



# HONG KONG

Legal System	Constitution	Bill of Rights	Form of Government
Common Law Statutory Law Customary Law	Written	Yes	Republic

## 1. INTRODUCTION

### 1.1. Hong Kong and Modern Slavery (Human Trafficking)

An autonomous territory of the People’s Republic of China (PRC) located on the southern coast of mainland China, Hong Kong is one of the world’s most densely populated metropolises. It has a total area of approximately 1,100 square kilometres, within which over seven million people of various nationalities reside. Hong Kong also has one of the highest densities of foreign domestic workers (FDWs) in the world. They make up over 4% of the total population and 10% of the working population in the city.<sup>1</sup>

Due to its geographical proximity to mainland China and Southeast Asia, as well as its location within the Asia and Pacific region—which has the second highest prevalence of modern slavery in the world—Hong Kong has long been identified as a destination and transit hub for slavery and human trafficking, and to a much lesser extent, a source territory for men, women, and children subjected to forced labour and exploitation.

In the first few years after the U.S. Department of State’s Trafficking in Persons Report was released in 2001, Hong Kong was placed in Tier 1 and considered to be fully complying with the minimum standards of the US Trafficking Victims Protection Act of 2002, § 108, 22 U.S.C.A. § 7103 (2002).<sup>2</sup> But, in 2009, Hong Kong was downgraded to the Tier 2 Watch List.<sup>3</sup> Since then, Hong Kong’s ranking has not improved, despite the Hong Kong Government’s insistence that it has intensified efforts to combat human trafficking.

In 2013, the UN Human Rights Committee stated that it was “concerned about the persistence of the phenomenon of trafficking in persons in Hong Kong, China, and reports that Hong Kong, China, is a source, destination, and transit point for men, women, and teenage girls from Hong Kong, the mainland of China, and elsewhere in Southeast Asia, subjected to human trafficking and forced labour,” and “the reluctance of Hong Kong, China, to take steps which could lead to the extension of the ... Palermo Protocol to Hong Kong.”<sup>4</sup> Accordingly, it recommended: “Hong Kong, China, should intensify its efforts to identify victims of trafficking and ensure the systematic collection of data on trafficking flows to and in transit through the

<sup>1</sup> The Minderoo Foundation, “Global Slavery Index,” *Global Slavery Index* (2018), available at: <https://www.globalslaveryindex.org/>.

<sup>2</sup> Robyn Emerton, “Translating International and Regional Trafficking Norms into Domestic Reality: A Hong Kong Case Study” (9 January 2004), available at: <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1127&context=bhrlr>.

<sup>3</sup> The Justice Centre Hong Kong, “Submission to the Panel on Security of the Legislative Council: On the Administration’s Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong and the Proposed Members’ Bill Entitled ‘Modern Slavery Bill’ to Criminalize All Forms of Human Trafficking in Hong Kong” (June 2018), available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180605cb2-1515-1-e.pdf>.

<sup>4</sup> UN Human Rights Committee, “Concluding observations on the third periodic report of Hong Kong” (29 April 2013), available at: <https://www.refworld.org/docid/539031324.html>.

region, review its sentencing policy for perpetrators of trafficking-related crimes, support private shelters offering protection to victims, [and] strengthen victim assistance by ensuring interpretation, medical care, counselling, legal support for claiming unpaid wages and compensation, long-term support for rehabilitation and stability of legal status to all victims of trafficking.” The Committee also recommended the inclusion of certain practices regarding FDWs in the definition of the crime of human trafficking. The Committee further recommended that Hong Kong consider taking steps to extend the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (**Palermo Protocol**) to the territory.

In 2016, the Global Slavery Index listed Hong Kong as one of the governments taking the least action against slavery. In the same year, the Hong Kong Justice Centre released a report called “Coming Clean,” which examined the prevalence of forced labour and human trafficking for the purpose of forced labour amongst FDWs in Hong Kong. The report estimated that as many as 17% of FDWs (one in six) in Hong Kong appeared to be working in conditions of forced labour and, of those, 14% had been trafficked into the situation. In fact, in total, only 5.4% of FDWs surveyed did not show any signs of exploitation or forced labour.

In the 2018 Global Slavery Index, Hong Kong was again named as one of the governments that had taken relatively limited action to combat human trafficking relative to its GDP.<sup>5</sup>

In 2019, after being on the Tier 2 Watch List for three consecutive years, the U.S. State Department’s Trafficking in Persons Report for 2019 (**2019 TIP Report**) upgraded Hong Kong to Tier 2. It explained that the Hong Kong Government had demonstrated overall increasing efforts compared to the previous reporting period.<sup>6</sup>

However, in June 2020, Hong Kong was downgraded back to the Tier 2 Watch List on the basis that the Hong Kong Government did not fully meet the minimum standards for the elimination of human trafficking.<sup>7</sup> In June 2021, it remained at that status with the recognition that it is making significant efforts to meet those standards.<sup>8</sup>

Therefore, at last report, Hong Kong is not generally recognised as meeting the minimum standards for the elimination of slavery and human trafficking.<sup>9</sup>

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<sup>5</sup> Tze-Wei Ng, “Hong Kong Should Use Its Financial Might to Fight Human Trafficking,” *Global Policy* (7 December 2018), available at: <https://www.globalpolicyjournal.com/blog/07/12/2018/hong-kong-should-use-its-financial-might-fight-human-trafficking>.

<sup>6</sup> U.S. Dep’t of State, Trafficking in Persons Report 226, 227 (2019), available at: <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>. The U.S. Department of State rankings are based on the minimum standards specified in the U.S. Trafficking Victims Protection Act of 2000, “which are generally consistent with the [UN] Palermo Protocol.” *Id.* at 35.

<sup>7</sup> U.S. Dep’t of State, Trafficking in Persons Report 242 (2020)(**2020 TIP Report**), available at: <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.

<sup>8</sup> U.S. Dep’t of State, Trafficking in Persons Report 273 (2021), available at: [https://www.state.gov/wp-content/uploads/2021/07/TIP\\_Report\\_Final\\_20210701.pdf](https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf).

<sup>9</sup> *Id.*

## 1.2. Hong Kong’s Policy and Legal Position

### 1.2.1. Hong Kong’s legal framework

Hong Kong has not enacted legislation that directly combats modern slavery, human trafficking, or forced labour. Instead, it must adapt different concepts under local legislation in a non-comprehensive and piecemeal manner to address modern slavery and trafficking-like offences.

While these pieces of legislation define crimes and impose penalties for certain conduct relating to slavery, slavery-like conditions, and human trafficking, they do not prohibit engaging in slavery or human trafficking, and they do not contain protective measures for victims of these crimes. Only limited programs and resources are available to victims of slavery, slavery-like conditions, and human trafficking, including forced labour.

Both the Global Slavery Index and the U.S. Department of State’s TIP Reports have mentioned the Hong Kong Government’s apparent lack of local actions and solutions to address modern slavery. The 2019 TIP Report found that the Hong Kong Government did not adequately investigate trafficking crimes, convict labour traffickers, ensure the safe repatriation of victims to their home countries, enact legislation to make all forms of trafficking a crime, or consistently refer victims to support services. In addition, the 2019 TIP Report found that officials continued to penalise trafficking victims for unlawful acts that traffickers compelled them to commit and did not vigorously penalise unscrupulous employment agencies and money lenders that facilitated debt bondage.<sup>10</sup> The 2019 TIP Report recommended that the Hong Kong Government enact a comprehensive anti-trafficking law that makes all forms of trafficking a crime in accordance with the definitions set forth in the 2000 UN TIP Protocol.

The Hong Kong Government took little action as a result of the 2019 TIP Report. The 2020 TIP Report found that the Government had not demonstrated overall increasing efforts compared to the previous reporting period. The 2020 TIP Report observed that:

Authorities did not investigate, prosecute, or convict any cases of labour trafficking and investigated significantly fewer cases related to sex trafficking compared to the previous year. Despite the government screening for trafficking indicators, it identified only three victims of trafficking, a decrease from 18 in 2018, and did not provide any victims with government-funded services. Observers reported that ineffective implementation of the screening mechanism and a lack of understanding of psychological trauma associated with trafficking continued to result in few victims being identified. As in previous years, the government continued to penalize victims for unlawful acts traffickers compelled them to commit. The government did not enact legislation to fully criminalize all forms of trafficking.

Thus, Hong Kong was downgraded to the Tier 2 Watch List.

Former Director of Public Prosecutions and High Court Judge Kevin Zervos JA recognized Hong Kong’s lack of a comprehensive legal framework to address human trafficking in *ZN v Secretary for Justice* [2017] 1 HKLRD 559 (**ZN case**). In that case, an application for judicial review alleged that the Hong Kong Government failed to protect the applicant as a victim of human trafficking (addressed in more detail in Section 2.2.). The application asserted that Hong Kong’s laws breach Article 4 of the Hong Kong Bill of Rights because they are inadequate to deal with adult human trafficking and forced labour. Zervos JA observed, “[i]f it is being suggested that the existing body of criminal offences available under [Hong Kong] statute and

<sup>10</sup> U.S. Dep’t of State, Trafficking in Persons Report (2019), available at: <https://www.state.gov/wp-content/uploads/2019/06/2019-TIP-Report-Narratives-D-I.pdf>.

common law appropriately and fully address the problem of human trafficking as it is understood, then I have to disagree with this submission.”<sup>11</sup>

### 1.2.2. Hong Kong’s policy framework

The general position of the Hong Kong Government is that it has a thorough and comprehensive framework for combating trafficking and modern slavery. However, over the last decade or more, Hong Kong has introduced a number of initiatives to improve its legal framework and enhance its anti-trafficking efforts.

In 2008, former Director of Public Prosecutions Grenville Cross SC observed that, while “Hong Kong is a transit and destination point for illegal immigrants, some of whom are subject to debt bondage, sexual exploitation and forced labour on arrival in a destination country ... human trafficking is certainly not rampant in Hong Kong.”<sup>12</sup> He also noted that, while “Hong Kong does not have a specific anti-trafficking law, it combats trafficking and its consequences through an arsenal of discrete laws,” and that “Hong Kong recognises that international collaboration and strong laws are crucial if human-trafficking networks are to be neutralised. Comprehensive arrangements exist at the operational level between our law enforcement agencies and their counterparts in major jurisdictions.”

Mr. Cross SC gave two examples of international collaboration: Hong Kong’s participation in the Asian Regional Initiative Against Trafficking in Women and Children (**ARIAT**) and the ARIAT Action Plan in 2000, which addressed the human rights aspects of trafficking and identified the strategic areas of prevention, protection, prosecution, repatriation, and reintegration; and the Asian Organized Crime Expert Group Meeting in 2006, which addressed the issue of human trafficking from Southeast Asian countries to Western Europe.

Mr. Cross SC also pointed out that “in the 2007 US Department of State’s Trafficking in Persons Report, Hong Kong was placed in Tier 1 for fully complying with the Trafficking Victims Protection Act’s minimum standards. The Crimes Ordinance and the Immigration Ordinance are the principal instruments used to prosecute traffickers and to frustrate their operations.”

In 2010, Hong Kong created an Inter-departmental TIP Working Group (**TIP Working Group**), led by the Hong Kong Security Bureau and including the Customs and Excise Department, Department of Justice, Immigration Department, Labour Department, Hong Kong Police Force, and Social Welfare Department, to enhance enforcement strategy against trafficking in persons (**TIP**). The TIP Working Group is to monitor TIP and formulate the overall strategy for combating TIP in Hong Kong. In 2016, a Guideline on Inter-departmental Cooperation for the Handling of Suspected Cases of Trafficking in Persons was issued to provide guidance for the TIP Working Group departments on the general principles and procedures for inter-departmental cooperation in the identification and handling of potential TIP cases.

For the most part, however, the Hong Kong Government continues to state that human trafficking is not a prevalent crime in Hong Kong and that Hong Kong is neither a destination for human trafficking nor a place of origin for exporting illegal migrants.<sup>13</sup> The Hong Kong Government also repeated its view that Hong Kong already has a comprehensive and solid legislative framework to deal with trafficking and forced labour.<sup>14</sup> The Hong Kong Government’s submissions in the ZN case (which was presented around the same time that

<sup>11</sup> *ZN v Secretary for Justice* [2017] 1 HKLRD 559 at [300].

<sup>12</sup> Ian Grenville Cross, Speech by Director of Public Prosecutions at Trafficking in Persons Research and Data Forum (3 November 2008), available at: <https://www.doi.gov.hk/eng/public/pdf/2008/dpp20081103e.pdf>.

<sup>13</sup> Committee on the Elimination of All Forms of Discrimination, “Third Report of the Hong Kong Special Administrative Region under the United Nations Convention on the Elimination of All Forms of Discrimination against Women,” available at: [https://www.lwb.gov.hk/CEDAW/documents/CEDAW\\_3rd\\_report\\_E.pdf](https://www.lwb.gov.hk/CEDAW/documents/CEDAW_3rd_report_E.pdf).

