



► Annex

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Reporting and referral step-by-step guide for forced labour and human trafficking

International and national legal frameworks on forced labour and trafficking

To determine whether an individual is in fact a victim of human forced labour or trafficking, it is necessary to understand the legal definition of what constitutes trafficking in persons and forced labour. Identification of victims is usually based on the definitions of forced labour and trafficking as stated in national legislation, which varies from country to country. Service providers and law enforcement in a position to identify human forced labour or trafficking should take account the relevant provisions in national legislation and also the international legal framework on forced labour and trafficking, as national laws are progressively reviewed and aligned to international standards. This Guidebook acknowledges the complexity of the relationship between forced labour and trafficking for labour exploitation. In particular, despite the fact that these can be overlapping offences, forced labour can occur independently of trafficking. The guidance provided in this Guidebook honours the complexity and distinction between forced labour and trafficking for labour exploitation by demonstrating how exactly legal definitions and identification protocols can be used to identify both offences.

► General provisions and mandates on forced labour and trafficking

Article 6 of the Federal Constitution states that “no person shall be held in slavery” and “all forms of forced labour are prohibited...” except for compulsory national service and work or service carried out by persons as a consequence of a court conviction. The use of the term ‘no persons’ indicates inclusion of all persons, e.g. citizens and non-citizens including documented and undocumented migrant workers, refugees and asylum-seekers. This is supported by the case of *Ali Salih Khalaf V Taj Mahal Hotel*, where the Industrial Court held that Article 8 of the Federal Constitution uses the word ‘person’ and not ‘citizens’, and that the rights guaranteed by its equality is extended to documented and undocumented migrants.

Section 374 of the Penal Code (Act 574) also provides that “[w]hoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both”. Section 370 prohibits buying or disposing of any person as a slave and Section 371 similarly criminalises

habitual dealing in slaves. All three sections refer to “any person” and not “citizen” which can include documented and undocumented migrants.

Forced labour

There is no national definition of forced labour. However, the internationally recognised definition of forced labour is found in ILO Forced Labour Convention, 1930 (No. 29), which Malaysia ratified in 1957.¹ According to this Convention,

- ▶ Forced labour is “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself (or herself) voluntarily.

For a situation to be considered forced labour, it is important to note that:

- **There should be work or service rendered:** This includes all types of work, service and employment, regardless of the industry, sector or occupation within which it is found, and encompasses legal and formal employment as well as irregular and informal employment.
- **The definition applies to ANY PERSON:** This refers to adults as well as children, regardless of their nationality and legal status.
- **There is a menace or threat of a penalty:** This threat or menace of penalty given by the perpetrator to the victim can be any form of coercion such as threats, violence, the retention of identity documents, confinement, or non-payment of wages. The penalty may also take the form of a loss of rights or privileges.
- **There is the element of involuntariness:** This means that the victim did not consent to enter into employment freely, or she/he has no freedom to leave the employment at any time, with reasonable notice in accordance with national law or collective agreements.

▶ What is not forced labour?

Article 2(2) of the ILO Convention No. 29 (ILO C29) sets out certain exceptions pertaining to practices which would otherwise have fallen under the definition of forced labour:

- compulsory military service;
- normal civic obligations;
- prison labour carried out under supervision and control of public authority, and not for private individuals, companies or associations;
- emergencies and minor communal service.

All these situations only constitute exceptions under certain conditions, as defined by the ILO Committee of Experts.²

The lack of viable economic alternatives that makes people stay in an exploitative work relationship does not in itself constitute forced labour though it may constitute a position of vulnerability to forced labour and trafficking.

¹ Such ratification goes with the obligation to eliminate forced labour as a matter of urgency, criminalise forced labour, impose adequate penalties to reflect the seriousness of the offense and strictly enforce the penalties. It is also critical that the law enforcement response includes prosecution under criminal law.

² https://www.ilo.org/ilc/ILCSessions/previous-sessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm

It should also be noted that in Article 1 of the ILO Forced Labour Protocol of 2014, the definition of forced or compulsory labour contained in ILO C29 is reaffirmed. Besides, the Protocol provides that measures tackling forced labour should include specific action against trafficking in persons for the purposes of forced labour – making a clear link between forced labour and human trafficking.

▶ **Can forced labour also be Trafficking in Persons?** Yes, if they meet the criteria for TIP.

Sub-standard working condition

Enforcement agencies, after careful assessment if indicators of forced labour are met, sometimes find either the involuntariness or menace of penalty is missing. Often, it could be a case of sub-standard working conditions, which are within the mandate of the Department of Labour.

Sub-standard working conditions are exploitative working conditions that do not meet the criteria for forced labour or TIP. For example, victims in receipt of low wages may not be working in a forced labour situation if they are not working under the threat of a penalty or are freely consenting on their employment.

