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PathFinders Limited
Written Submission

to

Hong Kong Special Administrative Region's (HKSAR)
Legislative Council Panel on Constitutional Affairs

in advance of its meeting on 30 April 2018 to discuss

HKSAR Government's Outline of its HKSAR Report to China
for China's Third Report to the United Nations Human Rights Council's under its
Universal Periodic Review Mechanism (UPR)

<http://www.legco.gov.hk/yr17-18/english/panels/ca/agenda/ca20180430.htm>

Submitted on 20 April 2018

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PLEASE NOTE: Headings, abbreviations and recommendations are in **bold**.

1. INTRODUCTION

- 1.1. PathFinders Limited (**PF**) works to ensure that the most vulnerable children born in Hong Kong and their migrant mothers are respected and protected. We believe that every child deserves a fair start in life;
- 1.2. From inception in 2007 to date, PF has helped over 5,300 babies, children and their migrant mothers, including over 2,200 newborns and toddlers, of whom over 160 were in such a vulnerable, abandoned and/or otherwise isolated state that they would, but for PF, have been at significant risk of abuse, neglect and/or trafficking;
- 1.3. The majority of the women we serve are current or former foreign domestic workers (**FDWs**) from Indonesia and the Philippines. Despite legal protections, once pregnant, these workers are typically fired unlawfully. They lose access to housing, healthcare and social welfare, and are left homeless, penniless and pregnant or with a newborn child. Utterly indigent, they exist in the margins at a level of precarity that is both surprising and shocking in a city state otherwise as advanced as Hong Kong;
- 1.4. The women are typically then criminalised as immigration overstayers despite the reason for their situation being their former employer’s criminal and unlawful act of firing a pregnant woman;
- 1.5. These women and their Hong Kong-born children are some of the most vulnerable people in Hong Kong. They are hidden in plain sight and denied protection to such a degree that, unless they have applied for asylum, their existence is worse than that of asylum seekers and refugees; and
- 1.6. With the population of FDWs in HKSAR predicted to grow from the current 370,000 to 600,000 by 2047, PF’s burgeoning caseload is only set to increase. We therefore ask that prompt measures are put in place to ameliorate and ideally entirely avoid the suffering and hardship these babies, children and women endure.

2. **PF’s response to the “Outline of the Third Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review” (Outline)**

PathFinders ensures that the most vulnerable children in Hong Kong, and their migrant mothers, are respected and protected. We work to ensure that every child has a fair start in life. 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 and is an organisation in Special Consultative Status with the United Nations Economic and Social Council since August 2017.

- 2.1. In its Outline¹, the HKSAR Government (**HKSARG**) states it will outline the “*b) Background / Framework and measures for the promotion and protection of human rights*” and the “*c) Achievements, challenges and initiatives.*” PF implores this Panel and HKSARG to include the topics set out in this submission in HKSARG’s report to China.

3. EXECUTIVE SUMMARY

3.1. HEADLINE TOPICS

3.1.1. The protection of pregnant, migrant workers and their HKSAR-born children;

3.1.2. PF welcomes and applauds China’s efforts to expand the rights of, and protections for, women and children since the last Universal Periodic Review (UPR) and now urges China to expand those efforts to women and children in HKSAR, and specifically to migrant workers and their HKSAR-born children;

3.1.3. This submission is a plea for employed, migrant women and their Hong Kong-born children to be granted humanitarian support and legal protections while in HKSAR, and for the employers of FDWs to be provided with clear guidelines as to how lawfully to manage the pregnancy and maternity of a FDW;

3.1.4. This submission is NOT a plea for HK residency status, but rather for a concerted effort to review, coordinate, create and communicate laws and policies, and to improve HKSARG’s template FDW contracts to ensure that the welfare of all pregnant, employed women in HKSAR, and their babies, is respected, protected, prioritised and guaranteed - and to put in place appropriate measures well ahead of the number of FDWs increasing to 600,000 in 2047 as announced by HKSAR’s Chief Secretary;

3.1.5. We invite these FDW workers to HKSAR. Whether you call them expats or migrant workers, they come to work and benefit our economy significantly. It is HKSARG’s responsibility to ensure that FDWs, like every other working woman here, are treated decently when they themselves have their families. The same applies to their babies.

