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**The Committee on the Protection of Rights of All Migrant Workers and Members of Their Families**

**and The Committee on the Rights of the Child for their**

**Joint General Comment on the**

**Human Rights of Children in the Context of International Migration**

Source: <http://www.ohchr.org/EN/HRBodies/CMW/Pages/JointGeneralCommentonChildren.aspx>

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PathFinders welcomes the initiative of the Committee on the Rights of the Child and the Committee on Migrant Workers to develop a Joint General Comment on the Human Rights of Children in the Context of International Migration and expresses its appreciation for the opportunity to provide the present submission.

## **1. About PathFinders**

**PathFinders** is a charity that operates in **the Hong Kong Special Administration Region, China** working to ensure that the most vulnerable children born in Hong Kong, and their migrant mothers, are respected and protected. PathFinders assists migrant workers who have become pregnant and/ or given birth to children in Hong Kong. The majority of these women are current or former Foreign Domestic Workers ("FDWs") from Indonesia and the Philippines.

For information about PathFinders, please visit our website at [www.pathfinders.org.hk/public](http://www.pathfinders.org.hk/public).

## **2. Scope of Submission**

PathFinders' submission relates to the human rights of the following categories of children in the context of migration:

- **"Children that are born to parents who are migrant workers in transit and destination countries;**
- **Migrant children that return to their country of origin, either voluntarily or by force, alone or with their parents"**<sup>1</sup>

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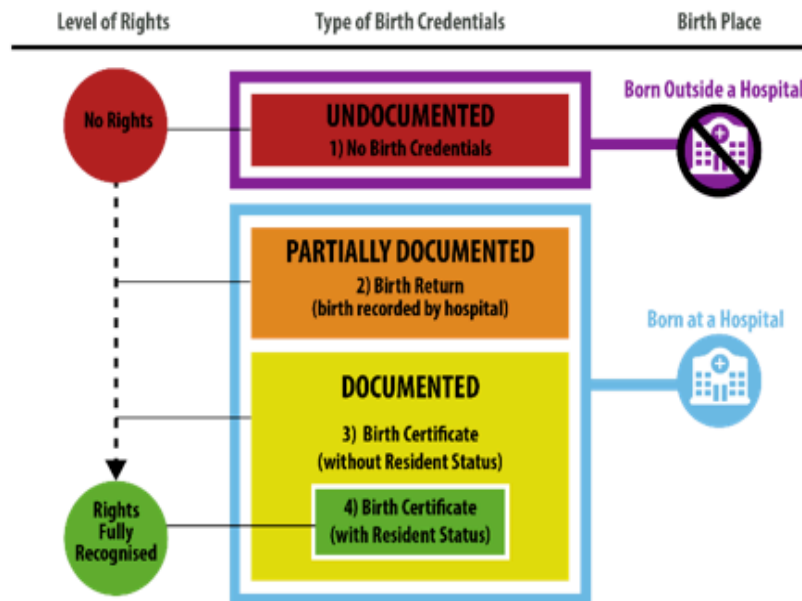
<sup>1</sup> CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International Migration – Concept Note, Point 4

In Hong Kong, PathFinders has found these children are can be separated from their families; deported; lack access to economic, social and cultural rights, including healthcare and education; are subject to various forms of abuse or violence; face discrimination based on race and nationality, can face extreme obstacles to the right to birth registration and the rights and benefits that would accompany that. They also face discrimination and abuse/neglect in their mother's country of origin by virtue of being mixed-race child often conceived and born out-of-wedlock;

### 3. The Issues

- 3.1 Based on our experience, **children born to migrant workers are among the most deprived babies and children in Hong Kong.** In the majority of cases, the cycle of deprivation can begin when the mother becomes pregnant;
- 3.2 While FDWs are entitled to maternity rights and protections under the Employment Ordinance and access to maternal health services in Hong Kong, there is limited protection of such rights. In practice, when a FDW's pregnancy is disclosed or discovered, she commonly suffers unlawful dismissal from her employment, thereby losing her home (a 'live-in' rule applies to employed FDWs) income, her right to live in Hong Kong and her access to essential public support services including maternal health care. The unborn child or newborn child is therefore also barred from receiving the maternity-related protections offered by Hong Kong's public welfare and medical safety net;
- 3.3 Even worse, once a FDW has been unlawfully dismissed from her employment due to pregnancy, it is common for her to overstay her employment visa because practically she is too pregnant to fly, she has been fired but not paid and/or because she fears returning home pregnant with a mixed race child, quite often conceived out-of-wedlock. The unlawfully 'fired' FDW victim often then becomes an immigration criminal. But for the employer's unlawful act, the FDW and her growing baby would still have a home, an income and access to the social welfare system. FDWs who stay in Hong Kong after their employment and visa have been terminated are not legally entitled to remain in Hong Kong. These FDWs are typically prosecuted for immigration breaches. They can be sent to jail and their children born there. **The children then born to mothers who overstay inherit their mothers' illegal, undocumented status. These children are documented or undocumented as shown below.**

