

**Submission 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**

**By**

**Liberty Asia**

**March 2014**

## **1 Executive Summary**

At present, access to justice remains a key issue amongst foreign domestic helpers (“FDHs”) that suffer from a range of labour rights violations, debt bondage, physical and mental exploitation and sexual abuse. Recruitment and placement agencies in source countries and Hong Kong are routinely involved in the trafficking of FDHs and their exploitation in forced labour, as they are using deception and coercion to recruit FDHs and compel them to work in situations that violate their human rights. The live-in requirement (see section 3.3) and the Two-Week Rule (see section 3.4) exacerbate the weak position of FDHs by making it more difficult for FDHs to leave such exploitative situations and access the systems for redress in Hong Kong. Moreover, the extortionate agency fees lead to debt bondage which compels FDHs to remain in abusive situations.

These violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are often at the core of trafficking for forced labour cases. Trafficking for forced labour denies FDH victims the right to “freely chosen work” and “to the enjoyment of just and favorable conditions of work” upheld by articles 6 and 7. Additionally, victims who are forced into trafficking seldom receive compensation, if any, for the services they are forced to provide and their conditions of work are far removed from “safe and healthy working conditions.”

The Hong Kong government’s efforts to ensure protection from exploitation, trafficking and forced labour are falling short as a direct result of its inadequate implementation of international standards within its own national legislation. Having ratified the ICESCR, International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and ILO Conventions No.29 and No.105, amongst other relevant international standards, Hong Kong has a particular obligation to suppress trafficking and the use of forced labour in all its forms and to ensure that those responsible face adequate penalties which must be strictly enforced and victims are afforded adequate redress.

In addition to the lack of a comprehensive anti-trafficking law, Hong Kong’s current legislation provides for a narrower definition of trafficking than the generally accepted definition under international law. Article 3(a) of the Palermo Protocol defines “exploitation” to include at a minimum “the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery.” While prohibiting only one form of trafficking for prostitution, the Hong Kong government has not addressed the more general problem of trafficking for forced labour that affects FDHs and is likely to affect other groups of migrant workers such as construction workers and fishermen. It is important to note that whilst the application of the Palermo Protocol does not currently extend to Hong Kong, a more comprehensive definition of human trafficking is called for by the wide-ranging anti-slavery provisions of the ICCPR, CEDAW, ILO Conventions No.29 and No.105.

It is recommended that the Hong Kong government adopt a National Plan of Action with a holistic approach to the issue to include measures relating to prevention, prosecution and protection. A broader definition of trafficking following the Palermo Protocol should be incorporated into the anti-trafficking legislation to prohibit all forms of trafficking and protect victims of forced labour. Without a comprehensive national legislation, the measures taken are always lacking and have limited effect. With the right legislation in place, the Hong Kong government can then implement an infrastructure, e.g. National Referral Mechanism, to process all suspected cases of human trafficking in a fair and systematic manner. Recommendations should focus on improving access to justice e.g. either allowing FDHs the right to work afforded to them under article 6 of the ICESCR whilst they are going through legal proceedings or providing some form of daily sustenance so they are able to pursue their claims unhindered by the inability to support themselves through legal proceedings.

## **2 Legal Framework**

- 2.1 Hong Kong's interpretation of human trafficking is very restrictive and not on par with the internationally accepted definition provided under the Palermo Protocol. This therefore contributes to the deficiency in practical measures taken to address the problem. The one-dimensional view of the issue relates to movement of people to and from Hong Kong for the purposes of prostitution.<sup>1</sup> The focus on the transnational movement rather than on exploitation creates the misconception that trafficking is an immigration crime and that victims can only cross borders illegally.
- 2.2 Hong Kong's obligations under ILO Conventions No.29 and No.105 are constitutionally entrenched under article 39 of the Basic Law. Yet Hong Kong still does not have a national law that clearly defines illegally forced or compulsory labour and its penalties.<sup>2</sup> Similarly, the ILO Convention No.105 requires each member to take "effective measures to secure the immediate and complete abolition of forced or compulsory labour..." Therefore, the government has an obligation to take all necessary steps to prevent forced labour from occurring especially in the private sector where FDHs are brought to Hong Kong under a special programme administered by the government.
- 2.3 Furthermore, Hong Kong has an obligation pursuant to article 8.3 of the ICCPR to suppress the use of forced or compulsory labour. The Hong Kong Bill of Rights Ordinance (Cap. 383), which incorporates this international

