



Submission to the UN ICESCR Committee

Introduction to PathFinders

PathFinders (Hong Kong Special Administrative Region (HKSAR) Registered Charity IRD No.91/10272) was founded over five years ago in response to the specific challenges that Migrant Domestic Workers (MDWs) in HKSAR can face upon becoming pregnant.

In that time, we have supported over 2000 MDWs and their children in finding a safe and sustainable future.

We do this by:

- Providing emergency 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 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 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' Submission to the UN ICESCR Committee:

PathFinders welcomes the opportunity to make submissions to the UN ICESCR Committee. The MDWs PathFinders supports experience a host of Economic, Social and Cultural challenges.

MDWs are a critical part of HKSAR society. These women are vital to maintaining HKSAR's position as a global economic hub as they offer their employers the potential to create dual-income households and to access a host of leisure opportunities which in turn are of direct economic benefit to HKSAR. Further, MDWs remit essential payments to their families in their countries of origin, boosting the income of those communities and contributing to the opportunities available to children within them.

Offering care and support to children and the elderly, some 320,00 MDWs are an essential part of the fabric of HKSAR. These women are largely from the Philippines and Indonesia, and, in February 2014, HKSAR received the first MDWs from Myanmar. It is estimated that close to 90% of HKSAR's MDWs are women.

The contractual terms of employment MDWs receive fall far short of their economic contributions to HKSAR society. The inadequate and discriminatory remuneration that MDWs receive for their labour has been well-documented. MDWs frequently experience extortionate agency fees¹ and low hourly-equivalent wages.²

Socially, MDWs may face discrimination and prejudice when accessing public services, including labour, immigration and health departments. There are also significant educational, linguistic and cultural barriers preventing MDWs from understanding and asserting their rights, and also shortcomings in employers/employment agencies understanding their obligations to MDWs.

Cultural perceptions of MDWs within HKSAR also create challenges. Reports of abuse are condemnable, and worse, many incidents of physical and mental abuse goes unreported by MDWs because of the ineffectiveness of support mechanisms and fear of the consequences. Limitations imposed by the Two-Week Rule³ and Live-In Rule⁴ compel MDWs to remain silent and tolerate abuses because they are dependent on their employer for both living arrangements and access to public services.

¹ As documented within the 'UN Joint Submission coordinated by Hong Kong Human Rights Monitor and the Center for Comparative and Public Law (HKU)' – Employment agencies hiring MDWs frequently adopt exploitative and unfair practices, including requiring the MDW to sign a loan agreement in their home country to circumvent the HKSAR's limit on agency fees (at 10% of one month's salary), with MDWs reportedly paying in excess of USD3,000.

² Research by Prof. Hans Ladegaard, Baptist University, points to the average working day for maids to be 16 hours per day, which, at the legal minimum monthly rate for MDWs equates to HKD7/hour. MDWs are exempt from the Minimum Wage Ordinance which sets a Statutory Minimum Wage of HK\$30/hour.

³ The Two-Week Rule means that upon the termination of employment, a MDW loses his/her visa status, and has two weeks to either find alternative employment or leave HKSAR. Other migrant workers (e.g. expatriates) typically have a longer transitional period than MDWs.

⁴ The Live-In Rule determines that under the conditions of the employment visa permitting MDWs to work, the MDW must 'live-in' with their employer. The Live-In rule currently offers no explicit statute on the treatment of MDWs during the transitional period out of employment, upon pregnancy, or within a maternity period. Recent guidance from HKSAR Labour Department stated that during maternity leave, the MDW must remain living with the employer, a situation which creates a significant conflict of interest, and one which is not accompanied by guidance on the minimum standard of living the MDW and her child may expect the employer to provide.

Within PathFinders' submission, we emphasize the specific challenges faced by MDWs who become pregnant in HKSAR, and offer clear recommendations as to how HKSAR may resolve them.