# 4 Levels of Documentation



3.4 In summary, the risks for children born to FDWs in Hong Kong include the following:

- (A) **Children do not exist:** FDWs are often unlawfully (civil and criminal sanctions apply) dismissed from their employment due to pregnancy. Typically, these mothers do not have savings in Hong Kong to deal with emergencies and once they become unemployed, they are unable to afford accommodation and food. These pregnant women are suddenly homeless and penniless. They have just two weeks in which to find a new job, failing which they need to leave Hong Kong but it is virtually impossible for a pregnant FDW (or indeed most pregnant interviewees) to find new employment, leaving them jobless. Her pregnancy, combined with a fear of returning home pregnant with a mixed race child often conceived out-of-wedlock, often results in the mother overstaying her visa and remaining illegally in Hong Kong, leaving her and her child without legal identity papers, undocumented and without access to any welfare services. Significantly, these children cannot access health care and are frequently born outside hospital as the mother fears a hospital-birth will alert the authorities to her illegal status. These children are legally non-existent. Undocumented and partially documented children are at risk of health problems, cannot be vaccinated, lack nurture, and are vulnerable to abuse and human trafficking.
- (B) **No access to medical care:** Even if the mother is able legally to remain in Hong Kong and is therefore considered 'documented', she will have no access to maternal pre-natal care. Documented former FDWs who are pregnant can only access medical care through public hospitals in emergency circumstances (such as when she is in labour). This lack of early and timely health care can be extremely risky to the unborn or newborn child and his/ her mother.
- (C) **No access to social services:** Children born to FDWs who do not have a valid employment contract, (regardless of whether they are documented or undocumented), have no legal rights to residency in Hong Kong. The only exception to this is when their biological father is a Chinese or a Hong Kong Resident and is willing to sign at the Birth Registry to attest to the fact that he is the biological father. Without residential status, these children are not entitled

to receive any social security support, medical care, including basic immunisations, or education.

(D) **Face discrimination:** The majority of FDWs are from Indonesia and the Philippines, countries that are relatively more conservative and patriarchal than Hong Kong. Indonesia is also generally known to be less supportive of women understanding and asserting their human rights, including reproductive rights. Rural communities in Indonesia are not accepting or tolerant of single mothers, children born out-of-wedlock and mixed-race children (Refugee Review Tribunal, Australian Government, 2010). As a result, if the children eventually return to Indonesia/ Philippines, either voluntarily or by force, with their mothers, they are typically subject to serious discrimination and bullying by the mother's home community (Constable, 2014).

#### 4. The size of the Issue

- 4.1 According to the Immigration Department of Hong Kong, there are over 340,000 FDWs working in Hong Kong, most of whom are female. At the end of January 2016, roughly 50% originate from the Philippines and 50% from Indonesia. The majority of these migrant women are in their prime reproductive years. It has been estimated that approximately half are unmarried<sup>2</sup>;
- 4.2 The Hong Kong government, including public hospitals, does not keep any statistical information in relation to the number of FDWs becoming pregnant and/ or the number of children born to FDWs in Hong Kong;
- 4.3 PathFinders estimates there are over 6,000 pregnant FDW women, mothers and their children in Hong Kong today. Since our establishment in 2008, PathFinders has assisted over 3,330 (2,100 if we exclude one-off hotline enquiries and referrals) pregnant FDW women, mothers and their children. Approximately 70% of PathFinders beneficiaries have been of Indonesian nationality. Further, of the pregnant women and mothers PathFinders has assisted, approximately 60% of them overstayed their visas (thus becoming undocumented) prior to approaching PathFinders for service. Year on year the number of women and children seeking assistance from PathFinders has grown aggressively and we served over 750 beneficiaries in 2015 alone.

#### 5. Recommendations:

In recognition of the specifications of the Concept Note, PathFinders recommends as follows:

##### 5.1. Establish a Committee

It is recommended that Member states should establish a committee, led by government but open to participation/submissions from other relevant stakeholders such as NGOs and academics, with the requisite decision-making authority to develop, implement and monitor policies and regulations relating to children of migrants. Such a committee should receive recognition as the primary authority on children of migrants within government and be consulted and able to direct policy across all sectors of government;

##### 5.2. Develop Time-Lines

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<sup>2</sup>Wang, Hongbo. 2011. The Use of Foreign Domestic Helpers in Hong Kong: A Discrete Analysis. Presentation for International Conference on Social Inequality and Mobility in Chinese Societies: Towards a Comparative Study" December 17, 2011.