---

<sup>1</sup> S129 of the Crimes Ordinance (Cap. 200).

<sup>2</sup> C29 Forced Labour Convention, art. 25 states that "the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

treaty into national legislation, prohibits “slavery and the slave trade in all their forms” and provides that “no one shall be held in slavery or required to perform forced or compulsory labour” in article 4. Hong Kong’s incorporation of the ICCPR’s forced labour provisions in the Bill of Rights alone is not adequate to give effect to the provisions. Implementation in Criminal code, however, is vital for it to be an effective provision with deterrent effect.

- 2.4 Given the applicability of the ICESCR to Hong Kong, it has an obligation to respect the right to work guaranteed under articles 6 and 7. Measures should be taken to prohibit forced or compulsory labour and ensure equal opportunity to decent work of all persons, especially marginalized groups<sup>3</sup> such as FDHS.
- 2.5 Hong Kong is also legally bound by article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which compels States Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”
- 2.6 Hong Kong falls short of its obligations under article 1(a) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery as many of the FDHs are working under the conditions of debt bondage. Their labour is pledged as a security for a debt and the unlimited and undefined maximum hours of work, owing to the live-in requirement, also contribute towards creating a situation of debt bondage.

In conclusion, Hong Kong has ratified many international instruments and under these standards, the Hong Kong government is obliged to suppress trafficking and the use of forced labour in all its forms and to ensure that those responsible face adequate penalties which are strictly enforced. However, Hong Kong does not fully comply with these duties and continues to lack a specific criminal prohibition of forced labour and trafficking for forced labour. Currently, Hong Kong has no comprehensive anti-human trafficking law and legislation is scattered across different ordinances,<sup>4</sup> making enforcement of the existing legislation extremely difficult. As a result, the accompanying practical steps are lacking in depth. Practical steps such as training or distribution of information for raising awareness are severely limited in their reach given that they do not fully address trafficking for forced labour. Many forced labour/debt bondage type

---

<sup>3</sup> Committee on Economic, Social and Cultural Rights, General Comment 18, art. 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006).

<sup>4</sup> S129 of the Crimes Ordinance (Cap. 200); Immigration Ordinance (Cap. 115); Offences against the Person Ordinance (Cap. 212); Employment Ordinance (Cap. 57); Employee’s Compensation Ordinance (Cap. 282); Sexual Discrimination Ordinance (Cap. 480).

cases fall within a jurisdictional grey area that no government wants to take responsibility for.<sup>5</sup> By ignoring the breadth of the human trafficking issue and cases, this problem remains largely unaddressed and comes at a high cost to source countries and communities within which the exploitation takes place.

### **3 Barriers to Access to Justice**

FDHs face multiple difficulties that prevent them from accessing justice in the first place. In the absence of anti-trafficking legislation, there is no ability for victims to even bring a case forward or make a complaint/seek a remedy about human trafficking for forced labour. In practice, the existing legal framework in Hong Kong, or lack thereof, is contrary to article 7 of the ICESCR as it contributes to unjust and unfavorable conditions of work faced by FDHs and discourages them from filing complaints with authorities. The two-year contract commitment and the Two-Week Rule in tandem give the employer the power to terminate the work visa at any time, making access to the justice system virtually impossible. The live-in requirement as well as other exploitative practices by the placement agencies all contribute to FDHs' vulnerability to abuses and reluctance or inability to seek redress.