3.2. HEADLINE RECOMMENDATIONS

3.2.1. Fully uphold and protect the legitimate rights and interests of pregnant, migrant women and their unborn as well as born children in HKSAR;

3.2.2. Ensure that law, policy and government contracts are coordinated to provide practical solutions thereby enabling all stakeholders professionally and humanely to manage a migrant worker’s pregnancy, maternity leave and maternity cover;

¹ HKSARG’s Outline, accessed on 19 April 2018:

http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/outline_UPR.pdf

3.2.3. Make further efforts to secure and guarantee human protections and rights for everyone, regardless of immigration status;

3.2.4. Strengthen guarantees of social and economic rights of citizens, in particular in the areas of education, health care, social protection and labour by paying special attention to vulnerable groups and specifically ethnic minority women, pregnant migrant workers and their Hong Kong-born babies and children; and

3.2.5. Improve HKSAR's paid statutory maternity leave from 10 weeks to 14 weeks, thereby finally bringing HKSAR in line with China and other developed nations' maternity leave law and practice.²

4. DETAILED TOPICS AND RECOMMENDATIONS:

WOMEN & MOTHERS: Inadequate protection and enforcement of FDWs' Pregnancy and Maternity Rights

- 4.1. HKSAR's current laws, template government FDW employment contracts and policies regarding maternity protections for FDWs fail to provide for what should happen when a FDW is pregnant to ensure a happy, healthy and well-managed pregnancy, birth and maternity leave. This absence is extraordinary because the vast majority of the 370,000 FDWs in HKSAR are women of childbearing age and Hong Kong has imported and employed FDWs for decades;
- 4.2. Like all other employed women in HKSAR, pregnant FDWs are protected by law from employment termination and discrimination on the grounds of pregnancy. Breach of those legal protections carries both criminal and civil law sanctions, albeit rarely enforced. FDWs are also eligible for statutory maternity leave;
- 4.3. However, the singular absence of policy and guidelines confirming how, practically, a happy, healthy pregnancy is to be successfully and lawfully managed by the employee, the employer and employment agents has multiple and devastating human consequences for both child and mother. This glaring omission is the largest single determinant for PF's existence;
- 4.4. PF is catching people who fall through HKSAR's otherwise strong social welfare safety nets. Despite vigorous flagging of the heartbreaking issues at discussions with HKSARG and through public consultations, PF's case numbers continue to grow and grow;
- 4.5. This is a solvable issue. The babies impacted, who are themselves voiceless, deserve, indeed are now literally screaming out, for help;

² ILO Maternity and Paternity Leave at Work: Law and Practice Across the World: accessed 20 April 2018: see page 135 for comparison of length of statutory maternity leave:
<http://www.ilo.org/global/topics/equality-and-discrimination/maternity-protection/publications/maternity-paternity-at-work-2014/lang--en/index.htm>

- 4.6. In essence, PF has handled, and continues to have to handle, an unpopular, ever-expanding and ultimately solvable humanitarian crisis that has seen PF help over 5,300 babies, children and women - and we believe there are more we have not yet reached. The number is staggering and it will worsen: HKSARG is predicting that our majority-female FDW population will double by 2047 from around 370,000 today to 600,000;
- 4.7. Specifically, no law or policy addresses what is to happen to the FDW mother or her child during maternity leave or, crucially, the interplay between maternity leave and the so-called 'live-in rule';
- 4.8. Based on PF's experience, there exist two maternity leave options that HKSARG deems acceptable, albeit not formally or publicly stated anywhere with regard to FDWs taking statutory maternity leave: (1) FDW to return to her home country for the duration of statutory maternity leave; or (2) FDW to remain in Hong Kong in which case she is expected to continue to live with the employer. Both options are significantly flawed and fail to prioritise the child's best interests;
- 4.9. Absent policy or guidelines, every single FDW who wants to return to her home country for maternity leave must each first individually negotiate the arrangements with her employer. Even where parties agree that the FDW can go to her home country, by law that leave can only start at the earliest of 4 weeks before the expected delivery date, i.e. when the worker is already 36 weeks' pregnant and is not only worried about the risk of flying, but is also largely prohibited from flying under most airline policies. The international nature of FDW employees add another layer of complexity and demands separate consideration;
- 4.10. Absent policy or guidelines, if the FDW stays in Hong Kong, she is currently expected to reside in the employer's home even during statutory maternity leave (and that despite it being called maternity 'leave'). No newborn should be separated from its mother like this! It is inhumane and unacceptable. The hundreds of employers who call PF asking for guidance do not know what to do - they want to be decent and humane and are scared of breaching the live-in requirement. Conversely, no employer contracts to have their female employee's newborn living with them - and so the issue arises as to what to do with the baby: if the baby cannot stay at the employer's residence, and the mother cannot leave the employer's residence to nurse her baby every 1-2 hours, what is to become of this precious, new life?
- 4.11. Many FDWs in this position remain in HKSAR and often end up giving birth alone or on the streets. Over the last year, there have been several media reports about newborn babies of current or former FDWs being dumped in bins or on the side of the street.³
- 4.12. Former FDWs can extend their visas to remain in the HKSAR legally if they bring a legal claim against their former employer for unlawful dismissal or for paternity - over 80% of the biological fathers live in HKSAR. However, while pursuing their legal claims, the women are unable to work, have no access to welfare or housing and can only access medical care through public hospitals in an emergency (such as when in labour) and then only at penalty rates. Had the women not been fired,