<sup>14</sup> *ZN v Secretary for Justice* [2017] 1 HKLRD 559 at [286].

the Guidelines on Inter-departmental Cooperation for the Handling of Suspected Cases of Trafficking in Persons was issued) argued that Hong Kong had enacted a “detailed, comprehensive and multi-faceted regime to tackle the problems of human trafficking and forced labour.”<sup>15</sup>

In March 2018, the Hong Kong Government released its Action Plan to Tackle Trafficking in Persons and Enhance Protection of Foreign Domestic Helpers (**Action Plan**). At the same time, it allocated funding to support the implementation of the Action Plan and established a high-level Steering Committee to formulate an overall strategy and coordinate its anti-trafficking efforts. The Hong Kong Government’s Action Plan aimed to cover prevention, victim identification, investigation, enforcement, prosecution, victim protection/support, and partnerships with different stakeholders.

The Steering Committee for the Action Plan is composed of representatives of the Security Bureau, the Customs and Excise Department (**C&ED**), the Department of Justice, the Immigration Department (**ImmD**), the Labour Department (**LD**), the Hong Kong Police Force, and the Social Welfare Department. It is chaired by Matthew Cheung, Chief Secretary for Administration.

The Action Plan sets out four overall objectives and its new or expanded initiatives:

- expanding coverage of victim identification, strengthening investigation and enforcement, and ensuring effective prosecution of suspects;
- providing the necessary protection and support to victims and facilitating their return to their home countries;
- prevention of TIP by providing suitable training to raise the awareness of frontline officers and other government officials; and
- partnership with the civil society, other sectors of the community, and other governments to raise public awareness of TIP.

At the beginning of 2019, the Hong Kong Government once again repeated its commitment to the Action Plan and its anti-trafficking efforts. In a written reply by the Secretary for Security, John Lee, issued in response to a question by the Hon. Dennis Kwok in the Legislative Council on 9 January 2019,<sup>16</sup> the Hong Kong Government stated that it has continued to strengthen efforts with respect to investigation and prosecution:

As set out in the Action Plan, the Police have already appointed designated teams to handle cases relating to TIP and exploitation of FDWs. Other relevant departments have also planned to set up designated teams in 2019. The “Inter-departmental Joint Investigation Team” (JIT), comprising the Police, ImmD, C&ED and LD, continues to meet regularly to discuss latest TIP trends and enforcement measures against TIP crimes, exchange intelligence, and conduct joint investigations. To further enhance the effectiveness of joint investigations, JIT developed an inter-departmental joint investigation mechanism to deal with relevant cases.

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<sup>15</sup> *Id.* at [297].

<sup>16</sup> Hong Kong Special Administrative Region, “Question by the Hon Dennis Kwok and Written Reply by the Secretary for Security Mr. John Lee,” *Press Releases* (9 January 2019), available at: <https://www.info.gov.hk/gia/general/201901/09/P2019010900805.htm>.

That said, the 2020 TIP Report and civil society organisations in Hong Kong report a lack of meaningful progress to combat trafficking in practice and continue to call for comprehensive anti-trafficking laws that define as crimes all forms of trafficking, slavery, and slavery-like offences, including forced labour.

## 2. OVERVIEW OF HONG KONG’S LEGAL APPROACH TO COMBATING MODERN SLAVERY AND HUMAN TRAFFICKING

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### 2.1. Hong Kong’s International Law Obligations

#### 2.1.1. *Fundamental human rights*

The National People’s Congress enacted the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (**Basic Law**) in accordance with the Constitution of the People’s Republic of China. The Basic Law is the constitution of the Hong Kong Special Administrative Region (**HKSAR**). It was promulgated on 4 April 1990, and came into effect on 1 July 1997 when the sovereignty of Hong Kong reverted to the PRC from the United Kingdom. The principle of “one country, two systems” is prominent in the Basic Law, which confirms that Hong Kong will retain its common law and capitalist system for 50 years after the 1997 handover.

All systems and policies practised in the HKSAR must be based on the provisions of the Basic Law. These provisions cover social and economic systems, the system for safeguarding the fundamental rights and freedoms of residents,<sup>17</sup> executive, legislative, and judicial powers, and relevant policies. Furthermore, no law enacted by the HKSAR’s legislature may contravene the Basic Law.

Under the Basic Law, all laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law) shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the HKSAR legislature. National laws of the PRC shall not be applied in the HKSAR except for a number of such laws relating to defence and foreign affairs (which are listed in Annex III to the Basic Law).

The Basic Law guarantees a number of fundamental rights and freedoms, including the right to equality before the law, the right to form and join trade unions, the right to strike, the right to freedom of movement, freedom of marriage, and freedom from arbitrary arrest or imprisonment.

The Basic Law also guarantees that previous international treaties to which the HKSAR was a party before the 1997 handover will remain in force. This expressly includes the:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights; and
- International Labour Conventions as they applied to the HKSAR.

The Basic Law does not specify what will occur in 2047, 50 years after the return of the HKSAR to China from the UK. The first Article of the Basic Law makes clear that the HKSAR is an inalienable part of the PRC.

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<sup>17</sup> Charles Mo, Joanne Mok and Keith Wong, “Legal Systems in Hong Kong: Overview,” *Thomas Reuters Practical Law* (1 April 2018), available at: [https://uk.practicallaw.thomsonreuters.com/w-007-8233?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-007-8233?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

### 2.1.2. *Slavery and trafficking*

Hong Kong is party to a number of international treaties and conventions relevant to the prohibition of slavery and trafficking and to the protection of general human rights.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (**Palermo Protocol**), is ratified in the PRC and is applicable to both the PRC and Macao; however, its application does not extend to the HKSAR.

In January 2019, the Hong Kong Secretary for Security explained the inapplicability of the Palermo Protocol:<sup>18</sup>

We kept explaining to relevant UN committees that although the Palermo Protocol does not apply to Hong Kong, our existing legislative framework above covers a wide range of conducts of TIP as defined in the Palermo Protocol. The unique situation of Hong Kong – a large population in a small area, a very high population density, a liberal visa regime, a vibrant economy, a transportation network well connected with the rest of the world – makes us vulnerable to the ill impacts on our effective immigration control if the Palermo Protocol (especially provisions permitting TIP victims to remain) is fully applied to Hong Kong, leading to various social and security issues, including similar situations as non-refoulement claimants and other illegal immigrants and overstayers being stranded for a long period of time here. The current situation also reflects that our policies and measures in place are effective and appropriate. As such, we must strike a balance.

Thus, Hong Kong does not have a comprehensive legal framework specific to anti-trafficking as defined under the Palermo Protocol and adopts a partial definition of human trafficking under section 129 of the Crimes Ordinance, but only to the extent it relates to the exploitation of persons for sexual purposes. Refer to Section 3.

The British Government ratified the International Labour Convention (**ILC**) No. 29 (1930) commonly known as the “Forced Labour Convention” in 1931, and extended it to the Hong Kong territory in 1957. Therefore, this Convention is legally binding in the HKSAR.

### 2.1.3. *Effect under Hong Kong’s law*

A treaty only becomes part of Hong Kong law when it is given effect by domestic legislation. Over 200 international treaties and agreements apply in the HKSAR by way of legislation. International law has also assisted in the development of the common law, for example, by acting as an aid to interpretation in judicial cases. Accordingly, the local legislation incorporates the majority of criminal and civil law that is relevant to combating modern slavery in Hong Kong.

Hong Kong’s status in relation to the key international instruments that touch on modern slavery and human trafficking is set out in Appendix 1 to this chapter.

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<sup>18</sup> Hong Kong Special Administrative Region, “Question by the Hon Dennis Kwok and Written Reply by the Secretary for Security Mr John Lee,” *Press Releases* (9 January 2019) available at: <https://www.info.gov.hk/gia/general/201901/09/P2019010900805.htm>.

## 2.2. Human Rights Protections Under Hong Kong’s Law

The Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong) adopted the International Covenant on Civil and Political Rights (**ICCPR**). It supersedes conflicting laws aimed at protecting human rights.

Article 4 of the Hong Kong Bill of Rights (which gives domestic force to Article 8 of the ICCPR) stipulates that:

- No one shall be held in slavery; slavery and the slave-trade in all their forms are prohibited.
- No one shall be held in servitude.
- No one shall be required to perform forced or compulsory labour.

### ***ZN v Secretary for Justice [2017] 1 HKLRD 559 (ZN case)***

Despite this protection from slavery, servitude, and compulsory labour, enforcement of this provision remains an issue. In *ZN v Secretary for Justice* [2017] 1 HKLRD 559, the Court of First Instance of the High Court held that other provisions of the criminal law do not adequately, if at all, address the need to make forced or compulsory labour a crime, and, in the absence of an offence against forced or compulsory labour, the Hong Kong Government had failed to fulfil its obligation under Article 4 of the Hong Kong Bill of Rights Ordinance.<sup>19</sup>

The ZN case involved allegations of human trafficking for forced labour:

- ZN applied for judicial review of the alleged failure by the Secretary for Justice, Director of Immigration, Commissioner of Police, and Commissioner for Labour (respondents) to protect him as a victim of human trafficking for servitude or forced labour. ZN was enticed to come to Hong Kong to work as a foreign domestic helper. However, he was deceived about his conditions of work. Once in Hong Kong, ZN was forced to work for the employer and subjected to threats, abuse, and regular beating.
- The grounds for judicial review asserted that the Hong Kong Government and the relevant government authorities failed in their duties and obligations to protect ZN against human trafficking, per Article 4 of the Hong Kong Bill of Rights (Cap. 383).
- The applicant alleged that he complained to officers of the ImmD, the Hong Kong Police, and the LD about his circumstances, but they did not investigate his complaints as a case of human trafficking for servitude or forced labour. Thus, the applicant complained that he was denied the protection of his right not to be subjected to servitude or forced labour, pursuant to Article 4 of the Hong Kong Bill of Rights. He further complained that these failures were systematic and occurred primarily because of the absence of any legislative framework to prevent human trafficking or to protect victims of human trafficking from servitude or forced labour.

At first instance, Zervos JA found in favour of ZN. He noted the Hong Kong Government’s position was that it had taken sufficient measures to deal with human trafficking, forced labour, slavery, and servitude, in compliance with any obligations it may have under Article 4 of the Hong Kong Bill of Rights. He referred to the Government’s arguments that the Immigration Ordinance, section 129 of the Crimes Ordinance, and

<sup>19</sup> The Justice Centre Hong Kong, “Submission to the Panel on Security of the Legislative Council: On the Administration’s Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong and the Proposed Members’ Bill Entitled ‘Modern Slavery Bill’ to Criminalize All Forms of Human Trafficking in Hong Kong” (June 2018), available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180605cb2-1515-1-e.pdf>.



the Employment Ordinance covered offences that were found in human trafficking cases. However, Zervos JA rejected those arguments:

It seems to me that this misses the point. There is a specific prohibition against a form of conduct and yet there is no legislation that criminalises it. Claims are made that features or symptoms of the prohibited conduct are addressed by existing criminal or regulatory offences, but the real mischief is not being criminalised as required. There is no law that prohibits slavery or trafficking in slavery, servitude or trafficking in servitude, and forced labour or trafficking in forced labour.

In any event, the respondents argue that the conduct complained of by the applicant if proven would clearly have been unlawful under existing Hong Kong criminal law. The alleged conduct of the applicant's employer would be penalised by criminal sanctions. The point has already been made that features or facets of the alleged conduct may have capably been dealt with by criminal offences. However, the question is where the overall conduct of an employer can be dealt with if it is considered to be forced labour or trafficking in forced labour.<sup>20</sup>

Zervos JA also observed:

I find on the evidence and material presented to me that the current regime does not address adequately or effectively the positive obligations under Article 4 of the Hong Kong Bill of Rights to tackle the practice of forced labour and the trafficking of persons for forced labour. The evidence [for the applicant] contradicts the respondents' submissions. They each describe from their own work experience and case studies a deeply disturbing and upsetting account of the treatment of foreign domestic helpers in Hong Kong who have been allegedly abused by certain unscrupulous employers. These employers have taken advantage of their vulnerability and their unfamiliarity with the laws and structures of Hong Kong.<sup>21</sup>

As a result, the Court found that the Hong Kong Government was in breach of Article 4:

I find that the HKSARG [the Hong Kong Government] has positive obligations under Article 4 of the BOR to enact measures to ensure the prohibition of forced or compulsory labour, and these include criminalising and penalising any offender of forced or compulsory labour or trafficking for that purpose, and having appropriate measures in place to investigate such cases. It seems to me that trafficking a person for forced or compulsory labour is within the ambit of criminal liability as formulated by the prohibition under Article 4 of the BOR. There is no offence against forced or compulsory labour and the reliance on other provisions of the criminal law does not adequately if at all address the need for the criminalisation of this prohibited conduct. The criminalisation of forced or compulsory labour satisfies two important objectives. First, it outlaws the prohibited conduct by a specific offence provision and penalty, and sets out the elements of the conduct that is prohibited. Secondly, it provides an important measure for law enforcement and the general public of the conduct that is prohibited. It seems to me that this case has illustrated the ineffectiveness of this important prohibition because of a lack of criminalisation.

