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Clerk to Bills Committee on Employment (Amendment) (No. 2) Bill 2017
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

PathFinders Limited

Written Submission

to the

Bills Committee on Employment (Amendment) (No. 2) Bill 2017

in advance of a

Meeting with Deputations and the Administration on 13 October 2017

Details: <http://www.legco.gov.hk/yr16-17/english/bc/bc60/general/bc60.htm>

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Introduction

PathFinders welcomes the proposed amendments to the Employment Ordinance and the Employment Agency Regulations to increase penalties for certain offences relating to Employment Agencies and tighten controls on employment agency licenses.

However, PathFinders has concerns that important failings in the prosecution and regulation of employment agencies are not addressed by his amendment. This paper outlines our recommendations to strengthen further the legislative proposals in the Employment (Amendment) (No. 2) Bill 2017 (“the Bill”).

1) Low rates of enforcement and the need for increased collaboration across key stakeholders.

According to one study, over 90% of Indonesian Foreign Domestic Workers (‘FDWs’) in Hong Kong are, illegally, charged more than the mandated agency fee cap.¹ Under such fee structures, a significant portion of a FDW’s early wages goes towards paying debts owed to their Employment Agency(‘EA’).

According to a report from *South China Morning Post* dated 25 June 2017, the Labour Department conducted 1,816 inspections between January 2016 and May 2017. As a result, 13 EAs (0.72%) were convicted and five (0.28%) lost their licences. The heaviest fine incurred by an EA during that period was a mere HK\$30,000.²

In July 2017, an EA was convicted and fined HK\$10,000 for overcharging a FDW. According to the Labour Department this was the first EA convicted of overcharging during 2017.³

In May 2017, ‘Students Against Fees and Exploitation’ conducted an undercover survey by interviewing a number of FDWs and 100 EAs over 7 months and found that more than 70% of EAs overcharged FDWs’ commissions by up to 13 times the statutory ceiling, withheld passports or engage in other illegal practices.⁴

While welcoming the government’s proposal to increase significantly the penalties imposed on EAs who overcharge FDWs on commissions, this can only be an effective deterrent if rigorously enforced. PathFinders calls on the Hong Kong government to enhance its efforts in prosecuting EAs for overcharging FDWs and to require, where feasible, that government departments (and in particular Immigration, the Security Bureau, and the Labour Department) work in collaboration with each other in investigating EAs who overcharged FDWs’ commissions beyond the statutory ceiling.

2) Loaning Services provided by EAs and the link between confiscation of passports, the Delphi method and loan bondage

¹ Justice Centre Hong Kong, *Coming Clean: The Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour Amongst Migrant Domestic Workers in Hong Kong*, March 2016, accessed September 13, 2017, <http://www.justicecentre.org.hk/framework/uploads/2016/03/Coming-Clean-The-prevalence-of-forced-labour-and-human-trafficking-for-the-purpose-of-forced-labour-amongst-migrant-domestic-workers-in-Hong-Kong.pdf>.

² Raquel Carvalho, “Sevenfold increase in fines proposed for those overcharging domestic helpers in Hong Kong,” *South China Morning Post*, June 25, 2017, accessed September 13, 2017, <http://www.scmp.com/news/hong-kong/law-crime/article/2099840/seven-fold-increase-fines-proposed-those-overcharging?edition=hong-kong>.

³ “Employment agency fined for overcharging foreign helper,” *The Standard*, July 3, 2017, accessed September 13, 2017, <http://www.thestandard.com.hk/breaking-news.php?id=92746>.

⁴ See n 2 above. See also “70% of employment agencies overcharge domestic helpers,” *EJ Insight*, May 11, 2017, accessed September 13, 2017, <http://www.ejinsight.com/20170511-70-of-employment-agencies-overcharge-domestic-helpers/>.

PathFinders' clients have reported that EAs, while carrying out non-EA related business (e.g. money lending under a valid Money Lenders Licence under the Money Lenders Ordinance (Cap. 163), frequently, illegally, confiscate the FDWs' passport as a collateral for a loan.

Under the Theft Ordinance (Cap. 210), any other person withholding a FDW's passport without the latter's consent commits an offence.

On 24 May 2017, the Secretary for Labour and Welfare, in replying to a written question ('LCQ') raised by Mr Paul TSE, a Legislative Council Member, stated that the Police did not maintain any figures concerning among other things:

- I. the number of loanshark syndicates which made loans to FDWs;
- II. the number of loanshark syndicates broken by the Police in each of the past five financial years;
- III. the total amount of loans involved;
- IV. the number of persons arrested;
- V. the number of cases where employers are harassed by finance companies to collect debts from their FDWs; and
- VI. the total amount of debts involved.⁵

Prompted by the LCQ, the Police conducted an operation codenamed Operation POLARINE in March 2017, and successfully neutralized a local loanshark syndicate and arrested its members. The syndicate was reported to have loaned money to around 1,200 Filipino domestic helpers at an annual interest rate of 120%, involving a sum of over \$10 million.⁶

The holding of a borrower's passport until the loan has been repaid has become widespread practice in the FDW community.⁷ It is unlawful to force a FDW to surrender his/her passport and other personal documents (e.g. employment contract). At present, the only feasible remedy is for the FDW to contact the Police (who will then notify the relevant Consulate General in Hong Kong) or to call the Consulate for assistance, and the officers at the Consulate will help re-issue a new passport to the victim.⁸

As such, PathFinders recommends that the Hong Kong government should enhance its efforts in investigating and, where appropriate, preventing and prosecuting EAs who engaged in money lending business in violation of any conditions of their licences.

