

## Contents Page: NZJER, 2009, 34(1)

Name	Title	Page Number
Jane Bryson & Paul O'Neil	NZJER Special Issue: Human Capability. Editorial	1-6
Simon Deakin	The 'Capability' Concept and the Evolution of European Social Policy	7-26
Gordon Anderson	The Capability Approach and the Legal Regulation of Employment: A Comment on Deakin	27-33
Paul Barker, Lis Cowey and Simon McLoughlin	The Human Capability Framework Ten Years On	34-46
Stefan Kesting & Candice Harris	Providing a Theoretical Foundation for Work-Life Balance – Sen's Capability Approach	47-61
Jane Bryson & Paul O'Neil	A Workplace View of Drivers and Barriers to Developing Human Capability	62-76
John Schischka	Lessons learned from the long term application of a monitoring and evaluation process based on the capability approach	77-93
Erling Rasmussen & Colin Ross	Chronicle: June–September, 2008	94-102

## **NZJER Special Issue: Human Capability**

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### **Editorial**

The genesis of this special issue lies in the conclusion of the editors' FoRST funded research 'Developing human capability: employment institutions, organisations and individuals', and in the tenth anniversary of the 'human capability framework' developed by the Department of Labour in 1999 to assist policy thinking on the labour market. Hence, this issue comprises six articles which utilise in different ways the concept of human capability and its development.

Dictionary definitions typically refer to capability as either 'ability and power' or as 'underdeveloped or unused faculty'. In relation to people, there is a sense in this definition of capability referring to human potentialities rather than actual human actions. In this sense, the concept of human capability and its development lends itself to a number of areas within the domain of employment relations, particularly with regard to workplace skills and skills development, an area which has been the focus of much recent effort from the macro- to the micro- level in developed states such as New Zealand.

At one level, therefore, human capability is perhaps indistinguishable from the notion of human capital, whereby human qualities, either innate or learned, have the potential to be employed in production in much the way that physical capital is. Human capability from this perspective becomes reduced to the utility people have in production. Similarly, capability development becomes reduced to the acquisition of skills and other human qualities that are of relevance and use to the workplace. Given the dominance of human capital theory in the disciplines informing employment relations, it is perhaps reasonable to ask what usefulness a new term – human capability – has for something that already has been 'named' and informs discourse and practice. The articles in this issue hope to address this question by encouraging the reader to think of human capital in more holistic terms by centring attention on the 'human' part in human capital. In doing so, emphasis is placed on people as social beings brought into existence for social reasons rather than for their use in production. It also acknowledges that individuals differ in their innate and learned qualities and motivations, including those that are useful to production.

Also, in this expanded view, sites of production become recognised as sites of social production as well as of commodity production and thus subject to societal tensions and contradictions as to what constitutes development. Similarly, a broad view of sites of production recognises that human capital and its development goes beyond bringing about economic development but also brings about social development. Most

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of the articles in this issue take this more expansive interpretation of human capital, and, principally drawing on the various works of A. K. Sen (the Nobel Laureate in Economics in 1998) and use the term human capability to capture this wider view.

Sen's work originated within the context of development economics. He critiqued dominant development thinking and practice which prioritised economic development based on a 'western model' and measured by increases in GDP per capita, noting its failure to raise the human condition for the masses in what constituted 'under-developed' nations. In *Poverty and Promise*, for example, Sen demonstrated that it was a lack of entitlements ('command over commodities') rather than insufficient food availability through development that resulted in death and suffering on a wide scale. His analysis of the famine in Bangladesh in the early 1970s illustrated that people started dying when food availability was at record levels. People died, not because of a lack of food but because many lost their jobs when the floods hit and consequently their entitlement to food. At issue was not a lack of economic development in terms of productive capacity but an issue of distribution (Sen, 1981).

Whilst a focus upon entitlements in development thinking moved towards putting people's well-being at the centre of analysis, Sen began to use the term 'capabilities' to break from the strong relationship entitlements have with command over commodities. To Sen, capabilities represent a "person's real opportunities to do and to be" (Pressman and Summerfield, 2002: 430), or simply the 'freedom to achieve various lifestyles' (Sen, 1985, 1993, 1999). This use expands on the human capital approach which focuses on a person's given skills and abilities.

Sen distinguishes between 'capabilities' and 'functionings' in his work. Functionings address the actual outcomes or achievements of what a person does or is. Capabilities, in contrast, represent those sets of functionings that a person could choose or alternatively, the availability of opportunities. From a policy or strategic perspective, capabilities are more important because they can more easily address the availability of opportunities such as the real capability of obtaining an education, being able to be mobile or having dignity and respect and in a liberal positive sense, open the space for agency in choosing to act for oneself to bring about change and to consider others in those decisions. In contrast, while some functionings are determined by social constraints, many are also related to preferences and inherent talents and thus, are beyond the influence of policy-makers.

Sen's approach to human capability is now migrating beyond informing progress in development thinking and practice in developing nations, to use as a philosophy and an analytic framework to address contemporary economic and social issues in developed nations. In Western Europe in particular, human capability has recently come to prominence in the debate over European Union (EU) social and economic policy as a result of its use in the Supiot report on the transformation of work and employment relations (Salais, 1999; Supiot, 1999). Here, the argument presented is for EU social and employment policies and institutions to be reconstructed to provide for "active security to cope with work transformation and economic uncertainty" (Salais and Villeneuve, 2005: 6) as a complement to the economic transformation strategy towards 'knowledge-based' economies as agreed to at the Lisbon summit in 2000. Thus, by recognising that economic transformation implies further moves away from standard employment relationships, social protections also need to shift away

from traditional forms of protection against economic risk towards proactive security for individuals in the labour market (Barnard, Deakin & Hobbs . 2001).

Similarly, the articles in this issue attempt to extend Sen's capability approach to examination of social and employment issues in a developed nation, such as New Zealand. Policy-makers and other agents in New Zealand have grasped, in recent times, the need for transition towards more knowledge-based economic activity as a means for sustainable development. There are, however, ongoing arguments and a lack of consensus as to the appropriate institutional arrangements, both in and surrounding the workplace, to support this transition. An aim of this issue is to provide a fresh perspective on this debate in New Zealand.

One aspect of the debate over appropriate institutional arrangements for economic transformation in New Zealand concerns the continuing dominance of neo-liberal thought, which prioritises institutions that promote freedom of contract and minimal interference by the state in redistributing resources. In this view, collective bargaining and social rights embedded in the welfare state upset the spontaneous order of the market and act as a fetter on economic development. The article by Deakin, whilst placed in an English and EU context, challenges this conception on its own grounds by utilising the capability approach to argue for the market-creating function of the rules of social law. Deakin develops this argument from a historical perspective by tracing the development of the welfare state and contemporary employment policies from early ideas associated with the duty to work as captured in the English poor laws. Whilst he acknowledges that some developments in EU statute and case law help support the idea of social rights promoting labour market participation, other institutional arrangements, such as the EU open method of coordination of social security are held by Deakin to limit the spread and learning from institutional innovations that occur in some member states (i.e. the Nordic states).

The article by Anderson provides a commentary from a New Zealand perspective on the article by Deakin. Anderson focuses on the relevance to New Zealand of Deakin's argument that a capability approach provides a framework to shape labour and social policy to maintain social security in the face of labour market insecurity. Anderson argues that the current ability and prospects for labour law in New Zealand to maintain social security is somewhat light compared to the EU. Anderson points out that unlike continental Europe, there is a strong ideological belief among New Zealand's legal community that common law is 'real law' and that statutory law interferes with 'fundamental common law rights'. This preference for common law limits capability approach thinking to labour law where for instance, the common law has never recognised that an employee might have 'protectable rights in the continuity of their employment'. Nevertheless, despite this, the modern contract of employment in New Zealand has to be seen as an integrated structure of common law and statute in which a range of protections exist from the minimum wage to protection against unjustified dismissal.

Such protections are somewhat different from what Deakin and Supiot have in mind in a reformed Welfare State, reflecting measures to protect individuals against economic insecurity rather than maintaining economic security in the face of risks. Nevertheless, New Zealand retains a relatively strong social welfare system, elements of which, such as the combination of social insurance and universal superannuation,

do provide a relatively strong degree of economic security for those unable to work because of accident or age. Anderson, thus, does not see much short-term influence of the capability approach on employment and social welfare law, but has prospects for it as a theoretical support for progressive reform of such structures.

The article by Barker, Cowey and McLoughlin considers how the human capability concept has been used by policy practitioners in New Zealand – principally in the Department of Labour (DoL). In contrast to Sen, the concept was developed in late 1999 and used early in the new millennium by the DoL as a ‘conceptual framework for understanding the dynamics and forces at work within the labour market’. In this human capability framework, the labour market is viewed as comprising three core elements: capacity (people’s skills, knowledge and attitudes), opportunities (places where people can utilise their capacity to generate income and other rewards) and matching (the process of matching capacity with opportunities).

As the authors note, naming this framework as ‘human capability’ is really a reworking of the mainstream economics understanding of how labour markets work, thus it is old wine in a new bottle. Nevertheless, as the authors discuss, such a reworking had significant utility as a guide for policy-makers, who were adjusting to the more social democratic regime of a Labour-led government and out of more than ten years of extreme neo-liberal-informed governance and associated reforms. The framework, thus, provided the concepts and language to re-insert society into labour market issues and to help frame the political emphasis on employment issues at the time ‘from a social welfare mentality to one of social development’. Additionally, the framework assisted the DoL in the competition with other Government agencies for influence with ministers. Within the DoL, the framework proved useful in the development of key policy initiatives such as the Government’s Employment Strategy in 2000 and its subsequent Inter-agency Skills Action Plan.

Barker et al. note that the framework largely fell into disuse after 2004. Whilst conceptually, the framework serves to identify the interdependence between ‘supply’ and ‘demand’ sides of the labour market, politicians and policy-makers find it easier to intervene on the supply side and are reluctant to intervene in the demand-side. Prior to 2004, supply-side policy initiatives, such as those mentioned above fitted with the policy emphasis on increasing labour market participation. After 2004, the policy emphasis began to shift towards increasing New Zealand’s low productivity relative to other OECD nations. The authors acknowledge that whilst still a valuable tool for labour market policy thinking, the framework needs to be supplemented ‘by greater depth in understanding [of] the underlying dynamics within the framework’.

From a policy perspective our own article, Bryson and O’Neil potentially provides a useful follow-on from Barker et al. We report on a recent FoRST-funded research project which utilised Sen’s notion of human capability to examine how New Zealand institutions, organisations and individuals associated with workplaces both drive and constrain the development of human capability. The study has a largely micro-focus within organisations.

Surveying the literatures on learning organisations, human resource development, human resource management, workplace learning and adult education, the authors find two separate strands on human capability. The dominant strand is one in which

an implicitly instrumental view of human capability as serving the achievement of organisational goals is taken. The dominance of this strand is, in no small part, due to the popular uptake of human capital theory and resource-based views of the firm, which provide an appealing logic for organisations to behave in a short-term, self-interested manner. A contrasting critical strand points to the limits of human capital thinking on HRM practices towards organisational learning – its commodification of learning, ignoring of power relations, inability to deal with the general problem of underutilisation of investment in learning, and its failure to recognise the factors in workplaces that are supportive of learning. In the light of the narrow conceptions of the role of workers, managers and organisations in human capability development, we were drawn to the work of Sen's capability approach as an alternative starting point to provide a more integrated way of considering organisational ends, individual needs and societal outcomes. More particularly, this lens helped to ask: what are the social arrangements that lead to the ability of people in workplaces to do or be something they value and have reason to value.

Based on extensive field research, we developed a framework identifying drivers and barriers to the development of human capability in New Zealand organisations. We believe that such a framework has relevance for policy-makers attempting to construct policy interventions that go within private production in order to facilitate increase in productivity as well as for managers and others within firms attempting to do the same. For instance, as with the EU initiatives discussed in the Deakin article, the framework expands the scope for policy measures which enable individuals to manage uncertainty in the face of organisational restructuring – as opposed to merely providing income security such as the unemployment benefit. Similarly, within organisations, the organisational practices that make a difference to human capability are not dissimilar to forms of good human resource management practice that underpin high performance in organisations.

The multi-dimensional nature of capabilities and functionings in Sen's approach, whilst adding complexity, lends the approach to applications evaluating the outcomes of policy and strategic initiatives. Two papers in this issue illustrate the utility of Sen's approach for evaluation purposes. In the first of these papers, Kesting and Harris utilise Sen's thinking on capability as freedom to lead one type of life or another with a feminist approach to the gendered notion of care to critically examine whether actual work-life balance initiatives fit with what is implied in the term – 'a wider range of life opportunities and a process to attain and guarantee [them]'. Two cases illustrate this approach. They find this approach offers a framework for developing a more open and less biased evaluation of work-life balance social policy and workforce initiatives.

Schischka, in his paper, evaluates the usefulness of Sen's capability approach to empower communities and to guide development appraisal mechanisms. The context of this paper is a development setting of pre-school education in Vanuatu in which Volunteer Services Abroad (VSA) is a development partner. Schischka argues that, in such settings, evaluation is dominated by mainstream economics thinking whose reductionist approach 'miss[es] much and misleads' the extent to which different aid programmes have been able to contribute to social progress and improved standards of living. He develops and reports on a capability approach inspired appraisal

methodology which seeks to capture more of the realities of the participants in development programmes.

Collectively, the articles in this special issue provide an illustration of the applicability of the capability approach to an alternative analysis of the human lot in work and society. They also remind us of the ongoing challenges for researchers, policy makers and organisational actors (from managers to workers and trade union organisers) to remain innovative, humane and holistic in our employment relations thinking.

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# The 'Capability' Concept and the Evolution of European Social Policy

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## Abstract

Amartya Sen's capability approach has the potential to counter neoliberal critiques of social welfare systems by overcoming the false opposition between security and flexibility. In particular, it can be used to promote the idea of social rights as the foundation of active participation by individuals in the labour market. This idea is starting to be reflected in the case law of the European Court of Justice concerning free movement of persons but its use in the European employment strategy is so far more limited, thanks to the continuing influence of neoliberal 'activation policies'.

## Introduction

The concept of 'capability', developed by Amartya Sen in a series of economic and philosophical texts (see 1985, 1999), could play a major role in the reshaping of the European Union's social and employment policies. The prominence of the capability concept in contemporary European debates owes much to the use made of it in the report on the *Transformation of Work and the Future of Labour Law in Europe* which was prepared for the European Commission by a group led by Alain Supiot (1999). The Supiot Report argued that a capability-based approach would help to overcome the opposition between 'security' and 'flexibility' which had been established in neoliberal critiques of labour law and the welfare state, and provide a basis for 'real freedom of choice' in relation to labour market participation. This analysis was further developed in a paper published in *Droit Social* by the economist Robert Salais (1999), one of the members of the Supiot group. A research programme was subsequently initiated, designed among other things to explore the potential role of a new 'politics of capabilities' within the wider project of European integration (see: <http://www.idhe.ens-cachan.fr/Eurocap/index.html>).

The present paper aims to contribute to that programme of research by exploring some of the legal aspects of the capability concept. There is no precise juridical equivalent to Sen's notion of 'capability'. However, certain legal concepts undoubtedly bear a certain resemblance to it. This is particularly true of notions of contractual *capacity* which are recognized in both common law and civilian systems of private law. The task of exploring the links between 'capability' and legal 'capacity' has begun. My aim here is to focus on a different strand of legal thought, namely the set of ideas associated with the *duty to work*

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in labour and social security law. The content of the duty to work has shifted over time according to different notions of the capacity or ability of individuals to make themselves available for employment. These in turn have been shaped by particular conceptions of the employment relationship and of the family. To see how this process has occurred is to gain some insight into how the capability concept might operate if, as its proponents intend, it comes to serve as a new conceptual cornerstone for social law.

To this end, the next section explores Sen's definition of 'capability' and the use made of the notion in the Supiot report. The paper then looks at the historical development of legal analogues of capability in the English poor law and law of social insurance. The paper then returns the debate to a European level by considering some ways in which the capability concept is being (or could be) operationalised within the current employment and social policy of the EU.

### **Sen's notion of capability and its adaptation in the Supiot report**

Sen's account of capabilities describes individual well being in terms of a person's ability to achieve a given set of functionings. In this context,

...the 'concept of "functionings"... reflects the various things a person may value doing or being. The valued functionings may vary from elementary ones, such as being adequately nourished and being free from avoidable disease, to very complex activities or personal states, such as being able to take part in the life of the community and having self-respect... A "capability" [is] a kind of freedom: the substantive freedom to achieve alternative functioning combinations, (Sen, 1985: 75),

An individual's feasible set of utilization functions is constrained by the limits upon their own resources. This is not simply a question of choice. Non-choice factors affect functioning; for example, an individual's metabolic rate which is a consequence of their physical state. The state of an individual's knowledge may also be a non-choice factor, although this can be improved by education. Here the element of choice may lie elsewhere, at the collective or societal level, that is to say, with policy makers, government officials, and judges. Apart from the resources available to an individual, their capability to make use of a commodity may depend upon access to a legal system which recognizes and guarantees protection of contract and property rights, but also upon access to health care, education and other resources which equip them to enter into relations of exchange with others. Thus an individual's capability is to some degree a consequence of their entitlements, that is, their ability to possess, control and extract benefits from a particular economic commodity or resource.

Thus pivotal within Sen's 'capability approach' is the idea of *conversion factors*. These are the characteristics of an individual's *person*, their *society* and their *environment* which together determine their capability to achieve a given range of functionings. *Personal characteristics*, in this sense could include an individual's metabolism, or their biological sex, and *environmental characteristics* could refer to climate, physical surroundings, or technological infrastructure. But in addition, *institutional* or *societal characteristics* would include social norms, legal rules and public policies. These can act to entrench inequality

of capability, as is the case with social norms which result in institutionalised racial discrimination or gender stereotyping, or, conversely, to offset inequality through legal interventions of various kinds, including anti-discrimination law.

Sen has not sought to develop a juridical theory which might give some institutional shape to the capability concept, beyond insisting that his 'capability approach' does not prescribe any particular set of outcomes for a given society or group of societies. The high level of generality and theoretical abstraction of the capability approach lends itself to adaptations which may be far from Sen's initial formulation; the Supiot report is perhaps best thought of in this way. In the Supiot report, the capability concept appears in the context of a discussion of the meaning of labour flexibility (1999: 267-291). The report notes that 'flexibility' is frequently associated with greater variability in the application of social protection and labour standards, and thereby appears to be opposed to 'security'. However, this view, it is argued, overlooks the degree to which the capabilities of an individual depend on them having access to the means they need to realize their life goals. These include guarantees of a certain minimum standard of living and the resources needed to maintain an 'active security' in the face of economic and social risks, such as those arising from technological change and uncertainty in labour and product markets. Thus 'real freedom of action' for entrepreneurs, in the form of protection of property rights and recognition of managerial prerogative, has its equivalent in guarantees for the development of human resources for workers. However, these, the report suggests, would not necessarily take the same form as the 'passive protections' traditionally provided, in twentieth century welfare states, against unemployment and other interruptions to earnings. Protection against social risks is not the same as mechanisms aimed to maintain security in the face of risks:

We can understand the fundamental difference between protection, on the one hand, and security in the face of risks, on the other, by seeing that the latter includes but goes beyond the former. The capacity to work flexibly is conditional upon being able to deal with the consequences of risks. Protective regulations, because of the essentially negative way in which they are formulated, go against this kind of learning process. Security in the face of risk, on the other hand, is about providing the individual with the means to anticipate, at any given moment, long-term needs... Thus guarantees of minimum living standards (for example, that each person should have an effective right to housing, and not just to a minimum income), far from being undermined by the need for flexibility, should be reinforced by virtue of this need, and, if anything, more clearly and concretely defined as a result, (Supiot, 1999: 278).

Phrased in this way, the capability concept can be understood as an answer, of sorts, to the neoliberal critique of labour and social security law. That holds, among other things, that regulation which interferes with freedom of contract upsets the process of mutual learning and adjustment which is implicit in market relations. As Hayek put it, private law is the precondition of the market order in the sense that without it, individuals are not free to use their own information and knowledge for their own purposes. Private law is certainly a product of governmental action: 'in most circumstances the organisation which we call government becomes indispensable to assure that those rules are obeyed' (1973: 47). However, legal coercion to enforce contract and property rights is justified 'where this is

necessary to secure the private domain of the individual against interference by others' (1973: 57). By contrast, public or regulatory law, which Hayek regarded as consisting of specific commands and directions aimed at the substantive redistribution of resources, introduces an illegitimate form of interference *by the state*. Where this occurs, the 'spontaneous order' of the market is upset, and a certain part of the advantages to individuals and society alike of a market order, in terms of a higher degree of specialization and a more extensive division of labour, are lost.

The capability approach offers a response, based on the *market-creating* function of the rules of social law. In order to participate effectively in a market order, individuals require more than formal access to the institutions of property and contract. They need to be provided with the economic means to realize their potential: these include social guarantees of housing, education and training, as well as legal institutions which prescribe institutionalized discrimination. Mechanisms of this kind, by extending labour market participation on the part of otherwise excluded or disadvantaged groups, may enhance the aggregate value of production.<sup>1</sup>

If the capability approach attempts to answer, at a certain theoretical level, some aspects of the neoliberal critique, it also moves beyond the conceptualization of social rights in the post-1945 welfare state. T.H. Marshall, perhaps the most articulate exponent of this tradition, saw social rights as operating in tension with market relations. Civil and political rights had 'harmonized with the individualistic phase of capitalism' in the nineteenth century (1949, 1992: 26). By contrast, social rights, which Marshall defined as ranging 'from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society' (1992: 8), created entitlements which were 'not proportionate to the market value of the claimant'. Marshall, it is true, made something of an exception in this respect for collective bargaining, which he thought was 'a normal peaceful market operation' which also gave expression to 'the right of the citizen to a minimum standard of civilized living' (1992: 42). But for the most part, social rights were in 'basic conflict' with the market.

The capability approach, by contrast, sees one of the principal purposes of social legislation and social rights as encouraging the participation of individuals in the labour market. It is only by putting in place effective mechanisms for dealing with the effects upon individuals of economic uncertainty that the legitimacy and effectiveness of the market order can be maintained. This is not necessarily a call for the individualization of labour law; the 'conversion factors' by which individual capabilities are enhanced are likely to be collective in nature (Supiot, 1999: 268). But in the passage from 'passive protection' to 'active security' (*ibid*, 1999: 269), it is likely that many features of existing welfare state and labour law systems would not survive unscathed.

The capability approach to labour and social security law appears particularly novel when set against the post-1945 paradigm of protection based around 'stable employment for an adult male able to provide, by these means, for the needs of a nuclear family' (Supiot, 1999: 267). That model makes certain assumptions about employment and family relations which no longer command general assent, and perhaps never did. However, the 'standard employment contract' was itself a reaction to a quite different view of the conditions under which individuals should make themselves available for waged work.

## **The prehistory of the capability concept: notions of ability to work in the English poor law and social insurance**

The English 'poor law' was the precursor not just of the welfare state but of modern employment policy. In the sixteenth and seventeenth centuries, the 'poor' were not simply those with a low income, but all who were dependent on wages from employment as their principal means of subsistence: 'those who labour to live, and such as are old and decrepit, unable to work, poor widows, and fatherless children, and tenants driven to poverty; not by riot, expense and carelessness, but by mischance' (Dalton, 1746: 164). The poor law was, in one sense, a survivor of feudalism; as T.H. Marshall put it, 'as the pattern of the old order dissolved under the blows of a competitive economy... the Poor Law was left high and dry as an isolated survival from which the idea of social rights was gradually drained away' (1949, 1992: 14). However, there was another sense in which the poor law was a response to the emergence of a labour market. The enactment of legislation dealing with wage rates, poor relief and labour mobility (or, as it was put, 'vagrancy') from the fourteenth century onwards is evidence how far traditional feudal ties based on obligatory service (villeinage or serfdom) had already declined by that point.

Under the poor law, relief was delivered locally, through parishes (small administrative units covering only a few square miles), but organized nationally, in the sense that within the framework set by the Elizabethan legislation, every parish was required to set a local tax to be paid by householders (a 'poor rate'), to suppress indiscriminate giving, and to organize in its place a regular system of welfare support (Poor Relief Act 1601 (43 Elizabeth I c. 2), s. 1). Legislation called for the unemployed to be set to work, but the cost of implementing this provision was found to be excessive, and only a minority of parishes constructed workhouses for the purpose; for the most part, those suffering destitution for lack of work received cash doles ('outdoor relief') in the same way as the sick and the aged. Local poor law officers were required to provide relief to all those with a *settlement* in the parish in question. Thus relief became, in a customary sense, if not necessarily in the modern legal sense of a justiciable entitlement, the 'peculiar privilege' of the rural poor (Snell, 1985: 73).

One of the principal means of acquiring a settlement, from the late seventeenth century, was through a yearly hiring, which was the normal form of employment for young, unmarried workers in agriculture. The young thereby had an incentive to leave their home parish to search for employment elsewhere, acquiring a settlement in return for annual service as they moved from one employer to another, thereby ensuring that they would not be subject to removal to their parish of origin. In this way, the poor law, along with the emerging notion of the contract of service, encouraged and supported labour mobility (Slack, 1990).

The second half of the eighteenth century saw falling real wages in agriculture at the same time as access to the land was restricted by enclosure (Slack, 1990: 66). The social upheaval which accompanied the depopulation of rural areas was matched by a similarly far-reaching process of transformation in the poor law and labour legislation. The response of those charged with the administration of the poor law to falling real incomes in agriculture in the 1790s was the institution of a practice of wage supplementation, known as the Speenhamland system after the rural district in which it was first adopted. It began as an ad hoc addition of poor relief to wages, designed to bring incomes up to subsistence level. At the same time, attempts to deal with the problem through the implementation of a minimum wage (through the revival of the wage fixing powers of the Elizabethan Statute of Artificers) were rejected

both locally and in the national parliament.<sup>2</sup> The combined effect was to relieve employers of the obligation to pay the customary level of wages; during the same period, yearly hirings were becoming increasingly uncommon (Hobsbawm and Rude, 1973; Snell, 1985), and changes to the law of settlement made it more difficult for wage earners and their dependants to acquire the right to relief (Deakin, 2001). As employment grew less stable and access to relief by the traditional route of the settlement by hiring, under which the employer absorbed the costs of short-term interruptions to earnings, became increasingly restricted, expenditure on poor relief grew to the point where a national debate was launched on the feasibility of maintaining the poor law system. This continued, at intervals, over several decades in the early nineteenth century, during which time the administration of poor relief became steadily more restrictive and punitive. This process culminated in the 1834 Poor Law Report<sup>3</sup> and the Poor Law (Amendment) Act<sup>4</sup> of the same year.