Trafficking in persons (TIP)

Malaysia's definition for TIP come from the Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act 2007 (Act 670) or otherwise called ATIPSOM. This Act states that

“trafficking in persons” means all actions involved in acquiring

or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

Proving the element of coercion is central to making a case of trafficking or forced labour. Under APTISOM movement is not necessary to establish a trafficking case.

Coercion is defined in ATIPSOM as:

- a. Threat of serious harm to or physical restraint against any person;
- b. Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- c. The abuse or threatened abuse of the legal process.

Under the ATIPSOM Act, Malaysian courts have jurisdiction to hear prosecutions of any person charged with an offense under the Act, whether or not the alleged offense occurred within or outside Malaysia and regardless of the nationality of the offender, if Malaysia is a receiving country, transit country, or if the trafficking starts in Malaysia. The Act also extends jurisdiction to extraterritorial offenses committed by Malaysian citizens or permanent residents.

Part III of the Act sets out a number of offenses related to trafficking in persons, while Part IV relates to smuggling of migrants. The main offense of trafficking in persons for the purpose of exploitation may be punished with up to fifteen years in prison; where threats, use of force, abduction, etc. are involved, the punishment is from three to twenty years of imprisonment. Trafficking in children also attracts a maximum twenty-year term. Persons convicted of these offenses can also be fined. Other offenses include profiting from the exploitation of a trafficked person; making, obtaining, giving, selling, or possessing fraudulent travel or identity documents; recruiting others to participate in an act of trafficking in persons; providing facilities or services in support of trafficking in persons; and harbouring persons involved in trafficking in persons.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children of 2000 (Palermo Protocol) states that:

3(a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

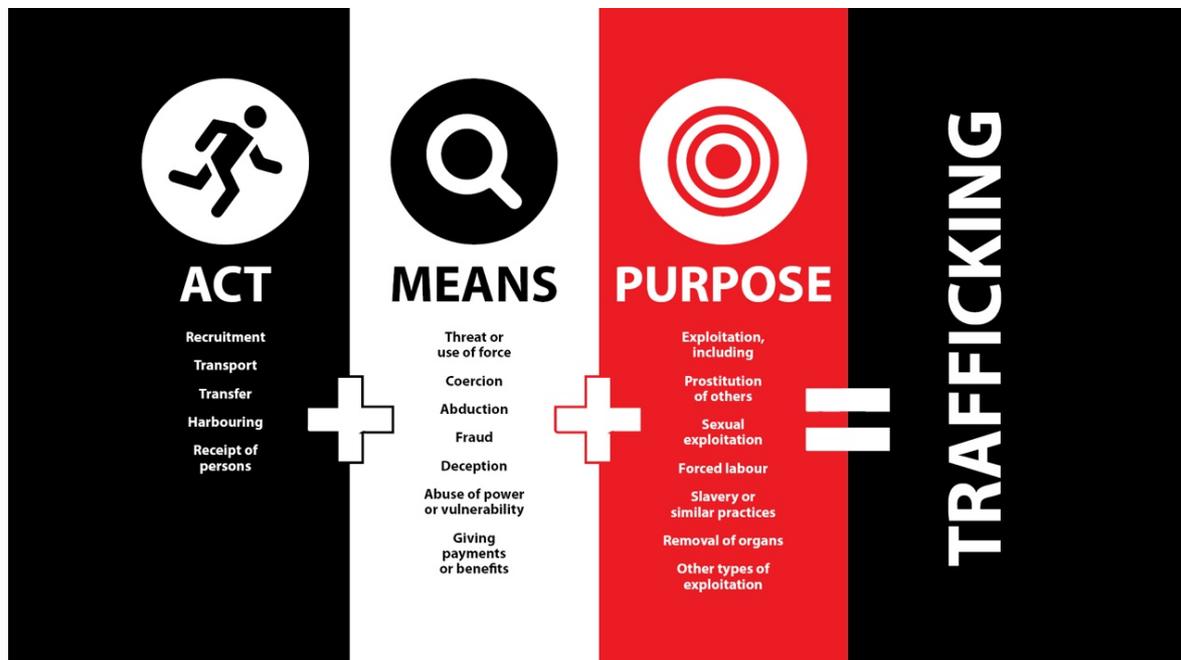
Exploitation shall include, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

3(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this Article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used

3(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in sub-paragraph (a) of this Article

3(d) “Child” means any person under the age of eighteen years of age

This definition is complex, but TIP can be broken down into three separate elements as shown in the following illustration:



- If one condition from each element (Means, Act, and Purpose) is met, the result is trafficking.
- If any one of the three elements is missing, then it will not be trafficking. However, if the person is under the age of 18 years, it is only necessary to show that any one or more of the defined actions has been used to achieve any one or more of the defined exploitative purposes. The means by which this has been achieved are considered as irrelevant and can be ignored.