It is recommended that governments adopting these recommendations develop clearly articulated time-lines so as to ensure the committees and related policies are in place in the shortest timeframes possible. In order immediately to begin protecting these most vulnerable children, basic social, civil and human rights should be extended forthwith to the babies and children before the requisite legislation has been passed;

### **5.3. Ensure registration and recognition of children born outside of their mother and/or father's country of origin<sup>3</sup>**

It is recommended that:

- 1) Every child, including those born to migrants in Hong Kong, should be officially acknowledged and provided with a legal identity;
- 2) For undocumented pregnant women who give birth in hospital, it is recommended that the police and immigration authorities be prohibited from arresting these women while in labour at the hospital in order to enable the women to be free of fear when giving birth. There should then be a delay in any arrest until the lives of newborn and mother have been confirmed by a doctor as sufficiently medically stabilised;
- 3) Public hospitals, the most likely place for these children to be born, should provide free/affordable access to pre- and post-natal care for the mother, without discrimination, and long-term basic and emergency health care for the baby, equal to those provided to the children of documented 'eligible' citizens. Including immunizations. Inability to effect payment on the part of the mother should be dealt with through separate legal recourse and should not, at any time, affect the services provided to the child.
- 4) Public hospitals should provide mothers with any and all necessary information regarding how to register the baby so as to make documenting the child as efficient as possible. The information leaflets currently provided are available only in Chinese and English and not any of the key minority languages spoken in Hong Kong. We especially wish to see translations into Bahasa Indonesian and Tagalog;
- 5) For babies born outside a hospital, the birth investigation and registration process and the speed of processing the application need significant improvement in terms of clarity and communication. The current registration period of 2-3 months is unacceptably slow;
- 6) For the still-hidden population of still-undocumented children in Hong Kong, provide an amnesty period of twelve months for all parents in Hong Kong to register their children, and/or for the children themselves to come forward to be registered, without fear of, and without there being any, legal or other reprisal against the babies and children;
- 7) Police and other government departments impacting migrants and their children, should establish more community liaison officers for ethnic minority groups;
- 8) Anti-child trafficking measures should be strictly imposed at all entry and exit points to the State in line with international best practice standards. Additional certification should be required to prove that all children travelling are indeed accompanied by a parent or other properly authorized person. Documentation can take the form of a birth certificate/passport reflecting the details of the parent(s) or other appropriate adult;
- 9) Provide clear, practical guidelines and policies to all stakeholders about how to successfully and lawfully manage all aspects of pregnancy, birth and maternity. These

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<sup>3</sup> Right to a name, identity, and to a nationality (art. 29 CMW; arts. 7, 8 CRC); Right to health (arts. 28, 45 CMW; art. 24 CRC) ; Equality and non-discrimination (arts. 1, 7 CMW; art. 2 CRC); Right to life and development (art. 9, CMW; arts. 6 CRC); Right to work and protection from forced labour, all forms of exploitation, child labour, and child abduction, sale or traffic (art. 11 CMW; art. 32, 34, 35, 36 CRC)

guidelines must, at all times, maintain the welfare and best interests of the child at their core. These should be linguistically and culturally inclusive.

#### 5.4. **Understand size of the problem**

Government departments and their agencies are to collect relevant data to assess the needs of the migrant community including the number of pregnancies and the number of children born to this group. This may also include information about the services sought by migrant mothers and children, such as family planning services; maternity services; labour-related guidance, for example when a woman is wrongfully dismissed due to pregnancy; and number of children born to migrant women. The government, with the support of public hospitals, should research, record, require and make publicly available longitudinal information about the number of pregnant migrants and the number of children known to be, and have been, born to them.

#### 5.5 **Improve Societal Support and remove stereotyping, prejudices and discrimination<sup>4</sup>**

There is an overall lack of societal understanding and support for migrants' rights. This arises from racist attitudes and fears that there are insufficient social services resources and economic wealth to share. These attitudes are powerful in that they can inhibit the migrants from understanding and asserting their rights but, conversely, if managed through education and outreach, pressure the government into developing proper policies and programmes to care for migrant mothers and, especially, their babies and children.

Migrants are often not aware of their rights, fear discrimination or even detention/deportation if they enquire about their rights. Those responsible for bringing them to their destination country, such as employment agencies, employers or even traffickers often ensure migrants remain unaware of their rights. The rights denied these migrants then affect the child, for example in Hong Kong many migrant women, especially FDWs, are unaware of their legally enshrined right to maternity leave and protections, and then are constrained by government's requirement that they live-in with their employers which makes both managing and taking maternity leave difficult/impossible.

