as non-essential in the deliberative consultation.¹⁷

¹⁷ The positioning of this element has however been adjusted in the final form of the proposed capability list 3, with trade unions included under the capability to participate in decision-making, have a voice and influence (see section 2.4).

Box 14: Support and endorsement of L2 expressed in the Equalities Review deliberative consultation

<p>Exercise 1: Spontaneous expressions of support – by domain</p> <ol style="list-style-type: none"> 2. Safety 3. Health, mental health, 4. Education, lifelong learning, compulsory schooling 5. Independent living 6. Good work environment 7. Family, sex, privacy 8. Participation, being able to change things 9. Self respect, be yourself, freedom of religion and belief 10. Legislation, law and order, freedom to move and choose residence, equality <p>Exercise 2: Prompted support, with discussion and reflection based on L2</p> <p>All elements of L2 with the exception of trade-union membership</p>

Box 15: Supplementation and refinement of the capability list

<p>Supplementation and refinement of the capability list attributable to the results of the Equalities Review deliberative consultation</p>	<p>Supportive comments (Source: Ipsos-MORI 2007)</p>
<p>The capability to be alive including, for example, to be able to:</p> <ul style="list-style-type: none"> • avoid premature mortality through disease, neglect, injury or suicide • be protected from arbitrary denial of life 	
<p>The capability to live in physical security including, for example, to be able to:</p> <ul style="list-style-type: none"> • be free from violence including sexual, domestic and identity-based violence • be free from cruel, inhuman or degrading treatment or punishment • be protected from physical or sexual abuse • <i>go out and to use public spaces safely and securely without fear</i> 	<p>Illustration of the importance of difference resources for different individual and groups, in order to attain the same levels of personal security:</p> <p>‘disabled people also felt that their disability put them more at risk than other people, and that the risk of crime had a greater impact on their life. For instance, some wheelchair users said they no longer went out at night alone after being a victim of crime when out on their own. Others emphasised the importance of technology to help them keep safe (e.g. vibrating/ flashing smoke alarms for deaf people, safety chain on the door for blind people and the elderly). Accessing the right equipment helped them lead an <i>independent</i> life – another issue of key importance to this group ‘.]</p> <p>+ Importance of feeling comfortable in public spaces</p>

continued

<p>The capability to be healthy including, for example, to be able to:</p> <ul style="list-style-type: none"> • attain the highest possible standard of physical and mental health, including sexual and reproductive health • <i>access to timely and impartial information about health and healthcare options</i> • access healthcare, including non-discrimination in access to healthcare • be treated medically, or subject to experiment, only with informed consent • <i>maintain a healthy lifestyle including nutrition, exercise and relaxation</i> • live in a <i>healthy and safe environment including clean air, clean water</i>, and to be free from pollution and other hazards 	<ul style="list-style-type: none"> + Access to health information and advice + Importance of exercise + Time for relaxation + Access to clean air and clean water (c.r. environmental goods below)
<p>The capability to be knowledgeable, to understand and reason, and to have the skills to participate in society including, for example, to be able to:</p> <ul style="list-style-type: none"> • attain the highest possible standard of knowledge, understanding and reasoning • <i>be creative</i> • <i>be fulfilled intellectually</i> • develop the skills for participation in productive and valued activities, <i>including parenting</i> • <i>learn about a range of cultures and beliefs and acquire the skills to participate in a multicultural society</i> • access education, training and <i>lifelong learning that meets individual needs</i> • <i>access information and technology necessary to participate in society</i> 	<ul style="list-style-type: none"> + Compulsory and free primary and secondary education + Creativity + Clearer focus on non-formal education, parenting and lifelong learning + The particular importance of access to information technology + Empathy and tolerance (interpreted as acquired life-kills – relevance to education and understanding); people should learn to understand and respect others point of view, through education, interaction and diverse life experiences <p>[Also: importance of social integration, community cohesion and community relations, importance of multiculturalism]</p>

continued

<p>The capability to enjoy a comfortable standard of living, with independence and security including, for example, to be able to:</p> <ul style="list-style-type: none"> • enjoy an adequate and secure standard of living including nutrition, clothing, <i>housing</i>, warmth, social security, social services and utilities • <i>have personal mobility</i>, and access to transport <i>and public places</i> • live with independence, dignity and self-respect • have choice and control over where and how you live • enjoy your home in peace and security • <i>access green spaces and the natural world</i> • <i>share in the benefits of scientific progress including information and technology</i> 	<ul style="list-style-type: none"> + Minimum income and affordable housing + Personal mobility – For participants with a physical disability, freedom of movement was interpreted as physically being able to move; all the more important as most of them said they do not currently have this freedom, due to limited disabled access in public transport and places of interest. + Clearer emphasis on a range of environmental goods (green space, access to nature, access to clean air and clean water) + Not being unreasonably affected by pollution/hazardous environment + The importance of technology and the benefits of scientific advance
<p>The capability to be engaged in productive and valued activities including, for example, to be able to:</p> <ul style="list-style-type: none"> • undertake paid work • <i>care for others</i> • have rest, leisure and respite, including holidays • choose a balance between paid work, care and leisure on an equal basis with others • work in just and favourable conditions, including health and safety, fair treatment during pregnancy and maternity, and fair remuneration • not be forced to work in a particular occupation or without pay • not be prevented from working in a particular occupation without good reason 	<p>Mobility impaired people included carers. Right to have a carer, whether in a paid or unpaid capacity, was of tremendous importance to these participants.</p> <p><i>Without carers people would be in one hell of a mess.</i> Man, mobility impaired, Bristol</p> <p>A few participants who cared for a disabled person (close friend or relative) in an unpaid capacity wanted to see the value of their commitment recognised.</p> <p><i>I think people underestimate how much carers save and how much they do. My youngest lad is 21, and he's got severe learning difficulties, he's 15 stone, six foot two, I've got to wash him, feed him, everything. I can't go to work and leave him on his own. We can't afford a residential home, so we do it for nothing.</i> Man, mobility impaired, Bristol</p> <p><i>Being able to spend time with, and care for, others</i> was highlighted by the parents' group in Edinburgh as essential (c.r. family life).</p> <ul style="list-style-type: none"> + Leisure time and time for relaxing were viewed as essential

