

**COMMENTS ON THE  
DRAFT REPORT OF THE PRODUCTIVITY COMMISSION REPORT  
ON THE DISABILITY DISCRIMINATION ACT**

**Jack Frisch**

**[j.frisch@unsw.edu.au](mailto:j.frisch@unsw.edu.au)**

Sen-Nussbaum Capabilities Approach

p.1

Comments on Epstein

p.3

on repeal of the ADA  
on segregation,  
on financing,  
on employment,  
on minimum wages,  
on the insurance principle,

Further Thoughts on Economics Relevant to Disability

p.9

Learning by doing  
Behaviour Economics

Sen-Nussbaum Capabilities Approach

Box 2.4 refers to four ways of assessing social welfare, adapted from Gupta. In excluding the Sen/Nussbaum's capabilities approach and in ignoring Amartya Sen's critique of the utilitarian and libertarian approaches and Martha Nussbaum's critique of the Rawlsian approach, the Commission ignores the two authors who place disability to the foreground in both their critique and in their constructions. The exclusion is a serious oversight since Sen is (I believe) the only economist awarded the Economics Nobel Prize specifically for his contribution to welfare economics i.e. assessing social welfare, and Nussbaum is one of the most serious and well-respected philosophers in the world today.

Sen argues that both the 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, even if the democratic choice procedure is "somewhat messy" (p. 79 *Development as Freedom*). This is not the place to summarise his views, but I refer the Commission to the most accessible discussion of Sen's critique in his *Development as Freedom*, particularly Chapter 3, "Freedom and the Foundations of Justice" and an accessible theoretical and empirical description (and extensive bibliography) of the Capabilities Approach at <http://www.fas.harvard.edu/~freedom/teaching/CAtaining20031209.pdf>

Suffice to note:

- *"it is thus important not only to take note of the fact that in the scale of utilities the deprivation of the persistently deprived may look muffled and muted, but also to favour the creation of conditions in which people have real opportunities of judging the kind of lives they would like to lead". (p. 63).*
- *"even if liberty is given a special status, it is highly implausible to claim that it would have an absolute and relentless a priority as libertarian theories insist it must have. We need a broader informational basis of justice."(p. 67).*

Sen rejects the use of prices or exchange value as a weighting metric for aggregating real outputs because he argues (against his main critic - Srinivasan) that the price metric is a special case with no special merit other than its observability. Sen turns on its head Samuelson's argument that revealed preference makes interpersonal utility comparisons unnecessary - arguing that prices reveal nothing about the interpersonal comparison of utility which policy analysis demands. (p80).

Nussbaum further critiques Rawls' theory of justice for not accounting for disability in his construct. She argues that this is not an oversight, but an immediate consequence of Rawls' Humean contractarian method, and his Kantian definition of the moral person. She argues that the capabilities approach is a more general approach that is informationally richer and therefore more general than Rawls. For a discussion of how the Capabilities Approach relates to disability, I refer the Commission to Capabilities and Disabilities: Justice for Mentally Disabled Citizens, her ANU Tanner Lecture, at [http://philrsss.anu.edu.au/tanner/papers/Lec\\_1\\_dr\\_131002.rtf](http://philrsss.anu.edu.au/tanner/papers/Lec_1_dr_131002.rtf)

Sen accepts that *"many technocrats are sufficiently disgusted by its messiness to pine for some wonderful formula that would simply give us ready-made weights that are 'just right'. However, no such magic formula does, of course, exist, since the issue of weighting is one of valuation and judgement, and not one of some impersonal technology"*.

I urge the Commission to integrate the Sen-Nussbaum approach into Box 2.4 because the capabilities approach:

- explicitly articulates the respectable intellectual foundations for a welfare economics approach which is more consistent with a Human Rights perspective from which the DDA springs, and explicitly articulates the special-case nature of the other approaches
- generalises the libertarian, utilitarian and Rawlsian approaches in using information about individual capabilities (including disabilities) which the other approaches treat by and large as irrelevant or ignore
- articulates the 'messiness' of all policy formulations.

Furthermore, by specifically articulating the capabilities approach, the Commission would be on a firmer intellectual grounding in rejecting Epstein's view calling for repeal of the Americans with Disabilities Act (and by extension presumably the DDA). The Commission's comment, "such a solution would be difficult to countenance" (p. 171) opens the Commission to accusations of "political correctness" and circular reasoning in its conclusion.

