

**Equality Law and Inclusion in Education  
Recommendations for Legal Reform<sup>1</sup>****Kelley Loper<sup>2</sup>  
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1. This report considers the extent to which a legal right to equality and non-discrimination – as it has been expressed and developed in international law, domestic legislation and constitutional provisions – can achieve or support inclusion in education for persons with disabilities. It explores the concept of equality and argues that when understood in its substantive sense – beyond a formal notion of equal treatment – equality has the potential to transform barriers to inclusion and achieve full participation and the equal enjoyment of rights, including the right to education.
2. Substantive equality as a transformative principle requires a contextual analysis to identify disadvantage – an understanding which is particularly important when addressing disability discrimination. Insights into the nature of disability have revealed that disability is not merely defined by an individual’s physical or mental impairments, but is instead a function of social and environmental impediments. Substantive equality is necessary to address discrimination arising from these impediments since they must be identified and then transformed before inclusion is possible. Equal treatment in a formal sense – treating likes alike and thus ignoring characteristics such as disability which should be irrelevant when allocating opportunities – may perpetuate discrimination resulting from structures which cater to a non-disabled norm but exclude, and thus render invisible, persons with disabilities.
3. The right to equality as it has developed in international human rights law reflects this imperative. Attempts to achieve its realization at the domestic level, however, have seen mixed results as legislators, policy-makers and courts fluctuate between embracing the change demanded by substantive equality and attempting to limit its impact on the status quo by retreating to a formal principle.
4. The framework and reference point for an examination of equality law and its relationship to inclusive education is the 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD). The Convention emphasizes the principle of equality and non-discrimination in its substantive sense, provides for a right to education, and elaborates the concept of inclusion in education and the relevant state obligations. Although the CRPD

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<sup>1</sup> This report reproduces and adapts substantial portions of the article: Kelley Loper, “Equality and Inclusion in Education for Persons with Disabilities: Article 24 of the Convention on the Rights of Persons with Disabilities and its Implementation in Hong Kong” (2010) 40 *HKLJ* 419-447 (with permission from the publisher). The article and the report are based on research conducted for a project funded by the Henry Chan Inclusive Education Fund. For more complete development of the arguments presented here, please see the full article as cited above.

sets out the most pertinent and far-reaching set of standards in this context, other key instruments also enumerate a right to equality – in general and in relation to education in particular – and therefore have a bearing on this analysis. These include the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1989 Convention on the Rights of the Child (CRC).

5. This analysis also considers domestic equality and anti-discrimination law with a focus on the Hong Kong legal framework including the Disability Discrimination Ordinance (DDO) and constitutional equality provisions in the Hong Kong Basic Law and the Bill of Rights which essentially duplicates the ICCPR. Hong Kong arguably has one of the most comprehensive legal regimes for addressing discrimination in the Asian region and has the potential to influence initiatives in China and elsewhere. In addition, since the Bill of Rights copies the provisions of the ICCPR and Hong Kong courts are often willing to cite the interpretive materials produced by the human rights treaty monitoring bodies, developments in international human rights law may have a particular impact in the Hong Kong context.

6. This review of legal standards suggests that while equality law – when underpinned by a substantive principle – can support efforts toward inclusion, it also has limitations. Speakers at a conference on the CRPD and inclusion in education held in Hong Kong in November 2009 expressed skepticism about the potential for equality law – and law generally – to serve as an effective driving force for greater inclusion.

7. Nevertheless, there was general affirmation that the law has a role to play in reaching solutions. In his keynote address, Vernor Muñoz noted the urgency of the situation and observed that the widespread denial of the human right to education of persons with disabilities stems from utilitarian visions of education as a privilege or commercial asset, rather than a right provided by law. He observed that globally only around 5% of children with disabilities manage to complete primary education and in many developing countries the numbers do not even reach 1%.

