

CHINA
Hong Kong Special Administrative Region (HKSAR)
PathFinders Limited
SUBMISSION FOR THE
UN UNIVERSAL PERIODIC REVIEW
March 2018

1. Background

- 1.1.** PathFinders (PF) works to ensure that the most vulnerable children born in Hong Kong and their migrant mothers are respected and protected. We believe that every child deserves a fair start in life.
- 1.2.** From inception in 2007 to date, PathFinders has helped over 5,300 babies, children and their migrant mothers, including over 2,200 newborns and toddlers, of whom over 160 were in such a vulnerable, abandoned and/or otherwise isolated state that they would, but for PathFinders, have been at significant risk of abuse, neglect and/or trafficking.
- 1.3.** The majority of the women we serve are current or former foreign domestic workers (FDWs) from Indonesia and the Philippines. Despite legal protections, once pregnant, these workers are typically fired unlawfully. They lose access to housing, healthcare and social welfare and are left homeless, penniless and pregnant or with a newborn child. Utterly indigent, they exist in the margins at a level of precarity that is both surprising and shocking in a city state as advanced as Hong Kong.
- 1.4.** The women are typically then criminalised as immigration overstayers despite the reason for their situation being their former employer's criminally unlawful act of firing a pregnant woman.
- 1.5.** These women and their Hong Kong-born children are some of the most vulnerable people in Hong Kong. They are hidden in plain sight and denied rights protections to such a degree that, unless they have applied for asylum, their existence is even worse than those of asylum seekers and refugees.
- 1.6.** This submission is therefore a plea for this population of women and children to be granted human rights protections.
- 1.7.** With the population of FDWs in HKSAR expected to increase from the current 370,000 to 600,000 by 2047, PF's burgeoning caseload is only set to increase. We therefore ask that prompt measures are put in place to ameliorate the suffering and hardship these babies, children and women endure.
- 1.8.** While PF applauds China's efforts to expand the rights of women and children since the last Universal Periodic Review, PF urges China now to expand those efforts to women and children in

Hong Kong, and especially to migrant workers and their HKSAR-born children.

1.9. HEADLINE RECOMMENDATIONS: Fully protect the legitimate rights and interests of migrant women and their children; make further efforts for securing all human rights for everyone regardless of immigration status; adopt further measures to ensure universal access to health and education and other welfare for migrant women and their children; strengthen guarantees of social and economic rights of citizens, in particular in the areas of education, health care, social protection and labour and give special attention to vulnerable groups specifically including migrant and ethnic minority women, pregnant migrant workers and their Hong Kong-born children; pursue policies in favour of the most vulnerable strata of society.

2. FDWs: Inadequate protection and enforcement of FDWs' Pregnancy and Maternity Rights

2.1. HKSAR's current laws, mandated template employment contracts and policies regarding maternity protections for FDWs fail adequately to provide clear guidance as to what should happen when a FDW is pregnant so as to ensure a happy, healthy and well-managed pregnancy, birth and maternity leave.

2.2. Like all other employed women in HKSAR, pregnant FDWs are protected by law from employment termination and discrimination on the grounds of pregnancy. Breach of those legal protections carries both criminal and civil law sanctions. FDWs are also eligible for statutory maternity leave.

2.3. However, the singular absence of policy and guidelines confirming how a happy, healthy pregnancy is to be successfully and lawfully managed by the employee, the employer and employment agents has devastating human consequences for both child and mother.

2.4. Specifically, no law or policy addresses what is to happen to the mother or child during maternity leave or, crucially, the interplay between maternity leave and the so-called "live-in rule" which is HKSAR Government's requirement that FDWs live in their employer's residence.

2.5. Based on PF's experience, there exist two options that are deemed acceptable (although not explicitly publicly stated anywhere) with regard to FDWs taking statutory maternity leave: (1) return to their home countries for the duration of statutory maternity leave; or (2) remain in Hong Kong in which case they are expected to continue to live with the employer. Both options are flawed and both lack consideration of the child's best interests.

2.6. Every FDW who wants to return to her home country for maternity leave must each first individually negotiate that with her employer. Even where parties agree that the foreign domestic worker can go to her home country, by law that leave can only start at the earliest of 4 weeks before the expected delivery date, i.e. when the worker is already 36 weeks' pregnant and is not only worried about the risk of flying for herself and the baby but is largely prohibited from flying under most airline policies.

2.7. Further, if the FDW stays in Hong Kong, she is expected to reside in the employer's home even during statutory maternity leave. No mother should be separated from her newborn like this. This is inhumane and unacceptable. The employers who call PF asking for guidance also really struggle

with the live-in rule during their FDW's maternity leave.