³ <http://www.scmp.com/news/hong-kong/law-crime/article/2127947/helper-held-over-abortion-hong-kong-flat-fetus-found> accessed on 29 March 2018

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they would have full access to public healthcare. This lack of early and timely maternal health care can be extremely risky, even fatal, to the unborn or newborn baby and the mother.

4.13. RECOMMENDATIONS: For Women & Mothers, PF recommends that the following 7 actions occur within the next 12 months:

- 4.13.1. HKSARG reviews, creates (where currently absent), clarifies, clearly communicates and enforces laws, contracts, practices and policies to enable lawful, safe and healthy pregnancies free from harmful treatment for FDWs and their unborn babies;
- 4.13.2. HKSARG introduces a concerted education programme about the maternity rights, obligations and protections for FDWs to all key stakeholders including FDWs, employers, employment agencies, Labour Department, Immigration Department, Health Authority, Police, Social Welfare Department, Prisons and relevant sending country consulates;
- 4.13.3. HKSARG relaxes the live-in rule during statutory maternity leave and specifically explains the expected interplay between, and management of, maternity leave and the so-called live-in rule;
- 4.13.4. For all female employees, including FDWs, HKSARG follows China and extends HKSAR's statutory maternity leave period to "*not less than 14 weeks*" in line with ILO Convention 183 Article 4.⁴
- 4.13.5. HKSARG devises detailed and practical policy guidelines stipulating how lawfully to manage the pregnancy and statutory maternity leave of FDWs. These should include detailed guidance about exceptions (if any) to the maternity leave entitlement, who should pay for flights to the FDW's home country, time off for medical checks during pregnancy, the banking/payment arrangements for maternity leave, sick leave entitlement during pregnancy, information for employers who wish to hire temporary helpers/FDWs during their regular FDW's maternity leave, flexibility in the commencement and duration of statutory maternity leave period specifically to enable foreign workers to settle their newborns in their country of origin before returning back to HKSAR to work and set out the criminal sanctions monetary fixed penalties for non-compliance;
- 4.13.6. HKSARG adds a specific line to its standard FDW employment contracts stating that pregnant FDWs are entitled to pregnancy, maternity and protection from pregnancy discrimination. Curiously, while the Immigration Department's legally non-binding '*Standard Employment Contract and Terms of Employment for Helpers*' web page⁵ does at least mention maternity leave, the legally binding and enforceable standard employment contract Form ID407⁶ itself is entirely silent; and

⁴ ILO Convention 183 Article 4: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183

⁵ Immigration Department's website: accessed 20 April 2018: <https://www.immd.gov.hk/eng/forms/forms/fdhcontractterms.html>

⁶ Immigration Department's FDW Standard Contract Form ID407: accessed 20 April 2018: <https://www.immd.gov.hk/eng/forms/forms/id407.html>

- 4.13.7. **HKSARG’s departments and their agencies collect and publish relevant data to assess the magnitude of problems faced by pregnant FDWs, their babies, their employers and all other relevant stakeholders. This should include: A. The number of FDWs in Hong Kong who become pregnant; B. The number of FDWs who give birth in Hong Kong; C. The number of FDWs who manage to negotiate a satisfactory maternity leave with their employers in compliance with the live-in rule; D. The number of FDWs returning to their home country to give birth and what their maternity leave arrangements were; E. The number of unlawful dismissals and forced ‘resignations’ of FDWs due to pregnancy; and F. The number of criminal investigations, prosecutions and convictions for unlawful employment termination and discrimination due to pregnancy.**