8. A. Wayne MacKay argued that “the concept of equality, properly understood and applied with adequate resources can be the lighthouse that guides us to more inclusive, effective, and even safer public schools”.<sup>3</sup> Much of the potential of equality law for furthering the objectives of inclusion depends on how this principle is reflected in and promoted through law and policy. When understood in a substantive rather than strictly formal sense, equality can contribute toward achieving the goals of inclusion as expressed in Article 24 of the CRPD.

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<sup>3</sup> A. Wayne MacKay, “An International Call for Action and Canada’s Long and Winding Road to Inclusion: The Canadian Experience”, paper presented at *Inclusion in Education: Implementation of Article 24 of the United Nations Convention on the Rights of Persons with Disabilities*, a conference held at the University of Hong Kong, 28 November 2009, pp 24-25.

9. In the Hong Kong context, although the DDO is an important starting point for protecting students with disabilities from discrimination by educational institutions, its potential is weakened by several factors. These include 1) broad exceptions in the education provisions; 2) the need to identify a similarly situated comparator in order to prove direct discrimination and the courts' interpretation of this requirement; 3) an overly narrow definition of discrimination; and 4) the lack of an explicit duty to provide reasonable accommodation in order to avoid discrimination. Hong Kong, unlike some other jurisdictions such as the United States, does not have in place specific legislation on education which stipulates the necessary environment and features for achieving inclusion. The impetus toward inclusion in Hong Kong remains within the realm of education policy rather than law.

10. This report argues, therefore, that in order to fully implement its responsibilities under the CRPD – especially the right to education in Article 24 - Hong Kong needs to make legal reforms which address these issues. The CRPD provides a framework which reflects a concept of substantive equality more capable of inclusion and the DDO needs to be analyzed, assessed, and potentially amended, taking these standards into account.

11. This report begins with a discussion of the concepts of disability, inclusion and equality and their expression in international human rights instruments applicable to Hong Kong, especially the CRPD. It then examines the DDO in detail with reference to these concepts and standards. It also compares the DDO's approach to disability discrimination statutes and equality guarantees in other jurisdictions. It concludes with several recommendations for legal reform in Hong Kong based on this analysis.

### **The concepts of disability, inclusion and equality**

12. The concepts of disability, inclusion and substantive equality have found expression in international human rights law, especially the CRPD, and form a matrix of overlapping and reinforcing principles which have the potential to strengthen legal mechanisms for inclusion if they are implemented effectively into domestic law.

13. The CRPD represents a “paradigm shift” away from the medical model of disability – an understanding of disability which emphasizes the impact of individual impairments and the need for medical treatment – and instead embraces the social model which recognizes that disability is created by impediments in society.<sup>4</sup> The Convention, as a core human rights treaty, also places the concerns of persons with disabilities firmly within a human rights framework.

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<sup>4</sup> See Rosemary Kayess and Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, (2008) 8 *Human Rights Law Review* 1, generally and at 3 citing Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “Commentary at a High-Level Dialogue held in association with the Signature Ceremony of the Convention, from Vision to Action: The Road to Implementation of the Convention on the Rights of Persons with Disabilities”, New York, 30 March 2007 and the UN High

14. Advocates for the “social” model contend that disability is caused by barriers in the environment – both physical and attitudinal - and is not inherent in any particular “impairment”. Although the Convention does not define disability in its “definitions” section, it provides some guidance and its approach clearly reflects the social model. For example, the preamble states that: “Disability is an evolving concept and ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” In other words, disability involves the ways in which social structures and attitudes create disadvantage and limit participation. The focus is on the social and environmental barriers rather than on the impairment.

15. Martha Nussbaum has observed that this insight about disability forces a re-evaluation of what we assume to be “normal” or “neutral”. She writes that “public space is arranged to cater to the impairments of the ‘normal’ case. What is different about people who are blind and deaf and wheelchair-users is that their abilities are typically not catered for, because they are impaired in an unusual way.”<sup>5</sup> To illustrate this point, she compares the use of wheelchairs by the physically disabled to the use of cars and buses by what she calls “normals.” “Normals” also have limitations (our legs can only go so fast!) and we use cars and buses as aids to move around. She observes that “public space is arranged to accommodate cars and buses – through the building of roads, parking lots, bus stops, etc. but that it’s not arranged to cater to prostheses used by the atypically disabled”.<sup>6</sup> In other words, everyone has limitations but society is generally structured only to accommodate “normal” impairments (such as having legs rather than wheels). The sources of disadvantage are based in society which is not “neutral” in the way it affects different groups with different needs.