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<sup>20</sup> *ZN v Secretary for Justice* [2017] 1 HKLRD 559 at [304]–[305].

<sup>21</sup> *Id.* at [312].

I therefore find that the HKSARG has not adequately fulfilled its positive obligations under Article 4 of the BOR. I further find that the applicant was denied his rights under Article 4 of the BOR in not having his case recognised by the relevant authorities as one possibly involving human trafficking for forced labour, which prevented any further appropriate action.<sup>22</sup>

The Hong Kong Government appealed.

A main issue on appeal was the scope of protection of Article 4 of the Hong Kong Bill of Rights. The issue centred on whether Article 4 merely prohibits forced or compulsory labour, or whether (in light of developments at the international level against human trafficking and European jurisprudence influenced by these international developments) it covers human trafficking for forced labour.

In August 2018, the Court of Appeal ruled in favour of the Hong Kong Government, concluding that Article 4 of the Hong Kong Bill of Rights, which prohibits slavery, does not cover human trafficking, nor does it obligate the Government to enact a specific offence to combat such human rights violations.

However, the Court of Appeal found that there is “a positive duty on the part of the government to carry out [an] investigation once it is aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or is at real and immediate risk of being, required to perform forced or compulsory labour within the meaning of Article 4.” Accordingly, it upheld the finding that the Hong Kong Government had failed in its duty under Article 4 to investigate the applicant’s complaints.

### 2.3. Criminalization of Modern Slavery

Modern slavery and human trafficking are not specific crimes in Hong Kong. That said, a number of criminal laws related to prostitution, immigration, employment, and physical abuse may be used to prosecute modern slavery and trafficking. Refer to Section 3.

### 2.4. Supply Chain Reporting

No legislation mandates supply chain reporting by companies in Hong Kong. Section 4 discusses recent legislative proposals.

### 2.5. Investigation, Prosecution, and Enforcement

#### 2.5.1. *Investigation and prosecution of criminal offenses*

The Secretary for Justice of the Hong Kong Government is responsible for conducting prosecutions in Hong Kong. The Secretary and those who prosecute on the Secretary’s behalf decide whether to initiate a prosecution in any particular case or class of cases.

In prosecutions for serious or complicated offences, or those which give rise to difficult points of law, police officers and other law enforcement agents will seek the advice of the Secretary for Justice or counsel in the Prosecutions Division of the Department of Justice. In determining whether to prosecute, the Secretary for Justice considers two issues:

- whether the evidence is sufficient to justify the initiation of proceedings; and

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<sup>22</sup> *Id.* at [355]–[356].

- if so, does the public interest require a prosecution to take place.

In making that decision, the Secretary for Justice is not subject to any instructions or directions from the executive branch of the Hong Kong Government.

In practice, many prosecutions at the summary level involve simple cases that the Police or other investigative bodies process and do not require the Secretary for Justice's participation. Senior Court Prosecutors acting on behalf of the Secretary still scrutinize all such cases at the Magistrates' Courts.

#### **2.5.1.1. Investigation and prosecution of trafficking offenses**

There have been limited investigations into and prosecution of trafficking-type offences in Hong Kong over the last few years. From the Hong Kong Government's own reporting, the 2020 TIP Report confirms that:

- The Hong Kong Government reported investigating nine cases related to sex trafficking in 2019, compared with 136 investigations in 2018.
- The Government did not report investigating, prosecuting, or convicting any cases of labour trafficking in 2019, compared to 14 investigations, two prosecutions, and no convictions in 2018.
- The Government did not report the number of sex trafficking prosecutions initiated in 2019, but it reported arresting five suspects (compared with 19 in 2018) during investigations for offences related to sex trafficking, including violations of section 137 of the Crimes Ordinance.
- The Government did not report any investigations, prosecutions, or convictions of government employees complicit in human-trafficking offenses.
- Courts convicted 10 offenders for crimes related to sex trafficking in 2019 (compared with seven in 2018), and sentenced nine to terms of imprisonment, ranging from approximately two to 10 months.

These figures show few successful prosecutions and short imprisonment terms for crimes related to trafficking.

#### **2.5.1.2. Prosecution Code**

Hong Kong's Department of Justice issued a Prosecution Code in September 2013.

The Prosecution Code is a set of statements and instructions to guide prosecutors in conducting prosecutions. The Prosecution Code provides a code of conduct for prosecutors to promote fair, just, and consistent decision-making at all stages of the prosecution process, and to make the community aware of how the public prosecutions system operates.

Article 18 of the Prosecution Code sets out guidelines for prosecutors on the identification of human exploitation and also provides broad principles on how to handle such cases. It states that exploitation of persons and the trafficking of them for that purpose are both serious crimes and violations of fundamental human rights and freedoms.

Article 18 defines human exploitation to include activities that demean the value of human life, such as sexual exploitation, enforced labour, domestic servitude, debt bondage, and organ harvesting. Article 18 further notes that:

Human exploitation is a domestic and international concern which should be handled by prosecutors with an appropriate level of understanding, skill and sensitivity. In appropriate cases, a prosecutor should consider a credible claim that a defendant or intended defendant is a victim of trafficking. If such a claim is found, a prosecutor should appropriately deal with the case bearing in mind that the person is a victim of trafficking. In this regard, reference can be made to applicable international standards and practices concerning victims of trafficking.

While Article 18 follows the internationally recognised definition of human exploitation, the Prosecution Code is limited in its practical effect because it is merely a code of practice for prosecutors, it does not carry the force of law, and a small number of cases are prosecuted. To highlight the limited effectiveness of the Prosecution Code, elected representatives questioned the Government during the Estimates of Expenditure 2018–19 hearing on the Code’s use in combating human trafficking and modern slavery. The Government responded that it does not keep comprehensive statistics on prosecutions of trafficking in persons, save for those relating to sex trafficking (there were 10 prosecutions for sex trafficking offences from January to September 2017).

### **2.5.2. *Mutual assistance/international cooperation***

The judgments and awards of the Hong Kong High Court and above may be enforced in most common law jurisdictions and, as a consequence of international agreements and arrangements, in a number of foreign countries, including France, Germany, and Italy. Reciprocal arrangements exist for the enforcement in Hong Kong of judgments of the superior courts of those same countries.

Extradition agreements also provide for the surrender of persons who are accused or convicted of serious criminal offences committed within the jurisdiction of signatory countries. Hong Kong courts also have jurisdiction, on request from a foreign court, to obtain evidence in Hong Kong for civil or criminal proceedings in that foreign court. Similarly, Hong Kong courts can issue Letters of Request to overseas courts to obtain evidence. Under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the International Law Division of the Department of Justice may give or obtain mutual legal assistance to investigate and prosecute criminal offences in Hong Kong and overseas and to recover proceeds of crimes.

## **3. HONG KONG’S FEDERAL CRIMINAL OFFENSES RELATING TO SLAVERY, SLAVERY-LIKE CONDITIONS, AND HUMAN TRAFFICKING**

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### **3.1. Overview of Criminal Offenses**

Hong Kong’s Crimes Ordinance (Cap. 200) sets forth the criminal offences.

Part XII (Sexual and Related Offences) contains a number of offences typically applicable to human trafficking and modern slavery (such as sexual exploitation, prostitution, and abduction). The Crimes Ordinance prohibits certain forms or acts of sexual exploitation, including threats or other coercion used against victims to procure sexual services, and the controlling and detaining of victims for the provision of sexual services. Appendix 2 summarizes these offences.

The prosecution has the burden of proving criminal offences beyond reasonable doubt.

The Crimes Ordinance sets maximum penalties of imprisonment, which vary depending on the offence.

The Crimes Ordinance focuses on trafficking for sexual services. It has no offences of general trafficking.

Other activities that the Palermo Protocol defines as human trafficking, such as moving a person into or out of Hong Kong for purposes of forced labour, forced marriage, slavery, servitude, or the removal of organs, are not regarded as human trafficking and are not crimes in Hong Kong.

## 3.2. Slavery Offenses Under the Criminal Code

### 3.2.1. General

No statute addresses modern slavery or slavery-like offences. However, existing laws may apply to crimes that offenders might commit in the course of modern slavery and human trafficking.

### 3.2.2. Extraterritorial application

Hong Kong has no applicable laws.

## 3.3. Slavery-Like Offenses in Hong Kong’s Legal Order

### 3.3.1. Servitude

Hong Kong has no criminal prohibition on forced labour or servitude.

Section 42 of the Offences against the Person Ordinance (Cap. 212) makes it an offence to forcibly take or detain persons with the intent to sell them. The ordinance states that “[a]ny person who, by force or fraud, takes away or detains against his or her will any man or boy, woman or female child, with intent to sell him or her, or to procure a ransom or benefit for his or her liberation, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.”

No cases have been brought under this provision to prosecute perpetrators of human trafficking and exploiters of forced labour. The cases brought for offences under section 42 have generally dealt with kidnapping and abduction to procure a ransom.

Section 44 of the ordinance makes it an offence to unlawfully transfer possession, custody, or control of other persons for valuable consideration. Under this section:

(1) Any person who takes any part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody, or control of any other person for any valuable consideration shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for two years.

(2) Any person who without lawful authority or excuse harbours or has in his or her possession, custody or control any person with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any other person within or without Hong Kong shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for two years.

There have been no reported prosecutions under section 44 of this ordinance.

**3.3.2. Forced labor**

The British Government ratified the International Labour Convention (ILC) No. 29 (1930) (commonly known as the “Forced Labour Convention”) in 1931, and extended it to the Hong Kong territory in 1957. Therefore, this Convention is legally binding in the HKSAR.

Hong Kong has also ratified the Abolition of Forced Labour Convention (ILC No. 105 Geneva, 25 June 1957).

**3.3.3. Deceptive recruiting for labor or services**

Hong Kong has no applicable laws.

**3.3.4. Early and forced marriage**

Hong Kong has no applicable laws.

**3.3.5. Debt bondage**

Hong Kong has no applicable laws.

**3.3.6. Any other relevant offenses**

Hong Kong has no other relevant slavery-like offenses.

**3.3.7. Extraterritorial application of the offenses**

Hong Kong has no applicable laws.

**3.4. Human Trafficking/Smuggling-Related Criminal Offenses**

The Hong Kong Government addresses human trafficking via various pieces of legislation, rather than through one, comprehensive piece of legislation. In June 2018, the Hong Kong Government set out the offences in the current legislative framework that, in its opinion, prohibit conduct often associated with TIP. In addition to those crimes discussed previously, these offences include:

- Employment Ordinance (Cap. 57) – discussed in more detail in Section 5.
- Immigration Ordinance (Cap. 115) – discussed in more detail in Section 5.6.
- Other provisions under the Crimes Ordinance and other relevant ordinances that prohibit other crimes often associated with human trafficking:
  - Criminal intimidation (section 24 of the Crimes Ordinance);
  - Assaults with intent to cause certain acts to be done or omitted (section 25 of the Crimes Ordinance);
  - Making or copying a false instrument or using a false instrument with the intention to use it to induce somebody to accept it as genuine (sections 71–74 of the Crimes Ordinance);
  - Improper use or possession of travel documents, including forged, false, or unlawfully obtained or altered travel documents (Immigration Ordinance);
  - Kidnapping and false imprisonment (offences under common law);

- Theft (Theft Ordinance, Cap. 210); and
- Additional offences under the Offences against the Person Ordinance (sections 17, 19, 39, and 40).

### 3.4.1. *International and domestic trafficking/smuggling of people*

Section 129 of the [Crimes Ordinance \(Cap. 200\)](#) is the only law that directly addresses human trafficking.

Section 129 makes it an offence to “[traffic] in persons to or from Hong Kong” for the purpose of prostitution. Sub-section (1) provides that “[a] person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.” It further provides, in sub-section (2), that: “[i]t shall not be a defence to a charge under this section to prove that the other person consented to being brought into or taken out of Hong Kong whether or not she or he knew it was for the purpose of prostitution or that she or he received any advantage thereof.”

The essential elements of this offence are both transnational movement of persons into or out of Hong Kong and prostitution. Section 129 does not draw any distinction between a person brought into Hong Kong legally or illegally. Accordingly, bringing any person into Hong Kong for prostitution would be a criminal offence for trafficking, regardless of whether the person consented, knew about working as a prostitute, or received any payment. However, there is no offence for domestic trafficking within Hong Kong for the purpose of prostitution or otherwise.

