



**PathFinders**<sup>TM</sup>  
Migrant Children Matter

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**PathFinders Limited**

**Submission to the Hong Kong Equal Opportunities Commission**

**Discrimination Law Review [“DLR”]**

**31 October 2014**





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### **About PathFinders:**

PathFinders (Hong Kong Special Administrative Region (HKSAR) Registered Charity IRD No.91/10272) was founded in 2008 in response to the specific challenges that certain migrant children born in Hong Kong can face. Most often, the children PathFinders serves are those of Migrant Domestic Workers (MDWs).

PathFinders has supported close to 2,500 MDWs and children to find a safe and sustainable future. We do this by:

- Providing emergency humanitarian first response to address the immediate basic needs of mother and child including shelter, food, medical care and clothing;
- Delivering practical and professional skills workshops which educate mothers on their legal and human rights and obligations, and also equip women with skills to build a sustainable future for their families; and
- Researching and advocating for change towards a better future for all women and children, either within HKSAR or in their country of origin.

It is a sad reality that MDWs can face a desperate conundrum upon becoming pregnant in HKSAR. Limited protection, at law and in practice, offers little support to pregnant MDWs financially and practically. Social and cultural stigmas exacerbate these problems.

Many women either experience or fear discrimination and/or unlawful termination of their employment upon becoming pregnant. Many more take little comfort or protection from ambiguous or incomprehensive employment contracts, leading to uncertainty around their maternity rights and the obligations on the employer with respect to living arrangements for both mother and child. Others suffer abuse from their employer or experience discrimination through public and governmental services such as documenting their child and accessing essential perinatal and child public healthcare.

Ultimately these women face difficult choices: to remain in sub-optimal employment in Hong Kong; be repatriated to their home countries; or put themselves and their child in the dangerous and illegal situation of remaining in Hong Kong without a visa.

### **Background to PathFinders' DLR Submission to the EOC:**

PathFinders welcomes the opportunity to make submissions as part of the EOC's DLR. The children and mothers PathFinders supports experience a host of discriminatory practices and prejudices.

In this document we set out our responses to the specific questions posed by the EOC. For further information, please also refer to the following submissions and interventions as detailed on PathFinders' website: <http://www.pathfinders.org.hk/public/resources/pathfinders-material/>



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PathFinders' Advocacy Reports:

- 2014 – UN International Convention on Economic Social and Cultural Rights Submission
- 2014 – HKSAR Legislative Council Oral Intervention under ICESCR to the Constitutional Affairs Panel
- 2014 – HKSAR Legislative Council Oral Intervention to the Manpower Panel
- 2014 – UN Convention on the Elimination of All Forms of Discrimination Against Women Submission
- 2014 – HKSAR Legislative Council Oral Intervention on the CRC to the Constitutional Affairs Panel
- 2013 – UN Convention on the Rights of the Child (CRC) Submission

Within PathFinders' DLR submission below, we focus on the specific challenges faced by migrant children in crisis in Hong Kong and their migrant mothers. If you have any questions, please contact us.

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## PathFinders

### DLR Submission:

#### Note:

Names of individuals or organizations that send submissions may be published in the consultation report. If you do not wish your name to be published, please indicate by checking the box below. Please note that the contact details of individuals and organizations will not be published in any event.

- We do wish our name to be published in the consultation report.**

All personal data submitted will only be used for purposes related to the present public consultation exercise, and will be destroyed within 12 months after the close of the public consultation exercise.

***Please give us your views in the spacing under the respective consultation question below. You may give us your views on separate sheets where necessary.***

## CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW

### Question 1

Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?

**Yes. Consolidation will reduce repetition and inconsistencies and make it easier for users to navigate the law.**

## CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS

### Question 2

Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?

**Yes.**

### Question 3

Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?



**Yes. Protection from sex discrimination applies to both women and men. Neutral language should be used for all sex discrimination provisions.**

#### Question 4

Do you think there should be express reference to protection from discrimination during maternity leave?