16. There is a close connection between the social model of disability and a right to substantive equality and non-discrimination as it has been developing in international human rights law and some domestic jurisdictions.

17. Substantive equality is generally contrasted with the more traditional notion of “formal equality.” Formal equality is based on a “neutral”, colour-blind principle of equal treatment which demands that likes be treated alike. According to this theory, irrelevant considerations such as gender, race or disability should not be considered. The problem with this approach is that it does not account for actual power imbalances among groups and communities. So if people are not starting from the same point due to past, systemic discrimination, treating them

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Commissioner for Human Rights, “Statement by Louise Arbor UN High Commissioner for Human Rights on the Ad Hoc Committee’s Adoption of the International Convention on the Rights of Persons with Disabilities”, 5 December 2006.

<sup>5</sup> Martha Nussbaum, *Frontiers of Justice* (Cambridge, Mass: The Belknap Press: Harvard University Press, 2006), pp 116-117.

<sup>6</sup> Nussbaum, *Frontiers of Justice*, 116-117.

alike will not redress disadvantage. In fact, it may actually create or perpetuate existing discrimination and social hierarchies.

18. This may be especially true in the case of disability, where social and environmental structures clearly create impediments and barriers to accessing opportunities. In contrast, substantive equality mandates a contextual examination that considers the actual circumstances facing a community – and individuals within that community - and an assessment of the group’s degree of marginalization. Substantive equality may require positive duties, special measures or affirmative action.

19. Sandra Fredman is one of a number of scholars who have described the problems with a formal approach to equality and argued for a conceptual shift toward a substantive model. She has suggested that equality should have 4 aims: 1) first it should break the cycle of disadvantage for out-groups; 2) next it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence based on group membership; 3) third, it should entail positive affirmation and celebration of identity within community; and 4) fourth, it should facilitate full participation in society.<sup>7</sup>

20. Substantive equality pursues these aims and has been described as a transformative project – in much the same way that the disability movement has sought to transform social structures and make society more inclusive. Inclusion – in education as well as other areas – is the realization of substantive equality and ensuring a right to equality demands inclusion. Achieving inclusion/equality necessitates breaking down the social barriers that cause disability (according to the social model) and transforming discriminatory structures through the application of special measures. To some degree, an ideal full version of equality would eliminate “disability” in the pure social model sense, since the social and environmental barriers would be gone, while still embracing the value of human diversity, one of Fredman’s suggested equality aims. In this way these concepts – inclusion, equality and disability – come together, reinforce each other and express their transformative potential.

21. A number of human rights treaties reflect this approach.

22. Article 2(1) of the ICCPR sets out the principle of equality and non-discrimination in the context of states’ general obligations under the Covenant. State parties must respect and ensure to all individuals within their territories and subject to their jurisdiction the rights recognized in the Covenant, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. “Other status” has been interpreted to include “disability”. Article 26 provides for a right to equality before the law and equal protection of the law without discrimination.

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<sup>7</sup> See Sandra Fredman, *Human Rights Transformed* (Oxford University Press, 2007), p 10 and Sandra Fredman, “The Future of Equality in Britain”, Working Paper Series No. 5 (Equal Opportunities Commission, 2002).

23. The United Nations Human Rights Committee (the treaty-monitoring body for the ICCPR) has interpreted these provisions to contain a right to substantive equality noting that States Parties must sometimes “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”. This “may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant”.<sup>8</sup> In this sense, such preferential treatment is part and parcel to ensuring equality and does not constitute an exception to the principle of non-discrimination.<sup>9</sup>

24. The Committee on Economic Social and Cultural Rights, which monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR), has similarly interpreted the right to equality in its substantive sense. State parties to the ICESCR must guarantee that the rights enunciated in the Covenant – including the right to education in Articles 13 and 14 - will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

25. According to the Committee, states must eliminate both formal and substantive discrimination in order to fulfill this obligation and recognize that

“the effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination”.<sup>10</sup>

26. The Committee goes on to observe that:

“In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and

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<sup>8</sup> Human Rights Committee, General Comment 18, UN Doc HR1/GEN/1/Rev.610, November 1989, para. 12.

