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MANUAL ON THE HUMAN RIGHTS TO SAFE DRINKING WATER AND SANITATION FOR PRACTITIONERS

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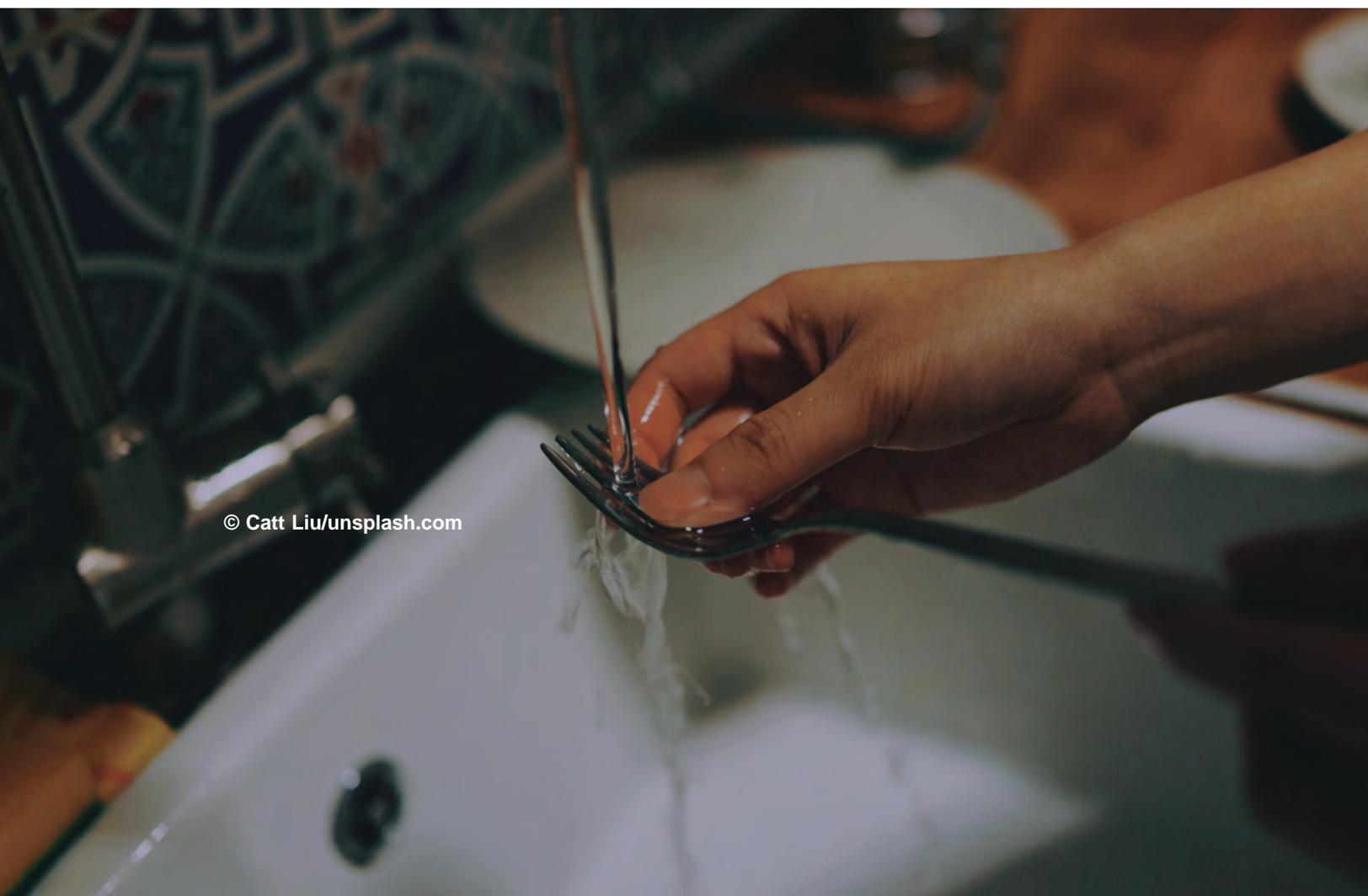
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Domestic water use at a pump in a village near Luang Prabang, Lao People's Democratic Republic (LPDR) © Robert Bos, IWA



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Chapter 5 Incorporating the human rights to water and sanitation into the operational and institutional framework of service providers and regulators

SYNOPSIS

At the core of progressive realisation of the HRWS is the way by which service providers put into practice the human rights criteria and principles in their day-to-day operations. This chapter introduces the various models of service delivery and the associated institutional arrangements specific to promoting the HRWS. It provides a checklist of issues that drinking water and sanitation operators may want to use in the process of restructuring their organisation and in negotiations with national authorities. The chapter concludes by addressing the framework for regulators to play their role in relation to respecting, protecting and fulfilling the HRWS.

