

LegCo Panel on Manpower

Special meeting on 21 February 2014

9:00am

**Policies relating to foreign domestic workers and
regulation of employment agencies**

Submission by:

PathFinders

13 February 2014

ABOUT THE ORGANISATION

1. PathFinders Limited is a Hong Kong registered charity with S88 tax-exempt status.
2. PathFinders empowers migrant women in **crisis pregnancies** to make informed life decisions for themselves and their Hong Kong born babies (who do not have right of abode) and to find a dignified path towards a safe, legal and sustainable future.
3. Migrant women can face significant challenges if they become pregnant in Hong Kong. **Their employment can become unlawfully terminated and they and their babies can become victims of the worst forms of neglect, abuse and discrimination.** They also suffer severely restricted access to critical and basic healthcare, thereby putting both themselves (and the larger Hong Kong population) at risk of preventable disease.



4. Over the past five years, Pathfinders has served over 2,000 migrant mothers and their babies born in Hong Kong. In 2013 alone, we helped close to 900 people.
5. We believe that Hong Kong's community of migrant women can be effectively supported by instituting appropriate, clearly communicated and enforced practice and policy changes.

Unfair dismissal;
loss of visa status;
abuse and
victimisation;
limited access to
critical services...

PathFinders helps by:

1. Assisting mothers and babies address their most immediate and basic human needs by providing food, accommodation, medical care and clothing;
2. Helping migrant women understand their human and legal rights; and
3. Enabling them to gain access to critical services, counselling, support networks, information and education thereby empowering mothers to make informed life decisions which are in the best interest of their children.

1. Issues facing Foreign Domestic Workers (FDW)

1.1 Unplanned pregnancies:

- 1.1.1 FDWs are less likely to assert their rights due to their cultural background. FDWs mainly originate from religiously devout countries such as Indonesia and the Philippines, both of which are patriarchal communities that are generally known to be less encouraging of women understanding and asserting their rights, particularly reproductive rights and sex education including the proper use of contraceptives.
- 1.1.2 There are limited sex education opportunities available and accessible to FDW women in Hong Kong. Family Planning Association clinics or public health clinics are not open on Sundays, which is the only rest day of FDWs. FDWs have limited access to sex education and contraceptives, which often results in unplanned or crisis pregnancies.

1.2 Inadequate protection from unlawful dismissal and enforcement of maternity rights:

- 1.2.1 In 2013, approximately half of PathFinders' working FDW clients were either unlawfully terminated from their employment as a result of pregnancy or resigned because they were not informed as to their maternity entitlements.
- 1.2.2 Employers often terminate FDW employment contracts because of pregnancy; even though this is unlawful (with civil and criminal sanctions) under the Employment Ordinance and Sex Discrimination Ordinance (an employer is prohibited from dismissing a pregnant employee, unless there has been serious misconduct).
- 1.2.3 Although FDWs are entitled to maternity rights in accordance with the Employment Ordinance they are often denied access to exercise these rights by employers and/or employment agencies, particularly in instances where they have been unlawfully dismissed.
- 1.2.4 While channels exist through the Labour Department, Labour Tribunal, Equal Opportunities Commission (“EOC”) and District Court for FDWs to seek redress and to ensure that employers are held accountable criminally and civilly, a number of factors inhibit FDWs from pursuing justice through these channels, such as:
- Lack of information available to FDW women as to the ways and potential benefits of seeking redress and general lack of understanding of maternity protection available in Hong Kong;
 - Prolonged court and tribunal processes, during which time FDWs are not able to continue working, either because of their pregnancy and/or the Immigration Department may put applications for a new working visa on hold pending result of the court process (note: employers can hire a new FDW during this time);

- Lack of living support (FDW is homeless once she is fired) available during the court/ tribunal process;
- Intimidation by former employer and/or employment agency both prior to and during the redress process;
- Lack of translation services available at the Labour Department; and
- Limited and inconvenient operating hours at the Labour Department, Labour Tribunal, EOC and courts (for instance, not open on Sundays).

1.3 **No access to Public Health care:**

- 1.3.1 Once a FDW has been unlawfully terminated from her employment, she is no longer entitled to receive public health care including perinatal care.
- 1.3.2 Even if she is able to extend her visa to legally remain in Hong Kong (which commonly occurs when a FDW pursues her claim for unlawful dismissal through the Labour Department), she will NOT have access to public health care including perinatal care because she is not considered to be a Hong Kong resident and is therefore classified as an ‘Ineligible Person’ for public health care.
- 1.3.3 Former FDWs who are pregnant can only access medical care through Public Hospitals in emergency circumstances (such as when she is in labour).
- 1.3.4 After giving birth she will be charged HK\$90,000 by the Public Hospital. This outstanding debt due to the government will then impact her ability to obtain a Birth Certificate for her child and may taint her immigration record, thereby limiting future employment opportunities in Hong Kong.