The Government prosecuted 14 human-trafficking cases between 2008 and 2012. All were connected with prostitution.<sup>23</sup>

U.S. State Department data show 10 convictions for sex trafficking under these provisions (sections 129, 130, and 131) in 2019,<sup>24</sup> seven in 2018,<sup>25</sup> 12 in 2017, and 28 in 2016.<sup>26</sup>

The Hong Kong Government does not report the number of prosecutions initiated, so it is unclear whether it brought other cases that did not result in convictions. In 2017, the courts sentenced 10 offenders to terms of imprisonment ranging from one to nine months and one to a suspended sentence; one offender was sentenced to a hospital order.

### 3.4.2. *International and domestic trafficking in children*

The Crimes Ordinance and other relevant ordinances address crimes associated with the sexual exploitation of children. However, the only human trafficking offence (section 129) is silent on the age of trafficking victims. Accordingly, it is necessary to look to other offences that make certain conduct with respect to children a crime.

<sup>23</sup> Liberty Asia, “Legal Analysis of Human Trafficking in Hong Kong” (2015) at 66, available at: <http://static1.squarespace.com/static/5592c689e4b0978d3a48f7a2/t/55b93477e4b0f6b3a56319e8/1438201228058/Legal+Text+HK+Gap+Analysis.pdf>.

<sup>24</sup> U.S. Dep’t of State, Trafficking in Persons Report (2020), available at: <http://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.

<sup>25</sup> U.S. Dep’t of State, Trafficking in Persons Report (2019), available at: <https://www.state.gov/wp-content/uploads/2019/06/2019-TIP-Report-Narratives-D-I.pdf>.

<sup>26</sup> U.S. Dep’t of State, Trafficking in Persons Report (2017), available at: <https://www.state.gov/wp-content/uploads/2019/02/271339.pdf>; U.S. Dep’t of State, Trafficking in Persons Report (2018), available at: <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>.

Section 26 of the Protection of Children and Juveniles Ordinance (Cap. 213) makes it an offence (punishable by imprisonment for two years) for a person to unlawfully take, or cause to be taken, any child or juvenile out of the possession and against the will of the father, mother, or any other person having the lawful care or charge of the child or juvenile.

Section 43 of the ordinance makes it a crime to steal a child under the age of 14 years. Under this section, any person who: unlawfully, by any means, leads or takes away, decoys or entices away, or detains any child under the age of 14 years, with the intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with the intent to steal any article upon or about the person of such child, to whomsoever such article may belong, or with any such intent receives or harbours any such child, knowing the child to have been led, taken, decoyed, enticed away, or detained as previously mentioned in this section, shall be guilty of an offence. The maximum penalty for this offence is imprisonment for seven years.

A number of offences prohibit sexual intercourse and sexual activity with children or persons under certain ages. Other offences forbid procuring children for sexual offences. Appendix 2 lists these offences.

### **3.4.3. Victim harboring**

Hong Kong has no applicable laws.

### **3.4.4. Extraterritorial application of human trafficking and smuggling offenses**

The Crimes Ordinance provides for the extraterritorial application of a number of sexual offences. Accordingly, offences listed in Schedule 2 of the Crimes Ordinance apply to Hong Kong residents, persons who regularly reside in Hong Kong, and non-residents whose acts abroad have a territorial or personal nexus to Hong Kong.<sup>27</sup>

In addition, under section 153Q, it is an offence for any person to make arrangements (whether wholly or partly in Hong Kong) for themselves or another person to commit any act in relation to a person under the age of 16 that would be a Schedule 2 offence, if it were committed in Hong Kong. Conviction of such an offence on indictment can result in a fine of HKD 3 million and imprisonment for 10 years.

### **3.4.5. Trafficking in human organs**

The Human Organ Transplant Ordinance (Cap. 465) (**HOTO**) prohibits commercial dealings in human organs. Section 4(1) of the HOTO makes it an offence where a person:

- (a) makes or receives any payment for the supply of, or for an offer to supply;
- (b) seeks to find a person willing to supply for payment, or offers to supply for payment; or
- (c) initiates or negotiates any arrangement involving the making of a payment for the supply of, or for an offer to supply,

an organ which has been or is to be removed from a dead or living person, whether in Hong Kong or elsewhere, and is intended to be transplanted into another person, whether in Hong Kong or elsewhere.

Section 4(6) of the HOTO also makes it an offence for a person to import an organ for the purpose of:

- (a) having it transplanted into a person in Hong Kong; or

<sup>27</sup> Crimes Ordinance ss 118C, 118D, 118H, 123, 124, 126, 130, 132, 134, 135, 140, 141, and 146.



(b) exporting it to a country where it is intended that it be transplanted into a person,

and the person knew or ought, after reasonable inquiry, to have known that a payment was or was to be made for supplying the organ, regardless of whether or not such payment was prohibited under the laws of the country where the payment was made.

Under section 4(7) of the HOTO, a person will also be guilty of an offence if, in Hong Kong, the person removes from a dead or living person an organ intended for transplant into another person, whether in Hong Kong or elsewhere, and the person knew or ought, after reasonable inquiry, to have known that a payment was or was to be made for that organ.

Under section 4(8) of the HOTO, a person guilty of an offence under section 4 may be liable upon a first conviction to a fine and imprisonment for three months and upon a subsequent conviction to a fine and imprisonment for one year.

No prosecutions have been brought in Hong Kong dealing with trafficking in persons for the purpose of organ removal.

### 3.5. Online Exploitation of Children Offenses

Under section 138A of the Crimes Ordinance, any person who uses, procures, or offers another person who is under the age of 18 to make pornography or to do a live pornographic performance is liable to a maximum fine of HKD 3 million and imprisonment for a maximum of 10 years.

The Prevention of Child Pornography Ordinance (Cap. 579) prohibits the printing, making, producing, reproducing, copying, importing, or exporting of any child pornography. Section 3 of the ordinance provides that any person who prints, makes, produces, reproduces, copies, imports, exports, or publishes child pornography commits an offence, liable after conviction on indictment to a fine of HKD 2 million and imprisonment for eight years.

### 3.6. Child Sex Tourism Offenses

Hong Kong has no applicable laws.

### 3.7. Anti-Money Laundering (AML) and Counter-Terrorism Financing (CTF) laws

No money laundering offence addresses human trafficking specifically.

The key piece of anti-money laundering legislation in Hong Kong is the Organized and Serious Crimes Ordinance (OSCO). Money laundering (ML) offences are prescribed under section 25 of the OSCO. Section 25(1), amongst other things, establishes an offence of money laundering:

[A] person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he [or she] deals with that property.

A person having committed an indictable offence may be liable to a money laundering offence by dealing in or with the crime proceeds. Under the OSCO, proceeds of an indictable offence include proceeds of a crime committed elsewhere, if the crime would also have been an offence had it been committed in Hong Kong. The offence may be prosecuted summarily or by indictment. Summary prosecution carries a maximum fine of HKD 500,000 and imprisonment for three years. Prosecution on indictment carries a maximum fine of HKD 5 million and imprisonment for 14 years. The broad definition is to deter persons from using Hong Kong to launder proceeds of crime.

The human trafficking offence in section 129 of the Crimes Ordinance fits within the scope of a money laundering offence under section 25 of the OSCO. However, no court decisions under section 25 of the OSCO relate to an offence under section 129 of the Crimes Ordinance.

Under the OSCO, any person who knows or suspects that any property represents proceeds of an indictable offence, or is a terrorist property, must report this knowledge or suspicion to the authorities as soon as practicable. Failure to report constitutes an offence punishable by HKD 50,000 and up to three months of imprisonment.

The definitions of a number of organised crimes under Schedule 1 of the OSCO, including section 37D(1) of the Immigration Ordinance, sections 129, 130, and 131 of the Crimes Ordinance, and false imprisonment, cover offences related to TIP. The OSCO also authorises the restraint and confiscation of proceeds of an indictable offence.<sup>28</sup> Upon conviction, the Court of First Instance or the District Court may order confiscation of criminal proceeds exceeding HKD 100,000.

### 3.7.1. AML and CTF policy

Hong Kong has been a member of the Financial Action Task Force (**FATF**) since 1991, and a founding member of the Asia/Pacific Group on Money Laundering (**APG**) since 1997.

The Financial Services Branch of the Hong Kong Government issued a Money Laundering and Terrorist Financing (**TF**) Risk Assessment Report in April 2018. It examined the ML/TF threats and vulnerabilities facing various sectors in Hong Kong and the city as a whole.<sup>29</sup>

Overall, the Government said that it had built up a comprehensive AML/CTF regime through a robust legal framework, effective law enforcement, rigorous preventive measures, international cooperation, public education, and publicity. However, it conducted the risk assessment in response to the fast-evolving international standards and the changing global financial market and security landscapes. The key findings of the risk assessment included:

- Hong Kong's ability to combat ML and TF was evaluated as medium high.
- As an international finance, trade, and transport hub with strong links to Mainland China, Hong Kong is exposed to ML threats arising from both internal and external predicate offences.
- Overall, Hong Kong is exposed to a medium-low level risk of ML, a medium-high level of threat, and a medium level of vulnerability.
- There is some room to enhance the AML/CTF legal framework in keeping with the changing security landscape and FATF recommendations.

The report notes the ML threats in banking:

There is also a growing awareness in the banking sector of ML threats arising out of human trafficking and wildlife trafficking in the Asia-Pacific region and beyond. Like elsewhere in the world, Hong Kong is not immune from these threats. [Customer due-diligence] practices, including gathering source of wealth/funds information and negative news searches, coupled with higher-quality external data sources assist banks to mitigate this risk.

<sup>28</sup> Organized and Serious Crimes Ordinance, s15 for restraint order; s8, Schedule 1 and Schedule 2 for confiscation order.

<sup>29</sup> Hong Kong Government, Financial Services and the Treasury Bureau, Money Laundering and Terrorist Financing, "Risk Assessment Report" (April 2018), available at: [https://www.fstb.gov.hk/fsb/aml/en/doc/hk-risk-assessment-report\\_e.pdf](https://www.fstb.gov.hk/fsb/aml/en/doc/hk-risk-assessment-report_e.pdf).

More recently, in September 2019, after the Risk Assessment, FATF issued a Mutual Evaluation Report of AML and CTF measures in Hong Kong. This report largely confirmed the findings of the Hong Kong Government in its Risk Assessment.

The Report also described two successful prosecutions of ML cases related to human smuggling.<sup>30</sup> Overall, FATF concluded that Hong Kong was moderately effective in investigating and prosecuting ML.

The Report also noted that some minor gaps remain in the range of offences relating to trafficking in human beings, though all indictable offences are predicate offences for ML under section 25 of OSCO.<sup>31</sup>

The Hong Kong Monetary Authority (**HKMA**), which supervises financial institutions' risk management systems for combating ML and TF, has not given any more specific directions to organisations as to how they ought to monitor and respond to AML/CTF risks posed by human traffickers. The HKMA's Guidance on Transaction Monitoring, Transaction Screening and Suspicious Transaction Reporting (issued in December 2013 and updated in 2018)<sup>32</sup> gives no guidance as to how to identify transactions connected to slavery or human trafficking. The Guidance merely states that financial institutions submitting Suspicious Transaction Reports (**STRs**) should provide the reasons why the reported transactions are suspicious.

## 4. HONG KONG'S SUPPLY CHAIN REPORTING LEGISLATION

No modern slavery legislation mandates supply chain reporting regarding human trafficking by companies in Hong Kong.

After the U.S. Department of State's 2018 Trafficking in Persons Report, where Hong Kong remained on the Tier 2 Watch List for the third consecutive year, the Hon. Dennis Kwok Wing-Hang introduced the Crimes (Amendment) (Modern Slavery) Bill 2019 (**Draft Bill**) in June 2018. The Draft Bill was modelled on the Modern Slavery Act 2015 (UK) that introduced the United Kingdom's supply chain reporting regime. The Explanatory Note explained the purposes of the Draft Bill:

- (a) to give effect to Article 4 of the Hong Kong Bill of Rights by prohibiting slavery and the slave trade in all their forms, forced labour, domestic servitude, and human trafficking;
- (b) to give effect to Article 1 of the Supplementary Convention on the Abolition of Slavery of 1957 by prohibiting forced marriage; and
- (c) to provide protection for slavery or trafficking victims.

During initial hearings regarding the Draft Bill, legislators noted that offences relating to TIP were scattered among different pieces of legislation and were inadequate. The importance of consolidated legislation to effectively combat modern slavery and plug loopholes in the existing legal framework was also emphasised. The inadequacies identified included the failure of the existing legislative framework to cover all forms of modern slavery, inadequate penalties for perpetrators of modern slavery, the lack of protections for victims, and the inability to trace and freeze proceeds of crime relating to human trafficking.

<sup>30</sup> FATF, "Anti-money laundering and counter-terrorist financing measures Hong Kong, China, Mutual Evaluation Report" (September 2019), pp. 68, 69, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Hong-Kong-China-2019.pdf>.