<sup>9</sup> See Warwick McKean, *Equality and Non-discrimination under International Law* (Oxford: Clarendon Press, 1983), p 159.

<sup>10</sup> CESCR General Comment 20, “Non-discrimination in Economic, Social and Cultural Rights”, UN Doc. E/C.12/GC/20, 10 June 2009, para 8(b).

reasonable accommodation of persons with sensory impairments in accessing health care facilities”.<sup>11</sup>

27. These approaches to equality and non-discrimination and the connection between the social model of disability and a transformative understanding of substantive equality are further strengthened in the CRPD. In the preamble and in many of its provisions, the Convention emphasizes the need to transform social structures in order to ensure the rights of persons with disabilities in all areas. It promotes substantive equality requiring positive, proactive measures to address the actual disadvantage and marginalization encountered by persons with disabilities.

28. For example, the definition of discrimination provided in Article 2 contains elements of a substantive approach:

“‘Discrimination on the basis of disability’ means 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.”

29. The first part of the definition essentially copies the definitions of discrimination found in other human rights instruments.<sup>12</sup> The phrase “purpose or effect” has been interpreted to indicate that the treaties prohibit both direct and indirect discrimination.

30. Direct discrimination means less favorable treatment on the basis of a prohibited ground (such as race, gender, or disability). Indirect discrimination, by contrast, considers the impact of apparently neutral measures or requirements – in other words, indirect discrimination occurs when a neutral practice has a negative, disproportionate effect on a disadvantaged group. So an education policy or practice that effectively excludes or marginalizes persons with disabilities, for example, could amount to *de facto* discrimination (or substantive inequality) even in situations where such a policy appears neutral on its face and where the policy-maker did not intend to discriminate.

31. Since apparently neutral social or environmental structures often have unequal impact on persons with impairments and can create disability, a definition of discrimination that includes *de facto* discrimination is especially important. Tackling indirect disability discrimination – and achieving real equality – often requires positive measures such as installing ramps for wheelchair users or promoting “universal design” products.

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<sup>11</sup> CESCR General Comment 20, “Non-discrimination in Economic, Social and Cultural Rights”, UN Doc. E/C.12/GC/20, 10 June 2009, para 9.

<sup>12</sup> See Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination, Article 1 of the Convention on the Elimination of all Forms of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, General Comment 20 (para 7), and Human Rights Committee, General Comment 18 (para 7).

32. The definition in the CRPD goes further than previous instruments, however, and specifies that discrimination on the basis of disability “includes all forms of discrimination, including denial of “reasonable accommodation” (Article 2). The Committee on Economic, Social and Cultural Rights has also interpreted the meaning of discrimination under the ICESCR as it applies to persons with disabilities to include the denial of reasonable accommodation.<sup>13</sup>

33. The CRPD further defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” This could entail alteration of environmental barriers – thus reflecting the social model of disability as well as a concept of substantive equality - but only to the point where accommodation becomes a disproportionate or undue burden.

34. To a certain extent, reasonable accommodation would still be required to fulfil the Convention’s obligation to ensure equality and non-discrimination even if its denial was not explicit in the Convention’s understanding of discrimination. Its inclusion in the definition, however, emphasizes the substantive nature of the equality principle and allows for an analysis of discrimination that focuses more directly on positive measures needed to ameliorate disadvantage.

