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**People with Disabilities and the Right to Work: Exploring Regulatory
Strategies to Reduce Barriers to Entry in China**

1. INTRODUCTION

The rights of persons with disabilities have gained increased international recognition with the adoption by the United Nations of the Convention on the Rights of Persons with Disabilities (**CRPD**). Both China and Australia have ratified this Convention and have taken leading roles with two of the twelve founding members of the Committee on the Rights of Persons with Disabilities coming from these jurisdictions: Ms. Jia Yang (China) and Professor Ronald McCallum AO (Australia) (The Committee is established under CRPD, art 34: Office of the High Commissioner for Human Rights). With a Chinese and Australian on the Committee it is timely to analyse how recent reforms in these Committee members' jurisdictions uphold the articles of the *CRPD*. This paper will focus on the situation in China with reference to the right to work in art 27 of the *CRPD*. This paper argues that the current reforms in China have improved the rights of persons with disabilities to exercise this right, however further reforms are necessary if people with disabilities are to fully exercise this right.

2. STATES ENFORCING RIGHT TO WORK

2.1. The Right To Work

This part will analyse the developments in the right to work and the obligations these developments impose upon States. The need to protect people with disabilities right to work is arguably critical. The number of people with disabilities in China is staggering. In 2007 it was estimated there were over 82 million people with a disability in China which is almost four times Australia's total population (Zhang 2007). These figures often do not include the 17% of Chinese who are carriers of diseases such as Hepatitis B (Brown 2006). If people with disabilities right to work is not protected then all of these people will be unable to contribute to their communities.

Howard and Donnelly observe, without the right to work being realised, no social or economic rights can be realised, as a person without work is unable to participate in the economy (1986). More broadly, Alston claims if economic rights are not realized, people will be denied many of the rights in the Universal Declaration of Human Rights (**UDHR**) (1997). It is argued that protecting people with disabilities right to work is crucial to enabling these citizens to fully participate the social and economic life of the community.

2.2. The *CRPD* And The Right To Work

This paper argues that ensuring people with disabilities can compete in the open labour market on terms which are as far as possible equal to the rest of the community is essential to ensuring economic and social rights. Article 27 of the *CRPD* provides people with disabilities extensive

protection in protecting their right to work. To ensure an inclusive labour market art 27(1) requires States to introduce legislation:

- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- (g) Employ persons with disabilities in the public sector;
- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
- (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

The rights contained in paragraphs (a), (b) and (i) will be analysed in part 3.1 of this paper. The enforcement of anti-discrimination provisions will be analysed in part 3.2. Part 3.3 will analyse the rights contained in (e), (f), (g), (h) and (j). Finally in part 4 this paper will analyse (k).

This paper will not analyse the right to trade union involvement in paragraph (c) as independent trade unions are currently unlawful in China. The All-China Federation of Trade Unions was the sole employee association. This union is directly controlled by the Chinese Communist Party (Chan 2002; Yu 2006).

The right contained in paragraph (d) and the educational aspect of paragraph (k) will not be analysed in this paper as these rights cross over with the right to education which is found in detail in article 24. To analyse the right to education as well as the right to work, while a critical issue, would render this paper exceptionally long.

To ensure the right to work in art 27 States agree to substantially reform their laws and policies where required. Through ratifying the *CRPD* Australia and China have undertaken to take steps including:

- (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; ...

Article 4(2) of the *CRPD* does not impose an absolute obligation for socioeconomic rights such as the right to work. States are only required to implement art 27 to maximum of a State's available resources. Accordingly States can argue that they are not in breach of art 27 if they are not economically able to implement reforms. Even though Australia or China could justify their non-compliance with art 27 on economic grounds it is arguably incumbent upon States to strive to find ways to ensure compliance with art 27. Even if art 27 may not impose a strong legal obligation it is submitted the *CRPD* does impose a strong moral obligation upon signatories.

3. DISABILITY SPECIFIC LEGISLATION

3.1. Chinese Anti-Discrimination Laws

This part will analyse reforms to disability specific laws in China.

The Law of the People's Republic of China on the Protection of Disabled Persons 1990 was revised at the 2nd Meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on 24 April 2008. *The Law of the People's Republic of China on the Protection of Disabled Persons 2008 (PRCPDP)* entered into force on 1 July 2008.

