DEVELOPMENTS IN CHINESE LABOUR LAWS: ENFORCING PEOPLE WITH DISABILITIES’ RIGHT TO WORK?

Paul Harpur*

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’).¹ The People’s Republic of China (‘China’) was active in the drafting of the CRPD, was involved with the launching the Decade of Disabled Persons in Asian and the Pacific Region (2003-2012) and on 26 June 2008 the Standing Committee of the National People’s Congress ratified a bill for China’s accession to the CRPD. China has now ratified the CRPD and will take a leading role in the enforcement of this convention. The enforcement of the CRPD will occur through the Committee on the Rights of Persons with Disabilities. One of the twelve founding members of the Committee on the Rights of Persons with Disabilities is from China: Ms Jia Yang.²

Due to the significant role China will take in enforcing the rights of persons with disabilities internationally, it is relevant to assess the extent to which China’s domestic laws reflect the rights protected in the CRPD. This article will focus on the extent to which Chinese laws protect and enforce people with disabilities’ right to work as enshrined in Article 27 of the CRPD. Over the last few years, China has ratified the CRPD and reformed its domestic laws. This paper will argue that Chinese laws have made substantial improvements; however, further reforms are necessary if people with disabilities are to fully realise their right to work in China.

2 THE RIGHT TO WORK IN THE CRPD

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.³ These figures often do not include the 17% of Chinese who are carriers of diseases such as Hepatitis B.⁴ If people with disabilities’ rights to work are

---

² Office of the High Commissioner for Human Rights, ‘Membership of the Committee on the Rights of Persons with Disabilities’ <www2.ohchr.org/english/bodies/crpd/membership.htm> at 1 February 2009. The Committee is established under the CRPD, art 34.
not protected then their ability to meaningfully contribute to their communities will be severely undermined.

The right to work is reflected in key human rights instruments. Article 23 of the *Universal Declaration of Human Rights* provides that everyone has the right to work in “just and favourable conditions” and the *International Covenant on Economic, Social and Cultural Rights* protects the right to work in Article 6. 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 this group’s 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, Article 27(1) requires States to introduce legislation which:

(a) Prohibits 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) Protects 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) Ensures that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enables persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promotes 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) Promotes opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employs persons with disabilities in the public sector;

(h) Promotes 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) Ensures that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promotes the acquisition by persons with disabilities of work experience in the open labour market; and

(k) Promotes vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

---

To encourage employers to employ people with disabilities, arguably laws must address the belief that discriminatory hiring and retention practices relating to people with disabilities are efficient; find ways to rebut the assumption that people with disabilities are less productive than their able bodied counterparts; and facilitate the overall perception that the existing labour market status quo achieves equity. To address these three points it is submitted that States must take proactive action to motivate employers to employ people with disabilities and demonstrate that with minor accommodations these employees can operate successfully and profitably for the business.

To ensure the right to work in Article 27, signatories agree to substantially reform their laws and policies where required. Through ratifying the CRPD, China has undertaken to take various steps, including the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention; and undertaking 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 socio-economic rights such as the right to work. States are only required to implement Article 27 “to the maximum of its available resources.” Accordingly, China could defend any non-compliance by arguing that it is not in breach of Article 27 as it is not economically able to implement the required reforms. Even though China could possibly justify its non-compliance with Article 27 on economic grounds, it is arguably incumbent upon States to strive to find ways to ensure compliance with it.

3 LAWS PROTECTING PEOPLE WITH DISABILITIES’ RIGHT TO WORK IN CHINA

This part will analyse the legal protections afforded to people with disabilities in China. It will focus upon the legal rights and will subsequently examine the enforcement of these rights.

3.1 Laws Permitting People with Disabilities to Form Trade Unions

People with disabilities in China are technically able to exercise their trade union rights on an equal basis with other employees as anticipated by Article 27(1)(c). This paper submits that the realisation of this right in China provides very little practical benefit. Independent trade unions are currently unlawful in China. The All-China Federation of Trade Unions centrally controls all employee associations in China. This union is directly controlled by the Chinese Communist Party. Accordingly there are substantial macro issues with Chinese trade union laws which are beyond this article’s scope.