35. The meaning of “reasonable accommodation” and “disproportionate or undue burden” must be interpreted in light of the text and context of the Convention including the need to ensure substantive equality. As discussed above, the scope and content of the legal right to equality and non-discrimination and the resulting state responsibilities must be understood with reference to the underlying concept of equality. The nature of the concept both reflects and determines the aims which the equality principle is trying to achieve. If equality is aimed at breaking cycles of disadvantage, promoting the equal dignity and worth of all, positively affirming and celebrating identity, and facilitating full participation, as suggested by Fredman, then its antithesis – discrimination including the denial of reasonable accommodation – can be measured and redressed in accordance with these goals.

36. Article 24 of the CRPD clearly links the concept of inclusion with a right to education without discrimination and provides that inclusion in education should be directed toward a number of aims - which are similar to the aims of substantive equality proposed by Fredman mentioned above. It provides for a right of persons with disabilities to education and “with a

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<sup>13</sup> CESCR General Comment 20, “Non-discrimination in Economic, Social and Cultural Rights”, UN Doc. E/C.12/GC/20, 10 June 2009, para 28. The Committee cites Article 2 of the CRPD and notes that under the ICESCR “the denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability”.



view to realizing this right without discrimination and on the basis of equal opportunity” states must “ensure an inclusive education system at all levels and lifelong learning”.

37. Article 24 is extensive and in its entirety provides a basis for understanding the meaning of “inclusion” as it relates to the right to education and the right to equality and non-discrimination in education. It recognizes that while “inclusion” demands a move away from “exclusion” and segregation, it goes beyond a concept of mere integration. Integration reflects a formal requirement that students with disabilities be allowed to attend “mainstream” schools, but the experience in a number of countries has demonstrated that integration without accommodation has largely failed.<sup>14</sup>

38. The Convention requires that persons with disabilities not be excluded from the general education system on the basis of disability; that persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; that reasonable accommodation of the individual’s needs be provided; that persons with disabilities receive the necessary support within the general education system to facilitate their effective education; and that effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion (Article 24(1)(a)-(c)).

### **The Hong Kong legal framework**

39. The CRPD has applied to China (and Hong Kong) since August 2008. As a result, Hong Kong has an obligation to review its laws and policies to ensure compliance with the Convention’s provisions. The Government submitted its report – which forms part of China’s report - to the Convention’s monitoring body (the Committee on the Rights of Persons with Disabilities) in August 2010 in accordance with the reporting obligations laid out in Articles 35 and 36.

40. The international human rights treaties mentioned above – which affirm the concepts of substantive equality and inclusion generally and in education in particular – provide the basis for an assessment of the extent to which a right to equality supports inclusion in education at the domestic level. The ability of a substantive equality principle to achieve transformation and the goals of full inclusion depends to a large extent on how it is implemented and reflected in domestic law.

41. Hong Kong provides a case study of a common law jurisdiction within the Asian region with a reasonably comprehensive regime of anti-discrimination law and a constitutional right to equality.

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<sup>14</sup> See Vernor Muñoz, “The right to education of persons with disabilities”, Report of the Special Rapporteur on the Right to Education (2007), para. 12.

42. The Basic Law provides for the right to “equality before the law” in Article 25 and has been interpreted in conjunction with Articles 1 and 22 of the Bill of Rights, which essentially duplicate Articles 2 and 26 of the ICCPR. These provisions form the basis of a constitutional right to equality in the Hong Kong context.

43. In addition to constitutional guarantees, Hong Kong has enacted legislation – the DDO – prohibiting direct and indirect discrimination on the basis of disability. The following paragraphs consider whether the DDO supports non-discrimination in education – in the sense of inclusion – and whether it fully implements Hong Kong’s commitments under the CRPD.

44. An analysis of the DDO illustrates the difficulties encountered by courts when applying disability discrimination law in Hong Kong – and in other jurisdictions with similar legislation. The tension between formal and substantive approaches to equality has limited the statute’s ability to achieve inclusion and reform is necessary.

45. In particular, the DDO lacks an express requirement to provide reasonable accommodation as part of the obligation not to discriminate. To some extent the DDO implicitly requires reasonable accommodation in education but this is limited and indirect and does not encourage a focus on the measures needed to promote equality when determining whether discrimination has occurred.

