

**HONG KONG HUMAN RIGHTS MONITOR**

**The Second Periodic Report on the Hong Kong Special Administrative  
Region of the People's Republic of China in light of the Convention on the  
Elimination of All Forms of Discrimination against Women**

**Submission by Hong Kong Human Rights Monitor**

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Key Author: Lam Chi Yan, Kay

4/F Kam Tak Building, 20 Mercer Street, Sheung Wan, Hong Kong  
Phone: (852) 2811-4488 Fax: (852) 2802-6012  
Email: [contact@hkhrm.org.hk](mailto:contact@hkhrm.org.hk) Home page: <http://hkhrm.org.hk>

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## Executive Summary

### - Issues Affecting the Most Vulnerable Groups of Women

1. **Foreign Domestic Workers** (hereinafter FDWs) are predominantly women. FDWs are discriminated against as compared to other migrant workers. They are not entitled to the right of abode in HK no matter how long they have been staying here as migrant workers, while in other jobs or professions like lawyers are eligible after seven years of stay in HK. They are the only category of migrant workers who are required by an immigration policy to return to their country of origin within two weeks after the completion or premature termination of their contract, irrespective of whether they are at fault or not, and whether they can find a new employer or not. This “two-week rule” substantially undermines the FDWs' bargaining power and exposes them to underpayment, long hours of work, poor conditions of work, sexual and other abuses. The Committee should express serious concerns about the modern form of trafficking and enslaving of FDWs based on deception and coercion by unscrupulous employment agents and employers imposed through the “debt bondage contract” arrangement and withholding or confiscation of travel documents which is reinforced by the two week rule. The Hong Kong Human Rights Monitor (the Monitor) requests the Committee to call for the enactment of proper laws and cross border undercover investigation to combat such form of trafficking and withholding of travel documents, the repeal of the two-week rule and the restriction on right of abode against FDWs. The Committee should also call for the abolition of the “maid-tax”, which is disguised as a levy for the purpose of retraining of local residents, and for the reversal of the deduction of the FDWs' salary of the same amount.
2. In spite of repeated calls from UN treaty bodies and local NGOs to legislate against racial discrimination, the Government is still delaying the legislation process. With the absence of a **Race Discrimination Ordinance**, many ethnic minorities of Nepalese and Pakistani origin suffer most from discrimination by their employers, co-workers, customers and other local citizens. The women among them are in even worse situation as they are subject to multiple discrimination, especially racial, language and gender ones. They have little access to public services, socially excluded from the mainstream Hong Kong society and economically less active. FDWs also suffer from **multiple discrimination**, especially on gender, race, language, class and national origin. They have been singled out for admission fees to certain commercial buildings, denied access to certain facilities, services and sales of goods. The Monitor calls on the Committee to urge the Government to demonstrate its commitment to enact and improves the laws to combat all kinds of discrimination, especially racial discrimination. The laws should also impose positive duty on the government to promote gender and racial equality in line with the requirement of **due diligence**. The Committee should urge the HK

Government to immediately introduce the Race Discrimination Bill and enact within a year a law offering effective protection against all forms of racial discrimination.

3. The Monitor questions the Government's assertion that new arrivals (immigrants) from Mainland China should not be included in the racial discrimination bill. Though the new arrivals are ethnically Chinese, their political, economic and cultural backgrounds are totally different from their local residence, which are the sources of discrimination. Again, women are the most vulnerable ones who bear most of the adverse impacts, e.g. working as the key bread-winners of the family while taking up most of the household chores. New arrival women are being discriminated when seeking help from the social workers and police. Actually new arrival women are just part of the **groups of most vulnerable women**, consisting of FDWs, ethnic minority women, women right of abode claimants and "Moms without ID" from the Mainland, asylum seekers and sex workers. The aloofness of the frontline service providers and law enforcement officers has escalated the hardship faced by these vulnerable women when they are victims of domestic and other forms of violence, sexual abuses, human trafficking, immigration policies, labour rights violations, crimes, poverty and social exclusion. The Government should take immediate measures to ensure that the law and the Sex Discrimination Ordinance should impose on all governmental and public authorities positive duties to achieve gender and racial equality, and should cover new arrivals. Effective measures should also be put in place to ensure **equal access to justice and social services** by vulnerable women.
4. The Monitor also expresses serious concerns over the matters relating to the **split families** between HK and Mainland China. After the stripping by the reinterpretation of the Basic Law by the Standing Committee of the National People's Congress in Mainland, of the right of abode of many **children born in Mainland China to HK permanent residents** once recognised by the HK Court of Final Appeal, many problems have been created and remain to haunt HK. There are grown-up children, mostly infants or young girl-children left behind in the Mainland by their parents when they came to HK for settlement, who are not eligible to come to settle and join their family in HK. Usually sons are brought to HK and daughters left behind due to sex discrimination among many parents under the old Mainland policy that only no more than one child was allowed to leave and settle in Hong Kong with the parents. These girls have grown up but found themselves too old to meet the new eligibility criteria to settle in HK and have their right of abode under the Basic Law when it come into force in 1997 stripped in 1999. "**Moms without ID**" are mothers who do not enjoy uninterrupted stay with their children because they do not have the right of abode nor resident status in HK while their children are HK-born and being raised in HK. Most of these categories of mothers have to travel in between HK and the place of their registered residence in the Mainland every three months for taking care of their children

and renewing their two-way travel permit. Others have decided to stay in HK without a valid Two-Way Permit from the Mainland authorities and permission by the HK Immigration. They are neither allowed to work nor entitled to social welfare since they have no formal resident status in HK. Some of them are also financially exploited by Mainland immigration officers. They do not fall in any categories of persons eligible to come to HK for settlement and the Government also stays aloof in this issue. At the same time, discrimination further adds pressure to this group of mothers already in distress. The Committee should urge the HKSAR Government to provide **remedial measures** in immigration and welfare policies to these groups of mothers who are in a way victims of wrongful policies of the Mainland and HK authorities to enable them to settle in HK in the near future to bring up their children in the territory.

5. The Monitor is concerned over the absence of laws for establishing the right to seek asylum in HK and the lack of refugee status determination (RSD) procedures. The Government continues to deny its international obligations of RSD by “sub-contracting” it to the United Nations High Commissioner for Refugees (UNHCR). Many of the asylum seekers are detained only because they have in their possession of fake passports (a practice common and necessary to refugees and excused by Refugees Convention) or overstaying (an artificial situation created by the government policy of denying visa to asylum seekers and the unrestrained and arbitrary use of detention), a measure totally inconsistent with UNHCR guidelines on not to detain asylum seekers. Several years ago, asylum seekers being processing by the UNHCR would normally not be detained when they reported to the Immigration with a letter from the UNHCR certifying their status. But detention is now a norm in spite of the letter. In addition, those who are not in detention centres, including those vulnerable families, are no longer supported by the UNHCR since May after its budget cut. Many of those affected are women and children. The “humanitarian” assistance by the Hong Kong Government is not only small and inadequate but also conditional upon their reporting to immigration “for verification of status”. Asylum seekers children applying for school education will be denied unless the children have approval from the Director of Immigration, a practice totally inconsistent with the right of all school age children to education irrespective of legal status. Such reporting to or approach of the Immigration, as warned to us by UNHCR, involves risks of the asylum seekers exposing themselves to detention. **Female asylum seekers** are particularly affected by the budget cut since they usually have less means of survival in HK. Mother asylum seekers now have to face the dilemma of whether bring their kids to the authorities and risk detention of all of them or suffer from hunger and deprivation of education to their kids. Even they are released on recognizance; they have to face the problems of lack of adequate basic support. Similarly, in fear of being detained or deported, female asylum seekers are reluctant to seek help from the police even they are being physically or sexually harassed or abused while their cases are still being

processed by the UNHCR.



## **Part 1. Background**

### **I. General political structure**

#### **Chief Executive**

1. The Chief Executive was elected by an 800-member Election Committee. (Basic Law, Annex I) The Election Committee is not broadly representative with regard to the population size of the HKSAR. Besides, the members are returned by small-circle elections based on sectoral interests. Due to the corporate voting system and the lower proportion of women in top management in many corporate bodies, women are systematically worse off in their chance of participation in such restricted franchise. Thus, the mandate of the Chief Executive, who assumes numerous constitutional powers, is gender-biased.<sup>1</sup> The denial of universal and equal suffrage and the existence of corporate voting method in returning the Chief Executive are serious institutional defects with strong adverse impacts on the protection and promotion of basic human rights.
2. As provided in Article 45 of the Basic Law, the ultimate goal for selecting the Chief Executive (CE) is by universal suffrage. The Basic Law further set forth that amendment on the method for selecting the Chief Executive subsequent to the year 2007 may be made with the endorsement of two-thirds majority of the Legislative Council, the consent of the CE and the Standing Committee of the National People's Congress (NPCSC) (Basic Law, Annex I). Nevertheless, the hope for universal suffrage in 2007 has been ruled out by the interpretation of Basic Law by NPCSC in 2004.

#### **Legislative Council**

3. The Legislative Council is composed of members returned by the Geographical Constituency (GC, 30 seats) and Functional Constituency (FC, 30 seats). (Basic Law, Annex II) GC members are elected on the basis of direct elections; whereas the system of FC confers a right to vote on a small percentage of the adult population based on membership or registration in a recognized professional body or sector. Many of the FCs adopt wholly or partly corporate voting. The FC system does not recognize sectors of the public such as those engaging in domestic work and part time jobs but manufacturing, banking, lawyers, doctors, engineers, etc. The voter size of each constituency also varies, ranging from 148 to 71,390 registered voters. While the total number of registered male and female electors are rough the same but since women voters are predominantly found in the two largest FCs

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<sup>1</sup> The powers and functions and the Chief Executive are stated in Article 48 of the Basic Law. See: <http://www.info.gov.hk/sitemap.htm>

for teachers and nurses, leaving an overwhelming proportion of the other FCs dominated by men. The system breaches the principle of “one person, one vote” since individual FC members can vote twice in the Legislative Council elections, while GC voters who are ineligible to vote in FC can only vote for once. Therefore, the electoral methods for returning Legislative Councillors are also structurally biased against women.

4. In spite of inequalities embedded in the system, Legislative Councillors returned by the FC may veto the bills proposed by GC members since the bills have to be passed by simple majority in both the GC and the FC divisions. (Basic Law, Annex II). What is worse, the NPCSC decided that the election of Legislative Councillors in 2008 would not be by universal suffrage and that the ratio of FC members and GC members would not be changed.

### **District Councils**

5. The District Councils advise the Government of the HKSAR on district affairs and promote recreational and cultural activities, and environmental improvements within their respective districts. The District Councils are elected on every four years, which comprise both elected and appointed members. In spite of the fact that the appointment system in the District Board has been abolished by the Colonial Government in 1994, the SAR Government has restored the appointment system of the District Council in February 1999. The reintroduction of appointment system signifies the regression of democracy after the handover of sovereignty.

### **Constitutional development**

6. The Monitor expresses serious concerns over the democratization process of HK since the Basic Law has laid down huge obstacles in the way to democracy. As discussed in previous sections, the Chief Executive and the Functional Constituency Legislative Councillors may effectively veto any meaningful progress of the democratic development. (Basic Law, Annex II, Part III) The Basic Law further restricts the power of the Legislative Councillors to move private bills, by requiring the consent of the Chief Executive in practically most issues. (Basic Law, Article 74).
7. In 2005, the Government presented the Fifth Report on Constitutional Development. It was recommended that the size of the Election Committee which is charged with selecting the Chief Executive should be increased from 800 to 1600, which includes all appointed and elected members of the District Councils. The Government also proposed an increase in Legislative Council seats, from 60 to 70. There will be five new seats for the GC and five new seats for the FC respectively. The five new FC seats will be returned by all members of the District Councils, including the elected and appointed members. The proposal was voted down by the democratic Legislative Councillors and the method for selecting the Chief Executive and the

Legislative Council in 2007 and 2008 will remain unchanged.

8. The recommended package is a “bird-cage” proposal, which made no substantive progress on the democratic development of HK. To start with, the expansion of the Election Committee is meaningless given that the electoral base of the Committee remains unchanged. On top of that, the expansion of FC seats goes against the ultimate goal of universal suffrage and it creates more vested interests which are very difficult to be taken away. Besides, the appointed members of the District Councils, who have no popular mandate, are vested with more political power than ever. Also, no attempts were made to abolish the appointment system of the District Councils. The package created a real risk of further diminishing the influence of the democratic camp if it is implemented. Last but not least, no concrete timetables on democratization were offered by the Government at all. It is in the interest of long term democratic development to have the package voted down.

## **II. General legal framework**

### **Rule of law and judicial independence**

9. Incidents after the handover of sovereignty, particularly the interpretation of Basic Law by the Standing Committee of the National People’s Congress (NPCSC), have revealed the defects of the Basic Law.<sup>2</sup> The Hong Kong government asserts that the NPCSC of the PRC has the ultimate power in

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<sup>2</sup> The first Basic Law re-interpretation by NPCSC took place in 1999. The Court of Final Appeal (CFA) of HKSAR ruled that the offspring of HK resident born in Mainland China are entitled to the right of abode in HK (Article 24, Basic Law). Since the decision of the CFA may cause influx of population to the HKSAR, the Government requested the NPCSC for re-interpretation of the Basic Law. The decision of the CFA was overridden by the NPCSC and the final decision being that children born outside Hong Kong will only be eligible for the right of abode if at least one of their parents has already acquired permanent residence status at the time of their birth.

In 2004, the interpretation of the Basic Law by the NPCSC added a new procedural requirement in order to democratize Hong Kong's electoral system. Under NPCSC's interpretation, the Legislative Council is barred from initiating a reform of the election law; instead, the reform process can only be initiated by the Chief Executive, who is effectively appointed by Beijing. These requirements are not found in the text of the Basic Law. Despite repeated calls by pro-democracy groups and political parties in HK to engage in an open and consultative process before issuing an interpretation, the central government refused to engage in any dialogue with the people of HK.

In 2005, after the resignation of the former Chief Executive Tung Chee-hwa, there was a dispute over the length of the term of the Chief Executive since Tung resigned before the end of his second term of office. To most local legal professionals, the length is obviously five years, under whatever circumstances. Nonetheless, legal experts from the Mainland said it is a convention for a successor to serve the remainder of the term if the position is vacant because the predecessor resigned. The Standing Committee of the National People's Congress exercised its right to interpret the Basic Law, and affirm that the next Chief Executive will only serve for the remaining term.

interpreting any provisions of the Basic Law at any time before, during and after the final adjudication of the Court of Final Appeal. Moreover, the SAR Government even actively seeks the interpretation of Basic Law from the NPCSC and refuse to undertake not to seek an interpretation again. The power of the NPCSC in Basic Law interpretation symbolizes the direct interference of the Central Authorities in the judicial matters of HKSAR, which place judicial independence in jeopardy. The weakening of judiciary in its ability to protect rights have serious consequences in protecting rights, including those of women. In the re-interpretation of Basic Law by NPCSC in 1999 have disparate adverse gender impacts because there were more female right of abode claimants than male ones, since there had been more girls than boys who had been left behind in Mainland China when both of the parents emigrate to HK for settlement under the then restriction of taking with them no more than one child.

### **Human rights recognised in the Basic Law and their limitations**

10. The Government affirms in its report that the rights and freedoms of residents are safeguarded under the provisions of the Basic Law (Basic Law, Chapter III).<sup>3</sup> It further asserts that the Bill of Rights Ordinance (BORO) was enacted in June 1991 specifically to give effect in local law to the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to HK. Nevertheless, the BORO only binds the Government and public bodies. In other words, activities of the private sector in respect of human rights are beyond the reach of the BORO. In case the citizens' rights are infringed by private bodies, there are no remedies based on the BORO. The BORO has not established any mechanism for reconciliation like those under the Sex Discrimination Ordinance.
11. Besides, Article 23 of the Basic Law remains a threat to the civil rights in HK since it requires HK to enact laws to prohibit treason, sedition, subversion, secession and theft of state secret. Though the bill was temporarily withdrawn by the Government, uncertainty remains. Since the Government is not elected by universal suffrage, it may weaken civil rights in the name of national security once the legislation of Article 23 is enacted. Such legislation may have adverse impacts on freedoms of association, assembly, and expression which are essential to the protection and promotion of human rights.

### **Lack of statutory Human Rights Commission**

12. Currently, HK does not have a statutory Human Rights Commission that specializes in monitoring the implementation of international human rights convention and the human rights situation in HK. The UN Human Rights Committee and the Committee on Economic Social and Cultural Rights have
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recommended the Government to reconsider the possibility of establishing a Human Rights Commission. Nevertheless, the Government has repeatedly denied the need for such a body.

13. In effect, the Ombudsman, the Privacy Commission and the Equal Opportunities Commission enjoy limited power, which is unable to provide adequate protection to the exercise of human rights in HK. Even the modest recommendations for amendments to the Sex Discrimination Ordinance proposed in 1999 have not yet been implemented. The recommendations do not include important things such as empowering the EOC to order governmental bodies to conduct assessments of gender impacts by various policies and other due diligence requirements. The Ombudsman's power is limited in the sense that it is barred from investigating in matters affecting national security, defence or international relations. The Privacy Commissioner's Office has neither conciliation measures nor any power to bring legal proceedings. Moreover, laws on equal opportunities only embrace discriminations relating to sex, disability and family status; other dimensions of discrimination, including age, race etc are not included. These bodies need improvements to their appointment, composition, power, function and resources to enable them to be effective in the protection and promotion of human rights, including women's rights.