continued

<p>The capability to enjoy <i>individual, family and social life</i> including, for example, to be able to:</p> <ul style="list-style-type: none"> • <i>develop as a person</i> • <i>develop your moral outlook and other beliefs</i> • <i>formulate and pursue goals and objectives for yourself</i> • <i>hope for the future</i> • <i>develop and maintain self-respect, self-esteem and self-confidence</i> • have a private life, including protection of personal data • <i>access emotional support</i> • form intimate relationships, friendships and a family • <i>celebrate on special occasions</i> • <i>be confident that your primary relationships will be treated with dignity and respect</i> • spend time with, and care for, others • enjoy independence and equality in primary relationships including marriage • be free in matters of reproduction • enjoy special support during pregnancy and maternity, and during childhood 	<p>Individual life: personal development and life-skills aspects – the importance of hope (reasons to be optimistic and think things would get better); the importance of goals an personal objectives; self-confidence and self-esteem; moral support for those threatened due to difference, building up of self-confidence [again, life-skills concept]</p> <p>+ Elements of personal development – being able to believe what you like about right and wrong, having the opportunity to develop religion, faith and spirituality ...</p> <p>+ Self-respect and <i>being yourself</i> – self-confidence in being able to think what you like; being able to overcome the personal impact of stigma and intolerance (self-confidence in being yourself, personal development and life-skills aspects)</p> <p>Family life: <i>'Being able to spend time with, and care for, others</i> was also highlighted by the parents' group in Edinburgh as essential. For other groups, this was less immediately valued, though all agreed that children should be protected. <i>Forming intimate relationships and a family</i> was a key capability.</p> <p>Support for an individual was seen as the basis for self-esteem and ultimately for success, enabling a person to recover from failure or difficult circumstances. Sources were varied but included family, friends, romantic relationships, other people in the community, counselling, charities and welfare provisions from the government.</p>
<p>The capability to participate in decision-making, have a voice and influence including, for example, to be able to:</p> <ul style="list-style-type: none"> • participate in decision-making • <i>participate in the formulation of government policy, locally and nationally</i> • participate in non-governmental organisations concerned with public and political life • participate in <i>democratic</i> free and fair elections • assemble peacefully with others • <i>participate in the local community</i> • form and join civil organisations and <i>solidarity groups, including trade unions</i> 	<p>+ Clearer emphasis on <i>local voice</i> an ethnic minority (especially in responses from ethnic minority groups)</p> <p>+ Importance of solidarity and ability to join and form civil organisations and solidarity groups to pressure for change/press for shared goals</p> <p>+ Importance of democracy</p>

continued

<p>The capability to be and express yourself, and to have self-respect including, for example, to be able to:</p> <ul style="list-style-type: none"> • have freedom of conscience, belief and religion • have freedom of cultural identity • have freedom of expression (so long as it doesn't cause significant harm to others) • communicate, <i>including use of ICTs</i>, and to use your own language • <i>engage in cultural practices, in community with other members of your chosen group or groups (so long as it doesn't cause significant harm to others)</i> • <i>have self-respect</i> • <i>live without fear of humiliation, harassment, or identity-based abuse</i> • <i>be confident that you will be treated with dignity and respect</i> • <i>access and use public spaces freely</i> 	<p>+ Access to the means of communication (information technology)</p> <p>Self-respect – ‘being tolerated and respected for who you are’ – (having the confidence that you will be treated with dignity and respect; being secure that the law will adequately protect you from intolerant behaviour; having the self-esteem and self-confidence to overcome the affects of discrimination and prejudice..... ;</p>
<p>The capability of knowing you will be protected and treated fairly by the law including, for example, to be able to:</p> <ul style="list-style-type: none"> • know you will be treated with equality and non-discrimination before the law • <i>be secure that the law will protect you from intolerant behaviour</i> • be free from arbitrary arrest and detention • have fair conditions of detention • have the right to a fair trial • access information and advocacy as necessary • have freedom of movement, and be free to choose where you live • have the right to name and nationality • own property and financial products including insurance, social security, and pensions in your own right • <i>know your privacy will be respected and personal data protected</i> 	<p>+ Data protection and privacy</p> <p>+ Protection from intolerance</p>

continued

<p>Capability list for children</p>	<p>+ Loving attention and support</p> <p>+ Being treated with respect at school</p> <p>Parents group put more emphasis on education and on the following issues (in comparison with other participants): family life, recreational activities done together as a family, educating children on safety and healthy life style. Teenagers insisted on being treated with respect at school.</p> <p>C.r. parents group – emphasis on ability to spend time with and care for others.</p>
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2.4 The proposed capability list: ten domains of central and valuable capabilities

The final form of the capability list that has been proposed by the Equalities Review Steering Group on Measurement in Recommendation 2 is presented as List 3 below. In line with the two-stage procedure proposed in Recommendation 1 (and discussed in full in sections 2.2 and 2.3) – and taking account of the comments of the Steering Group (as recorded in section 2.2.5) – the final capability list has been developed in the following way.

Stage 1: Derivation of a core list of central and valuable capabilities from the international human rights framework

- List 1 (the capability list derived from the two core international human rights treaties) modified and extending using other relevant international human rights instruments (as detailed in section 2.2).

Stage 2: Supplementation and refinement of the core capability list drawn up in stage 1 on the basis of the results of the Equalities Review deliberative consultation

- Supplementation and refinement of the core capability list based derived from the international human rights framework by the results of the Equalities Review deliberative consultation (i.e. by the spontaneous list of capabilities drawn up by the general public and individuals and groups at high risk of discrimination and disadvantage, and by the prompted responses of participants to the pre-prepared capability list (as detailed in section 2.3).

In line with the comments of the Steering Group, a separate list for children is specified as List 4.

List 3 (Final capability list recommended for adoption by the Equalities Review; derived from the international human rights framework and deliberative consultation)

10 domains of central and valuable capabilities

The capability to be alive

including, for example, being able to:

- avoid premature mortality through disease, neglect, injury or suicide
- be protected from arbitrary denial of life

The capability to live in physical security

including, for example, being able to:

- be free from violence including sexual, domestic and identity-based violence
- be free from cruel, inhuman or degrading treatment or punishment
- be protected from physical or sexual abuse
- go out and to use public spaces safely and securely without fear

The capability to be healthy

including, for example, being able to:

- attain the highest possible standard of physical and mental health, including sexual and reproductive health
- access to timely and impartial information about health and healthcare options
- access healthcare, including non-discrimination in access to healthcare
- be treated medically, or subject to experiment, only with informed consent
- maintain a healthy lifestyle including exercise and nutrition
- live in a healthy and safe environment including clean air, clean water, and freedom from pollution and other hazards

The capability to be knowledgeable, to understand and reason, and to have the skills to participate in society

including, for example, being able to:

- attain the highest possible standard of knowledge, understanding and reasoning
- be creative
- be fulfilled intellectually
- develop the skills for participation in productive and valued activities, including parenting
- learn about a range of cultures and beliefs and acquire the skills to participate in a multicultural society
- access education, training and lifelong learning that meets individual needs
- access information and technology necessary to participate in society

The capability to enjoy a comfortable standard of living, with independence and security

including, for example, being able to:

- enjoy an adequate and secure standard of living including nutrition, clothing, housing, warmth, social security, social services and utilities
- have personal mobility, and access to transport and public places
- live with independence, dignity and self-respect
- have choice and control over where and how you live
- enjoy your home in peace and security
- access green spaces and the natural world
- share in the benefits of scientific progress including information and technology

The capability to engage in productive and valued activities

including, for example, being able to:

- undertake paid work
- care for others
- have rest, leisure and respite, including holidays
- choose a balance between paid work, care and leisure on an equal basis with others
- work in just and favourable conditions, including health and safety, fair treatment during pregnancy and maternity, and fair remuneration
- not be forced to work in a particular occupation or without pay
- not be prevented from working in a particular occupation without good reason

The capability to enjoy individual, family and social life

including, for example, being able to:

- develop as a person
- develop your moral outlook and other beliefs
- formulate and pursue goals and objectives for yourself
- hope for the future
- develop and maintain self-respect, self-esteem and self-confidence
- have a private life, including protection of personal data
- access emotional support
- form intimate relationships, friendships and a family
- celebrate on special occasions
- be confident that your primary relationships will be treated with dignity and respect
- spend time with, and care for, others
- enjoy independence and equality in primary relationships including marriage
- be free in matters of reproduction
- enjoy special support during pregnancy and maternity, and during childhood

The capability to participate in decision-making, have a voice and influence

including, for example, being able to:

- participate in decision-making
- participate in the formulation of government policy, locally and nationally
- participate in non-governmental organisations concerned with public and political life
- participate in democratic free and fair elections
- assemble peacefully with others
- participate in the local community
- form and join civil organisations and solidarity groups, including trade unions

The capability of being and expressing yourself, and having self-respect

including, for example, being able to:

- have freedom of conscience, belief and religion
- have freedom of cultural identity
- have freedom of expression (so long as it doesn't cause significant harm to others)
- communicate, including using ICTs, and use your own language
- engage in cultural practices, in community with other members of your chosen group or groups (so long as it doesn't cause significant harm to others)
- have self-respect
- live without fear of humiliation, harassment, or identity-based abuse
- be confident that you will be treated with dignity and respect
- access and use public spaces freely

The capability of knowing you will be protected and treated fairly by the law

including, for example, being able to:

- know you will be treated with equality and non-discrimination before the law
- be secure that the law will protect you from intolerant behaviour
- be free from arbitrary arrest and detention
- have fair conditions of detention
- have the right to a fair trial
- access information and advocacy as necessary
- have freedom of movement, and be free to choose where you live
- have the right to name and nationality
- own property and financial products including insurance, social security, and pensions in your own right
- know your privacy will be respected and personal data protected

List 4 (List of central and valuable capabilities derived from international human rights framework and deliberative consultation, further developed for children)

Central and valuable capabilities for children

The capability to be alive

as for adults

The capability to live in physical security

as for adults

The capability to be healthy

as for adults, plus:

- be protected from emotional abuse or neglect
- grow and develop
- learn about how to remain healthy and safe

The capability to be knowledgeable, to understand and reason, and to have the skills to participate in society

as for adults, replacing training and lifelong learning with:

- compulsory and free primary and secondary education that meets individual needs

The capability to enjoy a comfortable standard of living, with independence and security

as for adults, where:

- an adequate and secure standard of living is understood to be one which enhances physical, mental, spiritual, moral and social development
- choice and control is understood to be at a level appropriate to the child's stage of development

The capability to be engaged in productive and valued activities

including for example:

- have safe, enjoyable, and developmental play
- be protected from exploitation through paid or unpaid work

The capability to enjoy individual, family and social life

as for adults, except marriage, reproduction, pregnancy and maternity, and adding:

- be nurtured, loved, and protected

The capability to participate in decision-making, have a voice and influence

as appropriate to the child's stage of development, including for example:

- be encouraged and supported to participate in decision-making, especially decisions which directly affect your own life
- be listened to with respect
- assemble peacefully with others
- form and join civil organisations and solidarity groups

The capability to be and express yourself, and to have self-respect

as for adults, plus:

- be protected from bullying and intolerant behaviour

The capability of knowing you will be protected and treated fairly by the law

as for adults, except own property and financial products

3 The capability approach and human rights: Feedback and clarification

This section discusses some of the feedback on the proposal for human rights based capability lists set out in section 2.2. The aim is to set out key issues raised regarding the capability approach and human rights, and to provide further clarification of the proposed methodological framework. The case for putting increased emphasis on human rights instruments and human rights-based approaches to equality was raised in a number of the initial submissions to the Equalities Review (e.g. British Institute of Human Rights/LSE Human Rights (Edmundson *et al.* (2005)); Fredman and Spencer (2006)); in the feedback to the Equalities Review Interim Report; in Butler (2006); and in Equalities Review consultation events (OPM 2006). As well as highlighting the importance of human rights based approaches to equality in Britain, key questions regarding the links between the capability approach, the idea of human rights and the British Human Rights Act (1988) were raised by these exchanges (e.g. Butler 2006; OPM 2006). The sections that follow provide feedback and clarification with respect to some of the key issues that have been raised in response to the proposal set out in section 2.2. It is important to note from the outset that the emphasis of this paper is on how capability approach and the human rights approach can be mutually reinforcing and supportive (rather than mutually exclusive or alternatives). The emphasis is on the ways in which both theoretical development and practical application of the capability approach by the Equalities Review can engage with, and be shaped by, human rights standards and principles. The capability approach can indeed be viewed as providing an analytical bridge between the equality and human rights functions of the new Commission on Equality and Human Rights – by providing an analytical space in which the valuable things that individuals and groups can do and be can be examined and appraised.

3.1 Feedback and clarification (1): ‘value added’ of the capability approach for conventional human rights analysis

The capability approach has ‘value added’ for conventional human rights analysis in examining the distinction formal rights and substantive rights and for examining the ability of people to exercise their human rights in practice. The capability approach focuses attention on the correspondences and lack of correspondences between (1) the valuable states of being and doing that are formally protected and promoted in the legal domain and (2) the things that people can and do achieve in practice (i.e. the central and valuable capabilities that are within a person’s reach); and (3) the results that people do actually achieve (i.e. a person’s realized functionings). This framework shifts the focus of human rights analysis away from process and formal legal guarantees, towards the full ability of people to exercise their human rights, and provides explicit analytical space for examining why the valuable states of affairs reflected in formal guarantees of fundamental freedoms and human rights may not be realized in practice [e.g. Sen (2002, 632-651), Nussbaum (2000, 135-147)].¹⁸

¹⁸ The ‘value added’ of the capability approach for understanding the distinction between formal rights and substantive rights is further developed in Fredman (2006a).