---


3.2 Laws Specifically Targeting Social Inclusion

Recent legal reforms in China have attempted to increase social inclusion through preventing discrimination. It is pertinent to ask whether these laws comply with Article 27(1)(a), (b) and (i) of the CRPD. Articles 27(1)(a) and (b) focus upon eliminating direct discrimination and Article 27(1)(i) requires the State to ensure accommodations are made to enable persons with disabilities to work.

The Law of the People's Republic of China on the Protection of Disabled Persons 1990 was revised at the Second 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 (the ‘PRCPDP’) entered into force on 1 July 2008. The PRCPDP provides in Article 3 that “[d]iscrimination on the basis of disability shall be prohibited.” Arguably, the amendment to Article 3 in the 2008 reforms improves the phrasing of the previous Article. Under the 1990 statute the then Article 3 provided that “[d]iscrimination 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.

It is argued that the approach in the PRCPDP to discrimination largely reflects the obligation in the CRPD to prevent unfavourable treatment of persons with disabilities due to the fact they have a disability. Article 2 of the CRPD provides that discrimination will occur where there has been “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

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 install lifts, then people in wheelchairs 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 his or her disability would be unable to work in that position even though he or she could manage the vast bulk of the other duties. For this reason, Article 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. It is rare for employers to have experience in accommodating a person’s disability. As a consequence it is likely that due to the unknown cost and effort, 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, Article 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 labour 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’. If the courts adopt an approach which reflects the principles in the CRPD then these provisions will require significant accommodations. If however, the courts interpret ‘appropriate’ accommodations in a way which imposes very little obligations upon the State or employers then it is submitted the PRCPD will not ensure people with disabilities’ right to work.

3.3 States Motivating Employers to Employ People With Disabilities

The CRPD requires States to promote the workforce inclusion of people with disabilities through the rights contained in Articles 27(e), (f), (g), (h) and (j) and requires States to adopt proactive measures to improve the inclusion of people with disabilities into the workforce. Article 27(e) arguably contains the overall objective and the other clauses provide vehicles through which this objective can be achieved. Perhaps the least complicated regulatory option for States to adopt is to provide people with disabilities assistance in finding, obtaining, maintaining and returning to employment. China requires the State to assist people with disabilities to obtain work. Article 37 of the PRCPDP provides for the establishment of employment services for people with disabilities in China.

By itself, simply assisting people with disabilities to approach employers will potentially 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 people with disabilities their own employers through encouraging them to develop their own businesses. Article 27(1)(f) of the CRPD adopts this concept by encouraging States to help people with disabilities to develop their own businesses. Likewise, Article 34 of the PRCPDP requires the State to support people with disabilities to start their own businesses. While, on its face, Article 34 demonstrates compliance with Article 27(1)(f) of the CRPD, the PRCPDP does not provide further details on how such support is to be funded, implemented or evaluated. As a consequence, Article 34 of the PRCPDP is seemingly an aspirational provision and does not require China to take any specific action.

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. It is much easier for States to control the human resource practices of public sector employers as generally the Government has direct control over public entities. For this reason, Article 27(1)(g) of the CRPD requires people with disabilities to be employed in the public sector in member States. It is incumbent upon public sector
employers to lead the way in adopting good human resource practices. If States are not bound by laws which require positive discrimination, it is politically and industrially difficult to impose such laws upon private sector employers who are privately funded and seeking profits.

The PRCPDP imposes significant obligations upon China to provide people with disabilities employment in the public sector. Article 31 requires the State to facilitate “concentrated and scattered” employment for people with disabilities. One way to realise this employment is for the State to fund the establishment of “welfare enterprises for persons with disabilities, blind massage institutions, and other enterprises and institutions of a welfare nature to offer concentrative job opportunities for persons with disabilities.”

In rural areas, Article 35 requires local governments to organise and facilitate persons with disabilities to “engage in planting, husbandry, handicraft industry and other forms of production.” In order to use the considerable purchasing power of the Chinese public sector, Article 37 requires all public agencies to give preference to products produced in sheltered workshops when procuring products for public use. China’s laws arguably comply with Article 27(1)(g). The PRCPDP requires the State to provide low level jobs for people with disabilities and to use public procurement practices to support sheltered workshops.