The new poor law which was put in place after 1834 was founded on the principle of 'less eligibility', meaning that relief should not provide a standard of living superior to that enjoyed by the least-well off 'independent' household. The assumption was that once the 'distortion' of wage supplementation was removed, wages would rise to the point where the subsistence needs could be met. On this basis, the unwillingness of individuals to accept wages set by the market could only be evidence of poor 'character', which it was the role of the law to address by disciplinary means. Thus a wilful refusal to accept an offer of employment at the going rate of wages became a criminal offence punishable by imprisonment.<sup>5</sup> At this point, in the absence of a minimum wage and before the development of collective bargaining, the relevant wage was whatever an employer was willing to offer, and not the customary rate for that trade. In addition, the simple fact of destitution as a result of unemployment or sickness would normally lead to the confinement in the workhouse of the wage earner and other family members.<sup>6</sup> Beginning in the 1840s, a series of regulatory orders spelled out the implications of this policy for the administration of poor relief: outdoor relief was to be limited as far as possible to the aged and infirm, denied to the adult 'able bodied', and under no circumstances combined with wages; if it were to be paid, exceptionally, to those who were able to work, it had to be combined with a 'labour test' designed to deter the work shy; and in order to ensure that conditions inside the workhouse were, as far as possible, below those of the worst-off household outside, a consciously degrading and punitive regime for workhouse inmates was put in place.<sup>7</sup>

In this context, being *able* to work was defined as having the physical capacity to labour, and the labour test functioned to distinguish the work-shy from those genuinely incapable of working. But of course, physical ability to work was only one aspect of being 'able bodied'. A further, implicit assumption was that the claimant for relief had no means of their own; that they were *propertyless*. Capability, then, was a function of the duty to work which was imposed on those with no means of subsistence but their own capacity to labour. The independently wealthy were not subject to the duty to work.

Bentham recognized, and implicitly endorsed, the dual standard at work here. The old poor law, he complained, had ceased to draw an appropriate distinction between 'natural' poverty, which the law could not hope to relieve, and the 'evil' of indigence. By enabling 'the condition of persons maintained without property by the labour of others [to be] rendered more eligible than that of persons maintained by their own labour' the old poor law removed the incentive to work upon which the market depended for its effectiveness: 'individuals destitute of property would be continually withdrawing themselves from the class of persons

maintained by their own labour, to the class of persons maintained by the labour of others; and the sort of idleness, *which at present is more or less confined to persons of independent fortune*, would thus extend itself sooner or later to every individual... till at last there would be nobody left to labour at all for anybody' (emphasis added) (Poynter, 1969: 125-126). It was because the numbers of the propertyless greatly outweighed those of the idle (or 'independent') rich that the law had to coerce the former into employment, while leaving the latter to enjoy their 'fortune' undisturbed.

Just as the new poor law was a response to the perceived failings of Speenhamland, so the welfare state of the twentieth century was constructed by way of reaction against what were seen as the shortcomings of the system put in place after 1834. By the end of the nineteenth century, there was a growing consensus that the new poor law had failed in its own terms. Wages had risen following the restriction of outdoor relief, but not to the extent which had been anticipated. Destitution was an ever-present phenomenon in Britain's major urban areas and in many rural districts. When numbers of the unemployed increased, as they did in particular during the long recession which lasted from the 1870s to the 1890s, the response of the poor law administrators was to tighten the disciplinary operation of the system; outdoor relief was made more selective, the labour test more severe, and workhouse conditions made more demeaning. Thus throughout the 1880s and 1890s, a number of urban poor law unions were constructing special 'test workhouses' with the aim of subjecting the adult able-bodied to a particularly stringent regime of discipline (Webb, 1909).

The sheer expense of this effort was one factor which helped to turn the tide of opinion; also important was the work of the 'social science' movement which set out to measure the extent of destitution outside the poor law system. 'Independent' households could not subsist on the wages offered for low-paid work, and were reliant in practice on ad-hoc charitable giving; the casualisation of urban occupations undermined efforts to establish a living wage and imposed unnecessary search costs on employers and workers alike.<sup>8</sup>

A key text in laying bare the deficiencies of the new poor law was the Minority Report of the Poor Law Commission of 1909, which was drafted by Sidney and Beatrice Webb. For the Webbs, the new poor law was constructed on a false premise, namely that destitution was always and everywhere the result of personal irresponsibility. This, in turn, was the result in turn of the undue attention placed in 1834 on 'one plague spot – the demoralization of character and waste of wealth produced in the agricultural districts by an hypertrophied Poor Law' (Webb, 1909: 4). The Webbs did not believe that the 'personal character' of those in poverty was completely irrelevant; it was '...of vital importance to the method of treatment to be adopted with regard to the individuals in distress'. However, it was not 'of significance with regard to the existence of or the amount of Unemployment' (Webb, 1909: 233).

As Beveridge had put it, unemployment was 'a problem of industry', that is, a feature of economic organization, rather than the result of personal irresponsibility. His research on casualisation<sup>9</sup> was called in aid to show that 'chronic over supply of casual labour in relation to the local demand was produced and continued, irrespective of any excess of population or depression of trade, *by the method by which employers engaged their casual workers*' (emphasis in original). This 'inevitably creates and perpetuates what have been called "stagnant pools" of labour in which there is nearly always some reserve of labour left, however great may be the employer's demand' (Webb, 1909: 200). It was continued

exposure to the effects of under-employment which precipitated decline into the permanently unemployed, a body which, leaving aside 'the rare figure of the ruined baronet or clergyman' consisted of 'those Unemployables who represent the wastage from the manual, wage earning class' (1909: 200).

To this, the Webbs added an important rider: the effects of casualisation were exacerbated by the poor law itself. The outdoor labour test, by providing intermittent work for the unemployed, 'facilitates and encourages the worst kind of Under-employment, namely, the unorganized, intermittent jobs of the casual labourer'. Likewise, the workhouse test for the able-bodied, by 'establishing a worse state of things for its inmates than is provided by the least eligible employment outside', not only engendered 'deliberate cruelty and degradation, thereby manufacturing and hardening the very class it seeks to exterminate'; it also 'protects and, so to speak, standardizes the worst conditions of commercial employment' (1909: 67). Thus the 'fatal ambiguity' (1909: 72) of 'less eligibility' was that standards inside and outside the workhouse, since they were mutually reinforcing, would drive each other down, until 'the premises, the sleeping accommodation, the food and the amount of work exacted, taken together, constitute a treatment more penal and more brutalizing than that of any gaol in England' (1909: 79).

The solutions advanced by the Minority Report reflected its diagnosis of the problem. Their principal aim was to remove the 'able-bodied' from the reach of the poor law. The key mechanisms for achieving this end were labour exchanges which, in addition to reducing search costs, would break the power which employers had to maintain 'pools of labour' in reserve, waiting for work:

What a National Labour Exchange could remedy would be the habit of each employer of keeping around him his own reserve of labour. By substituting one common reservoir, at any rate for the unspecialised labourers, we could drain the Stagnant Pools of Labour which this habit produces and perpetuates, (1909: 261).

The Minority Report also addressed the issue of unemployment compensation as an alternative to poor law relief. It argued in favour of a hybrid public-private system, under which government would have the power to subsidise the private insurance schemes already run, at that point, by certain trade unions. In the event, Part II of the National Insurance Act 1911 went further by instituting a fully state-administered system. However, the form of unemployment compensation which initially emerged was similar to that discussed by the Minority Report, namely a system of compulsory insurance 'applied only to particular sections of workers or to certain specified industries, under carefully considered conditions' (1909: 291). This was gradually extended during the inter-war period to cover the vast majority of the workforce; a key feature of the system, and a significant departure from the poor law, was that workers were entitled for the most part to refuse work at wages below those which they had received in their previous employment, or which were out of line with standards set by collective agreements between employers' associations and trade unions in the relevant district.

In this respect, social insurance dovetailed with state support for labour standards. The case for general legislative standards in the labour market was put by the Webbs in *Industrial Democracy*, the first edition of which appeared in 1896. Their 'National Minimum' of living

and working conditions would 'extend the conception of the Common Rule from the trade to whole community'. Low-paying and casualised trades were 'parasitic' as by paying wages below subsistence they received a subsidy from the rest of the community; thus 'the enforcement of a common minimum standard throughout the trade not only stops the degradation, but in every way conduces to efficiency'. In this respect, the deficiencies of the selective model of regulation contained in nineteenth century factory legislation were clearly recognised:

...this policy of prescribing minimum conditions, below which no employer is allowed to drive even his most necessitous operatives, has yet been only imperfectly carried out. Factory legislation applies, usually, only to sanitary conditions and, as regards particular classes, to the hours of labour. Even within this limited sphere it is everywhere unsystematic and lop-sided. When any European statesman makes up his mind to grapple seriously with the problem of the 'sweated trades' he will have to expand the Factory Acts of his country into a systematic and comprehensive Labour Code, prescribing the minimum conditions under which the community can afford to allow industry to be carried on; and including not merely definite precautions of sanitation and safety, and maximum hours of toil, but also a minimum of weekly earnings, (Webb, 1896, 1920: 767).

A third component in the re-regulation of the labour market was provided by full employment policy. In Beveridge's view, an effective social insurance scheme could not work unless 'employment is maintained, and mass unemployment prevented' (Beveridge, 1944, 1967: 17). The responsibility for providing the conditions for full employment lay with the state: '[i]t must be function of the State to defend the citizens against mass unemployment, as definitely as it is now the function of the State to defend the citizens against attack from abroad and against robbery and violence at home' (1967: 29). Full employment, in turn, had a specific sense. It did not just refer to the absence of unemployment, but to the availability of employment of a particular kind: 'at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means, by consequence, that the normal lag between losing one job and finding another will be very short' (1967: 18). Beveridge's combined scheme for social security and full employment therefore sought to complete the work of the Minority Report of 1909 in reversing the effect of the poor law. As he put it: "...the labour market should always be a seller's market rather than a buyer's market' (1967: 18).

The welfare state of the mid twentieth century therefore gave rise to a specific conception of social rights: a model of social citizenship based on employment. The duty to work was not completely neutralized. On the contrary, access to economic security depended on labour market participation. However, this was conditional upon the capacity of the state, through a combination of regulation and macroeconomic management, to guarantee access to stable and well remunerated employment, and to provide for collective provision against the principal hazards for wage earners in a market economy, in particular unemployment, illness and old age. Encoded in the complex mass of detail of national insurance legislation was a commitment to social integration and solidarity across different occupational groups: '[w]orkers of every grade in every town and village in the country are now banded together in mutual State-aided insurance... They are harnessed together to carry the industrial population through every vicissitude' (Cohen, 1938: 10).



There were qualifications to this idea, the most important of which was the differential treatment of male and female workers. Beveridge's social insurance scheme treated married women as dependent on a male breadwinner, and allowed them to opt out of most aspects of the scheme; in return they were able to claim the long-term benefits of retirement and widows' pension on the basis of their husbands' contributions. As a result of decisions taken in the 1940s, a high proportion of married women either stayed outside the national insurance scheme altogether or opted to pay a lower rate, up to the late 1970s (Williams, 1982).

The roots of the differential treatment of men and women in social insurance systems are to be found in contemporary assumptions about the family and the employment relationship. This is most clearly seen in the extensive discussion by the Webbs, in the 1909 Minority Report, of the question, 'are women able-bodied?'

The new category of 'unemployment' differed from the concept of 'able-bodiedness' in the way it carefully defined the status of the applicant for relief by reference to the employment which had been lost and to which the applicant was expected to return: as the Minority Report recognised in referring to the intentions of the Unemployed Workmen Act 1905, the 'bona fide Unemployed' were 'the men and women who, having been in *full work at full wages*, find themselves without employment through no fault of their own' (emphasis added) (Webb, 1909: 1). This category, in the view of the authors of the Report, necessarily excluded women whose domestic responsibilities prevented them from becoming 'regular and efficient recruits of the industrial army' (1909: 209). Thus in response to the questions 'are women able-bodied?', posed at the beginning of the Report, and 'are women unemployed?', posed at the end, the same answer was supplied: only if they were 'unencumbered independent wage earners, both supporting themselves entirely from their own earnings and having no one but themselves to support'.<sup>10</sup>

The logical conclusion was the male breadwinner wage:

...we have chosen so to organise our industry that it is to the man that is paid the income necessary for the support of the family, on the assumption that the work of the woman is to care for the home and the children. The result is that mothers of young children, if they seek industrial employment, do so under the double disadvantage that the woman's wage is fixed to maintain herself alone, and that even this can be earned only by giving up to work the time that is needed by the care of the children. When the bread-winner is withdrawn by death or desertion, or is, from illness or Unemployment, unable to earn the family maintenance, the bargain which the community made with the woman on her marriage – that the maintenance of the home should come through the man – is broken. It seems to us clear that, if only for the sake of the interest which the community has in the children, there should be adequate provision made from public funds for the maintenance of the home, conditional on the mother's abstaining from industrial work, and devoting herself to the care of the children, (Webb, 1909: 211).

In this way, the welfare state was constructed on a notion of ability to work which presupposed a particular family structure.

### **Contemporary European social and employment policy from a capability perspective**

In the post-war welfare state, the duty to work was qualified by state guarantees of full employment and by access to a breadwinner wage, underpinned by collective bargaining. The decline of the breadwinner wage, which has accelerated since the 1970s, is a complex phenomenon (Creighton, 1999). On the one hand, increasing female participation in paid employment, coupled with the growing importance of sex discrimination and equal pay legislation, has eroded the assumption that well-paid, secure and stable jobs should be reserved for male earners. On the other, the notion of a breadwinner wage is of declining relevance for the increasing proportion of households with children which contain a single parent, normally the mother (up from 7% of all such households in 1971 to 21% by 1994<sup>11</sup>). Both trends are particularly visible in the UK, but also illustrate the range of forces involved.

Thus overall participation rates for married women have increased markedly, from 10% in 1931 (this low figure influenced Beveridge to believe that married women should be a special class of contributors to national insurance) to 22% in 1951, 42% in 1971 and 53% in 1971. However, this growth has increasingly taken the form of part-time work: in 1971 this accounted for one third of all female employment, but by 2001 had reached almost half of the total.<sup>12</sup> An unduly large proportion of female part-timers are employed on very low weekly wages, in part because of an artificial fiscal subsidy which until recently applied to employment below the level of national insurance contributions.<sup>13</sup>

In general, and notwithstanding attempts to legislate for equality of treatment,<sup>14</sup> part-time work still confers relatively lower incomes and proportionately fewer employment-related benefits than is the case with full-time work. There has been a narrowing of the gender pay gap and average job tenure rates for women have been lengthening at the same time as those of men have been falling. Equal pay legislation, beginning in the 1970s, contributed significantly to the substantial reduction in wage inequality between men and women, and the longer job tenure of women was the result in part of the passage of maternity protection legislation, mandating a period of maternity leave and providing for the right to return to employment. However, these gains are largely concentrated on the situation of full-time working women; in the 1990s, while the gender pay gap was falling in overall terms, it remained constant for part-time work. Thus notwithstanding the elimination of discrimination against part-time workers in relation to terms and conditions of employment and access to occupational pension schemes, part-time work remains poorly paid in relation to full-time employment (Robinson, 2003).

Conversely, the rise in single-parent households, while undermining the idea that it is necessarily a male earner's duty to provide for the other family members, has been accompanied by a growing polarization of income and opportunities: while dual-earner households have been growing in number, an increasing proportion of households are without employment altogether. In 2002, of those households with married or cohabiting

couples between the ages of 25 and 49, around one third had two full-time earners and a further third had a full-time male earner and a part-time female earner. Less than 20% had a sole male breadwinner, around 4% had a sole female breadwinner, and around 6% of this age group had neither partner in work. At the same time, the division of household tasks between men and women remains unequal. This is so across all households, including those with two full-time earners and even those with sole female breadwinners, but it is particularly marked for households with part-time female earners and for those solely dependent on a male breadwinner (Harkness, 2003).

The overall effect is that ‘the erosion of the [male breadwinner family wage] has been only partial and has been accompanied by a number of interrelated problems, including increasing polarization between households, greater poverty, an uneven distribution of opportunities between households and difficulties in combining paid work with childcare’ (Creighton, 1999: 519). The principle of family subsistence no longer guarantees access to a living wage; instead, low pay is topped up with fiscal subsidies (tax credits), avoiding the ‘burden’ of regulation of employment.<sup>15</sup> In turn, the absence of a living wage is no longer, as it was at various points in the evolution of social insurance system, a good ground for refusing an offer of employment.<sup>16</sup> The withdrawal of benefits from the unemployed, now termed ‘jobseekers’, who refuse work on the grounds of its unsuitability or low level of remuneration is a policy which successive governments, Conservative and Labour, have followed during the 1990s.<sup>17</sup> Nor are lone parents completely exempt from the duty to work; although they cannot be deprived of benefit for refusing to take up paid work, they are obliged to attend periodic interviews with an employment adviser, on pain of losing part of their social security entitlements.<sup>18</sup>

This is the background, at least in the UK, against which the capability debate is currently being played out: a neoliberal-inspired *activation policy*, which is in many respects the polar opposite of the policy of full employment which it has replaced. Full employment, in its classic, Beveridgian sense, implied a set of measures to control and stabilize the labour supply. The policy of ‘a high employment rate’, by contrast, aims to increase numbers in employment even if this is carried out at the cost of creating categories of low paid and ‘flexible’ work which do not provide access to a living wage. Deregulation of terms and conditions of employment goes hand in hand with the restriction of the conditions under which social security benefits are made available. For the time being, contemporary policy is closer to the old, pre-1834 poor law, in the use being made of tax credits and other forms of wage subsidisation which echo Speenhamland, than it is to the late Victorian institutionalisation of the workhouse and labour yard. Yet it was precisely the same combination of rising expenditure and the use of poor relief to subsidise low wages which prompted the 1834 reforms, the last vestiges of which were swept away as recently as the 1940s.<sup>19</sup>

The UK is, from one point of view, something of a special case within the European Union. Other systems, in particular the Nordic countries, appear to have been more successful in replacing the male breadwinner model with alternatives based on an equitable household division of labour, regulation of working time aimed at achieving a more effective balance between working time and family time, and the use of active labour market policy measures to support transitions into paid employment (Supiot, 1999). However, while this model exists within certain Member States, it is striking that, to date, the European Union has done little to propagate it.

This is the consequence, first of all, of the restricted scope for harmonization of social security law at European level. In lieu of harmonization, the Treaty of Rome provided for the limited alternative of the coordination of social security systems. In the traditional meaning of this term (prior to its use as part of the ‘open method of coordination’ or OMC), coordination referred to measures designed to ensure that in moving between different social insurance regimes, migrant workers were not unduly penalized by comparison those whose employment remained within a single Member State.<sup>20</sup> Far from seeking to set a common standard for social security across different national regimes, it presupposed difference between them. Notwithstanding the far-reaching changes made since the 1950s in other areas of competence, social security remains an area in which the organs of the Community have very little capacity to act, as opposed to reacting to the effects of national diversity.

The inability of the European Union to take the initiative in this area also results from the approach which has been adopted to the implementation of the employment strategy. A full assessment of the use of the OMC in the context of employment is beyond the scope of the present paper. However, notwithstanding the attention justifiably devoted to the OMC as a novel technique of regulatory learning, it is looking less likely over time that it can serve as a viable means for implementing a progressive policy agenda, in particular one of the kind set out by the Supiot report. This is because the employment strategy bears the traces of its origin in the early and mid-1990s, at a series of European summits which set out the goals of counter-inflation policy and macroeconomic stability which accompanied the adoption of the single currency (Deakin and Reed, 2000). This accounts for the emphasis within the employment strategy upon the promotion of labour flexibility and the reduction of social security expenditure, themes which have led the Commission to give negative evaluations of the employment record of the Nordic systems while leaving the UK’s neoliberal approach relatively free of criticism (Raveau, 2004). The ‘learning process’ encouraged by the employment strategy is, at least for the time being, skewed towards neoliberal policy objectives; as such it is a potential force for the kind of deregulatory competition between European welfare states which has been long debated but, until now, has been limited in its impact.<sup>21</sup>

Against this rather unpromising background, what are the prospects for the capability approach as the foundation of a new conceptual framework in labour and social security law? The ‘prehistory’ of the concept of capability suggests the need for care here. For most of the period of the poor law, notions of ‘able-bodiedness’ were derived from the existence of a duty to work which the law imposed on the propertyless. Social insurance carved out a limited series of exceptions to this principle, based on a model of the breadwinner wage which now lacks legitimacy. Is it possible to see in the concept of capability a basis for reversing the logic of the poor law and reinventing the welfare state, so that the duty to work is *only* imposed under circumstances where the state has provided the conditions under which individuals are equipped for *effective* labour market participation? Simply to state this proposition in such terms is to see how far removed today’s mainstream debate is from any such conception of capability.

The capability approach may nevertheless be helpful in providing a particular way of thinking about social rights with respect to market processes. The purpose of the capability approach is not to provide a blueprint for social reform; as Sen has put it, ‘[i]t is not clear that there is any royal road to evaluation of economic or social policies’ (1999: 84). This

insistence that there is no universally-applicable, prescriptive list of functionings and capabilities means that attention is focused instead on social choice procedures by which the content of capability sets can be collectively determined in particular contexts.

In the context of social welfare, the capability approach suggests a particular way of thinking about social rights: either as claims to resources, such as social security payments, or as rights to take part in forms of procedural or institutionalised interactions, such as those arising out of collective bargaining. When social rights take the form of claims on resources, they are the equivalent of commodities which individuals can convert into potential or actual functionings. When they take the form of proceduralised rights, they come close to what Sen calls 'social conversion factors', that is, social or institutional settings which shape the set of possibilities open to individuals in terms of achieving their goals. Social rights shape the institutional environment in such a way as to enable all (or more) individuals to convert endowments in the form of human and physical assets into positive outcomes.

Juridical support for the idea is beginning to appear in the interstices of European Union social welfare law. One illustration of this is the parity accorded to social and economic rights in the Charter of Fundamental Rights of the European Union, adopted in 2000 (Hervey and Kenner, 2003). Whatever the limitations of particular provisions of the Charter (and there is evidence that they diluted in the drafting process), the equivalence accorded to the rights contained in the 'Equality' and 'Solidarity' chapters on the one hand, and those dealing with economic and political rights on the other, marks an important departure from the practice of subordinating social rights to economic considerations, which is to be found, for example, in the relationship between the European Convention on Human Rights and Freedoms and the European Social Charter, and arguably in the Treaty of Rome and its various successors. The significance of this move is reflected in the determined (but so far unsuccessful) effort made to restore the traditional priority of market considerations in the 2003 draft of the European Constitution (Bercusson, 2004).

A second source of institutional support for the capability approach may be found in the developing case law of the European Court of Justice on the concept of solidarity. As Catherine Barnard explains, this idea is underpinned by

...the notion that the ties which exist between the individuals of a relevant group justify decision-makers taking steps – both negative and positive – to ensure that the individual is integrated into the community where they have the chance to participate and contribute fully. The negative steps include removing obstacles to integration and participation; positive steps include active programmes to encourage participation of those otherwise excluded. If this reading is correct then the use of solidarity as a guiding principle can help liberate decision-makers and decision-takers from the straitjacket of formal equal treatment, (Barnard, Deakin and Morris, 2004).

The claim that participation in a market presupposes active measures of integration, and not simply the removal of formal obstacles, is very much in the vein of recent writing on capability theory. The appearance of this idea in the context of the case law of persons<sup>22</sup> indicates its potential, but also its limits. It goes beyond the requirements of formal equality in insisting on the need for state action to remove the conditions which inhibit

effective market participation. At the same time, it is only within a relatively narrow and established legal framework that the idea, to date, has much purchase. The Court's approach is suggestive of the kind of reasoning which might be put to good effect, if the legislative structure of European social law were to be developed further.

## Conclusion

This paper has examined the concept of capability from an historical perspective in order to try to gain some traction on the issue of its usefulness for contemporary EU social law. The idea has potential as a way of breaking out of the impasse established by neoliberal policies, which increasingly view social rights as a fetter on the growth and integration of markets. Capability theory, in contrast, insists on paying regard to the institutional preconditions for the effective participation of individuals in market activities. Contrary to neoliberalism, these are not limited to the provision, by private law, of contractual capacity or the right to hold property, but extend to collective mechanisms for the sharing and distribution of social risks arising from the operation of markets. However, the example of the male breadwinner model offers an example of the urgent need to review and renew these mechanisms. The EU, which already recognises that social rights have a place within an integrated market order, is ideally placed to play a central role in this process. It is disappointing, therefore, that the 'learning process' associated with the employment strategy has done more to endanger than to encourage institutional innovations of the kind needed to move this debate forward. This should perhaps serve as a reminder that notions of capacity or capability represent contested terrain, in which many different conceptions of the market order struggle for acceptance.

## Notes

<sup>1</sup> See generally S. Deakin and F. Wilkinson, "'Capabilities'", *ordineo spontaneo del mercato e diritti sociali* (1999) 2 *Il diritto del mercato del lavoro* 317 (also published in English as CBR Working Paper No. 174, September 2000 (<http://www.cbr.cam.ac.uk/pdf/wp174.pdf>); S. Deakin and J. Browne, 'Social rights and market order: adapting the capability approach' in T. Hervey and J. Kenner (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective* (Oxford: Hart, 2003); J. Browne, S. Deakin and F. Wilkinson, 'Capabilities, social rights and European market integration', in R. Salais and R. Villeneuve (eds.) *Europe and the Politics of Capabilities* (Cambridge: Cambridge University Press, 2004); and S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005), ch 5..

<sup>2</sup> The classic account of Speenhamland remains J.L. and B. Hammond, *The Village Labourer 1760-1832* (London: Longmans, Green and Co., 1920).

<sup>3</sup> Reproduced in S.G. and E.O.A. Checkland (eds) *The Poor Law Report of 1834* (Harmondsworth: Penguin, 1973).

<sup>4</sup> 4 & 5 George IV c. 76.

<sup>5</sup> Under the Vagrancy Act 1824 (5 George IV c. 83), it was an offence punishable by one month's hard labour to become chargeable to poor relief in the case of 'every person being able wholly or in part to maintain himself, or his or her family, by work or other means, and wilfully refusing or neglecting to do so'. In earlier vagrancy legislation, dating from 1744, a crime was committed only where there was 'a refusal to work for the usual and common Wages given to other Labourers in the like Work'. In the 1824 Act, the reference to 'usual and common wages' was removed.

<sup>6</sup> Workhouses existed in certain parishes prior to 1834, but after that point their use increased substantially thanks to the restriction of outdoor relief.

<sup>7</sup> The principal orders were the Outdoor Relief Prohibitory Order of 21 December 1844, the Outdoor Relief Regulation Order of 14 December 1852, and General Consolidated Order of 24 July 1847 (dealing with workhouse conditions). They are reproduced, with amendments and consolidations, in H.R. Jenner-Fust, *Poor Law Orders* (London: P.S. King, 1907).

<sup>8</sup> On the significance of the surveys of urban poverty carried out by Booth and Rowntree, see the account of Rowntree's work in A. Briggs, *Social Thought and Social Action: A Study of the Work of Seebohm Rowntree* (London, Longmans: 1961); on Beveridge, see J. Harris, *William Beveridge: A Biography* (2<sup>nd</sup> ed., Oxford: Clarendon Press, 1997).

<sup>9</sup> *Unemployment: A Problem of Industry* (London: Longmans, Green and Co., 1909).

<sup>10</sup> *Ibid.*, at p. 208. For further discussion of the Webbs' analysis of the issue of female 'able-bodiedness', see A. Picchio del Mercado, *Social Reproduction: the Political Economy of the Labour Market* (Cambridge: CUP, 1992), at pp. 86-94.

<sup>11</sup> Creighton (1999: 527), citing figures of the Office of National Statistics and official Census data which also show that during roughly the same period, the divorce rate in the UK rose from 2.0 per 1,000 members of the married population (in 1960) to 13.6 (in 1995), and the number of births outside marriage from 5.4% of all live births (in 1961) to 37% (in 1994).