<sup>31</sup> *Id.* at 169.

<sup>32</sup> Hong Kong Monetary Authority, "Guidance on Transaction Monitoring, Transaction Screening and Suspicious Transaction Reporting" (2018), available at: <https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2018/20180510e3a1.pdf>.

In light of those inadequacies, the Draft Bill sought to amend the Crimes Ordinance to add several criminal offences:

- (a) Human Trafficking – including trafficking any person for sexual and *non-sexual* exploitation.
- (b) Slavery, Servitude, and Forced Labour – meaning holding any person in slavery, servitude, forced or compulsory labour, and slave trade in all its forms.
- (c) Forced Marriage – the use of coercion, threat, or deception to make any person enter into marriage without free and full consent.

The Draft Bill also proposed additional measures to prevent modern slavery and to protect and provide restitution for victims:

- (a) Establish an Independent Anti-slavery Commission to encourage good practice in the prevention, detection, investigation, and prosecution of human trafficking and forced labour, and provide assistance and support to victims.
- (b) Require commercial organisations to publish a slavery and human trafficking statement each year to disclose whether measures are put in place to ensure that there is no slavery or trafficking in their supply chains or their own business.
- (c) Empower the courts to issue Civil Preventative Orders to prohibit any person from committing any of the proscribed conduct for the purpose of preventing slavery and trafficking.
- (d) Establish a civil claim for victims of human trafficking to bring against persons who had engaged in or knowingly benefited from participation in human trafficking.
- (e) Enable victims of slavery and trafficking to raise a defence for conduct connected to their slavery or trafficking situations.
- (f) Allow authorities to use their powers under the Organized and Serious Crimes Ordinance (Cap. 455) to intervene in criminally related accounts and proceeds of crime (and seize and freeze such illicit proceeds) in cases of slavery and human trafficking.

If passed, the Draft Bill would require commercial organisations over a certain size conducting business in Hong Kong to annually publish a slavery and human trafficking statement setting out the steps they had taken to ensure the absence of any slavery or human trafficking occurring in any part of their supply chains or their own businesses, or a statement that the organisation had taken no such steps.

The Draft Bill would also require senior management to approve the statements. For companies, the Board would have to approve the statement and a director would have to sign it. The company would have to publish the slavery and human trafficking statement on its website with a prominent link to the statement on the home page.

Unfortunately, the Government considered Hong Kong's existing legal framework to be adequate and did not support the Draft Bill, which then did not pass. The Government also noted the recent implementation of the Action Plan, which would tackle similar issues. Some members of the Panel on Security also believed that there are few victims of modern slavery and human trafficking in Hong Kong. Since that time, there has been no further progress in introducing the Draft Bill.

## 5. FORCED LABOR: OVERVIEW OF HONG KONG’S APPLICABLE EMPLOYMENT AND MIGRATION LAWS

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### 5.1. Employment Law Rights for Victims of Human Trafficking and Forced Labor

Although the ILO Convention (Forced Labour Convention) applies to Hong Kong, there is no criminal prohibition on forced labour in Hong Kong, nor any definition of “forced labour” in domestic legislation.

Accordingly, no specific protections are available to victims of trafficking or forced labour, and there are no routes by which victims can seek civil redress. Instead, victims need to look to Hong Kong’s more general employment laws.

The Employment Ordinance (Cap. 57) (EO) and the Basic Law<sup>33</sup> afford several basic rights for minimum employment conditions and mechanisms for redress to employees.

However, victims of trafficking, slavery, or forced labour may not have employment agreements with either those who have trafficked them or those who are exploiting them. Accordingly, while Hong Kong mandates certain minimum protections under both the EO and its Basic Law, Hong Kong’s employment laws may not protect those victims.

In some cases, the person may have been brought to Hong Kong under a form of employment (for example, in the case of FDWs), but in other cases, victims may find themselves coerced into travelling to Hong Kong due to some form of threat or incentive (for example, foreign workers from China being persuaded to traffic fabric samples into Hong Kong, and then on to other countries in Southeast Asia). In these latter cases, it may not be clear that there is an employment relationship at all. Indeed, the arrangement may be more akin to slavery, where it was never contemplated that individuals would be paid for their work and they are forced to work.

The Hong Kong Bill of Rights, which incorporates Article 4 of the ICCPR, prohibits slavery or servitude. However, as seen in the ZN Case, the Court of Appeal found that Hong Kong’s Government has no obligation to enact legislation to combat human trafficking for forced labour.

A key question, therefore, is whether there are any circumstances in which a person without an employment contract may obtain the benefit of the statutory protections afforded to employees in Hong Kong. This issue is further explored next within the scope of the legislation.

### 5.2. Applicability of Employment Legislation in the Context of Forced Labor or Trafficking

The EO does not require employment contracts to be in writing, so an employment agreement can be written or oral. In some cases, victims of forced labour or trafficking may be in a form of employment that would grant them rights and protections under the EO. However, the lack of a written employment agreement makes it difficult to track violations and enforce the minimum protections contained in the EO.

In cases of oral contracts, the EO requires the employer to provide details and information about the employment in writing, upon written request, and communicate essential terms and conditions – notably details of wages and bonuses, payment dates, and notice periods. Workers in a forced labour situation are unlikely to have such discussions with their employers. In fact, by the very nature of the arrangement,

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<sup>33</sup> Hong Kong Basic Law (last updated April 2017), available at: <https://www.basicleg.gov.hk/en/basiclegtext/index.html>.

victims of trafficking, slavery, or forced labour often do not have an agreement with either those who trafficked them or those for whom they are working.

Also, persons who have been brought into Hong Kong to work in forced labour may not have obtained a valid work visa and, therefore, are in the country and working illegally. While the EO does not apply to contracts employing illegal migrants, contracts of employment with illegal migrants may be found void ab initio, since the Immigration Ordinance prohibits employment of illegal migrants.

However, the Immigration Ordinance includes a statutory presumption (section 17N) that any person who is found at a place where an employer employs employees shall, unless evidence is provided to the contrary, be presumed to (a) have a contract of employment with that employer and (b) be an employee. Although, within the framework of the Immigration Ordinance, this provision is focused on ensuring that employers comply with the immigration laws to employ individuals lawfully, in theory it might be possible for victims of forced labour or trafficking to use this presumption to demonstrate that they were engaged in a contract of employment and, therefore, are entitled to the basic employment rights and protections afforded to workers under the EO.

However, in practice, a number of hurdles make it difficult for victims of forced labour to seek recourse against those who have trafficked them or benefited from their labour.

## 5.3. Statutory Rights

### 5.3.1. *Rights to minimum wages, entitlements, and other applicable minimum standards*

The EO is Hong Kong’s primary legislation that sets the basic rights and protection of employees. Subject to certain limited exceptions, the EO applies to all employees working in Hong Kong (local and foreign), regardless of nationality.<sup>34</sup> Further, courts have ruled that a contract cannot exclude the EO.<sup>35</sup>

The EO applies to every employee engaged under a contract of employment, to an employer of such employee, and to a contract of employment between such employer and employee.

The only employment arrangements excluded entirely from the scope of the EO are:

- Family members living in the same dwelling as the employer;
- Employees defined under the Contracts for Employment Outside Hong Kong Ordinance;
- A person serving under a crew agreement on board a ship not registered in Hong Kong or under the Merchant Shipping (Seafarers) Ordinance; and
- Apprentices whose contract is registered under the Apprenticeship Ordinance (subject to certain applicable provisions of the EO).

But for these statutory exclusions, the EO applies when there is a contract of employment. This is defined in the EO as “any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee ...”

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<sup>34</sup> Gareth Thomas and Gillian McKenzie, “Employment and Employee Benefits in Hong Kong,” *Thomas Reuters Practical Law* (1 October 2017), available at: [https://uk.practicallaw.thomsonreuters.com/7-503-4336?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-503-4336?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

<sup>35</sup> *Id.*

Workers falling under the EO, regardless of the hours worked, are entitled to basic protections including:

- Payment of minimum wages;
- Restrictions on wage deductions; and
- Entitlement to statutory holidays.

In addition, employees who are employed under a “continuous contract” (defined as an employee who has been working for the same employer for a minimum of 18 hours per week, for four weeks or more) are entitled to additional benefits, such as:

- Mandatory rest days (one in every seven days)<sup>36</sup> – the employer chooses the rest days and notifies the employee before the commencement of each month (orally or in writing, unless there are fixed days);
- Paid leave allowances, including annual leave, sick pay, and maternity and paternity leave;
- Sickness allowances;
- Severance payments; and
- Long-term service payments.

In any dispute as to whether the employment contract is continuous, the employer has the burden of proving the contract was not continuous.<sup>37</sup>

The EO generally prohibits employers from requiring employees to work on rest days,<sup>38</sup> unless necessary due to a breakdown of machinery or “other unforeseen emergency of any nature.”<sup>39</sup> Where a worker is required to work on a “rest day,” employers are obliged to substitute a rest day. Employers who fail to give rest days, or who compel workers to work on rest days, are subject to a fine of HKD 50,000.

### 5.3.2. *Claims available in relation to misrepresentations and “sham” arrangements*

Misrepresentations regarding employment or employment-related benefits often are used to induce FDWs to migrate to Hong Kong, or at least to travel there as an intermediary step for FDWs trafficked onto mainland China or other Asian countries. Hong Kong common law and statutory law, notably the Misrepresentation Ordinance (Cap. 284), create rights that protect against misrepresentation.

Section 2 of the Misrepresentation Ordinance provides an avenue for rescission for innocent misrepresentation (where otherwise fraud would have to be proven), where persons:

- Enter into a contract after a misrepresentation has been made to them; and
- The misrepresentation has become a term of the contract or the contract has been performed.

<sup>36</sup> *Id.* at 17(1). Rest days should be in addition to any statutory, alternative, or substituted holiday entitlement (see also s 39).

<sup>37</sup> *Id.* at 3(2).

<sup>38</sup> *Id.* at 19(1).

<sup>39</sup> *Id.* at 19(2).

If rescission is not available, for example, because it is not possible to restore the parties to their pre-contractual position, damages may be awarded in lieu of rescission. Damages under the Misrepresentation Ordinance are calculated by assessing the victim's likely position but for the fraudulent misrepresentation, unless the person making the misrepresentation had reasonable grounds to believe the statement was true.

The main elements for establishing an actionable misrepresentation claim are:

- A false statement of fact or law (a "statement" can include conduct or silence); and
- The statement induced the victim to enter into the contract. A misrepresentation claim might fail where the victim knew the statement to be false or did not rely on the statement in entering into the contract (for example, if the statement was made after the contract was executed, was immaterial, or was not known to be included in the contract).

Like other potential claims, the main barriers to making any formal misrepresentation claims against employers are the limited status and resources of FDWs and victims and their limited right to remain in Hong Kong without a valid work visa. Other barriers include a lack of legal aid to help meet court costs and obtain legal advice.

### ***5.3.3. Claims available in relation to unlawful deductions, loans, and debt bondage***

The EO permits wage deductions in various circumstances, including:

- Deductions related to absences from work, but not to exceed a sum proportionate with the period of absence;
- Damages or losses to employer's goods, equipment, or property, capped at HKD 300 (and subject to certain other conditions); and
- Recovery of any advance or over-payment made by the employer, but no more than a quarter of the wages payable in one wage period.

Unless approved by the Commissioner for Labour, the aggregate of all deductions, excluding those related to work absences, cannot exceed half of the wages payable for a particular period.

The underpayment and unlawful deduction of wages are criminal offences, carrying penalties of:

- Underpayment: A fine of up to HKD 350,000 and a three-year prison term.
- Unlawful deductions: A fine of up to HKD 100,000 and a one-year prison term.

Employers that wish to bring a FDW into Hong Kong must employ the FDW on a Standard Employment Contract. The Standard Employment Contract is governed by the EO, the Immigration Ordinance (Cap. 115), and the Employees' Compensation Ordinance (Cap. 282). The Standard Employment Contract permits deductions only in accordance with the EO and the Mandatory Provident Fund Schemes Ordinance (Cap. 485). The Standard Employment Contract makes clear that deductions are not allowed for wear and tear of assets, uniform costs, and the like.

### ***5.3.4. Remedies***

Other than actionable misrepresentation claims, the majority of laws and controls around employment contracts are focused on penalising errant employers and agencies, rather than compensating individual workers.



Claimants must bring their monetary claims arising from their employment before the Labour Tribunal (there is no upper monetary limit on claims that the tribunal can hear). Theoretically, FDWs or those in forced labour situations could apply to the tribunal for legal or economic redress; however, these types of workers face practical and legal difficulties in enforcing legislation protecting employees.

In the case of an employee's death falling under the Employment Compensation Ordinance (**ECO**), compensation is calculated with reference to the age and monthly earnings of the deceased employee (section 6 of ECO):

- (a) Under age 40: 84 months earnings or HKD 375,950, whichever is higher.
- (b) Age through 55: 60 months earnings or HKD 375,950, whichever is higher.
- (c) Age 56 and above: 36 months earnings or HKD 375,950, whichever is higher.