- 2.8.** Many FDWs in this position, pregnant with a mixed race child or with a child conceived out of wedlock, also feel unable to return to their home country for fear of isolation and discrimination from their families and communities. Instead they remain in HKSAR and often end up giving birth alone or on the streets. Over the last year, there have been several media reports about newborn babies of current or former FDWs being dumped in bins or on the side of the street.¹
- 2.9.** Former FDWs can extend their visas to remain in the HKSAR legally if they bring a legal claim, for example through the Labour Department, against their former employer for unlawful dismissal or against the father of their child, over 80% of whom live in HKSAR. However, the women are unable to work, have no access to welfare or housing and can only access medical care through public hospitals in emergency circumstances (such as when in labour) and then only at penalty rates. This lack of early and timely maternal health care can be extremely risky, even fatal, to the unborn or newborn baby and the mother.
- 2.10.** PathFinders recommends that within the next 12 months:
- 2.10.1. Recommendation:** HKSAR Government review, create (where currently absent), clarify, clearly communicate and enforce laws, practices and policies to enable lawful, safe and healthy pregnancies free from harmful treatment for FDWs and their unborn babies.
 - 2.10.2. Recommendation:** HKSAR Government introduce a concerted education programme about the maternity rights, obligations and protections for FDWs to all key stakeholders including FDWs, employers, employment agencies, Labour Department, Immigration Department, Health Authority, Police, Social Welfare Department, Prisons and relevant sending country consulates;
 - 2.10.3. Recommendation:** HKSAR Government relax the live-in rule during statutory Maternity Leave (ML) and specifically explain the expected interplay between and management of ML and the so-called live-in rule;
 - 2.10.4. Recommendation:** For all female employees, including FDWs, HKSAR Government extend the statutory ML period to 14 weeks in line with the ILO convention, and allow for flexibility in the statutory ML period especially for FDWs returning to their country of origin;
 - 2.10.5. Recommendation:** HKSAR Government devise detailed and practical policy guidelines stipulating how lawfully to manage the pregnancy and statutory ML of FDWs. These should include detailed guidance about exceptions (if any) to the ML entitlement, who should pay for flights to the FDWs' home country, time off for medical checks during pregnancy, the banking/payment arrangements for ML, sick leave entitlement during pregnancy, information for employers who wish to hire temporary helpers/FDWs during their regular FDW's ML, and set out the criminal sanctions for non-compliance;

¹ <http://www.scmp.com/news/hong-kong/law-crime/article/2127947/helper-held-over-abortion-hong-kong-flat-fetus-found> accessed on 29 March 2018

2.10.6. Recommendation: HKSAR Government add a specific line to FDW standard employment contracts stating that pregnant FDWs are entitled to pregnancy, maternity and non-discrimination legal protections; and

2.10.7. Recommendation: HKSAR Government departments and their agencies collect and publish relevant data to assess the magnitude of problems faced by pregnant FDWs, their babies, their employers and all other relevant stakeholders. This should include: A. The number of FDWs in Hong Kong who become pregnant; B. The number of FDWs who give birth in Hong Kong; C. The number of FDWs who managed to negotiate a satisfactory ML with their employers in compliance with the live-in rule; D. The number of FDWs who returned to their home country to give birth and what their ML arrangements were; E. The number of unlawful dismissals and forced “resignations” of FDWs due to pregnancy; and F. The number of criminal investigations, prosecutions and convictions for unlawful termination and discrimination due to pregnancy.

3. Privacy

3.1. PathFinders also encounters cases where employers infringe FDWs’ right to privacy. Infringements include forcing FDWs to take pregnancy tests² or filming them in their rooms or private places of rest. Such invasion of privacy is often unrecognized and unreported because of the imbalance of power and is further exacerbated by the so-called live-in rule.

3.1.1. Recommendation: that within the next 2 years, employers undergo education as to the specific privacy and personal data issues they need to be aware of when employing FDWs and the sanctions for non-compliance.

4. Trafficking

4.1. The babies, children and women we serve at PF are uniquely vulnerable in HKSAR. The women in particular are prone to trafficking. Trafficking for the purpose of forced labour is not expressly prohibited under HKSAR legislation.

4.1.1. Recommendations: The HKSAR government establish within the next 12 month a comprehensive and effective anti-human trafficking legal framework addressing multiple forms of exploitation including forced labour and establish a comprehensive monitoring and complaints mechanism.

5. Legal Advice

5.1. PF’s clients frequently struggle to understand their legal rights and obligations. They are in a culturally and linguistically foreign country. The absence of free legal advice on arrest dramatically and negatively impacts their access to justice.

5.1.1. Recommendation: that free legal advice be made available to cultural and linguistic minorities as a matter of course to fill the justice gap from arrest until first appearance in

² 2 Waliyah v Yip Hoi Sun Terence [2017] 1 HKLRD 1082

court when the free duty lawyer service kicks in.

6. Children born to current/former FDWs in HKSAR

6.1. Children born to FDWs are among the most deprived children in HKSAR.

6.2. Once an unlawfully fired FDW mother has overstayed her visa, her child, when born, assumes the same legal status as his or her mother – they are undocumented. As a result, these babies do not have access to documentation, healthcare, basic immunisations or welfare support, and are highly vulnerable to malnutrition, disease, abuse, neglect, abandonment, human trafficking, systemic oppression and overt discrimination.

6.2.1. Recommendation: PathFinders urges China and HKSAR to ensure equal protection at law, under policy and beyond to all children born in HKSAR regardless of their own or their parents' immigration status.