While China is providing considerable public sector employment support, it is arguable that its efforts are focusing upon low level employment. To enable people with disabilities to able to fully participate in society, they must have the opportunity to climb the social ladder. In the West, people with disabilities are taking leading roles in society and industry. For example, the present Governor of New York is legally blind, a former Dean of the University of Sydney Law School is totally blind, there are professors from Ivy League and leading universities and members of the legal profession who have a disability across Europe, North America and Australia – with Australia boasting a strong representation of people with disabilities (for example, the author of this paper is totally blind). The rights of people with disabilities in China are still developing along with the State’s economic growth. In this transitional period, it is ostensibly important for China to provide support for people with disabilities who have not had the educational and employment opportunities in the past, while taking proactive action to ensure people with disabilities can realise their full potential.

The CRPD requires signatories to ensure that people with disabilities are not restricted to low level jobs. Articles 27(1)(h) and (j) of the CRPD 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. The PRCPDP does appear to take some proactive action to assist people with disabilities to climb the social ladder.

It is submitted that China has adopted in legislation most of the suggested measures in Article 27(1)(h). For example, the PRCPDP requires the State in Article 31 to provide for “preferential policies” to encourage the employment of people with disabilities. Articles 33 and 36 of the PRCPDP require the State to introduce a quota scheme which is supported by tax incentives. Article 27(1)(h) of the CRPD requires States to adopt

9 PRCPDP, art 32.
“appropriate policies and measures” and offers quota systems as just one remedial means to achieve this end. As a consequence, the decision to adopt a quota system does not automatically mean that a State is compliant with the CRPD. The requirement is for appropriate measures. As quota systems which are poorly structured will have no remedial effect, 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 the 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.¹⁰

A number of European jurisdictions have adopted quota systems to support people with disabilities.¹¹ Some of these systems have been effective, while others have had minimal effect. Waddington and Diller divide the types of quota systems schemes into three broad categories.¹² The first category is quotas which contain a legislative recommendation. These quota systems provide guidelines but impose no sanction if the quotas are not met.¹³ Waddington has argued that these quotas have had no effect and have not significantly improved the numbers of people with disabilities in the workforce.¹⁴

A second form of quota system imposes mandatory obligations upon employers but fails to support these measures by effective legal sanctions or fails to enforce these sanctions. The problems with enforcing these measures was arguably one motivator which lead 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.”¹⁵ 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 by financially contributing to such employment.

¹³ An example of a voluntary quota scheme can be found in the Dutch Handicapped Workers Employment Act 1986 which has been repealed and replaced by the Law on the Reintegration of the Work Disabled 1998.
¹⁵ Waddington and Dillern, above n 12, 258.
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 that people with disabilities are given meaningful employment and not just provided low level token positions with no opportunity for promotion. Third, it is essential to ensure that the social inclusion strategy includes all disability categories. People with disabilities are not homogenous. People with disabilities range from people with minor amputations, to people with mental disabilities, to tetraplegics. The quota must identify strategies to include all groups and discourage employers from just employing the least disabled. Fourth, 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 which are sufficient to deter non-compliance from the laws. Until China provides further detail on the implementation of the proactive measures in the PRCPDP, it is impossible to judge whether or not China’s measures are likely to be effective.

3.4 State Ensuring that Injured Employees Can Return to Work

Traditionally in China, return to work laws have not been contained in anti-discrimination laws but in general industrial relations statutes. While these laws are not strictly anti-discrimination laws, these return to work laws are the primary vehicle through which the rights contained in Article 27(1)(e) of the CRPD are protected. Accordingly Chinese return to work laws are analysed here.

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

Articles 40 and 41 of the Labour Contract Law prescribe the circumstances where an employer can lawfully terminate a labour contract. Where the employee is injured at work or suspected of suffering a workplace injury, Article 42 prevents employers from terminating that employee until certain conditions are satisfied. Article 45 permits an injured employee to be dismissed where the Regulations on Industrial Injury Insurance permit the employee’s dismissal.

Article 31 of the Regulations on Industrial Injury Insurance, adopted at the Fifth Executive Meeting of the State Council on 16 April 2003, requires employers to provide employees who are injured at work twelve months’ leave. After this period, employees who are injured at work can be dismissed.
4 ENFORCEMENT OF LAWS PROTECTING PEOPLE WITH DISABILITIES’ RIGHT TO WORK

Laws can be enforced either by the State through public agencies or prosecutions or through private civil action. This part will start by analysing how the State investigates and enforces breaches of laws protecting people with disabilities and how private litigation can be used to address those breaches.