#### **3.1 Agency Fee**

FDHs usually face significant indebtedness as part of the terms of their job placement through recruitment agencies in their home countries, which often have tie ups with recruitment agencies in Hong Kong, leading to situations of debt bondage/forced labour. These extortionate placement fees which can be as high as US\$2,725 or more exceed the 10% agency fees permitted under the Employment Agency Regulation of the Employment Ordinance.<sup>6</sup> These agencies often disguise these fees as loans and then instruct employers to divert most of the monthly salary to a finance company or agent, circumventing Hong Kong law.<sup>7</sup> Such fees may comprise more than 80 percent of FDHs' salaries for the first seven to eight months of employment which is considered unfair wages under article 7 of the ICESCR.<sup>8</sup> Switching new employer would also incur new recruitment fees on top of the original which may not have been fully repaid. The fear of not being able to repay their debts, to secure a new job or having to repay a recruitment fee a second

---

<sup>5</sup> Amnesty International, "Exploited for profit, failed by governments: Indonesian migrant domestic workers trafficked to Hong Kong, November 2013, available at: <https://www.amnesty.org/en/library/asset/ASA17/029/2013/en/d35a06be-7cd9-48a1-8ae1-49346c62ebd8/asa170292013en.pdf>.

<sup>6</sup> Part XII, Employment Ordinance (Cap. 57); Employment Agency Regulations (Cap. 57A).

<sup>7</sup> Employment Ordinance, Cap. 57, Laws of Hong Kong (1968) s57(b). It stipulates a licensed employment agency shall not, directly or indirectly "share with any person, other than another licensee or a bona fide partner or shareholder in his employment agency, the prescribed commission which he is permitted to charge and receive."

<sup>8</sup> ICESCR, art. 7(a) provides "all workers, as a minimum, with (i) Fair wages and equal remuneration for work of equal value without distinction of any kind."

time compels many FDHs to remain in abusive and exploitative work conditions. The recent well-publicized case of Erwiana Sulistyaningsih, an Indonesian domestic helper who remained employed despite serious physical assault and torture by her employers, has highlighted the FDHs' vulnerability to all kinds of abuses.

### 3.2 **Confiscation of documents**

The confiscation of passports, identification documents and contracts by placement agencies or employers is an effective way of maintaining control over FDHs, as without these documents, they cannot work legally in another job or even prove their legal status in Hong Kong. This essentially restricts their freedom of movement and also deters FDHs from seeking help or leaving jobs where they are subject to abuse.

### 3.3 **Live-in requirement**

FDHs are required by Hong Kong's immigration regulations to work and reside in the employer's residence<sup>9</sup> which must be "suitable accommodation and with reasonable privacy."<sup>10</sup> This live-in requirement, however, prevents FDHs from enjoying just and favorable conditions of work, amongst others, "rest, leisure and reasonable limitation of working hours" as provided under ICESCR, article 7(d) because they are essentially on-call at all times due to the lack of private space. Most FDHs do not have their own rooms and are forced to sleep in the living room, kitchen or even bathroom. This living arrangement pushes FDHs into isolation and greater risk of being subject to exploitation and abuse. This also contributes to limited freedom of movement.

### 3.4 **Two-Week Rule**

The Two-Week Rule provides a disincentive for FDHs to denounce abusive practices and pursue legal recourses or access the systems for redress in Hong Kong. Unless the FDHs 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 a visa extension at a cost of HK\$160 (per renewal) (US\$20). To take a case to the Labour Tribunal, it takes on average around two months. During this time, they will have to pay for their own accommodation, food and other expenses including multiple visa extensions without any income. Most FDHs are unable to afford these costs which leave them with little choice but to remain in abusive conditions or

---

<sup>9</sup> Since April 2003 the government has required that newly hired FDHs live with their employers, in order to prevent FDHs from competing with local workers for "live-out" domestic work. See HK Legislative Council, Paper on Policy Government Employment of Foreign Domestic Helpers (5 July 2005), available at: <http://www.legco.gov.hk/yr04-05/english/panels/se/papers/se0705cb2-2116-7e.pdf> (visited 7 Mar. 2014).

