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## 2 Disability and human rights

This chapter examines different approaches to disability, and the relationship between disability and human rights. It discusses alternative views of ‘equality’, and different approaches to assessing human rights outcomes and social welfare. Many of the issues raised in this chapter are relevant to discussions throughout this report.

### 2.1 Approaches to disability

Many different individuals and groups have an interest in this inquiry. They include people with disabilities and their carers and representatives, but also governments (Australian, State and Territory, and local), employers, educators and other service providers, taxpayers and the broader community. These groups have different views on the nature of disability, the experience of discrimination and what the policy response should be. The Productivity Commission is required to take a community-wide view in its inquiry, accounting for different views and value systems, and incorporating social as well as economic values in its analysis.

In any discussion of alternative views, it is important to start with a common terminology. Some of the common terms used in this chapter and elsewhere in this report are defined in box 2.1.

The two main approaches to thinking about disability issues are the ‘medical model’, which views disability largely as a medical issue to be ‘cured’ and the ‘social model’, which views disability as resulting from social barriers to participation. The development of anti-discrimination legislation was largely due to the widespread acceptance of a social approach to disability.

This section explains the significance of these different ways of thinking about disability for defining and addressing discrimination. First, however, it discusses three related terms: ‘impairment’, ‘activity restriction’ and ‘disability’. Although these terms are often used as synonyms in general language, they can have quite different meanings in discussions of disability rights.

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## Box 2.1 Glossary of terms

**Impairment** is commonly used in a medical sense to refer to problems in body function (physiological and psychological functions of body systems) and body structure (anatomical parts of the body such as organs, limbs and their components), such as significant deviation or loss.

**Activity limitations** refer to difficulties an individual with an impairment may have in executing activities (tasks or actions).

**Participation restrictions** refer to problems an individual with an impairment may experience in involvement in 'life situations'.

**Disability** is sometimes used as a synonym for impairment. However, under the social model of disability it refers to interactions between impairment and personal and environmental factors that create activity limitations or participation restrictions.

**Environmental factors** make up the physical, social and attitudinal environment in which people live and conduct their lives. These can create barriers to participation, or facilitate participation.

**The medical model** views disability largely as a medical issue to be 'cured'.

**The social model** views disability as resulting from attitudinal and physical barriers to participation erected by society.

**Human rights** are rights recognised as inherent in every person by virtue of common humanity and their innate dignity as human beings. They tend to be derived from moral or ethical codes and social mores. Many human rights are recognised in international conventions and local legislation.

**Disability rights** refer to the human rights of people with disabilities. The term recognises that people with disabilities may require differential treatment in order to enjoy the same rights as other persons.

**Equality of opportunity** is a widely used term with different meanings in different contexts. Broadly, it requires that individuals should be treated on merit and that characteristics that are not relevant to merit should not be taken into account when making decisions. However, users of this term disagree on whether it requires formal equality or substantive equality.

**Formal equality** requires strict attention to merit. It rules out any favourable treatment for a disadvantaged group because this discriminates against those who do not receive preferential treatment.

**Substantive equality** takes limited account of disadvantage by providing assistance to disadvantaged groups to give them access to the same opportunities as advantaged groups.

**Equality of outcome** requires positive differential treatment of disadvantaged groups to achieve the same outcome as advantaged groups.

*Source:* adapted from WHO 2002.

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## Impairment and disability

The term ‘impairment’ is commonly used in a medical sense. In May 2001, the World Health Assembly endorsed the International Classification of Functioning, Disability and Health (ICF) (WHO 2002). It defines impairment as ‘problems in body function or body structure, such as significant deviation or loss’ (p. 10).

Although it is sometimes used as a synonym for impairment, the term ‘disability’ has a broader focus. Disability can be a function of impairment, environmental and personal factors. The ICF, for example, views ‘disability and functioning’ as:

... outcomes of interactions between *health conditions* (diseases, disorders and injuries) and contextual factors. Among *contextual factors* are external *environmental factors* (for example, social attitudes, architectural characteristics, legal and social structures, as well as climate, terrain and so forth); and internal *personal factors*, which include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour pattern, character and other factors that influence how disability is experienced by the individual. (WHO 2002, p. 10)

A number of inquiry participants emphasised the distinctions between impairment, activity limitations/participation restrictions and disability. Jack Frisch, for example, stated:

Impairment reflects a medical condition which relates to the individual; an activity restriction reflects the impact of the impairment on the individual’s ability to function without assistance and also relates to the person; while a disability reflects design characteristics which have the effect of excluding people with impairment from fully participating in the life of the community. (sub. 196, p. 4)

The Physical Disability Council of Australia drew a similar distinction, arguing:

The fact of impairment is not synonymous with disability. ... Impairment means lacking all or part of the functional capability of a limb, organism or mechanism of the human body.