<sup>12</sup> Overall participation rates are drawn from the official Census of Population (published by the *Office of Population Censuses and Surveys*) and those on part-time work from the Labour Force Survey (published monthly in the Department of Trade and Industry's *Labour Market Trends*).

<sup>13</sup> See S. Deakin and F. Wilkinson, 'Labour law, social security and economic inequality' (1991) 15 *Cambridge Journal of Economics* 125. Changes made to the law of national insurance in the late 1990s removed much of the subsidy effect (see Social Security Act 1998, s. 51, and Social Security Benefits and Contributions Act 1992, s. 6A, as inserted by the Welfare Reform and Pensions Act 1999).

<sup>14</sup> Principally in the form of the Protection of Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, SI 2000/1551, implementing Directive 97/81/EC Concerning the Framework Agreement on Part-Time Work concluded by ETUC, UNICE and CEEP, OJ L 14, 20.1.98, p. 9. On the important limitations in the 2000 Regulations, see A. McColgan, 'Missing the point? The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000' (2000) 29 *ILJ* 260.

<sup>15</sup> The tax credit scheme is governed by the Tax Credit Acts 1999 and 2000. See generally N. Wikeley, *Wikeley, Ogus and Barendt's Law of Social Security* (5<sup>th</sup> ed.,

London: Butterworths, 2002), ch. 10. Although a statutory minimum wage was put into place in the late 1990s by virtue of the National Minimum Wage Act 1998, it operates at a low level and is intended to be topped up by tax credits in order to provide a sustainable income for households.

<sup>16</sup> The National Insurance Act 1911, s. 86(3) made disqualification from unemployment benefit under this heading conditional upon it being shown that the work in question was outside the claimant's normal occupation and/or, in certain instances, was remunerated below the going rates set by collective agreement or custom and practice in the industrial sector or district in question. Despite some weakening of the test during the 1920s, it remained more or less in place up to the 1980s, when it was diluted in various ways (on which, see Deakin and Wilkinson, 'Labour law, social security and economic inequality', *op. cit.*).

<sup>17</sup> The Jobseekers Act 1995, passed by a Conservative government, confirmed the trend begun in the 1980s towards the tightening of benefit conditions and expansion of the grounds for disqualification from benefit on the basis of non-availability for work (see previous note). The Labour administration, elected in 1997, has maintained the same approach to the definition of benefit entitlements for those out of work.

<sup>18</sup> By virtue of the Welfare Reform and Pensions Act 1999, inserting ss. 2A-2C into the Social Security Administration Act 1992.

<sup>19</sup> The last workhouses were converted into hospitals with the creation of the National Health Service in 1946 and poor relief for the sick and aged was replaced by national assistance in 1948.

<sup>20</sup> For an overview of this highly complex and, within European legal studies, relatively neglected topic, see Wikeley, Ogus and Barendt's *Law of Social Security*, *op. cit.*, ch. 3.

<sup>21</sup> On regulatory competition in EU welfare state and labour law policy, see generally K.-H. Paque, 'Does Europe's common market need a social dimension?' in J. Addison and W.S. Siebert (eds.) *Labour Markets in Europe: Issues of Harmonisation and Regulation* (London: Dryden, 1997), and S. Deakin, 'Labour law as market regulation', in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.) *European Community Labour Law: Principles and Perspectives, Liber Amicorum Lord Wedderburn* (Oxford: Clarendon Press, 1996).

<sup>22</sup> The most important decisions are those in Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-413/99 *Baumbast* [2002] ECR I-000.

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# The Capability Approach and the Legal Regulation of Employment: A Comment on Deakin

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## Introduction

Sen's capability concept has become increasingly influential and has been applied in a variety of contexts that have extended its utilisation well beyond the original formulation in the context of economic development. It is clearly a versatile concept, capable of a variety of interpretations and applications. As the papers in this special issue illustrate, one area where the capability approach provides a valuable analytical tool is the analysis of human capability in the workplace, a topic which itself is multi-faceted. Within developed economies, the workplace and employment are central, either directly or indirectly, to the economic security of the great bulk of the population who are completely or substantially dependent on the return from their own labour. It might be expected that, given its underlying premises, the capability concept would have much to offer to the analysis of labour relations generally as well as to its separate components, in this case the law.

The paper contributed by Simon Deakin illustrates the capability concept's potential for providing a theoretical foundation for rethinking much of our approach, not only to employment law but also the various systems of law that provide economic and legal security for workers generally. The paper focuses on issues surrounding the "duty to work" in labour and social security law. The idea of a duty to work is, of course, one that has a long history and the legal enforcement of that duty has varied over time. In the main, the duty to work has always had a strongly punitive element although modern systems of social welfare have ameliorated that aspect to some degree. Deakin's paper, taking into account a number of academic developments in Europe, and particularly the work derived from Supiot, discusses the idea that the foundation of an individual's active participation in the labour market must be found in clear social rights. While Deakin's paper was written in 2005, the ideas in it have a particular contemporary resonance, given the current economic recession and the resulting unemployment. It is in periods such as this that the structures of the social welfare systems providing economic security to workers come more clearly into the political spotlight and the embedded assumptions, such as a duty to work, come under greater scrutiny. The ideas covered in Deakin's paper and the work from which it is derived make an important contribution to the debate on social security and welfare systems and their interface with the labour market.

## The law and capability

Legal rules, as Deakin points out, are an important institutional characteristic of society and can act either to promote or constrain capabilities. Although Sen has not sought to develop a juridical theory which might give some institutional shape to the capability concept, others

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have begun to formulate such a theory. In his article, Deakin refers to the work of Supiot with whom he has collaborated (Deakin, 2005, p.1). Supiot's work has been particularly influential in Europe and has provided the foundation for a major research programme within the European Union (see Supiot, 2001 and the references in Deakin). Deakin refers to the visionary intentions of the proponents of the capability concept; the intention that the capability approach should come to serve as a new conceptual cornerstone for social law (Deakin, 2005, p.16). Whether or not such a radical vision can be realised remains to be seen. Even if the debate on the capability concept only has the effect of providing a new lens through which employment law can be viewed, it may still make a major contribution to the theoretical debate on the structure and breadth of labour law and to the direction of and motivation for legal reform. As is suggested in Deakin's paper, a credible theory that presents an alternative to the new-right's neo-liberal orthodoxy is a welcome development. This paper and the work it refers to begin that task for labour law.

Deakin writes from the particular perspective of the European Union. From a New Zealand perspective, one might suggest that there is room for greater optimism for alternatives within Europe with its range of diverse legal traditions to draw on and with its developed "social market" ethos. Such a cultural context may be more responsive than countries dominated by the Anglo-American free market model and the common law concepts that have long dominated labour law discourse. However, it is also true that New Zealand has long had a strong social welfare ethos and, as it is the nature of the social welfare system that is at the heart of the capability approach in this context, there may well be room for the emergence of a capability based dialogue.

In any social or economic system, the law plays a central role. Whether the law acts to promote or constrain capabilities in a particular legal system will be dependent on how other factors, particularly economic, social, and political factors, influence the structure of the law at any particular time. In 1972, in the introductory chapter to *Labour and the Law*, Professor Otto Kahn-Freund wrote that "the law is a technique for the regulation of social power" (Kahn-Freund, 1972: 4) and went on to make the point that while the law may support, restrain and sometimes create social power the law itself is not the principal source of social power. As with other social forces, the law is subject to the shifting winds of political, economic and other contemporary social forces that change over time, sometimes rapidly and sometimes slowly. As the period from the mid-1980s to the mid-1990s illustrated relatively extreme ideological perspectives can emerge rapidly and result in fundamental changes in a short space of time before their excesses are restrained and a more balanced approach restored. It is generally the more extreme positions that have such an impact. The more moderate positions, as is inherent in the capability concept, tend to take longer periods to mature.

It must be also be recognised that the law is a prisoner of its own history. To paraphrase Keynes's well known comment, "even the most liberal modern lawyer is usually in the thrall of the ideas of long-dead judges and legislators", a tendency that can be particularly apparent in labour law. Common law notions of the nature of property and the common law concept of "freedom" of contract remain powerful constraints on any debate on reforming labour law. The legal origins of labour law in the law of feudal obligations and later the law of master and servant continues, as Deakin's paper illustrates, to carry the weight of its past. The paper's discussion of the prehistory of the capability concept shows how a range of historical mind set, economic theory and political pressures come together in changing eddies to shape the legal obligations imposed on the "working poor" at any particular time.

## Capability and the law

At the risk of oversimplification, Sen's notion of capability posits that an individual's capability possibilities reflects their ability to utilise a personal set of functionings. The set of utilisable functionings available to any individual will be determined by a mix of personal, environmental and institutional factors. Central to this picture is Sen's core notion of conversion factors that structure an individual's capability by setting limits to the freedom of the individual to achieve their chosen set of functionings. The notion of a conversion factor seems particularly apposite in a legal context given the strong gatekeeper role that is typically performed by legal rules. As noted above, the nature of the gate may be the result of a variety of social pressures, but the law is perhaps the most direct and blunt implement for translating those pressures into a form controlling the ability to access a wide range of societal and institutional resources.

Deakin, drawing on Supiot, notes the point that:

The capabilities of an individual depend on them having access to the means that they need to realise their life goals". He goes on to make the point that these means include a minimum standard of living and "the resources needed to maintain an 'active security' in the face of economic and social risks" and states: "Thus 'real freedom of action' for entrepreneurs, in the form of protection of property rights and the recognition of management prerogative, has its equivalent in guarantees of human resources for employees, (Deakin, 2005: 3).

Deakin's paper argues that a capability approach "can be understood as an answer, of sorts, to the neoliberal critique of labour and social security law" (Deakin, 2005: 3) The capability approach, unlike the neo-liberal conception of labour law, accepts that employees, as much as employers, need legal guarantees and protections if they are to participate in a market order. And as Deakin notes, effective participation must mean more than formal access to the institutions of property and contract. Formal rights mean very little in the absence of measures that provide underlying economic security. It is economic security, not formal legal rights, that are necessary to maintain active and flexible labour market participation. It is only when a measure of economic protection, housing, income and the like, is combined with measures that promote and open economic opportunities, such as training and protection within employment, that most individuals enjoy genuine choices and the ability to develop individual capability.

Law performs many functions but one of the most important is the allocation of risk within society. In many cases, risk can be distributed by standard contractual mechanisms with the expectation that the relevant risk can be commercially distributed through devices such as pricing, insurance and the like. Employers are generally well placed to manage economic risk through a combination of legal devices, for example corporate structures and the ability to diversify capital investment, as well as through contract. Moreover, a combination of the common law rules of contract and property has the effect that employment risk is easily shifted to employees. For example, at common law employment is effectively at will allowing the risk of economic downturn to be immediately mitigated by shifting it on to the shoulders of employees in the form of unemployment.

Employees, unlike employers, can do little to distribute risk. Generally, they lack the financial resources to diversify financial risk through substantial savings. For most employees, the only effective means of risk diversification is through ensuring a range of income sources within the household, generally by having all adult members of the household in some form of paid employment. Labour law has of course ameliorated some of these risks. Most developed countries now provide some form of protection against arbitrary or unjustified dismissal and most, although not New Zealand, provide for at least some measure of compensation in the case of redundancy. In the main, however, employee economic risk is carried by the state through some form of social insurance or social welfare.

### **Deakin's paper**

Deakin's paper focuses on the duty to work in labour and social security law. He considers this from two perspectives, the first historical and the second looking forward to contemporary European social and employment policy. The first part of his paper looks at transformations over time of the notion of the duty to work tracing changing attitudes to unemployment from the days of the English Poor Laws to the modern welfare state. While much of this early history is of limited direct relevance to New Zealand, and later social security approaches differ between the United Kingdom and New Zealand, this account is marked by a number of themes that are reflected in New Zealand's experience. One particular theme is the changing, or perhaps more accurately cyclical, attitude to "able to work" which oscillates between a recognition that ability to work is largely a consequence of economic and labour market conditions at any particular time to the notion that failure to work is largely a personal deficiency that should be addressed by state imposed disciplinary or coercive sanctions. The paper goes on to deal with the breakdown of a welfare model that existed for much of the post-war period, essentially a model of social citizenship based on employment and where economic security depended on labour market participation. This model was however dependent on the state, through a variety of measures, guaranteeing stable and well remunerated work together with a strong system of social insurance and was centred on the idea of a "breadwinner wage" underpinned by collective bargaining (Deakin, 2005: 11).

The latter part of the paper deals with the problems that have occurred with this model as the result of social and economic changes in the latter part of the twentieth and the early years of this century. The neo-liberal approach to the labour market is, of course, fundamentally opposed to this post-war model based on full employment. As Deakin notes, a high employment rate is quite different from the traditional notion of full employment and is generally achieved at the cost of low paid flexible work which, in many cases, does not provide access to a living wage. Labour market deregulation was accompanied by increased restrictions on access to welfare benefits and subjecting those on benefits to a more rigorously monitored regime. Deakin makes the interesting point that contemporary policy, with its use of tax credits and wage subsidisation, is not dissimilar to the pre-1834 poor law. While Deakin does not supply answers to the current problems in European social policy, and indeed could not be expected to, the paper does identify a number of issues that those developing such a policy will be required to face. What he does suggest is that the concept of capability may provide a basis for reinventing the welfare state so that the duty to work is conditional on the state providing the conditions under which individuals are equipped for effective participation in the labour market. The capability approach is seen as suggesting a particular way of thinking about social rights, either as claims to resources or the right to take

part in procedural or institutionalised interactions (Deakin, 2005, p.16-17). Deakin sees some room for movement of this type in some European Union instruments and having at least some traction in judicial developments. His conclusion, however, has a more general appeal. Deakin concludes that the idea of capability offers an alternative to neo-liberal policies which view social rights as a fetter on the growth and integration of markets. Capability theory, by contrast, considers the preconditions for effective participation in markets which extend beyond contractual and property rights to collective mechanisms for the distribution of social risks arising from the operation of markets.

## Comment

In discussing Supiot (2001) and others Deakin (2005: 5) argues that labour law must put in place “effective mechanisms for dealing with the effects upon individuals of economic uncertainty.” Supiot, looking at the question in the context of increasing globalisation, is of the view that such a change requires a new approach to the governance of work and in particular one that allows the management of uncertainty. In the case of employees, he sees the guarantee of the development of human capital and real freedom of action as essential in achieving this. The following comment looks at some of the challenges that a capability type approach might face in New Zealand.

Any debate on the future of labour law and social policy generally needs to take account of the peculiar attitude to the law in common law based systems. The law in countries with an English heritage is an amalgam of the judicially created common law and of parliamentary statute law. The problem is that the legal mind often has a problem in grasping this rather basic idea. At the heart of much common law legal education and legal philosophy is an underlying belief that the common law is “real law” and that statutory “intervention” is not only an inferior sort of law but one that should be regarded with considerable suspicion as “interfering” with “fundamental common law rights”. Inherent in the common law’s approach is a simplistic dichotomy between property rights and contractual rights that presents a major barrier to a capability based approach to social policy. Property rights have always enjoyed, and continue to enjoy, a high and expanding level of legal protection. Contractual rights, on the other hand, are dependent on the terms of the contract itself. In the particular case of employment the common law right to terminate the contract, effectively at will, has the effect of denying employees any clear legal stake in their employment. The common law has never recognised that an employee might have protectable rights in the continuity of their employment. This is not so much a legal issue as an ingrained ideological one. Property has always been a flexible concept and the common law has never found doctrinal problems in utilising this flexibility to give proprietary status to such abstract ideas as “customer connection”, “team glue” and the like to enable this “property” to be protected against errant ex-employees (Riley, 2005, 187-191). The purpose of employment at common law is not to provide economic security for workers and their families but to allow the effective utilisation of property.

This simplistic common law dichotomy has also been adopted by much of the law and economics movement where it is argued that the common law, being the aggregated result of many transactions, results in an economically more efficient legal outcome than is likely from government intervention (or as others might label it, legislation by democratically elected legislatures). The enthusiasm for the common law, or at least what economists understood the common law to be, reached its zenith in the Employment Contract Act 1991. That Act



abolished the pre-existing pluralistic industrial relations system that provided for a high degree of joint regulation of working conditions and replaced it with one of employer dominated, individualised, regulation of the employment relationship. Although there have been some significant reforms under the Employment Relations Act 2000 that give greater recognition to employee economic interests, for example good faith obligations and consultation rights, the Labour government adopted a very cautious approach to reform. For example, it failed to make any reforms around the problems of redundancy and its approach to job loss on the transfer of an undertaking was, at best, lukewarm.

To gain traction any radical change, such as a capability approach has to overcome the philosophical deadweight of the common law, a task that is likely to be extremely difficult where the common law is the only game in town unlike the situation in Europe. However, to think of modern labour law as the common law with add-ons is a fundamental mistake. The modern contract of employment, or employment relationship, only makes sense if seen as an integrated legal structure comprising both the common law and statute (Anderson, 2007). Labour law in this holistic sense does, of course, contain a range of protections from the minimum wage to protection against unjustified dismissal that might be seen as compatible with a capability approach and certainly this conception of the law provides room for further evolution in that direction.

The problem of the common law is less apparent in the second half of the capability equation that of a welfare system more aligned to a capability based approach. New Zealand's relatively strong social welfare system is one that grew out of New Zealand's own social environment and, while not without faults, its underlying structure and philosophy is such that a major change in mindset is not necessary if a more capability focussed approach were to be adopted. For example, the combination of ACC and universal superannuation provide a relatively strong degree of economic security for those who are no longer able to work because of accident or age. That being said, however, there are still issues in attitudes to the work-welfare interface and the personal versus social "fault" tension that seems inherent in any discussion of entitlement to unemployment benefits. The current recession will no doubt once again highlight this tension although currently there appears to be some recognition, for example in the ReStart programme,<sup>1</sup> that some account must be taken of economic misfortune in the transition from employment to unemployment. That being said there continues to be strong conflicts between the "benefit" ethos that drives social welfare and a "social insurance" ethos that might more accurately reflect the need to provide economic protection for those made unemployed by the state of the economy.

The capability concept is unlikely to become the dominant driver in labour law and the labour law-welfare law interface, in the short term, but it does provide a force that is compatible with many elements of New Zealand's labour/welfare law structures and which can provide a greater degree of theoretical support for the progressive reform of those structures.

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## Notes

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<sup>1</sup> On this programme see: <http://www.workandincome.govt.nz/individuals/a-z-benefits/restart.html>

## The Human Capability Framework Ten Years On

PAUL BARKER, LIS COWEY and SIMON MCLOUGHLIN\*

### Introduction

Ten years ago, in October 1999, the Department of Labour published a paper, “Human Capability: a Framework for Analysis”. Setting out to explain the labour market and its implications for public policy, the Human Capability Framework (the Framework) ended up having much wider impact and influence than was originally envisaged. Ten years on, it is appropriate to review the nature of that impact and influence, and to ponder the extent to which the contents of the document still resonate.

This paper considers the human capability framework (the framework) from a policy practitioners’ perspective. It outlines the genesis of the framework, its uses, and reflects on its utility as a conceptual framework to examine labour market issues. The labour market has changed considerably over the past decade, and the paper examines the framework’s ability to provide insights into the new challenges and emphasis that this requires.

Development of the human capability framework (the framework) commenced in late 1998, and an initial version formed the basis for the Department’s post election briefing to the incoming Minister in mid-1999. This conceptual framework came over time to fulfil a number of other purposes: it was used as a key policy development tool within the department, and, in ensuing years it was also picked up and further developed by a range of researchers and government departments to inform their own thinking.

Of course, this framework is one of many frameworks or conceptual documents developed by government agencies in recent years. These have included the Growth and Innovation Framework developed by the Ministry of Economic Development, and later, the Government’s Economic Transformation Framework to name two. Conceptual frameworks are developed by departments for a number of different purposes, and with differing levels of neutrality towards any particular set of policy choices. They are also developed in response to Governments’ or departments’ desire to ‘brand’ their own particular approach. The main purpose of the framework originally was to provide a conceptual framework for understanding the dynamics and forces at work within the labour market.

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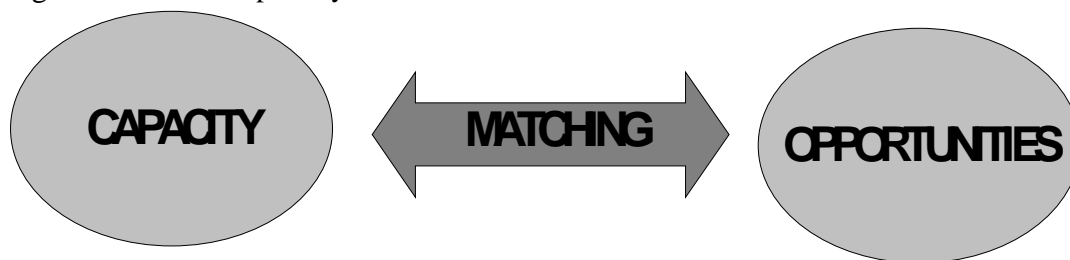
## The Framework

The Human Capability Framework is a conceptual model of labour market dynamics that provides a comprehensive overview of key factors affecting the labour market, as they were seen at the time. These factors relate to attainment of skills, the business environment, the influence of regulatory regimes, and key social trends such as population ageing.

It was intended to provide a clear account – and common language about - the Department’s strategic direction and policy focus, following a revision of the Department’s purpose and mission in 1998. It sought to bring to life the new Departmental purpose statement, “We link social and economic issues to enable people to develop and utilise their potential for the advantage of themselves and New Zealand.” As such it was seen as being the analytical core for the Department’s Briefing for the Incoming Minister in 1999. It was also explicitly designed to be a common tool and reference point for policy development within the Department, assisting in framing questions about what the areas of policy focus should be for the Department, why they are important, and how the Government can affect them.<sup>1</sup> A companion document was developed for departmental staff, elaborating on how the various aspects of the Department’s work fit into the framework.

The framework identifies three core elements of the labour market: capacity (people’s skills, knowledge and attitudes), opportunities (places where people can utilise their capacity to generate income and other rewards) and matching (the process of matching the capacity that people have to the opportunities created). As such, it is a reasonably uncontroversial formula, which, as one former Departmental official has observed, is nothing more than a way of describing well-known economic relationships of supply and demand as they relate to the labour market. The simplest conceptualisation of the three elements is given in Figure 1 below:

Figure 1: Human Capability Framework



Department of Labour (1999) “Human Capability: A Framework for Analysis”

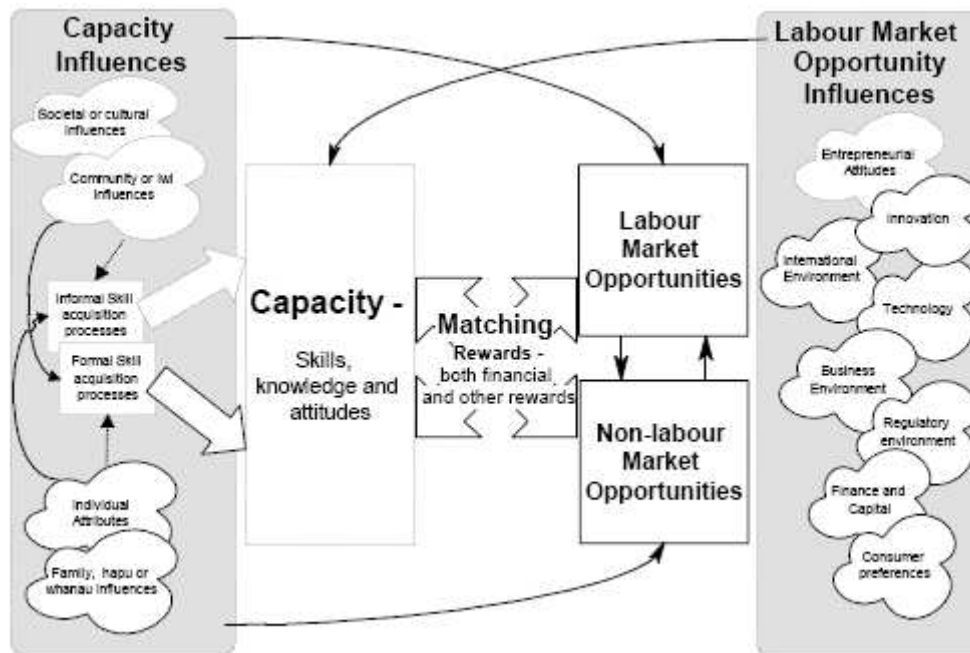
However, the framework also attempted to go one step further. Its notable feature is its integrated view of the relationship between key economic and social objectives, and the contribution of the labour market to both. It describes a broad view of the means whereby a country’s workforce or human resources are developed, utilised, and contribute to advancing wellbeing within society as a whole. On the supply-side, individuals’ capacity is seen to be shaped by a range of personal, social, and education factors, while on the demand-side, the nature of opportunities (both labour market and

<sup>1</sup> Maré, D, presentation to the Department of Labour Management Board, 22 February 1999.

non-labour market) are seen to be influenced by a range of social attitudes, and business and regulatory settings – both national and international. Once matched, capacity combines with opportunity in contributing to social and economic well-being for both individuals and society as a whole. This approach can be applied to analysis at the levels of the system, communities and regions, and individual people.

This more complex account of the dynamics of matching opportunity with supply is given in Figure 2.

Figure 2: Human Capability Framework



Department of Labour (1999:19) “Human Capability: A Framework for Analysis”

As one of the architects of the framework has observed<sup>2</sup>, at one level the framework provides scant guidance for policy: while it allows one to see a range of issues, it doesn’t have any particular emphasis or argument. Of course, the value of a framework is not in providing a basis for argument on either side of a debate, but, as Shaw and Eichbaum (2008) observe, its value is that “a policy framework assists in explaining relationships of cause and effect in a given area of policy and can therefore provide a rationale for a subsequent strategy... in short, a framework precedes a strategy”.

## Applications of the Framework

Within the group of the Department’s Ministers at the time, several adopted the language of the framework in public statements on labour and employment issues in public speeches. According to the principal political and strategy advisor of the Minister of Employment at the time, the “zeitgeist of the time was the move from [a]

<sup>2</sup> Mare, D, personal communication, 20 May 2009

social welfare [mentality] to social development". In this context, the framework allowed Ministers to tell this story particularly well, operating as it did as a "conceptually robust policy framework" that "joined up things across [the Minister of Social Development and Employment's] portfolios" and "allowed the Minister some purchase on macro-economic policy issues"<sup>3</sup>.

Within the Department of Labour, the framework was adopted to varying degrees. The Labour Market Policy Group of the Department used it extensively as a 'policy primer' until the Group's demise in 2004, and it was also used within the Community Employment Group among field workers as a problem diagnosis and discussion tool.

Some key policies developed by the Labour Market Policy Group were designed on the basis of it, including the Government's Employment Strategy and the Government's interagency Skills Action Plan, which focused on measures to address skill shortages.

Thus, the Employment Strategy, launched in July 2000, encompassed a comprehensive set of employment priorities, policies and programmes. Drawing on the framework, it outlined objectives focused on capacity, opportunity and matching, as follows:

- "Create opportunity – maximise employment opportunities through a steady growth in the demand for labour
- Build capacity – encourage the development of skills that are valued in the labour market
- Match jobs and skills – facilitate a well-functioning labour market, which minimises barriers to the matching of skills and jobs and enables participation in the labour market".

