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PathFinders Limited

**Written Submission
to**

**Hong Kong SAR's Labour and Welfare Bureau
for inclusion in its submission to China
as part of**

**China's Ninth Report under the United Nations
Convention on the Elimination of All Forms of Discrimination against Women ['CEDAW']**

Submitted on 31 May 2018

Introduction

PathFinders is a Hong Kong-registered charity with tax-exempt status and is an organisation in Special Consultative Status with the United Nations Economic and Social Council since August 2017. PathFinders works to ensure that the most vulnerable children born in Hong Kong and their migrant mothers are respected and protected.

From inception in 2007 to date, PathFinders has helped over 5,500 babies born in Hong Kong and their migrant mothers. The majority of the mothers are current or former foreign domestic workers (**FDWs**) from Indonesia and the Philippines. In 2017, around 80% of the children PathFinders helped were conceived in Hong Kong.

Given that 1 in 7 women of reproductive age in Hong Kong is employed as a FDW, it should be anticipated and expressly provided for (at contract, visa, policy and ideally also at legislative levels) that some will have children while employed here.

Comments on HKSARG's Outline of Topics

Article 1: Defining discrimination

(1) Discrimination in employment

1. In its Outline of Topics, the HKSARG stated that the definition of discrimination remains unchanged.¹
2. In PathFinders' experience, pregnant FDWs are too often unlawfully dismissed by their employers because of their pregnancy. Some might be replaced by another FDW after they finish their statutory maternity leave. Further, some employers and/or agents force their FDWs to take contraceptives, to report whether they have had or missed their period, or even require their employee to take a pregnancy test. These actions constitute potentially unlawful and discriminatory conduct under the Sex Discrimination Ordinance (**SDO**), Disability Discrimination Ordinance (**DDO**) and Family Status Discrimination Ordinance (**FSDO**).
3. Unfortunately, FDWs, their employers, employment agents and other stakeholders (such as government departments) are unaware of or do not understand a pregnant FDW's rights under the anti-discrimination ordinances. We therefore urge the HKSARG to make the following amendments or enhancements to the anti-discrimination ordinances:

¹ Paragraphs 3-4, page 1, Outline of Topics

- a. To consolidate the four existing anti-discrimination ordinances into one single ordinance;
- b. To include express reference to the applicability of anti-discrimination ordinances to migrant and domestic workers;
- c. To include in the anti-discrimination ordinances express reference to prohibition of discrimination during maternity leave and the entire peri-natal period (i.e. the full period of pregnancy, birth and at least 6-12 months after the baby is born);
- d. To include express protection from discrimination on grounds of potential pregnancy;
- e. To expressly include pregnancy and any physical or mental illness arising from pregnancy during the ante-natal, maternity and post-natal period in the definition of “disability”;
- f. To expressly include breastfeeding women in the definition of “family status”;
- g. To provide for a different test for direct discrimination for pregnancy, i.e. “on the ground of her pregnancy, sickness or other characteristic that pertains generally to women who are pregnant or potentially pregnant, a person treats her unfavourably”;
- h. To provide for a statutory presumption that dismissal of a female employee within six months after the expiry of her maternity leave constitutes discrimination unless the employer provides evidence to rebut the same; and
- i. To expressly prohibit harassment on grounds of pregnancy, family status and marital status.

(2) *Discrimination in provision of public services*

4. PathFinders’ mothers and children often encounter difficulties and discrimination when accessing services in various government departments, including the Social Welfare Department, Hong Kong Police Force, Immigration Department, Correctional Services Department, Legal Aid Department, Housing Authority, Hospital Authority (public hospitals), and Education Bureau, whose front line staff are often insensitive, ignorant or unable to respond to the cultural and linguistic needs of FDWs. Front line workers often turn away FDWs who want to access services or make it difficult for FDWs to understand the process to obtain services. Further, FDWs are also often denied services because of their immigration, or lack of immigration, status. These acts and omissions potentially constitute discrimination based on race under the Race Discrimination Ordinance (**RDO**).
5. PathFinders urges the HKSARG to:
 - a. Reduce barriers to accessing government services and understanding cultural sensitivities faced by pregnant FDWs or FDWs with children by providing translators and/or training of front line staff to improve communication and reduce the risk of misunderstanding;

- b. Educate front line staff on how to obtain information about the rights of FDWs including the services available to them;
- c. Improve inter-government-department collaboration, communication and cooperation given the multi-dimensional issues PathFinders' clients face;
- d. Review and revise the RDO to ensure that FDWs are protected in the treatment and services they receive in government departments, hospitals, social welfare, legal enforcement agencies, immigration department, correctional services department and the judicial system in Hong Kong and ensure that all public authorities have a duty to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics.