### **III General Framework in promoting women's rights**

#### **Lack of instruments in promoting women's rights**

##### **Gender mainstreaming**

14. The Government has affirmed in its report that gender mainstreaming should be introduced to different policy areas on an incremental basis. However, we believe that the Government's advocacy of gender mainstreaming is little more than a verbal promise since we can hardly observe any concrete actions and progressions. The only exception is the promotion in a small scale of a checklist for gender mainstreaming by the Women's Commission. The impacts of the checklist is far from adequate. The Government is halfhearted in the sense that it has even failed to institute institutional as well as attitude changes of civil servants and departments.
15. Institutionally speaking, it is an impossible task for the Women's Commission in HK to coordinate and implement the mandate of gender mainstreaming since it is established only under the Food, Health and Welfare Bureau (FHWB). The Commission is not much more than an advisory body of the Government, which does not have sufficient power and resources in policy coordination. Nonetheless, as set forth in the *Beijing Platform for Action* (1998), gender mainstreaming should be coordinated at the highest possible

- level. Besides, the subordination of the Women's Commission to the FHWB illustrates the Government's mentality in women's affairs. The Government associates women's affairs to the scope of health and welfare, which is not comprehensive in embracing all forms of women's rights, including political rights, economic rights etc.
16. In terms of attitude, none of the Government bureaus have a mandate in reviewing policies and programs from a gender perspective. One of the examples is policies on domestic violence. The services provided for victims of domestic violence are placed under the family services policy. The Government tends to view the family as a unit and still wants to preserve the family unity in cases of domestic violence. However, supporting the family does not equal to supporting the women in the family. Women may have their own rights and identity, which may be distinct from the family as a whole, especially in cases of domestic violence. In case the policy equalizes women's interests with family unity, women's safety may be sacrificed for the sake of preserving family unity.
  17. In order to promote gender mainstreaming, special trainings should be given to civil servants in enhancing their gender sensitivity in the police. Though the Government's report asserts that gender-related training has been provided by the Women's Commission to civil servants, the scale of training is very limited since the Commission does not have enough capacity in providing or ordering trainings to all government departments. The Government also failed to provide a timetable for realizing gender-related trainings for all civil servants.
  18. The Monitor requests your Committee to urge the Government to (a) upgrade the Women's Commission to the central level machinery for promoting gender equality; (b) provide gender sensitive trainings to all civil servants; (c) collect a full set of gender segregated data and coordinate or conduct policy gender impacts; (d) construct a time table for the implementation of gender mainstreaming in Government policies and programmes.

#### **Gender sensitive budgeting**

19. Gender sensitive budgeting integrates a gender perspective into budget analysis and budget formulation, which may facilitate equal resource allocation between men and women. Nevertheless, the Government's Report did not mention anything about gender budgeting. Budgets prepared by the Government often assume that the needs of everyone can be addressed in a uniform and apparently neutral way, which ignored the real impact of budgets on women's life chances and access to services.
20. Many pieces of evidence point to the fact that the Government is gender-blind in budgeting. In 2004, there was a budget cut in welfare services. The deduction in budgets on welfare may have different impact on men and

women since men and women apply for Comprehensive Social Security Scheme (CSSA) with different reasons. In particular, the reduction may add an increased burden to single mothers and women fleeing domestic violence.

21. Apart from the budget cut in CSSA, the Mandate Provident Fund (MPF) scheme as launched in 2000 was also not considered from a gender perspective. The MPF is a retirement scheme targeting employees and self-employed persons aged between 18 and 65. Under the Scheme, the employee is required to contribute 5% of his/her monthly income and the employer has to match this amount. An employee earning less than the minimum level of income (\$4,000 per month) is not required to contribute but may select to do so. However, regardless of the employee's decision, the employer must contribute 5% of the employee's income.
22. Obviously, housewives, women working in the informal sector (such as home jobs), freelancers etc are not protected under the umbrella of MPF System. Though this group of women is not entitled to retirement protection, the Government has made no attempts in increasing welfare budgets for women engaging in unpaid work and informal work. Apart from housewives, Foreign Domestic Workers (FDW), who are overwhelmingly female, are also excluded from the MPF Scheme.<sup>4</sup> This exclusion actually relieves employers from paying their share of MPF payment for their FDW as the low salaries of FDWs normally fall far short of the HK\$5,000 limit for requiring employee contribution.
23. The Monitor requests your Committee recommend the Government incorporates a gender perspective in its budget analysis and budget formulation. Particular attention should be paid in the budgets for vulnerable groups, including ethnic minorities, housewives, foreign domestic workers, new arrival women, refugees and asylum seekers etc.

#### **IV. General Framework in Law Enforcement**

##### **Discrimination regarding police enforcement**

24. NGO Reports show that the frontline police are biased in law enforcement, which results in secondary victimization of the victims. Sex workers, foreign domestic workers (FDWs), new arrivals, refugees, victims of domestic/sex violence, etc., are particularly vulnerable to being discriminated by the police. Without doubt, biased law enforcement results in discrepancies between the de jure and de facto rights of women.

##### **Sex workers**

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<sup>4</sup> Discussions relating to FDW are also included in paragraph [ ] of this paper.

25. Though being a sex worker is not illegal under the HK law, sex workers are often being mistreated, stigmatized and unreasonably arrested by the police. First of all, there are many complaints that the police officers enjoy free sex services during their undercover operations. Some of the undercover police officers even destroyed evidence, such as condoms, after having sexual intercourse with the prostitutes. The police revealed that undercover rules allow frontline officers to have physical contacts with the prostitutes; however, the ambiguous guidelines have raised great concerns. We also believe that the practice of undercover police officers receiving sexual services may not be necessary, or can be avoided, in order to gather sufficient evidence for most of the prostitution-related offences in which they are investigating.
26. Moreover, women who work independently in a “one-woman brothel”, which is legal according to the law, are also harassed by the police. Police officers frequently check out their workplaces without notice, which undoubtedly results in disturbances. Many sex workers protested that the police have verbally/physically assaulted them and scared away their customers.
27. At the police stations, many sex workers fail to enjoy the entitled rights upon arrest and questioning. There are cases reported that the sex workers are not entitled to (a) the right to remain silent, the right to make phone calls to friends; (b) families and lawyers for help; (c) the right to requesting an interpreter if needed; (d) the right to request for toilet facilities and a break to rest during questioning; (e) the right to refuse to sign the cautioned statements.
28. Furthermore, in 2005, it was reported that over hundreds of women, who were being suspected as being prostitutes from Mainland China, were arrested and caged in an open area where the media could easily take photos from an opposite building. In the cage, neither toilet facilities nor rest areas were offered. Without a doubt, this kind of treatment constitutes a severe violation of human rights. Sex workers are denied of basic human rights simply because they are sex workers. We strongly request your Committee to urge the Government to (a) review law execution procedures by police in order to guarantee the rights of sex workers; (b) prohibit police officers from receiving any kind of sex services during undercover operations; (c) stop the police officers from abusing sex workers; (d) ensure that complaints against police officers are handled by an independent mechanism.

#### **Victims of domestic violence**

29. A research also shows that the police are skeptical towards victims of domestic violence. In the period January 2001- June 2004, 215 cases were transferred from an NGO, which is known as the Rainlily, to the police. However, figures show that over 50% of the cases are either uninvestigated or being stopped from investigation. At the end, only 48 out of 215 cases were brought for trial. Some victims of domestic violence said that the police refused to file their cases because their neighbours were not willing to be



witnesses. Victims were also told by the police that they should not counter-attack their husband for the purpose of self defense; otherwise, both the husband and the wife will be charged.

#### **New arrival women**

30. New arrival women also suffer when seeking help from the police. Since cross-border marriages are mainly between young Mainland girls and middle-aged men from HK. New arrival women are stereotyped as using marriage in exchange for the right of abode in HK. Thus, in cases of domestic violence, the police may tend to be more sympathetic towards the husband instead of the victim. NGO Reports show that some victims of domestic violence were intimidated by the police officers to drop their case. Some of them were even humiliated by the police for “ruining your husband’s life” and “coming to HK merely for welfare”. The attitude of the police results in secondary victimization and further deters the victims from reporting cases.<sup>5</sup>

#### **Foreign Domestic Workers (FDWs)**

31. FDWs also face the same difficulties when seeking help from the police. In the case of sexual and physical harassment, the FDW is required to provide solid evidence while the police may not be willing to investigate the case actively. On the other hand, when it comes to a situation where the employer accuses the FDW of some suspected wrongdoing, the police investigates immediately, even for trivial cases. Obviously, the police are biased for the employer during the investigation process.<sup>6</sup>

#### **Complaints Against Police Office (CAPO)**

32. Though the police officers are biased in the law enforcement process, there are currently no effective ways in checking police power. The Complaint Against Police Office (CAPO) is responsible for investigating complaints about the conduct and behavior of police officers. Nevertheless, its impartiality is being questioned since it is not an independent mechanism for processing complaints against police. The Office is accountable to the Commissioner of the police and it is a division under the HK Police Force.
33. Another shortcoming of CAPO is that its officers are transferred from other branches of the police force. After serving in CAPO for a period of time, they will return to their original posts. As a result, the officers may be reluctant to point their fingers at their colleagues. Moreover, the procedures for complainants to file complaints are also problematic. The complainant is required to call for a non-relative to be his/her witness; otherwise, their complaint will not be filed. Nevertheless, if the police officers abuse their

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<sup>5</sup> See paragraph \_\_\_ for discussions relating to new arrival women.

<sup>6</sup> See paragraph \_\_\_ for discussions relating to foreign domestic workers.

powers in private households, it is almost impossible for the complainant to find a witness other than his/her family members.

34. The Government asserted in its Report that CAPO is monitored by the Independent Police Complaints Council (IPCC), which is an independent civilian body, comprising non-official members appointed by the Chief Executive. However, the IPCC has limited powers in monitoring the investigation procedures of CAPO. Firstly, most of the IPCC members have other engagements and they do not serve in IPCC full time. They may not have enough time and energy to review all complaints against the police. Besides, IPCC does not have independent investigation power; instead, it only examines the investigation reports received from CAPO. In other words, the CAPO may have already filtered important information concerning cases of complaint.
35. With regard to the inadequacies of CAPO and IPCC, we request your Committee urge the Government transform IPCC to an independent statutory body and increase the transparency of the police complaints investigation process.

## **Part 2: An Overview of Women's Substantive Rights in Hong Kong**

### **HKSAR's submission to CEDAW**

1. The HKSAR government has recently released its second report on the HKSAR under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. The report, however, only concentrate on the de jure rights of women, including laws, policies and mechanisms that may assist women. In its report, the Government points out that the Women's Commission was set up for the promotion of women's interests and well-being. Laws on Equal Opportunities are also cited in Article 2, paragraph 4 of its submission.
2. Nevertheless, the effectiveness of these measures in achieving gender equality is not assessed. Women may have difficulties in getting access to the Government's services and assistance. In particular, certain groups of women may experience multiple barriers to equality when gender discrimination intersects with other forms of discrimination such as race, citizenship, age etc; or other barriers such as poverty and rural residence. Minority women, sex workers, new arrival women and foreign domestic workers in HK are particularly vulnerable of being discriminated and exploited.
3. In other words, the Government's report did not touch on the de facto rights of women in HK. This report attempts to fill in the gaps that have been left out by the Government's report and the discussion will be organized according to the articles of CEDAW.

# Defining discrimination

## Article 1 :Defining discrimination

### Definition of discrimination

4. As asserted in the Government's report, the Sex Discrimination Ordinance (SDO) defines "discrimination" to include both "direct discrimination" and "indirect discrimination". According to the SDO, "direct discrimination" means "treating a person less favourably than another person in analogous circumstances because of the victimized person's sex, marital status, or pregnancy". "Indirect discrimination" involves "imposing on everyone the same requirement or condition which, however, has a detrimental effect on particular group of persons".
5. We believe that the definition of "indirect discrimination" in SDO is not comprehensive enough in embracing all possibilities of discrimination. First and foremost, the term "requirement and condition" is very narrowly interpreted, which only includes absolute and formal conditions. Informal or conventional practices, however, are excluded. Thus, we request your Committee to urge the Government to adopt the definition of indirect discrimination in the European Commission Race Directive, which covers more circumstantial factors including "provision, criteria or practices".
6. Above and beyond, statistical data is usually used in proving that one group is disproportionately affected by a condition or requirement. The use of statistical data may result in deficiency since it is very hard to collect. Besides, the discriminatory effect can only be proved after actual harm has taken place. We believe that statistics should not be required for the purposes of prove. In addition, policies and practices should be challenged based on their associated risk at every stage of their implementation.
7. Moreover, according to the SDO, conditions or requirements which result in detrimental effects must be reasonably justified; otherwise, they may constitute indirect discrimination. The term "justified" includes justifying by any preexisting Ordinances and subsidiary legislation. Nevertheless, we believe that preexisting Ordinances and subsidiary legislation should only be used for justification on the condition that the legislation themselves can be justified. If the preexisting legislation themselves cannot be justified and they are used to justify indirect discrimination, then it is conducive to institutionalized discrimination.
8. Last but not least, the constitutional document of HK, the Basic Law, does not contain a definition of discrimination. As included in the concluding comments of the initial report, the constitutional definition of

discrimination may “complement the prohibition of discrimination in civil under the Sex Discrimination Ordinance”. Moreover, the Basic Law does not contain a prohibition of discrimination against women. We urge your Committee to express as a matter of serious concern that the constitutional definition of discrimination is crucial for the prohibition of discrimination in civil laws.

### **Reservations**

9. Seven reservations are made by the Government of PRC on the Convention, which will also be applied to the HKSAR. With the reservations entered, the Convention does not impose any requirement upon the HKSAR to repeal or modify any of its existing laws, regulations, customs or practices which provide for women to be treated more favorably than men, whether temporarily or in the longer term.
10. First and foremost, the provisions of the Covenant continue to be excluded from the domestic laws of HK. Though the Covenant does not formally obligate all state parties to incorporate its provisions in the domestic laws, such an approach is desirable. Domestication of the Covenant may bring the human rights situation in HK in line with the international standards.
11. Above and beyond, the reservations entered by the Government may enable existing laws to be incompatible with the Convention. The reservations on religious activities of women may enable male domination within the religious domain. Moreover, the reservations entered in Article 11 (2) make possible for existing labour laws to go contradict with the favorable treatment of women in respect of law protection of pregnancy and maternity.
12. The Monitor request your Committee to urge the Government to (a) explain why the reservations are necessary; (b) re-examine the reservations entered; and (c) to clarify the time by which the Governments will bring HK’s laws and practices in conformity with the Covenant and will withdraw these reservations.

## Foreign domestic workers (FDWs) (Article 6, 9 and 11)

### A general view of FDWs in HK

13. By 2005, more than 222,500 FDWs were employed in HK, with 90% being women; 53% of them came from the Philippines and 43% came from Indonesia.<sup>7</sup> FDWs are administered jointly by the Immigration Department and the Labour Department. Over 90% of FDWs in HK are women. Most of their rights issues actually have a women's rights dimension.
14. The standard form employment contract ("standard form contract") for regulating all FDWs are drafted by the Education and Manpower Bureau and adopted by the Immigration Department. The standard form contract is the only form of contract that the FDWs accept, which specifies the remuneration, place of employment, rest days and other employment protection. Since 31 May 2006, the minimum wage level of the FDWs is set at the level of HK\$3400. The employer is liable to legal responsibilities in case of underpayment. FDWs are required to live with their employers, to work six days a week in which the maximum working hours are not being specified. The rights as mentioned above are protected under the Employment Ordinance.
15. FDWs in HK face multiple fronts of discrimination. They are systematically put into a disadvantaged position than other migrant workers who come to work in other professions. FDWs are not entitled to the right of abode in HK no matter how long they have been staying; while other "professional" migrants who have been staying in HK for a continuous period of not less than seven years may confirm their right of abode in HK. FDWs also face discrimination regarding their race, language and religion. In HK, there are no laws regarding discrimination based on one's race. Besides, some FDWs from Indonesia are not allowed by their employers to practice religious rituals. Though the Government has recognized their contribution to the HK economy, it continues to exploit them.

### Article 6: Exploitation of women

16. Article 6 of the Covenant obligates state parties to "take all appropriate

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<sup>7</sup> Peggy Lee and Carole Petersen, "Forced Labour and Debt Bondage in Hong Kong", Centre of Comparative and Public Law, The University of Hong Kong, Occasional Paper no. 16, May 2006. See: <http://www.hku.hk/ccpl/documents/16-LeePetersen.pdf>

measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.

### **Trafficking of women**

17. The UN Protocol on Trafficking (2000) defines human trafficking as “a situation where the recruitment, transportation, harbouring or receipt of persons involves force, coercion, deception or abuse of power for the purpose of exploitation.”
18. According to the Trafficking in Persons Report (2005), HK is a transit port and destination of human trafficking. HK is a transit port for illegal migrants, some of whom are subjected to the condition of debt bondage, forced labour, sexual exploitation upon the arrival of the destined countries. To a lesser extent, HK is regarded as the destination of women trafficked from Mainland China and Southeast Asia. In many cases, women are recruited by an agent to work as prostitutes in brothels and they know very little about their working conditions before they come to HK.<sup>8</sup>

### **Anti-trafficking laws**

19. HK has an international obligation to prohibit slavery and trafficking. Apart from CEDAW, the application of ICCPR in HK also obligates the Government to prohibit all forms of slavery and torture (Article 4, 6, 7, 8, ICCPR). The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1957), which in particular prohibits debt bondage, also applies to Hong Kong.
20. HK does not have specific laws against trafficking, but there are related criminal laws used to prosecute traffickers. Specifically, there are legislation that deal with the trafficking of women for the purpose of prostitution. As asserted by the Government’s report, the Crimes Ordinance provides for several offences which are designed to prevent the exploitation of persons for sexual purposes.
21. Nevertheless, the Crime Ordinance appears to be interpreted to include only those women who are brought into Hong Kong for the purposes of prostitution by a third party and who remain subject to the control of a third party after their arrival. There are many cases that women have been brought into HK by their friends or agents; and they work on their own in the sex industry afterwards. For example, they may work independently on the street and take their clients to the hotels for sex services. In this sense, they are not remain subject to the control of a third party and thus, they are

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<sup>8</sup> <http://www.state.gov/g/tip/rls/tiprpt/2005/>

not regarded as being “trafficked” under the definition of HK legislation.