In a similar vein, the Skills Action Plan addressed capacity through action areas "supporting skills development" and "attracting global skills and talent"; opportunity was addressed through "assistance with regional / industry problem solving"; and matching was addressed through "improving labour market information" and "helping job seekers make better choices".

Furthermore, structural organisation of the Labour Market Policy Group was influenced by it, with one policy team focused on capacity ("people and skills"), dealing with labour market participation and skills development issues and another focusing on opportunities (work-place and regulatory issues). A senior-level advisor worked across both teams, in the interests of addressing 'matching' between the two, and to some degree the two teams worked together on projects.

On the 'opportunities' side, there is less clear evidence within the Department of the framework's utilisation as a conceptual basis, for example, in the development of employment relations and health and safety regulatory policy. This perhaps suggests that the framework had a lower profile within the wider Department than it did within the Chief Executive's office, and the Labour Market Policy Group.

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<sup>3</sup> Eichbaum, C, personal communication, 4 June 2009

The framework was also used and adapted in a number of different ways by other government agencies, notably the Career Services, the Ministry of Women's Affairs, and work undertaken under the aegis of the Ministry for Agriculture and Forestry. While its prominence has effectively receded, references to it continue to be found in Government documents, for example, it was referenced as recently as 2008 in the Ministry of Social Development's Social Report.

The framework also attracted commentary from a variety of academics and labour market analysts. Tipples (2004) for example provided an outline of the genesis of the framework and its incorporation into a number of government and non government publications and work streams. These included the Canterbury Development Corporation and the Mayor's Taskforce for Jobs. As he notes, it was warmly embraced by the Massey University Regional Labour Market Dynamics and Economic Participation programme in particular, as a welcome contrast to the perceived mechanistic 'human capital' model promoted by the Organisation for Economic Co-operation and Development (OECD).

It was enthusiastically received at the Labour, Employment and Work in New Zealand Conference in 2001, where it was described as having a "view of individuals as being embedded in a variety of social relations that affect their choices and aspirations"<sup>4</sup>. A view that encapsulated the range of reasons for why people may be unemployed or outside of the labour market was, of course, particularly timely in the context of a high levels of long term unemployment and lower labour market participation than currently. As Tipples has noted, however, the Framework was not without its critics in academic circles, although critical commentary is not evident in relevant literatures. Notwithstanding its possible critics, the framework continues to retain currency in some parts of academia: it features prominently in a recently published New Zealand public policy text-book chapter on employment policy (Shaw & Eichbaum, 2008).

After 2004 the framework fell into disuse as a policy tool within the Department of Labour, partly due to a change in Departmental leadership and a focus on a new operating model. Nonetheless, strategic documents developed by the Department subsequently, such as the Skills Strategy Discussion Document developed in 2008, can be mapped against it. The Skills Strategy document's four priorities fall across the three elements of the framework:

- *Capacity*: priorities one and four, "increasing the literacy, language and numeracy skills of the workforce" and "increasing the skills of young people in the workforce.
- *Opportunity*: priority two, "building the capability of firms to support managers and workers to better develop and utilise their skills".
- *Matching*: priority three, "enhancing the relationship between the supply of skills and the demand for them, including a focus on measuring skill acquisition and retention".

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<sup>4</sup> Bartley et al (2001), cited in Tipples, Rupert (2002), "Practical Uses of the Human Capability Framework – An Outsider's View of a Concept Guiding Public Policy and Research", Paper to the Tenth Labour, Employment and Work Conference, Victoria University of Wellington, 21-22 November

So what then has been the lasting influence of the framework and what is its application in today's labour market?

The period during which the Framework was at its most influential in labour market policy discussions coincided with a shift in policy attention which can be characterised as moving from the 'supply-side' to the 'demand-side' of the framework. In the 1990's and into the early 2000s, there was a significant focus on 'supply-side' and matching issues in the labour market, as government priorities centred on the need to increase labour force participation, and address concerns about low skills and lack of 'fit' between education and training and the needs of businesses. Concerns such as these underlay reform to both the education and training sector (including the establishment of the Tertiary Education Commission) and reform of the public employment service which had recently been integrated with the income support agency (creating a new Department of Work and Income in 1998).

The paradigm shift at that time was an increasing awareness of the extent to which the economy depended on having appropriately skilled – and available – staff to do work. The nature of the demand-side tended not to be a focus for government intervention. The prevailing view was that, in the main, the government should 'leave business to business', with the exception of some level of business development assistance and support for community-based enterprise (the latter tended to have a strong employment focus).

This approach was reversed in the early 2000s and government attention broadened to focus more strongly on the demand-side. This was particularly driven by international research from organisations such as the OECD which drew attention to New Zealand's dramatic slide in productivity ranking within the OECD over previous years. While acknowledging the broad drivers of productivity, officials noted the critical role of firms in generating productivity and sought to identify an appropriate role for government in boosting firm productivity levels. The Ministry of Economic Development undertook a number of studies and surveys aimed at understanding firm performance and in-firm dynamics. Similarly, Statistics New Zealand established the Business Operations Survey<sup>5</sup>. A cross-government workplace productivity agenda was developed, in collaboration with business and union groups.

Over this time period, significant economic and the labour market adjustments were evident. The discussion below traces some of the main features of these changes, before going on to consider where the framework fits in today's labour market.

## **Changes in the labour market**

The New Zealand labour market has changed considerably over the last decade. This is of course consistent with one of the theses of the initial framework paper, which stated that "labour market adjustment is continuous". In 1998, the economy was in recession following a strong recovery from the structural change and cyclical downturns of the 1980s and early 1990s. In 2008, the economy was again in

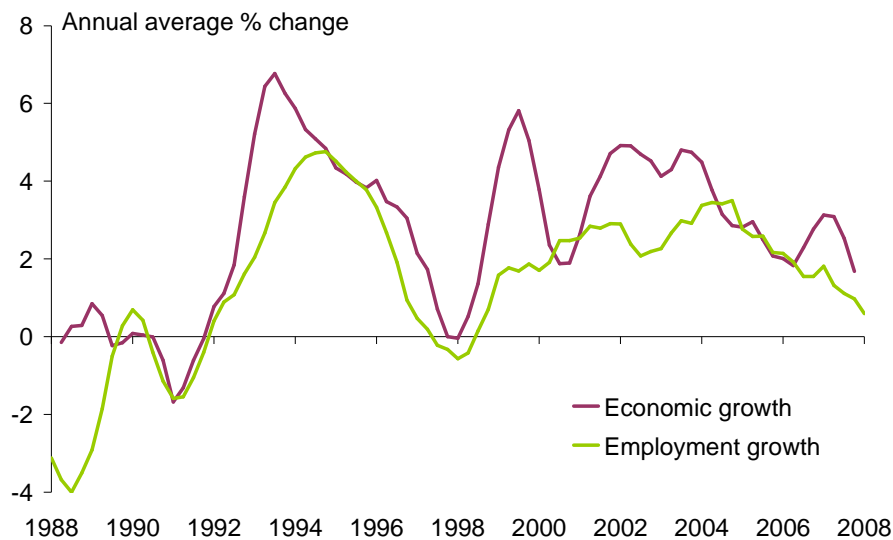
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<sup>5</sup> The survey was established with input from the Ministry of Economic Development, the Department of Labour and the Ministry of Research, Science and Technology



recession, but only after experiencing the longest expansion in around 60 years. Figure 3 below illustrates this trajectory. Economic expansion led to a significant improvement in labour market conditions from the late 1990s. This enabled public – and political – attention to broaden out beyond questions of unemployment, for instance, to focus on more qualitative issues on both the supply and demand sides.

Figure 3: Economic and employment growth



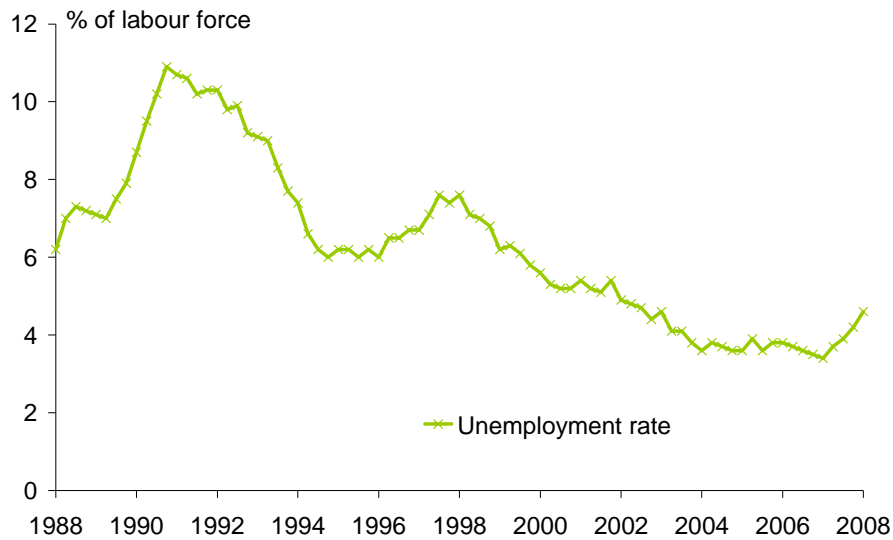
Source: Department of Labour 2009

The most significant labour market change since the framework was developed is probably the increase in jobs and accompanying fall in unemployment to historically low levels. Economic expansion led to high employment growth of 2.2% per annum on average from 1998 to 2008, which put an extra 420,000 people in work. By comparison, the rate of employment growth in the past decade averaged 1.0% per annum across the OECD.

The main source of additional workers since 1998 came from outside the labour force. The labour force participation rate (the proportion of working-age people who want to work) rose from 65.3% in 1998 to a record 68.6% in 2008 as more women and older people (those aged 55 years and over) entered or stayed in the labour force.

Over the past few years leading up to 2008, most people entering the labour force have found work as the unemployment rate fell from 7.5% in 1998 to 3.4% in late 2007, its lowest level in over 20 years and one of the lowest in the OECD (*Figure 4*). The fall in unemployment was experienced across much of the population. All 12 main regions of New Zealand had an unemployment rate below 5% in the year to September 2007, compared to 1998, when only Wellington and Nelson/Marlborough West Coast were below 6% and Northland and Bay of Plenty were above 10%. Unemployment rates also fell across ethnic groups and age groups.

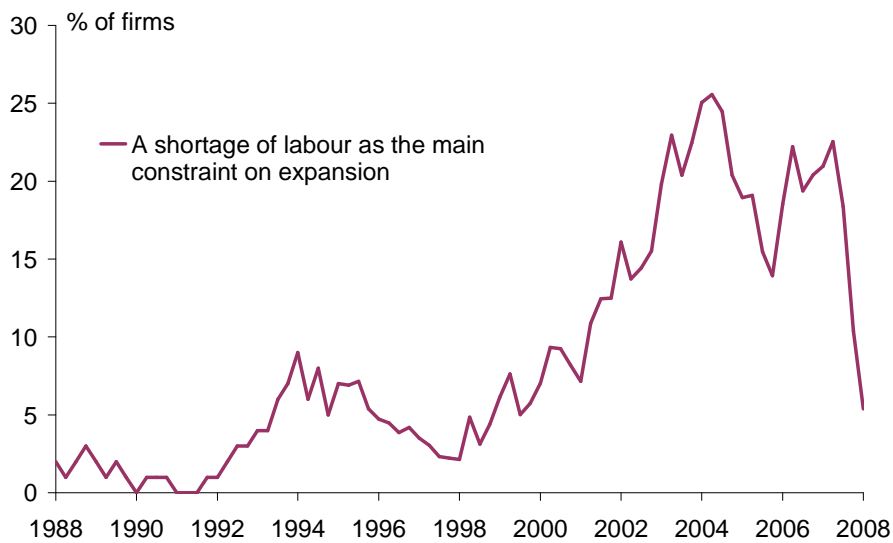
Figure 4: Unemployment rate



Source: Department of Labour 2009

Although some groups are still under-represented in the labour market (for example, Maori and Pacific people), the gains from Government initiatives aimed at getting more people into work became much smaller than in the late 1990s. The focus instead shifted towards raising the value of work (that is, raising productivity, as mentioned above) and addressing the growing problem of skill and labour shortages. At its peak, labour shortage became the main constraint for over a quarter of firms, the highest proportion since the mid-1970s (*Figure 5*). A key difference with previous upturns was that unskilled labour, not just skilled labour, became increasingly difficult for firms to find.

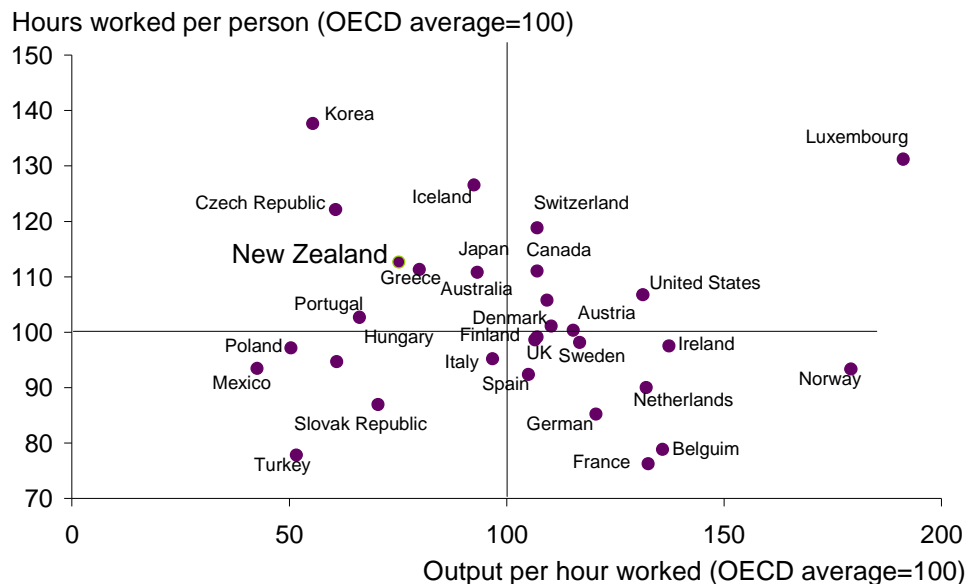
Figure 5: Skill and labour shortages



Source: Department of Labour 2009

Labour productivity is the amount of output produced per hour of worked. In New Zealand, labour productivity grew strongly coming out of the 1997/98 recession but slowed for much of the employment-led expansion of the 2000s until a rebound in 2007/08. On average, labour productivity grew by around 1.5% per annum from 1998 to 2008, slightly stronger than 1.2% per annum in the previous decade. However, it remained below that seen over the past ten years in nations such as the United Kingdom (2.3%), the United States (2.1%), and Australia (1.7%). Labour productivity is the key determinant of a country's standard of living and New Zealand's continued underperformance in this area has increased the focus on this issue relative to the late 1990s. Part of this recent underperformance has been attributed to the large increase in employment being concentrated among the lower-skilled, but New Zealand's level of labour productivity remains low relative to other developed nations, including those with similar levels of labour utilisation (*Figure 6*).

Figure 6: Labour productivity and labour utilisation across the OECD



Source: 2006 OECD data

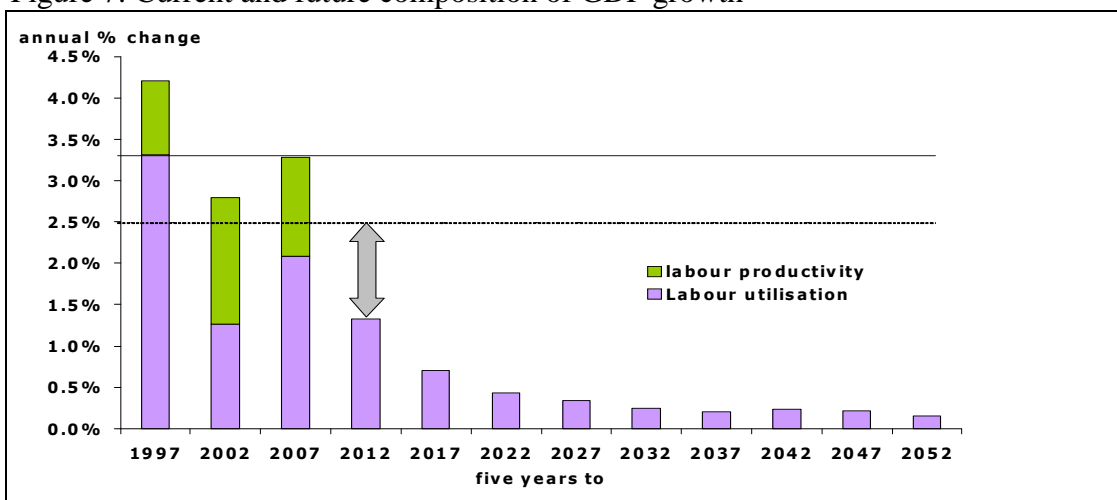
### Where does the framework fit in today's labour market?

Given shifts in the labour market and the economy, and in response to the worst world recession in sixty years, the question arises: is the framework still useful? As noted above, the framework envisaged the labour market going through continuous adjustment.

Considering the economic context, it is clear we have come full circle since the framework was developed: the past decade ended the way it began, in recession. As in 1998, tight monetary conditions, drought and financial crisis overseas led New Zealand into recession in 2008. Slowing economic growth has resulted in an easing of skill and labour shortages and has seen the unemployment rate rise in the March 2009 quarter to a six year high of 5 percent, with further increases expected in the coming year. Recently we have seen some of the issues of the late 1990s beginning to return, including unemployment and underemployment.

Nevertheless, the issues of productivity and skill and labour shortages are likely to once again be prevalent in the medium-term. The ageing population and global competition for migrants will put downward pressure on labour force growth and continue to put a spotlight on the need to lift productivity growth in New Zealand. In recent years, much of our economic growth has been driven by labour utilisation (that is, more hours of work), but we cannot rely on this to continue to drive growth. If we want to achieve economic growth of 2.5%, as we did over the five years 1996 to 2001, we would need to increase labour productivity by a significant amount, shown by the arrows in Figure 7. If we want to achieve growth of 3.5%, as we did over the five years from 2001 to 2006, then we would need to increase labour productivity by even more.

Figure 7: Current and future composition of GDP growth



Source: Department of Labour (2008: 11)

The importance of raising labour productivity growth is acknowledged by the new government’s aspiration to close the income gap with Australia by 2025, which will require productivity growth to rise to around 3% per annum. This will not be an easy task. Reaching a sustained rate of over 3% would be double our recent average growth. Furthermore, it would be almost double what Australia has achieved in recent times, which will be difficult given Australia and New Zealand tend to be influenced by similar factors. Nevertheless, high labour productivity growth rates in excess of 2% have been achieved in other similar nations, including Ireland, the United Kingdom and the United States. In particular, the example of Ireland illustrates how productivity performance can turn around in a small nation, with average labour productivity growth of around 4% over the last 20 years. To do so, New Zealand would have to overcome both its small size and its distance from other major world markets.

The recent shifts in the labour market have also seen the re-emergence of some old pressure points in labour market. For example, rising unemployment and slowing economic performance have once again raised the issue of matching unemployed people into jobs and helping create the conditions for sustainable employment growth. What might be different with this part of the economic cycle is the coexistence of both old and new problems. Work undertaken by the Department has shown that some skill shortages are persisting at the same time as higher levels of unemployment. New

Zealand's ageing population demographics will also further add to labour supply pressures by dropping New Zealand's relatively high labour force participation rate.

The changed economic environment still requires a focus on a number of trends that the framework provides a useful framework to explore. New Zealand's low labour productivity growth rates will continue to require a close look at the supply side of New Zealand's workforce – both employees and employers, and the factors that drive its development and utilisation. Management and firm owner capability in particular has emerged as a critical performance issue for New Zealand's firms with important consequences for creating high performing work place cultures. The framework lays out some of the complexities of this issue: it is at once a demand-side issue and a supply-side one. On the supply-side, issues of matching capability of managers with opportunities are not of a different order than those of other workers, and the same sorts of issues affect their recruitment as those of other workers. On the demand-side, factors such as entrepreneurial attitudes, consumer preferences, social attitudes to innovation, the international environment and the business environment all have a role in shaping the capability of managers in New Zealand workplaces.

While the current concern with unemployment and job security is heightened it is not unreasonable to assume that the quality of work will remain an issue. New Zealand's strong employment growth has given many new entrants to the labour market choices and expectations that previous generations had not always enjoyed. The framework reminds us that effective matching of labour market supply with demand depends on the relative attractiveness of labour market opportunities compared with other opportunities. The high participation rates of NZ workers has meant that working lives have had to be balanced with a range of other caring and community responsibilities.

The previous policy focus on flexibility for workers has only recently shifted to create an environment that compels employers to make adjustments while retaining jobs (such as the 9 day fortnight). While economic conditions have shifted the employees' focus onto job security, recovery will once again enable a relatively scarce workforce to demand greater flexibility.

The framework does not assist much in identifying what relative emphasis should be placed on any of these issues: that is a matter for detailed policy analysis and political decision. What it does, however, is provide a coherent basis for the lines of inquiry and analysis needed to develop well-rounded government policy relevant to the labour market.

It is undeniable that the basic observations of the framework still hold: the labour market is intrinsically linked to the changing state of the economy and underlying social and demographic trends. This remains compelling from two points of view. Firstly, it argues for breadth of focus. It reminds us that, for the labour market to perform effectively, policy in a number of separate but linked areas must be coordinated. The division of Ministerial responsibilities tends to encourage public servants and individual Ministers to approach issues through a relatively narrow frame. Set against this, the lasting relevance of the framework is that it challenges us to take a more comprehensive view of presenting problems. Secondly, it acknowledges the need for constant adjustment, in response to a dynamic system,

while at the same time reminding us of the limits of policy measures that are targeted at any one element of the labour market. The framework is not a static picture but a kaleidoscope, in which elements and the relationships between them constantly change and adjust, and not all are equally easily amenable to government intervention.

From a practical point of view, the framework remains a useful tool in the policy development arena to inform the range of analytical activities such as identifying the range of parties potentially affecting, and impacting on, a given policy issue; analysing the underlying nature of a presenting problem; setting objectives; identifying and analysing options for action, and designing an implementation and evaluation path.

It can, however, be criticised on the grounds that it does not tell an obvious story about some of the more detailed dynamics within the system. This is particularly so on the demand-side. On the supply-side it clearly posits some points of influence from various factors (indicated by direction of arrows within the diagram), for example, individual attributes and family and whānau influences affect formal and informal skill acquisition processes. However, on the demand-side, while a number of important factors are identified, the framework is silent on the nature of the relationships between many of them. For example, what might be the nature of the relationship between consumer preferences, technology, regulatory environments and entrepreneurial attitudes, and how do these affect the creation of both labour market and non-labour market opportunities?

These are complex issues, and they are no doubt beyond the capacity of any simple framework diagram to capture. However, it is precisely in this area that some of our most challenging policy questions arise at present. When considering policy issues such as workplace productivity, the framework is thus perhaps less illuminating for use by the Department than it might be. For example, it provides little insight on the nature of the impact of the labour market on growth, as opposed to the impact of growth on the labour market. The framework also perhaps does not readily lend itself to analysis of demand-side 'risk management' issues such as occupational health and safety and compensation for workplace injuries through ACC.

On the supply-side, too, the framework does not draw out some issues to the degree that we might today. For example, issues such as the following might figure more prominently: the relationships between immigration and both labour market supply and demand; the influence of the nature of education supply (for example, availability and cost of training, level of government funding and student support); and the role of good quality, accessible labour market information as an influencer on capacity and matching.

The architects of the framework may not have foreseen some of the challenges of the labour market ten years later. However it is sufficiently broad to accommodate new analyses, and from that point of view it remains a valuable tool for labour market policy thinking. That breadth now needs to be supplemented by greater depth in understanding the underlying dynamics within the framework, in particular the nature of the relationships between the various factors that drive capacity, opportunity creation and the matching and rewards between them.

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## **Providing a Theoretical Foundation for Work-Life Balance – Sen’s Capability Approach**

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*Key words:* Feminist Analysis, Structures of Constraint, Capability, Work-Life Balance

### **Abstract**

After reviewing and summarising critical accounts of the Work-Life Balance (WLB) in two special issues in academic journals in 2007, the paper turns to Amartya Sen’s capability approach and feminist economics to address shortcomings and gaps in the WLB concept. In particular, Sen’s capability approach can provide a substantial theoretical foundation for the so far conceptually underdeveloped and one-sided WLB. The aim of the application of Sen’s ideas in this paper is to understand and sort out some of the complexities and biases inherent in the WLB discussion. On the basis of this, further conceptual work might lead to a basic integrated framework for WLB policies in the future.

“I believe that variety is part of human existence and in fact – though this is quite irrelevant – that is a valuable attribute, though that is a very late idea, probably not be met much before the eighteenth century” (Isaiah Berlin in a letter in 1986).

### **Freedom of Choice and Work-Life-Balance**

An organisation promoting Work-Life-Balance (WLB) defines it as:

Work-life balance is about people having a measure of control over when, where and how they work. It is achieved when an individual’s right to a fulfilled life inside and outside paid work is accepted and respected as the norm, to the mutual benefit of the individual, business and society ... (Employers for Work Life Balance 2006, cited in Fleetwood, 2007a: 351).

Closer to home, the Department of Labour in New Zealand defines WLB as: “effectively managing the juggling act between paid work and the other activities that are important to people” (cited in McPherson and Reed, 2007: 14). Surveys and critical reviews of the WLB approach have recently identified considerable problems with this concept. Eikhof, Warhurst and Haunschild, 2007, provide a concise overview of these criticisms and highlight three major shortcomings of WLB:

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- 1) The premise that work is bad, "... that individuals tend to have too much rather than too little work" (Eikhof et al., 2007: 326) and therefore working time arrangements are the point of intervention;
- 2) The premise that "life" can be equated with caring (mainly childcare) which is seen as a female responsibility and that women are, therefore, the primary target of work-life balance provisions;
- 3) The assumption "... that work and life are separable and in need of being separated" (Eikhof et al., 2007: 326).

If the first premise is true, logically, overall reduction of working hours should be the primary goal. However, Eikhof et al. point out that "... the most common policy prescription is not to shorten working hours but to provide employees with more flexibility in their working hours, for instance by part-time working or flexi-hours" (2007: 326/327). With a particular emphasis on work from home, Felstead, Jewson, Phizacklea and Walter's article (2002) is representative of a narrow flexibility oriented approach to WLB. This focus is even apparent in their definition of WLB: "In short, work-life balance practices are those which, intentionally or not, increase the flexibility and autonomy of the worker in negotiating attention and presence in employment" (ibid. 56). Such flexibility solutions are mainly driven by employers' interests to service a 24/7 economy and does not necessarily lead to an employer-employee win-win situation (Lewis, Gambles and Rapoport, 2007). Though narrowly focussed on the financial sector in Scotland, an article by Hyman and Summers "... indicates the prevalence of management control of the work-life balance agenda and management's discretion in the operation of work-life issues" (2007: 367). Moreover, employees and their representatives seem to accept this control without challenging it. Employers perceiving recruitment and retention problems offer flexibility to draw into work the reserve army of mothers<sup>1</sup>. The government shares this gendered perspective on WLP because its "issue is not having better lives but breeding new lives; more specifically the reproduction of the future labour force" (Eikhof et al, 2007: 328). This is the major concern of governments, particularly in Europe, in times of low fertility rates. In conclusion, state and employers commonly define the WLB problem as one of separating life and work in order to accommodate domestic and occupational responsibilities. Again Felstead et al's article (2002) may serve as a typical example of this "family-friendly" motivation.