Even though Article 27(1)(b) of the CRPD is the only provision which specifically refers to the resolution of grievances, it is arguable that the effective discharge of every obligation in Article 27 requires States to provide vehicles to enforce anti-discrimination laws. This paper proceeds on the basis that enforcement is necessary if remedial statutes are to have any effect.\(^{16}\) Ian Ayres and John Braithwaite have explained the requirement for effective legal sanctions through the concept of the regulatory enforcement pyramid.\(^{17}\) An essential aspect of the regulatory pyramid model is that laws are effectively enforced.\(^{18}\) Richard 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.”\(^{19}\) It is submitted that for industrial or anti-discrimination laws to be effective they must be enforced to motivate compliance.\(^{20}\)

4.1 Public Enforcement Using Anti-Discrimination Laws

Article 59 of the PRCPDP enables persons with disabilities who have been discriminated against to complain to the state-sponsored China Disabled Persons’ Federation (“CDPF”). The CDPF then has the capacity to seek redress from relevant government departments or the courts.

The CDPF explains that it has three main roles.\(^{21}\) First, it represents the rights and interests of people with disabilities; second, it provides a wide range of services to persons with disabilities; and, third, it is mandated by the Chinese government to provide supervision of some affairs relating to people with disabilities in China. The drafting of Article 59 provides the CDPF with considerable control over the capacity of people with disabilities in China to seek legal redress. This level of control raises a number of issues. The CDPF is charged under Article 8 of the PRCPDP to represent the common interests of persons with disabilities, to protect their lawful rights and interests, to unite persons


\(^{17}\) Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1995) 19-53.


with disabilities and to enhance education and provide general services for persons with disabilities. It is unclear whether the CDPF will have the resources to investigate and prosecute every complaint of prosecution or whether it will only be able to prosecute test cases. The CDPF explains that the position of many people with disabilities in China requires substantial assistance:

People with disabilities remain a vulnerable group and still encounter specific difficulties. Nearly ten millions of [people with disabilities] live under poverty. There is still a long way to go and much more need to be done in order to ensure the full enjoyment of the rights enshrined by the laws and promote the realization of the goal of Equality […]22

There is also the issue of what powers the CDPF 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. To a certain extent it appears that the CDPF is partially controlled by people with disabilities. For example, the CDPF claims that in 2006:

1,078 disabled persons, their family members and workers for disabled persons were elected as deputies by the people’s congresses above county levels. Another 2,169 were elected as members of the people’s political consultative conferences above county levels. These deputies and members, representing 82.96 millions of disabled persons across China, are making an active and important role in political life of the State.23

While the empowerment of these people is positive, it appears that the State still effectively controls the CDPF. Accordingly, the effectiveness of the Federation will hinge upon the commitment of the State. Research indicates that there is substantial discrimination perpetrated by Chinese government departments. In 2006, Ronald C Brown observed:

Health/disability requirements for government jobs seemed to persist. For example, in Guangdong any applicant who manifests listed diseases or physiological deficiencies is deemed to be unqualified for a position in the Guangdong public service. A partial list includes, an obvious squint (xie shi), cleft lip, torticollis (wry neck), pigmentation moles, curvature of the spine, certain incomplete fingers, vision tests lower than 4.9, hearing deficiencies, stuttering, a history of enuresis (bed-wetting), signs of heart disease, hypertension, bronchiectasis, diabetes, hepatitis, too many fillings in their teeth […]24

In 2007, the United States State Department observed that “serious social conditions that affected human rights [in China] included […] discrimination against […] persons with disabilities.”25 According to Chinese statistics cited in this report, one quarter of people with disabilities in China live in extreme poverty and confront serious discrimination. This report provides an example of the extent of discrimination in China. In July 2007, media in Henan Province reported that over 1,000 illegal slave labourers were forced to

---

22 Ibid.
23 Ibid.
24 Brown, above n 4, 383.
work in brick kilns. The majority of these slaves were kidnapped children or persons with mental disabilities. The local government and police reportedly went to great efforts to suppress this story. Eventually the factory owner, supervisor and low level managers faced minor prosecutions and ninety-five local officials received warnings letters for attempting to cover up the slavery rather than prosecute it. According to the State Department, people with disabilities in China also reportedly face forced sterilization, exclusion from education and from job opportunities.26

States generally do not investigate and prosecute breaches of anti-discrimination laws. The burden of enforcement in most jurisdictions falls to individual complainants to prosecute their own claims.27 For this reason, it is submitted that relying solely upon public enforcement of anti-discrimination laws is unlikely to achieve substantial social change either in China or in other jurisdictions unless there is an extremely proactive and well resourced public agency.