Disability means the disadvantage or restriction caused by a contemporary social organisation, which takes no account or little account of people who have impairments and the functional or behavioural consequences of those impairments, leading to social exclusion or resulting in less favourable treatment of and discrimination against people with impairments.

Therefore people with disability are people with impairments who are disabled by barriers in society. [The] central theme in this definition is that disability is external to the individual and is a result of environmental and social factors. (sub. 113, pp. 5–6)

It could be argued that anti-discrimination legislation, being based on a social approach to disability, should refer to discrimination on the ground of impairment rather than disability. This would reflect the social model’s view that disability is a social construct, not a feature of the person with an impairment. The ACT anti-

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discrimination Act adopts this approach. However, there seems to be general acceptance of the term ‘disability’, as exemplified by proposals to amend the ACT Act to increase its consistency with legislation in other jurisdictions. The ACT Discrimination Commissioner, Rosemary Follett, stated:

I have recently put to our legislation program that we should drop the word ‘impairment’ in favour of the word ‘disability’. ... I think disability is the common term. It’s well understood, and that’s the word we should use. (trans., p. 718)

The Productivity Commission recognises the distinction between impairment and disability (see chapter 11). However, unless otherwise noted, this report uses the term ‘person with a disability’ in the commonly accepted sense of a person covered by the *Disability Discrimination Act 1992* (DDA).

## **Medical and social approaches to disability**

Traditional concepts of disability were derived from the medical approach. This approach viewed disability in terms of impairments, which were to be managed medically. Degener and Quinn (2002a) argue that this focus on impairment contributed to the segregation and marginalisation of people with impairments. Further, because the medical approach focused on the impact of impairments, improving access for people with disabilities was often viewed as welfare or charity, rather than recognition of the rights of people with disabilities.

In contrast, the social approach is based on a view of human rights that assumes all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community (see chapter 7). The social approach shifts the focus from the ‘problem’ of disability, to the ‘problem’ of discrimination:

A dramatic shift in perspective has taken place over the past two decades from an approach motivated by charity towards the disabled to one based on rights. In essence, the human rights perspective on disability means viewing people with disabilities as subjects and not as objects. It entails moving away from viewing people with disabilities as problems towards viewing them as holders of rights. Importantly, it means locating problems outside the disabled person and addressing the manner in which various economic and social processes accommodate the difference of disability—or not, as the case may be. The debate about the rights of the disabled is therefore connected to a larger debate about the place of difference in society. (Degener and Quinn 2002a, p. 5)

Rather than focusing on the disabling effect of an impairment, the social approach views disability as arising from physical and attitudinal barriers erected by society that exclude people with disabilities from participation. The social model argues that people with disabilities are part of society and have the same rights to

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participation as other citizens. Therefore, society must change by dismantling these barriers.

Although many commentators speak of the social approach having superseded the medical approach, the two approaches are complementary. As noted by the World Health Organisation:

Disability is a complex phenomena that is both a problem at the level of a person's body, and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives, but some aspects of disability are almost entirely internal to the person, while another aspect is almost entirely external. In other words, both medical and social responses are appropriate to the problems associated with disability; we cannot wholly reject either kind of intervention. (WHO 2002, p. 9)

In relation to discrimination law, a medical approach has a role in defining impairments and identifying people with disabilities, while the social approach has a role in describing how discrimination takes place and how it should be addressed. The scope of the DDA and definitional issues are discussed in chapter 11.

## 2.2 Human rights

The social approach to disability discrimination emphasises that people with disabilities have the right to enjoy the same rights as other members of the community.

