

(Revised)

HONG KONG

SUBMISSION TO THE LEGISLATIVE COUNCIL'S
PANEL ON CONSTITUTIONAL AFFAIRS ON THE
THIRD REPORT BY HKSAR UNDER THE ICESCR

AMNESTY
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Between May and October 2012, Amnesty International interviewed 50 Indonesian migrant domestic workers in Hong Kong. In March 2013, further interviews were conducted with 47 returnees in Indonesia who had worked in Hong Kong as domestic workers.¹ All of the interviewees were women. The issues raised are not limited to Indonesians, but reflect the problems faced by the wider community of migrant domestic workers irrespective of nationality.

Article 2 paragraph 2 - Non-discrimination

40. Please provide information on steps taken to review and repeal the “two-week rule” and to address discrimination and abuse against migrant domestic workers as a consequence of this rule.

Two-Week Rule

Under the New Condition of Stay, 1987, or the Two-Week Rule, migrant domestic workers in Hong Kong must find new employment and obtain an approved work visa within two weeks of the expiration or premature termination of their employment contract. Failing that, they must leave Hong Kong.

Even after completing their two-year contract, migrant domestic workers face difficulty in finding new employment due to the Two-Week Rule, which further exacerbates their vulnerability to exploitation by both their employer and placement agency. The time frame is clearly not sufficient as even the Immigration Department accepts that it normally takes “about 4-6 weeks” to process an application for change of employer by a migrant domestic worker once “all necessary documents” are received.²

Several interviewees told Amnesty International that they had to leave Hong Kong because they were unable to find new employment within two weeks of termination. In some cases, the workers had to go to Macau and/or mainland China to wait for their Hong Kong visas to be processed.

The inability to find new employment in the two-week time limit leaves migrant domestic workers with little choice but to remain in abusive and/or exploitative conditions or accept jobs with unfavourable work conditions in order to maintain their immigration status.

Despite clear recommendations from several UN bodies (CEDAW, CERD, CESC and Human Rights Committee),³ the HKSAR government has failed to take any action to abolish the Two-Week Rule. Instead, the Government maintains that “such rule is required for maintaining effective immigration control and eliminating chances of FDHs [Foreign Domestic Helpers] overstaying in Hong Kong or working illegally after termination of contracts”.⁴

The Two-Week Rule also significantly impedes their ability to access redress mechanisms in Hong Kong. A key obstacle is the fact that migrant domestic workers who lodge a complaint against their employer are likely to have their contract terminated. Under the current immigration policy, migrant domestic workers cannot normally change employers within their two-year contract except under “exceptional circumstances”, including the transfer, migration, death or financial reasons of the former employer, or if the worker was abused or exploited.⁵ This prevents many from raising issues of abuse, as doing so, would most likely result in loss of employment and income, and leave them with just two weeks to find new employment.

So unless the migrant can find another job in two weeks, which would be difficult given the average 4-6 week processing time by the Immigration authorities, they will have to apply for an extension of stay at a cost of HK\$160 (US\$20), which does not allow them to work and is typically valid for one month or less. To take a case to the Labour Tribunal, it takes on average two months.⁶ During this time, they will have to renew their visa and pay for their own accommodation, food and other expenses without any income. Most migrant domestic workers are unable to afford these costs.

In this respect, the Two-Week Rule provides a disincentive for migrant domestic workers to denounce exploitative or abusive practices and pursue criminal charges and/or compensation through the appropriate channels. This in turn makes the effective investigation and prosecution of those responsible for human and labour rights violations extremely difficult.

Article 7 - The right to just and favourable conditions of work

46. Please provide information on steps taken to ensure that migrant domestic workers do not receive a wage below the minimum allowable wage currently in place for this category of workers. Please clarify whether the Minimum Wage Ordinance will be amended to also cover live-in migrant domestic workers. Please also specify which steps are taken to ensure that migrant domestic workers are granted weekly rest days in accordance with section 17 of the Employment Ordinance.