46. In order to establish direct discrimination under the DDO a real or hypothetical comparator must be identified since direct discrimination is defined as “less favourable treatment” than someone without a disability. Therefore the process of determining discrimination is a relative exercise. This is fraught with difficulties since disabled and non-disabled persons are often not in comparable situations and thus the comparator analysis is often strained and artificial. The outcome of a claim which hinges on finding a comparator may rely too heavily on a formal equality principle which does not reflect the insights about disability and discrimination that the social model and substantive equality provide.

47. To some degree, the DDO reflects the social model of disability and the concept of substantive equality. First, it prohibits indirect, as well as direct, discrimination. Also, unlike other anti-discrimination laws, such as the Sex Discrimination Ordinance (SDO) and the Race Discrimination Ordinance (RDO), the DDO is in a sense inherently substantive in its approach because of its “asymmetrical” nature. In other words the Ordinance makes discrimination unlawful only on the basis of disability and does not allow claims from individuals for discrimination on the basis of a lack of a disability. For example, a student without a learning impairment could not bring a claim that he/she was discriminated against because another student with a learning disability was given more time to complete an examination. The SDO on the other hand applies to discrimination directed against *both* men and women. The DDO’s asymmetry signals some recognition of context and actual disadvantage as demanded by a substantive equality principle.

48. The scope of the Ordinance's application is broad and includes education, as well as employment and the provision of goods, services and facilities among other fields. Pursuant to s 24, it is unlawful for an educational establishment to discriminate against a person with a disability in the application process by refusing or failing to accept that person's application for admission as a student; or in the terms or conditions on which it is prepared to admit that person as a student. This provision on its own seems to provide for a blanket right to at least integration in education unless admitting someone as a student "would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational establishment" (s 24(4)).

49. The Ordinance explains that in determining what constitutes "unjustifiable hardship", all relevant circumstances of the particular case are to be taken into account including the reasonableness of any accommodation; the nature of the benefit or detriment like to accrue or be suffered by any persons concerned (s 4). Therefore, as a practical matter, the defence of unjustifiable hardship in the DDO incorporates to some extent the need to provide "reasonable accommodation". In other words in order to avoid discrimination on the basis of disability, a school must not only admit disabled applicants but must accommodate them unless the services or facilities which constitute the accommodation reach the level of "unjustifiable hardship".

50. There is no explicit, direct obligation to ensure reasonable accommodation, however, and unlike the CRPD the denial of reasonable accommodation is not included as part of the definition of discrimination in the DDO.

51. It is also unlawful for an educational establishment to discriminate against a student with a disability by denying or limiting that student's access to any benefit, service or facility provided by the educational establishment; by expelling that student; or by subjecting that student to any other detriment.<sup>15</sup> Notably the unjustifiable hardship defense does not apply to this sub-section of the education provisions.

52. Certain exemptions related to education may limit the law's capacity to ensure equality and encourage inclusion. Discrimination in the education context is exempted if the person claiming disability discrimination is not reasonably capable of performing the actions or activities reasonably required by the educational establishment in relation to the students at that educational establishment; or if the students who participate in or are able to participate in those actions or activities are selected by a method which is reasonable on the basis of their skills and abilities relevant to those actions and relative to each other (s 24(5)).

53. This seems to be a particularly broad exemption that undermines the aims of inclusion and does little to encourage transformation of school curricula and systems which promote competitive, merit-based criteria for the selection of students. It may also perpetuate

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<sup>15</sup> DDO, s 24(2).

assumptions about persons with disabilities based on stereotypes about their abilities and exclude them from activities which are not deemed suitable by a non-disabled society which has built structures designed for “normally” disabled people – in Nussbaum’s sense of this term. This exception allows educational establishments to measure the capabilities of students with disabilities with reference to educational arrangements which may be considered “normal” but which have the effect of limiting inclusion (and undermining substantive equality). In other words, if “reasonable” expectations which accord with the “norm” in the educational environment have the effect of excluding students with disabilities, then these could solidify marginalization.