22. Moreover, women are trafficked to HK not only for the purpose of prostitution, but for cheap labour, domestic work, forced marriage etc. FDWs are particularly vulnerable of being trafficked. There are cases that FDWs are deceived about their terms of employment before or after they come to HK. For example, the FDWs were not informed about their rest days and minimum wage level as stated in the standard form contract. At the same time, recruitment agencies may use deceptive or coercive means to draw FDWs into debts. The elements of “deception” and “for the purpose of exploitation” involved in the process of FDWs recruitment constitute trafficking as defined by the UN Protocol.
23. Recruitment agencies may also cover up illegal transactions through setting up shell financial companies or liaison with other loan companies. They may ask the FDWs to pay a huge amount of agency fees and direct them to a particular loan company. Many FDWs are drawn into heavy debts because of this deceptive means. Even the FDWs report the case of deception to the Labour Department, it is difficult to prove the correlations between the loan company and the agency. In case of complaint, the Labour Department only rely on existing evidences instead of active investigation. Besides, it is difficult to prosecute the recruitment agency and the loan company since related documents are signed by the FDWs, even though they are being deceived or forced to sign the documents.
24. It is also possible for HK recruitment agencies to collabourate with overseas recruitment agencies and/or loan companies to deceive the FDWs. These cases are even harder to prosecute since it is out of the jurisdiction of the HK Police to investigate overseas loan companies/agencies. Indonesian FDWs are particularly vulnerable of being exploited by the recruitment agencies since they are required by their Government to go through recruitment agencies prior to their arrival at HK. The Indonesian government assumes a hands-off approach in managing these recruitment agencies. Regulations regarding the amount and types of fees collected by the agency are absent.
25. Nevertheless, since local laws are designed to prohibit trafficking for prostitution only, deception by recruitment agencies does not constitute trafficking. The Employment Agency Regulations, which is designed for regulating the operation of recruitment agencies, does not mention anything about human trafficking. It only provides protections for employees against overcharging by recruitment agencies. Nonetheless, overcharging may be conducive to, and it may also be part of, the trafficking process. The maximum fine of HK\$50,000 is definitely too low for crimes relating to trafficking. Discussions relating to deceptive practices by recruitment agencies will be examined in subsequent sections.



26. Since the definition of trafficking under local law is more narrowly defined than the UN Protocol, many forms of trafficking is neglected by the Government. As a result, the Government denies that HK is a destination and transition for human trafficking.

#### **Victim protection**

27. The domestic laws of HK do not provide for the protection and assistance of victims of trafficking. Technically speaking, women may be granted immunity from prosecution in case she is willing to testify against the trafficker. Actually, the immunity of women depends on circumstances of the particular case.<sup>9</sup> In case the woman is the only source of evidence in prosecuting the trafficker, then the use of immunity is necessary. However, if other evidences are available, then she may be charged with a separated offence by the Immigration Department.

28. Moreover, a woman who has agreed to act as a witness may face different circumstances. Her passport may be confiscated and she is not allowed to work. Also, she is not given any living expenses from the Government while the case may take several months to come to court. Most of the victims seek help from the NGOs since the police do not appear to provide a safe house or witness protection before, on or during the trial. The same difficulties are faced by the FDWs in filing cases of trafficking due to limited period of visa extension and lack of means of survival during criminal proceedings.<sup>10</sup>

#### **Suggestions and recommendations:**

29. The Monitor requests your Committee to urge the Government to (a) enact anti-trafficking laws; (b) adopt the meaning of “trafficking” as provided in the UN Protocol; (c) establish effective mechanisms to identify and investigate all forms of trafficking, particularly in respect of FDWs; (d) provide adequate care and protection to victims of trafficking, including witness protection, safe house, subsidies, counseling etc.

### Article 9: Equality in nationality laws

“States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an

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<sup>9</sup> Robyn Emerton, “Occasional Paper on Trafficking of Women for the purpose of Prostitution”, Feb, 2001, See: <http://www.hku.hk/ccpl/pub/occasionalpapers/paper3/paper3.html>

<sup>10</sup> Related discussions in paragraph \_\_ of this paper

alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

States Parties shall grant women equal rights with men with respect to the nationality of their children.”

#### **Questions relating to the Immigration Ordinance**

30. The Government affirms in its report that “both women and men may acquire the right of abode on the same terms under the Immigration Ordinance”. Obviously, the report neglects the exclusion of FDWs in equal access to the right of abode in HK. The problem has gender implications in the sense that over 90% of the FDWs are female.<sup>11</sup>
31. Under the existing immigration policy, migrant workers staying in HK for a continuous period of not less than seven years may be able to confirm their right of abode in HK. Nevertheless, FDWs are identified as an exceptional group and they are not entitled to the right of abode no matter how long they have been staying in HK. In other words, there is differential treatment between (a) workers from the West and those from Southeast Asia and (b) “professionals” and FDWs. Since FDWs are not permanent residents of HK, they are also not given the right to vote and to stand for elections.
32. It is reported that in 2003, Julita Raza, a FDW who has been working in HK for a continuous period of seven years, was refused by the immigration officers in permanent residency application<sup>12</sup> Ms Raza claims that the rejection of her application was based on immigration provisions that are discriminatory and contravene the Basic Law and other international covenants.
33. As provided in the Basic Law, “[P]ersons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region”. Jaza argued that FDWs are not entitled to the right of abode even after a continuous stay of seven may constitute violation of the ICCPR since it unjustifiably discriminates on the basis of social origin. The case was granted permission for a full hearing at a date yet to be fixed. The landmark test case could have far-reaching implications for the status of thousands of FDWs who meet the seven-year requirement, but who are regarded as ineligible for permanent residency.

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<sup>11</sup> Related discussions in paragraph\_\_ of this paper

<sup>12</sup> The South China Morning Post, 27/09/2003

34. Besides, unlike professional migrant workers, FDWs are not permitted under immigration policy to sponsor family members to enter and reside in HK as their dependents. In February 2006, it is reported that two children of a long time FDW, who were HK-born, were granted right of abode on February 3 were granted with the right of abode in HK. With this precedent, the immigration officials have been urged to clarify the basis on which HK-born children of FDWs were granted right of abode. The case could have a major impact on other non-Chinese, HK-born children of FDWs who live in the city with their parents.
35. Though the Government has recognized the economic contributions of the FDWs, it continues to exploit them. We believe that all migrant workers, including FDWs and workers in other professions, should be treated equally by the law. We requests your Committee to urge the Government facilitate equal treatment of FDWs and professional migrant workers, including equal access to the right of abode and the right to sponsor their family members to enter or reside in HK.

## Article 11: Equality in employment and labour rights

### **Reservations entered in respect of this article**

36. A reservation has been entered by the government on the qualifying period of employment for the application of the provision contained in Article 11 (2). The Government of the PRC also reserves, for the HKSAR, the right to apply all its legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on ground of redundancy), whether or not derived from a social security scheme.
37. The reservations entered by the Government may enable existing laws on pregnancy and maternity to be incompatible with Article 11 (2) of the Convention. An employee is only eligible for maternity leave with pay when they have worked for no less than 40 weeks under a continuous contract. In other words, employees worked for less than 40 weeks are not entitled to maternity leave with payment. Besides, maternity leave pay is only four fifths of her original salary.<sup>13</sup> This may exacerbate the economic tension experienced by pregnant employees.
38. The Monitor requests your Committee to urge the Government to (a) explain why the reservations are necessary; (b) re-examine the reservations relating to the favorable treatment of women in respect of law

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<sup>13</sup> For legislation relating to maternity and pregnancy protection, see: <http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/06.pdf>

protection of pregnancy and maternity; and (c) to clarify the time by which the Governments will bring HK's laws and practices in conformity with the Covenant and will withdraw these reservations.

### **Article 11 (1) (b): The right to the same employment opportunities**

39. Article 11 (1) (b) obliged state parties to take appropriate measures to facilitate “[T]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment”.

### **Article (1) (c): The right to equal choice of professions and employment**

40. Article 11 (1) (c) provides for the right “to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training”. The ILO further recommends that migrant workers should be “allowed sufficient time to find alternative employment”.<sup>14</sup>

### **The two-week rule**

41. The “two-week rule” is part of the conditions of stay for FDWs. It was put into place by the Immigration Department in 1987 to prevent FDWs from *job-hopping* and *moonlighting* (meaning unapproved employment). Under this policy, when a FDW enters HK, her passport is stamped with a condition permitting her to remain in HK for twenty four months, or two weeks after termination of her contract, whichever is the earlier. FDWs have to return to her country of origin two weeks after her contract has completed or been prematurely terminated, irrespective of whether they are at fault or not, and irrespective of whether they can find new employments or not. In case they failed to return to their country of origin within two weeks, they may face heavy penalties, prison sentences or deportation<sup>15</sup> FDWs who left HK within two-weeks have to go through the whole process of recruitment again. It is especially bad for the case of the Indonesian FDWs since they are required by their Government to go through recruitment agencies prior to their arrival to HK and subject them to further exploitation. The rationales of the Government behind the two-week rule is that FDWs may end their contract prematurely with the view to seek a new employment with a new employer or take up other unauthorised employment. Nonetheless, this policy is not applied to other

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<sup>14</sup> ILO, R151 Migrant Workers Recommendation, (n72 above), Article 31

<sup>15</sup> Foreign domestic helpers who have overstayed are prosecuted for breach of condition of stay under Section 41 of the Immigration Ordinance which carries a maximum penalty of a HK\$50,000 fine and imprisonment for 2 years. See: Immigration Ordinance- SECT 41

types of migrant workers, nor FDWs dismissed for redundancy without any faults of their part. There are only a few exceptional grounds for taking up job for a new employer without the need to leave HK after contractual termination, including the death or emigration of the employer, and extremely clear evidence of abuses by employer. Another type of exception is that a FDW is granted a short visitor visa to stay in HK for legal proceedings, e.g. to act as a prosecution witness or in other court cases against her employer on abuses, which are considered not certain enough to the Immigration to allow her to have more lenient treatment. In such cases, the FDW is not allowed to take up any employment nor given any welfare during her stay. The threshold of certainty adopted by the Immigration is often too high to exclude many deserving cases.

42. The two-week rule substantially undermines FDWs' bargaining power and exposes them to underpayment, long hours of work, poor condition of work, sexual and other abuses by employers. The rule has also reinforced the modern form of trafficking and enslaving of FDWs based on deception and coercion by unscrupulous employment agencies, finance companies and employers imposed through “debt bondage contract” arrangement and withholding or confiscation of travel documents. The Hong Kong Human Rights Monitor (the Monitor) requests the Committee to call for the abolition of the two-week rule.

#### **Choice of profession and employment under the two-week rule**

43. The two-week rule constitutes discriminatory effects which go contravene to Article 11 (1) (b) and (c) of this Convention and the international standards as set forth by CPRMW.<sup>16</sup> According to Article 25 of the CPRMW, migrant worker shall enjoy treatment no less favorable than that applies to nationals of the State of employment.
44. Under this rule, the group of FDWs, which is overwhelmingly female, are systematically put into a disadvantaged position than other migrant worker who come to work in HK for other professions. FDWs enjoy less favorable employment opportunities when compared with other foreign “professional” workers. Particularly, the latter has the freedom in shifting jobs and other rights, in which the former is not entitled to.
45. The two-week rule also violates the obligation of “free choice of profession and employment” since FDWs are placed in a less favorable position than the permanent residents. FDWs are not contractually allowed to change their job freely before the contract completes. In other words, the rule protects the employer at the expense of the interests of FDWs.

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<sup>16</sup> See: Article 25, The International Convention on the Protection of the Rights of Migrant Workers and Members of their Family, <http://www.ohchr.org/english/law/cmw.htm>

46. The right to job security is also set forth by Article 11 (1) (c). While ensuring to a great extent of security of the employers to the service of their FDWs more than employers of other types of workers, the two-week rule does not enhance correspondingly the job security of FDWs. Moreover, in an employment disputes in which the Immigration is not satisfied who was at fault, a FDW will not be allowed to work for a new employer but the employer is allowed to take up a new FDW.
47. Even the employer violates the standard form contract, it is difficult for the FDWs to file their complaints to corresponding government departments. The period of two weeks is too short for many of the FDWs to file their complaints. Though the Government asserts in its report that the Immigration Department assumes discretion in work visa extension of the FDWs, only a short period of extension is allowed and the FDWs have to pay the visa fee of HK\$160 on every extension. while her claim is still under investigation or heard in the court.<sup>17</sup> Therefore, in case the contract is ended prematurely, the FDW suffers, irrespective of which party initiates the termination, the underlying reasons and on who is at fault.
48. Besides, the Immigration Department assumes enormous discretion in determining how long should the work visa be extended. The requirement for extended stay is therefore unknown to the FDWs.

#### **Suggestions and recommendations**

49. The Monitor considers the rationale for imposing the two-week rule on FDWs is very weak especially when dismissal for redundancy is not accepted as justifying an exception to the rule. Hence, we request your Committee to urge the Government to (a) abolish the two-week rule or (b) replace the two-week rule with a fixed-term employment visa that is not tied to any single employer; (c) set clear guidelines for regulating the discretion of the Immigration Department; and (d) reconsider the extension of CPRMW to HK. These suggestions may allow the FDWs to enforce their rights more effectively and give employers a greater incentive in complying with the standard form contract and corresponding employment ordinances and human rights standards laid down in CEDAW and other human rights and ILO instruments.

#### **Forced or compulsory labour**

50. The provision of free choice of profession and employment also prohibits all forms of slavery, forced or compulsory labour. As set forth by the *Beijing Platform for Action*, state parties should “safeguard and promote

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<sup>17</sup> Peggy Lee and Carole Petersen, “Forced Labour and Debt Bondage in Hong Kong”, Centre of Comparative and Public Law, The University of Hong Kong, Occasional Paper no. 16, May 2006. See: <http://www.hku.hk/ccpl/documents/16-LeePetersen.pdf>

respect for basic workers' rights, including the prohibition of forced labour ...”<sup>18</sup>.

51. According to Article 2 of the International Labour Convention on Forced Labour, the term “forced or compulsory labour” means “all works or services which is extracted from any person under the menace of penalty and for which the said person has not offered himself voluntarily.”<sup>19</sup> In particular, confiscation and destroy of identity documents may be conducive to forced or compulsory labour. Thus, the CPRMW further obligates state parties to outlaw the confiscation and destroy of identity documents.
52. Unfortunately, a considerable number of FDWs in HK suffer from forced or compulsory labour due to the confiscation of passports, identity documents and employment contracts by their employers or the recruitment agencies. According to the Survey by Lee and Petersen, 18 out of 22 interviewees reported that their employment contracts and passports are confiscated by the recruitment agencies and their employers. The confiscation may result in the lost of freedom of movement and it also denies the FDWs with sufficient information about their employment.
53. According to our interviewees, it is very difficult for the FDWs to retrieve their passports without the help from NGOs or the Consulates.<sup>20</sup> Though the NGOs and the Consulates may put pressure on the employers or the recruitment agencies, the latter may deny responsibilities. Besides, the police are used to stay aloof in cases document confiscation and refuse to investigate since these cases are considered as “normal”.
54. There may also be cases that the FDW has come into “agreements” with the employer, stipulating that the latter may hold the formers’ passport for the purpose of security. Yet, the FDW and the employer may not be on an equal footing during the stage of agreement formation -- they may get fired in case of refusal.
55. Nevertheless, under the existing legal framework, the confiscation of passport and related documents do not constitute theft; instead, it is considered as labour disputes. The Theft ordinance (1997) left grey areas in this issue since the passport is a property that officially belongs to the issuing government but not the employee.<sup>21</sup> Also, the employer may walk free by denying the intention of “permanently depriving” the property, i.e.,

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<sup>18</sup> *Platform for Action and the Beijing Declaration*, (4-15 September 1995), at para 166 (l)

<sup>19</sup> C29 Forced Labour Convention (n 25 above), Article 2(1).

<sup>20</sup> Interviews were conducted with Ms Holly Alan, the representative from a local NGO “Helpers for Domestic Helpers” and Ms Cynthia Tellez, the representative from “Mission for Filipino Domestic Workers”.

<sup>21</sup> According to the Theft Ordinance, theft is defined as “dishonestly appropriate property belonging to another with the intention of permanently depriving the others of it”.

the passport and related document, of the FDWs.

#### **Suggestions and recommendation**

56. The Monitor requests your Committee to urge the Government to (a) include in the Crimes Ordinance (Cap. 200) and or/ Immigration Ordinance (Cap. 115) a specific criminal offence to prohibit the confiscation of documents; (b) provide special trainings for the frontline police officers in dealing with cases relating to document confiscation; (c) empower the Employment Agency Administration to investigate cases relating to exploitation by recruitment agencies.

#### **Article 11 (1) (d): The right to equal remuneration**

57. Article 11 (1) (d) of the Convention obliged state parties to provide “[T]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work”.
58. Furthermore, Article 39 of the Basic Law also provides that the provisions of the ICESCR shall be implemented in the laws of HKSAR. As set forth by Article 7 of ICESCR, state parties are obligated to ensure the right to just and favorable conditions of work, including fair wages and reasonable limitations of working hours. The Government is therefore obligated to provide the above conditions for labours, including FDWs.