Article 2: Obligations of states parties

6. In its Outline of Topics, the HKSARG stated that it will address paragraphs 50 – 51 of the Concluding Observations with regard to the Women's Commission (**WoC**) and inform the Committee of any significant developments in respect of areas such as relevant provisions in the Basic Law and the Hong Kong Bill of Rights; the four anti-discrimination ordinances and changes in the other areas of the law regarding the protection of women; the work of the Equal Opportunities Commission (**EOC**); and the work of the WoC.²

(1) Women's Commission

7. In its Concluding Observations on the combined seventh and eighth periodic reports of China, the Committee expressed concerns that the WoC has a weak mandate and lacks the necessary resources to undertake gender-mainstreaming and other activities³.
8. PathFinders is further concerned that the WoC expressly excludes foreign domestic workers from its statistics and reports and does not have a dedicated, independent office looking after the rights of migrant workers, including FDWs.
9. We therefore urge the HKSARG to undertake the following with respect to the WoC to strengthen the protection of FDWs:
 - a. To require the WoC to research and report on the status of FDWs, including pregnant FDWs, in Hong Kong;

² Paragraph 5, pages 1-2, Outline of Topics

³ Paragraphs 50-51, Concluding Observations of the Committee on the Elimination of Discrimination against Women on the combined seventh and eighth periodic reports of China

- b. To create an office, working group, task force, or similar, within the WoC tasked with watching over, and speaking out for, this majority female population;
- c. To conduct a review of the structure of the WoC to ensure its independence and that it has a voice which truly represents and lobbies for the full spectrum of women in Hong Kong, including FDWs, and which is specifically tasked with implementing CEDAW recommendations.

(2) *Equal Opportunities Commission*

10. PathFinders is concerned that EOC's complaint-driven approach jeopardizes access to equal opportunities by FDWs who may be subject to triple discrimination on the basis of their sex, ethnic background and pregnancy. Pregnant FDWs may not be able to lodge a complaint due to the lack of awareness of their rights, or their cultural predisposition to non-confrontation, or pressure from their employers to resign from their job. Further, filling in a complaint form (in a foreign language) and gathering evidence of discrimination are often beyond the knowledge and skill of a FDW.
11. We therefore urge the HKSARG to:
 - a. Require the EOC to take a more proactive approach in promoting and educating relevant parties about equal opportunities, especially regarding vulnerable groups including pregnant FDWs;
 - b. Require the EOC to take a more proactive approach in investigating alleged pregnancy, sex and race discrimination, for example to interview the FDW for evidence and take more of a leadership role for this less well-educated population and then, if appropriate, initiate investigation and prosecution.

Article 3: Appropriate measures

12. In its Outline of Topics, the HKSARG stated it will update the Committee on developments on studies, research and data collection on women including the collection of sex-disaggregated statistics, surveys and researches conducted by the WoC⁴.
13. We urge the HKSARG to require the WoC to research, collect data and report on the status of FDWs, including pregnant FDWs and FDWs who give birth to children in Hong Kong.

Article 4: Temporary special measures

⁴ Paragraph 6, page 2, Outline of Topics

14. Regarding maternity leave for pregnant FDWs, please see our comments below regarding Article 11 (paragraphs 21-23).

Article 5: Stereotyping and prejudices

15. PathFinders is concerned that there is an overall lack of societal understanding and support for the rights of pregnant FDWs. In particular, employers and employment agencies often ensure that FDWs are not aware of their rights and/or actively obfuscate and/or misinform them of their rights. The lack of societal understanding and support for foreign domestic workers rights extends to government service providers, including public hospitals and other government departments (e.g. Social Welfare Department, Immigration Department, Labour Tribunal) whereby front line staff can be extremely insensitive to, ignorant of, or simply not equipped personally or professionally to respond to the situational and cultural needs of foreign domestic workers.
16. We urge the HKSARG to:
 - a. Educate FDWs, their employers and employment agencies about their respective rights and obligations, for example require employers to attend education sessions about the rights and obligations of employers of FDWs as a precondition of being able to hire a FDWr;
 - b. Address the barriers pregnant FDWs experience accessing government services by providing translators and better training front line staff to improve communications, to reduce the service gaps and bias and to improve understanding and tolerance.