According to Eikhof et al. 2007, these standard WLB assumptions and the policy prescription based on them are too simplistic. The long working hours problem might be over-stated. Roberts (2007) argues that it may be that individual working hours are decreasing whilst the hours worked by households are increasing with more dual income and neo-traditional families as more women participate in the labour market. Further, work can be identified as satisfying, motivating and self-fulfilling. Empirical Research shows, regarding long hours as negative depends on the general attitude towards work and whether work offers, and is desired to have, social relations:

Single men and women are least likely to work long hours and recently singled women as well as widowed men and women most likely, suggesting work as sustenance in times of personal difficulty; providing opportunity for socialisation or distraction and an 'escape from domestic stress'. For men there is no relationship

between having children and working long hours; for women there is, but the evidence is mixed, (Eikhof et al., 2007: 330).

If there is a trend of long working hours becoming desirable for both men and women to fulfil career ambitions and rising consumptive aspirations, this signifies a cultural shift to what is sometimes called “affluenza”. That is, a lifestyle which emphasises material wealth and status, or in other words “conspicuous consumption” (Veblen, 1899).

Moreover, the interdependence of fatherhood and the long working hours points toward a traditional gendered definition of child care obligations. Such a gendered view is confirmed in Martin’s (1990) deconstruction of a supposedly “family friendly” statement made by the CEO of a large company. She stresses that: “When work is conceptualized as separate from family concerns, the conflicts encountered by working mothers are defined as private problems that must be solved individually; the corporation is not responsible” (ibid. 344). For her, the ideological public/private dichotomy is the “... linchpin supporting discrimination against women” (ibid. 356). Consequentially, women having to undertake a “second shift” might not see long working hours as the source of their time squeeze but rather blame their male partners who insufficiently contribute to household chores and child care.

Thus, Eikhof et al. conclude: “Better work-life balance might be attained not with flexible working for women but persuading men to finally shoulder equitable domestic responsibility” (2007: 331). Ransome (2007) introduces the idea of a ‘total responsibility burden’ to account for this equity issue as a matter of negotiation between adult partners in a household.

In a nutshell, the implicit assumption that life equals child care and that work tends to be overwork does include a gender bias and does not fit all. Therefore, this specific use of the concept already somewhat limits the choice and self-determination of those who try to use it to achieve a higher degree and autonomy in balancing the demands of different types of activities (that is: paid and unpaid).

Though in practice work and “life” may not always be as separated as suggested in the literature and common ideology, it is still conceptually and analytically useful to think of spheres of life and work as separate. This is, for instance, clearly done by Felstead et al. Because employment may be conceived as the purchase of time and presence, they argue:

Spaces and times of employment have boundaries, therefore, which are juxtaposed to not-work times and places. Structurally complex societies require the negotiation of these boundaries – both in the sense of establishing where they lie and managing the process of crossing from one life activity to another, (Felstead et al., 2002: 55).

On the other hand, even the critical deconstruction of the ideological public/private dichotomy by Martin (1990) and her suggestions for overcoming and re-embedding it are based on an analytical separation of spheres of work and other activities in life on a very basic level. Hence, no matter how much the separation thesis holds empirically, it has its merits analytically and even normatively as in Habermas’s colonisation thesis<sup>2</sup> (1995) and Polanyi’s notion of the *double movement*<sup>3</sup> (Polanyi, 1957; Baum, 1996 and Block, 2003).

Moreover, having questioned the general validity of WLB’s premises, one should not overlook that overwork and the problem of combining child care responsibilities and a career

are certainly prevalent for parents with dependent children in New Zealand (Calister, 2005a and 2005b). However, as Harris and Pringle (2007) highlight, owner-managers of SMEs and Chinese migrants to New Zealand might view work interests as synonymous with their preferred leisure and life passions and hence, the aforementioned premises of WLB do not apply to them. There appears to be a cultural dimension in life style choices and arrangements which needs to be integrated.

Apart from being empirically questionable, WLB premises are mainly ad hoc assumptions and suffer from a lack of theoretical foundation. Guided mainly by state and employer interests to source the labour force pool of mothers with dependent children, it does not include the notion of freedom of choice for all employees to fulfil their specific needs and interests (Fleetwood, 2007b). Though the term suggests more freedom – a wider range of life opportunities and a process to attain and guarantee those is not systematically built into the concept of WLB (Fleetwood, 2007a: 352). What is regarded as a greater chance to enjoy life in all its varieties may differ according to cultural and ethnical background, social status, gender, age and other parameters (Fleetwood, 2007a: 353 and Lewis et al., 2007). A possible theoretical foundation with such an emphasis on having a better quality of life according to one's own particular ambitions and talents is provided by Sen's capability approach: "It represents the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person's freedom to lead one type of life or another" (Sen, 1995: 40).

## Capabilities

Sen argues that not all aspects of agency and well-being are captured in the notion of maximising utility. Translated into the world of employment and work this means: the optimal return on investment in human capital utilised on the labour market does not necessarily lead to the greatest degree of freedom of choice and happiness for all employees. WLB policies maximising the use of human capital while minimising the cost for child care provision are the primary goals of employers and government according to their vested interests. However, this might not lead to happiness or well-being of employees. To decide whether WLB policies lead to higher degrees of freedom or autonomy and capacity to enjoy life, employees' happiness and well-being needs to be accounted for. However, such an evaluation is complex. Sen states that well-being may even have nothing to do with momentary happiness or fulfilment of desires: "'Being happy' is not even a valuational activity and 'desiring' is at best a consequence of valuation. The need for valuation in assessing well-being demands a more direct recognition", (Sen, 1992: 46). And: "While being happy may count as an important functioning, it cannot really be taken to be all there is to leading a life ..." (Sen, 1995: 54).

Moreover, cases are imaginable where individuals might value certain acts and their freedom to act very highly, though these acts might have no positive effect upon their well-being or even a negative one: "Indeed, the person himself or herself may have reasons for pursuing goals *other than* personal well-being or individual self-interest" (Sen, 1992: 55). Sen's favourite example to illustrate this distinction is 'fasting':

For example, ‘fasting’ as a functioning is *not* just starving it is *choosing to starve when one does have other options*. In examining a starving person’s achieved well-being, it is of direct interest to know whether he or she is fasting or simply does not have the means to get enough food. Similarly, choosing a life-style is not exactly the same as having that life-style no matter how chosen, and one’s well-being does depend on how that life-style happened to emerge, (Sen, 1995: 52).

This highlights the strong relevance of the capability approach for life-style choice which is very relevant for WLB.

Freedom to choose is a value in itself, despite the utility resulting from an act:

If, for example, all the alternatives other than the one actually chosen, were to be eliminated, this need not affect achievement (since the chosen alternative can be still chosen), but the person clearly has less freedom, and this may be seen as a loss of some importance (Sen, 1992: 60).

To illustrate this loss with an employment related example. Imagine someone is conditioned or channelled to become a highly capable and successful website designer, earning a high salary, and it could be determined that this would optimise his or her income and constitutes the way this person can contribute the most to society. Though this appears to be an optimal choice, still something is lost, if this individual is not allowed (does not have the capability) to try out other aspects (functionalities) of her or his personality (e.g. did not have the chance to become a third rate rock musician, janitor or stay-home-dad/mum).

If the goal of WLB policies is to open up a greater realm of autonomy and life opportunities, then the freedom of process to attain goals is as important as the compatibility of our achievements with our preferences and their optimality in terms of providing utility (Sen, 2002a: 526). Sen points out, that preferences are relevant in judging processes in two different – though interrelated – ways:

“(1) *Personal process concern*: individuals may have preferences over processes that occur in their own lives;

(2) *Systemic process concern*: they may also have preferences over the processes that operate as general rules in the working of the society” (Sen, 2002c: 624).

Point (1) is violated if mothers and fathers, for instance, are obliged and have no choice than to negotiate WLB issues merely at home without any chance to negotiate and make changes in their work place arrangement or vice versa. To understand point (2), think of bargaining between employers and employees on an individual level compared to collective bargaining and/or the legally guaranteed right to a variety of WLB arrangements for employees in comparison to ones based on the goodwill of their employers.

The WLB approach is not alone in disregarding these process freedom issues. According to Sen, this neglect is also apparent in the underlying dominant philosophies of economics and ethics: “Since utilitarianism and libertarianism have been very influential in ethics and welfare economics (in different parts of them), the overall effect has been the neglect of process considerations as a part of any crucial valuational exercise” (Sen, 2002c: 628).

Though in most cases, well-being might be related to agency, sometimes positive well-being might occur without any causal link between the acts of a person and his or her well-being (e.g. a patient in a hospital or the child of a caring parent). Thus, maximising one’s own utility and the freedom to act are not the only welfare criteria either. Sen highlights therefore the distinction “... between ‘the occurrence of A’ and ‘the occurrence of A through our own efforts’” (Sen, 1995: 58).

To defend ones capabilities or freedom to act, not only negative freedom (absence of external coercion and constraints of action) but also positive freedom (autonomy in the sense of absence of inner pressure) has to be guaranteed (Berlin, 1970). The deconstruction of Martin (1990) shows how this positive freedom in terms of WLB is culturally or ideologically framed in setting particular boundaries of the public/private dichotomy. Only in case of given negative *and* positive freedom, agency might lead to self-fulfilment (Sen, 1992: 56-7)<sup>4</sup>:

... I have found it more useful to see “positive freedom” as the person’s ability to do the things in question *taking everything into account*<sup>5</sup> (including external restraints as well as internal limitations). In this interpretation, a violation of negative freedom must also be – unless compensated by some other factor – a violation of positive freedom, but not vice versa, (Sen, 2002b: 586).

These freedoms and distinguishing them from well-being are key for Sen:

Capability is primarily a reflection of the freedom to achieve valuable functionings. It concentrates directly on freedom as such rather than on the means to achieve freedom, and it identifies the real alternatives we have. In this sense, it can be read as a reflection of substantive freedom. In so far as functionings are constitutive of well-being, capability represents a person’s freedom to achieve well-being, (Sen, 1995: 49).

John Davis’s interpretation of Sen’s approach leads to four different combinations of individual advantage:

These two distinctions yield four sometimes overlapping, but relatively distinct, concepts of individual advantage for Sen (see Table 1). They are; (1) well-being achievement, (2) agency achievement, (3) well-being freedom, and (4) agency freedom .... The first represents the traditional concern of mainstream economics with individuals’ satisfying their own preferences. The second ..., concerns individuals’ ability to achieve goals that do not involve their own well-being. The third concerns individuals having the freedom to pursue their own well-being. The fourth concerns individuals simply having the freedom to pursue all their goals, whether or not they are successful in achieving them, (Davis, 2002: 486-487).

**Table 1: Sen’s four concepts of individual advantage**

	<b>Well-being</b>	<b>Other goals</b>
<b>Freedom to achieve</b>	Well-being achievement (e.g. old-age pensions)	Agency achievement (e.g. heroic sacrifices)
<b>Freedom to pursue</b>	Well-being freedom (e.g. occupational choice)	Agency freedom (e.g. fasting)

Source: Davis, (2002: 487)

Davis concedes that such a multi-goal framework might be criticised for its insufficiency in determining social policy, however, its advantage is "... the flexibility it provides in being able to address the great variety of different types of valuation problems that social policy confronts" (Davis, 2002: 487). In regard of our topic: WLB to attain well-being achievement (i.e. optimal use of human capital) or agency achievement (i. e. being able to care for ones' children) is not enough to guarantee a full freedom of choice concerning ones life-style.

The approach of capability (agency) and well-being allows Sen and his colleague Martha Nussbaum to come up with a universal catalogue of core human functional capabilities (Nussbaum, 2000: 78-80), which are indispensable for human well-being and agency. This is the list of headings of those central capabilities: 1. life, 2. bodily health, 3. bodily integrity, 4. senses, imagination and thought, 5. emotions, 6. practical reason, 7. affiliation (A. social interaction and B. self-respect), 8. other species, 9. play, 10. control over one's environment (A. political and B. material). Though such a catalogue lays the ground for interpersonal comparison of well-being, freedom and distributive justice, the concept remains inevitably vague and demands for more detailed criteria that have to be discussed and agreed upon and might be cultural specific in its their concrete form (*Gestalt*) (Nussbaum, 2000).

So, what can be learnt from Sen's capability approach for the WLB? Firstly, though there are some universal criteria of what well-being means. These are only broadly and vaguely defined. Well-being and other goals can be pursued either in "life" or in "work" or in both. Therefore, life cannot be, per se, good and work bad. How well-being is defined is individually, socially and culturally specific. If life is equated with (child) care activities and work mainly seen as overwork, our capabilities are unduly limited. Secondly and related, the freedom to achieve and pursue a particular level of WLB has to be considered when implementing WLB policies. In this attention has to be paid to personal as well as systemic process concerns. According to the capability approach, implementing WLB entails a process allowing for the widest possible range of meanings and combinations of WLB and a high degree of liberty and fairness in voicing all those alternative views.

## **The Gendered notion of Care**

Further theoretical foundation for WLB can be gained from alternative economic theory developed by feminist economists and philosophers like Nancy Folbre, Martha Nussbaum and others<sup>6</sup> (Davis, 2002; 2003).

According to Nancy Folbre's arguments, it is mainly caring labour which provides the basic human needs and thus, well-being for children. She defines caring labour as: "... labor undertaken out of affection or a sense of responsibility for other people, with no expectation of immediate pecuniary reward" (Folbre, 2003: 214). To foster caring through social policy is what WLB is mainly concerned about. Folbre points out:

... an emphasis on rewarding caring has somewhat anti-market implications, simply because the market does not elicit caring" (2003: 224). However, something has to be done to provide enough caring labour to sustain a certain society. "If you do not literally "value" caring labor, its supply may decline. But if you start running out, you cannot buy more at the corner store, (Folbre, 2003: 224).

On the other hand, providing positive rewards, such as public remuneration for caring labour, could have the effect of reinforcing the existing sexual division of labour and we should also recognize that debates over public policy often hinge on values that, in the long run, influence both norms and preferences as Folbre explains in detail in her book *The Invisible Heart* (2001: 44 and 99).

Thus, commercialisation of caring labour might undermine its primary non-monetary motivation and WLB practices focussing on work arrangements might cement the gendered division of household chores and childcare.

Davis suggests combining Sen and Nussbaum's *capability approach* with Folbre's *structures of constraint* (i.e. to be embedded in different kinds of social groups and their norms that form identities). From my point of view, such an amalgamation with Sen's liberal ideas about capabilities could lead to well founded concept of WLB. Folbre's structures of constraint analysis, which is primarily concerned with the dilemmas that women face and the unequal division of care giving responsibilities between women and men, offers an especially valuable framework for treating individual identity as a problem of negotiating multiple group identities. Davis's arguments lead to certain evaluative criteria for social policy. The policies should "... place value on having opportunities that are not taken up, a person's capabilities then need to be seen as the range of alternatives they have, even if none of these alternatives would have been preferred" (Davis, 2002: 488). They should, also, allow men and women to freely and successfully negotiate a variety of different often complex group involvements over one's lifetime including care responsibilities. Davis gives an example: "... a woman exercises her reproductive rights by not having children and electing to care for elderly or disabled family members" (Davis, 2002: 493). Social policy according to him, in this example, should not only be evaluated in terms of allowing care successfully and efficiently given to the elderly or disabled person but also in terms of capabilities of the care giver:

In the case above regarding public compensation for family labor devoted to caring for others, public compensation needs to be defended not just in terms of promoting the capabilities of those who provide family labor, where this concerns being able to accomplish all the activities (or functionings) involved in caring for others, but also in terms of promoting such individuals' capabilities to move back and forth between caring and their other social group involvements, (Davis, 2002: 493).

## **The New Zealand Context**

Articles by Hyman (2008) and Ravenswood (2008) and our evidence from two case studies suggest that the critical and theoretical arguments put forward concerning gender and WLB are relevant for New Zealand. Whilst Hyman describes the gendered structures of constraints, Ravenswood reviews the nature of recent WLB related law changes.

Though recent legislative changes (parental leave eligibility and the Flexible Employment Arrangement Act, 2007) seem to have led to some WLB improvements according to a study conducted by the Families Commission (2008):

The benefits for families were clear in terms of reduced stress levels and improved quality of time with families. However, substantial numbers reported that they did not have the flexibility they wanted while others experienced a trade off of flexibility for lower pay and status, (Hyman, 2008: 7/8).

Thus, the actual freedom to pursue and achieve for employees is limited and how far it goes seems to rest mainly on the culture of the particular workplace according to Hyman.

The case of a mother trying unsuccessfully to establish time banking to flexibly adjust working time to the particular demands of her life analysed by Simon-Kumar (2008), documents the priority of business interest in employer-employee negotiations concerning WLB issues. This case underlines Sen's process concerns. If the social and economic goals of employer and employee are not compatible, fairness of WLB solution hinges on the bargaining power of each side in the negotiation. Domett rightly argues in her thesis on WLB in New Zealand: "However, the gender-neutral and individualised language of work life balance masks its discriminatory systemic effects" (2006: 1). It is certainly difficult to negotiate flexibility individually for employees as pointed out in the consultation regarding flexible work by the Department of Labour (DoL, n.d.). Moreover, the department lists some of the aforementioned discriminatory effects. Two disadvantaged groups identified are women and shift workers (DoL, 2006: 10). As Ravenswood (2008) points out, the Employment Relations (Flexible Working Arrangements) Amendment Act 2007 grants employees with children under the age of five or with disabled children the right to request flexible work schedules. By limiting the right to flexibility to these particular conditions, the law indicates that the focus of this government initiative amongst others is merely on increasing labour force participation of parents and not to allow for a higher freedom of life style choice in general. The priority of business needs is also apparent in the lists of grounds upon which the employer may refuse the request for change to working conditions according to the act: "detrimental effect on quality, performance and ability to meet customer demand; inability to reorganise work among existing staff; inability to recruit additional staff; planned structural changes and burden of additional costs" (Ravenswood, 2008: 38).

Ravenswood concludes: "These policies, therefore, aim to fit employees' lives around the accepted way of working rather than changing organisational culture" (2008: 37). Hence, the true freedom in terms of Sen's capability approach achievable under the current WLB oriented legislation in New Zealand is fairly limited.

Nevertheless, the case of Switzer Home shows that a supportive workplace culture can have positive whilst limited WLB outcomes for employees. The Claud Switzer Memorial Home has provided relief, welfare and benefit for older people within the Kaitaia region for close to 60 years. Established in 1950, it has grown from 15 beds to currently 72 beds. It has 70 staff with an average age of 45 years old. At Switzer, 95% of the staff are female and 50% are Maori. The remainder of the staff are Pacific Islanders, New Zealand European, or British. The vision at Switzer is to provide leadership in the care of older people, and a range of services for their changing and diverse needs (Harris and Verreynne, 2008).

The nature of the work meant that staff had to conduct work that is physically and emotionally demanding, so the challenge was to determine how they can work smarter rather than harder. Switzer knew it had to find ways of organising their physical environment and workforce structure to respond to the growth in demand for their services. General Manager



Jackie Simkins and her team changed the structure of the organisation to focus on residents and caregivers. Previously, trustees and senior management were at the top of the organisational chart. Once this was redesigned residents and caregivers feature at the top and trustees and management are at the bottom of the chart. Introduction of the team structure created more cohesion in the workplace. Empowering people to make decisions for their own teams developed greater pride in the staff themselves and their work areas resulting in a more positive workplace culture. Across the workplace, staff collaborated to develop their own workplace rules including house rules, misconduct and gross misconduct guidelines. The management team measured health and safety performance indicators including sick leave, accidents and injuries, shift patterns, workload monitoring, infection control and number of hours of training. They also have developed their own standards and systems, for example, a workload monitoring system to make sure they have right number of carers in any area. As a result of the focus on measuring what matters in consultation with staff, the areas of financial performance, retention, morale, and participation have definitely improved. Jackie Simkins credits productivity increases to three factors – changed organisational structure emphasising teams, stakeholder collaboration, and creating an environment where everyone contributes to leadership (Harris and Verreynne, 2008). Besides positive productivity outcomes and making employees happier in their work, the discretion given to teams allows for some WLB effects because it addresses the process concerns pointed out by Sen. On the other hand, the Switzer case also illustrates Folbre's structures of constraints and confirms Hyman's account (2008) of the disadvantaged position of a low paid female workforce in care professions in New Zealand. If work is a bare necessity and its value is generally underrated in society as Hyman points out, there is little room for negotiations leading to WLB improvements despite the very favourable company culture and attitude by management in this example.

The second case, Paewai Mullins, underpins the argument that work does not necessarily play the role of a negative influence to be limited to achieve WLB. Instead, it can be turned into an instrument to gain a better life. However, to achieve this, the case also demonstrates that a shift away from the business case for WLB is needed.

Paewai Mullins Shearing Limited is a fourth generation shearing contracting business based in the small rural town of Dannevirke, situated about three hours north of Wellington. The company services more than 150 woolgrower clients, handling in excess of 2 million sheep per annum. Their clients are spread from the Hawkes Bay to Wellington and over to Taihape and Wanganui. They employ close to 40 staff with this number expanding up to 120 for a four month period from December to the end of March (Harris, Mullens, Ravenswood, Laneyrie, and Markey, 2009).

When Mavis and Koro Mullins purchased the business in the mid 1980s from her father, they wanted to operate according to the original philosophy of providing work for Whanau (family) and trying to assist other family members onto the land, and continue growing the business. It is this overlying philosophy and the four supporting Maori values of *Whanaungatanga* (family), *Matauranga* (life-long learning), *Maanakitanga* (unity and respect), and *Tino Rangatiratanga* (self-empowerment and leadership) that have driven productivity growth. Key to the significant growth of their business, predominantly over the last 15 years, has been the development of a strong workplace culture and productivity gains through attention to the four Maori values that they hold key to their lives and therefore business (Harris et al, 2009).

Koro Mullins stated that they recognised shearing as one of the toughest industries and that they wanted to ‘put the gloss on it’. Paewai Mullins have successfully professionalised their workforce through increased rewards for workers and considerable training in both life and job specific skills. They have not only worked with staff to build work specific skills, but continue to demonstrate commitment to assisting younger staff to develop careers and gain wider life skills. Managers start with the premise that everybody has ability and potential. Young people who otherwise have few skills or training are taken on in a Pre-Training programme and/or apprenticeship schemes. The pre-training programme is designed to give people an introduction to the industry and the work. Advice is given on flexibility, core strength and general fitness to avoid the risk of injuries. Completion of the three day programme enables new workers to go into a shed with some base level skills, thereby not slowing down processes. Senior staff also support new staff through a mentoring or coaching role, passing on their skills and knowledge. This builds a sense of unity and team amongst workers and empowers employees through a leadership role. It also provides clear career paths from ‘apprentice’ through to senior staff who have more involvement in the business. Supporting people into a profession with huge potential in terms of remuneration and international travel has provided many unskilled workers with attractive careers. This approach has returned to the company greater loyalty, retention and longevity. “If you are not bringing young people in, you risk dying,” says Mavis Mullins, Director (Harris et al., 2009).

Improving skill levels has lifted productivity levels and addressed issues such as retention. However, Paewai Mullins goes beyond training and support their staff to stay in the profession. Clean, comfortable accommodation is provided along with a gymnasium. To empower staff to take responsibility for their health, sessions were run to give them knowledge on issues such as second cuts and grease boils. A local Maori Health Provider was also used to educate staff on sexual health, substance abuse and gambling issues. The food served to the shearing staff in the accommodation quarters has changed over the years to include more variety and the right type of food to enable staff to perform well. A full time cook has been employed to provide balanced meals. Because the industry is such a physical one, there is now a greater awareness of protein needs, carbohydrate needs, and hydration (Harris et al., 2009).

A productive workplace culture at Paewai Mullins is built through supporting employees and creating opportunities for employees to succeed. Paewai Mullins Shearing Ltd operates under a flat structure where everyone works so it is not unusual for employees to be working next to one of the Directors. “Being a productive worker is about being a good team member, as performing as a team is smart working”, says General Manager Aria Mullins (Harris et al., 2009).

## **Freedom and Work-Life-Balance**

This movement backward and forward from paid work to caring responsibilities on a daily basis and across the life cycle is the explicit aim of WLB arrangements (Felstead et al., 2002: 55), though high levels of capability in this area are not widely achieved in practice. However, an encompassing WLB should allow for a wide variety of combinations of different functionings (for instance work and coaching a boys’ soccer team or other volunteer activities, reduced work load because of illness or particularly intensive or scattered work patterns according to cultural or otherwise individual specific consumption patterns).

According to Sen, the capability to freely choose between different sets of functionings, i.e. to find one's own preferred combination of work and other activities and identities is based on freedom in several respects. It can mean to achieve a high level of well-being (for instance to stay healthy, to earn a living wage), the freedom to define ones level of well-being (e.g. to work like mad though it is not healthy), to achieve non-work related goals (for instance to care for children, the elderly or sick or troubled friends) and the freedom to pursue goals like artistic or religious expression, trying to live off ones veggie garden, travel on a shoestring or jump off the cliff etc..

For a society to guarantee such a high level of capability, it is crucial to understand personal and systemic process concerns, that is, to organise negotiation and bargaining about WLB in a participatory way which allows for cultural diversity and equal voice for employers, employees and other interested parties. So far, policies to attain WLB are designed without much consultation or participation of those who work and other functionings than childcare are largely ignored. Part of negotiation, debate and bargaining about WLB has to be whether work time arrangements adjust to other functionings or family and private time arrangements adjust to work demands (Martin, 1990: 356). Such open and free processes require an equal power balance of all vested interests (employer associations, unions, the government and other interest groups) and an inclusion of all kinds of possible functionings to account for all areas of freedom and well-being.

In our interpretation, whilst Sen's capability approach defines and helps to distinguish between different aspects of freedom and well-being it offers a framework for developing a more open and less biased approach to WLB. Folbre's work on caring labour and structures of constraint enable us to make some of the underlying biases in the use of WLB more explicit. The strength of both theoretical frameworks lies in providing basic criteria to evaluate government interventions and company based WLB policies and strategies not in devising particular solutions as the case evidence from New Zealand shows. In future work they could be used as a screening device to identify international best practice policies to improve WLB.

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## Notes

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<sup>1</sup> Though the empirical study by Felstead et al. (2002) does seem to contradict this statement, the authors of the enquiry concede that this might be due to limitations of their quantitative approach (ibid. 66).

<sup>2</sup> Habermas describes the “life-world” as endangered by a total exploitation and dominance of the “system”.

<sup>3</sup> For Polanyi the exchange of labour on a self-regulating market requires work to be no longer embedded in other activities. However, he also claims that such a transformation is never totally complete and faces countervailing tendencies in society. He calls this *double movement*.

<sup>4</sup> Charles Taylor (1985; 1989) supports Sen’s interpretation of Berlin’s philosophy stressing the importance of both freedoms whereas Berlin emphasised the detrimental effects of philosophies based mainly on positive freedom and therefore prioritised negative freedom (Berlin, 1991).

<sup>5</sup> The emphasis is in the original.