3.1.1 Sen's treatment of the capability approach and human rights¹⁹

The idea of human rights is reflected in Sen's research agenda in a number of important ways. First, Sen has emphasised the development of 'capability space' as an analytical space in which the achievement of human rights in practice can be examined and appraised (c.r. sections 1.1 and 2.1). Second, Sen has repeatedly discussed the central importance of a small number of basic capabilities that are of general relevance for the development of theories of justice and in social assessment (c.r. section 2.1.1). Third, Sen has repeatedly emphasised the pragmatic role that the idea of human rights can play vis-à-vis agreement in a core set of highly valuable capabilities (c.r. section 2.1). Fourth, Sen's work has emphasised the conceptual links between capabilities and human rights, with many human rights being viewed as rights to capabilities, and "[m]inimal demands of well-being (in the form of basic functionings, e.g. not to be hungry), and of well-being freedom (in the form of minimal capabilities, e.g. having the means of avoiding hunger)" being viewed as rights that "command attention and call for support" (1985: 217; 2005). Fifth, more recent work has addressed the importance of extending the theory and practice of human rights beyond the legal domain. This includes an emphasis on the importance of 'imperfect obligations' to promote human rights – even where the claims are not legally codified (e.g. Sen 2000) and on the role of *public reasoning* rather than *fixed and final lists* in the selection and justification of human rights. The latter argument reflects Sen's emphasis on the constitutive role of democratic deliberation and debate in arriving at lists of capabilities (although more abstract processes of 'objective public reasoning' may also be required) (e.g. Sen 2004ab, 2005). Sixth, empirical work in economics has focussed on the analysis importance of human rights for public policy (with human rights figuring among the variables that influence the capability-achievements of individuals and groups) (e.g. Drèze and Sen 2002: 347-379).²⁰

19 A comprehensive examination of Sen's research agenda from the human rights perspective is provided in Vizard (2006).

20 In an important interpretative clarification, Sen (2005) contends that whilst many human rights can be viewed as capabilities, certain process freedoms cannot be adequately analysed in the capability framework. This proviso relates to the important distinction between process and opportunity freedom set out in footnote 7 of this paper. Sen (2002: 587) also explicitly recognises the overlaps between the two aspects and if a person value achieving something through free choice or through a fair choice (e.g. wanting to win an election fairly, rather than just winning) then the process aspect will have a direct bearing on the opportunity aspect of freedom. The working assumption of this paper has been that where human rights are shown to be highly valued (e.g. through recognition in the international human rights framework, and through the Equalities Review deliberative consultation), they figure in the assessment of the opportunity aspect of freedom, and can be analysed in the capability framework. Nevertheless, the measurement framework proposed in paper 1 recognises that information about the opportunity aspect of freedom (a person's ability to achieve valued outcomes) may require supplementation with information about process freedom (i.e. whether valued outcomes are arrived at through the free decisions of the person involved). C.r. sections 1.2.4 (especially f.n. 5) and 1.2.3 (especially f.n. 7); also see paper 1 (Recommendation 6 and sections 4.3 and 5).

3.1.2 Nussbaum's treatment of the capability approach and human rights

Nussbaum's more recent work has also placed a central emphasis on the links between the capability approach and human rights. The general correspondences between the capability approach and the idea of human rights are emphasized in Nussbaum (1995, 1997, 1999, 2003, 2004). Basic capabilities are conceptualised as needs for functioning that give rise to claims of assistance by others – giving rise to correlative political obligations on the part of governments, and encapsulating a key element in many contemporary notions of human rights (1995: 88). In linking the objective of “capability expansion” to the notion of obligation, Nussbaum further characterises central and basic capabilities as “fundamental entitlements” that should be protected in all Constitutions and included among the fundamental purposes of social co-operation as objects of collective obligation at both the national and the international levels (2003, 2004: 13). In addition, Nussbaum has emphasised the importance of codification and the correspondences between the “basic list” and internationally recognized human rights, with protection for liberty of conscience and religious observance built into element 6; non-discrimination and protection for freedom of assembly and speech into element 7; and political participation and protections of free speech and association into element 10 (2003: 41-42). Finally, in analysing the links between the capability approach and human rights, Nussbaum (2003: 38, 2004: 13) suggests that the “value added” of the capability framework over the human rights framework relates to the contested nature of the idea of human rights, and to the need to develop a framework for assessing human rights in terms of the states of being and doing that people actually can in practice realize (or achieve).

“[A] focus on capabilities, although closely allied with the human rights approach, adds an important clarification to the idea of human rights: for it informs us that our goal is not merely “negative liberty” or absence of interfering state action – one very common understanding of the notion of rights – but, instead, the full ability of people to be and to choose these very important things” (2004: 13).

3.2 Feedback and clarification (2): how does the proposed framework relate to the British Human Rights Act (1998)?

The statutory framework for the Commission on Equality and Human Rights is established in the Equality Act (2006). The Act brings together and builds on two areas of existing legislation: equalities legislation (the various pre-existing anti-discrimination and equalities provisions in British law) and human rights legislation (the British Human Rights Act 1998). The equalities framework and the human rights framework have evolved separately in the British context and their interactions raise a number of complex issues and debates that are currently under consideration by the Discrimination Law Review and are beyond the scope of this paper.²¹ The current discussion will be limited, therefore, to an analysis of the synergies and correspondences between the capability approach and the British human rights framework. It will concentrate on establishing and illustrating the ways in which the British human rights framework can be invoked to support the objectives of substantive freedom and equality (as well traditional understandings of non-discrimination, focussing on the interpretation of equal treatment as identical treatment).

3.2.1 The role of the British Human Rights Act (1998)

The Human Rights Act 1998, which came into force in Britain in 2000, incorporates the European Convention on Human Rights (ECHR) into UK domestic law. It gives statutory force to the fundamental human rights set out in the ECHR including life, prohibitions on torture and on inhuman and degrading treatment, fair trial, private and family life, free speech, free assembly, religion expression within the meaning of the HRA (see Box 16). The prohibition of discrimination under Article 14 of the ECHR provides a broad based prohibition of discrimination that has general application to cases of 'status based' differences in treatment.²² As well as providing individuals with enforceable human rights, the HRA establishes that it is unlawful for a 'public authority' to 'act in a way which is incompatible with a Convention right' (section 6). In this way, the Act introduces the requirement under domestic law that human rights such as the right to life, the right to privacy and family life and the right not to suffer degrading treatment should be taken into account by public authorities and in a wide range of public services including, for example, the police, the immigration and prison services, local authorities, housing, education, health services, social services and public care homes.²³

21 Issues relating to the extent of the protections relating to different groups and other issues are currently under consideration by the Discrimination Law Review. For details see <http://www.womenandequalityunit.gov.uk/dlr/index.htm>.