Kay McArdle
Chief Executive Officer
t: 9011 1620
e: kay@pathfinders.org.hk
website: www.pathfinders.org.hk



Luna Chan
Chief Operations Officer
t: 5135 3015
e: luna@pathfinders.org.hk

Article 2

In response to Article 2, PathFinders fully echoes the myriad concerns regarding MDW abuse/agency fees/incarceration encouraged by the Two-Week Rule, as documented in the HKSAR NGO UN Joint Submission.⁵ Further, we would emphasize that PathFinders' work highlights that these challenges are **both potentially triggered by, and exacerbated during, pregnancy.**

- Despite maternity rights being enshrined in HKSAR legislation, the practical adoption of such clearly failed over 25% of the women PathFinders supported in 2013. Close to 50% of the working women PathFinders served in 2013 cited mis-information and/or unlawful termination of employment as the catalyst for their/their child's predicament.
- MDWs (including pregnant MDWs) are not entitled to work or to receive living or financial support during the two-week transitional period even in instances of unlawful termination.
- Two-weeks is an insufficient time to find fruitful re-employment opportunities upon termination of contract, let alone address basic immediate needs including shelter and food. Pregnant MDWs face even more of a challenge.
- Further, two weeks is an insufficient time to seek redress for unfair dismissal. This meagre time period effectively prohibits the pursuit of legal remedies both civil and criminal. The consequences of a lack of practical support (e.g. housing, access to public health) and challenges in finding re-employment are key reasons as to why MDWs do not take legal action against abusive employers.
- Women who have had their employment contracts terminated are denied access to health services except in emergency circumstances. Perinatal care is not classified as 'emergency' care, thereby putting both mother and child at risk.
- In addition, denying access to vaccines and inoculation to infants poses a health risk to the wider population of HKSAR through contact with highly contagious and vaccine-preventable diseases.

Q: What can HKSAR do to mitigate discriminatory practices inherent in the Two-Week Rule and, as a corollary of this, address the employment, health and accommodation needs of pregnant MDWs?

PathFinders urges the Government to, among other steps:

⁵ Joint Submission from Hong Kong NGOs coordinated by the Hong Kong Human Rights Monitor and the Center for Comparative and Public Law (HKU) to the Committee on Economic, Social and Cultural Rights (CESCR) on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the Hong Kong Special Administrative Region, China

- Review the legislation around and the application of the Two-Week Rule, extending the period at a minimum to match the four weeks afforded to other expatriate and migrant workers, and offering specific mention of the anticipated treatment of pregnant/postnatal women;
- Review the ability of medical professionals to support pregnant MWDs, particularly during instances where visa status is ambiguous and/or the MDW is transitioning between or from employment;
- Review the processes and the support for MDWs in seeking legal redress for the unlawful termination of their employment, including delivering immediate pragmatic support.⁶

⁶ Pathfinders highlights HKSAR's commendable treatment of refugees (including those with pending status), who are granted accommodation, food, clothing and access to public health services while their claims are pending.

Article 6

In response to Article 6, PathFinders contends that while the unlawful termination of a MDW's employment upon pregnancy is in direct violation of the HKSAR's Employment Ordinance and Discrimination Ordinances, the situation is compounded by fundamental, systemic barriers which operate to impede access to legal redress.

- Although the Employment Ordinance and the Sex Discrimination Ordinance make it unlawful (with criminal and civil sanctions) to terminate MDW employment contracts due to pregnancy, in practice, these laws are frequently violated. Unlawful termination violates a MDWs' Right to Work and labour rights, and such violation is further compounded by ignorance of, and lack of ready access to, avenues of legal redress. In 2013, approximately 50% of the working women PathFinders served were either unlawfully terminated from their employment because they were pregnant or they themselves resigned because they were not adequately informed of their maternity entitlements.
- HKSAR's MDW population relies upon agencies to secure employment within the region. Aside from numerous reports of abuse from employers, clients supported by PathFinders over the past five-plus years cite pressure to be repatriated to their home countries; pressure to tolerate abusive or sub-optimal current employment; and pressure to accept sub-optimal future employment upon becoming pregnant. These women are therefore denied basic freedom of choice.
- In instances where a MDW wishes to claim redress for unlawful dismissal due to pregnancy, she faces significant social, cultural and legal barriers. Such challenges include limited provision of and access to publically funded Legal Aid; intimidation by or on behalf of the former employer or employment agency; lack of translation services available at government departments; and protracted court proceedings that favour the employer economically.
- Given that the majority of MDWs in HKSAR are female and of prime reproductive age (25 – 35 years of age), the likelihood of pregnancy should be anticipated and pragmatically addressed.

Q: How can the HKSAR Government tackle unlawful termination of employment of MDWs upon pregnancy and facilitate their access to justice?

PathFinders urges the Government to, among other steps:

- Review the contractual obligations of employers to specifically codify anticipated treatment of MDWs during and after pregnancy, and the corresponding obligations to the infant;
- Review and amend the standard MDW contract to ensure that protection under maternity and anti-discrimination laws is specifically provided for in the contract;
- Introduce compulsory training for both employment agencies and employers as a pre-requisite to employment/agency licence so that both parties understand the labour rights and obligations they hold, specifically in relation to pregnancy;
- Improve accessibility to Legal Aid for unlawfully dismissed MDWs;
- Ensure adequate provision and training of front-line government staff, including translator services;
- Ensure that MDWs seeking legal redress have effective access to adequate support and necessities, such as food, transportation, shelter and perinatal care.