<sup>6</sup> Compare e.g. England and Folbre, 2002 and Himmelweit, 2000

# **A Workplace View of Drivers and Barriers to Developing Human Capability**

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## **Abstract**

This paper reports recent research in New Zealand workplaces investigating institutional, organisational and individual influences on the development of human capability. The concept of human capability is used as a counterbalance to the organisationally instrumental view of individuals and institutions prevalent in contemporary skills debates. Drawing inspiration from Sen's capability approach, the research examines drivers and barriers to capability development reported by workers, managers, unions, business owners, and industry commentators. In conclusion, the paper presents a summary of a framework to assist managers, union organisers, and policy makers to analyse conditions impacting on human capability development in and for workplaces.

## **Introduction**

In recent years, skills have been much discussed in the academic and policy literatures, and many OECD countries have advanced 'high skills, high wage' economic visions. Skills have been portrayed as somewhat of a silver bullet for economies lagging in the productivity stakes, and as a natural corollary of the knowledge economy. Yet we know that skills, although necessary, are not a sufficient condition for economic growth and prosperity (Brown, Green & Lauder, 2001; Keep, 2003; Ryan, 2007). Recent thinking on workplace productivity takes a more multi-faceted view of the ingredients for economic growth and success (Department of Labour, 2008; Fabling & Grimes, 2007; Ryan, 2007). The seven drivers of workplace productivity identified by the tripartite Workplace Productivity Working Group (see: [www.dol.govt.nz/workplaceproductivity/drivers.asp](http://www.dol.govt.nz/workplaceproductivity/drivers.asp)) typify the micro economic view of the organisational factors impacting on performance. These also reflect much of the thinking in the high performance work systems literature. Even so, the contributing academic literatures, such as work and organisation studies, labour economics, and human resource management, treat features of individuals and workplaces (such as skills) as purely instrumental to organisational success, and thereby economic prosperity. Humans involved in work are portrayed as resources or capital at the disposal of organisations and employers benevolent enough to utilise them. Few discussions place the human as the central concern. Nor do these discussions acknowledge that the human contribution to society is one not solely derived from work, and that the organisational contribution is not solely an economic one.

This paper reports on research which has been analysed using Sen's notion of human capability to examine how the institutions, organisations, and individuals associated with workplaces, both drive and constrain the development of human capability: that is the opportunities, freedoms and social arrangements which enable people to live lives they

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have reason to value. By taking a human capability starting point it attempts to move the debate to a more holistic view. This focus on human capability development permits: i) a view beyond purely organisationally instrumental notions of individual skill; ii) examination of not only workplaces and individuals but also the institutional environments in which they exist: social, economic, labour market, and so on; and thus iii) a consideration of the impact on human capability of social arrangements associated with employment. The paper proceeds by briefly outlining some of the academic debates surrounding skills and workplaces, and the consequent appeal of the perspective of Sen's capability approach. It then describes case study research conducted in a range of New Zealand organisations investigating the development of human capability. The paper concludes by presenting a framework of the main factors which drive and undermine developing human capability in and for New Zealand organisations.

### **From human capital to human capability**

Our research project focused on human capability development in and for the workplace, and the various influences on that institutionally, organisationally and individually. Thinking about this drew us to research literatures which addressed skills, learning, human capital, human capability and achievement, in work related contexts. We found that the ever expanding commentaries on learning organisation, human resource development (HRD), human resource management (HRM), workplace learning, and adult education were largely underpinned by an implicitly instrumental view of skills and human capability as a tool for the achievement of organisational goals. The pervasiveness of this assumption is due in no small part to the popular uptake of human capital theory and resource based views of the firm. These perspectives, which have travelled variously from economics to strategic management and to human resource management, provide appealing logic for organisations to behave in a short-term, self-interested manner. For instance, human capital advocates would argue that it is not reasonable to expect employers to act in the development interests of employees who may then leave the organisation, or who may not use all their skills for the benefit of the organisation. On this basis, narrowly defined firm-specific skills are the most an employer would invest in – with an expectation of gaining all the pay-off from these skills. Similarly from a resource based view, skills and knowledge and other attributes of certain employees are regarded as the organisations strategic asset to be utilised and retained through various HRM practices.

However, the small but growing critical strands of these literatures (particularly in workplace learning and adult education) are an informative counterbalance. In recent years, human capital theory as the dominant school of thought in HRD has been widely criticised. These include suggestions that it commodifies learning (Baptiste, 2001), ignores power relations, is fixated on individualistic market relations and is unable to deal with the general problem of underutilisation of investment in learning (Livingstone, 1999). Others claim it only generates an efficient amount of HRD and training activity under very restrictive assumptions (Kaufman, 1994; Wang & Holton, 2005) that it ignores that HRD is embedded in work processes, and that it distracts attention from other processes by which HRD resources are allocated in organisations. Thus, although human capital theory has some explanatory power, it also has shortcomings and is certainly not a universally appropriate guiding principle.



These critical literatures also show that workplaces can be characterised as more or less supportive of learning, and that various factors are influential in this including: job design, the context in which workplace learning takes place, access and opportunity, particular organisational strategies and goals (Billett, 2002a; Billett, 2002b; Billett, 2004; Fuller & Unwin, 2004, Keep, 1997). It also shows that there remains a persistent gap between the haves and have-nots in access to development opportunities (Rainbird, Munro & Holly, 2004). Our own cases (Bryson, Pajo, Warm and Mallon, 2006) confirm these findings, showing that opportunities may be differentially experienced according to level in the organisational hierarchy or type of job. This critical perspective in the literature has seriously questioned the assumed mutuality of purpose and outcome of learning activity for the individual and the organisation (Thomson, Mabey, Storey, Gray & Iles, 2001; Fenwick, 1998). The amount of choice and self-direction individuals have in their own learning and career is arguable (Grimshaw, Beynon, Rubery & Ward, 2002) and the assumption that individual learning and knowledge are commodities, useable for organisational competitive advantage is still pervasive (Casey, 2003; Gherardi, 2000). In a critique of learning organisation and the knowledge based economy, Casey argues that “economic discourses of work and organisations, and of adult education, have precluded significant attention to the cultural dimensions of work – the non-material, personal and relational aspects of productive activity – which defy economic and productivity measures” (2004: 620). She appeals for education and skill acquisition to be directed towards goals of self and community development for living and working in participatory democratic society.

Another strand of the HRM and management literature which is highly influential for organisational practice and discourse is that pertaining to high performance work systems. This literature debates the emergence and shape of new forms of work organisation which have appeal as the high-wage, high-skill productive base upon which contemporary social and economic development aspirations can be met. Proponents of high performance work systems argue for bundles of HRM practices which feature: performance based pay, team work, firm specific skill selection and development, employee involvement and flexible work arrangements. Research is mounting to prove the link between these practices and their goal – increased firm productivity (Department of Labour, 2007; Fabling & Grimes, 2007; Huselid, 1995). The, not unreasonable, logic of the link between high performance work systems and productivity is that such practices “raise employee productivity by raising employee skill levels and motivating and engaging workers more effectively” (Department of Labour, 2007). Indeed, in a recent survey of employee experiences of high performance work systems in New Zealand workplaces, Macky & Boxall concluded “empowerment levels look healthy...but if links between empowerment, training, rewards and communications were stronger, employee productivity and commitment would likely be higher” (2008: 14). However, one could also argue that, from a worker’s perspective, there is a fundamental tension whether, in this emergent model of high performance work systems, employee relations are constructed so as to empower them and increase their intrinsic rewards through work or whether they are constructed to simply extract greater effort. There is a tendency in the high performance work systems construct to exaggerate the rationality and effectiveness of HRM practices to ‘create a social system in support of the technical system’ and to underplay the agency of management and workers in resolving the social tensions and technical constraints that occur in work.

In summary then, the range of skill, HRM and productivity debates are largely constrained by narrow conceptions of the role of workers, managers and organisations (focused on

short run productivity), and do not acknowledge or fully explore the possibilities of human capability within organisations and society. Drawing on the work of Amartya Sen, we characterise capability as a positive freedom to achieve things in order to live a life which one values and has reason to value. We utilise this broader notion of human capability to provide an alternative starting point from which to examine institutions, organisations and those that are part of them.

Sen's use of the concept of 'capability' originates in debates within welfare economics and is principally applied in the context of economic development. Sen's thought has been widely summarised and presented in the literature (see for example, Pressman & Summerfield, 2000; Osmani, 1995; Gasper, 2002). Sen, himself, has provided many summary accounts of his thoughts (see for example Sen, 1984; 1985; 1987; 1992; 1995; 1999). Whilst Sen's 'capability approach' raises complex philosophical issues and is developed out of a detailed critique of mainstream economic approaches to welfare, the essential point of departure of Sen's work is his focus upon human well-being and within that his arguments that the purpose of development is the expansion of people's well-being and freedoms so that people have the opportunity to expand their achievements.

As Sen himself (1993) and other commentators (Robeyns, 2000; Sehnbruch, 2004) emphasise, the capability approach operates at several levels, but is mainly a framework of thought, or a mode of thinking. The major constituents of the capability approach are the concepts of functionings and capabilities. In *Development as Freedom*, Sen offers a set of definitions of functionings and capability:

...the concept of "functionings"... reflects the various things a person may value being or doing. The valued functionings may vary from elementary ones, such as being adequately nourished and being free of avoidable disease, to very complex activities or personal states, such as being able to take part in the life of a community and having self-respect... A capability [is] a kind of freedom: the substantive freedom to achieve alternative functioning combinations (Sen, 1999: 75).

Functionings are, thus, the 'beings and doings' of a person, whereas a person's capability is the various combinations of functionings that a person can achieve. The two concepts are related but distinct in that:

...a functioning is an achievement, whereas a capability is the ability to achieve. Functionings are, in a sense, more directly related to living conditions, since they are different aspects of living conditions. Capabilities, in contrast, are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead (Sen, 1987: 36).

A key point that Sen makes is that the availability of a commodity (such as a money wage, or a job, or training) does not necessarily or automatically imply that people can achieve an intended act or state of being. With the concept of 'functionings', Sen is trying to capture the notion that what 'doings and beings' a person achieves depends upon command over a particular set of commodities, one's individual circumstances, the physical and social environment one lives in, and all other factors that may impact on the conversion of commodities into achievements.

Finally, crucial to the capability approach of Sen, is what Browne, Deakin, and Wilkinson (2004) refer to as the conversion factors which facilitate freedom or capability. These conversion factors are the characteristics of people and the society and the environment they live in, which together determine a person's capability to achieve a given range of functionings. Personal characteristics in this sense include such things as a person's metabolism, age and gender. Societal characteristics would include such things as societal norms, legal rules and public policies. Environmental characteristics would include such things as climate, physical surroundings, infrastructures and legal-political institutions.

Thus, to contrast human capital and human capability, and the ways in which they fit together, is illuminating. According to Sen human capital refers to "the agency of human beings, through skill and knowledge as well as effort, in augmenting production possibilities" (1997: 1959) On the other hand, human capability is about the ability of human beings to live lives they have reason to value. Sen discusses the nature of the two concepts and some important points of comparison. First, both concepts focus on human beings and their abilities. In this respect, they have a common reference point. Where they differ, however, is that human capital is often viewed in terms of its contribution to productivity within an organisation whereas human capability looks at its contribution in a much broader way in terms of the extent to which these abilities enhance people's lives in general. It could be argued that it is the same distinction that separates employers and employees. Employers want to grow people's abilities for use in production whereas employees are developing their abilities not only for work but also to contribute to their wider wellbeing. To some extent the definition of capability depends on whether you perceive individual capability as the end goal or whether you view the individual as an input to the overall goals of organisational capability.

In summary, a focus on human capability can provide a more integrated way of considering organisational ends, individual needs, and societal outcomes. It forces a more strategic view of human development, one which accepts the connection between individual, society and organisation. The capability approach of Sen provides an important alternative lens through which to identify the factors that lead to the optimal development of human capability in New Zealand organisations. It asks, what are the social arrangements that lead to the ability of people to do or be something? Whilst not denying the relevance of the concept of human capital, its focus upon skill and its individual rational acquisition misses the point that the individual also needs the effective means to apply such skill into an achievement. Skills are only a part of a wider concept of a person's broad capability to achieve his or her goals. Our research explores how this capability develops or declines depending on daily circumstances in life and work, at least as much as on formalised periods of education and training.

### **Investigating views from New Zealand workplaces**

The Foundation for Research, Science and Technology (FoRST) provided funding for our research to identify conditions for the optimal development of human capability in New Zealand organisations. We utilised a multi-level, multi-method approach to conducting the research in order to capture the breadth of perspectives and factors influencing human capability. After an extensive literature review, data were derived from 3 main sources: 1) an examination of collective employment agreements held in the employment agreements longitudinal database of the Industrial Relations Centre at Victoria University of

Wellington; 2) a series of case studies in 4 industry sectors; 3) a series of targeted focus groups with expert groups.

### ***What we examined in the database***

The database contains collective employment agreements which are coded, and can be searched, according to specific clauses or contract provisions. Thus, early on in the research project we were able to instigate coding of provisions related to training, workplace learning, flexible work, and other capability development opportunities that had been bargained into agreements. The database also contains annual union membership surveys which allow us to estimate levels of union density in New Zealand.

### ***What we did in the case studies***

The case studies were our main instrument for qualitative investigation of influences on human capability in and for the workplace. Participants in the case studies were drawn from what might be regarded as the wider capability community associated with each of the four industry areas we investigated (wine making, furniture manufacturing, mental health services, and Maori businesses). We conducted over 200 semi-structured interviews with employers, workers, unions, industry associations and Industry Training Organisations (ITOs), local education providers, regional authorities, and other organisations in the supply chain of each industry. The interviews were designed to look at individual, organisational and institutional issues. We found that for most workers the term 'capability' had limited meaning, thus we focused on obtaining a development history from each worker in order to understand how they had got to where they currently were job-wise, why certain choices had been made along the way, and what had been helpful and what had hindered them achieving what they wanted. This proved to be very helpful in identifying drivers and barriers to the development of human capability. Interviews with managers and owners covered similar questions and also asked how they developed workers and how the organisation and industry in general approached skill and capability development. Interviews with education providers and industry representatives canvassed opinion on human capability development practices and issues (driver and barriers) for the industry.

### ***What we did in the focus groups***

The final phase of the research involved a series of focus groups with 45 subject matter experts in order to test the framework of developing human capability that emerged from the case study, database and literature review phases. The subject matter experts included: a group of government policy advisors; a group of organisational consultants and researchers; a group of unionised workers; a group of non unionised workers; a group of managers from both unionised and non unionised workplaces; a group of union organisers and delegates. A final verification of the practical utility of the framework was conducted with two further focus groups: a group of Human Resource Managers; and a group of union educators. The focus group discussions explored drivers and barriers to human capability development, in particular what workplace and job characteristics facilitate capability development and what workers want in a job in order to add to their capability.

Within this paper we focus on the institutional, organisational and individual factors that enabled or constrained the freedom of opportunity for workers to achieve things they valued.

## Findings

A key result from examining the collective employment agreements database showed that despite the permissive nature of the Employments Relations Act, 2000 provisions within collective employment agreements remain limited largely to complying with the minimum standards of new legislation. For instance, the amendment of the Holidays Act in 2006 to extend the social right for annual leave for full-time employees from three weeks to four weeks per year has been reflected in agreements (Blackwood, Feinberg-Danieli, Lafferty, O'Neil, Bryson, Kiely, 2007). In addition, the database showed that union density in the private sector remains low and barely keeps pace with increased labour market participation. The reality of the limited results of collective bargaining within a permissive framework led us to think more seriously about human capability as the ability to achieve things and how an institutional framework such as the employment relations system helps or hinders the positive freedom for people to achieve things.

The case studies, collectively, shed further light on the impact on human capability of such institutional arrangements. Although, the qualitative findings of the case studies have been reported in detail elsewhere (Blackwood, Bryson & Merritt, 2006; Bryson et al. 2006; Bryson, 2007; Bryson & Merritt, 2007; O'Neil, Bryson, Cutforth & Minogue, 2008; O'Neil, Bryson & Lomax, 2008), in this paper we present a summary of key findings. The case study interviews yielded a breadth and depth of information on both formal and informal influences on development. In particular, while identifying the development influences (positive and negative) within the organisation, a capability approach also helped us to focus on the influences from outside the organisation, and a far wider range of the informal but highly significant capability development activities within the organisation. We used the analytic device of drivers and barriers to summarise the key influences on the development of human capability following analysis of all the case study interviews. These two categories were then subdivided according to the level they were reported as occurring:

- Institutional: Broad societal arrangements such as policy, regulation, legislation and social attitudes
- Organisational: Factors relating to practices within organisations
- Individual: Factors personal to the makeup of an individual

Table 1 presents a condensed summary of key themes identified in the case studies. Following the table we discuss some of those factors in terms of their impact on human capability.

**Table 1: Summary of drivers and barriers to developing human capability**

	<b>Drivers</b>	<b>Barriers</b>
<b>Institutional</b>	Role of the state - infrastructure, policies, norms which endorse industry and organisational practices Economic conditions	Lack of coordination between different incentives in infrastructure and policy; contracting out of service provision; schools and other influences
<b>Organisational</b>	Supportive employers, managers and supervisors; pay systems; work design and practices; occupational recognition and professional standards	Beliefs and values of board, senior management team, owner and/or general manager; short term focus; organisational strategy; small size of organisation; lack of mechanisms for genuine employee input/union absence and/or a transactional focus in the employment relationship
<b>Individual</b>	Aspiration to improve; proactive individual behaviour; confidence; community connections	Lack of awareness or confidence or pro-activity; mode of employment and bad jobs; poor schooling, life and work experiences

Although we were able to isolate institutional, organisational and individual factors for analytical and presentational purposes in Table 1, this does not mean to imply that they are unrelated or unconnected at the different levels. Institutional factors influenced organisational and individual choices, just as organisational practices influenced individual choices and (in some cases) vice versa. Below, we report on some of the interesting connected flows of influence between these levels, in particular: economic conditions and business strategy; nature of the 'employment' relationship; industry-wide responses; influence of those with power; individual experiences and confidence.

The uncertainties of competition in an open economy and in export markets drove differing business strategy responses which in turn impacted capability development. These strategies were usually focused on achieving production flexibility in various ways - for instance, through an emphasis on quality, or alternatively a focus on cost competitiveness. This was also evident in the public sector where state agencies drove funding contracts requiring efficiency and quality of service provision. We found that a common practice to achieve flexibility in both the private and public sectors was the contracting out of service or production to contractors and subcontractors. This practice operated as both a driver of and barrier to capability development. In the private sector, such contract arrangements more often constrained capability development of contractors who were tightly resourced to deliver with no margin for development. In the public sector, although this was in part the case, the contracts also often specified requirements for the contractor to meet certain professional development standards and cater to other development needs.

This also highlighted that the nature of the employment relationship (core employee through to sub contractor or temp) impacted significantly on whether capability development was acknowledged as the concern of the organisation or not. We found, paradoxically, that some workers having moved to independent contractor status in order

(they hoped) to access the freedoms they needed to live the type of life they valued, discovered other significant constraints they had not anticipated. For instance, the need to maintain cash flow led to acceptance of sub optimally resourced contracts. On the other hand we also spoke to some workers for whom seasonal employment provided the (social) arrangements which enabled them to live as they wanted. In the off-season, they pursued other lifestyle options ranging through creative activities, to physical pursuits such as skiing, hunting, fishing and generally 'going bush'.

Also, at an institutional level, vocational education infrastructures and industry responses were influential. The presence of industry-wide responses to economic and other pressures often encompassed a concern for capability. Industry strategies acted as drivers and served to ameliorate the tendency to very short term focus of many of the organisations we visited. The reputation of apprenticeship training or other qualifications, the perception of availability of work in the industry, the experience of secondary school, were all important.

A clear theme at the organisational level was the influence of the board, managers and supervisors. People in positions of power over others, whether it was formal managerial power, or power conferred by age, experience, or earned through respect, were consistently reported to be central to facilitating achievement of individual capability. For example, workers reported key capability development experiences due to the regular encouragement and support of certain managers, supervisors and colleagues, and also from any key person, such as 'Mum' or a respected friend. These were important in increasing individual confidence, feeling of value, and thus willingness to develop. This was further emphasised in reflections by employees on their capability development being hindered by unsupportive bosses and "guys in the past who've been narrow minded about sharing knowledge or skill development" (worker). In addition, deliberately short term business strategies combined with a lack of desire to engage with workers at any level other than hierarchically based direction and control, both proved to be massive barriers to capability development of any sort. As one worker noted: "If you don't have a good employer, it makes it harder". This inability or unwillingness of owners and managers to acknowledge and utilise worker knowledge in its broadest sense was detrimental to workers and ultimately, one surmises, the organisation. A number of themes around the individual's freedom to act (or not) also emerged. These included tensions over job security, how 'skilled' workers are 'made', and an absence of occupations or career paths in the workplace.

Focusing on capability also enabled researchers to discern the fine line between the worker classified with a 'good' attitude and those labelled with a 'bad' attitude. Beneath the 'bad' attitude often lay literacy issues, poor education and/or family experiences, poor employment experiences, and in some cases just immaturity or fear of commitment. In the workplace, people who have had these experiences sometimes appeared to lack confidence, or not be motivated. One worker summed up a common view saying: "Self confidence – a lot of people are very unconfident about their ability to undertake training and achieving". On the employer side, this manifested as: "It is hard to find young guys with [a] work ethic and sense of responsibility and good social skills".

Capability development was dependent on employers, supervisors, proactive employees and their wider social networks, and on industry and institutional initiatives. As one worker put it: "You really have to do it yourself... [the company] expects people to ask, to

be proactive”. Workers who had the awareness, confidence and interest to ask, make time, shape the work environment to suit their needs, were more likely to get the capability development they desired. Access to, and take up of, opportunities through work were positively influenced by proactive individual behaviour. Individuals are not without some agency in most work situations, the question is whether they exercise it or not. Interviews with workers revealed that numerous factors determine this including awareness of rights and possibilities in work and life, issues of identity (cultural, occupational, etc), confidence and self efficacy. These, in turn, are linked to educational and family experiences, presence of role models or supportive facilitators at work and outside of work.

## **Building a framework for developing human capability in New Zealand organisations**

In the final phase of the research, we discussed the drivers and barriers and other factors from the literature with expert focus groups. Several iterations of these discussions helped refine a detailed framework outlining the factors which drive and undermine developing human capability in New Zealand organisations. Table 2 presents a summary of the framework of factors. The detailed framework, which is reported in full in Bryson (forthcoming), describes the conditions in which these factors act to drive human capability development and the conditions in which they undermine it. Following, as an illustration of the full framework, is explanation of just one factor from each of the levels (institutional, organisational, and individual) and the conditions which make the factor drive or undermine human capability.

The institutional factor “nature and state of the product market” drives human capability development when there are collaborative, networked employer responses (across industry or region), for example through ITOs or other sector groups, or government initiatives focused on specific sectors. On the other hand, uncoordinated, fragmented responses are associated with a spiral downwards in human capability.

An example of the impact of differing conditions on the organisational factor “philosophy of economic and working life” shows that an encompassing approach by organisations including ethical, sustainable approaches, and /or in some businesses the Maori philosophy of ‘production for use’, drives human capability. Other driving conditions were management belief in the goals of the organisation, and facilitation of team work and reflective practice. Employers, managers and supervisors supportive of capability development were highly influential, as was a respect for workers as a ‘whole’ person with citizenship rights in the organisation. A long term view of the business and developing human capability was an important driving condition, and in Maori organisations this was sometimes expressed as a vision of iwitanga with iwi economic self determination. On the other hand, conditions under which ‘philosophy’ undermined human capability development included the existence of instrumental commercial visions based on a definition of value defined by the extent it can be bought, sold and turn a profit. Associated with this are boards and senior management teams which prioritise shareholder return ahead of workforce development. In SMEs, the beliefs of the owner or general manager can work either for or against human capability. In all organisations, a short term focus of business owners and business strategy can seriously undermine capability development for the business and the industry. An absence of management of the relationship between employer and employee, and between employee and employee also compromised



capability. Similarly a focus on the employment relationship as purely transactional undermined capability development.

An example of an individual factor is that of “attitude, confidence and self efficacy”. Attitude was consistently found to drive capability, in particular the willingness and desire to learn, and interest in the work. Aspirations to improve one’s lot in life or that of one’s family drove capability development, as did personal beliefs and interests which influenced career choice and desire to foster personal development or well being. Proactive individual behaviour was also a key driver which led to shaping of one’s work environment or asking for the development one required. However, undermining capability was lack of awareness, confidence, pro activity or organisation based self esteem which led to unwillingness to push for improvements. The absence of confidence, motivation and no way to access it, and poor attitudes to work and capability development were all powerful undermining conditions.

**Table 2: Overall factors identified as driving or undermining human capability development in different conditions**

<b>Institutional</b>	<b>Organisational</b>	<b>Individual</b>
Economic <ul style="list-style-type: none"> <li>• Nature &amp; state of the product market</li> <li>• Nature of the labour market</li> <li>• Nature of the legal form of employment</li> <li>• Geographic setting</li> </ul> Role of the State/public policy <ul style="list-style-type: none"> <li>• Publicly defined standards</li> <li>• Public funding</li> <li>• Policy concerning indigenous community</li> </ul> Educational arrangements <ul style="list-style-type: none"> <li>• Infrastructure</li> <li>• Integration of different elements</li> <li>• Sensitivity/engagement with local condition</li> </ul> Cultural/ideological legacies	Philosophy of economic & working life  Key structures & practices <ul style="list-style-type: none"> <li>• Scale of operation</li> <li>• Work organisation &amp; design</li> <li>• Skill formation arrangements</li> <li>• Workplace (industrial) relations &amp; cultures</li> </ul>	Attitude , confidence & self efficacy  Educational experience  Perception of work arrangements & culture  Life, capability & experience beyond work

At the outset, we noted that a human capability perspective encouraged us to examine the impact of opportunities, freedoms and social arrangements associated with employment on people’s ability to live lives they value. The research has clearly indicated the importance of this broader notion of human capability. Each of the factors identified in the framework has sets of conditions in which they drive human capability, and other conditions in which they constrain it. These conditions reflect the changing pattern of opportunities, freedoms and social arrangements to which people are exposed. The research has reinforced that

what happens in workplaces influences human capability, that institutional arrangements also matter, and the interplay between them.

The full framework goes some way to explicating what arrangements make a difference. The organisational practices that make a difference for human capability are not dissimilar to forms of good human resource management practice. For instance, high performance work systems could have value in developing human capability but a reorientation is necessary in order to achieve change to the status quo. Such a reorientation, inspired by Sen's capability approach, is to acknowledge and encourage organisations not only as economic contributors to society but also as capability enhancing institutions in society.

Work organisations are the providers and guardians of good quality jobs and work environments essential to the development of human capability. There is an imperative for them to support and encourage the reorientation of industries, boards, business owners, employers, managers, trade unions, workers and shareholders, to a longer term focus on the balance between the dual goals of enhancing human capability and economic wellbeing. Only through this will the limitations of the human capital approach and resource based view of the firm be overcome.

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## **Lessons learned from the long term application of a monitoring and evaluation process based on the capability approach**

JOHN SCHISCHKA\*

### **Abstract**

This paper evaluates the utility of the Capabilities Approach (CA) to empower communities and to guide development appraisal mechanisms. Volunteer Services Abroad (VSA) is a New Zealand non-governmental organisation (NGO) working in the area of international development. One of VSA's development partners in Vanuatu is the indigenous NGO Pri Skul Asosiesen Blong Vanuatu (PSABV). The central aim of PSABV is to bring together all those concerned with the development of pre-school education in Vanuatu. In particular, VSA volunteers are working with PSABV to improve the quality of pre-school education especially in remote rural parts of Vanuatu. This project was used to pilot a CA based monitoring mechanism. The lessons learned from the long-term application of a CA based participatory appraisal methodology are applied as a means of ascertaining the long-term results for the children, parents and other community stakeholders involved in the programme.