#### **Underpayment**

59. Underpayment is a condition that may violate the obligation of equal and fair remuneration. In order to prevent the problem of underpayment, the Government stipulates a minimum allowable wage from time to time for all FDWs on approval of new or renewed contracts. The stipulated salary therefore depends upon the date on which the contract was signed. The minimum wage level was HK\$3,670 in 2001 and readjusted to HK\$3,400 on 31 May 2006. In 2003, HK\$400 monthly wage reduction was imposed on the FDWs together with a HK\$400 levy on the employer. The amount is used to finance a retraining program of local workers. Researches consistently indicate that most of the employers will just pay the minimum allowable wage to their FDW and there
60. It is also mandatory required that the employer must sign a standard form contract with the FDW, which serves as an employment protection to the latter.<sup>22</sup> In case the FDWs are underpaid by their employers, they can report to the Labour Department and the employer is liable to legal

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<sup>22</sup> For sample of the standard form contract, see: <http://www.immd.gov.hk/ehtml/id407form.htm>



responsibilities in case of violation.<sup>23</sup>

61. As shown in many NGO studies, underpayment is a serious problem which causes sufferings of the FDWs, especially those from Indonesia. According to the “Foreign Domestic Workers baseline survey” as conducted by the Asian Migrant Centre (AMC) in 2005, around 42% of the Indonesian migrant workers as surveyed are underpaid.<sup>24</sup> Amongst this group of migrant workers, 22.6% of them reported that they received only HK\$2,000 or below per month. The Association for Indonesian Migrant Workers (ATKI) also conducted a survey in September 2005, which obtained responses from 2,777 Indonesian migrant workers in HK. About 1478 respondents (53%) reported underpayment of salary.<sup>25</sup>
62. As provided by our interviewees, there is a case that the employer forced the FDW to sign twenty four receipts, stating that the FDW has received full salary from the employer. The receipts enable the employer to underpay the FDW for the entire contract duration. The FDW has no way to provide any evidence to the authorities even though she has been continuously underpaid by the employer. In other words, the standard form contract without further safeguards is prone to abuses.
63. Moreover, the existing legal framework discourages FDWs from reporting cases of underpayment. Except in unusual circumstances, FDWs are seldom allowed under the two-week rule<sup>26</sup> to switch employers before the end of the two-year contract. As discussed in the previous sections, the work visa of the FDWs expires two weeks upon the termination of her contract and they may have to repeatedly renew their visa during the period of complaint investigation. Besides, most criminal proceedings which inevitably involve long waiting period before they are actually heard in the court, the FDWs involved will usually lose the means of basic subsistence since they are not allowed to work and do not normally have the required financial supports to wait for the court hearing or judgment.

#### **Suggestions and recommendations**

64. The Monitor requests your Committee to urge the Government to take appropriate measures to prevent all forms of underpayment. In particular,

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<sup>23</sup> An employer who underpays wages as stated in the standard employment contract is liable to a maximum fine of HK\$350,000 and three years' imprisonment. *Ibid 1*, p. 9

<sup>24</sup> The research by Asian Migrant Centre on Foreign Domestic helpers was conducted in HK through survey questionnaires administered to a total of 1017 respondents. For further detailed, see: [http://www.asian-migrants.org/index.php?option=com\\_content&task=view&id=4&Itemid=29](http://www.asian-migrants.org/index.php?option=com_content&task=view&id=4&Itemid=29)

<sup>25</sup> Peggy Lee and Carole Petersen, “Forced Labour and Debt Bondage in Hong Kong”, Centre of Comparative and Public Law, The University of Hong Kong, Occasional Paper no. 16, May 2006, p.19, See: <http://www.hku.hk/ccpl/documents/16-LeePetersen.pdf>

<sup>26</sup> For discussions relating to the two-week rule, please refer to \_\_\_ of this paper.

to (a) take a more active role in obtaining evidence of violation of the standard form contract, such as assisting the FDW in gathering evidence; (b) blacklist abusive employers; (c) relax the standard of certainty to a level of an arguable case; and (d) provide basic subsistence allowance and visa extension for FDWs during the period of civil or criminal proceedings.

### **Debt bondage**

65. Apart from underpayment, debt bondage may also constitute unequal remuneration. Most of the FDWs in HK are initially recruited and placed with an employer by the recruitment agencies and the agencies usually collect recruitment fees from the FDWs. In particular, FDWs from Indonesia are required by their government to find employers via the recruitment agencies.<sup>27</sup>
66. At present, employment agencies are regulated by section 57 of the Employment Ordinance and the Employment Agency Regulations, which is administered by the Labour Department. As stated in the Regulation, no more than 10% of the FDWs' monthly salary, i.e., HK\$340 for those earning minimum wages, shall go towards paying a recruitment fee.<sup>28</sup> In case of infringement, the recruitment agency is liable upon conviction to a maximum fine of HK \$50,000. It is also against the law for any recruitment agencies to share their commissions with a third party.
67. In practice, however, there are cases that the recruitment agencies charge the FDWs with fees far exceeds the legal limits, ranging from HK\$6,000-\$21,000.<sup>29</sup> Such charges may be in the name of training fees. It is also reported that some FDWs are deceived or coerced to sign false loan documents. According to the survey by Lee and Petersen, 18 out of 22 of their interviewees reported that the false documents were usually printed in English, a language most of the Indonesian FDWs do not speak, and the interviewees were neither allowed to read nor keep a copy of the documents that they have signed.<sup>30</sup> None of their interviewees ever received any of the money that they supposed "borrowed".
68. It is also possible for the recruitment agency to charge both the employer and FDW with agency fees. There are a number of cases that the employer reduces the monthly salary of the FDWs for compensating the agency or

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<sup>27</sup> [http://www.asian-migrants.org/index.php?option=com\\_content&task=view&id=4&Itemid=29](http://www.asian-migrants.org/index.php?option=com_content&task=view&id=4&Itemid=29)

<sup>28</sup> See: <http://www.labour.gov.hk/text/eng/legislat/content2.htm>

<sup>29</sup> Peggy Lee and Carole Petersen, "Forced Labour and Debt Bondage in Hong Kong", Centre of Comparative and Public Law, The University of Hong Kong, Occasional Paper no. 16, May 2006, p.14, See: <http://www.hku.hk/ccpl/documents/16-LeePetersen.pdf>

<sup>30</sup> Ibid

other fees or “repayment of loans”. According to our interviewees, in case the FDW failed to repay the debts, the financial companies or the recruitment agencies may call upon the FDWs time after time or even ask the debt collectors to intimidate the FDWs. With repeated disturbances of the debt collectors, some FDWs were being laid off by their employers.

69. When applying the international definition of “debt bondage” to HK (UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practice Similar to Slavery<sup>31</sup>), FDWs in HK are working under the condition of debt bondage: The labour of FDWs is undertaken as a security for a debt, which takes the form as a sham “loan” that is used by the employment agencies to mask the deceptive collection of exorbitant placement fees from the FDWs.
70. Though the problem of overcharging and debt bondage is acknowledged by the Government, it is reported that only two licenses have revoked in 2004.<sup>32</sup> The Government also refuses to grant visa extension for FDWs undergoing criminal proceedings. According to our interviewees, many cases of debt bondage are left unresolved due to unsuccessful visa extension.
71. There is a case where the FDW is charged by the recruitment agency with excessive fees. The recruitment agency directed the FDW to borrow money from a financial company, which has connections with the recruitment agency. The FDW filed a complaint against the financial company and the case was scheduled for hearing. Unfortunately, her contract is completed shortly before the case has been settled. She approached the Immigration Department for visa extension but it turnout to be unsuccessful. The FDW was told by the Immigration Officer that her visa can only be extended on the ground that the case is between her and her employer. Since her case is against the financial company instead of the employer, visa extension is not permitted. Moreover, she is not permitted to work during the criminal proceeding and has to rely on the charity for shelter. After the expiry of the work visa, she went back home without the fees being recovered.
72. Worse still, even the case is redressed, the maximum fine for the

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<sup>31</sup> According to the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practice Similar to Slavery (1957), debt bondage is defined as: “The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”

<sup>32</sup> Peggy Lee and Carole Petersen, “Forced Labour and Debt Bondage in Hong Kong”, Centre of Comparative and Public Law, The University of Hong Kong, Occasional Paper no. 16, May 2006, p.19, See: <http://www.hku.hk/ccpl/documents/16-LeePetersen.pdf>

recruitment agencies is too low to have a deterrence effect. Also, though there are laws governing the collection of fees by recruitment agencies, this kind of rule is not applied to the financial companies. This loophole enables the recruitment agencies to liaise with the financial companies or set up shell companies in drawing the FDWs into debts.

#### **Suggestions and recommendations**

73. The Monitor requests your Committee to urge the Government to (a) increase the maximum amount of fine for cases of overcharging by recruitment agencies; (b) enact legislation in combating deceptive practices of financial companies; (c) routinely inspect recruitment agencies; and (d) strictly enforce the law by actively investigate, sometimes through undercover cross border investigations, and prosecute suspect recruitment agencies, finance companies and employers for the sake of preventing and combating violations.

#### **Article 11 (1) (e): Equal access to social security**

74. Article 11 (1) (e) of this Covenant obligates states to implement appropriate measures to ensure “[T]he right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave”.

#### **Access to social security**

75. Although the Government asserts in its report that the FDWs enjoy employment benefits and protections as local workers, the former is not entitled to the right to employers’ MPF contributions and the right to other forms of social security. The FDW will usually also lose their means of subsistence in case of civil or criminal proceedings since they are not allowed to work. In such cases, most of the FDWs have to rely on the temporary shelters and subsidies provided by NGOs and others.
76. Moreover, in the past, a FDW who has worked for the same employer for a continuous period of five years may enjoy a long service paid, and the amount equals to 2/3 of the FDW’s monthly salary. However, under the present arrangement, an FDW is not entitled to such a long service paid if she initiates the termination of contract without attempting to or failed to prove a constructive dismissal by the employer.
77. The Monitor believes that the Government should (a) enable an FDW to work while seeking redresses and, if the FDW cannot find a job, to provide an FDW social assistance if a FDW has an arguable case against her employer, employment agency or the related finance company; (b) and (c) restore the past arrangement regarding long service payment

mentioned above.

#### **Medical care**

78. Under the standard form contract, sickness allowance should be provided by the employer to the FDW. However, there is reporting regarding the failure of the employer in purchasing medical insurance for their employees. The Monitor has also documented a case that the health of a FDW deteriorated because the employer refused to bring her to the hospital. However, the FDW neither know much about her contractual rights nor procedures in redressing her complaints. Moreover, FDWs are no longer entitled to the citizens' rate in public hospital services after their contract is being terminated. Those who have been physically assaulted by their employer and have their contract terminated afterwards are particularly affected since they have to pay the expensive visitors' rate in public hospitals.

#### **Mandatory Provident Fund (MPF)**

79. The MPF Scheme was launched in December 2000.<sup>33</sup> According to the Government, the MPF system may act as one of the pillars in retirement protection. Under the scheme, employees and self-employed persons aged between 18 and 65, unless specifically exempt under the Ordinance, are covered. The employee is required to contribute 5% of his/her monthly income subject to a maximum amount of HK\$1,000 and the employer has to match this amount. An employee earning less than the minimum level of income (HK\$4,000 per month when MPF was first introduced, but recently increased to HK\$5,000) is not required to contribute but may elect to do so. However, regardless of the employee's decision, the employer must contribute 5% of the employee's income. As stipulated in the Ordinance, employees may claim their accrued benefits upon the retirement age of 65.
80. With the MPF system put into place, around 85% of the total working population is covered by either the MPF scheme or other retirement schemes. Nevertheless, the FDWs are excluded from the scheme. Due to the exclusion, FDWs are not covered by retirement protections. In effect, the reservations regarding pension schemes enable the Government to exclude FDWs from having equal access to retirement protections. However, the Government does not have any strong reasons in excluding them from enjoying the benefits of MPF. It mentioned the difficulties in enforcing the MPF scheme in a domestic setting and therefore household cooks and local domestic workers are also excluded from the mandatory payments. Unlike accommodation conditions, there is no difficulty in enforcing the MPF scheme. All employers of FDWs should contribute

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<sup>33</sup> See the homepage of MPF for reference: <http://www.mpfahk.org/eindex.asp>

MPF payments for their FDWs.

**Suggestions and recommendations:**

81. The Monitor requests your Committee to urge the Government to (a) reexamine the reservations regarding pension schemes that may affect retirement protection; (b) extend the MPF schemes to cover FDWs; and (c) extend medical services for FDWs to cover the period after contractual termination.

**Article 11 (1) (f): The protection of health and work safety**

82. Article 11 (1) (f) obliged state to undertake appropriate measures to ensure “the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction”.

**Accommodation and food**

83. According to the standard form contract, FDWs are required to live with their employer. As stated in the Schedule of Accommodation and Domestic Duties provided by the Immigration Department, if a separate room cannot be made available for the FDW, a suitable accommodation with reasonable degree of privacy should be provided. Therefore, made-do bedrooms in the corridor and sharing a bedroom with teenagers of the opposite sex are considered as unsuitable. Besides, the employer should provide the FDW with food free of charge or food allowance.
84. In practice, such regulations are difficult to enforce in private homes. There are many cases that the FDWs have to sleep on the floor, kitchen, or share bedroom with the opposite sex. We have documented a particular case in which a FDW was forced by the employer to find an alternative accommodation. The FDW has to travel to her employer’s apartment everyday, without transportation costs compensated. When the FDW reported her case to the police, the employer photographed a picture of a room in his apartment and told the police that the FDW sleeps in that room. At the end, the employer walked free since the FDW failed to provide the police with counter evidence.
85. There is another case in which the FDW had been arranged to sleep in the same room with a ten year old boy, but actually she had to stay with a man who slept at the lower deck and she slept at the upper one. However, she stayed as she needed the job and also the employer treated her well in other aspects.
86. Apart from unsuitable accommodation, some employers did not provide the FDW with enough food. As provided by our interviewees, there is a

case that the employer mixed the left over food with hot water and asked her maid to eat. There is another case in which the FWD was provided with monthly food allowance of \$HKD300 only. On average, the FDW merely had HK\$3 to spend per meal. In fact, the standard form of contract only required the employer to provide the employee with meals free of charge; however, the content of the meals are not specified and it is not convertible to HK dollars. Therefore, the standard form contract is difficult to be enforced, unless reported by the FDWs. However, cases of unsuitable accommodation and insufficient food are difficult to be proved by the FDW since they do not have solid evidence and the employer may deny responsibilities.

#### **Rest days and working hours**

87. According to the Employment Ordinance, FDWs are entitled to rest days, statutory holidays and paid annual leave. A day-off is a continuous period of 24 hours. Employers cannot require FDWs to work on rest days; otherwise, they will be in breach of the Ordinance. FDWs are also entitled to paid annual leaves according to the length of services to the employers. Yet, no regulation mentions the daily working hours of the FDWs.
88. The rest day requirement, however, may not be followed in real situations. According to researches, the average number of rest days given to Indonesian FDW is 2.6 days per month, which is far fewer than the required 4.3 leave days. Besides, with the fact that the FDWs are required to live and stay in their employers' household and the maximum hours of their work is not precisely defined, they may have to standby for work at anytime. As reported by the United Filipino in HK, over 805 of the respondents were deprived of a full 24-hour rest on their rest days.<sup>34</sup>
89. Under the international definition, uncertainty over working hours may also constitute debt bondage. As noted by the ILO, one element of debt bondage is that "length and nature of those services are not respectively limited or defined".<sup>35</sup> As mentioned in the previous paragraph, FDWs may be required to work at day and night without overtime payment. In this sense, neither the nature of work nor the working hours are made known to the employees. The FDWs may not be able to resist excessive orders with the fear that they may be laid off by their employers. The two-week rule again exposes many FDWs to abuses by such employers.

#### **Suggestions and recommendations**

90. The Monitor requests your Committee to urge the Government to (a) enact legislation on the maximum working hours of FDWs in order to comply

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<sup>34</sup> [http://www.asian-migrants.org/index.php?option=com\\_content&task=view&id=7&Itemid=101](http://www.asian-migrants.org/index.php?option=com_content&task=view&id=7&Itemid=101)

<sup>35</sup> Please refer to paragraph \_\_\_ of this paper for discussions relating to debt bondage.

with HK's international human rights obligations; (b) specifies the minimum allowable dimension of FDW accommodation; (c) conduct careful investigations and prosecute abusive employers; (d) reconsider the live-in requirement of the FDWs since it increases the difficulties for FDWs to protect their own rights; and (e) open and support service centres in handling complaints from FDWs and provide with adequate backup services.

### **Sexual and physical abuse**

91. Under the Disability Discrimination Ordinance (DDO) and the Sex Discrimination Ordinance (SDO), the FDWs may claim the same rights as local workers. In particular, a provision in the SDO (Cap. 480, c23) prohibits anyone who lives in the household, including the employer, the employer's son etc, from sexually abusing the FDW who lives there.<sup>36</sup> The Crimes Ordinance and Offences Against the Person Ordinance are also applied to protect the FDWs against violence.
92. Reports show that FDWs are vulnerable of being physically and sexually abused. A study of Southern Asian Migrant workers in HK points out that more than 25% of the FDWs are being physically/ verbally abused; while 4% of them have been sexually abused.<sup>37</sup> Unfortunately, if a FDW is abused without any physical marks, evidences may be insufficient for the complaint to be filed. As told by our interviewees, some cases of sexual harassment are difficult to be proved. For example, there is a case in which the FDW is required by her employer to perform body massage. This kind of indecent request from the employer, however, is difficult to be filed due to the lack of evidence. In case of rape, FDWs may have washed away all the evidences right away. Also, in fear of losing the contract, they may not report the case immediately; instead, they only report after several incidents and the police may suspect that the FDW agreed to the sexual intercourse. Besides, it is very difficult for the FDW to prove cases of rape in case of delayed reporting.
93. Even the FDW file a complaint with the Equal Opportunities Commission (EOC), FDWs may not be able to renew her work visa and unable to support her living while the case is under investigation. Partly due to the two-week rule, the FDWs are discouraged from filing complaints. Particularly, EOC resolve cases mainly by voluntary reconciliation. The two-week rule may place the employer in the upper hand since he/she may deliberately lengthen the complaint process or refuse to reconcile. Due to the expiration of working visa, the FDWs may be forced to return home without sufficient settlement and compensation. In other words, even

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<sup>36</sup> <http://www.eoc.org.hk/EOC/GraphicsFolder/showsdo.aspx?id=3551>

<sup>37</sup> Amy Sim, Organizing Discontent NGOs for Southeast Asian Migrant Workers in Hong Kong, 18 January, 2000, available at: <http://www.cityu.edu.hk/searc>



existing laws embrace the interests of FDWs, it is very difficult to enforce them when comes to practice.