Note: monthly earnings are subject to a maximum of HKD 26,070 for calculating compensation in fatal cases.

This compensation award is apportioned among the eligible family members of the deceased employee. Additionally, employers are liable to reimburse funeral and medical expenses, up to a maximum of HKD 76,200.

In the case of injury resulting in disability, compensation depends on the disabled employee's age and whether the injury results in total or partial incapacity.

In the case of permanent total incapacity, the payable compensation is:<sup>40</sup>

- (a) Under age 40: 96 months earnings or HKD 426,880, whichever is higher.
- (b) Age 40 through 55: 72 months earnings or HKD 426,880, whichever is higher.
- (c) Age 56 and above: 48 months earnings or HKD 426,880, whichever is higher.

Note: monthly earnings are subject to a maximum of HKD 26,070 for calculating compensation for permanent incapacity.

For permanent partial incapacity, the payable compensation is calculated by a formula:

(amount of compensation due to permanent total incapacity) × (percentage of loss of earning capacity).

The Employees' Compensation Assessment Board determines the percentage of lost earning capacity according to the ECO.<sup>41</sup>

For temporary incapacity claims following an accident, compensation is payable as a series of periodical payments during the period of temporary incapacity, capped at 24 months. If incapacity lasts longer than 24 months or a further period that the court may allow (which cannot exceed an additional 12 months), the incapacity will be regarded as permanent, giving the employee the right to request compensation under the permanent incapacity measure. In the meantime, the formula for calculating the periodic payment is:

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<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.* at 9.

(monthly earnings at the time of the accident – monthly earnings after the accident) × 4/5 (80%).<sup>42</sup>

Employees can claim certain additional costs, on top of any statutory compensation:

- (a) Medical expenses: unless the employer provides adequate medical treatment or coverage, the employer is liable to pay for any medical expenses during the period required, until the medical practitioner certifies that no further treatment is needed. Costs should be reimbursed within 21 days of receiving the medical receipts, and are subject to a daily cap of HKD 200 for either in-patient or out-patient care, or HKD 280 for both in- and out-patient care carried out on the same day.
- (b) Prostheses/surgical appliances (if any): employers are obliged to pay the cost of supplying and fitting a prosthesis or appliance, capped at HKD 36,430, and the probable costs of repair and renewal of the item for 10 years after fitting, subject to a cap of HKD 110,390.

#### 5.4. Rights to a Safe Workplace and Compensation Associated With Injuries or Illness

Under the Occupational Safety and Health Ordinance (Cap. 509),<sup>43</sup> employers have a duty to provide and maintain a safe work environment. However, the Ordinance excludes certain workplaces, including:

- (a) Domestic premises on which only domestic workers are employed; and
- (b) Places where only self-employed persons work.

As such, the ordinance does not apply to many FDWs employed in Hong Kong.

Where the Ordinance does apply, it places obligations on employers, employees, and occupiers of buildings. The Commissioner for Labour enforces the ordinance and is empowered to issue suspension and improvement notices where it considers an activity to be an imminent hazard. Failure to comply with a notice is a criminal offence, carrying penalties of a fine of HKD 200,000 to HKD 500,000 and imprisonment up to 12 months.

In addition, the Employment Compensation Ordinance (Cap. 282) (**ECO**) may apply to workers' claims and rights. The ECO sets out further rights and obligations for personal injuries and deaths caused by accidents arising out of or in the course of employment, or by certain occupational diseases.

##### 5.4.1. Included/excluded workers

The ECO applies to workers who have entered into or are working under a contract of service or apprenticeship (whether written or oral, express or implied).<sup>44</sup> It excludes a few categories of workers:

- (a) Casual employees (the ordinance includes part-time domestic workers, employees employed for the purposes of the trade or business, or for the purposes of a game or recreation who are engaged or paid through a club);

<sup>42</sup> *Id.* at 10.

<sup>43</sup> Occupational Safety and Health Ordinance (Cap. 509).

<sup>44</sup> Employees' Compensation Ordinance (Cap. 282) s 2(1).

- (b) Outworkers (defined as persons to whom items are given to be made up, cleaned, washed, altered, repaired, or worked on in that worker’s own home or other premises not in the control of the person who gave the items);<sup>45</sup> and
- (c) Members of the employer’s family who live with them (however the ECO will apply if an insurance policy taken under the ECO applies to such members).

In the case of illegal contracts, the ECO provides that the court has discretion to treat the case as if the injured person was employed at the time of accident under a valid contract of employment.<sup>46</sup>

In general, an employer must pay compensation under the ECO where an employee is injured or dies as a result of an accident “arising out of and in the course of employment.” The obligation to pay compensation will apply despite the fact that the employee might have been negligent or at fault when the accident took place.

#### 5.4.2. *Criteria to be met*

An accident will be deemed to “arise out of or in the course of” employment if it happens in certain circumstances:

- (a) While (with consent of the employer) the employee is being trained in or engaged in first aid, ambulance, or rescue work or engaged in any competition or exercise in connection with such training or work (whether on or off the employer’s premises).<sup>47</sup>
- (b) When the employee, with the employer’s express or implied permission, is travelling as a passenger by any means of transport to or from the place of work and at the time of the accident, the means of transport is being operated by or on behalf of the employer or by some other person pursuant to arrangements made with the employer and other than as part of a public transport service.
- (c) While the employee is driving or operating any means of transport arranged or provided by or on behalf of the employer or by some other person pursuant to arrangements made with the employer between the employee’s place of residence and place of work, travelling by a direct route for the purpose of and in connection with the employee’s employment.
- (d) When, during specified levels of gale or rainstorm warnings, the employee is travelling between the employee’s place of residence and place of work:
  1. To the employee’s place of work, by a direct route within a period of four hours before the time of commencement of the employee’s working hours for that day or to the employee’s place of residence, within a period of four hours after the time of cessation of the employee’s working hours for that day, as the case may be; or
  2. In such other circumstances as the Court thinks reasonable.
- (e) While the employee is, with the employer’s express or implied permission, travelling by any means of transport for the purposes of and in connection with the employee’s work between Hong Kong

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<sup>45</sup> *Id.* s 3.

<sup>46</sup> *Id.* s 2(2).

<sup>47</sup> *Id.* s (4)(c)(i).

and any place outside Hong Kong or between any place outside Hong Kong and any other such place.

## 5.5. Access to Justice and Practical Issues Associated With Enforcing Social Legislation

Even if victims of forced labour could be considered to be employees, it is unlikely that victims would bring an employment claim against their abusers/employers.

It is difficult for FDWs (who are already in a much more advantageous position than a victim of trafficking), to seek legal or economic redress, even though FDWs are entitled to bring claims before the Hong Kong Labour Tribunal.

Employment cases do not qualify for legal aid, so FDWs would have to pay not only the costs of extending or obtaining a visa (if their visa is tied to their contract) but also any court and legal fees, as well as all costs of remaining in Hong Kong for the case to be heard. Moreover, since FDWs have no general right to legal representation and would not have any rights to work until their claim is adjudicated, FDWs would have no ability to gain employment and wages pending resolution of the dispute. For this reason, many FDWs choose to return to their home countries, rather than risk the time, cost, and uncertainty of a court hearing.

Establishing a claim itself also raises problems. In the same way that it is likely difficult to check whether a FDW's work duties are limited only to domestic work, in practice, tracking cash payments to monitor compliance with the minimum wage for FDWs may be problematic, particularly where there is any migration of the worker.

Further, while the Standard Employment Contract and visa requirements govern the rights and obligations of workers and employers in Hong Kong, no legislation governs whether and how employers can take FDWs outside of Hong Kong (and neither the EO nor Immigration Ordinance include provisions about it). In the absence of such legislation, the work performed by FDWs on FDW visas could be unlawful and place them at risk of exploitation, when they are moved outside of the minimum protections provided by Hong Kong.<sup>48</sup> Indeed, for FDWs who are employed in Hong Kong under the Standard Employment Contract regime but who are taken to work outside of Hong Kong, it is unclear whether or how HKSAR authorities could enforce the terms of the Standard Employment Contract or prosecute offences under Hong Kong law. NGOs have reported possible offences or violations of the minimum protections, but police forces have claimed that they are unable to investigate or take action where the alleged offences took place outside of Hong Kong.

The Standard Employment Contract also ties the FDW to a specific contract with a specific employer. A FDW's status in Hong Kong is thus tied to that contract. When a contract is ended prematurely, FDWs are only permitted to transfer their contracts in certain limited circumstances, such as when the employer is migrating, has died, or has financial issues with continuing the contract, or where there is evidence that the FDW has been abused or exploited.<sup>49</sup> Absent these conditions, upon expiry or termination of a Standard Employment Contract related to a FDW, workers are expected to leave Hong Kong within two weeks to return to their country of origin. Due to this short timeframe in which a work pass lapses upon termination of an employment contract, FDWs have limited time to raise grievances – not even accounting for the time it would take for the Labour Tribunal to hear the matter. To remain in Hong Kong beyond this time, FDWs

<sup>48</sup> The Justice Centre Hong Kong, "Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking" (January 2019), available at: [https://www.justicecentre.org.hk/framework/uploads/2019/01/JC\\_eA4\\_28pp\\_OP9-2.pdf](https://www.justicecentre.org.hk/framework/uploads/2019/01/JC_eA4_28pp_OP9-2.pdf) at 15.

<sup>49</sup> Hong Kong Special Administrative Region Constitutional and Mainland Affairs Bureau, "HKSAR Government Welcomes Constructive Dialogue with UN Human Rights Committee," *Press Releases* (28 March 2013), available at: [https://www.cmab.gov.hk/en/press/press\\_3146.htm](https://www.cmab.gov.hk/en/press/press_3146.htm).

would need to apply to the Immigration Department for a visa extension – another expense that most FDWs cannot afford.

All of these practical barriers are amplified for individuals who are trafficked into Hong Kong in forced labour situations and are trying to get access to the Labour Tribunal. The main issue would be the individual's right to remain in Hong Kong and bring a claim, since victims may have no legal status in Hong Kong. The interaction between employment law and migration law limits the rights and remedies for victims of modern slavery and human trafficking.

## 5.6. Interaction Between Employment Law and Migration

Like many other countries in Asia, Hong Kong employs a significant number of FDWs. FDWs are entitled to the same benefits and protections under the EO. However, they are also subject to mandatory immigration and employment law requirements.

The HKSAR Immigration Department requires employers to use a Standard Employment Contract to employ FDWs. The Standard Employment Contract is governed by the EO, the Immigration Ordinance (Cap. 115), and the Employees' Compensation Ordinance (Cap. 282). When seeking entry to Hong Kong, FDWs are generally required to produce a copy of their Standard Employment Contract and obtain a specific FDW visa, which is tied to the contract itself.

The Standard Employment Contract mandates a number of terms:

- A maximum term of two years; after that term expires, workers must return to their country of origin, at their employer's expense.
- FDWs are required to live at their employer's primary residence.
- FDWs should perform only domestic work. FDWs are prohibited from driving (absent approval from the Director of Immigration).
- FDWs may not have any other employment with any other person – and the employer should not require or allow the FDW to carry out any work for any other person.
- Wages should be at or higher than the minimum mandated by the Hong Kong Government at the date of contract and should be paid in cash or cheque to the worker's bank account (if the worker consents to this) along with a food allowance at a government-mandated minimum level.
- The employer may not make any deduction from the FDW's wages other than as permitted under the EO. (The EO allows deductions for: (i) absence from work not exceeding a sum proportionate to the period of absence, (ii) damage to or loss of the employer's goods, equipment, or property, subject to a limit of HKD 300, and (iii) recovery of any advance or over-payment of wages made by the employer to the FDW, subject to a maximum of one-quarter of the wage payable in one wage period.)

Under the EO, any employer who underpays wages commits an offence and is liable to a fine of HKD 350,000 and to imprisonment for three years. Any person who unlawfully deducts wages commits an offence and is liable to a fine of HKD 100,000 and to imprisonment for one year. The EO also sets out numerous other offences and penalties for employers who fail to comply with the EO's requirements.

### Employment and placement agencies

The Labour Department of the Hong Kong Government does not require that FDWs be recruited through an agency. However, many countries home to FDWs have this requirement for their citizens.

All agencies placing employees in Hong Kong are required to be licenced with the Employment Agencies Administration (**EAA**). Each licence is valid for one year. Licensing is mandatory before an agency can undertake any placements in Hong Kong, and the names of all licence holders are published in the Gazette and on the EAA's website. In theory, this provides a mechanism through which prospective workers can verify the status of an agency.