Epstein is explicit in arguing for repeal of the ADA from a libertarian and utilitarian framework, seemingly oblivious to the ambiguities and complexities these models and of their limitations. I believe that the omission of Sen, Atkinson and Mishan from his 'author's index' reveals much about his lack expertise in policy making and welfare economics. It is presumably not an oversight that the Commission would want to entertain.

I further believe that Peter Singer is more explicit and honest than Epstein in his conclusions based on utilitarian principles that parents (carers? agents? trustees? government?) ought to be given the right to dispose of those non-person humans

without happiness/pain feelings if the existence of the non-person children (or adults) causes unhappiness to the parent (carer? agent? trustee? government?). I suspect that Epstein would rather segregate so these humans do not blight our consciences.

### COMMENTS ON EPSTEIN

#### Epstein on Repeal of the ADA

Epstein generalises from race and sex discrimination (on which he spends 248 pages) to disability discrimination (on which he spends 14 pages). Even though he begins the disability discrimination chapter with the caveat the *"public accommodation obligations under the DDA lie outside the scope of this book"* (p. 481) he ignores his caveat 14 pages later when he argues that *"the ADA ... too should be repealed, whether or not some subsidy for disabled persons is retained"* (p. 505).

The ADA and DDA address far more than employment discrimination. They both also involve "public accommodation" obligations relating to transport, building infrastructure, education, service provision etc ... It is logically possible to be critical of the employment discrimination provision of the DDA while supporting the public accommodation provisions. Indeed, I personally am of two minds about the employment provisions of the DDA even though I believe the DDA is a valuable and important tool both for redressing the injustices faced by many people with disabilities, **and** for making the economy more efficient in redressing the absence of markets which affect many people with disabilities.

I believe that this distinction should be made explicit in Box 8. I. Indeed, I believe that there is a case to be made for extending Box 8.1 with a more explicit critique of Epstein. I would not support excluding the Box since that would amount to censorship, but I do believe that a more articulate critique ought to be made.

Epstein makes two unjustifiable logical leaps in calling for a repeal of the ADA. Firstly, he makes a reasonable caveat on page 481 about public accommodation not being part of his subject but he then unreasonably concludes on page 505 that the whole Act, including presumably public accommodation provisions, be repealed. There is no logic in excluding an area of investigation from analysis and then making a conclusion about the excluded area. Secondly, he generalises from his critique of race and gender anti-employment discrimination laws to disability anti-employment discrimination laws as if there are no particular circumstances or issues which might warrant additional investigation before generalising from race and gender to disability. He assumes that his agenda is made stronger in disability than in race and gender partly because more resources are expended in disability anti-discrimination cases, but his assumption is valid only if resource expenditure is the only dimension differentiating race and gender from disability. Disability is different for other reasons which may prove significant even within the utilitarian libertarian framework.

#### Epstein on Segregation

Epstein accepts that disability is more heterogeneous than race and gender, but in arguing for the efficiency of segregation, he analyses heterogeneity only with respect to the cost associated with the disability from the employer's point of view. The wide geographical dispersion of a small number of differently-skilled persons warrants a richer analytical framework than the cost associated with disability however.

Epstein's argument boils down to suggesting that once a ramp to accommodate a wheelchair is in place, it is more efficient to employ a second (and third and fourth) wheelchair user in the same workplace than to spend resources on a ramp at other workplaces. If employees were all the same except for the need for a ramp, then Epstein's analysis would hold.

In reality however, wheelchair users vary in the skills they bring to the economy. Some have numeracy skills, others have literacy skills, others have legal skills, others have analytical skills, and others have mechanical skills. There is no reason to expect that the skills can all be accommodated efficiently in the same workplace in a way which employs skills to their maximum capacity. Occupational segregation may be efficient if the wheelchair is the only factor differentiating a wheelchair user from the rest of the population, but it is hardly efficient if one accounts for the range of skills that workers bring to the workplace.

Epstein also implicitly assumes that the savings from additional ramps at several workplaces is greater than the cost of transport from several residences to the single workplace. It may be true that with occupational segregation, workplaces that need not accommodate wheelchair users would save \$25,000 in fixed costs per employee with a wheelchair i.e. \$1,250 p.a. annualised at a 5% discount rate. From an economy-wide efficiency point of view however, each employee would have to travel a greater distance from their home to the segregated workplace. With a seamlessly accessible transport system, it would cost the wheelchair user only \$ 1,000 to get to the segregated workplace - thereby making occupational segregation 'efficient'. But with an inaccessible transport system, the wheelchair user's cost of transport is more likely to be \$25 per day i.e. \$5,000 per year - making occupational segregation inefficient because the additional transport costs are greater than the savings from not having to build ramps.