22 See, for example, Klug and Wildbore (2005: 3) for a discussion of the implications of the broad and non-exhaustive basis of the non-discrimination provision

23 The meaning of 'public authority' under the HRA and issues of gaps in protection raised by current jurisprudential interpretations of this phrase are currently under consideration by the Joint Committee on Human Rights. For further details of this review see http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchr231106pn03.cfm

Box 16: UK Human Rights Act, 1998

Convention Rights Set Out Section 1

Article 2 Life

Article 3 Torture/inhuman/degrading treatment

Article 4 Slavery and forced labour

Article 5 Liberty and security

Article 6 Fair Trial

Article 7 Punishment under the law

Article 8 Private and family life

Article 9 Freedom of thought, conscience and religion Article 10 Freedom of Expression

Article 11 Freedom of Assembly and Association

Article 12 Right to marry

Article 14 Discrimination

Article 16 Political activity of aliens

Article 18 Limitation on restrictions

First Protocol

Article 1 Property

Article 2 Education

Article 3 Free Elections

Thirteenth Protocol

Article 1 Death Penalty

3.2.1.1 The Human Rights Act and substantive equality

In what ways does the British Human Rights Act support the objectives of substantive freedom and equality (as well as traditional understandings of non-discrimination based on the interpretation of equal treatment in terms of identical treatment)? The jurisprudence of the European Court of Human Rights (which plays a key role in the development of case law in Britain) establishes two key principles here: the principle of ‘positive obligations’, together with key jurisprudential principles requiring the recognition and facilitation of differences in the needs and situations of different individuals and groups.

- **The positive obligations principle.** Under Article 1 of the ECHR, states are under an obligation to ‘secure to everyone’ the rights and freedoms set out in the ECHR. The ECHR has reasoned that the obligation to secure human rights for everyone can create a positive obligation on states to ensure that the exercise of the freedoms and rights set out in the ECHR are ‘practical and effective’ (rather than ‘theoretical or illusory’). Discharging this positive obligation may necessitate positive action by the state and resources. Similarly the obligation to respect private and family life can create a positive obligation to facilitate different ways of life.²⁴

²⁴ This principle was established in ground-breaking cases such as the *Airey v Law* case and has been repeatedly applied, developed and extended in subsequent case law. For summaries and full references see Klug and Wildbore (2005).

- **Recognition and facilitation of differences in need and situation.** The standard of 'equal treatment' developed and applied by the ECHR goes beyond the notion of identical treatment and addresses the recognition and facilitation of the different needs and situations of different individuals and groups. The ECHR has recognised, for example, that in order to avoid discrimination and to secure equal rights for everyone it can be necessary to treat individuals and groups differently because their needs and situations are not identical. The prohibition of discrimination under Article 14 do not always require everyone to be treated the same – but rather can involve groups being treated differently in order to 'correct factual inequalities' between them.²⁵

The ways in which these principles are reflected in the recent case law of the European Court of Human Rights – and the specific links with the capability concept – are examined in Fredman (2006a). In the British context, the principles set out above are not specifically spelt out in the British Human Rights Act (1998). However, the jurisprudence of the European Court of Human Rights is (and must) be taken into account by the British Courts; and there is a developing domestic case law recognising both the positive obligations on government and public authorities to ensure fair and equal treatment, and the need to recognise and facilitate difference through specially tailored provision (Klug and Wildbore 2005: 3-31). Furthermore, the positive obligations principle is associated with an alternative to the interpretation of section 6 of the HRA in terms of a 'passive compliance' model – with the general duties of public authorities under the HRA being viewed not only in terms of a minimal obligation to be in compliance with the human rights set out in the European Convention of Human Rights (within the meaning of the HRA), but also in terms of a positive duty of public authorities to give due regard to the protection of human rights. The positive duty concept is in turn becoming increasingly influential in the British context²⁶ and gives rise to an interpretation of the British Human Rights regime that is closely associated with the second generation of equalities legislation discussed in section (1.3.2) – with public authorities being required as a matter of law to adopt a positive/proactive/corporate approach (rather than a merely reactive approach) to the implementation of the Human Rights Act (Butler, 2005: 9-26).²⁷ In this sense, the British Human Rights Act not only incorporates the European Convention on Human Rights, but also has its own provisions that underline the importance of moving beyond a legalistic, formal rights model. In establishing an obligation on public authorities to deliver human rights, the section 6 provisions reflect the central emphasis of the capability approach on going beyond conventional human rights analysis, and securing the full ability of people to exercise their human rights in practice.

25 E.g The Belgium Linguistics Case (No 2) (1968) I EHRR 252. For relevant case summaries and full references see Klug and Wildbore (2005). Edmundson *et al* (2005: 3) suggest that under the jurisprudence of the ECHR there can be a requirement to treat groups **unequally** in certain circumstances in order to 'correct factual inequalities between them'. It is important to note that, when seen from the capability perspective, the application of the standard of needs based differential treatment can be elucidated as a principle of *equal treatment* rather than as a principle of *unequal treatment*. The relevant standard might be expressed in terms of non-identity of treatment rather than in terms of inequality of treatment as follows: The ECHR does not require everyone to be treated **identically** in order to avoid breaching Article 14 (prohibition of discrimination). Rather, the principle of equal treatment can itself require that due consideration is given to needs, situations and other interpersonal and contextual variables. This principle can accommodate and require where necessary the non-identical treatment of individuals and groups. C.r. section 1.3.2.1.

26 For example: 'Now public authorities have to be proactive in their dealings with the public in order to ensure that all these basic rights are respected' (Lord Falconer 2004, cited in Butler (2005: 16).

27 Edmundson *et al.* (2005) suggest that the human rights principles highlight the importance of *outcomes* as well as *processes*. The human rights approach to fair treatment requires not only eradicating discrimination, but also recognises that certain outcomes need to be guaranteed in order to facilitate full and equal participation and to allow individuals to achieve their potential. On the argument for a new outcome orientated public duty of equality in Britain, see Fredman and Spencer (2006).

3.2.1.2 Moving beyond the complaints based model

There are by now numerous examples of how the human rights framework can be extended beyond traditional litigation and complaints-driven models to provide an overarching framework for public policy and public service delivery in areas such as health, housing and social care. The advantages of moving beyond litigation and complaints-led models and developing and applying human rights principles as an overarching framework for public service delivery has been recognised by the Audit Commission (e.g. Audit Commission 2003). The rationale for this approach includes pragmatism (to prevent human rights based complaints and litigation); equity (with vulnerable people often less likely/able to complain); and because human rights law can be instrumental as a policy tool for improving quality in public service provision (by focusing public service delivery on service users, and helping to ensure that service provision meets the needs of individual service users (Butler 2005, Audit Commission 2003). Organisations such as the British Institute of Human Rights have highlighted the ways in which the human rights framework can be invoked in the public services context with a view to moving beyond the 'identical treatment' interpretation of equal treatment and promoting the three core objectives of respecting difference; making adjustments for difference; and ensuring that all public service users are treated with dignity and respect (Edmundson et al 2005; Butler 2005). As well as relying on provisions under the Human Rights Act for ensuring equality and fairness, this approach is underpinned by the principle that all users of public services should be treated with dignity and respect (derived, for example, with reference to the protection of the human right to freedom from degrading treatment under the HRA). Human rights standards have been invoked, for example, to make the case for new policies to recognise and facilitate the different needs of people with disabilities in relation to independent living (DRC, 2006); to challenge the poor treatment of vulnerable groups such as the elderly, children, people with disabilities and users of mental health services in a wide variety of contexts (Edmundson *et al* 2005); and as a policy framework for longer-term transformation and change with respect to the quality of care (e.g. Townsend 2006, Age Concern 2006).