The PRCPDP seeks to prevent people from treating people with disabilities less favourably because of their disability. *PRCPDP* provides in art 3 that 'Discrimination on the basis of disability shall be prohibited'. Arguably the amendment to art 3 in the 2008 reforms improves the phrasing of the previous article. Under the 1990 *PRCPDP* art 3 provided that 'Discrimination against, insult of and infringement upon disabled persons shall be prohibited.' It appears that in China the issue of disability discrimination is approached by simply asking whether or not a person was treated less favourably than a person who does not have a disability. The trouble in China is arguably that courts have historically provided no remedy where discrimination has occurred. For example, in a case before the People's Court in Xinwu District a job applicant sued the Government for discrimination (Brown 2006383). The student had applied for the position and was successful with the interviews. Prior to commencing the position the Government required the job applicant to pass a medical examination. The job applicant was hepatitis B positive and on this basis the job offer was withdrawn. The Court found there had been discrimination but did not order the Government to provide the job applicant a position.

Arguably one of the most critical aspects of direct discrimination is the obligation to make adjustments. If no accommodations are made in the workplace then it may be impossible for many employees with disabilities to operate. If workplaces were not required to put in lifts then people in wheel chairs would not be able to access offices. If a job required employees to drive a car once a month to a meeting then if no adjustment was made a person who was unable to drive due to their disability would be unable to work in that position even though they could manage 99% of the other duties. For this reason art 27(1) (i) requires that reasonable accommodations are made in the workplace. The accommodation of employees with disabilities requires either employers or the State to take steps. Employers often have virtually no experience in employing people with disabilities (Leonard 2005). As a consequence it is arguable that many employers will be cautious about electing to make accommodations and employ a person with a disability. It is therefore incumbent upon States to find ways to support employers and to encourage them to employ persons with disabilities

In China art 38 of the *PRCPDP* requires employers to make some accommodations to ensure persons with disabilities can work:

Enterprises and institutions where persons with disabilities work shall provide appropriate working conditions and labor protection based on the characteristics of disabled workers,

and shall make renovations where necessary on workplaces, work equipments and life facilities in light of their actual needs.

The effectiveness of this provision will hinge upon what is regarded as appropriate. As people are only required to make 'appropriate' adjustments presumably adjustments which go beyond what is regarded as 'appropriate' are not required to be made. Whether this provision will result in exclusion or inclusion will hinge upon how Chinese courts interpret the term 'appropriate'.

Whether the direct discrimination or reasonable accommodation provisions in China are effective will depend on how these laws are enforced.

3.2. Enforcing Anti-Discrimination Laws

Even though art 27(1) (b) is the only provision which specifically refers to the resolution of grievances, it is arguable that the effective discharge of every obligation in art 27 requires States to provide vehicles to enforce anti-discrimination laws.

China relies upon a mix of private public enforcement. Article 59 of the *PRCPDP* enables person with disabilities who have been discriminated against to complain to the State-sponsored China Disabled Persons' Federation about any instances of discrimination. The China Disabled Persons' Federation then has the capacity to seek redress from relevant Government departments or the courts.

While this level of public enforcement is arguably positive, the drafting of art 59 appears to limit people with disabilities from bringing private litigation without the support of the China Disabled Persons' Federation. While such litigation is not prevented, there is an argument that litigation without the support of the China Disabled Persons Federation would be difficult to prosecute. If this Federation did not regard the discrimination as sufficiently serious to prosecute then presumably courts would be less willing to provide a remedy.

This provides this Federation considerable control over the ability of people with disabilities in China to seek legal redress. This level of control raises a number of issues. The China Disabled Persons' Federation is charged under art 8 of the *Law of the PRCPDP* to represent the common interests of persons with disabilities, protect their lawful rights and interests, unite persons with disabilities and enhance education provide general services for persons with disabilities. It is unclear whether the China Disabled Persons' Federation will have the resources to investigate and prosecute every complaint of prosecution or whether they will only be able to prosecute test cases. There is also the issue of what powers the China Disabled Persons' Federation will have to require disclosure of relevant documents from parties and whether this body will be held accountable for its conduct to the State or to people with disabilities.