4.2 Public Enforcement Using General Industrial Relations Laws

Often disputes over dismissals for disability discrimination are prosecuted using general industrial laws.28 Previously, labour disputes in China were resolved according to the 1994 Labour Law and the 1994 Regulations for the Handling of Enterprise Labour Disputes. These laws were complemented recently by the introduction of two pieces of ground-breaking legislation. The 2007 Labour Contract Law and Law of the People’s Republic of China on Labour Mediation and Arbitration have purported to increase employees’ rights in the workplace.

Chapter VI of the Labour Contract Law establishes procedures for State enforcement of labour rights. Historically, China has been criticised for failing to enforce employees’ rights. Arguably the major problem with Chinese labour laws is that they are not enforced effectively.29 While government is charged with enforcing occupational health and safety laws, the number of inspectors to enforce labour laws is inadequate to the task. There are over 3,000 inspectorates with over 45,000 inspectors charged with inspecting over three million enterprises.30 Sean Cooney has analysed the enforcement of Chinese labour laws and adroitly observes that the “the quantity of labour inspectors may well be inadequate to implement the law systematically across the country.”31 Zhong-bin and Qin-yun have argued that China lacks a comprehensive plan to enforce labour laws and the fragmented and disorganised approach of thousands of inspectorates is resulting in extremely poor enforcement of labour laws.32

26 Ibid.
27 See, for example, the Australian Disability Discrimination Act 1992 (Cth), Disability Discrimination Act 1995 (UK) and Americans with Disabilities Act, 42 USC §12112 (a) (2000).
28 This is similar to the position in Australia where an employee who is dismissed due to her or his disability can prosecute the claim under Chapter 6.4 of the Fair Work Act 2009 (Cth) or s 46P of the Human Rights and Equal Opportunity Act 1986 (Cth).
31 Ibid.
Research demonstrates that Chinese regional councils substantially fail to enforce labour laws. The National Labour Committee has concluded:

On paper the laws are there, but [...] they mean nothing, as every law is blatantly violated [...] Clearly these workers are seen as a cheap commodity, expendable, and not worth investing in.  

If employees attempt to protest against labour violations to regional councils they are frequently ignored, receive unjust decisions or are punished. Students and Scholars against Corporate Misbehavior provide an account of what happens where employees attempt to collectively raise concerns about their labour conditions. After employees raised concerns about the egregious labour conditions, factory management punished the employees; some employees were detained by the local police without charge and the regional council ignored workers’ concerns and supported management’s position. This research demonstrates that regional councils often focus upon upholding managerial prerogative rather than enforcing labour laws.

The Labour Contract Law arguably does not improve the regulatory framework for State-based charges of the labour administrative departments of the local people’s governments at the county level or with regard to the responsibility for supervising and managing labour conditions, which is monitored by the labour administrative department of the State Council. Article 77 empowers employees to lodge complaints with the relevant authorities or to seek to privately resolve the dispute through arbitration. If an employee lodges a complaint, this will only be effective if the local county’s labour department enforces the employee’s rights. Where the relevant authorities will not prosecute employers, then the only avenue available to employees is to personally take action to enforce their rights.

4.3 Private Enforcement of Anti-Discrimination Laws

Under Article 59 of the PRC PDP, people with disabilities can bring their own actions to enforce their rights. The problem in China is that courts have often 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. The student had applied for the position and was successful with the interviews. Prior to commencing the position, the government required the applicant to pass a medical examination. The 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

33 See, for example, PlayFair Alliance, No Medal for the Olympics on Labour Rights (2007) 10.
37 Brown, above n 4, 382-383.
the applicant a position. If courts do not impose penalties and reinstate discriminated employees, then the effectiveness of the PRCPDP will be substantially undermined.

4.4 Private Enforcement Using General Industrial Relations Laws

This section will analyse how general industrial relations statutes can provide an avenue through which people with disabilities can seek redress for certain types of employment discrimination. While the PRCPDP does not provide substantial detail about how disputes are to be resolved, the general industrial relations statutes have far more detailed and arguably advanced processes. If people with disabilities can utilise the general industrial statutes, this has the potential to substantially increase the enforcement of laws which protect their right to work.