Under section 60 of the EO, absent an exemption issued by the Commissioner for Labour, any person operating an employment agency without a licence is guilty of a criminal offence. Following implementation of the Employment (Amendment) Ordinance (Cap. 57A) (**Amendment Ordinance**) (also termed the Employment Agency Regulations Ordinance) in February 2018, operating without a licence carries a maximum penalty of a fine of up to HKD 350,000 (raised from the previous maximum fine of HKD 50,000) and imprisonment of three years.<sup>50</sup>

Agencies are prohibited from receiving compensation other than their prescribed commission: 10% of the first month's wages of the employee.<sup>51</sup> Where agencies breach the limit on compensation, agencies may be subject to a fine of HKD 50,000.

The limitation period for bringing prosecutions under section 60 EO has been extended to 12 months from the date of commission of the offence.<sup>52</sup> The Amendment Ordinance also extends liability from the named licensee, to those "associated with" the agency, including directors, managers, and secretaries of a company engaging in any offending activities (see section 50(1)). While complaints of overcharging are rife, particularly for spurious "loans" offered by agencies to FDWs, there are few cases of enforcement.

### Code of Practice

The Amendment Ordinance also enables the Commissioner for Labour to issue guidelines and codes of practice applicable to employment agencies. The Commissioner has introduced a Code of Practice<sup>53</sup> applicable to employment agencies. It creates enhanced statutory grounds under which the EAA can refuse to issue, renew, or revoke a licence, including non-compliance with the Code.

The new Code of Practice, implemented in 2018, was aimed to tie the Code into the new legislative framework. In addition, it provided certain standard reference forms for agencies, set out service standards related to job-seeker ID documents, and reiterated the need for compliance with the Bribery Ordinance (Cap. 201).

In 2018, the Commissioner for Labour's press releases reported that around six agencies had their licenses revoked, including where there were suspicions of overcharging foreign domestic workers, and retaining FDWs' passports and identity documents to pressure payment of "loans" made to workers. The

<sup>50</sup> Amendment Ordinance (Cap. 57A) s 7.

<sup>51</sup> Employment Ordinance (Cap. 57) s 57.

<sup>52</sup> Amendment Ordinance (Cap. 57A) s 7.

<sup>53</sup> Hong Kong Labour Department, "Code of Practice for Employment Agencies," available at: [https://www.eaa.labour.gov.hk/\\_res/pdf/CoP\\_Eng.pdf](https://www.eaa.labour.gov.hk/_res/pdf/CoP_Eng.pdf).

Commissioner also rejected applications for the renewal of several licenses based on non-compliance with the Code.<sup>54</sup>

### **5.6.1. *Employment rights affected where employment is unlawful under migration law***

FDWs' employment rights and their right to remain in Hong Kong are tied to their Standard Employment Contract. Under the Standard Employment Contract, employers are required to provide their primary residence address, and workers are required to live there. Workers who move to other locations as a requirement of their work risk breaching the conditions of the Standard Employment Contract. A breach of the Standard Employment Contract residence requirement is a criminal offence. On the face of the legislation, workers have primary liability. In addition, those who "aid or abet" the offence can be liable, and those may include employers.

Outside of the Standard Employment Contract, the Immigration Department has an informal policy regarding movement of migrant workers, including FDWs. The Immigration Department has published general remarks on its website reiterating that employers should obtain FDWs' consent to travel with an employer overseas. Much of the commentary focuses on insurance arrangements for workers. As it currently stands, the Immigration Department's position is ambiguous and does not expressly permit or restrict the ability of employers to move domestic workers abroad.

FDWs who are moved outside of Hong Kong are outside the protection of Hong Kong's employment legislation, potentially in breach of their visa conditions, and at risk of exploitation in another jurisdiction.

Hong Kong is often used as a transit point where workers are brought in and quickly moved away. The Hong Kong Justice Centre has commented on cases involving trafficking of FDWs into China from Hong Kong, including workers employed under the Standard Employment Contract. Workers may arrive in Hong Kong expecting employment in Hong Kong, and may sign a Standard Employment Contract, but are quickly transported to other jurisdictions across Southeast Asia or mainland China.<sup>55</sup> In one example cited by the Justice Centre, a domestic worker was killed in China, with the press reporting that her employer was arrested for conspiracy to defraud. However, the press report did not explain the basis for the arrest or whether it related to contravention of rights under the Standard Employment Contract. The Justice Centre also cited anecdotal cases of border officials ignoring workers' requests for help. In other cases, after workers expressed concern, their employers threatened to terminate their employment contracts (meaning they would automatically have to return to their home countries) or to refuse references.

### **5.6.2. *Rights/remedies available under applicable migration law and regulations***

The Immigration Ordinance (Cap. 115) prohibits arranging for or assisting the passage of unauthorised individuals into or within Hong Kong. Part IV.B of the Immigration Ordinance makes it a crime to employ illegal immigrants. Employers who employ someone unlawfully face a maximum penalty of a HKD 350,000 fine and three years of imprisonment.<sup>56</sup> As a result, the Immigration Ordinance indirectly deters trafficking, as it prohibits individuals from employing or assisting those who are unauthorised to work. According to statistics released by the Immigration Department, 275 employers of illegal workers were prosecuted in 2017, and 283 were prosecuted in 2018.<sup>57</sup> However, employers have defences under this section, including

<sup>54</sup> Hong Kong Special Administrative Region, "Licence of Employment Agency Revoked," *Press Releases* (30 October 2018), available at: <https://www.info.gov.hk/gia/general/201810/30/P2018103000629.htm>.

<sup>55</sup> The Justice Centre Hong Kong, "Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking" (January 2019) [https://www.justicecentre.org.hk/framework/uploads/2019/01/JC\\_eA4\\_28pp\\_OP9-2.pdf](https://www.justicecentre.org.hk/framework/uploads/2019/01/JC_eA4_28pp_OP9-2.pdf).

<sup>56</sup> Immigration Ordinance (Cap. 115) at 17I(1).

<sup>57</sup> Hong Kong Special Administrative Region Immigration Department, "Statistics on Enforcement and on Non-refoulement Claim," *Enforcement*, available at: <https://www.immd.gov.hk/eng/facts/enforcement.html>.

that the accused person took “all practicable steps” to determine whether the individual was lawfully employable and reasonably concluded that they were.<sup>58</sup>

The Immigration Ordinance imposes a number of other obligations (with related offences and penalties) on would-be employers:

- (a) An obligation not to enter into a contract of employment to employ another person until the employer has inspected their valid identity and immigration documents (contravention of which carries a penalty of a fine of up to HKD 150,000 and one year of imprisonment);<sup>59</sup>
- (b) A requirement on employers to keep, at each “place of employment,” easily accessible records, capable of being produced on demand, of:
  1. Employees’ full names as shown on their identity documents, or other document demonstrating that they are lawfully employable; and
  2. The type of document held by the employees to demonstrate they are lawfully employable.<sup>60</sup>

A violation of these requirements leads to a range of offences, including obstruction, with maximum penalties ranging from a fine to imprisonment of up to six months.<sup>61</sup>

Additionally, the Immigration Ordinance includes a statutory presumption (section 17N) that anyone found at a place of employment (a) has entered into a contract of employment, and (b) is an employee of that employer.

However, according to section 17H(3) of the Immigration Ordinance, an employer is entitled to terminate without notice or payment in lieu an employee who fails to comply with a requirement to produce valid identity or travel documents. This section also excludes liability – either under common law or any other ordinance – to the employer.<sup>62</sup>

Other than standard employment provisions, the Immigration Ordinance includes a series of offences for arranging or assisting the passage to, or within, Hong Kong, of unauthorised entrants (section 37D). The offence applies whether the person arranges or assists the passage, on the person’s own behalf or on behalf of another (whether that other person is in Hong Kong or not), and it includes offering to arrange or assist such passage, or doing or offering to do any preparatory acts to passage. Contravention is either a summary or indictable offence, carrying a maximum penalty of a HKD 350,000 fine and imprisonment of three years (upon summary conviction), or a HKD 5,000,000 fine and imprisonment of up to 14 years (upon indictment).

Section 37DA includes a further offence for assisting an unauthorised entrant to remain in Hong Kong, punishable upon conviction with a fine of up to HKD 250,000 and imprisonment of three years (summary conviction) or a fine of up to HKD 500,000 and imprisonment of 10 years (indictment).

Furthermore, section 37G of the Immigration Ordinance empowers immigration authorities to apply for forfeiture of any property, other than a ship, that is linked with an offence under sections 37C or 37D, or that represents the proceeds (either direct or indirect) of any such offence. The powers of forfeiture apply regardless of whether any person is convicted of an offence, unless the court believes there is “good reason”

<sup>58</sup> Immigration Ordinance (Cap. 115) s 17I(1A).

<sup>59</sup> *Id.* section 17J(2).

<sup>60</sup> *Id.* s 17K.

<sup>61</sup> Criminal Procedure Ordinance (Cap. 221) Sch. 8.

<sup>62</sup> Immigration Ordinance (Cap. 115) s 17H(3).



not to make such an order or such an order would be unjust. These rights may then confer additional pressure to dissuade trafficking, by allowing authorities (and potentially, victims) to seek to freeze and forfeit assets that have some connection to certain offences under the Immigration Ordinance.

It is also an offence to aid and abet a person to enter Hong Kong illegally (in contravention of section 38(1)(a) of the Immigration Ordinance) or a person who has entered illegally to remain in Hong Kong (in contravention of section 38(1)(b) of the Immigration Ordinance). The offence carries a maximum penalty of three years of imprisonment and a fine of HKD 25,000 after conviction on indictment. If a person lands from a ship in contravention of section 38(1)(a) of the Immigration Ordinance, the captain, the ship owners, and their agents shall be guilty and liable after conviction on indictment to a fine of HKD 600,000 and imprisonment for seven years (in contravention of section 38(4) of the Immigration Ordinance).

Section 13 of the Immigration Ordinance allows the Director of Immigration to authorise an unlawful entrant, such as a victim of trafficking, to remain. Hong Kong law provides no other protection to victims.

## 5.7. Employment Laws and Child Labor

The Employment Ordinance (Cap. 57) prohibits the employment of all children in Hong Kong under the age of 13. Children over 13 but under 15 years of age can work in non-industrial undertakings, provided they either are also attending full-time schooling, or have already attained Form III education. In these circumstances, children can only be employed (1) with parental consent, (2) between the hours of 7 am and 7 pm, (3) for not more than eight hours in any day, and (4) for not more than five hours without a break of one hour. If a child is attending full-time schooling, further restrictions apply to prohibit the employment of the child during school hours and place limits on the hours that the child can work before or after school. A conviction for violating the Employment Ordinance's prohibition on the employment of children carries a penalty between HKD 10,000 and HKD 50,000.

## 6. GOVERNMENT PROCUREMENT RULES

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The Government Logistics Department is the Hong Kong Government's central procurement agent. It purchases goods and related services for all departments of the Hong Kong SAR Government and many non-government public sector organisations. However, the Treasury Branch, Financial Services, and the Treasury Bureau establish government procurement policies and procedures.

The Treasury Branch's Guide to Procurement Policy and Principles sets out the policy and principles behind government procurement in Hong Kong. The government has the twin policy objectives of achieving best value for money and maintaining open and fair competition. Government procurement is to follow the principles of: (1) Public Accountability; (2) Value for Money; (3) Transparency; and (4) Open and Fair Competition.<sup>63</sup>

The Stores and Procurement Regulations issued by the Financial Secretary under the Public Finance Ordinance govern the government procurement process. Financial Circulars and Financial Services and Treasury Bureau Circular Memoranda supplement these regulations. The procedures laid down in these regulations, Circulars, and Circular Memoranda are consistent with the Agreement on Government Procurement of the World Trade Organization (**WTO GPA**) to which Hong Kong has acceded.

The Tender Procedures for Government Procurement allow the government to exclude suppliers and service providers because of final judgments against them for serious crimes or other serious offences. However, no rules prohibit or require the reporting or monitoring of modern slavery and human trafficking

<sup>63</sup> Guide to Procurement, The Treasury Branch under the Financial Services and the Treasury Bureau of the Government of Hong Kong, available at: [https://www.fstb.gov.hk/en/treasury/gov\\_procurement/guide-to-procurement.htm](https://www.fstb.gov.hk/en/treasury/gov_procurement/guide-to-procurement.htm).

in supply chains of Hong Kong businesses. Moreover, no law, regulation, or procedure in the government procurement process requires suppliers to provide any assurance about the absence of any modern slavery in their supply chain.

## 7. RESTITUTION AND VICTIM COMPENSATION

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### 7.1. Overview

Hong Kong does not provide statutory compensation to victims of slavery or human trafficking. Moreover, legislation does not provide measures to protect and assist victims of these crimes. Therefore, victims of trafficking do not have protected status under Hong Kong law.

Avenues of compensation for victims of trafficking in Hong Kong are limited to specific statutory compensation mechanisms under employment laws (if the need for compensation arises from an employment relationship), compensation orders made by the criminal courts against offenders as part of sentencing, and common law claims for damages against traffickers.