It is submitted that the reliance upon effectively a charity to enforce the laws represents a strange blend between private and public enforcement. This mix has the potential to limit the enforcement of Chinese anti-discrimination laws. In Australia the focus upon complainant enforcement means that many people with disabilities will not have the financial resources or capacity to prosecute their claims.

It is submitted that remedial statutes will only achieve their objects where they are supported by legal deterrents. Gunningham has argued that 'persuasion by coercion by means of law remains a necessary condition'(Gunningham 1999, 192). Ayres and Braithwaite have explained the requirement for effective legal sanctions through the concept of the regulatory enforcement pyramid (Ayres and Braithwaite 1995, 19-53). An essential aspect of the regulatory pyramid model is that laws are effectively enforced. Johnstone argues that '*at the heart of the enforcement pyramid is a paradox – the greater the capacity of the regulator to escalate to the top of the pyramid, and the greater the available sanctions at the top of the pyramid, the more duty holders will participate in co-operative activity at the lower regions of the pyramid*' (2003, 17). Accordingly

for industrial or anti-discrimination laws to be effective they must have sufficient deterrents to motivate compliance.

As Chinese employment law are not effectively enforced it is argued that States have an increased duty to take proactive action to ensure people with disabilities are able to obtain work.

3.3. States Motivating Employers To Employ People With Disabilities

To encourage employers to employ people with disabilities arguably laws must:

- (1) address the belief that employers' hiring and retention practices relating to people with disabilities are efficient;
- (2) find ways to rebut the assumption that people with disabilities are less productive than their able bodied counterparts; and
- (3) the overall perception that the existing labor market status quo achieves equity (Stein 2003).

To address these three points it is submitted States must take proactive action to motivate employers to employ people with disabilities and demonstrate that with minor accommodations these employees can be extremely profitable for businesses.

The CRPD requires States to promote the workforce inclusion of people with disabilities through the rights contained in art 27 (e), (f), (g), (h) and (j) and require States to adopt proactive measures to improve the inclusion of people with disabilities into the workforce. Arguably (e) contains the overall objective and the other clauses provide vehicles through which this objective can be achieved. The least complicated regulatory option for States to adopt is to provide people with disabilities assistance in finding, obtaining, maintaining and returning to employment.

Article 37 of the *PRCPDP* requires public bodies to assist people with disabilities to obtain work. However, simply assisting people with disabilities to approach employers in itself, will arguably achieve very little. If employers are unwilling to employ people with disabilities then additional regulatory vehicles need to be implemented. One vehicle is to render the person with the disability their own employer through encouraging them to develop their own businesses. Art 27(1) (f) adopts this concept by encouraging States to encourage people with disabilities to develop their own businesses.

It is submitted that the most important regulatory intervention States can implement is to motivate large private and public employers to employ people with disabilities in meaningful positions.

CPRD arts 27(1) (h) and (j) require States to promote the employment of people with disabilities in the private sector through measures which may include quotas, affirmative action or work experience. The *CRPD* suggests possible vehicles States may adopt but it does not mandate any measures. China has adopted in legislation most of the suggested measures in (h). For example, the *PRCPDP* requires the State in art 31 to provide for 'Preferential policies' to encourage the employment of people with disabilities. Article 33 and 36 requires the State to introduce a quota scheme which is supported by tax incentives. While this proactive action is positive, arguably merely introducing a quota system does not mean that State has complied with the *CRPD*. The requirement is for appropriate measures. As quota systems which are poorly structured will have no remedial affect it is arguable that poorly structured quota systems would not constitute an appropriate measure.

When will a quota system constitute an appropriate measure? Stein and Stein explain role of quotas:

Quota systems are an equality measure commonly employed on behalf of disabled workers. Preferably, they legally obligate private and public employers to hire either a minimum percentage or an absolute number of employees with disabilities. If possible, these duties should also be coupled with sanctions enforceable through a combination of civil or criminal penalties, and levies. Hiring preference schemes enjoy some advantage over civil rights measures because as overt affirmative measures they claim neither to achieve formal equality, nor economic efficiency (Stein and Stein 2008).