94. In effect, there are “special arrangements” among the Government departments regarding the extension of visa. According to our understanding, the Immigration Department will extend a migrant worker visa base on the Labour Department’s supporting letter in extending the FDW’s working visa. On the other hand, the Equal Opportunities Commission does not have special arrangement with the Immigration Department in terms of extending the work visa of FDWs. Apparently, this kind of “special arrangements” between government departments sets a precondition for FDW’s visa extension and further hinders them in claiming fair settlements.
95. Our interviewees also pointed out that the police are biased against the FDWs in case of sexual/physical abuse. There is a case that the FDW is repeatedly assaulted by the employer and she attempted to call the police. Before the police arrived, the employer used a pen to hurt herself and later told the police that she was being injured by her maid. It happened that the police interviewed the employer first, though it was the FDW who called the police. A statement was drafted by the police, indicating that both parties are injured. The FDW was forced by the police to sign the statement and she refused. It turned out that the FDW was accused of assaulting the employer. In this sense, the FDW was treated by the police as the suspect instead of the victim. When it comes to the case that the employer accuses the FDW, the police investigate immediately, even for trivial cases. In other words, the police are biased against the FDW during the investigation process, which hinders the FDWs from getting access to justice.
96. Moreover, it is very difficult for the FDW to find a new employment if her old contract is terminated prematurely, regardless of which party initiates the termination and the underlying reasons. This may add burdens on the FDWs and further discourage them to file complaints against abusive employers.

#### **Unauthorized work**

97. Unauthorized work may risk work safety since the nature and conditions of work are unknown to the employee. Under the standard form contract issued by the Immigration Department, the FDW shall only perform domestic duties. Unauthorized work means that a FDW takes up, or required by her employer to take up, any other employment with any other person or outside the domestic sphere. Both the employer and the employee are liable to prosecution in case of violation.

98. The law on unauthorized work ignores the fact that the FDW and the employer do not have equal bargaining power. FDWs may have troubles in resisting the employers' order of unauthorized work. Even they are being forced by their employer to take up unauthorized work, they are still liable to legal responsibilities.
99. According to the figures provided by the Asian Migrant Centre (AMC), in 2001, about 13.7% of FDWs are forced by employers to work in other houses, shops or businesses. They are not remunerated for the extra amount of work. As estimated by AMC, with FDWs performing unauthorized work, HK\$1,145,062,440 was saved by employers on the condition that they do not need to hire extra employees.<sup>38</sup>

#### **Suggestions and recommendations**

100. The Monitor requests for Committee to urge the Government to (a) provide special trainings and guidelines for the frontline police in handling cases of physical and sexual abuse; (b) grant immunity from prosecution in case the FDW is willing to testify against the employer in cases of unauthorized work.

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<sup>38</sup> See: [http://www.asian-migrants.org/index.php?option=com\\_content&task=view&id=7&Itemid=101](http://www.asian-migrants.org/index.php?option=com_content&task=view&id=7&Itemid=101)

## Minority women

101. Minority women in HK include female ethnic minorities, overseas Chinese from Indonesia, asylum seekers, mothers in split families and new arrival women. Minority women are one of the groups facing multi-dimensional discrimination. Though the Government asserts in its report that the Bill of Rights Ordinance (BORO) is against racial discrimination and it has been taking initiative over policies in facilitating their integration into the mainstream society, it did not give reference to the problems faced by these groups of women. When compared with minority men and majority women, minority women suffer from multiple barriers to equality since gender discrimination intersects with ethnic and racial discrimination.

### **Ethnic minority women in HK (Article 5, 10, 11 and 13)**

102. According to the 2001 census, non-Chinese minorities constitute about 5% of the population (340,649 persons). In particular, people from the South Asian countries, including the Nepalese, Indians, Pakistanis found difficulties in sustaining their living in HK due to employment problems and discrimination based on race, religion, culture etc.<sup>39</sup> Women of ethnic minority origin constitute about 3.8% of the total population. Within the group of ethnic minority women, some of them are born in HK, while some of them come to HK for family union. Better employment chance and pursuit of a sense of security are also reasons for them to live in HK. Most of them do not know Chinese; only some of them know how to speak English.

103. In the Government's report, issues relating to ethnic minority women are put under Article 13 of this Convention, which mainly addresses matters relating to their community welfare and social integration. In daily lives, however, ethnic minority women find difficulties in having equal opportunities in employment and fair remuneration. Besides, their children are also experiencing inequalities in the field of education. These issues are not covered by the Government's report. Moreover, the Government also tried delay the introduction of laws racial discrimination over again. In its report, the Government also asserts that the Bill Of Rights Ordinance (BORO) and Broadcasting Ordinance are effective means in prohibiting racial discrimination. Nonetheless, the BORO only binds the Government and public bodies, having no effects on the private sector at all.

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<sup>39</sup> The Report on *The Status of Women and Girls in Hong Kong 2006*, Women's Foundation, [http://www.thewomensfoundationhk.org/pdf/full\\_part2\\_e.pdf](http://www.thewomensfoundationhk.org/pdf/full_part2_e.pdf)

## Article 5: Stereotyping and prejudices

### **Violence in ethnic minority families**

104. Under Article 5 of this Convention, state parties are obliged to “achieving the elimination of prejudice and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles of men and women”.
105. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. Traditional beliefs that women are subordinated to men are conducive to domestic violence, forced marriage and other kinds of sexual abuse. Such prejudice may justify gender based violence as a form of protecting or manipulating women.
106. According to a study by the Harmony House (2004), among 1,055 female clients of Harmony House at the time, 61 were ethnic minority women. When compared to their Chinese counterparts, ethnic minority women were more likely to tolerate domestic violence. Over 36% of the ethnic minority women chose to return to their husbands after leaving the shelter; while 29% of Chinese women were willing to do so.<sup>40</sup> According to the study, ethnic minority women believed that they had the responsibility to remain married and they were not going to accept divorce. Moreover, they were also more likely to believe that a broken family would be harmful for children and they would suffer from economic crisis if divorced.
107. We consider that ethnic minority women are tied by their traditional beliefs and obligations so they are not willing to accept divorce even for cases of domestic violence. Besides, they have limited resources and social network so they are less likely than Chinese women to seek help. Moreover, since ethnic minority women generally face the problem of unemployment and low payment in HK, they can hardly survive on their own. According to statistics as provided by the Women's Foundation, male ethnic minorities generally earned seven times more than that of the female ethnic minorities. Thus, ethnic minority women are financially dependent on their husband and they may not resort to divorce even they are severely abused by their husbands. All these deter ethnic minority women from claiming for divorce.
108. The Monitor requests your Committee to urge the Government to (a) provide special trainings for the frontline police and social workers in

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<sup>40</sup> The Report on *The Status of Women and Girls in Hong Kong 2006*, Women's Foundation, [http://www.thewomensfoundationhk.org/pdf/full\\_part2\\_e.pdf](http://www.thewomensfoundationhk.org/pdf/full_part2_e.pdf)

dealing with cases of violence in ethnic minority families (b) provide outreach services in order to tackle the passive attitudes of ethnic minority women in seeking assistance; and (c) improve the employment situation of the ethnic minority women in order to facilitate their financial independence.

## Article 10: Equality in Education

109. Under the provisions of Article 10, state parties shall” take all appropriate measures to eliminate discrimination against women in order to ensure to them equal right with men in the field of education”. In HK, though ethnic minority children generally have problems in getting access to education, we believe that girls are particularly affected owing to the traditional and cultural practices of ethnic minorities.

### **On ethnic minority children’s education**

110. Children of ethnic minorities encounter enormous problems in getting access to education. In ethnic minority cultures, especially for Muslims, women are assigned with the caretaker role while men are breadwinners. Since women are assigned with family roles, they are especially concerned about their children’s education. The first problem that ethnic minority mothers and their children have to come across is language problems. Owing to language problems, they could not apply for the mainstream schools, which use Chinese as their medium of instruction. Consequently, ethnic minority children may only be able to enroll in special schools for ethnic minorities even though they are not satisfied with the standard of the school.

111. Secondly, owing to racial and cultural differences, children of ethnic minorities are discriminated by their teachers and other students. Reports show that over 30% of the ethnic minority students generally think that their teachers punish them more severely than Chinese students.<sup>41</sup> Ethnic minority children are also compared by their teachers with Chinese students, and they were told that they are “useless”. Sometimes teachers may also switch in between English and Cantonese, making them hard to concentrate during class. Moreover, instead of fostering the co-existence of different religious believes in the campus, teachers selectively educate the students with certain religious doctrine. Islamic doctrines are neglected if not being expelled by the teachers.

112. In particular, ethnic minority girls may find themselves in difficult situations when enrolling for schools. Some ethnic minority groups such as Pakistanis have distinctive dressing culture for women and girls. Girls have

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<sup>41</sup> Ku, Chan and Sandhu, *A Research Report on the Education of South Asian Ethnic Minority Groups in Hong Kong*, Centre for Social Policy Studies, May 2006

to wear headscarf and baggy trousers since their adolescence. However, only few schools, which are particularly opened for ethnic minorities, allow girls to dress according to their traditional ways. Most of the schools are not flexible in making arrangements for the ethnic minority girls. Many ethnic minority girls therefore have to quit at primary six. In this sense, they are not able to apply for the mainstream schools. This may further restrain them from integrating with the local community.

113. The Monitor requests your Committee to urge the Government to (a) increase the facilities and resources for ethnic minority children in respect of education, in particular the number of schools admitting ethnic minority children; (b) eliminate all forms of racial discrimination in the campuses, especially in terms of the dressing culture and religious beliefs of the ethnic minorities.

## Article 11: Equality in employment and labour rights

### Article 11 (1) (b): The right to the same employment opportunities

### Article (1) (c): The right to equal choice of professions and employment

#### **Market segmentation**

114. According to the Research Report by Ku, Chan and Sandhu, the labour market in HK is racially segmented. Even though the ethnic minorities have professional qualifications from their home countries, they could not work in their professional fields in HK.<sup>42</sup> Although the entrance to professional fields is not entirely closed, ethnic minorities are placed at the bottom of the labour queue, mostly because of their language problems, cultural differences, qualifications not being recognized etc.

115. In particular, job opportunities for minority women are very limited. Other than those who stayed home as housewives, most of them work as teaching assistants in kindergarten and primary schools or other unskilled labour like cleaning workers, dish working workers etc. Statistics show that more than 90% of ethnic minority women are working in the “community, social and personal service sector”, compared to 37% of the overall female population. In other words, the choice of occupation for is much narrower when compared with Chinese women.

116. One of the reasons that account for the limited occupational choice of ethnic minority women is their low education attainment. When compared with male ethnic minorities, female ethnic minorities experience more

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<sup>42</sup> Ku, Chan and Sandhu, *A Research Report on the Employment of South Asian Ethnic Minority Groups in Hong Kong*, Centre for Social Policy Studies, May 2006

difficulties. The proportion of male ethnic minorities attaining tertiary education was about 54%; while it is only 29% for female.<sup>43</sup> From the statistics as mentioned above, it is obvious that the choice of occupation for ethnic minority women is narrower, no matter comparing with male ethnic minorities or Chinese women.

117. Moreover, ethnic minority women have limited channels in seeking jobs. Surveys on ethnic minorities show that over 50% of the respondents failed to find a job through the Labour Department.<sup>44</sup> According to our interviewee, some of the ethnic minority women have approached the Labour Department but they did not find it helpful, mainly because the advertisements posted were written in Chinese. Moreover, staff at the Department failed to understand the special needs of ethnic minority women and some of the staff even showed attitudes of discrimination. Thus, most of them have to rely on their friends or the NGOs in seeking jobs.

#### **Racial discrimination in employment**

118. Apart from low education attainment, racial discrimination also accounts for low participation rate of ethnic minority women. Research Reports show that ethnic minority women face difficulties in finding jobs because of their skin colour, language problems and their way of dressing. They claimed that the employer would not consider employing them once he saw their face. Ethnic minority women also said that occasionally, their boss and co-workers may ask them to change their way of dressing in order to match with the local culture. However, daily activities of the ethnic minorities have to go in line with their traditional and religious beliefs. As mentioned, Pakistani women have to wear headscarf and baggy trousers early since their adolescence. For them, it is their duty to follow the traditional way of dressing.

119. Although the ethnic minority women are not liberated from their traditional obligations, local Chinese continue to discriminate against them. At the same time, ethnic minority women's way of dressing also limits their occupational choice. They may not be able to find jobs in the service sectors, such as banks, restaurants etc, since these firms require their employers to dress in uniforms or suits. With these constraints, they may only work in firms opened by people of their own ethnicity or apply for low paid jobs such as cleaning workers.

120. While HK's legislation prohibits all forms of discrimination on the

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<sup>43</sup> The Report on *The Status of Women and Girls in Hong Kong 2006*, Women's Foundation, [http://www.thewomensfoundationhk.org/pdf/full\\_part2\\_e.pdf](http://www.thewomensfoundationhk.org/pdf/full_part2_e.pdf)

<sup>44</sup> Ibid.

basis of sex, there is no legislation regarding racial discrimination. Though the Government asserts in its report that the Bill of Rights Ordinance embraces the dimension of racial discrimination, it only binds the Government and public authorities. Employers from the private sector may continue to be racially biased since their practice is not against the law. Though the Equal Opportunities Commission has made efforts in eliminating racial discrimination through issuing code of practice to the employers, the code is not legally binding. As a result, racial discrimination on the field of employment continues to exist.

121. Moreover, the Government's attempt in enacting an anti-racial discrimination bill is halfhearted. Though the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has been extended to HK for more than thirty years, the Government's obligation in combating all forms of racial discrimination is unfulfilled. No laws on racial discrimination have been enacted even after a prolonged period of public consultation. In March 2006, facing the pressure from the United Nations, local legislators, NGOs and the ethnic minorities' community, the Government has promised that the Bill for enactment of racial discrimination will be introduced before the Legislative Council's summer recess.

122. To our disappointment, the introduction of the Bill is delayed by the Government over again, mainly because of internal resistance and the criticisms from some local business chambers. The Government announced that the Bill will be introduced before the end of this year, yet there is no guarantee for fulfillment. This is the third time for the Government to break its promises. Without doubt, the rights of the ethnic minorities are sacrificed in front of the Government's resistance business interests.

123. In order to provide adequate protection to ethnic minorities in the workplace, we believe that the Bill on Racial Discrimination should outlaw all forms of discrimination by the employer, co-workers and customers. We also strongly request your Committee to urge the Government to introduce the Bill for enactment of racial discrimination immediately in order to fulfill its international human rights obligations.

#### **Article 11 (1) (d): The right to equal remuneration and benefits**

##### **Late payment and Unfair treatment**

124. With the absence of laws on racial discrimination, ethnic minorities are treated unequally in the use of company resources, workload, job safety, chance of promotion, salary, working benefits etc. First of all, it is reported that ethnic minorities have difficulty in getting salary on time. It is mainly because they are of minority position and they can hardly find any



backups in launching complaints against their employers. Thus, most of them are very reluctant in complaining against their bosses. The problem of late payment is particularly serious in contractual works, in which the ethnic minorities are unable to find out which is the main contractor.

125. Apart from late payment, ethnic minorities are treated unequally in the use of company resources. For instance, there is a case in which the ethnic minority workers were not allowed to use the refrigerator whereas the Chinese workers are allowed to use it. Yet the reason why they are not allowed to use is untold. Regarding promotion opportunity, ethnic minorities generally have lower chances of getting promoted when comparing with their Chinese counterparts. According to Research Report by Ku, Chan and Sandhu, 42% of the respondents believe they have less chance of getting promoted.

126. Ethnic minorities are treated unfairly not only by their boss, but also by their co-workers. Chinese workers used to call the ethnic minorities as “ar cha”, a name which is used in insulting the Indians and Pakistanis. Besides, ethnic minority workers may also get bullied by their Chinese co-workers on the job into doing more work, particularly for those who cannot speak Chinese. Despite of persistent discrimination, ethnic minority workers would not argue or seek trouble with the Chinese workers as they are afraid to lose their jobs.

127. Though the problem of unfair treatment and late payment are problems come across by both ethnic minority men and women, we believe that ethnic minority women are less adjusted and adapted to the working environment than men. Our interviewee pointed out that ethnic minority women are actually not ready for jobs.<sup>45</sup> In ethnic minority cultures, especially for Muslim cultures, women are assigned with the caretaker role while men are the breadwinners. Some of them are even not allowed by their husband to go out. Thus, they are totally unprepared for finding jobs. However, in order to sustain their living in HK, ethnic minority women have no choice but to search for jobs. Thus, the unfriendly working environment may add psychological burden to ethnic minority women in particular.

#### **Article 11 (2) (a): Maternity protection**

128. Article 11 (2) (a) of the Convention obligates states parties to take appropriate measures “ [T]o prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.”

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<sup>45</sup> An interview was conducted with Ms Sharmila Gurung, a representative from the Christian Action, an NGO in HK.

129. According to the Research Report by Ku, Chan and Sandhu, minority women may be laid-off on the ground of pregnancy. Respondents reported that employers “do not have the guts to fire the Chinese”. For the minorities, since they do not know much about their rights and benefits, they are more likely to be exploited by their employees. They may stand alone in case of labour conflicts due to their minority status. Women of ethnic minority origin are particularly vulnerable of being treated unfairly due to their pregnancy.

#### **Suggestions and recommendations**

130. The Monitor requests your Committee to urge the Government to (a) enact laws on anti-racial discrimination as soon as possible for eliminating all forms of discrimination in the workplace; (b) accredit overseas qualifications; (c) provide employment services that are accessible by the ethnic minorities; and (d) provide adequate vocational training and retraining programs for the ethnic minorities.