54. Although the DDO’s education provisions are largely copied from the 1992 Australian Disability Discrimination Act, this particular exemption is not included in the Australian Act’s education section. It has instead been copied from an exemption elsewhere in both the DDO and the Australian Act which deals with the specific context of sports (DDO s 35). Applying this exception more broadly to education risks allowing unjustifiable discrimination and limiting the law’s ability to provide the basis for inclusion and substantive equality.

55. Another provision in the Australian Act which arguably supports inclusion has not been duplicated in the Hong Kong statute. The Australian Act makes it “unlawful for an education provider to discriminate against a person on the ground of the person’s disability: by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or by accrediting curricula or training courses having such a content” (s 22(2A)).

56. An additional problem is that a claimant with a disability who alleges disability discrimination must designate a real or hypothetical non-disabled comparator who is similarly situated to the claimant with a disability but treated more favourably in order to establish a disability discrimination claim.

57. This problem was highlighted in the landmark Australian case *Purvis v New South Wales*.<sup>16</sup> The case originated in a claim of direct disability discrimination made on behalf of a boy with an intellectual disability who had been expelled from a “mainstream” high school in New South Wales after exhibiting violent behavior caused by brain damage. Initially the Australian Human Rights and Equal Opportunities Commission upheld the claim and took an approach that recognized the social disability and substantive equality models. The Commissioner argued the school had not provided sufficient support and could have done more to accommodate the student (such as provide training to school staff).

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<sup>16</sup> *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 202 ALR 133. For a discussion of this case, including the comparator issue, see Elizabeth Dickson, “Disability Discrimination in Education: *Purvis v New South Wales (Department of Education and Training)*, amendment of the education provisions of the *Disability Discrimination Act 1992* (Cth) and the formulation of Disability Standards for Education”, (2005) 24 *UQLJ* 213-222.

58. The case eventually reached the High Court and the majority took a different approach. Its analysis of the comparator issue is worth examining. Both the DDO and the Australian Act require that a comparison of the cases of persons with or without a disability shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other (DDO s 8).

59. The “irrelevant” circumstance would be the prohibited ground – in this case disability. This analysis is designed to sift out all other factors apart from the prohibited ground in order to establish whether less favorable treatment - direct discrimination – has occurred. The question in *Purvis* was whether the behavior – the violence – was part of or caused by the disability and therefore irrelevant for the purposes of comparison (if so, the non-disabled comparator would not exhibit the behavior) or whether the violent behavior should be considered separately from the disability (in which case it should be attributed to the comparator in order to ensure that the relevant circumstances are the same). Of course the outcome would be different, depending on which approach a court resolves to take.

60. In *Purvis*, the three judge majority took the second approach and held that the school had not discriminated against the student. The two minority judges, however, adopted the social model of disability – and substantive equality - in their reasoning stating that the “purpose of the disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator”. They added that “[i]f the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, persons suffering from those disabilities would lose the protection of the Act in many situations.”

61. In this case the unjustifiable hardship defense was not available because the boy was already a student at the school and the Australian Act, like the DDO, only provided for an unjustifiable hardship defence at the stage of determining whether to enroll a student at a school and not once the student had been enrolled. If it had been available, the court may have avoided an over-emphasis on a strained comparator analysis and could have shifted the focus to the school environment and what the school did – or could have done – to manage the boy’s disability and behavior. The DDA – but not the Hong Kong Ordinance - has since been amended to include an unjustifiable hardship defense in those circumstances.

62. There have been only a handful of disability discrimination cases in Hong Kong which have reached the courts and only one has involved a claim of disability discrimination in education. These cases have also demonstrated the comparator problem in the Hong Kong context.

63. *Ma Bik Yung v Ko Chuen*<sup>17</sup> involved a woman who claimed a taxi driver discriminated against her on the basis of her disability since he rudely refused to help her with her wheelchair and had subjected her to harassment. The court chose as a comparator an able-bodied passenger who had heavy luggage. Petersen has pointed out that this is rather strained and indeed a disabled person and the person with heavy luggage are not really in similarly situated circumstances since the person with heavy luggage could have more easily placed the luggage in the taxi on her own.<sup>18</sup> A similar observation could be made about the comparator in the *Purvis* case. A boy without the disability and with the violent behavior would not have been similarly situated since he may have more easily responded to discipline or may have had more control over his behavior in the first place.