**Yes. This is crucial. Express reference will avoid ambiguities in interpretation and uncertainties in court decisions.**

**PathFinders recommends that protection should extend beyond just the maternity leave period to cover the whole peri-natal period (i.e. the full period of pregnancy, birth and at least 6-12 months after the birth).**

**PathFinders also recommends that the legislation specifically include a provision expressly stating that maternity protection(s) extend(s) to migrant and domestic workers.**

#### Question 5

Do you think there should be protection from discrimination on grounds of potential pregnancy?

**Yes. This would protect the women PathFinders encounters who are forcibly required by their employer to take contraceptives and/or to report when/whether they have/miss their period.**

#### Question 6

Do you think that the protected characteristic of marital status should be amended to apply to “relationship status” and expressly protect persons in de facto relationships? If so, how should de facto relationships be defined? Should it be defined to include protection for both heterosexual relationships and same-sex relationships? Should this also be extended to protection from discrimination relating to former de facto relationships?

**PathFinders submits that “relationship status” should be expanded to include common law marriages and de facto relationships, both current and previous.**

#### Question 7

Do you think that the current definition and scope of what constitutes a disability is appropriate and proportionate? Or should it be amended in any way, for example by qualifying that the physical or mental impairment must be substantial and/ or likely to last a certain period?

**No, the current definition and scope of what constitutes a disability is not sufficient since it does not expressly include pregnancy.**

**PathFinders submits that the definition of disability be expanded to refer to any physical or mental illness arising from pregnancy during the ante-natal, maternity and post-natal period. In our view,**



**there is no need to qualify the severity or the period of illness since this would reduce the level of protection offered under the current legislation.**

#### Question 8

Do you think that the protected characteristic of family status should be redefined as “family responsibilities” in order to clarify that it relates to persons who have responsibility for the care of immediate family members?

**No strong view.**

#### Question 9

Do you think that the scope of family status discrimination should be expanded to include protection where persons in de facto relationships care for immediate family members? If so, how should de facto relationships be defined? Further, do you think the protection should be extended to situations where a person cares for an immediate family member from a former marriage or de facto relationship?

**Yes, family status protection should include de facto relationships and should be defined to cover common law relationships. The protection should also be extended to caring of an immediate family member from a former marriage or de facto relationship.**

#### Question 10

Do you think that there should be express reference in the definition of family status to include breastfeeding women?

**Yes. Under the existing SDO, there is currently no express protection of breastfeeding women. While it is likely that a claim could be brought by under the FSDO on the basis of having the care of an immediate family member, the protection for breastfeeding women deserves absolute specificity and articulation.**

#### Question 11

In relation to the protected characteristic of race, do you think that any or all of the characteristics of nationality, citizenship, residency or related status should be added as protected characteristics?

**Yes. PathFinders supports the inclusion of all these characteristics which will particularly give protection to migrant domestic workers in the services and treatments they receive in hospitals, social welfare, legal enforcement agencies, immigration department, correctional services department and the judicial system in Hong Kong.**

#### Question 12

In relation to residency status or related status, if you think there should be protection, how should it be defined?



**PathFinders believes that there should be protection and proposes that the residency status or related status should refer to anybody who is a lawful resident in Hong Kong, whether the residency is conditional or unconditional.**

#### Question 13

Do you think that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under section 8(3)(b)(i) and (ii) should be repealed?

**Yes.**

#### Question 14

Do you think that the exception to race discrimination on the grounds of length of residence in Hong Kong under section 8(3)(c) should be repealed?

**Yes.**

#### Question 15

Do you think that the exception to race discrimination on the grounds of nationality, citizenship or resident status of a person in another country under section 8(3)(d) should be repealed?

**Yes.**

#### Question 16

Do you think that consideration should be given to an exception to discrimination on grounds of residency status, but only where the relevant requirement is for a legitimate aim and is proportionate?

**Any requirements for an exception to discrimination on the ground of residency status must be clearly spelled out, specific and limited in scope.**

### CHAPTER 3: FORMS OF PROHIBITED CONDUCT

#### Question 17

Do you think that the definition of direct discrimination should be amended to:

- include any less favourable treatment on grounds of a protected characteristic; and
- made clear that for direct disability discrimination a comparison can be made with persons without that particular disability (including persons with a different disability)?