3) The EA Code of Practice is not available in the key languages of the sending country workers

In January 2017 the Labour Department brought into force a Code of Practice for Employment Agencies ("the Code")⁹, which sets out the statutory requirements that EAs must comply with as well as the minimum standards which the Commissioner for Labour expects of an EA, including the requirement that EAs should avoid getting involved in the financial affairs of job seekers.

⁵ Legislative Council, "LCQ21: Problems relating to foreign domestic helpers being debt-ridden and overcharged by intermediaries for foreign domestic helpers," 24 May 2017, accessed September 13, 2017, <http://www.info.gov.hk/gia/general/201705/24/P2017052400645.htm>.

⁶ See n 5 above.

⁷ Michelle Chan and Mary Ann Benitez, "Loan sharks arrested for preying on helpers," *The Standard*, March 15, 2017, accessed 21 August 2017, <http://www.thestandard.com.hk/section-news.php?id=180742>.

⁸ "Eight Filipino helpers, HK couple busted for loan sharking," *The Standard*, March 14, 2017, accessed 22 August 2017, <http://www.thestandard.com.hk/breaking-news.php?id=86133>.

⁹ Labour Department, *Code of Practice for Employment Agencies*, January 2017, accessed September 13, 2017, http://www.eaa.labour.gov.hk/res/pdf/CoP_Eng.pdf.

However, the Code is only available in English. FDWs coming to Hong Kong for the first time are particularly vulnerable to EA malpractices, yet often have limited understanding of English. PathFinders therefore recommends that the LD provide the Code in multiple languages (Tagalog, Indonesian, Thai, Nepali, Myanmar, Urdu, Hindi, Bengali and Sinhala) so as to increase the awareness and oversight of the regulations covering private EAs by FDWs, the corresponding Consulates General in Hong Kong and in the sending countries.

4) The Labour Department's role in educating the public and EAs about FDWs maternity rights, and raising awareness regarding unlawful dismissal of pregnant FDWs and sex discrimination based on maternity or pregnancy

Many PathFinders' clients have reported being pressured by EAs to resign when they are pregnant. For instance, one PathFinders' client was forced to resign in the EA's presence after serving Notice of Pregnancy on her employer. The EA told the client to sign the resignation letter because she was pregnant. The EA had even already informed Immigration of her resignation, leaving the client vulnerable to having her visa terminated at any time. The EA also threatened the client with the possibility of being pregnant, giving birth and having to raise her child in jail.

In another case, a PathFinders' client was coerced by the EA to sign a receipt for wages and payment of the cost for a one-way plane ticket to her home country after serving Notice of Pregnancy to her employer. The client was then immediately, unlawfully, fired and forced to move into a boarding house.

PathFinders recommends that the Labour Department should not only raise the awareness of employers regarding unlawful dismissals of FDWs on the ground of pregnancy; but also raise the awareness of EAs about FDW's maternity rights and penalize EAs for unlawfully inducing FDWs to resign based on pregnancy.

5) Extending the Statute of Limitations for prosecuting erring EAs

Currently, the time limit for prosecuting EAs that breach both the Employment Ordinance (Cap. 57) ("EO") and the Employment Agency Regulations (Cap. 57A) ("EAR") is 6 months. Such offences under the EO are summary offenses in nature. However, with the increased penalties proposed in the Bill, the new EO will include indictable offenses, which carry no formal time limit for commencement of prosecution.

FDWs who have been overcharged by EAs often receive letters from the Employment Agencies Administration ("EAA") saying that their complaints against offending EAs were time barred because it has been more than 6 months since the offence.

Given that FDWs often lack the understanding or courage to make a complaint against their recruiters in the first few months of their employment, the time limit for prosecuting erring EAs should be extended from six months to one year from the date the offence of overcharging was committed.

Recommendations

We call upon the Immigration Department, Security Bureau and Labour Department to:

- Enhance its efforts in prosecuting EAs for overcharging FDHs on commissions beyond the statutory ceiling; and

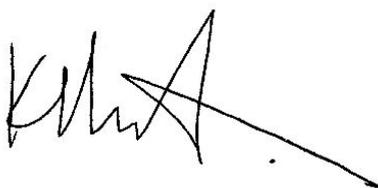
We call upon the Labour Department to:

- Enhance its efforts in investigating and, where appropriate, prosecuting EAs who have engaged in money lending business in violation of any conditions of their licence;
- Provide the Code of Practice for Employment Agencies in multiple languages so as to raise the awareness and oversight of private EAs by the Consulates General in Hong Kong of FDH's home countries;
- Raise the awareness of employers regarding unlawful dismissals of FDHs on the ground of her pregnancy;
- Raise the awareness of EAs about FDH's maternity rights and introduce sanctions against EAs who unlawfully induce FDHs to resign based on their pregnancy.

We also call upon the Department of Justice and Labour Department to:

- Extend the time limit for prosecuting erring EAs from 6 months to 1 year from the date the offence of overcharging was committed.

Thank you for taking the time to consider PathFinders' submission.



Kay McArdle
CEO, PathFinders

About PathFinders Limited

PathFinders is a Hong Kong-based charitable organization in Special Consultative Status with the Economic and Social Council since 2017. Our goal is to ensure that the most vulnerable children in Hong Kong, and their migrant mothers, are respected and protected. We believe that every child deserves a fair start in life. PathFinders was founded in 2008 after rescuing two babies born in poverty to migrant women in Hong Kong. Since then, PathFinders has helped over 4,600 babies, children and women. In a typical year, between 70-80% of the women we help are Indonesian nationals. In 2016 alone, we provided assistance to 198 Indonesian women nationals.

For more information please visit: www.pathfinders.org.hk