Article 7

In response to Article 7, PathFinders contends that a lack of legislation and guidance as to the basic treatment and rights of MDWs and the current Live-in Rule exposes pregnant women and new mothers to potentially harmful environments.

- Due to a lack of regulation and the limited monitoring of working conditions, the requirement of MDWs to live within their employers' homes (the "Live-In Rule"), exposes MDWs to potential abuse and custodial violence. Moreover, 30% of live-in MDWs do not have their own room and are made to sleep in unsuitable places including in the same room as an adult male member of the household.⁷
- In Hong Kong today there is currently no legislation or guidance, at law or in practice, as to the basic living arrangements and rights for MDWs who are pregnant or new mothers. There is significant ambiguity as to the requirements of employers to provide a temporary or permanent home for the MDW during pregnancy and, even more critically, for both the MDW and baby after pregnancy. Further, there is weak guidance on whether MDWs in transition between employers or who have been summarily dismissed are permitted to live outside of their employer's residence.
- Correspondence between PathFinders and HKSAR Labour Department in 2013 and 2014 offers some initial clarification that MDWs are required to live in the employer's home during maternity leave. This raises significant concerns owing to the explicit conflicts within this situation, contradicts the MDW's guarantee of rest from work during this time and raises significant concerns around the living requirements for, and health and welfare of, the MDW's new born baby.
- These ambiguities can be exploited by employers. They also impede the ability of the charities and agencies who are trying to assist these most vulnerable of women and their babies, in determining what levels of support they can lawfully give.

Q: How can the Hong Kong Government ensure that MDWs are provided with just and favourable conditions of work, including safe and healthy working conditions, fair wages and equal remuneration?

PathFinders urges the Government to, among other steps:

⁷ <http://www.migrants.net/live-in-policy-primer-is-online-now/>

- Release clearer guidance to the employers, MDW mothers and the agencies who seek to support pregnant MDWs so as to empower the MDW women to remove themselves from precarious situations and seek sustainable solutions for their family. Such guidance should include financial and practical advice for all parties involved (MDW, agency and employer) and include the provision for safe, suitable and monitored accommodation for both mother and baby;
- Capture statistics and evidence to understand and raise awareness of the reasons for repatriation and denied employment, to better determine a woman's practicable right to freedom of choice of employment and re-employment.

Article 10

In response to Article 10, PathFinders contends that the current ambiguity surrounding the protection afforded to MDWs before, during and after childbirth puts both mother and baby at risk.

- There are several areas of ambiguity within current HKSAR legislation that can be exploited by employers. This lack of clarity compounds the vulnerabilities of MDWs who become pregnant.
- Specific instances include:
 - Obligations of the employer – in both clarity and comprehensiveness of obligations towards pregnant MDWs and MDWs on maternity leave;
 - Access to documentation upon unlawful dismissal;
 - Access to essential rights and services upon unlawful dismissal / employment transition.

Q: How can the Hong Kong Government ensure that pregnant MDWs who have been unlawfully dismissed are afforded proper social security protection during a reasonable period before, during and after childbirth?

PathFinders urges the Government to, among other steps:

- Deliver clearer guidance with specific timeframes of reasonable perinatal care, including expectations conferred upon the employer, and safety nets afforded by the HKSAR Government and its agencies;
- Review the impact of, and provide exemptions to the Two Week Rule as appropriate.

Article 11

In response to Article 11, PathFinders contends that pregnant MDWs and their children potentially experience limited access to an adequate standard of living, including inadequate food and housing.

- Many MDWs arrive in Hong Kong with a heavy debt burden as a result of extortionate agency fees.⁸ The stress arising from debt obligations is aggravated when a MDW's contract is unlawfully terminated when she is pregnant, her earnings cease and her re-employment potential are reduced. This has significant repercussions on the MDWs' ability, and that of her child, to enjoy the right to an adequate standard of living.
- There is significant ambiguity as to the obligations of an employer during MDW pregnancy and maternity leave. This lack of clarity pervades not only the adequacy and appropriateness of housing but also extends to the right to appropriate food and necessities required for both mother and baby. The Hong Kong Government currently accepts that food and housing are basic human rights and confers them onto other vulnerable members of society such as refugees. The same rights should be conferred onto any MDW who has been unlawfully dismissed during pregnancy and who faces similar barriers in obtaining an adequate standard of living for herself and her family.
- Further, many pregnant MDWs may find themselves in dangerous and abusive environments following unlawful dismissal. They may overstay their employment visa due to cultural and social stigmas attached to returning to their home countries with a child. These women essentially become "invisible" and are forced to earn a living in the underground economy, including resorting to precarious and substandard working conditions. Their irregular administrative status makes the MDW, and her baby, vulnerable to blackmail and physical, mental and sexual abuse by third parties, including trafficking.