### Article 13: Women in Economic, Cultural and Social Life

#### **Social Security**

131. According to the statistics as provided by the Computerized Social Security System, Pakistani is an ethnic minority group that has the highest percentage of receiving Comprehensive Social Security Assistance (CSSA) from the Government. Over 30% of the non-Chinese CSSA recipients are Pakistanis. In particular, over 90% of the Pakistani social welfare recipients are female.

132. In effect, problems and difficulties are unique to each ethnic group. Since the Pakistanis started to migrate to HK since the 60s, their financial and social network is less developed when comparing with the Indians. Before the 80s, Pakistanis encountered severe discrimination from the local community. Though the situation has been improving, Pakistanis are still facing persistent inequalities.

133. Specifically, the problem of poverty of Pakistani women is far more severe than their male counterparts. According to a newspaper reporting, the Pakistani culture is patriarchal and does not encourage women to study and develop.<sup>46</sup> Owing to the lack of education, most of the Pakistani women only speak their mother language. They even have difficulties in going out on their own since they are not able to read and speak Chinese and English. Therefore, most of them failed to find jobs. Moreover, some

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<sup>46</sup>[http://www.thestandard.com.hk/weekend\\_news\\_detail.asp?pp\\_cat=30&art\\_id=16589&sid=7351998&con\\_type=3&d\\_str=20060415](http://www.thestandard.com.hk/weekend_news_detail.asp?pp_cat=30&art_id=16589&sid=7351998&con_type=3&d_str=20060415)

Pakistani women are discouraged by their husband from working since “it hurts their ego to take money from their wives”. Though some of them have to no alternatives but to work after residing in HK, they are totally unprepared for this challenge. Likewise, as mentioned in previous sections, the dress code of the Pakistani women also limits their occupational choice.

134. Apart from Pakistani women, poverty is also a problem face by other ethnic minority women. According to statistics as provided by the Women’s Foundation, female ethnic minorities generally earned far less than their male counterparts. The median income of male ethnic minorities is HK\$25,000, seven times that of the female ethnic minorities, who earned only HK\$3,670. We express a matter of serious concern over the poverty problem of ethnic minority women, in particular the Pakistani women. We ask your Committee to urge the Government to (a) raise the employability of ethnic minority women through retraining and continuing education; (b) eliminate workplace discrimination through the enactment of Race Discrimination Ordinance; (c) pay efforts in remedying multiple fronts of poverty as faced by ethnic minority women, including the lack of social network and the lack of political participation.

#### **Community resources and community integration**

135. Article (13) (c) obligates state parties to provide “[T]he right to participate in recreational activities, sports and all aspects of cultural life.” Though public services are generally open to all members of the community, ethnic minority women have difficulties in utilizing these resources owing to language barriers, cultural differences and discrimination.
136. Ethnic minority women usually spend their time with their family members, relatives and friends within their ethnic group. It seems that their social circle was confined to their ethnic groups and they do not mix with local people. According to a study on the life experiences of Pakistanis in HK, over 82% of them feel that it is difficult to make friends with local Chinese.<sup>47</sup>
137. As told by our interviewee, Chinese people often avoid having any contacts with the ethnic minorities. In public places like transportations, Chinese people tend to stay away from the ethnic minorities. Our interviewee also pointed out that ethnic minority women are discriminated by the Chinese because of their dressing style. Chinese people stared at them when they are walking on the streets, which makes them feel sore. Besides, they also have problems in utilizing community facilities

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<sup>47</sup> Tnag, Lam, Lam and Ngai, *Racial Discrimination in Hong Kong, Prevalence and Impact*, The Department of Social Work, the Chinese University of Hong Kong, , P. 19

including housing, health care services and other public facilities.

138. Regarding housing, most of the ethnic minorities face difficulties in renting/ purchasing private housing. One of the problems is high rental price. In order to share the financial burden with their husband, some ethnic minority women may go out and search for jobs. Apart from high rents, ethnic minorities often face discrimination from the tenants and agents. They were asked about their ethnicity once they approached the agents and they were rejected merely because of their ethnicity. Besides, Chinese tenants used to think that ethnic minorities do not pay rent on time and they are dirty.
139. According to our interviewee, ethnic minority women encounter numerous difficulties when using the health care services in HK. In particular, those who have been staying in HK for less than seven years are not permanent residence of HK and they are not entitled to enjoy health care services at a citizens' rate. Besides, with language barriers, ethnic minority women may not be able to explain their situation to the medical doctors. Some of them even choose to go back to their home countries for medical treatments. Moreover, ethnic minority women with Muslim as their religion tend to be very timid and they may feel uncomfortable with male doctors.
140. Moreover, since most of the public services target Chinese or English users, ethnic minority women who know neither of the languages may not be able to enjoy these services. Since ethnic minority women have lower education attainment than ethnic minority men, most of them only speak their mother languages. Thus, they may encounter difficulties in getting access to public facilities such as libraries and cultural centres and some of them even have problems in going out on their own.
141. The Monitor calls on the Committee to urge the Government to (a) facilitate the integration of ethnic minorities to the local community through public education, Race Discrimination Ordinances and community projects; (b) increase the accessibility of public services by ethnic minorities by providing multi-language translations.

## Overseas Chinese Women from Indonesia (Article 5 and 11)

### Background

142. In the 20s and 30s, many Chinese migrated to Indonesia owing to the internal wars in China. After seventy years of time, the third generation of these overseas Chinese has grown up. Though the new generation is ethnically Chinese, they do not speak and read Chinese since they are educated under the Indonesian education system. In particular, many overseas Chinese women in Indonesia try to look for spouses in HK.
143. Owing to the economic tribulations and the discriminatory policy against overseas Chinese in Indonesia, this group of young women tries to find better lives in HK. Most of them match with their spouses in HK through their relatives or matchmakers. They only have about a month time in locating a spouse; whether they are able to find a suitable husband is a matter of luck. In most of the cases, their husbands are ten to twenty years older than them.
144. The situation of this group of women is very unique. Though they are ethnically Chinese, they do not know how to communicate in Chinese. Most of these women only speak and read Indonesian and dialects, which causes them many inconveniences in daily lives. However, their existence in the HK society is unfamiliar to most of the HK citizens, even the Government.

### Article 5: Stereotyping and prejudices

#### Domestic violence and unequal relationship in marriage

145. In certain cases of marriages between HK Chinese and Indonesian Chinese, the husband and the wife may not be of equal relations. Since the wife came to HK alone and she does not speak and read Chinese, she has to rely on the husband in most of the matters, including their children's education, family finance etc. Since their qualifications obtained in Indonesia are not accredited by the employers and they are totally unprepared for jobs, most of them are housewives while some of time may have part-time jobs such as household cleaning. Besides, Thus, they are financially dependent on their husband. According to our interviewees, the husbands of their friends incline to look down on their wives and treat them as if they are inferior.<sup>48</sup>
146. Domestic violence does happen to this group of women though it

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<sup>48</sup> An interview was conducted with a group of overseas Chinese women from Indonesia and the representatives from the Women Centre, an NGO in HK.

is rare. However, when it comes about to them, most of them tend to swallow up their anger. Apart from financial dependence, this group of women only has a narrow circle of friends. They may only seek assistance from a limited number of relatives and friends. According to our interviewees, they seldom turn to the social workers since they are not familiar with the corresponding procedures.

147. More importantly, owing to pressure from their relatives, it is never their choice to get divorced with their husband and return to Indonesia. Once they return to Indonesia, their relatives may blame them for splitting up with her husband, irrespective of the underlying reasons and who initiates the divorce. They may feel very much ashamed and self-abased because of their relative's accuse.

148. According to our interviewees, there is a case in which the victim of domestic violence has tolerated her husband for about seven years. The victim has no choice but to bear with the hard times since she does not have the right of staying in HK once she has split up with her husband. Thus, she has to wait for seven years until she is entitled to the right of abode in HK. There is another case in which an overseas Chinese woman has to work on her own after getting divorced. Though the income for the job is very low and she has to rely on social welfare for living, she never chooses to return to Indonesia. Despite of huge difficulties, she keeps on trying to find another spouse in HK.

149. Last but not least, they may face the situation of separating from their children in case of divorce, which is particular for those overseas Chinese women who have been staying in HK for less than seven years. Even the wife is entitled to permanent residency, she may not be able to claim for the right of custody of her children since she does not have the financial ability in raising her child. The Monitor requests your Committee to urge the Government to pay special attention to the situation of these overseas Chinese women from Indonesia since they are completely isolated in matters relating to domestic violence.

## Article 13: Women in Economic, Cultural and Social Life

### **Public services and community integration**

150. Article (13) (c) obliged state parties to provide “[T]he right to participate in recreational activities, sports and all aspects of cultural life.” Though public services are generally open to all members of the community, overseas Chinese women from Indonesia may find difficulties in getting access to these services, mostly because of their

language barriers. During the first few years of arrival, they did not go out on their own since they were not familiar with the situation of HK. Even up till now, some of them spent most of their times at home and do not have many choice of activities for leisure.

151. Moreover, this group of overseas Chinese women is not very eager in making friends with HK Chinese. Though they may know some HK people from their workplace or community centres, they seldom keep in contact with each other. Occasionally, people may discriminate against them owing to their language problems. According to our interviewee, she had an uneasy experience of going to a Chinese restaurant on her own. Since she could not read the menu as written in Chinese, she requested the waiter to read for her and the waiter treated her in a rude manner. The same situation occurred when they went to the marketplace. Since these overseas Chinese women do not have major difference with the local Chinese in terms of appearance, people may take for granted that they know how to communicate in Chinese and refuse to help.

152. This group of overseas Chinese women is neglected by the Government and the society. We believe that the Government should foster their self-improvement and community integration through providing (a) courses on Chinese and English; (b) service guidebooks in different languages; (c) community projects targeting on this group of overseas Chinese women.

## **New arrival women (Article 5, 11, 12 and 13)**

### **New arrival women: a general view**

153. Every year, more than 20,000 women are coming from the Mainland to HK. The term “new arrival women” is used to describe the group of women who come from the Mainland, and they have been staying in HK for less than seven years. Currently, there are about 160, 000 new arrival women in HK. Among them, over 92% come to join their husbands in HK. According to a survey conducted in 2003, only 30% of the new arrival women were employed; while the employment rate of HK women is around 50%.

154. Owing to the reasons that their credentials and working experiences are not being recognized by firms in HK, most of them can only find low-paid jobs such as waitress, janitors etc. However, as new arrivals, they are not entitled to the welfare services as enjoyed by HK residents. Even they tried to approach the Government departments, they are being rejected and humiliated. The new arrival women are being marginalized in the HK society and face multiple fronts of discrimination and deprivation.

## **Article 5: Stereotyping and prejudices**

### **Domestic violence in new arrival families**

155. In CEDAW General Comments 12, it was recommended that state parties are obligated to “protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life”.<sup>49</sup> State parties should also provide support services for women who are victims of aggression or abuses.

156. In its report, the Government alleged that it adopts the principle of “zero tolerance on domestic violence”. Though the Government’s report emphasized that continuous efforts have been paid in reviewing policies and services relating to domestic violence, it does not necessarily mean that women have equal access to these services. Besides, the biases of frontline service providers may also affect women’s access to services. In particular, new arrival women are not entitled to welfare services when they suffer from domestic violence. They are also being stereotyped, humiliated and excluded by the frontline police, medical doctors and social workers.

157. According to the figures provided by the Harmony House, over

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<sup>49</sup> [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/300395546e0dec52c12563ee0063dc9d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/300395546e0dec52c12563ee0063dc9d?Opendocument)



85% of the women who suffer from domestic violence are new arrival women.<sup>50</sup> The most alarming case of violence against new arrival women took place in April 2004. The victim was a new arrival woman, who stayed in HK for only three months. She was repeatedly abused by her husband and moved to a shelter before the incident occurred. Since her husband warned that he would hurt their daughters, the victim called the police before she returned home from the shelter. However, it happened that the police told her that there was no “imminent danger” and turned a deaf ear to her call. The case ended up with the death of the wife and the two daughters---they were stabbed to death by the husband in their residence.

158. It was reported that the victim had approached the social workers, medical doctors and the police before the incident happened; yet, none of the parties were willing to help. The police denied that they have received any phone calls from the victim before the tragedy took place and further asserted that there were no problems with their filing procedures. The police refused to apologize for their grave errors despite of public pressure. It shows that the frontline police did not have adequate knowledge and sensitivity in handling cases of domestic violence. The case would have prevented if the police were aware of the potential danger of domestic violence.

159. Despite of the alarms, the frontline police and social workers remain aloof in handling cases of domestic violence. One of the cases from NGO Reports shows that a new arrival woman has been continuously assaulted by her husband and she tried to seek help from the SWD. When she left her husband, she only got few hundred dollars in her pocket and did not have any social networks in HK. Nonetheless, officers in the SWD told her that she is not entitled to welfare services since she has been staying in HK for less than seven years. The officers asked her to forgive her husband and further pushed her to drop her application by claiming that “you were willing to tolerate your husband in the past, so why can’t you give him another chance”. The officer even suggested her to go back to the Mainland for living or return to her husband. Without doubt, the above suggestions totally pay no attention to the victim’s safety and put her into great risk.

160. Apart from social workers, new arrival women are also humiliated by the frontline police. A victim of domestic violence was disgraced by the police of “pushing your husband to the edge of imprisonment”. Moreover, cross-boarder marriages are mainly between young Mainland girls and middle-age men from HK. New arrival women are stereotyped as using marriage in exchange for staying in HK. Thus,

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<sup>50</sup> <http://www.legco.gov.hk/yr02-03/chinese/panels/ha/papers/ha1108cb2-268-1c.pdf>

the police may incline to be more sympathetic with the husband instead of the victim. The attitude of the police is conducive to secondary victimization and discourages the victims from reporting.

161. Regarding the above concerns, The Monitor requests your Committee to urge the Government to provide gender sensitive training for the frontline police and welfare services providers.

#### **Legislation against discrimination**

162. At present, there are no legislation against racial discrimination. Hopes for a racial discrimination bill were repeatedly wiped out by the Government. In March 2006, the Government has promised to complete the legislation process of Racial Discrimination Bill before the Legislative Council's recess and the promise was broken over again. To our disappointment, the Government proposed not to include the new arrivals from Mainland in the Racial Discrimination Bill. The Government alleged that according to the definition as set forth by ICERD, new arrivals from Mainland share the same race as local residents; thus, discrimination against Mainland new arrivals does not constitute racial discrimination.

163. We believe that ICERD only provides the minimum standards for protection. Though the new arrivals do not fall within the definition of ICERD, there is no harm in extending the definition to embrace the group of new arrivals. In the United Kingdom, for example, racial discrimination is extended to include discrimination based on "nationality". Similar to the ethnic minorities, the new arrivals are vulnerable of being discriminated by local residence. Though HK residence and new arrivals share the same race, they have distinctive cultural, economic and political backgrounds. These significant differences are conducive to discrimination. Therefore, new arrivals deserve special protection under the law.

164. We also believe that the definition of "national origin" can be expanded to include "any jurisdiction of the People's Republic of China" to cover the new arrivals. Above and beyond, in order to protect new arrivals from places other than China, discrimination on the grounds of a person's current and past status immigrant should also be outlawed. The Monitor requests your Committee to urge the Government to (a) introduce the Bill on enactment of racial discrimination immediately; (b) expand the definition of "national origin" for including new arrivals in the Bill.

## Article 11: Equality in employment and labour rights

### Article 11 (1) (b): The right to the same employment opportunities

165. New arrival women do not have equal access to employment. Research shows that over 90% of new arrival women are facing discrimination in the labour market. The discrimination is based mainly on their Mainland background, class or family status, i.e., married with childcare obligations.

166. A household survey conducted by the Census and Statistics Department (CSD) in 2002 shows that new arrival women generally face more difficulties in finding jobs when compared with new arrival men. New arrival men were generally employed in jobs that had more prospects. Some of them even started their own businesses after working for a few years. On the other hand, new arrival women may only be able to find jobs such as washing dishes in the restaurants, waitress, janitors etc, which had no prospect for promotion at all. Though the CSD did not examine why there were wage differences between new arrival men and women, we believe that the underlying reason is women's family responsibilities such as childcare. Thus, they may not be available for full time jobs; instead, they may only have part-time or take home jobs.

167. Although the Government affirmed that employment services for the new arrivals have been provided by the Employment and Guidance Centre for New Arrivals, the services are inadequate in helping new arrivals to find jobs. The Centres only provide information to the new arrivals, such as job interviewing and job-finding skills. These services are not effective indeed. The job advertisements posted by the Centre is characterized by long working hours and low pay. Some full time jobs posted are only of HK\$1000-\$2000 per month. Besides, most of the advertisements placed in the Centres are written in Chinese so the new arrivals have difficulties in reading them. In other words, assistances provided by the Centres are not effective in bringing new arrival women out of poverty.

### Article 11 (1) (c) The right to receive vocational training and retraining

168. One of the reasons for new arrival women's inability in finding high-paid jobs is that their credentials are not being recognized by HK employers. Besides, the skills and techniques they possess may not meet with the demands of the HK labour market. Nevertheless, only 1/10 of the existing vocation training and retaining programs provided by the Labour Department and the Employee Training Board are

suitable for the new arrival women. Though they may apply subsidies from the Continuing Education Fund, the amount is payable after the completion of the courses and subsidies are only provided to applicant who have attained certain results of study. Therefore, new arrival women who do not have the means in applying for the courses are only able to stay in low-paid jobs. We believe that inexpensive training courses are particularly crucial for new arrival women since they have received less academic and vocational trainings than new arrival men in the past.