5.1 INTRODUCTION

Governments are the ultimate duty bearers for the obligations related to the human rights to safe drinking water and sanitation. Yet, their direct role in service provision may be limited or non-existent. Their principal task is to create the enabling environment to support other actors in optimally performing the tasks related to their responsibilities for the common good of drinking water supply and sanitation. The HRWS does not prescribe or even express a preference for a model for service delivery, it simply demands that government actions, including the actions delegated to third parties, are carried out in compliance with the HRWS criteria and principles.

The key principle of progressive realisation of the HRWS (see Annex A) does not only imply a steady and tangible reduction in inequality and discrimination in service delivery, but also a maximum resource allocation to the actions supporting this progressive realisation. This applies to direct government actions and delegated actions alike.

5.2 SERVICE PROVISION MODELS

The nature and size of entities engaged in water and sanitation service provision show a high level of diversity.

It is the norm, in any given territory, that a public authority has the overall responsibility for the delivery of drinking water/sanitation services. This may be a ministry, another institution part of the central Government, a department of a local government or a dedicated institution such as a water board. Its primary role is to establish a policy framework, formulate regulations, fix targets, priorities and tariffs, and to ensure that these services are delivered effectively to end-users. The authority and capacity to

Human Rights To Safe Drinking Water And Sanitation

organise public water services is usually attributed to this entity by law. Obviously, it has to respect the HRWS. The public authorities with the overall remit to ensure protecting and fulfilling the different criteria and principles of the HRWS may be different from the public authority responsible for service delivery, although the latter usually plays a major role in progressively extending access to all.

Different types of operator contribute to the delivery of these services. In a considerable number of areas the population receives services through more than one, as, for example, in the case of a public utility that mandates another operator to undertake part of the service or one operator selling water in bulk to another.

From the perspective of the HRWS, the type of public authority responsible for delivery of the services falls into one of three categories with respect to the effective supply of water/sanitation services. The nature of the relationship between the responsible public authority and the water operators contributing to delivering the service determines the differences between these three categories:

- (1) the public authority delivers these services directly to water-users. In this case, the authority and the operator are the same legal entity;
- (2) the public authority mandates (or authorises) and regulates a third party, public or private, to deliver the service (partly or totally) to water-users and provides it with the appropriate instructions;
- (3) the service is delivered by operators whose activity is not organised and not regulated (or only loosely regulated) by the public authority.

Service providers pertaining to the first two categories act with an official mandate. They are referred to as “formal operators”. Service providers in category (3) are referred to as “informal operators”.

From the HRWS perspective these categories also differ, because the actions to be taken by the public authority responsible for water/sanitation services are different (AquaFed 2010):

- Those in the first category must satisfy by themselves the State’s obligations to fulfil the HRWS progressively while respecting it; and, protect it where it is already satisfied.
- Those in the second category must ensure that the State’s obligations to fulfil the HRWS are satisfied progressively by the operators under their mandate; ensure that these operators respect the HRWS; and, protect the HRWS where it is already satisfied.
- Those in the third category must protect the HRWS and ensure that the HRWS is respected by informal operators. However, this authority often lacks the capacity to enforce the expansion of the service to all, as required by progressive realisation of the rights.

There is also considerable diversity in the legal status of formal service providers. They can be State-owned and managed, pertaining entirely to the public sector, they can originate from investment with private capital, pertaining entirely to the private sector, or they can be based on a model anywhere in between these two ends of the spectrum, including parastatal organisations, city-owned corporations, public–private partnerships or customer-based cooperatives. In addition, non-governmental organisations and community-based organisations can fill the gaps for communities where services are not yet provided by either public or private entities. Globally, service providers with full or partial State ownership are in the majority.