<sup>10</sup> See HKSAR Government, Guidebook for the Employment of Domestic Helpers from Abroad (ID 969), available at: <http://www.immd.gov.hk/en/forms/forms/id-e-969.html> (visited 7 Mar. 2014).

accept employment with exploitative terms and conditions in order to maintain their immigration status in Hong Kong.<sup>11</sup>

Even if a FDH decides to file a complaint, she will generally have to negotiate with her former employer for any remedy at the Labour Department.<sup>12</sup> At this point the FDHs are unrepresented (not entitled to legal representation) and the Labour Tribunal is not the correct forum to examine debt bondage and ensuing exploitation. FDHs are mostly unaware of their rights for their cases to be referred to the District Court especially where there are other issues aside from unpaid wages. The Immigration Department will extend a FDH's visa if she has an active claim with the Labour Department but normally grants only short extensions and does not permit the FDH to work while she pursues her claim, a fundamental right recognized under article 6(1) of the ICESCR, amongst several other international instruments. This provides a strong incentive for the FDHs to abandon their cases or accept an offer from the employer that may be less than what they are legally entitled to.

#### **4 Recommendations**

##### **4.1 Adopt the Palermo Protocol's definition of trafficking**

Hong Kong government should first adopt a broader, more holistic and all-encompassing definition of trafficking as set out in the Palermo Protocol. The current definition of trafficking addresses only one form of trafficking for prostitution and it erroneously focuses on the movement rather than exploitation. An extended definition of trafficking should then be followed by an adoption of a comprehensive anti-trafficking law that prohibits all forms of trafficking including forced labour and defines concepts such as debt bondage according to standards set out in international instruments.

##### **4.2 Create a National Plan of Action for measured and holistic change**

Hong Kong government should create a National Plan of Action as an initial step to a national counter-trafficking strategy to provide a meaningful opportunity to make measured changes in a manner that suits the needs of the present time and its capacity. The key areas to be covered must be prevention, protection and prosecution with victims' rights being the lynchpin of the Plan of Action.

##### **4.3 Amend existing legislation to combat forced labour**

Hong Kong government should adopt legislation to ensure adequate procedures are in place to guide officials in proactively identifying forced

---

<sup>11</sup> In 2013, the UN Committee on Economic, Social and Cultural Rights, in its List of Issues for the second periodic report of the Republic of China, including the Hong Kong SAR, also requested the Government to 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.

<sup>12</sup> See Hong Kong Government, Department of Labour, Practical Guide for Employment of Foreign Domestic Helpers - What foreign domestic helpers and their employers should know, available at: <http://www.labour.gov.hk/eng/plan/iwFDH.htm> (visited 7 Mar. 2014).

labour cases among vulnerable populations. More enforcement effort should be put into inspections of recruitment/placement agencies or finance companies and collaboration with source countries to effectively contain the issue at both ends. More specifically, the Hong Kong government should amend the Two-Week Rule, the live-in requirement, the Employment Agency Regulation and clearly define maximum working hours, amongst other reforms, as these rules facilitate exploitation of FDHs and violate the right to work which is essential for realizing other human rights.

#### **4.4 Create a National Referral Mechanism (“NRM”) and accompanying data protection systems**

Hong Kong would benefit greatly by the implementation of a NRM, a structure that formalizes the cooperation between the state and NGOs. These structures are crucial in ensuring early identification of victims and fair assessment of each suspected case of trafficking as well as providing onward support service referral. A NRM will also offer the opportunity to put in place an effective data collection and management system to ensure data is collected systematically and without duplication, an essential step in implementing a targeted response to Hong Kong’s anti-trafficking needs.