Q: How can the Hong Kong Government ensure an adequate standard of living for pregnant MDWs and their children?

PathFinders urges the Government to, among other steps:

- Provide clearer guidance and legislation as to the obligations of the employer with respect to appropriate housing during pregnancy, maternity leave, and transitions between employment;
- Determine direct and pragmatic support available to women who experience employment termination due to pregnancy;
- Review the treatment and diminished choice of pregnant women/new mothers who have sought employment via agencies, and determine appropriate recommendations;
- Provide clearer and more comprehensive guidance as to the reasonable level of care and support that charities, NGOs and agencies can afford to undocumented women and children who have fallen through the HKSAR's social security nets;
- Offer additional repatriation support via MDW home country Consulates.

Article 12

In response to Article 12, PathFinders contends that MDWs' rights are severely restricted in relation to health care including perinatal care during pregnancy, sex education, family planning and protection from preventable disease.

- The right to perinatal care, sex education and safe, effective, affordable and acceptable family planning services are vital to a woman's Sexual and Reproductive Health Rights (SRHR). Commitments by States to guarantee these rights have further been affirmed in the Program of Action of the International Conference on Population and Development as well as in the Beijing Platform for Action.
- Pregnant MDWs in HKSAR are not entitled to any public healthcare services if they lose their working visa (even when termination arises as a result of the employer's unlawful act), and nor are their babies. Lack of access to perinatal medical services puts the life of the MDW (and that of her unborn/newborn child) at risk, and violates the MDW's human right to the highest attainable standard of physical and mental health, also enshrined in the Convention on the Elimination of Discrimination against Women and the World Health Organization guidelines. Pregnancy can and does lead to specific health vulnerabilities if women are denied basic perinatal support.
- Legal documentation of mother and child is the first and most significant step towards gaining the right to access essential sexual and reproductive health services. A MDW who has had her contract terminated is classified as an 'Ineligible Person' for public health care and is denied access to perinatal care. The cost of a Hong Kong Birth Certificate⁹ can be prohibitive for a MDW whose employment has been terminated due to pregnancy and has no income. There is currently no fee waiver or alternate social aid mechanism offered by the Birth Registry. This in turn results in failures or delays in obtaining Birth Certificates.
- Critically, without a clear legal status and no right of abode, the MDW's new born baby is also considered an 'Ineligible Person' for public health care. The baby has no right to receive post-birth medical follow-ups, including basic immunisations. This creates a risk not only to the immediate family, but also to the wider HKSAR population via contagious disease.
- There are currently extreme limitations as to the statistical data collected and recorded by HKSAR on this issue.

Q: How can the Hong Kong Government ensure that pregnant MDWs and new mothers have full access to

⁹ HK\$140 if obtained within the first 42 days of a child's life and increasing costs thereafter

the suite of perinatal care as well as protection from preventable disease?

PathFinders urges the Government to, among other steps:

- Redefine ‘sickness’ as per Article 12 clause 2d to capture ‘health vulnerabilities,’ as a suggested term to encompass the specific needs of pregnant women and newborns in accessing essential perinatal and child care and to mitigate against public contagion risks;
- Recategorise ‘emergency’ services and/or sickness, as enshrined in HKSAR legislation, to allow pregnant MDWs, and their Hong Kong-born babies, reasonable access to essential medical services during and after pregnancy;
- Establish sufficient resources to sexual reproductive health services delivered in a culturally sensitive and linguistically appropriate manner in public hospitals and through the Family Planning Association;
- Oblige employment agencies to cover basic sex education and health rights of all women to diminish risk of exploitation and discrimination.
- Ensure that all children in HKSAR receive essential vaccinations regardless of documented status and/or that a medical fee waiver is granted, as per the HKSAR precedent for refugees and torture claimants with claims/status determination pending;
- Conduct a statistical review of incidents of contagion within MDW families in HKSAR and deliver corresponding policy proposals.