▶ Other relevant national legal provisions

The following laws do not specify forced labour as an offense but prohibit specific practices that could be considered indicators of forced labour:

- The Passport Act 1966 prohibits employers from withholding passports of their workers.³
- The Private Employment Agencies Act 1981 (as amended by the Private Employment Agencies (Amendment) Act 2017) regulates private recruitment agencies. The Act requires grant of a licence under the Act permitting an agency to carry out recruiting activity;⁴ a licence will only be granted to an employment agency who satisfies certain good conduct provisions including that the director is a citizen of Malaysia, is not an undischarged bankrupt and has not been convicted of a trafficking in persons or forced labour offence.⁵ The licence may be granted subject to conditions.⁶ There is provision for suspension/revocation of the licence in certain circumstances including in cases of failure to comply with the Act (as amended) or any relevant regulations.⁷
- The Employment Act 1955, The Sabah Labour Ordinance 1949 and the Sarawak Labour Ordinance of 1952 provide for basic labour rights of workers such as contract of service, wages, hours of work, protection for female employee, entitlement of leaves and with certain provision for domestic workers. As of April 2019, extensive amendments had been proposed to the Employment Act 1955 which were in the final stages of public engagement before the amendments are tabled before Parliament.⁸ At the time of writing the proposed changes have yet to come into force. The proposed amendments include a new definition of ‘forced labour’: “‘forced labour’ as the condition of any person who provides labour or services by the use of threat or deception, a reasonable person in the position of the victim would not consider himself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services”.
- The Employee’s Minimum Standards of Housing, Accommodations and Amenities (Amendment) Act 2019 sets minimum standards of housing, living, medical and social amenities for workers to be provided by employers who choose to provide their workers with such benefits. The amendment of the Act 446 expanded the coverage of the Act which previously applied only to estate employees to other employment sectors.
- The Occupational Safety and Health Act 1994 provides for securing the safety, health and welfare of persons at work, to protect workers from unsafe work practices. The Act applies to certain industry sectors set out in the First Schedule to the Act including manufacturing, construction, agriculture, forestry and fishing, mining and quarrying, utilities, hotels and restaurants. The Act imposes a duty on all employers to ensure, so far as practicable, the safety, health and welfare at work of all employees.⁹
- The National Wages Consultative Council Act 2011(Act 732) is an Act to establish a National Wages Consultative Council with the responsibility to conduct studies on all matters concerning minimum wages and to make recommendation to the Government to make minimum wages orders according to sectors, types of employment and regional areas, and to provide for related matters.¹⁰

³ S.12(1)(f) Passport Act 1966.

⁴ Private Employment Agencies Act 1981 (as amended by the Private Employment Agencies (Amendment) Act 2017)

⁵ Ibid, s.9(b)(i)-(iii).

⁶ Ibid, S.9(B).

⁷ Ibid, a.11A(1)(a).

⁸Please refer to: https://www.mohr.gov.my/index.php/en/?option=com_content&view=article&id=885

⁹ The Occupational Safety and Health Act 1994, s.15(1).

¹⁰ [http://jtksm.mohr.gov.my/images/kluster-warnawarni/akta-borang/akta-peraturan/SENARAI%20AKTA_2020/Akta%20Majlis%20Perundangan%20Gaji%20Negara%202011%20\(Akta%20732\)/11.%20Act%20732%20-%202021.08.2015_bi.pdf](http://jtksm.mohr.gov.my/images/kluster-warnawarni/akta-borang/akta-peraturan/SENARAI%20AKTA_2020/Akta%20Majlis%20Perundangan%20Gaji%20Negara%202011%20(Akta%20732)/11.%20Act%20732%20-%202021.08.2015_bi.pdf)

▶ Legal provisions and mandates on victim protection

Part V of the Anti-Trafficking in Persons and Smuggling of Migrants (ATIPSOM) Act relates to the care and protection of trafficked persons and makes provision for the appointment of social welfare officers as Protection Officers. There are also provisions relating to protection orders, whereby a person is placed at a shelter home, and for the medical treatment and hospitalization of trafficked persons. A new provision, added by the 2015 amendment legislation, enables trafficked persons to be given permission by MAPO to move freely or to be employed outside of refuges.

A trafficked person is immune from prosecution in relation to irregularly entering the receiving or transit country, unlawful residence in a country, or his or her procurement or possession of any fraudulent travel or identity document.