2. **Issues facing children born to FDWs**

2.1 **Difficulties accessing Hong Kong Birth Certificates:**

- 2.1.1 The outstanding public hospital bill will impact the FDW’s ability to obtain a birth certificate for her child in a timely manner. She will not be able to travel back to her home country as soon as she may wish for family support for the new born. In the meantime, there is no living support for her and her new born baby.
- 2.1.2 The cost of a Hong Kong Birth Certificate (HK\$140 if obtained within the first 42 days of a child’s life and increasing costs thereafter) can be prohibitive for a FDW whose employment has been recently terminated due to pregnancy. There is currently NO fee waiver offered by the Birth Registry or any other social aid mechanism, which results in mothers delaying or not obtaining the Birth Certificate.

2.2 No entitlement to Public Health care:

2.2.1 Once a FDW has been unlawfully terminated from her employment due to pregnancy, she is no longer entitled to receive public health care and her child, once born, also has no right of abode and is not considered to be a Hong Kong resident. The new born baby is therefore considered to be an ‘Ineligible Person’ for public health care. The baby has no right to receive post-birth medical follow up, including basic immunisations.

3. Lack of Government Awareness and Data

- 3.1 Despite repeated requests under Access to Information, various government departments including the Immigration Department, Social Welfare Department, Hospital Authority and Public Hospitals, have failed to provide basic data on the overall market size and character of this vulnerable group. Government departments and Public Hospitals claim that they do not collect data in relation to:
- the number of FDWs obtaining perinatal, or pregnancy termination, or family planning services from Public Hospitals
 - the number of children born to FDWs in Hong Kong
 - the residency status of children born to FDWs in Hong Kong
- 3.2 This demonstrates the government’s general lack of awareness, raw data collection and policy measures to address the issues affecting FDW women and their children.

4. Approach and Attitude of Society and Government Service Providers

4.1 Complaint-driven approach of the Equal Opportunities Commission (EOC):

- 4.1.1 The complaint-driven approach of the EOC excludes and intimidates the FDW community, who may not be able to lodge a complaint due to a lack of awareness of their rights, or because they may be culturally predisposed to non-confrontation. FDWs may also be under pressure from their employers and/or employment agencies to resign from their job by being misled about having breached the law through pregnancy. These circumstances invariably impact the ability, competence and extent to which vulnerable victims of discrimination can successfully make use of official mechanisms to protect them.
- 4.1.2 The format and language of EOC complaint forms also serve to exclude and intimidate FDWs. Complaint forms must be completed in a foreign language, and the evidence gathering process proving discrimination is often beyond the knowledge and skills of a FDW.

4.2 Lack of respect of FDWs' rights:

- 4.2.1 A lack of respect, societal understanding and support for FDWs' rights exists within society and extends to government service providers including Public Hospitals and other government departments. Front line workers at these agencies are often insensitive, discriminatory, ignorant and/ or unable to respond accurately to FDWs' request to access services. Front line workers often turn away FDWs who are entitled to receive services and/ or make it difficult for FDWs to understand the process to obtain services.
- 4.2.2 A lack of sensitivity, human rights training or capacity-building can result in unintentional discrimination and intimidation by public servants and government workers.

5. Recommendations on policy change for improvement

For all FDWs:

- 5.1 include a specific clause in FDW employment contracts stating that the worker is entitled to protection under Hong Kong's maternity and anti-discrimination laws;
- 5.2 require FDWs to attend mother-tongue sex/contraception/family planning education training including proper use of contraceptives;
- 5.3 ensure Hong Kong's Family Planning Association and public health clinics provide services that are more linguistically, culturally and practically accessible to FDWs including Sunday opening hours;
- 5.4 provide FDWs with information and training on their rights including legal entitlements when pregnant such as the right not to be unlawfully dismissed, not to be unlawfully discriminated against (sex, pregnancy, race) and the appropriate avenues and methods for bringing claims, both civil and criminal;
- 5.5 clarify whether the live-in rule applies to FDWs during maternity leave and if so, what privacy the mother and baby are entitled to during maternity leave;
- 5.6 ensure that all FDWs, including those who have been dismissed unlawfully, have access to essential public health care including essential perinatal health care and that FDW Hong Kong born children have access to post-birth medical follow up and basic immunisation while they remain in Hong Kong;
- 5.7 waive the cost of visa extensions for FDWs who seek legal redress and compensation for human and labour rights abuses;

- 5.8 ensure that FDWs 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 preparation for criminal proceedings;
- 5.9 open the Labour Tribunal and Labour Department office on a Sunday (the only day of rest for a FDW) and to employ full-time native-tongue officers to interact and nurture FDWs' claim for redress; and
- 5.10 review the Labour Tribunal's claims adjudication process to ensure FDWs are not inappropriately pressured to settle.