Just as there is a great diversity in organisational and business models, there is also diversity in scale and levels of decentralisation: apart from situations where the provision of water and sanitation services is a State monopoly, there are some countries with a limited number of regional providers, and others where the responsibilities for service provision have been devolved to the local or district level, resulting in large number of relatively small providers. Yet, all these models fit within legal and regulatory frameworks set up by governments, and all contractual arrangements, licenses or concessions to provide

Incorporating the human rights to water and sanitation into the operational

water and sanitation services also have to fit within these national frameworks, or within the local legal/regulatory frameworks that are derived from national frameworks.

In addition, informal service providers – individuals or small informal enterprises – often have the largest part of their customer base among marginalised, vulnerable or underprivileged communities, where neither public nor private organisations, nor even NGOs, have an outreach. There are also informal service providers in potentially wealthier areas where there is no public service. Services organised by property developers independently from public networks, by industries in towns built for their workers, or by non-regulated NGOs and CBOs fall into this category as well. The informal service providers are probably hardest to engage in actions supporting the progressive realisation of the HRWS. Yet, it is also the group most critically linked to the households and individuals suffering from inequality and discrimination, such as those in informal settlements in peri-urban areas, often outside of municipal jurisdiction or concessional supply area. By definition, they operate outside of existing regulatory frameworks. Their operations are tolerated to a varying extent in different countries. Tolerance is inspired by the recognition that they provide services that would otherwise be lacking - services with a reasonable level of reliability, although often not adhering to established tariffs and quality standards.

5.3 CATEGORIES OF INSTITUTIONAL ARRANGEMENTS

Similar to the wide spectrum of organisational models, a range of institutional arrangements make these models work. The State, as the duty bearer for progressive realisation of the HRWS, must ensure its obligations are effectively allocated, accompanied by the provision of effective jurisdiction, capacity and capability development. In essence, the relevant public authority must organise the work of the formal providers under its mandate effectively.

The simplest situation is where the provision of water supply and sanitation services is the exclusive responsibility of a government organisation within or affiliated with a ministry. In this case, the mandated Minister will have a direct say over the incorporation of HRWS criteria and principles into the management processes of the organisation, to ensure government obligations are adequately met. There is an important role for parliament in such cases, to ensure that the political leadership adheres to the HRWS criteria and principles. In some settings, parliaments may establish independent verification mechanisms of a temporary or permanent nature. The role of parliament also opens up important lobbying opportunities for providers of water and sanitation services, including NGOs, to promote HRWS issues.

This arrangement can also be effective at a different level of government, when the provision of water supply and sanitation services is the exclusive responsibility of a local government department. In this case it is crucially important there is an effective chain between central government (usually the Ministry of Internal Affairs or of Local Government), the local government and the specific department in charge of service provision, in terms of transfer of information and resources specific to the progressive realisation of the HRWS.

One step away from this is the parastatal organisation, with the status of responsible authority, operating independently from any of the ministries, but under the supervision of a government-appointed board. The mission, roles and responsibilities of the board and management will be defined in a constitution or charter compatible with the relevant part of the legal framework. The board oversees whether the organisation's operations are carried out satisfactorily within the boundaries of the given license or mandate. The national level (government and parliament) has the possibility (and in fact, as part of its international commitments, is obliged) to include HRWS as an issue to be regularly scrutinised by the board, so as to ensure that effective steps in progressive realisation are being made by the management, and no regression occurs.

Human Rights To Safe Drinking Water And Sanitation

Public–private partnerships (PPPs) are arrangements that ensure the delivery of public services in a defined territory, funded and operated through a partnership between the relevant public authority and one or more private sector entities. PPPs for the provision of water supply and sanitation services are based on contractual agreements between the responsible public authority and one or more private sector entities, covering service obligations (such as tariffs), operational responsibilities, the capital investment shares of all parties, as well as the arrangements for sharing often substantial financial, technical and operational risks. Public sector operators acting in competitive markets may also be the “private party” of a PPP contract.

In many instances the public authority responsible for organizing services in a territory mandates a public entity that is not under its direct legal control. For example, a local government may use a public utility organized by another local government or by several local governments. In that case the responsible authority provides a licence to operate or signs an agreement with the external utility. Another example is that of a private entity that owns the water and sewerage infrastructure and delivers services according to a licence/authorization issued by the responsible public authority (as is the case for water supply and wastewater management in England and Wales, or in Chile).