Article 6: Exploitation of women

17. In PathFinders' experience, FDWs are highly vulnerable to abuse and exploitation. PathFinders has clients who suffered from some sort of exploitation, and/or physical, sexual or emotional abuse initiated by their employers, or by someone in the employer's family or their relatives. Such abuse has included rape, sexual assault, physical assault, withholding of identification documents, withholding and non-payment of salary, and threats of abuse.
18. Further, pregnant FDWs who are unlawfully dismissed are highly vulnerable to trafficking and/or abuse as they and their child are often rendered homeless and without food or income after being dismissed.

19. In PathFinders' experience, these victims of domestic, sexual violence, and/or exploitation often do not report to the authorities because they fear losing their jobs, pressure from employers, agents or other parties, debts, or lack knowledge about what assistance is available to them. Further, even if victims report to police, the police or other authorities might not necessarily do anything to protect them, or to prosecute the perpetrators. We too often see the victims being prosecuted themselves.
20. Regarding domestic and sexual violence, PathFinders urges the HKSARG to:
 - a. Educate FDWs that sexual and domestic violence is a crime: design and implement a culturally and linguistically appropriate communication plan to educate FDWs, employment agencies and employers that violence in all its forms is a crime in Hong Kong;
 - b. Review, clarify and enhance forms of victim support: communicate clearly-publicized guidelines about what forms of victim support are available including criminal compensation and protection against whistle-blowing; ensure FDW victims are afforded the same level of victim protection and support as other victims including alternative safe-shelter options;
 - c. Enable reporting through other media: develop and publicize media, including social media, hotline and SMS avenues that operate 24 hours, through which FDWs can report allegations of rape and other criminal acts of violence to the police and other appropriate crisis intervention services;
 - d. Review and revise immigration policy: allow FDWs who are victims of sexual violence and who become pregnant to remain in Hong Kong on a visa that categorizes her as a resident and therefore an eligible person for the purposes of accessing public health and welfare services; and
 - e. Relax or waive the live-in requirement for a FDW who lodges a complaint of domestic / sexual violence against her employer pending completion of the police investigation and prosecution.
21. Regarding trafficking in persons, PathFinders echoes the Committee's last Concluding Observations regarding this issue and in particular urges the HKSARG to:
 - a. Identify the root causes of trafficking in women and girls and ensure the rehabilitation and social integration of victims, including providing victims with access to shelters, legal, medical and psycho-social assistance, and alternative income-generating opportunities;
 - b. Undertake a comprehensive study with a view of collecting data on the extent and form of trafficking in women and girls;

- c. Intensify efforts aimed at bilateral, regional and international cooperation to prevent trafficking;
- d. Extend the applicability of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (**Palermo Protocol**) to Hong Kong SAR;
- e. Adopt comprehensive anti-trafficking legislation in order to criminalize the perpetrators and protect the victims.