There is broad agreement about the importance of human rights, as reflected in the following statement by Dr Ozdowski, the Australian Human Rights Commissioner and Acting Disability Discrimination Commissioner:

Human rights are rights recognised as inherent in each and every one of us by virtue of our common humanity and innate dignity as human beings. They are the rights that must be respected if we are each to fulfil our potential as human beings. They are not luxuries — they are the basic and minimum necessities for living together in human society. (Ozdowski 2002c, p. 3)

Bodies such as the United Nations and the International Labor Organisation have several long standing declarations and conventions that specifically recognise the human rights of people with disabilities (see chapter 3). These declarations and conventions recognise various forms of human rights, including:

- civil and political rights—such as rights to life, liberty, free speech, movement, political thought and religious practice, a fair trial and privacy, the right to found a family and the right to vote

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- economic, social and cultural rights—such as rights to adequate food and water, health care, education, a clean environment, respect for cultural practices and welfare assistance
  - humanitarian rights, which are the rights of those who are involved in, or affected by, armed conflict—such as the treatment of prisoners of war, the wounded or sick, those shipwrecked, civilians, and women and children in particular
  - rights that are defined by the special nature or circumstances of particular groups—such as the rights of workers, women, children, minority groups, refugees, Indigenous peoples and people with a disability (HREOC 2001b, section 3, p. 1).

However, as with many generally agreed terms, ‘human rights’ can have different meanings to different people. There is ongoing debate about which rights constitute human rights of ‘ubiquitous validity’ (that is, equally valid to all communities) and which are ‘social rights’ (that is, dependent on a community’s traditional culture, level of development, etc.) (Kis-Katos and Schulze 2002, p. 102). Different arguments are put forward to explain the underlying bases and significance of human rights (box 2.2).

#### **Box 2.2 Bases of human rights**

Some people argue that human rights are based on moral or ethical codes. These codes are likely to derive from (or be the basis of) religion or culture.

Others argue that human rights can arise out of social mores or be provided by law. In either case, the right may be morally neutral (or even amoral for some) and yet be considered a human right. The right to free speech, for example, could include the right to vilification or incitement to violence (so-called ‘hate’ speech).

Still others argue that rights are no more than privileges bestowed on individuals by society or, at least, by law makers. According to this reasoning, rights are discretionary because they can be taken away as easily as they can be granted.

Human rights can have greater degrees of authority or primacy, depending on the accepted basis. Where rights are expressed in moral or ethical terms, they might be regarded as absolute and immutable. Where they are expressed in terms of prevailing social or cultural norms or customs, they may be seen as flexible, changeable or replaceable. If expressed in purely legal terms, then depending on the nature of the legal system in question, they might be considered to be fully or partially entrenched (for example, in a constitution or Bill of Rights) or not entrenched at all (that is, easily altered as decided by the law makers).

*Source:* HREOC 2001b, section 3, pp. 1-3.

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Many conceptions of human rights extend well beyond the right to freedom from discrimination. For example, Val Pawagi argued that ‘human rights’ include the right to assistance to enable people with disabilities to enjoy ‘equal’ rights:

The term implies that people with disabilities are accorded the full range of rights as other persons. To ensure that people with disabilities enjoy the same rights as other persons, they are entitled to additional rights, including measures that enable them to become as self-reliant as possible. (sub. DR251, p. 2)

Stephanie Mortimer made a similar point:

... human rights are more than equal opportunity and discrimination ... The right to shelter, clothing and food, they’re basic human rights. (trans., p. 2693)

This inquiry does not address the foundations of these broader conceptions of human rights—its focus is on the right to freedom from discrimination. However, it does grapple with important rights-related issues, including valuing human rights, resolving conflicts between different rights and between the rights of different groups, and defining human rights outcomes.

## **Rights-related issues**

Merely talking about valuing human rights is controversial. Many human rights advocates argue that human rights are of incalculable value and should be pursued regardless of cost. However, this is not always possible in practice.

Some human rights can be enjoyed equally by all without creating potential conflicts. These include many fundamental civil and political rights, such as the right to personal liberty, the right to vote and the right to equal protection before the law. However, even where rights do not conflict, sometimes decisions must be made about how far they will be pursued. Society has limited resources and many competing demands. Depending on how social welfare is measured (section 2.4), pursuing some rights beyond a certain point might impose unacceptable costs on the community. For example, under the DDA the right to freedom from discrimination is not absolute. In many circumstances, discrimination is not unlawful if preventing it would create ‘unjustifiable hardship’. The defence of unjustifiable hardship is discussed in chapter 8.

In some situations, different rights come into conflict—for example, the right not to be discriminated against conflicts with the right of employers to employ whom they like, or the right of service providers to provide whichever services they choose. Some extreme approaches argue that there should be no restrictions on the freedom of individuals to make voluntary contracts, even if they are discriminatory (box 2.3 and chapter 6). On the other hand, advocates of equal opportunity argue that the

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rights of disadvantaged groups should take precedence over individual preferences (or prejudices).