Epstein's simple model of disability does not account for the specifics of disability and his conclusion relating to the efficiency of segregation is, I believe, flawed. He generalises from simple models of race and gender to disability without paying attention to the specifics of disability.

If people with disability all had the same skills and lived in the same location, then Epstein's argument would hold. Indeed, historically people with disability did have relatively homogeneous skills and they did live in concentrated locations. Their skills were minimal because they were given a minimal education and they lived in concentrated dwellings because they were institutionalised i.e. they were segregated in education and habitation, and it then made sense to segregate them in employment. Nor was there a need for accessible buildings or transport or accessible services because people with disabilities were treated as a homogeneous group that was segregated. In short, they were treated as non-persons.

It is unclear whether or not Epstein favours segregation at all levels, as was the case historically, but given that skills are now far more heterogeneous and dwellings more dispersed, Epstein's employment segregation argument is logically flawed.

There are of course many service providers - in the housing and education sectors - who believe that Epstein's segregationist views apply to them as well as to employers. I will restrict myself to comment here on education, since many educators and parents of disabilities believe that children with disabilities would be better off in special units or special schools. Here too the assumptions are that all children with disabilities are a homogeneous group where in reality disability can to some extent be defined as difference - or heterogeneity; or that the numbers in a particular community and with a particular impairment are sufficiently large that specialist units/schools can be set up locally.

In general the numbers with a particular impairment in a community are small, so that either composite classes of people with different impairments and of different ages would need to be created - with a consequent impact on the quality of the education; or transactions costs to transport children to specialist segregated schools distant from the local community to the distant special school would offset the savings from the appropriate accommodation that could be made in a mainstream classroom.

Thus, in the composite class case, a 14 year-old boy exhibiting violent behaviour as a result of his impairment might be put into the same high-school special unit as a 13 year-old girl with Down's Syndrome and a 15-year old girl with CP which affects only her writing and speech (but not her intellectual) ability. This would not provide an appropriate education or grounding in life skills for any of the three, but would instead provide an education appropriate for the lowest common denominator - i.e. skills for basket weaving in a segregated workshop.

In the distant-location case, past evidence suggests that many hours available for reading, homework and play would be taken up in driving the child from home to the special school. Thus an intellectually capable child with CP driving from her home in Sutherland to the special school some 40 Km away to be in a cohort of similarly aged and intellectually capable peers would hardly be able to nourish her potential if 4 hours a day was spent driving to and from school in a bus which picks children up along the way. Alternatively, a child with an intellectual disability would learn few active appropriate life skills if large segments of the day were spent being forced to sit passively in a bus.

Segregation in education and employment is likely to be efficient only with a highly restrictive set of false assumptions about the heterogeneity of impairment, residential location and economies of scale.

#### Epstein on Financing the Cost of Accommodating Disability

I concur with Epstein that employers in competitive industries should not have to bear the burden of accommodating the employment of people with disability. The range of impairments is highly heterogeneous while the scope of the DDA is extremely broad. With employers facing the cost of accommodating disability, this implies that two similarly placed firms in the same market and with the same technologies would face

different costs if one employed a person with a disability with significant disability-related accommodation costs while the other employed a person with a disability with little or no disability-related accommodation costs. The former would face the full cost of the additional cost, and if the industry were competitive, it may even be forced out of business. This situation would both be unfair to the employer and of no advantage to the person with the disability if the business was forced to close.

A theoretical case can be made for having employers in non-competitive businesses bear the cost of employing people with disabilities since this would not lead to its being put out of business, but the practical task of distinguishing a competitive from a non-competitive business is fraught with legal and conceptual difficulties which would add significant transactions costs to the accommodation costs.

It should be noted that public accommodation or infrastructure and employment are quite different and it is wholly inappropriate for Epstein to generalise from employment to public accommodation. Retailers, services providers and builders in the same market face a homogeneous set of DDA standards, making it possible to pass the additional cost of access forward onto consumers of the services or backward onto suppliers of inaccessible products and owners of inaccessible land.