Minimum Allowable Wage

Hong Kong's Minimum Wage Ordinance does not apply to “a person who is employed as a domestic worker in, or in connection with, a household and who dwells in the household free of charge”. The reasons for this exclusion are:

- (a) the distinctive working pattern, i.e. round-the-clock presence and provision of service-on-demand expected of live-in domestic workers;*
- (b) enjoyment of in-kind benefits [...] not usually available to non-live-in workers;*
- (c) possible significant and far-reaching socio-economic ramifications; and*
- (d) fundamental erosion of the FDH policy.⁷*

However, migrant domestic workers, unlike nationals, are required to reside in the

employing household; they do not have a choice but to live-in. Therefore, migrant domestic workers are excluded from the Minimum Wage Ordinance due to an immigration requirement and consequently, fall under a separate, less favourable Minimum Allowable Wage. Furthermore, other types of workers such as on-site carers who also work “round-the-clock” and have benefits in kind are not excluded from the Minimum Wage Ordinance.⁸

This exclusion of live-in domestic workers from the scope of the Minimum Wage Ordinance has a disproportionate effect on female migrant workers, who make up nearly 100 per cent of domestic workers.

Where Hong Kong laws and regulations on labour standards either exclude domestic workers completely or provide a lower level of protection to domestic workers than to other workers, the authorities must demonstrate that this distinction does not result in discrimination on the basis of sex, national origin, or any other status. The overwhelming majority of domestic workers in Hong Kong are migrant women. In addition, domestic work generally is a form of work that is most often carried out by women. It involves tasks associated with stereotypical female gender roles, for example cooking, family care, and cleaning. As a result, even exclusions or distinctions that seem neutral (e.g. they apply to all domestic workers) may constitute discrimination because they have a disparate impact on a specific population defined by its sex and national origin (migrant women). The authorities must show that there are legitimate reasons for the distinctions made.

Weekly rest day

Hong Kong’s Employment Ordinance stipulates that “every employee who has been employed by the same employer under a continuous contract shall be granted not less than one rest day in every period of seven days”.⁹ However, the denial of a rest day is a common problem among Indonesian migrant domestic workers in Hong Kong. More than half of the migrants interviewed by Amnesty International did not receive a weekly rest day.

By denying migrant domestic workers their statutory rest day, the employer not only forces them to work more, but also prevents them from having contact with other migrants and accessing information about their rights and entitlements in Hong Kong.

Furthermore, Hong Kong law defines a rest day as “a continuous period of not less than 24 hours during which an employee is entitled [...] to abstain from working for his employer”.¹⁰ Interviews indicate that even when migrant domestic workers are given a rest day by their employer, it is often not a full 24 hours. This was the case for the majority of the interviewees.

Article 7 - The right to just and favourable conditions of work

62. Please provide information on steps taken to ensure that migrant workers are employed under formal contracts, that they do not have to pay excessive fees to recruitment agencies, and that they are paid equal wages for equal work in comparison to local workers.

Excessive agency fees

Under the HKSAR Employment Agency Regulation of the Employment Ordinance, placement agencies can charge migrant domestic workers for their services a maximum of ten per cent of the first month's wages.¹¹ This means that, at the current Minimum Allowable Wage of HK\$4,010 (US\$517), the maximum fee placement agencies in Hong Kong can charge is HK\$401 (US\$52).

However, Amnesty International's research demonstrates that most Indonesian interviewees had to hand over the vast majority of their salary to their Hong Kong placement agency, normally a monthly repayment of HK\$3,000 (US\$387) for the initial seven months of their contract. This corresponds to a total of HK\$21,000 (US\$2,709), which exceeds the statutory limits established by legislation in Hong Kong (as well as in Indonesia).

While the Hong Kong placement agencies work in close partnership with Indonesian recruitment agencies, they are separate organizations and come under the jurisdiction of the Hong Kong authorities which have a responsibility to monitor and regulate them, and ensure that they are operating in full compliance with the laws in the Hong Kong SAR.

Consequently, serious indebtedness due to excessive recruitment fees is common among Indonesian migrant domestic workers. Many interviewees expressed how heavily they were burdened by their debt and their fear of acquiring more debt through new employment due to the common practice by placement agencies of charging new fees. These debts often force workers to accept exploitation and abuse in the workplace. Several migrant domestic workers told Amnesty International that they were reluctant to change employers because doing so would incur further fees to their agencies.