**Box 2.3    Libertarian approach to rights**

According to a libertarian (or 'contractarian') view of the world, the socially optimal distribution of income and goods would result from voluntary contracts among unconstrained adults, with each person trying to satisfy their own preferences. Government action that constrained free choices would reduce social welfare.

The libertarian approach argues that the government should not compel contracts between parties when all parties do not choose to contract voluntarily. Thus, ordering an employer to hire or retain someone whom they would not choose to hire is impermissible, even if the employer is motivated by prejudice.

This approach also argues that the government should not forbid voluntary contracts from being made. The role of anti-discrimination law should be limited, therefore, to ensuring the government does not mandate discriminatory practices.

According to libertarian theory, market pressures to maximise profits would prevent entrepreneurs from acting on prejudice. Discrimination would persist only where the government mandates it.

*Source:* Kelman and Lester 1997, pp. 198–201.

In some cases, conflicting rights might be reconciled informally, through generally accepted social norms—for example, the implied right to free speech is tempered by the generally accepted use of language. However, these informal mechanisms can come under pressure during times of social change, as different views of 'acceptable' conduct come into conflict.

In other cases, society (through Parliament) clarifies how conflicts between rights should be resolved, through legislation such as the DDA. But some potential conflicts are difficult to resolve, even with legislation. Anti-discrimination law can interact with occupational health and safety law, for example. How should potential conflicts between non-discrimination and the right to a safe workplace be resolved, where particular individuals are themselves at a greater risk than others, or impose risks on others? Other examples arise where governments (at State or federal level) pass laws that might have discriminatory effects. To what extent should anti-discrimination law over-ride these other laws? What criteria should be used to determine precedence? These issues are discussed in chapters 9 and 12.

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## Defining human rights outcomes

The social approach to disability emphasises the human rights of people with disabilities. Under this approach, the term ‘disability rights’ recognises an entitlement to enjoy the same rights as those of the rest of society (even where people with disabilities might require special arrangements to allow them to enjoy those rights). As stated by Degener and Quinn:

The disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, without discrimination, by people with disabilities. (Degener and Quinn 2002c, p. 5)

There is little disagreement that enabling people with disabilities to participate in the life of the community is a desirable outcome. However, there is more disagreement about how this outcome should be achieved.

To many disability advocates, *how* things are achieved can be as important as *what* is achieved. They argue, for example, that people with disabilities are entitled access to ‘mainstream’ services (such as public transport). Separate ‘parallel’ services for people with disabilities (such as subsidised accessible taxis) are regarded as discriminatory, because they restrict freedom of choice and lead to segregation of people with disabilities.

On the other hand, a focus on efficiency might suggest that outcomes should be defined in terms of what services are meant to achieve (such as mobility). It could be argued that this approach would allow better consideration of different ways of achieving the outcomes. A focus on efficiency might argue that the most cost-effective way of providing mobility should be adopted, as this frees up resources that could be used elsewhere (for example, improving other areas of access).

Defining the outcomes to be achieved by the DDA is an important issue for this inquiry. The way in which outcomes are defined affects the assessment of the DDA’s effectiveness in eliminating discrimination (see chapter 5).

## 2.3 Equality

The social approach to disability, based on equal enjoyment of rights, is generally accepted. But there is less agreement on how this should be reflected in disability policy. One of the most fundamental issues is the very notion of ‘equality’. This section discusses different forms of equality, including ‘equality of opportunity’, ‘formal equality’, ‘substantive equality’ and ‘equality of outcome’.

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Some forms of equality call for ‘positive measures’ to assist people with disabilities. Colker (1998) identified a spectrum of positive measures (box 2.4). He emphasised that the distinctions among these categories can be subtle, and the same set of circumstances can be characterised in different terms depending on the perspective of the viewer.

**Box 2.4 Colker’s hierarchy of positive measures**

Colker identified a spectrum of positive measures ranging from ensuring formal equality to mandating equality of outcomes.