While it is in principle easy to propose that government ought to finance the cost of accommodating the employment of people with disabilities, asymmetric information problems come into play in estimating the financial consideration. Both employers and employees can be expected to overestimate the cost if they know that government will finance whatever amount the employer and employee arrive at, while independent cost estimators may add to the transactions costs of accommodating the disability and bias the estimates if the organisation architecture for determining cost is inappropriate.

I have no clear answers as to appropriate models for efficient, transparent and accountable government financing of employment accommodation for people with disabilities, but do suggest that this is priority area for research as increasing numbers of students with disabilities graduate from high schools and universities.

#### Epstein on the Employment Provisions of the DDA

The empirical evidence on the effects of the ADA on employment participation in the USA is unclear. It appears that there has been a decrease in employment participation of people with disabilities since the ADA has come into existence in the USA.

There is a good deal of debate as to the causes of the decrease. Some researchers argue that employers are reluctant to hire employees with a disability because of the perceived additional costs of accommodating their needs. Others suggest that the lower participation is due to an increase in the number of people with disabilities as a result of their transference from the pool of long-term unemployed. It is also possible that there are long lags involved in creating the necessary conditions for employment participation on the supply side (e.g. inadequate infrastructure) but short lags involved in the perceived additional cost of employment on the demand side - leading to a net negative employment effect.

I think the jury is still out in regard to the evidence and am therefore of two minds on the DDA's employment provisions, while strongly supporting the DDA's public accommodation provisions as the lowest transaction cost method of moving towards decency in the economy in regard to people with disabilities.

My predisposition however is to maintain the employment provisions of the DDA in Australia because I don't think that there has been sufficient case law to suggest to employers that the employment provisions are unduly onerous, and I don't think that there has been sufficient employer awareness of the DDA applying to employment to discourage many employers from employing people with disabilities.

### Employment in General

Employment participation is a complex multi-faceted and dynamic phenomenon. Discrimination against people with disabilities is only one part of the total institutional picture explaining the low employment participation of people with disability. Other parts of the institutional background include:

- the Commonwealth-State Disability Agreement which ensures that the parameters of specific equipment and service provisions vary across states according to state rules and regulations about quantity of service, criteria for allocation, price of services etc...
- income and housing support at the Federal level to people with disability and to different classes of unemployed persons, with varying support levels, taper rates for additional income, eligibility rules etc...
- in-kind service transport, housing and recreation provisions for people with disability at the local Council and Shire level
- discrimination against people with disabilities in the design of infrastructure, goods and services etc...

While I think that the Productivity Commission has been fairly careful in specifying these inter-relationships and the complexity of the labour market, it could go further in calling for a more formal specification of the totality of employment participation. There have been various investigations into employment participation of people with disability in the past, but they have all been piecemeal. Thus, the McLure Report into Welfare Reform looked at employment participation only from the income support viewpoint, CSDA studies some years ago looked only peripherally at employment participation but this was only looked at from the point of Commonwealth State disability service provision, and now we have this Productivity Commission Enquiry looking at employment participation only from the viewpoint of the DDA.

In my conclusion to my submission to the McLure Report, I called for a Productivity Commission Enquiry into Employment Participation which takes a holistic approach which encompasses our Federal structure of service provision, our Commonwealth Income Support system, and the DDA. I am hoping that one day this sort of Enquiry will take place.

I expect that it is beyond the brief of the Productivity Commission to recommend that there be bipartisan support for Departments of Disability that might

be able to take an overview of disability, but I believe that it would be a commendable reform to the structure of government.

### Epstein on Minimum Wage Laws

Another suggestion Epstein makes is that *"like everyone else, the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit"*. (p. 484). There may be merit in this proposal from the incentive and organisational architecture viewpoint but it is hardly likely to lead to increased participation by people with disabilities. If people with high-cost disabilities had to bargain away their accommodation costs (Including provision of toilet facilities, ramps into buildings, special equipment, transaction costs of re-organising schedules) via a reduction in their wage, the net wage would either more than likely be below their reservation wage or very low. Taking into account the additional cost of living due to disability, people with high cost disabilities would more than likely either be forced into destitution or beggary, into segregated institutions, or to stay with family members.

I don't know whether Epstein would find favour with the choice set outlined above, but by his own admission that *"there is more support for the handicapped than would occur if persons could take a disinterested attitude toward the subject"* it is unlikely that the community would countenance these choices. I believe the community would want a redistributive mechanism at some point in the system - either to employers, or to people with disabilities, or through some sort of insurance.