The Labour Mediation and Arbitration Law was adopted at the Thirty-First Session of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China on 29 December 2007 and commenced operation on 1 May 2008. This law seeks to empower employees to resolve disputes in almost all facets of the employment relationship. Article 2 establishes that the Labour Mediation and Arbitration Law can potentially be utilised to resolve some disputes which involve disability discrimination. According to Article 2, the law can be used to resolve labour disputes:

1. Arising from the confirmation of a labour relationship;
2. Arising from the conclusion, performance, alteration, dissolution or termination of a labour contract; or
3. Arising from the striking off or dismissal of an employee, or the resignation or demission of an employee.

It is submitted that if a person is provided less favourable treatment in obtaining work or is terminated, injured or unfavourably treated at work because of a disability, then the Law of Labour Mediation and Arbitration can be used to resolve this dispute.

The next part of this article will analyse three key aspects of the Law of Labour Mediation and Arbitration. First, it considers how the Law of Labour Mediation and Arbitration impacts upon employees’ access to the legal system to seek legal redress. After examining the issue of access, the article will consider whether the Law of Labour Mediation and Arbitration improves the legitimacy of the legal process. Finally, it will analyse the enforcement procedures under this law to ensure mediated and arbitrated outcomes are enforced.

4.4.1 Access to The Legal System

If employees do not have access to the legal system, then they will not be able to enforce their rights. If employees do not have access to the legal system, then they will not be able to enforce their rights. It is submitted that a major factor limiting employees’ access to justice is limitation periods. A limitation period prescribes a time period in which an employee must file her or his application in the courts. If an employee fails to file an application within that time frame, then prima facie that employee’s application can be struck out

[38] For the importance of access to the legal system in enforcing human rights, see Estelle Askew Renaut, ‘Access to justice’ for individuals before the European Court of Justice and the Court of First Instance of the European Communities: In Line with International Human Rights Law and Practice? (PhD thesis, University of Essex, 2007).
without any consideration of the merits of the case. While courts can give employees leave to file out of time applications, this process requires the permission of the court, which can be difficult to obtain without legal representation. The duration of the limitation periods is therefore significant.

Article 77 of the Labour Law previously enabled employers and employees to resolve labour disputes through mediation or arbitration, bring the case before the people's court or settle through consultation. If the employee desired to take the dispute to arbitration, the employee was required to file within sixty days of the dispute occurring. This time limit arguably created extreme injustice. Aaron Halegua has observed:

> In cases involving unpaid wages, this provision is particularly problematic. Workers rarely take action after just one or two months of wages have been withheld, choosing instead to maintain faith in employers who promise to pay them as soon as they have the money. The worker will generally not bring a case for arbitration until several months or even a whole year of wages has been withheld. In some industries, workers do not even expect to get paid on a monthly basis.\(^{39}\)

The application of the sixty day time limit became an extremely powerful vehicle through which employers could strike out employees’ claims.\(^{40}\) The time limit was substantially altered by the Law of Labour Mediation and Arbitration. In order to provide disputants greater flexibility in bringing applications, Article 27 of the Law of Labour Mediation and Arbitration now imposes a one year time limit on all applications. When an employee commences action for discrimination, it is almost certain that the employee will be terminated. The one year time limit enables employees to provide their employers the benefit of the doubt prior to commencing litigation and enables parties to potentially resolve disputes harmoniously rather than being forced to race to legal action.

Short time limits simply require parties to engage lawyers and participate in an adversarial system more quickly. If a time limit is extremely short, then parties have less opportunity to negotiate and resolve the dispute in a way which enables a continued working relationship. Accordingly, it is argued that short time periods are counter-productive to resolving employment relationships as they encourage hostilities and substantially reduce the possibility of enabling the employment relationship to successfully continue. The extending of time limits in Chinese labour laws is an extremely positive move.

4.4.2 Representation in Tribunals

The problem that there are no independent trade unions in China to provide employees’ independent representation has already been mentioned in this article. The Law of Labour Mediation and Arbitration moves to increase employees’ access to independent and affordable legal representation. Article 4 of the law enables employees to be represented by a trade union official or an independent third party of the employee’s selection. More significantly, Article 7 enables employees to bring collective actions. Considering Chinese laws have consistently prevented employees from collectivising and


acting independently, Article 7 of the *Law of Labour Mediation and Arbitration* is a positive development. The provision enables ten or more employees to jointly retain an independent representative to prosecute their action. While it does not enable employees to officially form a trade union, Article 7 does enable an entire workforce to act collectively without reference to the All-China Federation of Trade Unions.