#### **Article 11 (1) (d) The right to equal remuneration**

169. On average, new arrival women have to work 10-17 hours per day. Despite of long working hours, they only receive average salary of HK\$5800 and their salary level is 30% lower than that of local women. New arrivals are not able to find high paid jobs since their past credentials and working experiences are not being recognized by the employers. Besides, they were the first to be fired during economic downturn. Since local people do not easily compromise with low wages, new arrivals have no alternatives but to accept wage cut.

170. Moreover, over 70% of the new arrival women think that they are being stereotyped by their employers and co-workers.<sup>51</sup> For instance, their employers have deliberately suppressed their wage level and lengthened their working hours without overtime compensation. Their co-workers also think that people from the Mainland are grabbing their “rice-bowls”. Nevertheless, over 70% of them are neither willing to redress their complaints nor aware of their labour rights. Thus, most of them do not receive equal remuneration when compared with their local counterparts.

#### **Suggestions and recommendations**

171. The Monitor requests your Committee to urge the Government to (a) provide a package of assistance that are accessible by the new arrival women, including child care services, employment services, retaining programs etc; (b) introduce laws on maximum working hours; and (c) eliminate workplace discrimination by introducing law on anti-racial discrimination and issuing codes of practice to the employers.

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<sup>51</sup> Report on the situation of new arrival women in HK, by the Society for Community Organizations, an NGO in HK.

## Article 12: Equality in access to health facilities

### **Health care services for the new arrivals**

172. Article 12 of the Convention obliged state parties to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning”.
173. The health care services for grassroots women in HK are underdeveloped. At present, there are only three health care centres for women ranging from the age of 45 to 64. The services charge of these centres is HK\$310 per year. There are no mandatory health checks for Mainland women before their arrival to HK. However, they may not be able to afford the expensive health care fees after starting their new lives in HK.
174. In addition, new arrival women also suffer from poorer mental health than local women. According to the researches by NGOs, new arrival women are found to be lack of emotional management techniques and ways to reduce stress. Also, they do not have social networks in supporting them in terms of difficulties. Owing to problems in adapting to the new environment, including language incompetence, lack of knowledge and resources, poor economic conditions etc, they often have low self –esteem.
175. The Monitor asks your Committee to urge the Government to (a) increase the health care services for grassroots women; (b) provide special counseling services for new arrival women.

## Article 13: Women in Economic, Cultural and Social Life

### **Social security for the new arrivals**

176. Since 2004, only new arrivals who have been staying in HK for more than seven years are eligible to social welfare. In the past, new arrivals were eligible for welfare after one year of stay in HK. In other words, many new arrivals are excluded from the safety net of the social security system. Though the Social Welfare Department (SWD) has discretion in handling new arrivals’ application for the Comprehensive Social Security Assistance Scheme (CSSA), they seldom exercise this kind of discretion. In 2005, only 198 out of 1580 applications from the new arrivals succeed. However, most of the applicants are single mothers or those who suffer from long term

diseases.

177. Prejudice and stereotyping are reasons why officers or social workers from the SWD refuse to exercise discretion over new migrants' application. Local residents tend to consider the new arrivals as deceitful, greedy and "exploiting HK taxpayers' money by receiving CSSA without having contributions". Instead of having professional judgment on the applications, there are cases showing that social workers/ SWD officers are prejudiced against the new migrants. New arrival women particularly suffered since reports show that they are more likely than men in applying for CSSA.
178. Moreover, we believe that the CSSA Scheme itself is not comprehensive enough in covering all dimensions of poverty. The Scheme only focus on the economic aspect of poverty and it aims at helping the family in maintaining their basic subsistence level. The social and political aspects of poverty are left untouched. In the social dimension, the new arrival women do not have networks of assistance, for example, friends, relatives, neighbours etc. Due to the lack of social network, no one may help the new arrival women with childcare. Consequently, they are not available for full time jobs. Most of them have to work in the informal sector or part time jobs, and their income is insufficient in supporting the family. This is particularly the case for new migrants who are single mothers.
179. New arrival women are also deprived in the political dimension. They are not entitled to vote unless they have been staying in HK for seven years. Besides, new arrival women are heavily engaged with job and domestic duties; thus, they do not have enough time and energy to participate in political activities. Unfortunately, the Government continues to pay little attention to different faces of poverty.

#### **Community integration**

180. New arrival women have to overcome different barriers before integrating to the new environment. According to a survey conducted by The Society For Community Organization New-arrival Project (2003), over 47% of the informants found difficulties in communicating with others and 78% of them found difficulties to read traditional Chinese characters used in HK. New arrival women also face persistent discrimination from the local community due to the differences in cultural backgrounds. Nevertheless, little efforts have been made by the Government in fostering the integration of new arrival women into the community.
181. Though the Government affirmed in its report that four additional post-migration centres were set up for providing packages of

preventive and supportive programs for the new arrivals, the centres have been closed down by the Government in recent years. Instead of maintaining the new arrival services centres, Integrated Family Service Centres (IFSC) were established under the Social Welfare Department.<sup>52</sup> IFSC consist of a family resources unit, family support unit and family counseling unit. Again, the Government attempted to equalize the interests of women with the interests of the family as a whole, which is particularly for the case of domestic violence. The interests of women may be sacrificed in preserving family unity. Also, the IFSC is not specialized in providing services for women, in particular the new arrival women. The Government also failed to provide the number of IFSC social workers who are responsible for handling the enquiries of new arrival women. Hence, the IFSC may not be helpful in solving the problems faced by new arrival women.

182. Though the Women's Commission has been offering the "Capacity Building Mileage Program" in promoting the self-improvement and confidence of new arrival women, the course is not suitable for them in terms of timing and course fee.<sup>53</sup> First of all, participants of the Program are required to listen to thirteen hours of radio programs, which are broadcasted at nine every night. The Program may not fit in the schedule of new arrival women who have long working hours. Most of the new arrival women have to work for more than ten hours, till late at night; thus, they are not able to participate in the Program. Besides, course fees for supplementary classes are unaffordable by most of the new arrivals. Moreover, the Program is not comprehensive in addressing the needs of the new arrival women. Although the Program may enhance the self-development of new arrival women, it does not include vocational trainings. It may not be effective in bringing the new arrival women out of poverty.

183. The Monitor requests your Committee to urge the Government to (a) reduce the number of years of stay for eligibility of CSSA; (b) provide special trainings and guidance for social workers in handling the new arrivals' application for CSSA; (c) provide free childcare services for the new arrival women; (d) re-open the post-migration centres; (e) introduce cost-effective community integration programs and vocational training programs for the new arrival women.

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<sup>52</sup> [http://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_family/sub\\_listofserv/id\\_228/](http://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_228/)

<sup>53</sup> [http://www.women.gov.hk/eng/activity/activity\\_go.html](http://www.women.gov.hk/eng/activity/activity_go.html)

## Split Families and the Right of Abode (Article 5 and 9)

### The right of abode issue

#### Background

184. The definition of “HK permanent residence” provided in Article 24 of the Basic Law was drafted at a time of “brain drain” from the territory after the crackdown on the 1989 pro-democracy movement in the Mainland. A liberal definition of “permanent residence” was purposely used in enabling a lot of people to be eligible for having the right of abode in HK. As provided in Article 24 of the Basic Law, children of parents who have the right of abode in HK also have the right of abode, irrespective of whether their parents are permanent residence at the time of their birth. Though the liberal definition may result in an influx of population from Mainland China, the SAR Government was not very keen in addressing the issue except by increasing the daily quota to 150 for Mainlanders to come to HK.
185. Due to the close interaction between HK and Mainland China and the Mainland’s open door policy since the late 70s, the number of HK single males returning to the Mainland for marriage has grown rapidly. Immediately before the handover, the Government estimated that there were about 30,000 Mainland-born children eligible for applying permanent residence in HK.
186. After the handover, a number of claimants holding “two-way permit”<sup>54</sup> went to the Immigration Department for the recognition of right of abode in HK. However, the Immigration Department refused to accept that the Basic Law gave all these children the right of abode. With the increase in the number of claimant, the Government amended retrospectively the Immigration Ordinance and required all the claimants to apply in Mainland for a certificate of entitlement offered by the SAR Government and the Mainland Public Security Bureau respectively, with is known as the “one-way permit”. The system was used in delaying the constitutional right of abode as stipulated in the Basic Law. Many claimants went into court case with the Immigration Department, and these cases in due finally found their way to the highest court of HK, the Court of Final Appeal.
187. On January 1999, the CFA ruled that the one-way permit was unconstitutional since it delayed or denied the enjoyment of constitutional right of abode by making it dependent on the decision of Mainland bodies. Thus, children of parents who have the right of abode in HK also have the

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<sup>54</sup> Two-way permits are issued by the Mainland Authorities to the Mainland visitors who come to HK for the purpose of sight seeing and visiting their relatives. The permit is renewable in every three months.



right of abode, irrespective of whether their parents are permanent residence at the time of their birth. The ruling would have granted immediate right of abode to 160,000 people in Mainland China.

188. However, after China voiced its disapproval of the CFA's views expressed in the judgment, especially that the CFA had the power to review the acts of the National People's Congress if such acts violated the Basic Law, the Government applied to the CFA to clarify its judgment. Besides, the Government also publicized an estimated figure of the number of persons eligible for the right of abode in HK, which is grossly exaggerated. The public was shocked by the figure and the CFA's judgments were also being severely criticized. On May 1999, the Government requested the Standing Committee of the National People's Congress (NPCSC) to re-interpret the provisions of the Basic Law.

189. On June 1999, in line with the request of the HKSAR Government, the NPCSC issued its interpretation which makes it clear that children born outside Hong Kong will be eligible for the right of abode only if at least one of their parents has already acquired permanent residence status at the time of their birth. Also, those eligible for right of abode need to comply with Article 22 of the Basic Law, i.e. they need to apply for the one-way permit from the relevant Mainland authorities before entry into Hong Kong.

190. Obviously, the decisions of the NPCSC marked a denial and delay of the constitutional right of abode of Mainland-born children. The reinterpretation of the Basic Law by NPCSC also marked a grave setback of the rule of law in HK since the CFA should have been the final adjudication of the territory. Though Article 158 of the Basic Law has explicitly provided that the NPSCS assumes the power in interpreting the Basic Law, no mechanisms are provided under the Article for the Government to take the initiative to seek interpretation. Protest and repeated requests from the claimants continuous till now, but the Government still refuses to meet them.

#### **The one-way permit**

191. With the NPCSC's decisions, those eligible for right of abode who wish to enter HK for settlement have to apply to the Mainland Public Security Bureau offices for a one-way permit. The daily quota is 150 with priority given to eligible children and spouses. There is a daily sub-quota of (i) 60 children of all ages who are eligible for right of abode in HK under Article 24(2)(3) of the Basic Law and a sub-quota of 30 for (ii) long-separated spouses and their children (more than ten years of separation). An unspecified sub-quota of (iii) 60 are for applicants from different categories, including:

- (a) Separated spouse irrespective of the length of separation;

- (b) Dependent children (under the age of 18) coming to HK to join their relatives;
- (c) Persons coming to Hong Kong to take care of their dependent parents;
- (d) Dependent elderly people coming to Hong Kong to join their relatives; and those entering Hong Kong for the inheritance of property.

192. The administration of the one-way permit system, including the queuing, allocation and the granting of the permit, is the responsibility of the relevant Mainland authorities.

### Article 5: Stereotyping and prejudices

193. Girls are more likely than boys to be the victims of the right of abode controversy owing to the “prejudices and customary and all other practices which are based on the inferiority or the superiority of either of the sexes.”

<sup>55</sup> The stories of the right of abode claimants can be traced to their parents’ generation. In the 70s and 80s, one or both of their parents’ application for settlement in HK has been successful. With the regulations as set forth by the Mainland Authorities, a parent can only bring one child with him/her for settling in HK. Besides, as required by the Authorities, families that wish to resettle in HK or other countries have to leave over one of their family members in Mainland. In most of the cases, the parent would choose to bring the son instead of the daughter with him/her since the Chinese customs place girls in an inferior position than boys.

194. In order to have reunion with their family members, these groups of children who were left behind in China have been applying for their settlement in HK. Nevertheless, most of their applications have been suspended by the Mainland Authorities for a prolonged period of time, ranging from one year to thirty years, depending on provinces. The problem is induced by the wide spread corruption in Mainland China. Applicants have to bribe the officials, ranging from HK\$6,000-\$200,000, or they may risk their applications.

195. As time goes by, these children are no longer eligible in applying for the one-way permit. They no longer belong to the category of (iii) (b) of the one-way permit application, i.e., dependent children (under the age of 18) coming to HK to join their relatives. However, the age limit of applicants for (iii) (b) varies across provinces, ranging from the age of 12-18. In other words, there is no standardized mechanism for these children to apply for the one-way permit. According to the research conducted by the Justice and Peace Commission of the HK Catholic Diocese, 57% of the respondents are not eligible for the one-way permit since they have exceeded the age limit.

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<sup>55</sup> CEDAW, Article 5.

196. With the CFA's decision in January 1999, there was a beam of hope for this group of unsuccessful applicants. According to the CFA's judgment, children of parents who have the right of abode in HK also have the right of abode, irrespective of whether their parents are permanent residence at the time of their birth. Since the parents of these adult sons and daughters have the right of abode in HK, they are also entitled to the same right according to the CFA's judgment.
197. With the ruling of CFA, many claimants went to HK in demanding for their right of abode. Some of them had given up their job in the Mainland for this endless campaign. During the period of struggle, most of the claimants found that they were being discriminated by the HK residence. Research figures show that over 89% of the respondents feel that the HK residence look down on the Mainlanders.
198. Unfortunately, with the NPCSC's reinterpretation of the Basic Law, the hope of the right of abode claimants has been vanished. In June 1999, NPCSC issued its interpretation which makes it clear that children born outside Hong Kong will be eligible for the right of abode only if at least one of their parents has already acquired permanent residence status at the time of their birth. With the reinterpretation, the number of claimants who are eligible for the right of abode in HK has sharply decreased from 160,000 persons to 27,000 persons.<sup>56</sup>
199. Despite of the NPCSC's decision, some claimants continued to fight for their right of abode in HK. At least 179 of them were being detained by the Immigration Department. It was reported that they were being maltreated by the immigration officers. During detainment, some expectant mothers were not allowed to calling back home. Also, the immigration officers refused to provide sanitary napkins for female claimants. Without doubt, the maltreatment by the immigration officers added trauma to these group of claimants.
200. At present, there are no mechanisms for these adult sons and daughters to apply for settlement in HK. They are not eligible to apply under category (iii) (c) unless their parents have exceeded the age of 60 and they do not have any sibling in HK to take care of their parents. Under the absence of a standardized mechanism, some of them have been separated with their family members for more than thirty years. According to the research by the Justice and Peace Commission of the HK Catholic Diocese, more than 70% of the respondents stay with their parents for less than a month per year. Without doubt, the right to family reunion of these rights of abode claimants, who are overwhelmingly female, is sacrificed under the NPCSC's reinterpretation of Basic Law.

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<sup>56</sup> [www.99129.org/about/about03.htm](http://www.99129.org/about/about03.htm)

201. On the other hand, people who are eligible for applying one-way permit under category (i) is decreasing. We believe that part of these quotas should be reallocated to adult sons and daughters who have been separated with their parents in HK. The Monitor requests your Committee to urge the Government to negotiate with the Mainland Authorities for a standardized mechanism in arranging the settlement of these adult sons and daughters in HK.

### **Split families and “moms without ID”**

#### **Background**

202. The controversy over the right of abode extends to the third generation of the families involved. During these years of struggle, some claimants of right of abode have developed their family in HK. They gave birth to their children in HK while the claim for right of abode is still going on. After NPCSC’s decision, these children are doomed to be separated from their parents since the latter are not entitled to right of abode in HK.
203. Mothers of these children are particularly burdened owing to divorce and their husband’s death. In this way, they have to carry the responsibilities of childcare alone. In some cases, the father is a HK residence while the mother has lost in their claim of right of abode. Under this situation, the mother is in extra distress since she has to return to the Mainland and cannot enjoy uninterrupted stay with her children. We believe that these mothers are the victims of misfortunes. On one hand, they are separated from their parents since early childhood; on the other hand, they are facing the destiny of living apart from their children.
204. As mentioned, these mothers are not qualified in applying for the one-way permit. They are not eligible for application under category (i) since neither of their parents were permanent residence when they were born. Only a small proportion of them may apply under category (iii) (c) in taking care of their parents who have exceeded the age of 60. Most of these mothers have to wait for more than 30-40 years in order to be eligible to apply for one-way permit under (iii) (d). As set forth in (iii) (d), dependent elderly people coming to Hong Kong to join their relatives. In other words, these mothers have to wait until they have reached the age of 60. Immediate and sustained reunion between these mothers and their children is impossible under the existing arrangement.
205. In order to take care of their children, the only way these mothers can do is to apply for “two-way permits” to HK. The two-way permit is issued to the Mainlanders coming for sightseeing or visiting relatives, which is renewable in every three months. These mothers have to travel in between HK and Mainland time after time since the two-way permit has to be renewed by the Mainland Authorities in every three months. However, the

time for renewing a two-way permit is uncertain; sometimes it only takes a few days while sometimes it takes a month for renewal.

206. Our interviewees told us that the officers of Mainland Authorities often make things difficult for them.<sup>57</sup> In order to renew their two-way permit to HK, these mothers have to give out petty favourites, bribes and cultivate *guanxi* (meaning relationship) with the Mainland officials. Besides, their children are usually in bad moods while they return to the Mainland for permit renewal. Despite of unbroken hardships, maternal love from these mothers never ceases.

207. According to our interviewees, there are about 400-500 cases of “moms without ID” in HK. They are called mom with visa because they do not have any identity documents issued by the HK Government. Without any identity documents, they are neither allowed to work nor entitled to social welfare. Most of them spend about eleven months in HK in taking care of their children while they do not have any sustainable income. Unfortunately, this group of mothers is completely isolated in the HK society owing to the Government’s aloofness and public discrimination. The Government’s submission also mentioned nothing about the difficulties encounter by this group of ‘moms without ID’.