**Yes.**



### Question 18

Do you think that there should be a different test for direct pregnancy discrimination which states:

“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably”?

**Yes. PathFinders proposes that the characteristics should include all health complications, physical and mental, arising from or connected with pregnancy and that such protection should cover the entire child-bearing timeline, i.e., potential pregnancy, pregnancy, maternity and the post-natal and breastfeeding periods.**

### Question 19

How to protect pregnant staff from dismissal after maternity leave on the pretext that the temporary replacement performed better?

**PathFinders proposes:**

- 1. the introduction of a statutory presumption that dismissal from employment within 6 months after the end of the maternity leave is unlawful; and**
- 2. The employer has the burden of rebutting that presumption.**

### Question 20

Do you think that the definition of indirect discrimination should be amended to:

- refer to a “provision, requirement or practice”; and
- set out the meaning of “justifiable” as where a provision, requirement or practice “serves a legitimate objective and bears a rational and proportionate connection to the objective”?

**Yes.**

### Question 21

Do you think that there is a need for introducing specific equal pay for equal value provisions?

**Yes. Equal pay for work of equal should apply to all workers in Hong Kong, migrant or otherwise, including migrant domestic workers.**

### Question 22

Do you think that discrimination due to being accompanied by an assistance animal should be added as a category of disability discrimination?

**No comment.**





### Question 23

Do you think that a new category of discrimination arising from disability should be introduced?

**Yes. Pregnancy should be expressly included as a disability.**

### Question 24

Do you think that new distinct duty to make reasonable accommodation for persons with disabilities should be introduced in the discrimination legislation and that it should be based on the United Kingdom model?

**Yes.**

**No comment on which jurisdiction's model is best suited to Hong Kong.**

### Question 25

Do you think that harassment should be prohibited in relation to the protected characteristics of sex, pregnancy, family status and marital status?

**Yes.**

### Question 26

Do you think that the definition for harassment for all protected characteristics should be "A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."?

**Yes.**

### Question 27

Do you think there should be protection from harassment for all protected characteristics?

**Yes.**

### Question 28



In relation to sexual harassment, do you think that the definition should be the same as other forms of harassment, other than stating in addition that it is unwanted conduct of a sexual nature?

**Yes.**

#### Question 29

Do you think that there should be provisions on intersectional direct and indirect discrimination, as well as harassment? If so, do you think that there should be protection from intersectional discrimination on the basis of two or more protected characteristics?

**Yes.**

#### Question 30

Do you think that:

- there should be protection from direct and indirect discrimination, and harassment by association across all the protected characteristics;
- and if so, do you think “association” should be broadly defined to include association by immediate family, other relatives, caring responsibilities, friendships or working relationships?

**Yes.**

#### Question 31

Do you think that there should be express protection from direct and indirect discrimination, and harassment by perception and imputation across all the existing protected characteristics?

**Yes.**

#### Question 32

Do you think that there should be a defence for principals to liability from unlawful conduct of agents, where the principal took reasonably practicable steps to prevent the unlawful conduct?

**Yes. But to avoid deliberate evasion of liability by the principals, there should be clear guidelines as to what the reasonable steps expected to be taken by principals are.**

#### Question 33

Do you think that the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics?

**Yes.**

## CHAPTER 4: FIELDS OF PROHIBITED CONDUCT



#### Question 34

Do you think that there should be express provisions in the discrimination laws that it applies to all public authorities, and that it is unlawful for them to discriminate in the performance of their functions and exercise of their powers?

**Yes. In particular, the express provisions should specifically apply to all government departments, public authorities and quasi-government authorities including to their outsourced service providers who perform functions and exercise powers on their behalf.**

#### Question 35

Do you think that there should be protection from racial discrimination in the exercise of the Government's functions and powers?

**Yes. There will not be equality for all racial groups in Hong Kong unless there are measures to restrict the Government's exercise of its functions and powers to prevent racial discrimination. In particular, migrant children and their mothers often face challenges when dealing with government departments and public authorities and it is critical that such protection is provided in the Ordinance(s).**

#### Question 36

Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?