BABIES & CHILDREN: Children: born to current/former FDWs in HKSAR

4.14. Deprivation: Children born to FDWs are among the most deprived children in HKSAR. Once an unlawfully fired FDW mother has overstayed her visa, her child, when born, assumes the same legal status as his or her mother – they are undocumented. As a result, these babies do not have access to documentation, healthcare, basic immunisations or welfare support, and are highly vulnerable to malnutrition, disease, abuse, neglect, abandonment, human trafficking, systemic oppression and overt discrimination;

4.15. Nationality for Children: Every child has the right to acquire a nationality. Registration difficulties of children born to migrants in HKSAR directly impede their ability to obtain a nationality, since having a birth certificate is typically a prerequisite for acquiring nationality;

4.15.1 Undocumented children face difficult lives. They exist in the shadows. They are without access to public healthcare, welfare and education. They fall prey to the most dangerous and frightening elements of our society;

4.15.2. Too often, PF has seen cases where babies do not even have birth certificates because the cost of the birth certificate is either beyond the parents’ means or the Birth Registry delays issuing the birth certificate for up to 9 months;

4.15.3. Registering the birth of a child is free in HKSAR. However, obtaining a copy of the birth certificate, which is necessary to register the child for the purposes of healthcare, education and to obtain identity and travel documentation (in other words the basic necessities of life) costs HK\$140. If the parents fail to register the child within 42 days of birth, a copy costs HK\$280 and if they fail to register within a year, the cost rises to HK\$680 plus a further HK\$140 search fee. There is no discretion for case officers to review individual cases and, where appropriate, waive the cost of issuing a birth certificate, not even for the ultra poor. At present, when necessary, PF is funding the cost of obtaining these copy birth certificates;

4.15.4. The only exceptions to the hardship these children suffer are: (1) when the biological father is Chinese or is a Hong Kong Permanent Resident, provided he can be found and is also willing to attest to his paternity at the Birth Registry; (2) when the parent has applied for a non-refoulement claim on behalf of the child, and the child is issued a recognizance paper and will then become entitled to humanitarian support from the Social Welfare Department via International Social Services Hong Kong. While these babies do have access to accommodation, food, medical care, transportation and education, this support is minimal and, for children, developmentally limiting with many of the babies PF helps exhibiting stress-related damage and developmental delays;

4.15.5. Child Asylum Seekers: at a practical level, we observe that the ‘*best interests of the child*’ principle is not given adequate consideration when designing government policies that impact asylum-seeking children as demonstrated by: 1) Inadequate representation of the child in the non-refoulement claims process. In most cases the child is accompanied by the mother and/or father and the child’s asylum claim is adjunct to that parent or family’s claim without separate consideration. However, the status and concerns of the child and parent(s) are not always fully aligned. For example, the parent(s) might be unfit and incapable, for lifestyle and/or health reasons, of being the child’s primary carers. The child itself might also have serious health and/or developmental problems requiring more advanced medical attention and treatment and therefore protection. Unfortunately, there exists currently no mechanism whereby the child’s individual circumstances are investigated in order to establish whether the child might be at such serious risk that separate consideration of that child’s claim for asylum is justified. There is growing public sympathy for these children.⁷

4.16. RECOMMENDATIONS: For Babies and Children born to migrant workers in HKSAR, PF recommends that the following 3 actions occur within the next 12 months:

4.16.1. China and HKSARG to ensure equal protection at law, under policy and in practice to all children born in HKSAR regardless of their own or their parents’ immigration status;

4.16.2. HKSARG does review the reasons for delays in issuance of Birth Certificates, ensures time-bound issuance of Birth Certificates and significantly reduces (to photocopying cost levels) or ideally waives, the cost of obtaining copy Birth Registration Certificates; and

4.16.3. HKSARG and appropriate judicial and administrative bodies do consider children’s claims for asylum separately and with immediate effect and do put in place free legal representation for these children.

5. CLOSE

⁷ SCMP: accessed 20 April 2018:

<http://www.scmp.com/news/hong-kong/law-crime/article/2142397/racism-alive-and-well-hong-kong-theres-growing-sympathy>

PF thanks this Panel's members for considering our submission and the 10 recommendations we make at paragraphs 4.13 and 4.16. We trust that this Panel will include these recommendations in its commentary on, and own submissions under, HKSARG's UPR report. The vulnerable babies, children and women we serve at PF deserve to be better protected.



Kay McArdle, CEO of PathFinders Limited.

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 founded in 2008 after rescuing two babies born in poverty to migrant women in Hong Kong. Since then, PathFinders has helped almost 5,300 people of whom nearly 2,400 are babies and children born in Hong Kong.

More information: www.pathfinders.org.hk/public

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