- ‘Non-discrimination’ (or formal equality) requires the removal of blatant stereotypes and prejudices so individuals can have an opportunity to be treated according to their merit.
- ‘Reasonable accommodation’ requires the removal of barriers created by society so qualified individuals can demonstrate their merit.
- ‘Affirmative action’, ‘preferential treatment’ and ‘positive action’ require the re-definition of merit to give greater value to the traits and abilities of members of disadvantaged groups.
- ‘Reverse discrimination’ requires the awarding of an automatic ‘plus’ to a member of a disadvantaged group, so that individual has a better opportunity of being selected for the desired outcome.

*Source:* Colker 1998, pp. 35–36.

## **Equality of opportunity**

Many commentators refer to ‘equality of opportunity’ as the aim of anti-discrimination policy. There is general agreement that equality of opportunity requires that individuals should be treated on merit, and that anti-discrimination legislation should prohibit decision makers from taking irrelevant characteristics into account. The reverse also holds true—decision makers should be allowed to take account of relevant characteristics that indicate merit. An employer would not be permitted to discriminate on the basis of disability, but would be permitted to take relevant qualifications and experience into account.

However, commentators disagree on the extent to which special services or adjustments are required to enable members of disadvantaged groups to take advantage of equality of opportunity. This disagreement is illustrated by the difference between formal equality and substantive equality.

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## Formal equality

Formal equality requires that individuals be treated solely on merit. This is based on the principle that procedural fairness requires consistency of treatment. This approach appears straightforward and desirable. It requires that ‘formal exclusionary laws are dismantled and overtly prejudicial behaviour prohibited’ (Fredman 2002, p. 7).

There is general agreement that formal equality has a role to play, particularly in eradicating prejudice or stereotyping. But many commentators argue that it does not go far enough, because its focus on individual merit does not address systemic or structural barriers to participation. Colker (box 2.4) characterises legislation requiring formal equality as a positive measure, because it requires people to act differently than they would in the absence of the legislation. Many commentators argue that it does not amount to a positive measure, as it does not require differential treatment.

Fredman (2002, pp. 7–10) identified four ‘problems’ with formal equality. First, there are problems identifying when two individuals are sufficiently ‘similar’ to be protected by formal equality. Not all distinctions are discriminatory, and different groups of people are treated differently in many legitimate circumstances, such as through the application of progressive income tax brackets or means testing of benefits. It can be difficult deciding what sort of distinctions should be regarded as undesirable. At different points in history, distinctions based on race, gender, disability and sexual orientation have been regarded as ‘legitimate’ grounds for differential treatment (both positive and negative).

Second, requiring that people be treated the same does not require that they be treated well. If all groups are treated equally badly, formal equality is not compromised. Complaints about inequality could be avoided by removing benefits from ‘advantaged’ groups, rather than extending benefits to all groups.

Third, formal equality requires a ‘neutral comparator’ in order to assess relative treatment. In practice, such a comparator tends to be the traditional white, able-bodied, male ‘norm’, which to many commentators is a far from neutral reference point.

Fourth, and importantly for disability discrimination, formal equality is symmetrical—all individuals must be treated the same, regardless of whether they are members of advantaged or disadvantaged groups. Formal equality is premised on equal treatment, and does not require any allowance be made for the impact of difference (such as a disability). This is the case even if the differential treatment (such as providing Braille materials) merely places the person with a disability on

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an ‘equal footing’ with a person without the disability (who receives printed materials).

## **Substantive equality**

In contrast to formal equality, substantive equality is based on the view that equal treatment against a background of social and structural barriers can perpetuate disadvantage. Differential treatment or ‘reasonable adjustment’ can be warranted to overcome barriers and provide disadvantaged individuals with equal access to opportunities. Implementing the social model of disability discrimination, with its focus on dismantling social barriers to participation, relies strongly on the concept of substantive equality (see chapter 7).

Substantive equality requires that, once equality of opportunity is achieved, the outcome achieved by each individual depends on merit. This has been described as ensuring all individuals compete from the same starting line. But this can be difficult to achieve in practice, if past discrimination means that disadvantaged groups have little chance of meeting ‘legitimate’ merit criteria (Fredman 2002, p. 14). Apparently neutral criteria (such as work experience requirements) might reinforce existing disadvantage if people with disabilities have been deprived of the opportunity to acquire merit.

Substantive equality addresses disadvantage—it does not go so far as to give preferential treatment to a person with a disability. However, it might impose a cost on the organisation that has to provide the differential treatment.

## **Equality of outcome**

As a social policy objective, equality of outcome goes beyond equality of opportunity to require that results be ‘equal’, even if this involves preferential treatment for individuals with certain characteristics. Equality of outcome requires ‘affirmative action’ or ‘reverse discrimination’ to achieve equivalent outcomes for disadvantaged groups (box 2.4).