Box 17: The human rights vision of equality

Organisations such as the British Institute of Human Rights have argued that core values such as fairness, respect, equality, dignity and autonomy can be deduced from the Human Rights Act (1998) and applied as an overarching framework for public service delivery. In this way, the British Human Rights Act extends beyond traditional notions of equal treatment in terms of 'identical treatment' and supports the objectives of fairness, dignity, respect and access to the fundamental rights that enable participation in a democratic society

Source: Edmundson *et al* (2005)

3.2.2 Why retain an emphasis on the international human rights framework in the British context?

A key recommendation of this paper is that the development and application of a human rights based capability list by the Equalities Review should refer to the international human rights framework (rather than the HRA alone). It is critical to note here that both the Human Rights Act (1998) and the European Convention on Human Rights fail to incorporate the set of economic, social and cultural rights reflected in the International Convention on Economic, Social and Cultural Rights (Box 16). Whilst acknowledging the argument that the application of the provision for non-discrimination under the HRA (corresponding to Article 14 of the European Convention) does not require a breach of a substantive right (a view expressed, for example, in Klug and Wildbore 2006: 4), it nevertheless remains that the task at hand is to develop a framework for the Equalities Review to develop an agreed list of central and basic capabilities. This objective raises the need to identify and justify the constituent elements of human freedom that can provide a basis for a capability list and provide a comprehensive definition of the domains with which equalities policy should be concerned. As discussed in section 1, the key role of a capability list is to provide a more complete and specific answer to the question: *Equality of What?* The issue here is not only the coverage of a theory of equality in terms of population groups, but also coverage in terms of domains or dimensions of human freedom. When viewed from this perspective, the omission of the full range of economic, social and cultural rights from the HRA is clearly problematic.²⁸

28 There is a broader point here about the ability of the human rights framework to provide an appropriate normative focus for the analysis of human rights issues in the social sciences. Even if the HRA can be extended and applied to cover certain aspects of social, economic and cultural rights, the failure of the HRA to give clear and explicit coverage to the full range of social, economic and cultural rights remains problematic for the current discussion.

3.2.2.1 Issues raised by the proposed reliance on the international human rights framework

The proposal that the development and application of a human rights based capability list by the Equalities Review should be based on the international human rights framework (rather than the Human Rights Act alone) is underpinned by the broad, sustained and on-going nature of British commitment to international human rights treaties. As well as adopting the Universal Declaration of Human Rights, the UK is party to the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights, as well as to a wide range of other legally binding international human rights treaties (Box 18). To this extent, in seeking evidence of a 'pragmatic consensus' in relation to the domains of human freedom that people value and have reasons to value, the international human rights framework appears to provide a legitimate point of departure for the Equalities Review. On the other hand, there could be important drawbacks, and many of the potential limitations of this approach have been highlighted in feedback and consultative events organised by the Equalities Review. Not only are international enforcement procedures under international human rights law notoriously weak, but the standards set out in international human rights treaties are not automatically incorporated into domestic law. For example, although the UK regularly reports to the UN Committee on Economic, Social and Cultural Rights in relation to its obligations under the International Covenant on Economic, Social and Cultural Rights,²⁹ this Committee has highlighted the failure of Britain to incorporate the full range of economic, social and cultural rights into domestic law.³⁰ Furthermore, the public are relatively unfamiliar with the content of international treaties and unaware of the nature and scope of the human rights that they codify. In addition, at a Seminar specifically convened to examine the proposal set out in section 2.1, participants raised a number of concerns regarding the 'watering down' of established and legally binding human rights standards. These related to both the fact that the capability approach does not itself impose legally binding obligations on governments, as well as to the proposed linkage with the international human rights framework rather than the British Human Rights Act, and the potential 'watering down' of established and legally binding human rights standards that this might imply (OPM 2006).

29 The official position is that the United Kingdom has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has agreed to provide periodic reports to the United Nations Committee on Economic, Social and Cultural Rights covering not only the United Kingdom but also the British Overseas Territories and the Crown Dependencies. The United Kingdom is also required to publish the reports and the Committee's Concluding Observations. The Department for Constitutional Affairs is responsible for coordinating the preparation of the reports to the Committee on Economic, Social and Cultural Rights. See www.dca.gov.uk

30 'The Committee deeply regrets that, although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has still not been incorporated in the domestic legal order and that there is no intention by the State party to do so in the near future. The Committee reiterates its concern about the State party's position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justiciable, and that consequently they cannot be given direct legislative effect' (UN Committee on Economic, Social and Cultural Rights (2002: para.11).

Box 18: UK ratification of core international human rights treaties

	Signature	Ratification/Accession Acceptance/Succession (reservations not indicated)
International Covenant on Economic, Social and Cultural Rights New York	16 Sep 1968	20 May 1976
International Covenant on Civil and Political Rights	16 Sep 1968	20 May 1976
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	15 Mar 1985	8 Dec 1988
Convention on the Rights of the Child	19 Apr 1990	16 Dec 1991
Convention on the Elimination of All Forms of Discrimination against Women	22 Jul 1981	7 Apr 1986
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women		17 Dec 2004
International Convention on the Elimination of All Forms of Racial Discrimination	11 Oct 1966	7 Mar 1969

Source: www.ohchr.org**3.2.2.2 The duties of the Commission for Equality and Human Rights established in the Equality Act 2006**

The duties of the Commission for Equality and Human Rights are established and spelt out in Part 1 section 3, and sections 8 and 9, of the 2006 Equality Act. In addition to the duty to encourage public authorities to comply with section 6 of the Human Rights Act 1998, the Commission on Equality and Human Rights is charged with three further duties that relate to the active promotion of human rights. These are the duties (1) to promote understanding of the importance of human rights; (2) to promote good practice in relation to human rights; (3) to promote awareness, understanding and protection of human rights. In this way, the Commission is explicitly charged with the duty of actively promoting human rights (as well as encouraging compliance with section 6 of the HRA). The term 'human rights' is defined in section 9 of the Equality Act (2006) in the following way:

... human rights means

(a) the Convention rights within the meaning given by section 1 of the Human Rights Act 1998; and

(b) other human rights.