**Yes, there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies. There should be an exception permitting disability discrimination where it is for a legitimate aim and proportionate.**

#### Question 37

Do you think that the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics?

**Yes.**

#### Question 38

Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the exception on the medium of instruction should be repealed?

**Yes. 45% of the children served by PathFinders in 2013 are Hong Kong residents. With their ethnic minority background, they are vulnerable to discrimination in education in kindergarten, primary and secondary schools as well as in vocational training.**

#### Question 39



Do you think that new harassment provisions should be introduced for all the protected characteristics which provide:

1. employer liability for harassment of employees by customers, tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;
2. common workplace liability on the person harassing but there is no employer/ employee relationship (e.g. volunteers harassed by another volunteer);
3. liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;
4. liability of service users for harassing the service providers;
5. liability of service users for harassing other service users;
6. liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;
7. liability of tenants and subtenants for harassing other tenants or subtenants; and
8. liability of the management of clubs for harassing members or prospective members?

**Yes to all the above.**

## CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY

### Question 40

Do you think that:

- Special measures provisions should be conceptualized and positioned within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and
- The definition of special measures should be made clearer as suggested in paragraph 5.18 in terms of their purpose, circumstances in which they can be used and when they should end?

**Yes.**

### Question 41

Do you think that there should be duties on all public authorities to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics?

**Yes. While there are guidelines on what steps public bodies should take in formulating and reviewing policies and measures, they are not mandatory. And these guidelines do not cover some of the most relevant functions serving ethnic minority groups, such as the Social Welfare Department, Police Department, Immigration Department, Correctional Services Department, Legal Aid Department, Housing Authority, Health Authority, Education Authority.**



## CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC

### Question 42

Do you think there should be provisions introduced which indicate that once the claimant establishes facts from which discrimination can be inferred, the burden of proof shifts to the respondent to show there was no discrimination?

**Yes. Shifting the burden of proof at this point should be clearly set out in the legislation.**

### Question 43

Do you think that, consistent with indirect disability discrimination provisions, damages should be able to be awarded for indirect sex, pregnancy, marital status, family status and race discrimination, even where there was no intention to discriminate?

**Yes. Intention is irrelevant to whether or not discrimination has in fact occurred. Intention can be taken into account when assessing the level of damages.**

### Question 44

Do you think that the discrimination laws should be amended to ensure the EOC can recover its legal costs where claimants are awarded costs?

**No comment.**

### Question 45

Do you think that for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices?

**Yes. As to whether or not the reason is for consistency with other powers, no comment.**

### Question 46

Do you think that the discrimination laws should contain an express power that the EOC may produce non-statutory guidance?

**Yes.**

### Question 47

Do you think that the formal investigation provisions should set out more clearly the distinction between general and specific investigations?

**No comment.**

### Question 48



Do you think that for reasons of consistency with the EOC's other powers, the EOC should be able to issue enforcement notices relating to discriminatory practices against persons with disabilities?

**In principle and not necessarily for reasons of consistency, PathFinders supports that the EOC should have the power to issue such enforcement notices. However, such notices should be expressly stated as not prejudicing (including specifically not impacting adversely time bars/limitations of any claims) the legal rights of a claimant to pursue claims in the courts including the Labour Tribunal and in both criminal and civil proceedings.**

#### Question 49

Do you think that in relation to formal investigations provisions, permitting voluntary binding undertakings should be introduced and be enforceable by the EOC?

**Yes.**

#### Question 50

Do you think that the discrimination laws should expressly provide that the EOC has powers to conduct research and education in relation to all the protected characteristics?

**Yes.**

#### Question 51

Do you think that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise:

- The Government on relevant existing and proposed legislation and policy; and
- On the Government's compliance with international human rights obligations relating to equality and discrimination?

**Yes.**

#### Question 52

Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae in court proceedings relating to any relevant discrimination issue?

**Yes. PathFinders supports this initiative in principal, provided the EOC obtains appropriate, prior consent to do so on an inter-partes basis. The scope and nature of the intervention/amicus powers of the EOC must be clearly defined.**

#### Question 53

Do you think that the EOC's power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?