The equality of outcome approach is based on what appears to be a logical argument. If talents and skills are distributed uniformly throughout the population, equality of opportunity should result in the proportional representation of different groups (for example, in employment and education). Any large disparities in outcome must be due, therefore, to some form of discrimination. If the precise source of that discrimination cannot be identified and removed, an equal outcome

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can still be achieved through positive measures such as affirmative action or reverse discrimination (adapted from Moens (1985)).

The pursuit of equality of outcome raises difficult issues. If no actual barriers or overt discrimination can be identified, is it logical to assume that under-representation is due to discrimination? Under-representation might be due to discrimination elsewhere (for example, in education) or to the genuine preferences of the different groups. Given this, can preferential treatment for members of one group be justified if it imposes a disadvantage on others?

In addition, introducing affirmative action or reverse discrimination might lead to increased participation, but by encouraging ‘assimilation’ rather than addressing underlying discrimination. That is, only those members of the disadvantaged groups who can conform to existing arrangements benefit. While still having some positive effects, such ‘assimilation’ does little to improve the situation of those not capable or willing to overcome any discriminatory barriers.

## **Conclusion**

The form of equality which should be pursued by anti-discrimination legislation is a recurring issue for this inquiry. There is general agreement that, at a minimum, formal equality is a desirable objective of anti-discrimination legislation. There is some controversy about the pursuit of substantive equality, and significant disagreement about mandating equality of outcome.

These are crucial issues. Sometimes, the nature of disability requires more than formal equality to achieve equality of opportunity. This implies that differential treatment can be justified to achieve substantive equality. But going beyond substantive equality to require equality of outcome appears to go beyond removing barriers to giving preferential treatment to people with disabilities—arguably beyond the scope of anti-discrimination legislation.

## **2.4 Measuring social welfare**

The primary goal of any public policy is to make society as a whole better off—in economic terms, to ‘maximise social welfare’. Various philosophers, economists and social scientists have proposed different approaches to measuring social welfare (box 2.5).

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## Box 2.5 Measuring social welfare

**Utilitarians** (such as Jeremy Bentham) argue for the maximisation of total utility (that is, 'happiness' or 'welfare') in society. Policies should aim to maximise the sum of all individual utilities. This approach implies that redistributing resources is justified if it leads to an increase in total utility. Taxing the rich to assist the poor, for example, is justified if the loss in utility felt by the rich is more than offset by the increase in utility felt by the poor. A problem with this approach is that it is impossible to measure or compare individual utilities without relying on imperfect proxies such as monetary income.

**The Pareto principle** (named after Vilfredo Pareto) holds that society can be regarded as better off only if one member is made better off without taking anything away from others. This principle has very limited application: it makes no comment on the initial distribution of resources, and cannot be used to assess any policy that would lead to a redistribution of resources.

**The Kaldor-Hicks compensation principle** (argued separately by Nicholas Kaldor and John Hicks) seeks to balance the needs of society and those of individuals. It argues that society is better off when it pursues policies that generate sufficiently large benefits for the winners, so the winners could compensate the losers and still remain better off. It is argued that this approach does not violate the Pareto principle because one person's gain does not have to take something away from someone else. However, it reintroduces the need to compare individuals' utilities, and the issue remains as to how the losers are to be compensated, particularly if they cannot be individually identified or their losses cannot be quantified.

**The Rawlsian challenge** (named after John Rawls) proposes different criteria for judging social welfare. To deduce a 'just' distribution, distributive issues should be decided behind 'a veil of ignorance'—by determining which distribution a rational person would choose if they did not know what part of the distribution they would receive. One view is that a rational person would choose the option that protects the share of the most unfortunate group, to minimise their potential loss. Social welfare is maximised, therefore, by improving the position of the least fortunate. A potential drawback of this approach is that it emphasises the wellbeing of the worst off at the expense of the welfare of others.

**The capability approach** (developed by Amartya Sen) rejects theories that rely exclusively on utility (particularly when utility is measured in terms of income or gross domestic product), because they exclude non-utility information from what are 'moral' judgements. It argues that social arrangements should be primarily evaluated according to the extent of freedom people have to promote or achieve 'functionings' they value. Progress, development or poverty reduction occur when people have greater freedoms (that is, greater 'capabilities').