### **An Introduction to the Capability Approach and its Applicability in a Development Setting**

This article attempts to demonstrate the utility of the capability approach (CA) to empower communities and to guide evaluation mechanisms. The article commences with an introduction to the CA and how it can be applied in the development setting. There is then a discussion of the background of the Vanuatu case including: Pri Skul Asosiesen Blong Vanuatu (PSABV), Volunteer Service Abroad (VSA), and the educational context. Following this, there is a description of the case study. Next, important themes from the study are related and finally conclusions are presented on the outcomes from this process for the capability of the communities, pre-schools and agencies involved.

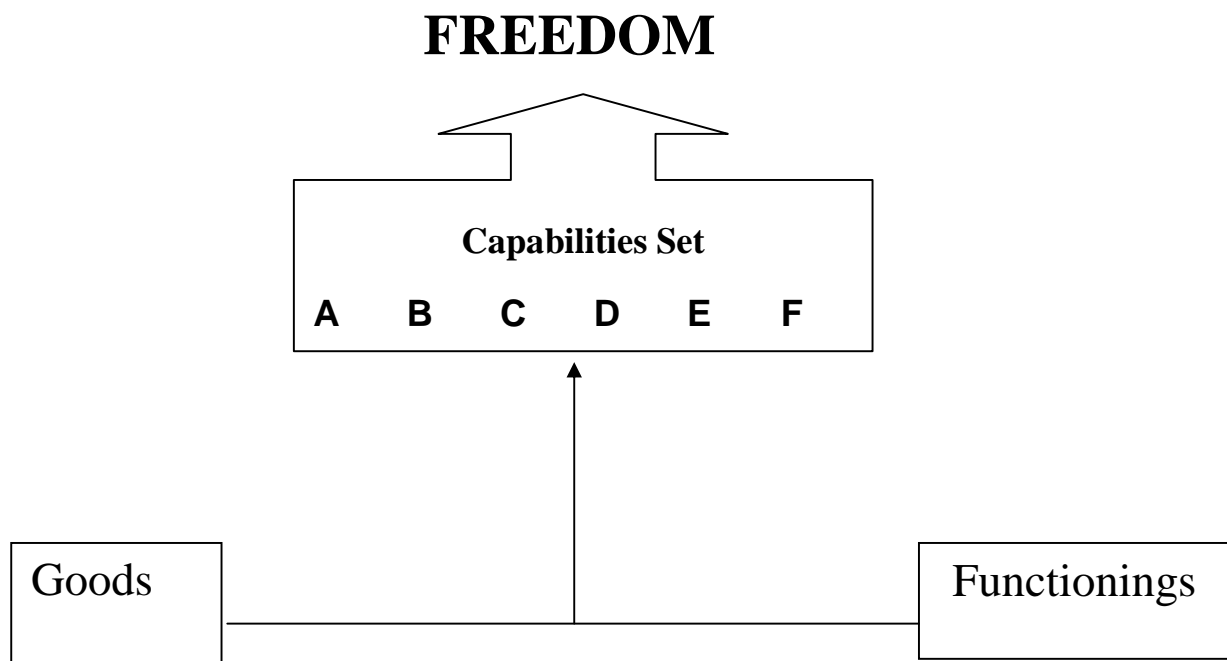
Nobel Prize winning economist Amartya Sen has outlined an alternative to appraising economic development (Sen, 1999). Sen argues that it is necessary to go beyond traditional measures of material success to encompass concerns of social development. He believes this may be done by focusing on enhancing capabilities to achieve education, health and other goals – through the use of the CA. Central to his framework is its focus

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on the freedoms generated by commodities rather than just the commodities themselves. Sen argues for the necessity to examine capabilities that people have to choose a life that they have reason to value. While development projects can supply *goods* and facilitate the acquisition of *functionings*, it is in combining these in the course of the development project that an individual's and a community's *capabilities set* expands which results in greater *freedom*. This expansion of capabilities results in greater choice and is central to development. A framework demonstrating the relationship between these four key concepts is shown in the diagram below developed by the author in Schischka (2005).

**Figure 1: Sen's Capabilities Approach**



The CA has a number of implications, not least that agencies involved in the funding and delivery of development work, look for new ways of appraising the success of their interventions. For some time, there has been comment in the literature and amongst development practitioners on the effectiveness of some Aid programmes. Rehnstrom (2000:1) notes that:

The effectiveness of development cooperation has been the subject of much debate, and while some critics continue to argue that aid is wasteful, a more commonly held view is that development cooperation can be justified on grounds that are not merely humanitarian. While recent research is beginning to show more clearly under which conditions aid can be most effective, **what remains less clear is the extent too which different bilateral or multilateral organisations have been able to contribute to social progress and improved standards of living.** (Emphasis added).

Dasgupta (2001: 32) has noted that:

Policy evaluation techniques that were developed in the 1970's, while formally correct, neglected to consider resource allocation in the wide variety of non-market institutions that prevail throughout the world...I have argued that the evaluation of policy changes can only be done effectively with a fair understanding of the way socio-economic and ecological systems would respond to the changes.

The problem has been that, in not properly considering the socio-economic context and the perspective of those involved in the projects, more harm may be caused to them than good by the operation of the development programmes.

There have been other calls for some time from development practitioners to re-examine development programmes in order to develop evaluation techniques that better encapsulate the views of the poor. Chambers' (1995: iv) statement is typical of this view:

In assessing conditions and seeing what to do, professionals' realities are universal, reductionist, standardised and stable. The [views] of economists dominate [and are] expressed in poverty thinking, concerned with income-poverty, and employment... Both projects [namely] the Northern project, [which has] the more industrial and urban conditions, [inserts] categories onto Southern project [which has] more agricultural and rural realities. Both have force **but miss much and mislead.** (emphasis added).

Research reported here outlines a longitudinal study conducted by the author with development partners in Vanuatu, which aims to apply the CA to develop appraisal methodology suitable for development initiatives that allows for reduction in this propensity to "miss much and mislead" and seeks to capture more of the realities of the participants in development programmes.

## **The Background of the Vanuatu Case: PSABV, VSA in an Educational Context.**

### **Pri Skul Asosiesen Blong Vanuatu**

The PSABV was established in the early 1980s and has been the main agent in introducing a progressive approach to early childhood education (ECE) throughout Vanuatu. The PSABV has worked with the Vanuatu government to ensure that early childhood education has moved from being solely community-based and relying on voluntary effort to a situation where early childhood education has become a recognised and valued sector of education in Vanuatu, managed and staffed by a mix of trained teachers and volunteers.



During the late 1990s, as there was a limited supply of locally trained early childhood educators, PSABV turned to volunteer sending development agencies for support. A request was made to the New Zealand NGO Volunteer Service Abroad (VSA) for an early childhood educator for assistance. By 1999, the first New Zealand pre-school teacher started her volunteer assignment as a Pre-School Adviser with the PSABV in Port Vila, Vanuatu. This was the beginning of a long-term relationship between the PSABV and VSA, and set the pattern for the subsequent assignment of a series of volunteers.

### **Volunteer Service Abroad**

VSA aims to deliver volunteer programmes that address key development needs in partnership with local organisations. Accordingly, VSA has developed a Monitoring and Learning Framework (MLF) as a means of monitoring and evaluating the quality and processes of its programmes and operations against intentions and values set out in a formal statement of strategic intent (VSA, 2006a).

This study is one in a series of studies undertaken, as part of the MLF, to monitor and evaluate the work of VSA's international development programmes. Lessons learnt from this research will be applied to this and other programmes, with the aim of improving the quality of VSA's development practice. A significant role of the research is to contribute to VSA's declared intention that "New Zealand volunteers, partner organisations, and communities abroad share skills and knowledge to help improve quality of life, and build self-determining communities and stable nations" (VSA, 2006b: 2).

### **Context of Pre-school Education in Vanuatu**

Most of Vanuatu's rapidly growing population live in rural areas (around 80%) and are dependent upon subsistence agriculture for their livelihoods. New Zealand's Agency for International Development (NZAID) estimates 40% of the population experiences poverty or hardship and notes:

Lack of access to education opportunities and unemployment are increasingly serious issues for young people. Urban drift is becoming a problem as people look for better opportunities in the towns. In recent years the population has grown faster than the economy, and services such as education and health have fallen behind (NZAID, 2008).

Vanuatu is rated 118<sup>th</sup> on the UNDP Human Development Index (between Guatemala and Egypt), (UNDP, 2005).

The formal education system in Vanuatu today is a product of a particular approach to education, dominated by church mission schools, and developed by the British and French during the colonial period. As a result, Anglophone and Francophone schools are still in operation throughout Vanuatu and many schools are run by religious organisations.

The Vanuatu Ministry of Education is aware of the problems. In 2001, the Ministry noted "...despite enormous efforts and [considerable] costs, Vanuatu's education system is not producing the desired results." (2001: 58) This concern is not limited to Vanuatu; it is a Pacific-wide problem. A group of leading Pacific educators concluded that "...three decades of considerable investments in education has not made a significant impact on the educational developments of Pacific communities" (Pene, Taufe'ulungaki and Benson, 2002: 1). What has been missing in the educational development of Vanuatu has been the influence of Ni-Vanuatu educators, and the 'ownership' and active participation by parents, local teachers and communities. The beginnings of a paradigm shift can now be detected. Early childhood education programmes, and the development of the PSABV, are important in this shift in educational philosophy and practice.

A recent movement to re-think Vanuatu education, and assert an indigenous, Ni-Vanuatu perspective, was documented following a Regional Colloquium on Education in 2001 (Sanga, Niroa, Matai and Crowl, 2004; Sanga, Chu, Hall and Crowl, 2005). This move towards indigenous self-assertion is summarised in Jean-Pierre Niroa's statement: "We must think and act as Ni-Vanuatu and do away with Anglophone and Francophone agonies" (Sanga et al, 2005: 38). Hence, the CA based participatory monitoring and evaluation methodology utilised in this study is located within this growth of early childhood education, the development of the PSABV, and the context of a wider social movement. A movement brought about by a change in thinking about education in Vanuatu, and informed by an appreciation of the development needs, and rights, of children and their parents.

### **A description of the Case Study**

The CA based monitoring process utilised a participatory, focus group process reported in detail below. The CA is reflected in this focus group process, both through the actual questions asked, the participatory process employed, in the resulting evaluation and commentary on changes in opportunities and choices experienced by participants and their children.

#### ***(a) The focus group process***

Focus group interviews were conducted with groups of self-selecting parents and extended families of pre-school age children enrolled in PSABV pre-schools. The first set of interviews were carried out in seven different villages in North Pentecost in January 2006, in a location deemed to be appropriate by the local people such as the village pre-school or meeting house. The second sets of interviews were conducted in seven villages and communities in Espiritu Santo and Malo Islands in June-July 2006, most of which were in a more developed and urbanised context than the first set of interviews. The general aim of the focus group study was to determine the perspectives of parents and community members on what had happened for their children since their involvement in the programmes of PSABV. Opportunity was also provided for the parents to give their suggestions for the future development of the PSABV programmes and resources.

Present at the meetings was the PSABV key teacher or provincial coordinators who were able to observe in detail the focus group approach. Initial consultation took place with the PSABV staff and the staff counterparts (the VSA volunteers) to determine the most appropriate village pre-school groups to act as the pilot studies and the most appropriate timing for the focus groups so as to minimise the intrusiveness into the lives of the participants. The longer term aim of this project is to have local staff become trained in the focus group approach so that they may be able to assume the role of the focus group facilitators.

Optimising the opportunities for inclusiveness required considerable efforts and the realisation that for the parents of the pre-schoolers, there are many competing calls on their time. In some cases, the focus group locations were moved in location to allow for important activities such as the vanilla bean harvest. In other instances, the focus groups were re-scheduled to fit in with important cultural activities related to celebrations such as weddings, funerals and coming of age ceremonies. In all cases, the focus groups were held where local communities felt best for them to occur, whether they were the village meeting house, the grounds of the pre-school or elsewhere.

***(b) The discussion guide used in the focus groups***

The discussion guide, developed in consultation with PSABV staff, is discussed below:

*Introduction: background to study, request for full participation and outline of what will happen to the results.*

This gave the opportunity for all participants to become familiar with the aims of the study, for the facilitator to ask that all present take part fully but to also make it clear that if they did not want to be involved they could leave at the start of the process or during the course of the focus group discussion. It was also important to establish that the results of the focus group would be used in the research process but also that the contents of the discussion were primarily owned by the participants and that they would receive the research results.

Questions

*1) When did you and your children join the group - how did you come to be involved?*

This question aimed to encourage everyone present to answer and is designed to make people feel involved and comfortable by identifying early on what all the participants have in common. This also allowed each of the individuals to reflect on how they and the people in their village became involved in PSABV. In this way, there was the possibility of a comparison (as outlined in question three) between the situation when they first got involved and how things were for them now that they and their children had been engaged in PSABV activities for some time.

2) *What were your expectations for you and your children when you joined?*

This built on question one and was aimed at eliciting more information from the respondents on how they perceived the project and their aspirations when they started. It was planned that this question would provide further basis for comparison in question three – in particular on how the choices and opportunities that they had expected to receive for them and their children compared with what actually did occur for them. Another important aspect of this question and others used in this discussion guide was that it was open-ended so as to enable the respondents to determine the direction of the response. Framed as an open ended question, Krueger writes: “The answer is not implied, and the type or manner of response is not suggested, individuals are encouraged to respond based on their specific situation” (1998: 31). It is then possible to delve into what is on the mind of the participants rather than what the moderator *thinks* is on the mind of the participant and this is at the essence of this research.

3) *What changes have resulted from your involvement?*

4) *Have you had any new choices and opportunities for you and your children since your involvement in the programme?*

These were the key questions in the discussion guide and the one for which most time was allocated. Question three was a more general question aiming to obtain the parents’ observations on any variations they had seen. In question four, the plan was for the parents to elaborate further in more of a capability approach context. The participants were given the opportunity to nominate the choices and opportunities that they felt were important so as to give the maximum chance for them to express, in their own words, how it was that they and their children’s lives had changed in the time they had been participating in the programmes. It should be noted that in question four, the words “choices” and “opportunities” were used as these were seen to be ones which the participants would be able to readily relate to and it was felt that they also captured the essence of “capabilities” and “functionings” as used by Sen in the CA. The use of the terms “functionings” and “capabilities” would have been ideal from an academic point of view but may not have been so easily understood by the participants.

The hope was that the participants would start by identifying aspects which could be called increased functionings. That is, new skills that they and their children may have developed since they have been in the projects. It was hoped that this would lead on to elaboration of new lifestyle choices that they now had, in particular new capabilities that they had developed.

*Did you expect these changes?*

This follow up question intended to elicit from those involved any surprising developments that occurred since they had been involved in the programmes. In this way,

the respondents had the opportunity for personal reflection on the development process that they were undergoing.

*5) What suggestions do you have for the future of the PSABV programme?*

This question was included at the request of PSABV and was aimed at obtaining the perspectives of parents and other community members on how the NGO could better suit their needs. When asking this question, care was taken to avoid unrealistic participant expectations.

*6) Summarise, ask if there was anything that was missed and promise to provide a summary of research findings and express thanks*

In this part, the researcher gives a short summary of the major findings that have come out of the focus group session and allows the chance for participants to add any further comments that they may have thought of at the end. It was also considered to be important to reiterate to the participants that they will be receiving feedback from the results of the study that they take part in.

***c) Collaborative Training Session***

Following a second field trip in Sanma Province, it was considered that there would be benefit in a collaborative training session with Provincial Coordinators at the national conference so as to allow key staff the opportunity to gain feedback from the two studies conducted and to gain their input and to experience the focus group methodology. It was also considered that there would be benefit in future interviews with class one primary teachers to determine their perspectives on the differences that attendance at PSABV pre-schools makes in children's lives and education. In November 2007, a collaborative training exercise was carried out with PSABV provincial co-coordinators at the annual conference of the association in Vila. During this time key, PSABV staff had the opportunity to develop and contribute their perspectives on the focus group methodology. This allowed for advancement of capabilities at another level – that of the provincial coordinators trainers within the PSABV movement.

***d) The capability approach and the focus group methodology used in the study***

The parallels between the participatory approaches to project appraisal (such as focus groups) and the CA have been noted in the literature – see for example, Alkire (2002), Apsan Frediani (2006), and Pellisery and Bergh (2007). The participatory appraisal methodology, developed and used in this project, is based within the CA and allows for evaluation of a programme's progress in terms of criteria that are especially relevant to the participants in the programmes. Sen argues that "...in analysing social justice, there is a strong case for judging individual advantage in terms of the capabilities that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value." (1999: 87). Furthermore, Sen suggests that "...in this perspective, poverty must be seen as the deprivation of basic capabilities rather than merely as

lowness of incomes, which is the standard criterion of identification of poverty” (ibid: 87). From a CA perspective, the aim of the focus groups utilised in this study is to determine the extent to which the programmes of PSABV, supported by VSA are alleviating the deprivation of these basic capabilities of the parents and children involved. Fundamental to the focus group methodology is that the village communities where the pre-schools are established are at the centre in this evaluation process:

One of the strengths of the focus group method is that it allows participants to identify *for themselves* the choices and opportunities they have learned or discovered through their participation; that is, it assists participants to recognize the active expansion of their own capability sets (Schischka, Dalziel and Saunders, 2008: 21).

The main objective of the focus group project was to provide the Ni-Vanuatu people involved in PSABV programmes in the villages with a participatory tool whereby they can regularly take part in the appraisal of the programmes. The appraisal of the programmes has particular reference to the stated aims of PSABV:

To bring together all people concerned with the care, education, and health of pre-school children, so that through contact and discussions with each other, the members will seek ways to promote the development of pre-school education... To work with the community to develop and improve village pre-schools... James (2004: 141)

The methodology utilised was based around focus groups which had been successfully applied in case studies of two poverty alleviation programmes in other Pacific locations. The results of which are reported in Schischka et al. (2008). Using focus groups within Sen’s CA has two particular strengths for practitioners. First, it is a mechanism for facilitating reflective participation by programme members. In the group interviews with the parents (and in some cases extended families) of PSABV children, participants were able to reflect on the way the programme had helped them to discover capabilities they already had, but which they had not previously realised could be valuable in creating self-help opportunities. Second, the focus groups are a mechanism for providing information to external agencies on the participants’ life choices that they themselves value and have reason to value.

### **Key themes emerging from the focus groups**

*Theme one* was the efficacy of the CA based focus group methodology in empowering the communities in Vanuatu that work with PSABV. As the long term aim is for the focus group methodology to become part of the regular operation of the PSABV in all their activities, it is seen as important that the focus group methodology is adapted to local circumstances and that can be owned locally. In this way, it is not dependent on an outside facilitator but rather can be implemented by local people as part of the development cycle that they are taking part in. It is anticipated that the Researcher will

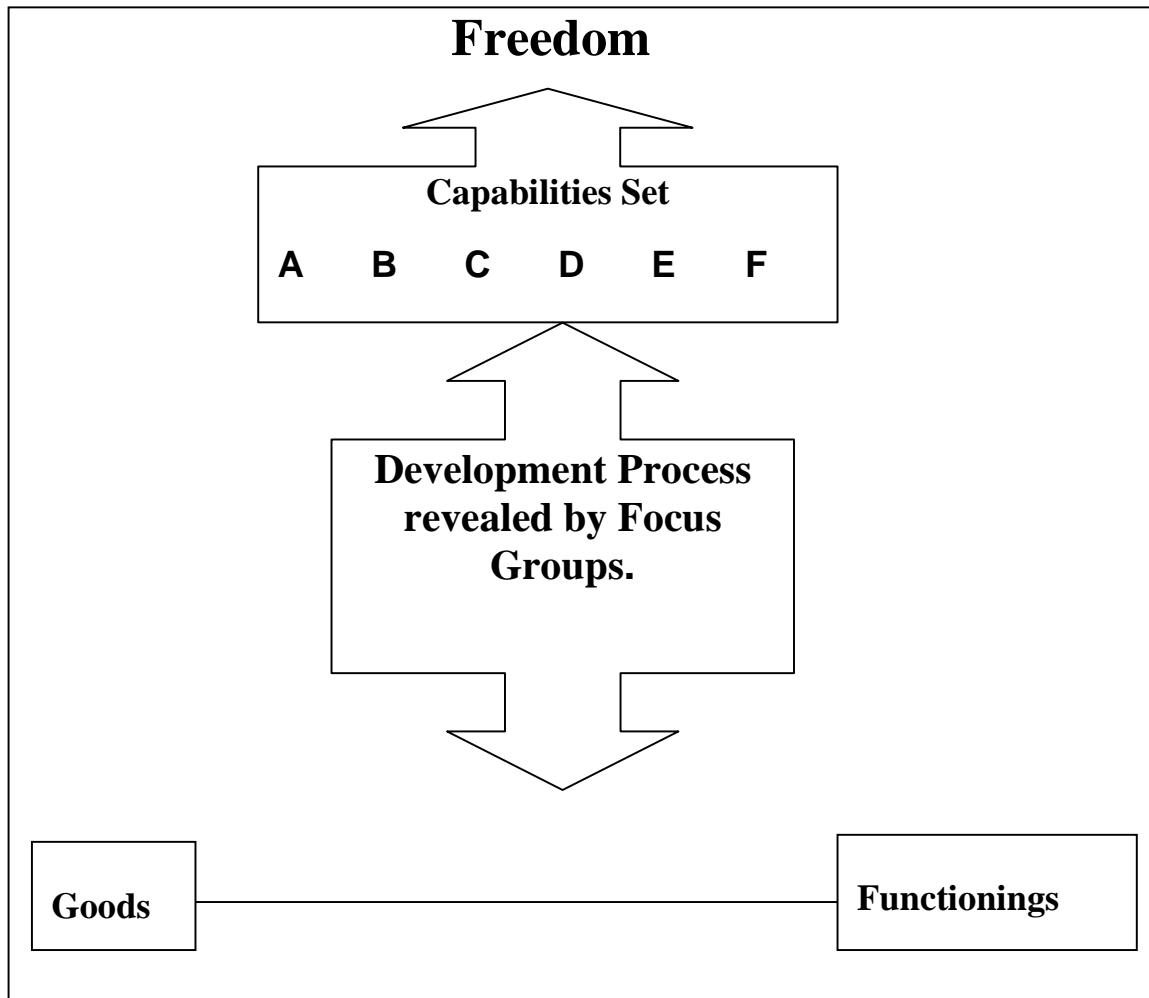
return to the community pre-school groups in the future to appraise the extent of success of the incorporation of the focus groups into the programmes of PSABV and to advise on any modifications that might become necessary to the methodology and discussion guide in future years. The focus groups also allowed parents the opportunity to increase their awareness of the effect of PSABV programmes operating in their villages.

In the terms of the CA, it is argued that what is necessary is that the participants are able to discover for themselves the valuable functionings that they have been able to develop and it is useful to return to Sen's original definition of capabilities. The necessity of people's involvement in the process of development and appraisal is accentuated when it comes to the consciousness raising process that should occur when they are able to realise the "...substantive freedoms that they have been able to achieve alternative functionings" or in the way that the participants are more likely to understand the freedom that they are developing "...to achieve various possible lifestyles," (Sen, 1999: 75).

Not only is it essential, therefore, that the people involved in the development and appraisal process not come up with the criteria by which the projects can be appraised through such means as the focus group process, but it is also important that they get immediate and ongoing feedback of the results of this analysis, since the discoveries they make in the appraisal are part of their discovery of the development process. It is important that the results of focus group deliberations are owned by those participants rather than simply "extracted" by outsiders for analysis elsewhere. After a time, the focus groups can provide a clear trend as to how the capabilities of groups are developing and comparisons can be made regularly over time without the need for outside control groups for comparison.

However, it is also important that field workers, supervisors and management of development organisations regularly monitor the results of participatory methods, such as focus groups. It is important for them to be aware of the motivations of the participants – what sorts of functionings they see as valuable to develop and what alternative capabilities they wish for. This is also important because this kind of discussion amongst the participants will give opportunity for real contribution to programme design by those who are supposed to be benefiting. It will also be possible with regular appraisal by focus groups for the management to be regularly conversant with the changes that are occurring in the lives and perspectives of the participants in a systematic way. There is also the real prospect of the results of the focus groups being used as a means of accountability of the development agency to participants – a way of making explicit how far the projects provided are succeeding in discovering or expanding the capability set of the participants. These focus groups should be used as a way of returning again and again to the participants in a continuous cycle of appraisal that is incorporated into development initiatives. It is argued here that it can be through the use of participatory methods such as the focus groups used in this study can realise these freedoms to achieve various possible lifestyles and thereby enhance their capabilities. The incorporation of the focus group methodology into the capabilities approach can be shown in a diagram (figure two) which is an adaptation of figure one earlier in this article.

**Figure 2: The Capabilities Approach Revisited: A model which puts the development process occurring for the participants at the centre of the appraisal process and which incorporates the capabilities approach.**



This diagram shows that the capabilities approach can, indeed, be operationalised using focus groups to appraise the development processes that are going on in the minds and lives of those participating in the programmes. While development agencies can provide goods and increase functionings, it is possible to argue that development has only truly occurred when “the free and sustainable agency” as stated by Sen, is developed and participants are able to actively expand their own capabilities set. The arrow leading from goods and functionings represents the development process that occurs for individuals involved in development initiatives such as the PSABV. It is the realisation of this development process that is going on within them that is important to capture in the appraisal method that is developed – the realisation of the extent to which Sen would say that they are “achieving alternative functioning combinations (or less formally put, the freedom to achieve possible lifestyles)” (1999: 75). It is the consciousness raising



process whereby the participants realise the extent to which their capability set has expanded that the focus groups have been able to highlight and to appraise.

The diagram shows that this appraisal is an overtly qualitative and subjective process – the participants are describing in their own terms the potentials within themselves that are being developed when they take part in these projects. By looking back at the time they have been taking part they can see how their lives and their perspectives have altered since they received the ‘goods’ of the project and started to develop the ‘functionings’ that they have reason to value. They can also reflect on the way in which their ‘capability set’ is expanding.

Implicit in the two-way arrow of the diagram leading from the focus group is that there needs to be continual re-evaluation of the goods and functionings incorporated into a project. Development is acknowledged as a dynamic process and the needs of a group of participants will change over time. For example, Vanuatu may be hit by another major cyclone in the future that will greatly affect the relevant goods and functionings that the participants value in the immediate recovery phase from such a catastrophe. This, in turn, could change the capability set that a project would develop.

The methodology revealed in this diagram is one that is flexible enough to cover many different contexts. This methodology does not attempt to develop a ‘master list’ of ‘central human functional capabilities’ or ‘central values of the poor’. Rather it recognises that participants in development programmes such as PSABV are a heterogeneous group, that poverty is a multi-faceted condition and that poverty reduction programmes should reflect this diversity. Consequently effective appraisal of these programmes should allow for, or even encourage, the changing and diverse perspectives of those involved.