The *Law of Labour Mediation and Arbitration* does not provide employees with financial assistance to fund their litigation. However, Article 53 does provide that employees will not have to pay mediators’ or arbitrators’ fees. While the fact that employees are not required to pay court fees will reduce the cost of prosecuting claims, the cost of engaging independent legal advice would be considerable and prohibitive for most employees. Halegua has examined the prohibitive cost faced by most employees attempting to prosecute unpaid wages claims and concluded that this resulted in many employees not being able to enforce their rights. In general terms, people with disabilities are likely to be in a worse position than most employees as there is a higher probability that the discrimination complained of would have prevented the person from earning an income. Without an income stream it can be extremely difficult to prosecute a legal complaint.

4.4.3 *Fairness in the Process*

The ability of employees to have access to the legal system will only ensure those employees’ rights if the legal system is fair and impartial. A concern with state-based labour enforcement is that a large number of county officials appear to have a bias favouring the employer. The *Law of Labour Mediation and Arbitration* moves to reduce the risk of arbitrator bias. The absence of bias is an essential element to ensure procedural fairness. The bias rule *nemo debet esse judex in propria causa* (no one can be a judge in her or his own cause) encapsulates the requirement that decision makers must be perceived not to have a bias which impacts upon their judgment.

The clearest way in which an arbitrator can have a bias is through a direct pecuniary interest in the outcome of the case. In addition to direct pecuniary interests, decision makers can be held to have bias where they have certain non-pecuniary interests in the case. There is no fixed list of non-pecuniary interests which will disqualify a decision maker on the grounds of bias. Western courts have developed a number of tests to determine if a decision maker’s non-pecuniary interest is sufficient to disqualify her or him from the case. In the English case of *R v Rand*, the court asked whether “a real likelihood of bias existed.” Other courts have determined if there is bias based upon the opinion of a hypothetical disinterested observer. Lord Denning focused upon whether a reasonable person observing the proceedings would consider it likely that the decision maker unfairly favoured one side or not. Generally speaking, the bias rule focuses upon factors which lead to a reasonable concern of bias.

---

41 Halegua, above n 39, 271.
42 *Dimes v Grand Junction Canal Co* (1852) 3 HL Cas 759; *R v Hendon RDC; Ex parte Chorley* [1933] 2 KB 696.
43 *R v Rand* (1866) LR 1 QB 230.
44 *Ex parte Lewin; Re Ward* [1964] NSWR 446.
Article 33 of the *Law of Labour Mediation and Arbitration* requires arbitrators to stand aside and empowers parties to apply for them to stand aside if they have a bias in the case. Article 33 defines clearly where bias will arise:

1. Being a party concerned in the case or a close relative of a party concerned or its agent;
2. Having interest relationship with the case;
3. Having other relationship with the party concerned or its agent in the case, and the said relationship may affect the impartiality of the arbitration; or
4. Having met the party concerned or its agent privately, or accepted any treat or gift from the party concerned or its agent.

If the procedural fairness provisions of the *Law of Labour Mediation and Arbitration* are enforced, then these provisions will substantially improve the ability of employees to seek legal redress of their grievances.

### 4.4.4 Regulatory Hole: Staffing Firms

The ability of employees to enforce their grievances is arguably undermined by a regulatory hole in Chinese labour laws. Through carefully managing corporate structures, corporations are able to avoid the regulatory impact of some Chinese labour laws. A common approach to reducing the liabilities caused by the employment relationship is to have a third party enter into that relationship. If the principal then contracts with the third party to provide the principal with employees, there is no employment relationship between the principal and the employee. This arrangement in Australia is between so-called principals, labour hire agencies and employees; in China, it is between the accepting entity, staffing firms and employees. While the terms are different, the contractual structures are virtually identical.

Employees employed by labour hire agencies are generally regarded as vulnerable and in need of regulatory protection. The widespread use of labour hire employees has the potential to substantially undermine the power of employees to negotiate with employers, as employees become increasingly employed in temporary positions. Labour arrangements can be used to disempower employees and be used to disguise employment relationships.