There are, then, two parts to the definition provided. First, the range of human rights enumerated in the European Convention of Human Rights (within the meaning set out in section 1 of the Human Rights Act 1998) fall within the scope of the definition of human rights. The specific duties of the Commission on Equality and Human Rights are spelt out primarily with respect to (a) (with the definition of specific duties and unlawful acts referring to the 'equalities and human rights enactments', which are in turn specified in terms of Equalities Legislation and the British Human Rights Act 1998). However, the range of human rights relevant to the work of the Commission is not *limited* to Convention rights under the Equality Act. The definition of human rights in the general duties section (b) also includes 'other human rights'. The term 'other human rights' is not specified in the Act and might reasonably be interpreted and elaborated in terms of a fuller range of British human rights commitments (including international human rights treaty commitments and regional commitments, in addition to the European Convention on Human Rights, the European Social Charter and relevant instruments of the European Union) and with respect to established international human rights jurisprudence (taking account, for example, of the principles established in the jurisprudence of the European Court of Human Rights). In this sense, the recommendation that development and application of a human rights based capability list by the Equalities Review should refer to the international human rights framework (rather than the HRA alone) is consistent with the statutory framework of the Commission for Equality and Human Rights established by the Equality Act 2006.

3.3 Feedback and clarification (3): is the human rights based approach too 'minimalist' in the British context?

Proposals for adopting the international human rights framework as a basis for selecting and justifying a core list of capabilities might be criticised on both procedural and substantive grounds. Important limitations of the international human rights framework have been highlighted, for example, in the legal, power-based and feminist critiques (including the traditional greater emphasis on civil and political rights and the traditional downgrading of global poverty issues, weak enforcement mechanisms, limited procedures for democratic accountability and participation, and the ways in which the international legal system can function to promote power-based interests). A list of central and basic capabilities generated on the basis of internationally recognized human rights might be criticized, therefore, on both procedural grounds (in terms of the need for greater democratic accountability and participation) and on substantive grounds (in terms of both the capabilities included and those that are de-emphasised or excluded).³¹ A "human rights-based capability list" derived from international treaty commitments might be criticised for being too "minimalist" – both in terms of dimensions, and in terms of thresholds. As discussed in section 2.3, the Equalities Review must decide, therefore, whether the human rights based approach is best viewed as providing a *partial* or a *complete* basis for its work.

31 In the broader literature, criticism of the international human rights framework also relate to the implementation of human rights standards in different developmental and institutional contexts, and to the relationships of power and inequality that underlie the fact that global poverty and associated deprivations are often downgraded and neglected as human rights issues. Other concerns relate to the traditional relative neglect and downgrading of human rights that are central to the freedom of women (e.g. concerning, for example, reproductive choice, sexual violence and harassment) as well as the relative neglect in the international human rights framework of the capability to care for children and elderly and disabled relatives. For the legal, power based and feminist critiques, see, for example, Gearty (2004), Chomsky and Herman (1979) and Nussbaum (2003: 37). References to the literature on civil and political rights and different developmental/institutional contexts are given in McKay and Vizard (2006, 44).

3.3.1 Minimalism: The question of dimensions

A particular concern relates to the possibility that central and basic capabilities might be 'lost' through the adoption of an exclusively human rights based approach. For example, the capability to care for a dependent relative such as a child or an elderly person is increasingly articulated in the broader literature on the capability approach. However, can the individual and social importance of the capability to care be adequately reflected in a human rights based approach, or is the development of other supportive principles required? For example, the Convention on the Rights of the Child established legally binding international obligations to ensure adequate protection for children. Adequate protection for the evolving capacity of children is in turn often interpreted in terms of adequate care and attention (including love and affection). The human right to family life is also increasingly interpreted as extending to the capacity to care, with the jurisprudence of the European Court of Human Rights supporting broad interpretations that interpret parental leave as falling within the ambit of Article 8 of the European Court of Human Rights.³²

3.3.1.1 The enjoyment of self-respect

The individual and social importance of the capability of self-respect has been repeatedly highlighted in Sen's work and in the broader literature on the capability approach. Can the individual and social importance of self-respect be adequately reflected in a human rights based approach? Arguably, the international human rights framework can also be meaningfully and coherently viewed as providing implicit support for a capability of this type. Justification of this interpretation could be made with particular reference to:

1. The emphasis on dignity in the Preambles to the ICESCR and the ICCPR;
2. Provisions for the prohibition of advocacy of national, racial or religious hatred under Article 20 of the ICCPR;
3. Prohibitions on inhuman and degrading treatment in the ICCPR;
4. The inclusion of the term 'adequacy' in the recognition of the human right to an adequate standard of living under Article 11 of the ICESCR. Arguably, this formulation introduces a degree of relativity into judgements about the fulfilment and non-fulfilment of the human right to an adequate standard of living that can be partly elucidated in terms of the notion of self-respect).

32 As discussed in Fredman (2006a).

In the British context, the ways in which provisions under the British Human Rights Act (1998) support the principles of dignity and respect are central to the emerging human rights model of public services reform discussed above. Organisations such as the British Institute of Human Rights have invoked provisions of the Human Rights Act (1998) including the prohibition on degrading treatment to argue that (1) all users of public services are entitled to be treated with dignity and respect and that dignity and respect should be core values of public service delivery; (2) that dignity and respect are themselves the social bases of self-respect. For example, the recent Department of Health initiative *Dignity in Care* aims to 'place dignity and respect at the heart of caring for older people'. The British Institute suggest that this objective be elucidated in terms of the kinds of care that support and promote, rather than undermine, a person's self-respect (BIHR 2006). If this argument is accepted, there would be grounds for expanding the list of central and basic capabilities recommended in List (1) to include self-respect.

3.3.2 Minimalism: Thresholds v relative gaps/distribution

The Equalities Review Interim Report proposes:

'a basic minimum set of capabilities which everyone has to possess in order to play a proper, autonomous part in society at all. This includes some aspects of human rights as well as some basic entitlements ... But it must also include the basic capacity to function in a modern society ... having reached basic educational standards, essential knowledge to take advantage of citizenship, being able to communicate with most other people, preferably in English, Welsh or sign' (Equalities Review 2006: 8).