Amnesty International calls on the HKSAR government to:

- Repeal or amend the Two-Week Rule to allow migrant domestic workers a reasonable period to find new employment, including incorporating the average time of 4-6 weeks it takes to issue a new visa.
- Amend current legislation which forces migrant domestic workers to live with their employers and excludes them from the Minimum Wage Ordinance.
- Thoroughly regulate and monitor placement agencies in its territory and sanction placement agencies which are operating in violation of Hong Kong's laws in respect to illegal excessive fees, including the application of criminal sanctions when appropriate.

- Take action to prevent and address human rights abuses and violations of Hong Kong's domestic legislation by employers (e.g. weekly rest days), including through the application of criminal sanctions when appropriate.
- Waive the costs of extensions of stay for migrant domestic workers who are seeking compensation for human and labour rights abuses, and ensure that they have effective access to appropriate support measures, such as shelters and interpretation, at all stages of redress, including the conciliation process, at the Labour Department.
- Pursue with the Central Government in Beijing the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and ILO Convention No.189 concerning Decent Work for Domestic Workers (2011), incorporate their provisions into Hong Kong law and implement them in policy and practice.

¹ Amnesty International, *Exploited for Profit, Failed by Governments: Indonesian migrant domestic workers trafficked to Hong Kong*, November 2013 (AI Index: ASA 17/029/2013), available at: <http://www.amnesty.org/en/library/info/ASA17/029/2013/en>.

² Correspondence from the HKSAR Labour Department (incorporating information provided by the HKSAR Immigration Department) on 15 August 2013.

³ Committee on the Elimination of Discrimination against Women, Concluding comments on China, UN Doc. CEDAW/C/CHN/CO/6, 25 August 2006, para41; Committee on the Elimination of Racial Discrimination, Concluding observations on the People's Republic of China (including Hong Kong and Macao Special Administrative Regions), UN Doc. CERD/C/CHN/CO/10-13, 15 September 2009, para30; Committee on Economic, Social and Cultural Rights, List of issues in relation to the second periodic report of China (E/C.12/CHN/2) including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2), adopted by the pre-sessional working group at its fifty-first session (21-24 May 2013), UN Doc. E/C.12/WG/CHN/Q/2, 13 June 2013, para40; and UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, UN Doc. CCPR/C/SR.2974, 26 March 2013, paras20-21.

⁴ HKSAR Constitutional and Mainland Affairs Bureau, "HKSAR Government welcomes constructive dialogue with UN Human Rights Committee", Press Release, 28 March 2013, available at: http://www.cmab.gov.hk/en/press/press_3146.htm.

⁵ HKSAR Immigration Department, "Immigration Department implements measure to deter abuse of arrangements for premature termination of contract by foreign domestic helpers", Press Release, 30 August 2013, available at: <http://www.immd.gov.hk/en/press/press-releases/20130830.html>.

⁶ In 2012, the average waiting time for cases in the Labour Tribunal, from appointment to first hearing, was 50 days. See: http://www.judiciary.gov.hk/en/publications/annu_rept_2012/eng/caseload06.html, accessed 1 February 2014.

⁷ HKSAR Labour and Welfare Bureau, "Legislative Council Brief: Minimum Wage Bill", File Ref.: LD SMW 1-55/1/4(C), June 2009, para15, available at: http://www.legco.gov.hk/yr08-09/english/bills/brief/b24_brf.pdf, accessed 1 February 2014.

⁸ Hong Kong Confederation of Trade Unions and Hong Kong Federation of Asian Domestic Workers

Unions, *Joint report on Hong Kong SAR of the People's Republic of China on the government's application of Migration for Employment Convention (Revised), 1949 (No. 97) (Ratification 1997)*, submitted to the ILO on 31 August 2012, para18.

⁹ Section 17 Grant of rest day, Cap 57A Employment Agency Regulation, HKSAR Employment Ordinance.

¹⁰ Section 2 Interpretation, Cap 57A Employment Agency Regulation, HKSAR Employment Ordinance.

¹¹ Regulation 10(2) (Part II of Schedule 2), Cap 57A Employment Agency Regulation, HKSAR Employment Ordinance.

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