Within the contractual arrangements, governments, as the duty bearers for the HRWS, have to ensure not only that the relevant criteria and principles are addressed as part of the process of progressive realisation, but also that government obligations are transferred, as appropriate, to the private sector partners. The concept of maximising resources for progressive realisation of the HRWS is critical in this case. Efficiencies gained should translate into a more rapid progressive realisation. At the same time, the various mechanisms open to government to contribute to the PPP also offer opportunities to specifically promote HRWS objectives, in a way that helps overcome financial obstacles that may otherwise impede affirmative action by the private sector partners. Any HRWS-specific arrangements will have to be anchored firmly in the PPP contractual agreement.

The negotiations about the objectives, scope and detailed contents of the license/contract should leave ample room to consider the effective incorporation of HRWS issues. The fulfilment of government obligations towards HRWS can be supported by the incorporation of service conditions and targets, infrastructure expansion objectives, rights-specific performance indicators (i.e. reduction in inequalities), dedicated reporting as well as tariff mechanisms of (cross)-subsidies that benefit the underprivileged and people living in remote areas.

Cooperative utilities (entities operating under a government concession, managed as a private enterprise but owned by the customers; example: Saguapac in Santa Cruz de la Sierra, Bolivia) are a special case with many similarities to the above categories, since the government has to impose HRWS obligations through a licence to operate. The case of Saguapac is a cooperative model based on a public–private arrangement: public for the property of the assets and private because the company’s shares are owned by its customers. Its governance is rooted legally in the Bolivian General Law on Cooperatives. A major challenge in Santa Cruz (estimated population 2.4 million) is the expansion of sewage coverage, which currently stands at only 38% - from a human rights perspective this requires a focus on peripheral communities, but these fall outside the jurisdiction of Saguapac and the level to which it can perform functions for the smaller cooperatives operating there is limited by law.

The Handbook on Realizing the Human Rights to Water and Sanitation by Catarina de Albuquerque provides a checklist for government authorities of the HRWS issues that need to be addressed in negotiations over any contract, concession or licensing document, from the government perspective. It is presented in Box 5.1 because it is important that providers and regulators are aware of the checklist of recommended issues used by their counterparts at the negotiating table. A checklist developed for this Manual of considerations for agencies providing the services under whatever kind of contractual arrangements is presented immediately after this box.

Incorporating the human rights to water and sanitation into the operational

Box 5.1 Checklist for national/local authorities

1. A clear definition of service providers' human rights responsibilities with respect to the human rights to water and sanitation.
2. Explicit integration of human rights standards, including:
 - a. Water quality standards and targets that protect human health (as laid down in the WHO Drinking Water Quality Guidelines).
 - b. Service level targets to be met, including affordability, accessibility, safety, acceptability, sustainability.
3. Performance targets that include delivering services to unserved and underserved areas, and specify investment plans to address inequalities in access between different areas.
4. Incentives to deliver services to disadvantaged areas or households.
5. Clarity on how tariffs or other charges are set. Clarity on pro-poor pricing arrangements, subsidies and alternative methods of payment, and protection for low-income households in times of economic or other crises. Disconnections permissible only after full review of reasons for non-payment, with a ban on disconnections due to inability to pay.
6. Relevant information about the service must be available to users, and transparency should not be undermined by commercial confidentiality.
7. Meaningful participation of those for whom the services are intended in decisions that will affect their enjoyment of the human rights to water and sanitation.
8. A clause obliging service providers to ensure training in the necessary skills and knowledge for municipalities and regulatory bodies to fulfil their regulatory roles.
9. Clarity about how profits for shareholders can be limited and are regulated.
10. Clear monitoring and oversight mechanisms that scrutinise compliance with the established standards.

Source: Albuquerque, C. de (2014) Realizing the Human Rights to Water and Sanitation: a Handbook by the UN Special Rapporteur Volume: Planning processes, service providers, service levels and settlements.

Utilities and other providers must abide by the HRWS and contribute to their realisation in their service area. This implies considering the HRWS both when they interact with public authorities and in their operations. The following checklist presents the issues that may be raised in contract/licence/mission negotiations with public authorities.