Does the human rights approach provide an adequate foundation for this argument, or are other principles and values required? A key issue here concerns the distinction between poverty (disadvantage below a threshold) and inequality (relating to the distribution of disadvantage across a population). In the income-focussed literature, poverty analysis focuses on income-deprivation below a certain threshold, whereas inequality analysis focuses on differentials and relative gaps – on the question of where individuals and groups are in the overall income distribution, with equality being interpreted in terms of a flat or equal income distribution. Analogously, the shift to the capability perspective gives rise to a minimum threshold perspective (deprivation in capability-freedoms below a minimum threshold) and an inequality perspective (the question of whether individuals and groups are in the overall distribution of capability freedoms). If a threshold approach is adopted, then an analogous question relates to the critical level at which the threshold is to be set, and the way in which the appropriate threshold is to be specified: are these to be approached in a way that prevents the worst abuses (eg freedom from hunger or nutrition), or in a way that is orientated towards and appropriate for 21st century Britain? The question, then, is whether the human rights approach can *adequately* and *completely* cover both perspectives.

3.3.3 Minimalism: Is it a valid critique?

The validity of the 'minimalist critique' of the human rights approach was challenged in feedback to the Equality Review and in a seminar convened to examine the relationship between the capability approach and human rights. Participants and the latter acknowledged that the human rights framework might not provide a complete justification for full equality. However whereas some participants emphasised the ways in which the human rights framework provides a basis for the enforcement of minimum standards, others emphasised both the ways that the international human rights framework is being developed and applied in the context of contemporary democracies as well as in the developed country context. The development and application of the international human rights framework includes, for example, the specification of relevant and context variable standards and principles. In the British context, these include the principles of fairness, dignity, respect and access to the fundamental rights that enable participation in a contemporary democratic society. The principle of dignity and respect in public services, for example, goes beyond 'minimalism' by focusing public services on service users and addressing the quality of care that should be provided in a developed democracy. Another issue relates to the ways in which the human rights framework focuses attention on the *range* of deprivations that can result in failure of the basic capability threshold. The underlying point here is that the capability threshold be conceptualised and operationalized in terms of the full range of capability deprivations that can result in an individual falling below the requisite threshold – rather than the analysis being limited to, for example, education and skills. Capability failure can for example include a human rights dimension – with individuals and groups failing to reach the requisite capability threshold because of lack of dignity and respect in their treatment by public services (OPM 2006, Edmondson *et al* 2005, Butler 2006).

3.3.4 Why retain a key role for public consultation and debate?

This paper recommends that a human rights-based capability list of the type discussed in section 2.1 can provide a basis for conceptualising and measuring human equality in a broad range of dimensions that are of relevance to the work of the Equalities Review. It has the advantage of drawing on existing processes of international consensus-building around the central and basic freedoms that are of value in human life and that are at least in part deliberative and democratic (rather than being purely of an “expert” or “technocratic nature”). Another advantage is that the proposed human rights based capability list provides an analytical bridge with on-going attempts to invoke broad based human rights values and principles as a basis for the promotion of equality in Britain. However, the human rights based capability list has a number of possible important limitations. Key issues concern the question of “minimalism” (i.e. whether the human rights based approach is overly restrictive in terms of both dimensions and thresholds) and the nature and scope of the British human rights regime (especially the failure of the UK Human Rights Act to incorporate the full range of economic and social rights reflected in international human rights law). Furthermore, the ‘constructive role’ reserved for democratic deliberation and debate in both the theoretical conception and practical application of the ‘capability approach’ suggests the need for a process of public consultation and debate about the central and basic capabilities that ought to be included in a ‘capability list’. As well the possible need to supplement “human rights based capability lists” with other central and basic capabilities with an alternative basis for justification (discussed above), the “capability framework” itself invites public discussion and dialogue (by placing emphasis on the need for open, fair and participative methods for selecting basic and central capabilities). For these reasons, this paper recommends that the core list of central and valuable capabilities derived from the international human rights framework should be firmly embedded in a broader processes of democratic consultation and debate. Other open, fair and participative exercises aiming at the development of an “agreed” capability list for the Equalities Review are also required; and the core list of central and valuable capabilities derived from the international human rights framework is supplemented and refined through a process of democratic consultation and debate.

Conclusion

The aim of this paper has been to set out a framework for the Equalities Review to develop an agreed capability list that can provide a foundation for the conceptualisation and measurement of inequality in Britain. Before the capability approach can be applied in practice in any particular context, agreement is required both in terms of procedure (i.e. the process of generating a capability list) and substantive content (i.e. the range of capabilities that are to be included). This means that, in taking the capability approach forward as a basis for conceptualising and measuring inequality in Britain, the Equalities Review needs to develop an explicit procedure for selecting the key 'capability freedoms' in terms of which the position of individuals and groups are to be examined and appraised.

In reviewing the methodologies for capability list generation in the broader literature on the capability approach, the paper has highlighted a number of general methodological principles that have been developed to avoid selection bias and ensure that open, fair and participatory methods of capability selection are adopted. It is recommended that, in developing an agreed capability list, the Equalities Review should adhere to these principles.

The paper also placed particular emphasis on the ways in which existing international human rights commitments can provide a pragmatic starting point for generating human rights-based capability lists. A human rights-based capability list based on the broad range of human rights codified in international human rights law has been set out for this purpose. It has been argued that a human rights-based capability list of this type provides appropriate foundations for the work of the Equalities Review by providing the basis for a pragmatic consensus regarding the protection and promotion of equality across population groups with respect to thirteen constituent elements of human freedom. It has been recommended that a 'human rights-based capability list' of this type be adopted by the Equalities Review as a pragmatic starting point for the development of a capability list. It has been further recommended:

- The human rights based capability list should be derived from the international human rights framework, rather than being based exclusively on the British Human Rights Act (1998);
- A human rights-based capability list should be viewed as constituting the *irreducible core* of a capability list;
- That, beyond the irreducible core, supplementation, refinement and revision of the capability list is possible through a range of additional methods discussed in the literature (e.g. philosophical reasoning, participative methods, social scientific research, other types of pragmatic consensus).

Finally, it has been argued that the 'constructive role' reserved for democratic deliberation and debate in both the theoretical conception and practical application of the capability approach suggests the need for other open, fair and participatory exercises aiming at the development of an agreed capability list for work of the Equalities Review. It has been recommended, therefore, that the core list of central and valuable capabilities derived from the international human rights framework should be supplemented and refined by a process of democratic deliberation and debate.

The need to develop open, fair and participative exercises aiming at the selection and justification of a list of central and valuable capabilities was foreseen by the Equalities Review in its Interim Report. The Equalities Review subsequently commissioned Ipsos-MORI to undertake a deliberative consultation on the selection of central and basic capabilities with the general public and individuals and groups at high risk of discrimination and disadvantage. The paper has reported the results of the deliberative consultation and has recommended that the capability list adopted by the Equalities Review is supplemented and refined on the basis of these results.

A capability list setting out ten central and valuable capabilities that have been selected and justified through the above two-stage procedure has finally been proposed. The paper has finally recommended that this capability list (List 3) is adopted by the Equalities Review as a basis for the conceptualisation and measurement of inequality in Britain.

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