**Yes. PathFinders supports this initiative in principal.**

Question 54

Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?

**Yes. Increased transparency is welcomed.**

Question 55

Do you think that a provision should be included in reformed discrimination laws providing for the maintenance of the independence of the EOC from the Government?

**Yes.**

Question 56

Do you think that in relation to Board members, applications should be openly invited and an independent panel established to interview and make recommendations for appointments?

**Yes. The Board members of the EOC should be independent from the Government and broadly representative of Hong Kong's diverse population. The EOC board appointments' committee members should be declared. The process of selecting and interviewing EOC Board members should be open and transparent.**

Question 57

Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?

**Yes. Eligibility criteria and requirements should be clearly stated and subject to formal review. The Board should be represented by diverse sectors of the community. A significant portion of the board should ideally have a minimum of 3 years' experience at board level, be that corporate or NGO.**

Question 58

Do you think that there should be a provision protecting EOC members and staff from personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?

**No comment.**

Question 59

Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?

**No comment.**



### Question 60

Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles? If so what structure and mandate should the Human Rights Commission have?

**Yes. A Human Rights Commission should be established in Hong Kong.**

**For the structure of the Commission, an Asia-wide and common law-wide comparative institutional human rights mechanisms review should first be conducted to determine best fit for Hong Kong.**

**The mandate of the Commission should include monitoring the performance of Hong Kong in relation to the UN conventions Hong Kong has or has not yet ratified, e.g. ICESCR, CRC, CEDAW, UN ILO Domestic Workers Convention 189 etc.**

## CHAPTER 7: EXCEPTIONS

### Question 61

Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?

**Yes.**

### Question 62

Do you think that the definition of genuine occupational qualifications (GOQs) should be reformed and made consistent across all the protected characteristics by defining them as:

“There is an occupational requirement which relates to a protected characteristic;

- the application of the requirement is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement; or, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

In relation to the protected characteristic of disability, the exception does not apply where a reasonable accommodation can be made to perform the occupational requirement.”?

**No comment.**

### Question 63

Do you think that the discriminatory training exceptions are unnecessary and should be repealed and incorporated within the scope of the definition of special measures?

**Yes.**





#### Question 64

Do you think that the charities exceptions should be amended to require a legitimate aim and proportionality in order to be lawful?

**No, PathFinders believes that charities usually have limited resources and therefore they should be free to determine who should benefit from their programmes provided they qualify as a charity within the s88 of the Inland Revenue Ordinance: <http://www.ird.gov.hk/eng/tax/ach.htm>.**

#### Question 65

Do you think that the Government should conduct a review of its New Territories small house policy?

**No comment.**

#### Question 66

Do you think that the Government should as soon as possible repeal the exceptions in the SDO relating to sex and:

- requirements for height or weight;
- granting pension benefits to surviving spouses and children of deceased public officers?

**Yes.**

#### Question 67

Do you think that the exception for numbers of men and women employed in the Correctional Services Department is unnecessary and should be repealed?

**No comment.**

#### Question 68

Do you think that the national security exception relating to sex is necessary, and if so do you agree that it should be amended to require proportionality?

**No comment.**

#### Question 69

Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?

**No comment.**

#### Question 70



Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons who are married and persons in a de facto relationship?

**Yes, the protection should be equal for married persons, people in common law marriages and those in de facto relationships.**

#### Question 71

Do you think that:

- the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and
- the exception in the SDO relating to reproductive technology should then be repealed?

**Yes.**

#### Question 72

Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be repealed?

**Yes.**

#### Question 73

Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?

**Yes.**

#### Question 74

Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?

**Yes.**

#### Question 75

Do you think that the system under the Minimum Wage Ordinance by which persons with disabilities can assess their productivity has worked effectively? Do you think that the exceptions under Items 1 to 3 of Schedule 5 of the DDO should therefore be retained and/or reformed in any way or repealed?

**No comment.**

#### Question 76



Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?

**Yes.**

**Question 77**

Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?

**Yes.**

**END**