### 7.2. Restitution and Reparation Schemes

No legislation specifically enables victims of trafficking to obtain compensation. However, section 73 of the Criminal Procedure Ordinance gives Hong Kong courts the power to order a convicted offender to compensate the victim of a crime for personal injury or loss or damage to property.

Section 84 of the Criminal Procedure Ordinance also allows victims to claim restitution (orders for the return of property) for their harm or loss caused by a crime. Courts could use this power in slavery and trafficking cases, but it first requires the successful prosecution of an offender under the Crimes Ordinance. The low prosecution and conviction rates for these crimes under Hong Kong law diminish the potential for this remedy for victims of slavery and trafficking. As a further barrier to recovery, the offender may not have sufficient assets to satisfy an order to pay the victim compensation.

### 7.3. Statutory Compensation

Victims of slavery and human trafficking may also be able to claim compensation under the Criminal and Law Enforcement Injuries Compensation (CLEIC) Scheme (Scheme). Under this Scheme, the Criminal Injuries Compensation Board distributes public funds to persons who are injured as a result of a violent crime. Unlike restitution and reparation claims, claims under the Scheme are not means tested and do not rely on the perpetrator having any financial resources to meet the victim's claim.

The Scheme is not specific to victims of human trafficking. However, if during trafficking activities a victim sustains a personal injury directly attributable to a violent crime in Hong Kong, the Scheme may provide compensation to eligible victims.

The victim (or the spouse or dependent of a deceased) must meet certain eligibility criteria to bring a claim:

- (a) The Scheme covers crimes of violence only. There is no coverage for property damage. The Scheme mostly deals with crimes of: (1) assault or wounding; (2) robbery, theft, or burglary; (3) homicide, murder, or manslaughter; and (4) rape or sexual assault.
- (b) The circumstances of the victim's injury must have been the subject of criminal proceedings, or reported to the police without unreasonable delay. The applicant must also give the Criminal Injuries Compensation Board all related information and reasonable assistance, particularly any medical reports that it requires.

- (c) The victim must have been injured in Hong Kong from the crime of violence.
- (d) The victim must have the right to remain in Hong Kong and not be in contravention of a limit of stay (if any) in force at the time of the incident. Where permission is granted after the victim arrived or overstayed in Hong Kong, the victim may receive compensation if the incident occurred on or after the effective date of such permission.
- (e) The Scheme only covers “serious” injuries. To qualify as a “serious” injury, the victim must have either died from the incident or lost at least three days of earnings or earning capacity because of the injury. This will be deemed to be the case if the person is on sick leave as certified by a registered medical practitioner or registered Chinese medical practitioner, or is in hospital for three days.
- (f) The application must be made within three years of the date of the incident. If the application is withdrawn or there is a loss of contact with the victim leading to the case being closed, a second application may be made, provided it is made within the later of three years from the date of the incident or one year from the date of loss of contact.
- (g) The Criminal Injuries Compensation Board has discretion to reduce the amount of compensation, or reject the application altogether because of the victim’s conduct, character, or way of life.
- (h) The Criminal Injuries Compensation Board will scrutinise with particular care any application based on sexual offences to determine whether the victim has any responsibility, either because of provocation or otherwise, and it will especially consider any delay in submitting the application.
- (i) Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family, no compensation will be paid (subject to certain exceptions).

Several of these eligibility conditions may impede or deter applications by victims of modern slavery or trafficking. The Scheme is not aimed at crimes related to human trafficking, but at Hong Kong residents and tourists who are the victims of violent crime in Hong Kong,

An application must be made in writing using the prescribed application form, which is available at police stations, District Offices of the Home Affairs Department or Medical Social Services Units, Social Security Field Units, and the CLEIC section of the Social Welfare Department. After the application has been submitted to the Criminal Injuries Compensation Board, the Board will confirm the criminal incident with the police.

The Scheme’s rules do not state the standard of proof for victims of violent crimes. However, the other part of the Scheme, which covers injuries sustained by law enforcement officers, uses a “balance of probabilities” standard of proof.

Finally, the Scheme has been criticised in general for not offering a sufficient mechanism of compensation for victims of violent crimes. In 2018–19, a total of 4,976 criminal injury cases were reported to the police. However, only 206 applications for compensation were made to the Scheme (4.1% of all reported victims of criminal injuries). The Criminal Injuries Compensation Board decided 156 applications, and awarded compensation in 104 cases.<sup>64</sup>

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<sup>64</sup> Jason Pow Wing-Nin SC, “Criminal and Law Enforcement Injuries Compensation Boards Forty-Sixth Annual Report” (2019) at [13].

## 7.4. Tortious Claims and Remedies

Victims of dishonesty and fraud in Hong Kong may seek compensation through civil tort claims, with relief in the form of damages, restitution, seizure of goods or property, injunctions, constructive trust, or account of profits.

A victim of human trafficking or modern slavery might be able to bring a common law claim in tort, depending on the circumstances. Examples of these torts include:

(i) False imprisonment: Anyone who, without cause, restrains another person or deprives another of personal freedom has committed a tort. Damages are allowed for time lost, discomfort and resulting ill health, mental suffering, humiliation, loss of reputation or business, and expenses.

(ii) Assault and battery: Assault is the threat of immediate harm or offensive contact or any act that would arouse reasonable apprehension of imminent harm. Battery is unauthorized and harmful or offensive physical contact with another person that causes injury.

(iii) Intentional infliction of emotional distress: A victim who suffered severe mental distress caused by another person's intentional conduct could potentially establish this tort.

Victims must allege and prove a compensable injury caused by the defendant's allegedly wrongful conduct. From a practical point of view, even if victims of trafficking are able to overcome their lack of access to legal resources and visa challenges, the requirement to present admissible evidence may make victims unwilling or unable to pursue any claim.

## 7.5. Confiscation of Proceeds of Crime

Section 8 of the Organized and Serious Crimes Ordinance gives courts the power to confiscate the proceeds of certain organised crimes, including trafficking of persons into Hong Kong, where the proceeds exceed HKD 100,000.

Confiscated assets are deposited in the Government Treasury and are at least indirectly available, through a bidding process, to government departments and, in theory, to NGOs to support anti-trafficking programmes and services to victims of trafficking.

# 8. HONG KONG'S MULTIDISCIPLINARY/INTERAGENCY COOPERATION APPROACH

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Refer to Section 1.2.2.

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## APPENDIX 1.

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### International Instruments Relating to Modern Slavery

#### PART A. STATUS OF INTERNATIONAL OBLIGATIONS

A number of international treaties and conventions relevant to the prohibition of slavery and trafficking and general human rights apply to Hong Kong:

International Agreement for the Suppression of the White Slave Traffic, Paris, 18.5.1904, as amended in 1949

International Convention for the Suppression of the White Slave Traffic, Paris, 4.5.1910, as amended in 1949

International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30.9.1921

Slavery Convention, Geneva, 25.9.1926, as amended in 1953

Convention on the Political Rights of Women, New York, 31.3.1953

Convention Relating to the Status of Stateless Persons, New York, 28.9.1954

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7.9.1956

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10.12.1962

International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7.3.1966

International Covenant on Economic, Social and Cultural Rights, New York, 16.12.1966

International Covenant on Civil and Political Rights, New York, 16.12.1966

Convention on the Elimination of All Forms of Discrimination against Women, New York, 18.12.1979

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10.12.1984

Convention on the Rights of the Child, New York, 20.11.1989, as amended in 1995

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, New York, 25.5.2000

## PART B. OVERVIEW OF INTERNATIONAL INSTRUMENTS

### [United Nations Convention against Transnational Organized Crime](#)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

## Appendix 2.

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### Domestic Legislation

## PART A. OVERVIEW OF DOMESTIC LEGISLATION PROHIBITING VARIOUS FORMS OR ACTS OF SEXUAL EXPLOITATION

#### Procurement by threats

Section 119 of the Crimes Ordinance makes it an offence (punishable by up to 14 years of imprisonment) for a person to procure another person, by threats or intimidation, to do an unlawful sexual act in Hong Kong or elsewhere.

#### Procurement by false pretences

Section 120(1) of the Crimes Ordinance makes it an offence (punishable by up to five years of imprisonment) for a person to procure another person, by false pretences or false representations, to do an unlawful sexual act in Hong Kong or elsewhere. For the purposes of that section, “pretence or representation” includes a pretence or representation relating to the past, the present, or the future, and any pretence or representation as to the intention of the person.

#### Control over persons for the purpose of unlawful sexual intercourse or prostitution

Section 130 of the Crimes Ordinance provides that a person who harbours another person or exercises control or direction over another person with the intention that the other person shall do unlawful sexual acts with others, or harbours another person or exercises control, direction, or influence over another person for the purpose of or with a view to that person’s prostitution, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.

#### Causing prostitution

Section 131 of the Crimes Ordinance makes it an offence to procure another person to become a prostitute in Hong Kong or elsewhere, or to procure a person to leave Hong Kong to become an inmate of a vice establishment. The offence is punishable by up to 10 years of imprisonment.

#### Procurement of female under 21

Section 132 makes it an offence for a person to procure a female under the age of 21 to have unlawful sexual intercourse in Hong Kong or elsewhere with a third person. The offence is punishable by a maximum penalty of imprisonment for five years.

#### Detention for intercourse or in vice establishment

Section 134(1) of the Crimes Ordinance makes it an offence (punishable by imprisonment for 14 years) to detain a person, in any manner or by any means, against the person’s will with the intention that the person shall do an unlawful sexual act, or merely detain that person on any premises or in any place that is kept as a “vice establishment” (or brothel).

Section 134(2) provides that where a person detains another person against their will with the purpose that the other person will do an unlawful sexual act on any premises, vessel or in any place kept as a vice establishment, the person will be deemed to have detained that person if the other person, with the intention of compelling or inducing the detainee to remain there, (a) withholds the detainee’s clothes or



other property, or (b) threatens the detainee with legal proceedings in the event of that person taking away clothes provided for that person by the other person or on the other person's directions.

#### Sexual intercourse and sexual activity with a child

Section 118C of the Crimes Ordinance makes it an offence to commit "buggery" (as termed by the legislation) with or by a man under the age of 16. The offence is punishable by a maximum penalty of imprisonment for life.

Section 118D of the Crimes Ordinance makes it an offence to commit "buggery" with a girl under the age of 21. This offence is punishable by a maximum penalty of imprisonment for life.

Section 118H of the Crimes Ordinance provides that a man who (a) commits an act of gross indecency with a man under 16, or (b) being under the age of 16 commits an act of gross indecency with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for two years.

Section 123 of the Crimes Ordinance makes it an offence (punishable by a maximum penalty of life imprisonment) for a man to have unlawful sexual intercourse with a girl under the age of 13.

Section 124(1) of the Crimes Ordinance makes it an offence (punishable by a maximum penalty of five years of imprisonment) for a man to have unlawful sexual intercourse with a girl under the age of 16. However, under 124(2), where a marriage is invalid by reason of the wife being under the age of 16 under section 27(2) of the Marriage Ordinance (Cap. 181), the invalidity shall not make the husband guilty of an offence under section 123(1) when he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.

Section 126 of the Crimes Ordinance provides that a person who, without lawful authority or excuse, takes an unmarried girl under the age of 16 out of the possession of her parent or guardian against the will of the parent or guardian shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

Section 127 of the Crimes Ordinance makes it an offence for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian, with the intention that she shall have unlawful sexual intercourse with men or with a particular man, and provides that that person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for seven years.

Section 135 of the Crimes Ordinance provides that a person who causes or encourages the prostitution of or an unlawful sexual act with a girl or boy under the age of 16 for whom that person is responsible shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

Section 140 of the Crimes Ordinance makes it an offence for an owner or occupier of any premises or vessel, and any person who manages or assists in the management or control of any premises or vessel, to induce or knowingly suffer a girl or boy under the age of 13 to resort to or be on such premises or vessel for the purpose of doing an unlawful sexual act or for the purpose of prostitution. The offence is punishable by a maximum penalty of imprisonment for life.

Section 141 of the Crimes Ordinance provides that an owner or occupier of any premises or vessel, and any person who manages or assists in the management or control of any premises or vessel, who induces or knowingly allows a girl under the age of 16 to be on the premises or vessel for the purpose of sexual intercourse, or a boy or girl under the age of 21 to be on the premises or vessel for the purpose of committing buggery with a man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.

Section 146 of the Crimes Ordinance makes it an offence to commit an act of gross indecency with or towards a child under the age of 16, or to incite a child under the age of 16 to commit such an act with another. The offence is punishable by imprisonment for 10 years. It is not a defence to a charge under this section to seek to prove the child consented. However, a person who commits an act of gross indecency with or towards a child or who incites a child to commit such an act with or towards the person shall not be guilty of an offence under this section if that person is or reasonably believes that they are married to the child.

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