*Sources:* adapted from Gupta 2001; Robeyns 2003.

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Discrimination is largely viewed as a social issue, and the main impetus for the DDA was to protect human rights and create a more inclusive society. However, as discussed above, giving effect to human rights can involve difficult tradeoffs. These tradeoffs require an assessment of the benefits and costs of different approaches. Sometimes, these different approaches lead to very different assessments of whether particular actions enhance or detract from social welfare.

Several commentators, particularly Amartya Sen and Martha Nussbaum, have criticised the application of ‘traditional’ measures of social welfare to the area of human rights, and argue that policies should be evaluated according to their impact on people’s capabilities (box 2.6). Rather than aiming at equalising resources or welfare, Sen argues that equality should be defined and aimed at in terms of the capability each individual has to pursue and achieve wellbeing.

**Box 2.6      The capability approach**

The capability approach rejects other welfarist theories because they rely *exclusively* on utility and thus exclude non-utility information from moral judgements. Sen (1979) argues that utilitarian and libertarian approaches are both special cases based on limited information and arbitrary weightings and that the capabilities approach is more general than either.

The core characteristic of the capability approach is its focus on what people are effectively able to do and to be, that is, on their capabilities. This contrasts with philosophical approaches that concentrate on people’s happiness or desire-fulfilment, or on theoretical and practical approaches that concentrate on income, expenditures, consumption or basic needs fulfilment.

The capability approach to wellbeing and development thus evaluates policies according to their impact on people’s capabilities to function, that is, on their effective opportunities to undertake the actions and activities that they want to engage in, and be whom they want to be. These ‘beings’ and ‘doings’, called ‘functionings’, together constitute what makes a life valuable. Functionings include working, resting, being literate, being healthy, being part of a community, being respected, and so forth.

For some of these capabilities, the main input will be financial resources and economic production, but for others it can also be political practices, such as the effective guaranteeing and protection of freedom of thought, religion or political participation, or social or cultural practices, social structures, social institutions, public goods, social norms, traditions and habits.

Sen does not endorse a set of capabilities, but argues they should be identified through political and democratic processes. Nussbaum, on the other hand, proposes a list of ten central human capabilities that should underpin a ‘just constitution’.

*Sources:* Robeyns 2003.

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Some inquiry participants strongly endorsed the capability approach. Jack Frisch argued that the capability approach provides the intellectual foundations for applying a human rights perspective to measuring social welfare. He argued that, by requiring consideration of information about individual capabilities (including disabilities), it explicitly overcomes the limitations of other approaches (which ignore disability or treat it as irrelevant). Although he recognises the ‘messiness’ of having to identify relevant capabilities through political or democratic processes, he argues that this better reflects the ‘messiness’ of all policy formulation (sub. DR331, p. 2).

The capability approach provides a valuable perspective from which to examine social policy. It is a reminder that measures based on ‘utility’ can miss important aspects of human experience. However, the capability approach provides little guidance on some of the difficult tradeoffs that must be made in the area of anti-discrimination. How should the rights and capabilities of different individuals be balanced? What proportion of society’s resources should be devoted to improving the capabilities of different groups or individuals?

The DDA recognises that the objective of eliminating discrimination involves tradeoffs. The object includes the words ‘as far as possible’ (s.3(a)), recognising that no Act can completely eliminate discrimination. The need to balance benefits and costs is reflected in other provisions of the DDA. The unjustifiable hardship provision (which applies to both complaints and disability standards), for example, requires an assessment of the benefits or detriments to any persons concerned.

However, the DDA does not make it clear how the benefits or detriments of eliminating discrimination are to be measured or weighted, and what view of ‘social welfare’ should be pursued. The benefits and costs of the DDA and its impact on social welfare are discussed in chapter 6.

## 2.5 Summing up

This chapter has raised fundamental issues that will arise throughout this report. The most significant issues include:

- integrating the medical approach (defining impairments and identifying people with disabilities) with the social approach (describing how discrimination takes place and how it should be addressed)
- defining discrimination on the ground of disability in terms of formal or substantive equality of opportunity, or equality of outcome

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- valuing human rights and dealing with conflicts and tradeoffs among different rights.

Many of these issues do not have ‘right’ or ‘wrong’ answers, but require a careful balancing of views. The Productivity Commission does not seek to impose any social or cultural values of its own, but some economic perspectives can provide useful guides to assist the balancing of views presented by inquiry participants.