Article 11: Equality in Employment and Labour Rights

22. FDWs are protected from employment termination and pregnancy discrimination under the Employment Ordinance (**EO**) and the four anti-discrimination ordinances, and are eligible for statutory maternity leave and maternal health care in public hospitals. However, there is an acute lack of awareness of those rights and obligations among FDWs, their employers and employment agents. There is no clear guidance from HKSARG as to how the pregnancy and maternity of a FDW should be successfully and lawfully managed to the benefit and protection of all impacted parties and in particular the unborn and newborn child. More particularly, the absence of clear guidance/policy as to whether or not the so-called live-in rule (the “**live-in rule**”) is to apply during statutory leave periods is especially troublesome. And thus, when an FDW becomes pregnant, she all too often suffers unlawful dismissal or is forced to resign from her employment because of the uncertainty surrounding each parties’ rights and obligations.
23. A pregnant FDW who wishes to make civil and/or criminal claims against her former employer may not be granted the ability to work (if she is pregnant, it is almost impossible for her to find a job) or, alternatively, be provided with housing and social security payments to cover her living and visa extension expenses pending hearing or trial. This lack of practical support severely impedes and, indeed, often disables this group from making claims in practice. The reality is that they cannot afford to stay in Hong Kong to pursue their legal claims.
24. PathFinders urges the HKSARG to:
 - a. Set out explicitly within the standard FDW’s contract that they are entitled to maternity leave and protections;
 - b. Review or clarify the live-in rule and its waiver/application to pregnant FDWs and FDWs on statutory maternity leave;
 - c. Educate key stakeholders (employers, employment agencies, government departments etc), both locally and in collaboration with consulates and Governments of FDWs’

- sending countries, that it is both a civil and criminal offence to terminate pregnant employees including foreign domestic workers;
- d. Track and publicly report on the number of civil and criminal cases brought against defaulting employers of foreign domestic workers, setting out how the cases are settled and whether criminally convicted and/or abusive employers (and their households) are tracked and prohibited from employing again;
 - e. Ensure that those seeking legal redress have effective access to adequate support, such as food, transportation, shelter and interpretation services, at all stages of redress, including specifically the conciliation process at the Labour Department and Labour Tribunal and in the preparation for criminal proceedings; and
 - f. Waive the costs of visa extensions for FDWs who seek legal redress and compensation for human and labour rights abuses.

Article 12: Equality in access to health facilities

(1) Access to healthcare by pregnant FDWs who are unlawfully dismissed

25. Once an employer notifies the Immigration Department of the termination of the pregnant FDW's employment, even if unlawful, she loses her access to the heavily-subsidized public healthcare system, despite the fact that she is the aggrieved party and carries the health risks associated with being pregnant. Her entitlement to access the public healthcare system stops when her employment is terminated. She can only access the hospital in an emergency. She and her baby have no access to public peri-natal care and cannot afford private healthcare. When the FDW does access the public healthcare system in an emergency, she will be charged at least HK\$90,000 for giving birth which she is unable to pay.
26. PathFinders therefore urges HKSARG to conduct a wholesale review of the above anomaly in our public healthcare system and policy. We urge the government to:
 - a. Review the access of FDWs to the public healthcare system;
 - b. Conduct a public healthcare risk assessment of this population (both mother and baby) which are denied peri-natal care including checks and immunisations for communicable and preventable childhood diseases;
 - c. Waive the hospital fees charged to FDWs for giving birth and to provide mother and baby with same level of peri-natal care as eligible local residents;
 - d. Require the WoC to research and report on the health and welfare status of FDWs and babies born to them in the HKSAR; and

- e. Require Hong Kong government hospitals (in collaboration with the WoC) to record data on the specific health needs of foreign domestic workers, including those that seek for family planning, pregnancy termination and birthing services.

(2) *Sexual and reproductive health rights*

27. Unplanned or crisis pregnancy of FDWs can be prevented by providing them with access to sex education and contraceptives.
28. With one in seven women of child-bearing age in the HKSAR working as an FDW, PathFinders therefore urges the HKSARG to:
 - a. Increase knowledge dissemination to the migrant and FDW communities about Family Planning Association (**FPA**) and women's health clinic services that are available, the terms on which they are available and how to access them;
 - b. Ensure all vulnerable groups, including FDWs, migrant workers and ethnic minority women and girls have access to easily accessible, user-friendly, and linguistically and culturally sensitive sex education including the proper use of contraceptives; and
 - c. Require FPA and women's clinics to make their services more linguistically, culturally and practically accessible to these vulnerable groups of women (for example all of these clinic close on Sundays which is the only rest day of FDWs).

(3) *Equality and Non-Discrimination in using public health services*

29. PathFinders' mothers and children often encounter discrimination when accessing public health services due to the lack of understanding of FDWs' cultural and linguistic needs.
30. PathFinders urges the HKSARG to:
 - a. Provide mandatory sensitivity training to all public health service providers and all officials who come into contact with these vulnerable women and children in order to deal with them in a non-judgmental, culturally sensitive way, in their own language and/or with the help of a suitably trained interpreter; and detect indicators of abuse that may present differently due to cultural and/or language differences; and
 - b. Improve inter-government-department collaboration, communication and cooperation given the multi-dimensional issues PathFinders' clients face (for example between the Hospital Authority, Immigration Department, Birth Registry, police, courts, prisons, and the Labour and Welfare Bureau).