Checklist for utilities and other providers

1. Request a clear set of goals and policy objectives relating to the progressive realisation of the human rights to safe drinking water and sanitation, as appropriate within the overall remit of the organisation/enterprise.
2. Agree on performance standards and indicators that relate to these goals and to the HRWS criteria and principles, to monitoring compliance and progressive realisation in the service areas.
3. In situations with multiple service providers, request clarity on their respective roles in relation to the HRWS policy and obligations of public authorities.
4. Present an in-depth overview of the structure and functions of the organisation/enterprise to identify options for modification and strengthening in favour of the full integration of visible and effective HRWS actions, and establish a routine of periodic review of the structure and functions for further incremental improvements in this respect.
5. Emphasize the need for baseline surveys of coverage by the drinking water supply and/or sanitation services in the mandated area or area under jurisdiction, with a focus on marginalised and

Human Rights To Safe Drinking Water And Sanitation

underprivileged groups, informal communities and individuals/groups with special conditions (handicapped, elderly, HIV-positive individuals, homeless, institutionalised people).

6. Analyse existing baseline survey data to determine, for the various customer groups, which criteria and principles require priority attention and discuss these needs.
7. Present the options for corporate in-service training programmes to enhance awareness, knowledge and capacities with respect to the HRWS of all staff throughout the organisation/enterprise.
8. Request and define the context of community awareness programmes as part of the customer relations activities to educate current and potential future customers about the HRWS and in particular, their position as rights-holders and the implications in terms of rights and responsibilities.
9. Present options to strengthen essential support functions (human resources management, a monitoring system, a customer complaint mechanism, anti-corruption measures, liaison with national human rights authorities, with other relevant public sectors and with a possible national regulator) to ensure optimal resource use for the progressive realisation of the HRWS.

5.4 THE REGULATORY FRAMEWORK

The regulatory framework for drinking water supply, sanitation and wastewater management services is a combination of standards, criteria, good practice, rules and requirements that have to be respected by service providers, and of institutions that apply and enforce them. As defined by the IWA Lisbon Charter, regulations are established by the executive branch of government at central and local levels (see Chapter 4) to create, limit or constrain a right, create or limit a duty, or allocate a responsibility. Regulation can take many forms; drinking water regulation, for example, sets quality standards and norms, and good practice rules for those mandated to supply drinking water as a “common good” service. A regulatory framework is a set of government-decreed rules within the broader legislative framework.

As a mechanism to create, limit or constrain rights, regulations are a powerful tool available to governments in the promotion of the human rights to safe drinking water and sanitation. Past experience shows that regulations are not always used to their maximum potential or to the best advantage of all stakeholders. Specific challenges raised by national experts and regulators on drinking-water supply and sanitation include:

- regulations tend to be developed from an engineering and operational perspective, neglecting the public health perspective such as the exertion of authority for public health surveillance and associated responses;
- even in some high-income countries, regulations may be non-existent, incomplete and/or outdated;
- in the current integrated (“from source to tap”) risk assessment and management approach to ensure water quality there may be a disconnect between regulations for old-style drinking water supply, and regulations for the environmental safeguarding of water sources; and,
- the regulatory framework for drinking water quality may lack clarity regarding jurisdiction, legal mandates and authority, including gaps and overlaps.

Essentially, regulatory frameworks should be constructed in such a way that they support all State obligations with respect to HRWS implementation. Therefore, standards, criteria, rules or requirements that must be respected by service operators must be compliant with all HRWS criteria and principles and contribute to their progressive realisation. The fact that these were adopted for specific purposes without explicit mention of HRWS criteria or principles does not mean that they do not respect these criteria and principles. On the contrary, many existing regulations contribute to the progressive realisation of the HRWS, but this must be verified rule by rule. This is the task of Government and its regulatory bodies.

Incorporating the human rights to water and sanitation into the operational

Furthermore, regulatory bodies should check that their own activities are compliant with all HRWS criteria and principles.

An example of such review is presented below. This relates to the regulatory framework of drinking water quality¹⁰.

Many (but by far not all) countries have a regulatory framework and a corresponding regulator for drinking water quality. In some countries the functions of drinking water regulation are embedded in the functions of an economic regulator, who also covers drinking water tariffs. In some regions (Latin America, Europe) drinking water regulators are organised in regional associations.