A number of European jurisdictions have adopted quota systems to increase the employment of people with disabilities (Waddington 1995). Some of these systems have been effective while others have had arguably minimal effect. Waddington and Diller divide the types of quota systems schemes into three broad categories (2002). The first categories are quotas which contain a legislative recommendation. These quota systems provide guidelines but impose no sanction if the quotas are not met. Waddington has argued that these quotas have had no effect and have not significantly improved the numbers of people with disabilities in the workforce (Waddington 1994). A second form of quota systems imposes mandatory obligations upon employers but fails to support these measures by effective legal sanctions and/or fails to enforce these quotas. The problems with enforcing these measures was arguably one motivator which caused the United Kingdom Parliament to abolish quotas in that jurisdiction with the passage of the *Disability Discrimination Act 1995* (UK).

The third form of quotas involves legal obligations supported by sanctions. Generally under this model 'employers are obliged to either meet their quota target or pay a fine or levy, which usually goes into a fund to support the employment of people with disabilities' (Waddington and Dillern, 258). This model is premised on the notion that employers (generally large employers) have a social obligation to assist with the integration of people with disabilities through direct employment or financially contributing to such employment. Naturally the effectiveness of this scheme depends upon the amount of the sanction balanced with the assistance provided by Government to offset any accommodation costs. For example, if an employee requires a modified work station then it may be cheaper for the employer to pay the levy.

It is submitted that quotas will only achieve social inclusion where they include five essential aspects. First they must target all employers including both large and small businesses and private and public sector employers. Second quotas must ensure people with disabilities are given meaningful employment and not just provided low level token positions with no opportunity for promotion. Thirdly it is essential to ensure the social inclusion strategy includes all disability categories. People with disabilities are not homogenous. People with disabilities include people with minor amputations to mental disabilities to tetraplegics. The quota must identify strategies to include all groups and encourage employers from just employing the least disabled. Fourthly Government must provide financial and specialist support to employers who desire to employ a person with a disability so that the employer will not incur a financial burden due to the employee's limitations and the Government must ensure that employers are provided with specialist support to make the appropriate accommodations. Finally the quota system must be enforced with legal sanctions. It is argued that both Australia and China need to review their policies to ensure their regulatory frameworks to ensure they are taking adequate proactive action to ensure people with disabilities can exercise their right to work.

4. STATES ENSURING INJURED EMPLOYEES CAN RETURN TO WORK

The Standing Committee of the National People's Congress (NPC) adopted the *Labour Contract Law* of China on 29 June 2007. The Labor Contract law came into effect on 1 January 2008. The *Labour Contract Law* focuses upon establishing rights and obligations within the employment relationship. One aspect of the employment relationship that the *Labor Contract Law* regulates is the dismissal of injured employees.

Articles 40 and 41 of the *Labor Contract Law* prescribed the circumstances where an employer can lawfully terminate a labor contract. Where the employee is injured at work or suspect of suffering a workplace injury art 42 prevents employers from terminating that employee until certain conditions are satisfied. Article 45 permits an injured employee to be dismissed where Regulations on Industrial Injury Insurance permits the employees dismissal.

The Regulation on Industrial Injury Insurance, adopted at the Fifth Executive Meeting of the State Council on April 16, 2003, art 31 provides reasonably strong protection for workers who are injured and desire to return to work. These regulations require employers to provide employees who are injured at work 12 months leave. After this period employees who are injured at work can be dismissed.

5. CONCLUSION

This paper has analysed the extent to which laws protecting people with disabilities right to work in China comply with art 27 of the CRPD. This paper first analysed the right to work generally and explained what compliance with art 27 required. This paper then analysed how Chinese anti-discrimination laws render discrimination based upon disabilities unlawful. This paper then analysed how China has taken proactive action to enforce people with disabilities right to work through a quota scheme. While this scheme is identified by art 27 as a positive vehicle to improve the social inclusion of people with disabilities, this paper argued that the effectiveness of this measure will depend upon enforcement. Finally the protection afforded to employees injured at work was analysed. It could be argued that employees who are injured at work receive substantial formal protection in China to receive rehabilitation and have their right to return to work protected. It is submitted that the legislative regimes in China provide people with disabilities a reasonable level of formal protection. To realize the benefits of this legislation will require China to develop vehicles to ensure the formal protections are turned into substantive results.

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