### Epstein on the Insurance Principle

I concur with Epstein that *"no matter how healthy we may be, we all know that through misfortune or ill health we could become handicapped tomorrow. There is thus a powerful insurance feature..."* It is for this reason that I believe that the benefits of accommodation policies such as those required by the DDA are best estimated by a shadow insurance premium.

As I have shown in my submission to the Productivity Commission last year, private insurance markets to offset the effects of **long-term, high-cost activity restrictions**<sup>1</sup> do not exist and, I believe, cannot exist for reasons to do with asymmetric information problems. In the absence of private insurance markets, I believe that the sort of framework provided by the DDA is the style of minimum transactions cost insurance which is most appropriate.

I believe that Epstein does not delve sufficiently into this issue, and that if he were to examine more closely the work of theoreticians such as Stiglitz and Shiller, he might come to the conclusion that the DDA is economically decent legislation.

1. Disability insurance against income loss exists, but these generally have money and/or time caps which effectively make them insurance against short-term loss only, and for less significant (mild and moderate) activity restrictions rather than severe and profound activity restrictions. The caps are means to overcome moral hazard and are necessary features of the insurance. The available private insurance also covers only income loss, and not the type of capability loss which is a feature of the Sen-Nussbaum framework.



It is interesting to note that insofar as the ADA is concerned, Epstein's language is less dogmatic than in his language relating to gender and race. Thus he says, "it is **far from clear** that a legally enforceable voluntary anti discrimination norm would form any part of a comprehensive strategy" or "the better strategy **might well be** to concentrate on programs that deal with rehabilitation, training and counselling and direct assistance" (emphases mine). These are not unequivocal statements, and are instead statements which any reasonable open person would make. Indeed very few things are "clear" and there are always likely to be alternative better strategies than those which are commonly held.

Epstein suspects that "*most people know in their bones that they can and should make accommodations in their daily life to assist the handicapped*" (p. 483). I concur with this view, but I have also integrated the "Prisoners' Dilemma" model into my thinking and understand that where people look to one another in determining how they should act (as shown in recent studies in behaviouristic economics), they might not act in ways they know would be right "*in their bones*".

### Further Thoughts on the Economics of Disability

#### *Learning- by-doing:*

Epstein's analysis, and indeed much of economic analysis, is conducted within a static framework. One of the insights lost in such an analysis is Arrow's "learning by doing". The literature on technical progress, innovation and diffusion suggest that technical progress is often demand-driven by exogenous factors such as government demand and that the progress develops an internal dynamic within a trajectory re-inforced by learning by doing. Thus is relevant to the DDA in that the demands created by the DDA can be carried forward through developing a trajectory.

Thus for example, the first accessible buses in the US were clumsy and required the bus to stop for up to 10 minutes while the wheelchair user embarked and disembarked with assistance from the driver, who had to stop the bus. This was clearly inefficient and any cost benefit study based on this technology would have been quite unfavourable to accommodating wheelchair users. It did not take long however for new technologies to come forward, and now with a "leaning buses" and easy access-ramps and level platforms, the process is far more straightforward. These buses are certainly more expensive than buses without these features, but with further learning by doing, and embedding the technology into the design, the cost becomes relatively marginal in the course of time.

Without the initial demand created by the ADA, there would never have been the incremental progress to make accessible buses in some American cities a "natural" part of the infrastructure and the opportunity cost of an accessible bus would be much the same as it was with those initial clumsy accessible buses.

#### *Behavioural Economics*

There are many exciting developments in the new area of Behavioural Economics, which empirically examines from a psychological perspective some of the assumptions about *homo economicus*. I am only just beginning to familiarise myself

with these works, but it is clear that many of the distinctions being found are relevant to the Economics of Disability.

Thus for example,

- it seems that in attitudes to risk, there is an asymmetric valuation of gains and losses - so people value a \$1,000 loss more than they value a \$1,000 gain;
- the value of \$100 of an experiential goods is greater than the value of \$100 of a material good;
- people seem to underestimate the probabilities of big losses and overestimate the probabilities of small losses;
- the value of goods and services depends partly on how other people value the goods and services, on the language used to describe the goods and services, and on media reporting;
- people underestimate the probability of profound disability as well as the impact of disability.

Much of this is probably intuitively obvious, but the literature is still in its infancy, and it still needs to be integrated into economic thinking.