In line with the recommendations of the WHO Drinking Water Quality Guidelines, regulation of drinking water quality at the point-of-use alone is inadequate and inefficient for a robust protection of public health. Multiple elements from source to consumers, including oversight and management, are key determinants of drinking water quality and their coordinated management plays an important role in protecting public health.

Therefore, the following elements of drinking-water quality management should be covered by regulations in order to safeguard public health:

Protection of Public Health

- Consideration of, and reference to, the WHO Stockholm Framework (WHO 2006) and WHO Guidelines for Drinking Water Quality (WHO 2011a).
- Adequacy of supply (i.e. quality, availability, accessibility, affordability, acceptability and reliability), including drinking-water quality standards.
- Surveillance for potential water-borne illness events to identify, as a minimum, those responsible for collecting and sharing information and responding to such events.

Source Water

- Source water protection, including pollution prevention (land use zoning and policies), protection zones of springs, protection of well-heads, application of codes of practice, and watershed management.
- Water abstraction and use, such as permits allowing for the withdrawal of water from surface and groundwater sources, protection from over-withdrawal and associated tariffs.

Infrastructure

- Materials and fittings, including treatment chemicals, materials that come into contact with water from the point of collection to the point of distribution, water meters and water treatment devices used in households.
- Commissioning and decommissioning of wells, boreholes, water treatment facilities and other infrastructure.
- Design and construction of water treatment facilities and plumbing systems, including environmental impact assessments.

Water treatment and delivery

- Minimum treatment standards, including identifying allowable concentrations of substances and setting performance targets, based on assessment of source water quality and processes and practices used to treat the water.

¹⁰http://www.who.int/water_sanitation_health/dwq/sheet1.pdf?ua=1.

Human Rights To Safe Drinking Water And Sanitation

- Operation and maintenance of drinking water supplies to confirm that the chain of supply is operating properly and that appropriate water quality standards are met.
- Occupational health and safety programmes to protect workers from occupational hazards, such as handling and using chemicals and working in confined spaces.
- Standards for delivering non-piped water, including bulk transportation and storage.

System assessment and enforcement

- Verification and operational monitoring, for example testing of finished water quality by authorised laboratories to confirm compliance with targets.
- Creation of a key performance indicators system linked to benchmarking.
- Inspections of, for example, drinking water supplies and installations, to identify hazards and assess risks, as part of the water safety plan (WSP) audits (WHO/IWA 2015).
- Consumer satisfaction: feedback from consumers whether drinking water is safe, acceptable, physically accessible in sufficient quantities and affordable, and the service is reliable.
- Enforcement powers, including authority to act and penalise non-compliance with regulations.

Operation and management procedures

- Codes of practice, training and, where appropriate, certification of operators, inspectors, engineers, laboratories, plumbers and other relevant stakeholders.
- Emergency planning and response which, as a minimum, defines roles and responsibilities in the event of possible and confirmed water contamination and water-borne illness events.
- Health promotion and education, for example for water supply managers and operators, and households and other water supply users on the treatment and storage of drinking water.
- Record keeping and information sharing.

Clearly, the above listing covers many of the criteria and principles of the HRWS in a conventional sense of water quality and service levels, but does not address the issues of equality, non-discrimination, accountability, sustainability, transparency and stakeholder participation. It is therefore important that drinking water regulators review their functions for the further incorporation of HRWS considerations.

In 2011, the WHO-hosted International Network of Drinking Water Regulators (RegNet) agreed on a statement concerning the HRWS (WHO 2011b, page 24). The statement's section reflecting the regulators' perspective on the implementation of actions in support of the rights is presented in Box 5.2.

Finally, the recently adopted and endorsed IWA Lisbon Charter¹¹ complements these recommendations, in Article four, with a list of HRWS-relevant responsibilities for regulatory authorities:

“Article four of the IWA Lisbon Charter for Guiding the Public Policy and Regulation of Drinking Water Supply, Sanitation and Wastewater Management Services.