## Article 11: Equality in employment and labour rights

208. Article 11 (a) set forth that “the right to work as an inalienable right of all human beings”. These mothers, however, are deprived of their right to work since they do not have identity documents as issued by the HK Government. At the same time, they are not entitled to welfare since they are not permanent residence of HK. In this way, they can only rely on the social welfare received by their children. The standard rate of Comprehensive Social Security Assistance (CSSA) for able-bodied child is set at HK\$1930 per month.<sup>58</sup>

209. Without doubt, this amount is not enough in covering all the fees involved in the child’s education, food, rent and other living expenses. In addition, these mothers have extra fees to pay, which includes transportation fees to travel in between HK and Mainland, permit renewal fees and petty favourites to officials. According to our interviewees, it costs them about HK\$600 for each permit renewal (including transportation fee). Moreover, owing to the lack of sustainable income, these mothers do not have enough resources to devote to their children’s

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<sup>57</sup> An interview was conducted with a group of “mom with visa” and representatives from the Caritas, an NGO in HK.

<sup>58</sup> [http://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_socsecu/sub\\_socialsecurity/#CSSAsr](http://www.swd.gov.hk/en/index/site_pubsvc/page_socsecu/sub_socialsecurity/#CSSAsr)

development. One of the mothers told us that her child is unable to participate in extra-curriculum activities as other children. Apart from CSSA, they do not have access to any other types of welfare assistance, including family services.

### Article 12: Equal access to health facilities

210. Article 12 (2) obliges state parties to “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.
211. Since these mothers are not HK citizens, they are not entitled to inexpensive medical services. Our interviewees recalled that while they were giving birth to their children in the public hospitals of HK, they were unable to afford the fees involved. The hospital refused to grant them the citizens’ rate until the NGOs negotiated for them.
212. In addition, prior to April 2004, mothers using two-way permit to HK could get access to the public health care services at the citizens’ rate. After April 2004, the policy was revised and this group of mothers is no longer entitled to inexpensive health care services. Some of our interviewees are reluctant to go to the hospital even they suffer from long term illness. Since they are relying on social welfare, they are not able to afford the medical fees, especially for special practice, which costs about HK\$700 per treatment. With the lack of medical care, they may only buy medicine from the pharmacy when they feel unwell.
213. Owing to uncertainty over their future and pressure induced by childcare, some of them also suffer from prolonged mental illness such as melancholy. They are also self-abased because of their inability to work and their reliance on social welfare. Worse still, some of them have to shoulder the burden on their own due to their husbands’ death or divorce. These mothers are not able to afford psychological therapies and they only get access to limited counseling services provided by the NGOs.

### Article 13: Women in Economic, Cultural and Social Life

#### **Stigmatization and isolation**

214. These mothers are deprived of the right to “participate in recreational activities, sports and all aspects of cultural life” owing to the lack of formal identity in HK. They only have a narrow circle of friends---most of their friends come from people sharing the same destiny. They often try hard to cover up their background since they feel ashamed of letting others know that they do not have an ID card

in HK.

215. As told by our interviewees, in case their situation is made known to others, the life of their children may be adversely affected. In effect, local people tend to view Mainlanders in a negative way, stigmatizing them as welfare seekers. Besides, owing to the lack of understanding, local people are inclined to put the blame on the mothers, alleging that they deliberately let their children born in HK. According to one of our interviewees, she is being discriminated because of her situation as a mom without ID. One day she revealed her situation to the principal of her son's school and she expected that the principal would show understanding for her case. However, it happened that the principal avoided her after knowing the real situation. Undoubtedly, discrimination from the local residence adds pressure on this group of fortuneless mothers. They are very much isolated in the society and no one is willing to show acceptance.
216. We believe that this group of women deserves special care and attention since their predicament is caused by situational factors rather than their own choice. They would have reunited with their children and other family members in HK if the CFA's judgment has not been repealed by the NPCSC. We also believe that the curse of split family should not be extended to the next generation. Children of mom without ID are deprived of the right to enjoy uninterrupted maternal love. Owing to the situation of persistent poverty, these children only have limited resources in education. Since the Convention on the Right of Child is also applicable in HK, the best interest of the child should be put into primary consideration.<sup>59</sup>
217. We regret that the Government is not putting priority in solving the problems of split families. On the one hand, the Government emphasized in its Population Policy that importing Mainland talents is vital in order in increasing the competitiveness of HK population.<sup>60</sup> On the other hand, the course of action towards split families, which affects 53,216 family units, has never been mentioned in the Population Policy.
218. The Monitor requests your Committee to urge the Government to
- (a) negotiate with the Mainland Authorities for a standardized mechanism in arranging the settlement of the mothers without permit;
  - (b) issue temporary identity cards to these mothers and allow them to

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<sup>59</sup> According to Article 3 of the Convention, "[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

<sup>60</sup> <http://www.info.gov.hk/info/population/>

work and/or (c) provide welfare and inexpensive medical services for them.



## Female Asylum Seekers (Article 4)

### Background

219. The 1951 United Nations Convention relating to the Status of Refugees does not apply to HK. Thus, the Government does not have any international obligation to admit individuals seeking refugee status; nor there is a statutory refugee determination procedure in HK.

220. Under this circumstance, claims for refugee status which are lodged in HK are dealt with by the United National High Commissioner for Refugees (UNHCR). The UNHCR has been present in the territory for more than 50 years and processing close to 2,000 cases per year making an average of about 100 decisions per month.

221. At the end of April 2006, there were 1473 asylum seekers in HK waiting for a decision in their asylum seeking applications. Of these, 24.7% were women and 23.9% were children. About 90% of them came from South Asia countries such as Sri Lanka, Nepal, India etc; while 9% of them fled from Africa, such as Congo, Ghana, Togo etc, to HK.<sup>61</sup>

222. Though the Commission provides a channel for assessing the claims for refugee status, it stands outside any legal jurisdiction in HK. Therefore, any decision given by the Commission can neither be appealed nor have any enforcement power. This leaves the asylum seekers with no remedy for safety and protection.

223. As affirmed by the Government, there is a firm policy of not granting asylum. The Government statement said, “Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes use vulnerable to possible abuses if the 1951 UN Convention were to be extended to HK”.

224. Owing to the hard-hitting position the Government, resident permits are not issued to the asylum seekers while a claiming is considered by the UNHCR. Many asylum seekers are detained in the Victoria Prison and other detention centres while their cases is being reviewed. In the past, asylum seekers with cases pending a decision are not generally detained. Recently, the Government has reaffirmed its position and asylum seekers are now routinely denied visa extensions while their cases are still under proceedings. Asylum seekers are either detained or deported, though they would be at the

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<sup>61</sup> Report on Asylum Seekers and Refugees in HK: Overview, by Raquel Amador and Melissa K.Neher.

risk of torture after deportation.

#### Article 4: Temporary special measures

##### **Reasons for extra protection of female asylum seekers**

225. According to Article (4) (2) of the Convention, state parties should “adopt special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”.

226. In the case of asylum seekers, special protections shall be provided for women since they are more vulnerable than men during the period of seeking asylum. First and foremost, as commented by refugee law scholars, women have had a more difficult time gaining recognition as refugees than men. The underlying reason is that the 1951 Refugee Convention has been interpreted through a framework of male experience. According to the Convention, the term “refugee” is defined as:

227. “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

228. The definition does not include gender-related persecution that occurs in the “private sphere”, including female genital mutilation, mass rape, trafficking for the purpose of prostitution etc. Besides, gender-related persecution often occurs at the hands of non-state actors, including militias and armed groups that the state cannot control; members of the society or even family members. A state may refuse to offer a woman protection from a non-state actor since the state’s laws reflect a certain view towards women and gender roles, or because the state considers “traditional” or “tribal” violence against women of a particular ethnic group to be acceptable. Though not all persecution experienced by women are gender based, women often have difficulties in seeking asylum in cases of gender related persecution.

229. Moreover, female asylum seekers have extra vulnerability during the period of seeking asylum. When compared to men, women may

have less means of survival. Also, they may be in great danger of being sexually harassed if they are not provided with shelters. Therefore, we believe that special protections for female asylum seekers should be justified.

#### **Other international obligations**

230. Regarding the protection towards female asylum seekers, the Strategic objective (E) (5) (a) of Beijing Platform for Action further recommends state parties to “[O]ffer adequate protection and assistance to women and children displaced from their home country and find solutions to the root causes of their displacement with a view to prevent it and, when appropriate, facilitate their return and resettlement”.

231. Moreover, strategic objective (E) (5) (d) urges that “[W]hile fully respecting and strictly observing the principle of non-refoulement of refugees, take all the necessary steps to ensure the right of refugees and displaced women to return voluntarily to their place of origin in safety and with dignity, and their right to voluntary and safe return to their home of origin”.

232. Apart from CEDAW, the Convention against Torture (CAT) is applicable to the HKSAR. Under the Article 3 of the Convention, no State Party shall “expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

#### **The refugee status determination mechanism**

233. Despite of its CEDAW and CAT obligations in assisting the asylum seekers, the Security Bureau reaffirmed the Government’s position of not granting asylum to admit individuals seeking refugee status.<sup>62</sup> With the Government’s assertive position, the asylum seekers continue to suffer from a lack of legislation, lack of a clear policy and a lack of appeal on the merits.

234. At present, the Government has no refugee status determination system and it tries to “sub contract” its CAT obligations to the UNHCR, which is a body that cannot be compelled to appear in the HKSAR. Besides, despite of its obligations under CAT, the Government has only implemented “discretionary” screening procedures for the asylum seekers. Worst of all, the decisions involved

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<sup>62</sup> <http://hk.news.yahoo.com/060322/12/1mapp.html>

are made under the absence of legal representation. We consider the Government's arrangements as a denial of treaty obligations. Due to the lack of domestic personality, the UNHCR cannot be a surrogate for the HKSAR properly assuming its obligations.

#### **UNHCR's interview procedures**

235. The UNHCR takes up most of the responsibilities in determining the refugees status of asylum seekers; however, its determination process has numerous shortcomings. It is reported that it takes a long period of time, i.e., seven months to three years, for the UNHCR to determine the refugee status on an asylum seeker. The prolonged period of determination have a greater adverse impact on women than men. As told by our interviewee, some female asylum seekers are forced to prostitution since they do not have other means of survival in HK.<sup>63</sup>
236. Moreover, according to a study by the Society for Community Organization (SoCO), 91 out of 100 cases of asylum seekers had not been allowed to be accompanied by a lawyer during interview. As mentioned, female asylum seekers face more difficulties when collecting evidences relating to gender related persecution. Thus, legal assistance for female asylum seekers is particularly crucial. In experience of lawyers and NGOs, legal representation in the asylum process leads to a significant improvement in the rates of recognition or overturning refusal. According to our interviewee, the UNHCR is deciding on allowing legal representation from HK trained lawyers. Nonetheless, until now, only a couple of HK lawyers take asylum cases. Besides, the Government does not provide financial remuneration for lawyers in assisting the asylum seekers. The lack of legal assistance increases the difficulties for asylum seekers in collecting evidences and defending for themselves, especially for women.
237. Besides, there is no way for ensuring the procedural fairness of the UNHCR. Almost all of respondents of SoCO's study said that they had not been given a copy of the interview transcripts and they were treated by the staff of UNHCR in a hostile way. Moreover, no interpreters were offered to the asylum seekers during the whole interview process. According to our interviewee, sometimes the UNCHR fails to follow the gender guideline in interviewing female asylum seekers owing to the lack of resources. There is a case in which a survivor of rape was put into an uneasy situation since her credibility was being criticized by the staff of UNHCR during the

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<sup>63</sup> An interview was conducted with Ms Raquel Amador, the representation from a local NGO, the Christian Action.

interview process. We believe that the unsympathetic interview procedures may constitute secondary victimization of the asylum seekers, especially for the survivors of rape.

238. We understand that the UNHCR is operating under an extremely difficult financial situation and it does not have the capacity in processing all the claims for refugee status. Still, it should not be an excuse for the UNHCR in abusing human rights. Above and beyond, there is no excuse for the Government in denying its international responsibilities incessantly since the UNHCR is supposed to be an agency in assisting the Government in emergency situations only.
239. In regard of the above concerns, we strongly request your Committee to urge the Government to (a) takeover the responsibility of UNHCR in handling asylum applications; (b) follow strictly the gender guidelines of UN in handling cases of female asylum seekers; (c) provide financial remuneration for lawyers in assisting the asylum seekers.

#### **The provision of welfare assistance for asylum seekers**

240. Asylum seekers are not allowed to work when the UNCHR is still processing their refugee status. They have to rely on the financial subsidies granted by the UNHCR, and it is particularly the case for the single mothers and their children. An amount of HK\$600-\$1200 is granted by the UNHCR to the asylum seekers per month.
241. Though the asylum seekers are granted with subsidies, the amount is not enough for sustaining their basic livings. One of the reportings by newspapers on asylum seekers is a 28 year-old female asylum seeker from the Congo Republic. She is a political criminal in her home country since her husband was a member of the opposition party. Her husband disappeared while her country ran into chaos. After arriving HK, the UNHCR only granted her with HK\$1600 for living expenses. The amount has already included the expenses of her and her daughter--- HK\$300 was allocated for water and electricity supply and the rest was for food expenses. Most of the times, they stay at their 100 square-feet apartment.
242. Moreover, since shelters provided by the NGOs are very limited, some asylum seekers have to sleep in the open air and have no means of subsistence. It is reported that a female asylum seeker was not provided with a shelter and she had to sleep in a pier. She was raped after receiving financial assistance from a man. However, she dared not call the police since it she may be deported because of overstaying.

243. Unfortunately, since 1 May 2006, the UNHCR could no longer afford support the asylum seekers in HK.<sup>64</sup> With the funding cut of UNHCR, about eighty asylum seekers, who are overwhelmingly women and children, are being severely affected.
244. Though the Government has collaborated with the NGOs in offering welfare services in kind to asylum seekers, the claims are dealt with on a case-by-case basis. Also, provisions for minors of asylum seekers are granted at the Government's mercy. In other words, the Government does not consider the welfare assistance to asylum seekers as its obligations; thus, it may withdraw at anytime. Moreover, the needs of the asylum seekers may not be met by the Government's assistance in kind.
245. Apart from shelters and food, asylum seekers also have difficulties in getting access to medical and mental health services, especially as related to interpreters and doctors who can provide treatments and reports for scarring and PTSD. In particular, HIV tests are very crucial for survivors of sex violence, who are overwhelmingly female. As told by our interviewee, a female asylum seeker is reluctant in going to the public hospitals for HIV tests due to the lack of interpreters and stigma.
246. Since 2005, refugee children and CAT claimant are entitled to education in HK. However, for children asylum seekers, they still do not have the chance of receiving education. With the uncertainty over the number of years for seeking refugee status, these children may be deprived of the right to education for a couple of years.
247. The Government considers that it has no obligations in assisting the asylum seekers with accommodation, food, or education for children despite of its CAT obligations. The problem is left to the UNHCR and ad hoc graces of the NGOs. We consider that the Government has seriously breached its treaty obligations since it denies any guaranteed support to the asylum seekers.
248. The Committee should express serious concerns about the situation of asylum seekers and refugees in HKSAR. We ask your committee to urge the Government to (a) allow asylum seekers to work while their cases are being reviewed by the UNHCR or (b) provide them with financial subsidies; (c) provide medical services that are accessible by the asylum seekers, including the provision of interpreters; (d) allow children of asylum seekers to receive education during the period of seeking asylum.

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<sup>64</sup> <http://hk.news.yahoo.com/060322/12/1mapn.html>

### The detention and deportation of asylum seekers

249. Despite of its CAT obligations and the recommendation of *Beijing Platform for Action*, the Government continues to risk running afoul of the principle of non-refoulement at customary international law. Previously, asylum seekers with cases pending a decision of the UNHCR were not generally detained. Nevertheless, recently, the Government has changed the policy regarding asylum seekers. Many asylum seekers' visa has been expired while they are waiting for the decisions of UNCHR; however, most of them are now routinely denied of visa extension. They are at risk of being charged by the police of "overstaying" and in case they are caught, they will be detained in the Victoria Prison or other detention centres.
250. We believe that the Government has been going against its international obligations since the reasons for detention is not specified and the asylum seekers did not commit any recognizable criminal offences. Most of those in detention are detained because they have been found to be in possession of fake passport or overstaying. Such "offences" are considered normal and acceptable in leaving the oppressive countries and in seeking refuge in other jurisdictions, and therefore the related asylum seekers should not be punished for these. It is also reported that some asylum seekers have been detained for as long as twenty months, and many still have not been informed about their reasons for detention.
251. There have been reports that the Government returned asylum seekers to their countries without giving them an opportunity to claim asylum. (The Airport Case, *Aliyar v Director of Immigration*. HCAL 64 of 2003) It is also reported that persons who informed immigration they wish to claim asylum are detained within the airport under questionable conditions until the UNHCR interviews the applicants and makes a decision in the case. In particular, female asylum seekers are kept in the same room, which is overcrowded, with male asylum seekers. Their application is also delayed by the immigration in forming the UNHCR.
252. Worst of all, asylum seekers may be deported to their home country even they may face torture and gender based violence after their return. Nevertheless, the Government continues to deny the responsibility in ensuring "the right of refugees and displaced women to return voluntarily to their place of origin in safety and with dignity, and their right to voluntary and safe return to their home of origin".
253. The Monitor expresses a matter of serious concern about the situation of asylum seekers and refugees in HK. We ask your Committee to urge the Government to (a) reconsider its position

concerning the extension of CAT to HK; (b) assumes its CEDAW and CAT treaty obligations in providing financial support to the asylum seekers; (c) take over UNHCR's tasks of refugee status determination; (d) increase the transparency of the refugee status determination process; (e) stop detaining and deporting asylum seekers and release detained asylum seekers.



## **Acknowledgment**

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