#### 5.5. **Provide education to stakeholders<sup>5</sup>**

Migrant parents, employment agencies and employers of migrants must be accurately and constantly educated on laws related to migrants, especially those relating to children born to migrants. Employment agencies specifically targeting migrant workers should be required by government to attend educational sessions on the rights and obligations of employers of migrants and of migrant employees. Business licences and/or approval by the Immigration Department of the migrant's contract should be withheld pending confirmation that these agencies have attended and understand these sessions. Migrants should also be required to attend an education session about their rights and obligations as a migrant worker but this information could also be passed on through leaflets/brochures/websites/apps provided that such information is in a language the migrant worker understands.

#### 5.6. **Ensure access to Government Services<sup>6</sup>**

Discrimination, prejudice and lack of societal understanding and support of and for migrants and their children extends also to government service providers, including public hospitals and other government departments whose front line staff are often insensitive, ignorant or unable to respond to the needs of these people. Front line workers often turn away migrants who want to access services or make it difficult for them to understand the process to obtain services. It

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<sup>4</sup> Equality and non-discrimination (arts. 1, 7 CMW; art. 2 CRC)

<sup>5</sup> Right to education and professional training (arts. 30, 43, 45 CMW; arts. 28, 29 CRC)

<sup>6</sup> Equality and non-discrimination (arts. 1, 7 CMW; art. 2 CRC)

is vital that migrants feel assured that their children will receive government services, be it health, education, or otherwise, regardless of the attitude towards the migrant themselves or their legal status.

Reduce barriers to accessing government services and understanding cultural sensitivities faced by pregnant migrants or migrants with children by providing translators and/or training front line staff to improve communication and reduce the risk of misunderstanding. Also educate front line staff on how/where they are easily able to obtain information about the rights of migrants and their children, including the services available to them.

#### **5.7. Ensure equality before the law<sup>7</sup>**

As noted above, migrant children or children born to migrants living in destination countries should be equal before the law and receive the same rights and public benefits offered to the children of citizens, this is to ensure that the welfare of the child is at all times paramount and should be provided regardless of the legal status of the child or the parent. Government should review barriers to the regularisation of their immigrant status, such as visa-issuance, marriage laws, and dependency visas so as to ensure the right to family union is taken seriously and to consider the family as a whole in handling dependent visa applications from the family in the best interests of the child.

In Hong Kong, if 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, accompanied by her child, can still be removed from Hong Kong if the mother loses her own residency status or overstays her visa. It is therefore recommended that policies relating to children of migrants always use deportation and detention as an absolute last resort and that decisions by immigration authorities are always made with the best interests of the child as the primary concern. Children who have been granted permanent residency rights in a destination country, should have those rights extended to their primary caregiver, i.e. their mother in most cases.

#### **5.8. Improve situation upon return to country of origin<sup>8</sup>**

Countries of origin need to take responsibility for children born to their overseas-based workers through educating their population about the rights of their children and, equally as important, the dangers and challenges they may face abroad. This is especially relevant for countries such as Indonesia and the Philippines where migrant workers are common and registered with their governments. The governments in the countries of origin should collect relevant information and statistics, such as number of children born overseas to their nationals (while those nationals work overseas) and who returned home with their mothers or alone and their long-term well-being. Social welfare policies, women's empowerment programmes and re-integration programmes should be established in the migrant's home country to assist these mothers and children better to integrate into the mother's home society and to assist local communities to have an accurate and unbiased understanding of the issues so they are better prepared to welcome these children (often mix-raced and born out-of-wedlock) and the children are able to grow up and to thrive in a supportive environment.

Please contact us if you need further information or clarification in relation to the above.

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<sup>7</sup> Equality and non-discrimination (arts. 1, 7 CMW; art. 2 CRC); Right to family life (arts. 14, 17, 44, CMW; arts. 9, 10, 11, 20, 21, 22, CRC)

<sup>8</sup> Equality and non-discrimination (arts. 1, 7 CMW; art. 2 CRC); Right to physical integrity (art. 10 CMW; arts. 19, 37, 39 CRC); Right to family life (arts. 14, 17, 44, CMW; arts. 9, 10, 11, 20, 21, 22, CRC); Right to a name, identity, and to a nationality (art. 29 CMW; arts. 7, 8 CRC); Right to an adequate standard of living (art. 45 CMW, art. 27 CRC)

We support your efforts to protect and promote the rights of vulnerable children and wish you every success in doing so.

Very best,

A handwritten signature in black ink, appearing to read 'K McArdle', with a long horizontal stroke extending to the right.

Kay McArdle  
CEO, PathFinders

A handwritten signature in black ink, appearing to read 'Luna Chan', with a long horizontal stroke extending to the right.

Luna Chan  
Deputy-CEO, PathFinders