Based on the principles of competence, professionalism, impartiality, accountability and transparency, the corresponding activities of regulatory authorities with relevance to the human rights to water and sanitation are as follows:

- 4.1 Ensure that at all stages, from design and tendering processes, contracting, service management, contract amendment and termination, are carried out in strict compliance with legislation and with

¹¹http://www.iwa-network.org/downloads/1428787191-Lisbon_Regulators_Charter.pdf.

Incorporating the human rights to water and sanitation into the operational

Box 5.2 The expert opinion of RegNet members on implementing human rights activities for water and sanitation

Non-State actors, such as individuals, private enterprises and NGOs have a role to play in implementing the HRWS. These roles and responsibilities need to be defined, although the overall responsibility remains with the State. To meet its human rights obligations with regards to water and sanitation, the State could provide for an administrative, financial and legislative framework through the following actions:

1. **Adopt a strategy** for providing services and accelerating access to water and sanitation, especially for the disadvantaged, using targeted pro-poor policies and instruments. A national strategy could detail how to reach the urban poor, the marginalised and vulnerable groups in society and encourage their participation in the institutional setup of the water services sector.
2. **Encourage meaningful participation** in the decision-making processes at different levels and within formalised structures while ensuring access to relevant information, such as water quality data and tariffs to all. Various participation mechanisms at the national, regional and local levels could be put in place, such as community-based organisations in rural areas. However, in the case of excluded or marginalised people, capacities often need to be strengthened before people can fully exercise their right. Empowering the poor might require awareness-raising campaigns and capacity development.
3. **Reform public policies and plans** to prioritise resources, implement strategies and to monitor performance. Water policies need to be designed to prevent discrimination and to foster equitable access to water supply and sanitation. The need for the participation of the unserved could be reflected in water sector legislation and in all official documents.
4. **Introduce a pro-poor water tariff structure** to fulfil obligations to facilitate access to water and sanitation services with the goal of assisting those most in need. Expenditure for water and sanitation services should not exceed five percent of a household's income. Subsidies for basic water supply and sanitation must be provided where necessary as part of a sustainable financing policy. A special basket funding mechanism could be created to improve the situation of the poorest in urban and rural areas. Water service providers could be given access to funding to extend their services to informal urban settlements.
5. **Establish clear responsibilities** among the water sector institutions. Separated and clearly allocated responsibilities between the various institutions described through regulation will help establish checks and balances. Replace informal service providers with formal service providers that can then be brought within the regulatory regime.
6. **Establish appropriate water quality monitoring systems**, combined with regulatory enforcement, to ensure safe water quality standards.
7. **Establish a regulator** for the water sector to protect citizens from unequal access to water. The regulator also oversees the monitoring efforts of the service providers and demands corrective measures in cases of non-compliance.
8. **Establish a mechanism to empower consumers and the unserved** to organise themselves to become a formalised negotiating partner for their service and provide feedback to sector institutions.
9. **Adopt a customer service approach** and set up adequate complaints mechanisms, for example customer service desks, surveys. Unresolved consumer concerns may be addressed through appropriate corrective measures or enforced through regulation.
10. **Promote the licensing of abstractions** (water withdrawal from natural water resources), metering of consumption, and the introduction of a pro-poor water tariff structure for the consumption of drinking water and for sanitation standards. These measures are designed to increase equitable access and reduce water wastage and move towards sustainable ecological sanitation.

Source: WHO 2011b.

Human Rights To Safe Drinking Water And Sanitation

any pre-existing contract, such as in the case of delegation or concession of the services to third parties;

- 4.2 Supervise tariff schemes to ensure they are fair, sustainable and fit for purpose; promoting efficiency and affordability of prices together with a level of cost recovery that meets the requirements for economic and financial sustainability; enabling service providers to adequately perform operation and maintenance activities, considering infrastructure, environmental and resource costs;
- 4.3 Oversee and promote the provision of a suitable quality of services to users, ensuring compliance with standards, norms and best practices for the benefit of public health and the environment;
- 4.4 Address the interface between service providers and users, in order to ensure the protection of consumers' rights, safeguard the right to submit complaints and due process, and improve the quality of the relationship between service providers and users;

[...]

- 4.7 Collect, analyse and disseminate accurate information on the implementation of public policy of the sector and on the performance of service providers; enable a culture of transparency, providing reliable, concise, credible information that can be easily interpreted by all, covering all operators, regardless of the management system adopted for service provision;

[...]"