While Article 22 of the *Law on Labour Mediation and Arbitration* enables employees to prosecute claims against both an employment entity and a labour hire agency, employees are only able to join both parties for the purposes of determining which entity is their actual employer. Once the employee has identified their correct employer, they are required to discontinue the action against the other party. This approach arguably reflects the rights and obligations contained in the *Labour Contract Law*.

---

Under the *Labour Contract Law*, the majority of duties are connected with the employment relationship and do not pierce the contractual layers to vest duties between the employing entity and the employee. Article 58 states that the staffing firm is the employer of the employee and owes the employee all the duties of an employer. The largest risk for employees who are employed by staffing firms is that they will be shell companies with no assets. If an employee obtains a successful judgment against a staffing firm and that staffing firm has no assets, the employee has no party against whom to enforce the judgment. In order to reduce the risk of staffing firms having no liquid assets, Article 57 requires staffing firms to have a registered capital of at least RMB 500,000 (approximately US $73,000). While this is a reasonably large amount of money, if a staffing firm is underpaying a large number of employees and also has other creditors, it is doubtful that employees will recover their full entitlements.

One of the most disempowering aspects of labour hire arrangements is the temporary nature of the employment. Where employees depend upon the goodwill of the host employer/accepting entity and the labour hire agency/staffing firm, then employees are less able to negotiate from a position of strength. While employees who are discriminated against can commence litigation, the short term nature of the employment arguably renders it very difficult to prove that an employee was dismissed on prohibited grounds. For example, if an employee is employed generally on two month contracts, the fact her or his employment was terminated after two months would be hard to link with discrimination. If the employee was not offered any more contracts, then the employee would need to prove that events arising in that two month contract with a host employer caused the discriminatory outcome.

It is very common for employees to be employed on short term contracts. In the United Kingdom, Australia, New Zealand, Canada and other Western nations, employees can be employed on probation and have limited rights if they are dismissed in this period. These periods typically range from a year to no period at all without contractual provision for a probationary term. The Australian *Fair Work Act 2009* (Cth) provides that probationary periods range from six to twelve months. While the probationary periods do not prevent an employee from suing for discrimination under Chapter 6.4 of that Act, the short term nature of the employment arguably renders it more difficult to prosecute an unlawful dismissal complaint.

The restriction on staffing firms in China appears robust by comparison. Article 58 of the *Law on Labour Contract* requires staffing firms to employ employees on fixed term contracts of not less than two years. Staffing firms are also prevented from contracting out employees on short term contracts to cover a continuous labour hire contract. No similar restrictions appear in the United Kingdom, Australia or the United States.

Without regulation, the most likely way in which employers could take advantage of the staffing firm/labour hire agency structure would be to create subsidiaries to employ employees. Article 67 prevents employers from establishing staffing firms to place workers with themselves or their subsidiaries. While the restriction upon staffing firms has the potential of reducing the vulnerability of employees, in practice these laws will only be successfully implemented if there is sufficient political will.

---

5 CONCLUSION

People with disabilities around the world have confronted substantial discrimination. China has become actively involved internationally with protecting the rights of persons with disabilities and has recently introduced substantial reforms to domestic anti-discrimination and industrial relations statutes. This article analysed how effective these reforms have been at protecting people with disabilities’ right to work as described in Article 27 of the Convention on the Rights of Persons with Disabilities. This analysis was performed in two broad parts.

The first part of this paper analysed the legal protections introduced by the Law of the People's Republic of China on the Protection of Disabled Persons and the Labour Contract Law of China. These statutes have provided substantial formal protections and have imposed obligations upon the State to introduce proactive policies to ensure people with disabilities are employed in public and private employment. Overall, it is argued that these reforms reflect the rights contained in Article 27 of the CRPD. However, these reforms will only ensure people with disabilities’ right to work if they are enforced.

The second part of the paper analysed how public and private enforcement occurs under both traditional anti-discrimination laws and industrial relations statutes. Overall, this part concluded that the recent reforms in China have not substantially altered public enforcement but have increased the ability of individuals to prosecute their own grievances. While the ability of persons with disabilities in China to exercise their right to work still requires substantial attention, this paper argues that China has made considerable improvements to ensuring people with disabilities are able to exercise their right to work.

For discussion of the routine oppressive treatment of people with disabilities in contemporary Australia, see Gerard Goggin and Christopher Newell, Disability in Australia: Exposing a Social Apartheid (2005).