7. **Nationality for Children**: Every child has the right to acquire a nationality. Registration difficulties of children born to migrants in HKSAR directly impede their ability to obtain a nationality, since having a birth certificate is typically a major prerequisite for acquiring nationality.

7.1. Undocumented children face difficult lives. They exist in the shadows. They are without access to public healthcare, welfare and education. They fall prey to the most dangerous and frightening elements of our society.

7.2. Too often, PathFinders has seen cases where babies do not even have birth certificates because the cost of the birth certificate is either beyond the parents' means or the Birth Registry delays issuing the birth certificate for up to 9 months.

7.3. Registering the birth of a child is free in HKSAR. However, obtaining a copy of the birth certificate, which is necessary to register the child for the purposes of healthcare, education and to obtain identity and travel documentation (in other words the basic necessities of life) costs HK\$140. If the parents fail to register the child within 42 days of birth, a copy costs HK\$280 and if they fail to register within a year, the cost rises to HK\$680 plus a further HK\$140 search fee. There is no discretion for case officers to review individual cases and, where appropriate, waive the cost of issuing a birth certificate, not even for the ultra poor. At present, when necessary, PF is funding the cost of obtaining these copy birth certificates.

7.4. Recommendation: within the next 12 months, HKSAR government do review the reasons for delays in issuance, ensure time-bound issuance of Birth Certificates and significantly reduce (to photocopying cost levels) or ideally waive the cost of obtaining copy Birth Registration Certificates.

7.5. The only exceptions to the hardship these children suffer are: (1) when the biological father is Chinese or is a Hong Kong Permanent Resident, provided he can be found and is also willing to attest to his paternity at the Birth Registry; (2) when the parent has applied for a non-refoulement claim on behalf of the child, and the child is issued a recognizance paper and will then become entitled to humanitarian support from the Social Welfare Department via International Social

Services Hong Kong. While these babies do have access to accommodation, food, medical care, transportation and education, this support is minimal and, for children, developmentally limiting.

8. Children's Commission: The establishment of a Children's Commission has long been mooted and called-for by numerous stakeholders in Hong Kong. PF welcomes the HKSAR Government's stated commitment to establishing a Children's Commission.

8.1. Recommendation: it is essential that the Children's Commission be independent, established by statute, and accord fully with the Paris Principles.

9. Restraint of Children: We are aware of 6 cases of very young children who had been sent to hospital and tied to their beds and/or being placed into restraint vests when medically that treatment was not justified.

9.1. Recommendation: that the rules and procedures as to when a child may be physically restrained be reviewed and overhauled as soon as possible and in any event, within in the next 6 months.

10. Children in Prison: Beyond the most basic elements of care, there are no mechanisms to cater for children who remain with their parent in prison. In HKSAR, babies are permitted to stay with their mother in prison until the child is 3 years old.

10.1. Recommendation: that the Prison Rules (Cap 234A, s21) be urgently reviewed to ensure that the medical, social and educational needs of these children are properly provided for during this critical formative period of their lives. Given that this involves extremely young children, this needs to be done as a priority.

11. Children in Education: The Race Discrimination Ordinance (**RDO**) is the ordinance within the spread of "anti-discrimination" legislation with a specific exemption for government powers and functions. This renders ethnic minorities like PF clients especially vulnerable. The RDO does not prohibit discrimination on the grounds of nationality or residency status. These gaps persist in defiance of recommendations from CERD(2009) and HRC(2013). The problems extend to the area of education, including of the very young. State kindergartens routinely reject applications for placement from the ethnic minority children PF serves. Additionally, the children we serve, because of their lives, suffer from developmental delays but are not diagnosed or treated.

11.1. Recommendations: that a wholesale review be conducted as to why children are segregated based on race rather than language ability. Also that the currently used nomenclature of 'Ethnic Minority' education be replaced with either 'Chinese as a second language' or 'Linguistic Minority' education - immediately. That government powers and functions no longer be exempted from the RDO. That early special needs assessments be extended to all children in HKSAR, regardless of immigration status.

12. Child Asylum Seekers: At practical level, we observe that the '*best interests of the child*' principle has not been given adequate consideration when designing government policies that impact asylum-seeking children as demonstrated by: 1) Inadequate representation of the child in the non-refoulement claims process. In most cases the child is accompanied by the mother and/or father and the child's

asylum claim is adjunct to that parent or family's claim without separate consideration. However, the status and concerns of the child and parent(s) are not always fully aligned. For example, the parent(s) might be unfit and incapable, for lifestyle and/or health reasons, of being the child's primary carers. The child itself might also have serious health and/or developmental problems requiring more advanced medical attention and treatment and therefore protection. Unfortunately, there exists currently no mechanism whereby the child's individual circumstances are investigated in order to establish whether the child might be at such serious risk that separate consideration of that child's claim for asylum is justified.

12.1. Recommendation: that HKSAR government and appointed judicial and administrative bodies consider children's claims for asylum separately and with immediate effect and do put in place free legal representation for those children.