For Unlawfully Terminated Pregnant FDWs:

- 5.11 Labour Department to clarify why unlawfully terminated FDWs need to agree in writing to be a prosecution witness before a case is investigated as a criminal case AND whether the Director of Public Prosecution requires unlawfully terminated FDWs to stay in Hong Kong pending criminal prosecution of the employer and, if so, whether visa and costs of: public health care, accommodation and living allowance will be provided (since the FDW has no income), or alternatively whether flights and accommodation will be provided for FDWs in their capacity as a prosecution witness; and
- 5.12 Hospital Authority to clarify under what circumstances Public Hospital medical fees will be waived and/or for perinatal (pregnancy and birth and 3 to 6 months after birth care for mother and child) care provided for unlawfully terminated FDWs and their new born babies.

For children born to FDWs in Hong Kong:

- 5.13 provide FDWs with information, in their own language, about how to obtain a Birth Certificate and passport for their baby born in Hong Kong; and
- 5.14 ensure that all children born in Hong Kong obtain a Birth Certificate as soon as possible. Should the mother experience financial difficulties, ensure there is an appropriate mechanism to review and provide a waiver of fees.

For Employers and Employment Agencies:

- 5.15 require both employer and employment agency to attend training as a pre-requisite to employment/agency license so that both understand the labour rights and obligations they hold, specifically in relation to pregnancy. Currently, anyone with sufficient financial resources can hire a FDW. It is akin to a commercial transaction;
- 5.16 track and publish statistics of both civil and criminal cases brought against employers who unlawfully terminate pregnant workers and/or otherwise mistreat their FDWs; and

- 5.17 create a 'blacklist' of all households and their members and/or require, at a minimum, criminal record background checks of anyone seeking to hire a FDW.

For Government Departments:

- 5.18 create policy and best practice to determine how a FDW's pregnancy and maternity situation can and should be dealt with by all parties concerned (FDWs, their employers and the employment agency involved) both successfully and lawfully and with the child's best interests as its cornerstone; and
- 5.19 ensure there is adequate provision and training, of suitably qualified front-line government staff to deal in a culturally sensitive manner and in the mother-tongue of pregnant FDWs and their babies. Such departments include the Hospital Authority, Public Hospitals, Health Department, Social Welfare Department, Immigration Department, Birth Registry, Police, Labour Department, Labour Tribunals and Courts.

Public Data:

- 5.20 most government data specifically excludes migrant domestic workers. This has to change given that the population of almost 320,000 FDWs in Hong Kong; and
- 5.21 make the following information publically available:
- the number of FDWs obtaining perinatal, or pregnancy termination, or family planning services from Public Hospitals
 - the number of babies born to FDWs in Hong Kong and their immunisation rate
 - the residency status of babies born to FDWs in Hong Kong
 - the number and types of civil claims brought against employers by unlawfully terminated pregnant FDWs
 - the number and types of investigations and/or criminal proceedings claims brought against employers of FDWs and specifically those who unlawfully terminate and/or otherwise abuse their FDWs

Institutional Mechanisms:

- 5.22 the EOC is to take a more proactive approach to promote and educate relevant parties on equal opportunities legislation in Hong Kong, especially regarding vulnerable groups including pregnant FDWs who may be subject to triple discrimination on the basis of their sex, ethnic background and pregnancy. We also urge the EOC to take a more proactive approach in investigating alleged pregnancy, sex and race discrimination. Instead of relying heavily on the victim to gather and provide evidence, EOC should interview FDWs and take more of a leadership role to support this less well-educated population and then, if appropriate, initiate investigation and prosecution;
- 5.23 the Women's Commission, or other government departments as appropriate, is to create an office, or similar, tasked with watching over, and lobbying for, FDWs; and

5.24 the government is to conduct a review of the structure of the Women’s Commission 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 the 320,000 female FDWs present in Hong Kong.



Kay McArdle
Chief Executive Officer
t:
e: kay@pathfinders.org.hk



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