*Theme two* was that the CA based focus group methodology has allowed the views of the participants to be expressed and this is revealed in the following analysis of the transcripts of the focus group interviews. Primary, the realisation amongst many parents that pre-school is the foundation of children’s learning and what they do while attending helps them get ready for Class One at primary school. A number of comments were made by parents in various pre-schools to the effect that their older children had performed much better at primary school in comparison to those children who had not had the opportunity to attend a pre-school. Related to this better performance was the greater confidence that the children had gained from their exposure to the pre-school activities such as the games and toys which help them to be able to write, read and understand basic mathematics.

Also of significance was what the parents came to realise when reflecting on their own understanding of the learning of pre-school age children. A number noted that it is beneficial to allow the child to gain independence in play and learn to solve problems on their own and that the children had this opportunity at the village pre-school.

The use of the local vernacular language as the main medium of instruction in the pre-schools attracted generally favourable comments from the parents interviewed. A common sentiment was that it is important that the child is familiar with his/her own language first before he/she learns a new language like English.

The focus groups offered the opportunity for constructive criticism of the programmes they were involved in. A number of parents saw need for permanent materials for classrooms including concrete floors, corrugated iron roofs to make the buildings of the pre-schools more durable and water tank storage facilities to make better use of the rain that falls in the wet season. However, there were also many positive comments concerning the pride communities felt in constructing buildings and equipping them using local materials. An important outcome of the discussions in the interviews was the unexpected results that the parents had come to realise after they and their children had been involved in the activities of PSABV for some time. The focus group discussions gave the parents the opportunity to actively reflect on the consequences for their communities and children due to the presence of PSABV pre-schools in their villages.

Related to this was the realisation of the importance of the involvement of different parts of the village. It was seen by a number of parents that this participation was important to maintain the momentum of the pre-school in the long term. A common sentiment was that there are a large number of commitments that individuals households have and the contribution to the village pre-school was sometimes hard to maintain in the long term. Having an active and effective Chairman and committee was cited as an important requirement for the pre-school to develop in the district especially when it came to fund raising and the construction of new buildings, as well as the maintenance of existing facilities.

Comments revealed the importance that the parents gave to the need for the whole community to work together for the pre-school to be successful in their community. The integration of older people into the pre-schools was seen as very important when they visited the class to pass on customs, songs, stories and dances.

### **Conclusions on the Outcomes from this Process for the Capability of the Communities, Agencies and Schools Involved**

The focus group analysis provided the participants with the opportunity to voice *their* opinions on a wide range of changes which had occurred in their lives, to consider the scope of the projects and to relate the standards by which *they* would wish to appraise the effectiveness of the programmes. That is, the findings show that development does not involve just *giving* people skills or physical goods, rather, in the terminology of the capabilities approach, development is a process involving people actively enhancing their functionings and thereby recognising their own capabilities *that already exist*. The focus group process also makes it possible to identify the choices and opportunities that the participants are realising are becoming available to them through their participation – that is, the *active expansion of their own capability sets*. In this way, the capabilities and

processes revealed in the focus group findings represent a significant appraisal of development for those individuals and groups involved in the projects.

The focus group methodology allows for the highlighting of the paradigm shift that is required in advancing education opportunities for all children. According to Swain, James and Schischka (2008: 48)

Over two thirds of Ni-Vanuatu children are currently excluded from the education system before secondary school. Girls are actively discriminated against. Exam-centred schooling has led to elitism and nepotism with many inequities. The basic human right of access to education has been denied for many Ni-Vanuatu children. However, change, led by early childhood educators, is underway. The beginnings of a paradigm shift can now be detected as learner-centred early childhood education programmes have spread throughout Vanuatu. It is expected that this shift will percolate up.

The changes in their children identified by the parents, and the many advantages of local ownership of the PSABV *kindis* revealed in the focus groups reported above, indicate that there is an increasing realisation amongst parents of the value of the active learning environment provided in PSABV pre-schools. The reports of the focus group interviews allow PSABV management to better articulate these benefits to policy makers and funding providers. They have also aided increased recognition of the important role PSABV plays and provided impetus for provision of resources to enable the growth and consolidation of PSABV programmes.

Moreover, the results of the focus group studies, undertaken in a number of village communities, demonstrate the wide engagement of these communities in the learning and education of their children. Active engagement was a requirement at the outset as villages had to demonstrate their commitment to the establishment of a *kindi* by providing land, building a local material school and other facilities, and actively participate in the establishment of the *kindi*. This approach ensured that the principles of partnership and participation were central to the work of the PSABV in rural Vanuatu. The consequences of this partnership approach, that have been identified in the evidence gathered for this study, and have been profound for families and communities throughout Vanuatu.

The transcripts from the interviews in both the remote rural context and the more developed urban situations revealed some significant capability outcomes from the result of the programmes of PSABV. Specifically, the realisation amongst many parents that pre-school is the foundation of children's learning. Also, that what children do while attending *kindi* helps them prepare for Class One at primary school, their future education, and greater parental involvement and understanding of their children's education.

The focus group interviews also revealed quite specific capability needs of Key Teachers, Provincial Coordinators and local people involved with the PSABV. The need for trained teachers in isolated rural communities was identified by many and this need reflected the

views of returned VSA volunteers and PSABV management. High training needs, very limited access to any training opportunities, and difficulties in travelling away from home for training characterised the situation of local teachers. When it comes to training needs at PSABV, demand most often exceeds supply. The focus group methodology was successfully utilised and adapted by key PSABV staff in both remote rural and urban contexts outlined and represents a sustainable long term option for training and awareness raising within the limitations of time and resources that this organisation operates.

In other instances, the focus groups allowed for the contrasting views of the parents to be articulated, such as, where they made suggestions for priorities for resources for the pre-schools. While it was important that unrealistic expectations were not raised in the course of the focus groups, they provided an opportunity for parents to report back to the programme staff their views on ways in which the pre-schools could develop to best reflect what the parents valued.

Finally, local PSABV stakeholders developed the local Bislama name for the focus group process – “Janis blong toktok”, which translates as “the chance to talk”. The focus groups allowed a chance for all community members to “exercise their voice”. Central to Sen’s CA is the concept of expanding capabilities, and this provides a useful framework for analysis of the situation of the many parents and children who have participated in the development and management of village pre-schools. The focus groups also provide a means by which organisations like VSA working with development partners can integrate the views of their development partners into the ongoing development of their programmes.

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## **Chronicle: October, 2008 – January 2009**

### **October 2008**

The upcoming November election provided a platform for political parties to trumpet their employment policies. The *Press* reported an announcement by Minister of Labour Trevor Mallard that the Government planned to introduce requirements for businesses to give staff minimum notice periods and payouts if they propose to lay off workers. Mr Mallard said that options for a statutory minimum for compensation and notice would go out for public consultation in early 2009. This announcement came amongst predictions of a sharp rise in unemployment due to the world financial crisis.

The *NZ Herald* reported on the National Party's proposal to introduce a 90-day trial period for new employees in firms that employed fewer than 20 people. The National Party's Employment Relations Spokesperson Kate Wilkinson claimed that New Zealand was the only country in the OECD (apart from Finland) that did not have a trial period for new staff. She said that a trial period would give smaller employers confidence to take on new employees with the knowledge that if they did not work out, they could be dismissed. The article went on to note that the proposal would affect most of the country's companies as 350,000 (96.8% of all firms) employed 19 or fewer full-time staff. Wilkinson also suggested that Small Medium Enterprises (SME) lacked the human resource capacity to make good employment decisions and that the policy would give them the confidence to take on people. She concluded that the policy included enough safety mechanisms to protect people from being exploited by bad employers.

In a response to this announcement, Minister of Labour Trevor Mallard called on the National Party to clarify its position on whether new teachers would face 90-day trial periods or not after conflicting comments from two spokespersons. The National Party's Education Spokesperson Anne Tolley had previously said that teachers would not be included in the policy but subsequently, at a Council of Trade Unions election forum, Employment Relations Spokesperson Kate Wilkinson said that teachers would be included.

The celebration of Labour Day was foreshadowed by a *Dominion Post* article which said that more New Zealander's than ever were working in excess of 50 hour' a week. This level was exceeded only by South Korea in the developed world. Reasons given for working longer included changing economic conditions meant that households could not survive on one income. Business NZ's chief Executive Phil O'Reilly said that workers could not continue "slogging away day after day" but until they started thinking smarter and productivity increased, the 40-hour week would be a dream for many. Council of Trade Unions' President Helen Kelly cited research that stipulated that those working in excess of 50 hours fell into two categories. The first group of workers worked long hours to make ends meet, and the second group of workers earned a good wage but were part of a work culture that caused them to work long hours.

The *Press* reported that junior doctors had finally ratified their collective employment agreement which featured an 8.68% pay rise. This brought to an end a protracted dispute that had lasted for 15 months and led to doctors to take strike action in May and June 2008 (see May and July Chronicles).

The *Dominion Post* reported in early October that Wellington bus drivers were again threatening strike action. After another round of negotiations, a new offer was made by the employers which included a cash payment of \$300 plus a new pay offer of a 7.5% rise, and this new offer was accepted by the drivers. The *Taranaki Daily News* reported that workers at Fitzroy Engineering in New Plymouth threatened to strike if their pay negotiations did not reach a satisfactory outcome. However, they accepted a 6.5% pay increase over 12 months, which constituted a significant cut on their initial demand of up to 15%.

Fast-food giant McDonald's featured prominently in the media during October. The *Timaru Herald* reported that union employees at all five McDonald's outlets at Auckland Airport took industrial action in an attempt to gain pay equity with their union colleagues at KFC, Starbucks and Pizza Hut. The Secretary of the Unite union Matt McCarten claimed that members who went on strike and protested at the airport were harassed by security staff and police, and the union's organiser was threatened with a trespass notice. The *Waikato Times* suggested that McDonald's employees in Hamilton had asked their customers not to eat at McDonald's at all. The workers wanted McDonald's to lift its minimum pay rate from \$12 per hour to at least \$12.80 per hour with allowances to pay for length of service. A McDonald's spokesperson was quoted as saying that the company supported the right to strike but there were many ways workers could earn more money and the company preferred to give pay increases on performance rather than service.

McDonald's featured again in a *Press* article with a report that the Kaiapoi outlet was going to appeal an Employment Relations Authority decision that awarded \$15,000 to a teenage worker (see September Chronicle). The Authority ruling found that the employee had been constructively dismissed after joining a union. The same franchise received further publicity in the *Press* when the union representing another employee claimed that the employee was forced to finish her shift despite her foot being run over in the restaurant car park. A Unite union organiser Joe Davis said the 17-year-old girl was working on the drive-through when her foot was run over as she delivered food to a parked car. She suffered a swollen foot but her manager told her she still had half an hour until her shift finished and made her carry on.

A *Dominion Post* article claimed that high staff turnover at the Accident Compensation Corporation was attributed to a "bullying culture" and a massive workload. This was despite a Department of Labour investigation in 2004 into complaints of overwork, stress and bullying at ACC. Figures showed that since May 2007, 630 staff had resigned (out of 2600) and that since 2003, 56 personal grievance cases had been taken by staff members. The turnover rate of around 25% per annum did not compare favourably with comparable government agencies such as Housing New Zealand and Auckland District Health Board who had around 15% staff turnover. In the article, a former employee was quoted as saying that there was definitely a "bullying culture" and the management approach was "dictatorial".



According to the *Dominion Post*, the Supreme Court had agreed that it would hear the case of unlawful discrimination of a senior Air New Zealand pilot who was automatically demoted when he turned 60. The pilot went from being a Boeing 747 captain and flight instructor to the lower rank of first officer when he turned 60 in September 2004. The appeal would be against a Court of Appeal decision that age discrimination was not the reason the man lost rank and was moved to a lower-paying job (see July Chronicle). The appeal was seen as having the potential to clarify the way discrimination issues are defined and decided.

The *NZ Herald* reported that an Auckland school teacher, who took a case to the Employment Relations Authority claiming he was repeatedly bullied by other staff, was so difficult to work with that his dismissal was entirely justified. The teacher claimed that his workload was intolerable and maintained that he was bullied by other staff. It was also asserted that his dismissal was in retaliation for having complained to the Ministry of Education about college management. The Authority found that the teacher's workload was not "out of sync" with other teachers and that he was given adequate support which included an extra day off a month. It was also found that he was not bullied by his colleagues, but rather that they acted in an "entirely predictable" way in frustration at the way he behaved towards them. The Authority added that the teacher appeared to have little insight into the effects of his behaviour on those with whom he interrelated with.

The *NZ Herald* featured an article detailing the impact of casualisation on sectors of the workforce and gave the example of a Middlemore Hospital kitchenhand employed by Spotless Services. The employee worked on average 20 to 30 hours a week for four years but was still a casual worker. The worker said that although she was working 40 hours at the moment, it was 'off and on' and that she needed secure work to support herself, her sick husband and four children. The article went on to say that despite nine years of Labour-led governments, her experience was commonplace. The Service and Food Workers Union suggested that the trend toward using casual workers had become a serious problem. In response, the Minister of Labour Trevor Mallard had drafted legislation which would give Labour Department inspectors the power to determine whether 'casual' employees were, in fact, really permanent employees (see June Chronicle). The bill would also provide a code of employment practice for casual workers, and would require that unionised workers in labour hire companies to be paid at least as well as unionised workers employed directly by an employer that hires the labour hire company.

### **November 2008**

The *Herald on Sunday* reported that small and medium business owners welcomed the news that the 90-day probation period policy was likely to be implemented by the newly elected National government (see September Chronicle). Employment Relations Spokesperson Kate Wilkinson indicated that the new government had not set a time for implementing the policy but an indication would be given once parliamentary roles had been announced.

Both the *NZ Herald* and the *Waikato Times* reported that The Dairy Workers' Union had given Fonterra notice of a strike planned to begin on 17 November 2008. The

union was seeking an 8% increase but the employer had offered 5% plus a 2.5% lump sum payment. The National Secretary of the New Zealand Dairy Workers' Union James Ritchie said the collective bargaining agreement, which covered about 4,500 people, was historically the most serious negotiating situation the union had with Fonterra. It was later reported in the *Waikato Times* that the parties had reached a settlement after two days of negotiations. The agreement still required ratification by the members before the strike notice would be withdrawn. Fonterra claimed that the offer was a fair and appropriate agreement that would give security for both sides in the current turbulent economic and financial climate.

An ongoing dispute at Ports of Auckland flared up again with the *NZ Herald* reporting that the Ports of Auckland Company had received notice only an hour before its annual Christmas party of a one-day strike by members of the Maritime Union. The union withdrew the notice after a technical error, but Branch President Denis Carlisle said another strike notice would be issued. Predictably, the reaction from Ports of Auckland management was that the strike notice was "disappointing, unnecessary and provocative" in difficult economic times. The Maritime Union claimed that it was the company that was being provocative by making it increasingly difficult for the union to hold meetings for its members.

There was further unrest at McDonald's with a report that unionised workers were planning to burn an effigy of Ronald McDonald at a meeting in Auckland (see October Chronicle). Unite union members were taking part in a meeting to mark both Guy Fawkes day and to emphasise anger over work and pay conditions. Unite's National Director Mike Treen was quoted as saying that "...young, angry workers are telling the world's biggest fast food company that we're not lovin' low pay and unfair rostering..." According to Mr Treen, low pay and irregular work hours were among the main concerns but McDonald's Communications Manager Kate Porter claimed that McDonald's had already agreed to the demands for secure work hours and that the planned strikes were an attempt at "news grabbing".

The *Waikato Times* reported that Hamilton bus services were disrupted by a 24-hour drivers strike after a breakdown in pay talks between bus company Go Bus and drivers who were members of the Northern Distribution Workers Union (see September Chronicle). Drivers indicated to Go Bus that they would not accept cash fares but, in turn, Go Bus responded that this refusal was not acceptable and that it would lock out the union drivers. However, within a week the drivers ended the five-day strike and accepted a 5.6% pay increase. Union Secretary Karl Andersen said the bus drivers had to settle for an offer of \$14.27 per hour but would have preferred \$15.50 an hour.

The ongoing case of the leading medical specialist wrongly dismissed after trying to e-mail photographs of his genitals to a female friend remained in the news with *Dominion Post* recorded his successful appeal in his battle for a costs award in the Court of Appeal. The Court determined that he could remit his appeal for costs back to the Employment Court, after a previous judgment that awarded no costs. The doctor was dismissed after pictures of his penis were found on his work computer. He was reinstated to his \$200,000 position by the Employment Court in November 2005 after a ruling that he had been unjustifiably dismissed. Subsequently, the doctor claimed more than \$195,000 in costs which was rejected by the Employment Court.

The Court of Appeal concluded that the judge failed to deal separately with the issues of remedies and costs.

In a sign of the times, the *Dominion Post* suggested that corporate chiefs and businesses were hiring bodyguards and extra security to protect themselves from disgruntled employees who had lost their jobs. The article claimed that the fallout from the financial crisis had made several chief executives hire round-the-clock protection as sacked or redundant workers threatened both them and their families. In one case, a bodyguard maintained protection of a chief executive for several weeks, while another monitored the movement of a former employee.

Although there was an economic downturn it was highlighted in media reports that a number of initiatives were being used to prevent staff layoffs. Helene Higbee, director of a specialist remuneration consultancy, informed that while most of her clients were looking at making staff redundant, some were doing their best to retain and redeploy people. These actions included redeployment of staff into other areas, a freeze on hiring new staff, not replacing staff as they leave as companies try to do more with less. Budget reviews also looked at ways to trim spending such as calling travel halts. However, the reality for unions was that redundancies were increasing at a great rate. The President of the National Distribution Union claimed that the union had been "right up to our necks" in redundancies.

## **December 2008**

There was extensive coverage in the mainstream media regarding the introduction of the 90-day probation period amendment to the Employment Relations Act. The *Dominion Post* informed in early December that the National-led Government looked set to introduce a 90-day probation period for new employees into Parliament under urgency. The introduction of the Bill was predicted to run into "stiff opposition" and was seen as a test of the relationship between the National Party and the Maori Party. There was no select committee hearing required because the changes were signalled in the election campaign and the Bill introduced in 2006 by Wayne Mapp went before a select committee. This lack of "public debate" drew criticism from the union movement who called it an attack on worker's rights. Former MP Laila Harre claimed that this was "the first step to wind back workers' rights and protections". She further criticised the push to pass the bill before Christmas as "ideological" and that it was "unashamedly backing bad bosses against vulnerable workers".

Later in the month, the *Dominion Post* and the *Press* published articles suggesting that the Government could extend legislation which would allow the 90-day probation period to cover all employers. The explanatory notes to the Bill stated that "[c]onsideration could be given to evaluating the outcomes of this legislative change with a view to extending it to cover all employers in future." Minister of Labour Kate Wilkinson was quoted as saying that the Government was open to such an extension.

There were further media reports on the operation of the Employment Relations Authority when an article appeared in the *NZ Herald* which criticised the operation of the Authority. The article cited the Parentline / Maxine Hodgson case (see September

Chronicle) and added that reform of the Authority was high on the government's agenda. The article suggested that the Minister of Labour Kate Wilkinson was planning to make the Authority keep records of its proceedings, allow the cross-examination of witnesses and make it act more "judicially". One senior employment law practitioner commented that legal costs had crept up and that taking a case to the Authority could be more expensive than taking a similar case to the Employment Court. The Head of the Authority James Wilson said that the increased costs were partly due to a 2004 amendment to the Employment Relations Act allowing dismissal on the grounds of what "a fair and reasonable employer would have done in all the circumstances". According to Mr Wilson, hearings that lasted more than a day had increased 50% since the law change. Unions and employers generally felt that the system was working well but just needed "tweaking" with Tony Wilton, of the Engineering, Printing and Manufacturing Union (EPMU), claiming that compulsory mediation and the use of the Authority had made resolving employment disputes much less costly.

A further *NZ Herald* article on the Auckland waterfront dispute which began in late 2006 after the collective agreement expired claimed that it was "lumbering into another year" (see October Chronicle). An Employment Relations Authority investigation into claims breaches of good faith by both parties had been adjourned until 2009. The article stated that the port company appeared "unenthusiastic" about the Maritime Union's latest proposal and that prospects of a settlement looked shaky.

The *Nelson Mail* highlighted that an Auckland bar manager was awarded nearly \$36,000 in compensation and lost wages. The woman was demoted from her job as a bar manager one week after she informed her employer that she was pregnant. She was then dismissed a month later after she was accused of lying about her work hours.

A high profile television personality Craig Busch, also known the "Lion Man", lost his claim for temporary reinstatement at the Zion Wildlife Park in Whangarei, according to the *NZ Herald* and the *Dominion Post*. The articles reported that Mr Busch had been dismissed for alleged serious misconduct, including allegations of major breaches of safety protocols, inappropriate behaviour in the workplace, performance issues, failing to keep proper training records and causing loss of revenue through cancelling tours. What made the case more sensational was that he had been dismissed by his mother and that some of his fellow staff members had threatened to resign if he was reinstated.

The Unite union received further media coverage after accusing research company Digipoll of victimising union members at its Hamilton call centre. The *Waikato Times* reported that the union has instructed its lawyers to file a claim in the Employment Relations Authority citing bullying, intimidation and workplace segregation. The union attacked Digipoll owner Dr Gabriel Dekel, calling him "psychopathically anti-union". The article featured Dr Dekel's response where he denied that he was anti-union, but he also argued that his line of work was not suited to unionism, with client demand erratic and with many of his workers "otherwise unemployable". Dr Dekel said the union did not acknowledge "the uniqueness" of his operations and, if forced, he would outsource all his jobs to call centres overseas.

In yet another case of workplace bullying, the *NZ Herald* recorded the unsuccessful claim of an employee dismissed for bullying a fellow worker. The man claimed that he was dismissed because his employer wanted to avoid the cost of making him redundant. The Employment Relations Authority found that his employer Auckland firm Buckley Systems (BSL) was justified in sacking the man because of his abusive and aggressive behaviour towards his fellow worker. The behaviour included pouring yellow or brown coloured primer paint on the man's overalls to make it appear he had soiled himself, making loud and sudden noises to cause fright and filling his gloves and facemask with tuna, as well as smearing it on some of his equipment. The harassment escalated to physical assault and the employee eventually resigned. An exit interview revealed the extent of the victimisation. The company investigated and the perpetrator was dismissed for serious misconduct. The Authority concluded that "an employer acting in a fair and reasonable manner" would have dismissed the man.

A *Dominion Post* article published an analysis of the Employment Relations Authority and its decisions which had been conducted by the Employers and Manufacturers Association (EMA). The analysis of awards over the past five years showed that complainants in Wellington were consistently awarded the highest compensation for the hurt and humiliation involved in unjustified dismissals. The Wellington payouts averaged \$8,536 in 2007 while Christchurch averaged \$6,630 and Auckland \$5,526. The analysis identified Wellington member Denis Asher, as making the highest average awards of all the 17 members in 2004, 2005 and 2006, although he was eclipsed in 2007 by Maria Urlich of Auckland. Auckland lawyer Eska Hartdegen was quoted as saying that the variations showed that authority members were "a law unto themselves". The EMA had said in previous annual surveys that compensation claims were "a gravy train still picking up speed", with the number of personal grievance claims taken to the authority rising from 340 in 2004 to 436 in 2005 and 515 in 2006. However, the latest analysis showed that the number of claims had dropped to 416 in 2007.

## **January 2009**

There was a dearth of reporting on employment relations in January 2008. Apart from the focus on further changes to employment relations legislation, most reporting concerned disputes before the Employment Relations Act.

Reform of employment relations legislation remained on the agenda. A *NZ Herald* article suggested that the Government needed to go further in overhauling the Employment Relations Act if New Zealand was to survive the recession. Once again, there were claims that restrictive employment law was one of the major hurdles for small to medium enterprises (SMEs). A survey conducted by a coaching company, the Results Group, claimed that 94% of all the businesses surveyed stated that "unworkable employment law" was the primary issue they faced. The announcement of an employment summit by Prime Minister John Key was seen by the Minister of Labour Kate Wilkinson as a forum which could "offer a good opportunity for businesses and unions to raise their primary concerns and promote any initiatives, particularly with respect to productivity and employment opportunities".

The *NZ Herald* suggested that the primary school teachers' union, the NZ Educational Institute, was taking its "first shot" at the recently passed 90-day employment trial period. The union wanted to omit the trial period provisions from the kindergarten teachers' collective agreement with the Ministry of Education. The union sought an agreement from the Ministry of Education and various kindergarten associations that a 90-day trial period was "neither necessary nor desirable". The National Secretary of the NZEI Paul Goulter stated that the Ministry of Education needed "to realise that law change did not just deprive workers of personal grievance rights, but had a significant effect on the labour market".

In yet another employment issue involving McDonald's (see November Chronicle), the *Sunday Star Times* reported that a disagreement over payment of \$10 worth of McDonald's burgers had escalated into a year-long employment dispute costing thousands of dollars. Daniel Gledhill, an employee at McDonald's branch in Mana (Porirua), won his case for unjustifiable dismissal before the Employment Relations Authority. However, the Authority told both parties that they should have been able to settle the dispute themselves. Gledhill, who had worked at the McDonald's branch for three years and had a clean work record, was dismissed in October 2007 for giving away \$10 worth of fast food to friends. He took a personal grievance, claiming that he felt pressured to give the food away, but intended to settle the bill after his shift finished. However, he only paid the staff discount rate of \$4 and accepted that he should have paid the full amount. Gledhill was not awarded any remedies as his actions had contributed to the employment dispute. It was found that the McDonald's branch did not conduct a reasonable inquiry into the incident and did not have heard evidence before dismissing Mr Gledhill.

Both the *NZ Herald* and the *Waikato Times* reported on the case of a breakfast radio announcer from Tokoroa who claimed unjustifiable dismissal after a public "bust-up" with his manager. The employee was unsuccessful in his claim for reinstatement and compensation. The man was dismissed after he loudly challenged the mayor of Tokoroa at a public meeting while dressed in clothing that identified his employer. The man's manager said she was embarrassed by his actions as local people recognised him and associated him with working at the radio station. The Employment Relations Authority found that the man's conduct outside of working hours did impact on his employment and his behaviour was "manifestly injurious to the interests of the employer" and could bring his employer into disrepute.

The *Dominion Post* reported that the Defence Force was ordered to pay \$100,000 to a doctor who was dismissed after raising concerns about her ability to treat patients in a naval decompression chamber. The treatment of the doctor was labelled as "callous, hasty and rash" by the Employment Relations Authority. The Doctor had met with her then manager to express concerns about her own work in the hyperbaric unit, stating that she believed it was not safe for her to continue working as she was not adequately trained nor qualified. Hours later she was dismissed on the grounds that her duties could be altered only by mutual agreement. Additionally, it was claimed that the doctor was not an employee because she worked under an independent contractor agreement. However, the Authority ruled that, although the doctor worked under an independent agreement, the nature of the employment meant that an employment relationship existed. The Defence Force was ordered to pay her \$81,072

in lost wages, plus a further \$20,000 compensation for “emotional trauma and distress”.

Another employment dispute involving a high profile personality reached the media. Real-estate agent and former television star Michael Boulgaris was ordered by the Employment Relations Authority to pay back \$163,635 in unearned commission. An Authority ruling determined that Mr Boulgaris, who had a major role in the ‘Location, Location, Location’ TV series, had to pay back the money to Wensley Developments Ltd who had employed him as a salesman in Queenstown. The dispute focussed on a \$535,000 commission paid in advance. Mr Boulgaris had only earned \$339,990 when he resigned. Boulgaris claimed that he did not owe on the pre-paid commission as his employer had misrepresented what he would earn. The Authority found no merit in his argument.

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