Provisions in Part VI of the ATIPSOM Act prohibit media reporting and publication of certain matters and particulars of trafficked persons, and contain rules relating the admissibility in court of various documentary and testimonial evidence.

The 2015 amendment legislation added provisions to this Part that enable a court to order a person convicted of an offense under the Act to pay compensation to the trafficked person. Where there is no conviction, a person can still be ordered to pay any wages in arrears to the trafficked person. In relation to the order of the payment of compensation, subsections 426 (1A), (1B), (1C) and (1D) as well as section 432 of the Criminal Procedure Code shall apply. At the moment this is the judge's prerogative. The ideal situation should be that compensation should be guaranteed.

International standards on victim protection

A non-punishment clause was included in the ILO Forced Labour Protocol supplementing the ILO Convention No. 29:

- ▶ "Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour".

The language specifically addresses "unlawful activities" and not "criminal activities", thus potentially include activities that not only violate criminal laws but also other laws such as administrative law or immigration law. This can include immigration-related, prostitution, drug offenses that are linked to victims' forced labour situations.

It is common for officials to ignore complaints in relation to passport confiscation or withholding of wages in cases of domestic workers, thereby failing to recognise potential signs of forced labour and instead taking action against those who complained for immigration violations. Workers are most often penalised for being undocumented in the event their employer retains their passport and the employment arrangement ceases.

Given that the work permit renewal process is employer driven, there are also instances reported where employers fail to renew the permits and do not inform the workers about this, accordingly. In the latter case, workers caught are considered to be working "illegally" and criminalised by law enforcers despite the renewal failure being the employer's fault. The ATIPSOM provides for the non-criminalisation of victims of trafficking in line with the requirements of the ILO Forced Labour Protocol. However, the same victim protection is not available for forced labour under the Criminal Code provision or those whose cases are heard under various different labour laws because they do not meet the ATIPSOM threshold.

International standards are clear on this point. The United Nations High Commissioner for Human Rights published the Principles and Guidelines on Human Rights and Human Trafficking in 2002. This document is acknowledged as setting the international standards as to how victims of trafficking should be treated.

The Principles and Guidelines state:

- ▶ Trafficked persons shall not be detained, charged or prosecuted for:
 - Their illegal entry into countries of transit or destination
 - Their illegal residence in countries of transit or destination
 - Their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons

As all victims of crime, forced labour and TIP victims have the right to seek legal redress for what they have suffered and to be supported and assisted while they navigate through the justice system. Law enforcement officials and all actors in the justice system must make every effort to respect the victim's rights including:

- Ensure speedy investigation and prosecution of their case. All measures must be taken to avoid unnecessary delays in investigation and prosecution.
- Treat them with compassion and respect for their dignity.
- Treat them as a victim and/or a witness and not a perpetrator.
- Inform them about their rights and what protections are available to them.
- Do not ask leading questions or influence their testimony.
- Ensure their privacy is protected.
- Ensure their physical safety and the safety of their families, including by protecting them from intimidation and retaliation.
- Ensure their testimonies are received by personnel properly trained and sensitized to the needs of the victims.
- It is however important that all victims should be informed in clear and understandable language of the following:
 - Their role in legal proceedings
 - The scope, timing and progress of such proceedings
 - The disposition of their cases
 - Their basic human rights in a language that the victim understands.
 - Procedure to be followed in relation to the investigation and the trial.
 - Regular feedback during the investigation process
 - Date and the time of the trial of his or her case.
 - A basic outline on what is going to happen during the legal proceedings. In most cases victims have never seen the inside of a court room and they do not understand the process.
 - Postponement of any trial.
 - Date on which the accused will be sentenced
 - Right to express their views and concerns whenever their interests are at stake.
 - Right to be properly assisted and supported through judicial proceedings.
 - Access to restitution and compensation for the damage/harm suffered.
 - Access to material, medical, psychosocial and social assistance through government or NGOs. Victims should be informed on the availability and modalities of such services.

In terms of the experiences of victims of trafficking for labour exploitation and forced labour, The ILO acknowledges that:

- ▶ “ Within that part of the spectrum in which forced labour conditions may be found, the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish.”¹¹

¹¹ ILO, 'A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration of Fundamental Principles and rights at Work 2005', 2005, p.8, para. 31.

It is therefore paramount to take a comprehensive approach to labour exploitation by assessing individuals for trafficking for labour exploitation as well as for forced labour and other labour violations. The range of services required by these individuals and the stakeholders involved in providing these services is likely to be the overlapping but not always the same. For example, singular labour law violations would usually require services such as mediation, assistance to access wage arrears and a return to work whereas service provision required in the cases of forced labour or trafficking for labour exploitation will often include rescue, shelter and access to medical care that might be immediate requirements.

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