64. The comparator problem was also apparent in *Tong Wai Ting*,<sup>19</sup> a case decided in August 2009 by the Court of First Instance, which challenged the imposition of an age limit of 18 years for free public education for students with intellectual disabilities attending special schools. The court chose as a comparator a secondary school student who had completed 11 years of free education but who wished to repeat secondary 5 in order to pass the public examinations. It held that the mainstream school students' application to repeat a year would not be automatically approved – and therefore the two students would have been treated the same way and thus there was no discrimination. The two students, however, were facing different conditions which were not actually comparable. They were not really similarly situated since they were in separate school environments with an entirely different set of expectations so meeting the requirements of the comparator test would be virtually impossible.

### Conclusions and recommendations

65. The reasoning of the Hong Kong courts in these cases – and the courts of other jurisdictions in similar cases – when applying anti-discrimination law demonstrates the law's limits for furthering the goals of inclusion in education. The legislation and its interpretation have been impeded by an insufficient understanding of substantive equality. In particular the DDO lacks a strong reasonable accommodation obligation, contains an overly broad exception in the education provisions, and necessitates identification of a similarly situated comparator even in situations which are arguably incomparable.

66. Given the new paradigm of the CRPD, the social model of disability, and the substantive equality requirements in international human rights law generally, these limitations hinder Hong Kong's ability to fully implement its international legal commitments in this area. Amendments to the DDO could help resolve some of these difficulties.

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<sup>17</sup> [1999] 1 HKC 714 (at first instance) and [2000] 1 HKLRD 514 (Court of Appeal).

<sup>18</sup> Carole J. Petersen, "Implementing Equality: An Analysis of Two Recent Decisions under Hong Kong's Anti-discrimination Laws", (1999) 29 *HKLJ* 178 at 190.

<sup>19</sup> [2009] HKEC 1367.

67. First, the comparator problem could be partly ameliorated by amending the definition of discrimination in the DDO to clearly include the denial of reasonable accommodation reflecting the language of the CRPD. This could help shift the analysis towards a discussion of necessary accommodation and away from strained arguments about whether a comparison of two similarly situated cases – apart from the disability – show a violation of the equal treatment principle. If such a discussion – including how to delineate the boundaries of unjustifiable hardship – is guided by the aims of substantive equality, then this could strengthen the law’s role in transforming social barriers and achieving inclusion.

68. Also, overly broad exceptions in the DDO’s education provisions should be removed or amended to limit their scope.

69. In addition, Hong Kong should consider enacting specific education legislation which sets out more explicit requirements that more fully implement stated policy imperatives and which could better support and elaborate measures to achieve inclusion. Such legislation could supplement and further the aims of a right to equality and non-discrimination as it has in other jurisdictions. Legislation governing inclusion in education for persons with disabilities has been enacted in some locations which also have anti-discrimination legislation and constitutional equality guarantees.<sup>20</sup>

70. The principles of equality and non-discrimination in the law – including international human rights instruments, especially the CRPD - should be used to guide and support these law reform initiatives and policymakers’ approach toward developing approaches to inclusion in education.

71. Disability forces us to confront how we conceptualize the notion of “equality” and raises questions about our objectives. What are we trying to achieve? What legal measures are required to meet these aims? Probably more than any other prohibited ground of discrimination, disability requires a substantive approach to dismantling discriminatory barriers. To achieve the goals of participation and inclusion, accommodation and even transformation is required. Disability makes us query in a profound way what we mean by “normal” and challenges us to consider the implications of the ways in which we have constructed our society. A substantive equality principle – supported by effective legal measures – can play an important role in addressing these challenges and promoting inclusion in education and in Hong Kong society more generally.

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<sup>20</sup> For example, the US Individuals with Disabilities Education Act (IDEA) and Part IV of the 1996 UK Education Act and the SEN Code of Practice.