Article 13: Women in Economic, Social and Cultural Life

PathFinders ensures that the most vulnerable children in Hong Kong, and their migrant mothers, are respected and protected. PathFinders Limited is incorporated in Hong Kong CR No. 1289039 and is an approved charitable institution under s88 of the Inland Revenue Ordinance, file no. 91/10272. PathFinders is listed on WiseGiving. PathFinders Limited is an organisation in Special Consultative Status with the United Nations Special Economic and Social Council since August 2017.

31. As stated above, a pregnant FDW who wishes to make civil and/or criminal claims against her former employer may not be granted the ability to work (if she is pregnant, it is almost impossible for her to find a job) or, alternatively, be provided with housing and social security payments to cover her living and visa extension expenses pending hearing or trial. This lack of practical support severely impedes and, indeed, often disables this group from making claims in practice. The reality is that they cannot afford to stay in Hong Kong to pursue their legal claims.

Article 15: Equality in Legal and Civil Matters

(1) Treatment of women in court and access to legal aid

32. In PathFinders' experience, pregnant FDWs and their children face significant barriers in accessing legal advice, legal assistance, and the courts (in particular the Labour Tribunal where parties are not allowed legal representation).

33. We urge the HKSARG to:

- a. Review procedures of the Labour Tribunal to ensure they enhance, not inhibit, FDWs' access to justice. For example, to open Labour Tribunal office on a Sunday (often the only rest day of an FDW), employ full-time Indonesian speaking officers; and
- b. Monitor and review the adjudication process of tribunals and courts that handle cases involving ethnic minorities and FDWs, in particular in the Labour Tribunal where legal representation is not permitted and claimants often unduly pressured by the Presiding Officers to settle their claims without understanding their legal rights.

(2) Women and children in prisons

34. The current statutory Prison Rules are woefully insufficient. They do not provide for any support for female prisoners and their babies/children except for clothing.

35. PathFinders therefore urges the HKSARG to:

- a. Extend the Prison Rules to cover all typically required supplies from newborn to 3 years of age including educational and social stimulation in the best interests of the child as well as immunisation and other medical support;

- b. Provide for maternal and child education and support in prison in a culturally and linguistically appropriate manner, specifically birth registration, national documentation, legal, health, nutritional and child development information;
- c. Put in place in all correctional institutions, referral and support networks for ethnic, linguistic, religious and cultural minorities; and
- d. Require a detailed and full assessment be made of child care options available well in advance of the time when the child is to leave the prison, focussed absolutely on the best interests of the child. Specifically for children born to ethnic minority women, such assessment should include consideration of family and other care options in the mother's home country and should be done in conjunction with the consular officials.

Article 16: Equality in Family Law

Mothers of HK Permanent Resident children

- 36. In situations where a FDW is a single mother (or was formerly married to a Hong Kong resident but is now divorced), and her child has permanent Hong Kong residency status by virtue of the birth father's Hong Kong residency status, the mother and her child can both be removed from Hong Kong if the mother loses her residency status or overstays her visa. When issuing removal and/or deportation orders against these women, the Department of Immigration fails to take into account the best interests of the child.
- 37. PathFinders urges the HKSARG to allow the mothers of these children with Hong Kong permanent residency status to remain in Hong Kong with their children.

Conclusion

Thank you for considering PathFinders' submissions. We look forward to read HKSARG's upcoming CEDAW report and to see its inclusion of issues relating to FDWs in particular pregnant FDWs and children born to them.



Kay McArdle
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About PathFinders

PathFinders' mission 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 Limited is an approved charitable institution incorporated in Hong Kong. It receives no government funding. PathFinders was formally founded in 2008 after rescuing two babies born in poverty to migrant women in Hong Kong. Since then, PathFinders has helped over 5,500 people of whom over 2,400 are babies and children born in Hong Kong.

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