



The Legal Gap Analysis of Myanmar National Laws and International Standards for Domestic Work

Developed by
The Working Group on Legal Protection of Domestic Workers¹

Introduction

The nature of domestic work differs from other work. There is often only one employee per employer or workplace. The workplace is a home not a business. Many domestic workers not only work but also live in their employers' houses making it difficult to separate work and personal time. It is work that has traditionally been done by the wife or mother in a household and has been considered a woman's duty and as such has not been respected as work and has not been remunerated. For these reasons, labour laws all over the world have, until recently, failed to recognize domestic workers as workers and have thus left domestic workers vulnerable to abuse and exploitation.

This changed at a global level when the International Labour Conference adopted the Convention on Decent Work for Domestic Workers (Convention No189, referred to as C189) in 2011. The Convention and its supporting Recommendation 201 (R201) were developed through consultations with governments, employers and workers' associations and domestic workers groups, and set standards for the working and living conditions of domestic workers.

Concerned by the unprotected status of domestic workers in Myanmar and recognizing the increasing demand for domestic workers at home and overseas, the Working Group on Legal Protection of Domestic Workers decided to conduct a gap analysis on the current legal and policy framework in Myanmar vis-à-vis international standards for domestic work as set

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forth in C189 and R201. Where gaps are identified between the current legal framework and the international standards, the analysis provides recommendations with a view toward improving the protection of domestic workers and ensuring domestic workers enjoy equal rights with other workers. The analysis exposes incoherencies between Myanmar law and international standards and also between different pieces of labour laws within the country and provides recommendations to address these incoherencies.

Taking into consideration that the working and living situation of domestic workers are significantly different from other workers, the Working Group concludes that simply reforming the existing laws will not be sufficient. There are currently no laws to be reformed which currently address stand by hours for workers in households or the eating and sleeping arrangements of workers within a private household. Therefore, the Working Group strongly recommends the development and adoption of a labour law specific to domestic workers as has been done in many countries recently including but not limited to The Philippines (Domestic Workers Act, 2013), South Africa (Domestic Workers Act), United Arab Emirates, (Domestic Workers Law, No 10, 2017), Qatar (Law No 15, 2017, Service Workers in the Home), Morocco (Domestic Workers Law, 2018), Hawaii (Domestic workers Bill of Rights, 2013) and Argentina (Law No 26,844, 2013).

If Myanmar adopts a law specific to domestic workers, other laws will need to be revised in line with the new law recognising domestic workers as formal workers. In the meantime, many existing labour laws are under review and can be immediately revised making the necessary adaptations to include domestic workers; of particular importance is the inclusion of domestic workers in the revised Employment and Skills Development Law (see point 10 and 11 in this paper).

In preparing this gaps analysis, the following Myanmar laws and rules were reviewed:

- Employment and Skills Development Law (2013) and Rules (2015) [Rules not in force]
- Notification No. 140/2017 dated 28 August 2017
- Factories Act (1951) amended in 2016
- Directive No.615/2/a la ya – law 2/12 (1584), dated December 11, 2012
- Labour Organization Law (2011) and Rules (2012)
- Leave and Holidays Act (1951) as amended in 2006 and Rules (2018)
- Minimum Wages Act (2013) and Rules (2013)
- Notification on Minimum Wage No.2/2018 effective 14 May, 2018
- Occupational Safety and Health Law (2019)
- Payment of Wages Act (2016) and Rules (2018)
- Restriction of Employment Act (1959)
- Anti-Trafficking in Persons Act (2005)
- Social Security Law (2012)
- Settlement of Labour Disputes Law (2019)
- Shops and Establishments Act (2016)
- Constitution of the Union of Myanmar (2008)
- Penal Code (1974)
- Child Law (2019)

Key Recommendations

The review finds that the following areas in existing labour laws should be reformed or included in a new legislation specifically designed to protect the rights of domestic workers:

- ✓ the recognition of domestic work as *work*, through a unified definition;
- ✓ Inclusion in minimum wage protection;
- ✓ setting of normal hours beyond which overtime time pay is required;
- ✓ minimum age and the protection of young workers;
- ✓ social security provisions;

- ✓ occupational health and safety minimum standards and protection;
- ✓ the requirement of a written contract for domestic work;
- ✓ protection against physical and sexual harassment;
- ✓ maternity leave and protection against dismissal on the basis of pregnancy;
- ✓ provision of standards for decent living conditions for 'live in' domestic workers, and the recognition of the right to privacy, communication and freedom of movement; and
- ✓ the right for all domestic workers, including and especially migrants, to retain their personal documents including passports and other identification documents, work permits, social security cards etc.

Findings

In this section, the paper looks at specific conditions in domestic work and compares the Myanmar labour laws with the standards set in C189 and R201.

1. Definition of Domestic Work

Domestic workers are mentioned in several labour laws in Myanmar. They are included in (Minimum Wage Law (2013), the Payment of Wages Law (2016), Labour Organization Law (2011), Social Security law (2012) but excluded in Holiday and Leave Act (1951) and Occupational Safety and Health Law (2019). However there is no definition of domestic work in this body of law and the terminology differs between laws.

C189 Definition of Domestic Work

- a) the term **domestic work** means work performed in or for a household or households;
- b) the term **domestic worker** means any person engaged in domestic work within an employment relationship;
- c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

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Working Group Recommendations on Defining Domestic Work

- ✓ In consultation with domestic workers, labour organisation and employers, adopt a term for domestic workers and use it consistently in all laws.
- ✓ Define the scope of work included under the term adopted.

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2. Minimum Wages

In the Minimum Wages Law (2013), *house maids*² are included in the definition of workers. However, according to the notification (2/2018) of the National Committee on Minimum Wages, which set the first minimum wage, small businesses with less than ten employees and small family businesses do not need to comply with the minimum wage payment.

²The paper follows the terminology used in each law.

The interpretation of the notification is not clear for domestic workers. On the one hand in most households there are fewer than ten domestic workers, but on the other hand, a household is not a small or family business. Nevertheless, in practice, most employers of domestic workers understand that they are exempt from paying minimum wage and there have been no legal cases where a domestic worker has claimed minimum wage payments.

Coverage under the Minimum Wage Law would not only ensure a stable wage but also protects from discrimination in terms of payment based on the sex of the worker. Additionally workplaces covered by the Minimum Wage have to give labour inspectors the right to enter and review and copy pay slips.

C189 Article 11

Each member shall take measures to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex.

Article 17

1. Each Member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.
2. In so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due respect for privacy.

Working Group Recommendations on Minimum Wage

- ✓ Clearly differentiate between small and family businesses and households in the Notification (2/2018).
- ✓ Extend minimum wage coverage to domestic workers and specify skills and pay levels.
- ✓ Develop a system for inspection of payment of domestic workers with due regard to privacy.

3. Payment of Wages

Housemaids are included in the **Payment of Wages Law (2016)**. The law states that employers should pay wages monthly and may not make deductions except in some specified situations. Some of these exemptions directly affect domestic workers. For example, although allowing deductions from salaries for absence taken without approved leave is not generally unreasonable, in the case of domestic workers who are excluded from the Leave and Holidays Act, it could be interpreted to mean that any leave taken by a domestic worker is not approved or allowed and therefore the salary can be deducted.

The law is in line with the R201 in not allowing deductions for uniforms or materials needed to perform the work. The clauses allowing employers to make deductions for housing and other services provided by employer or government and for damage or loss of material or money through neglect or fault of the worker should be reviewed in relation to the international standards.

C189 Article 12(2)

National laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favourable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable.

R201 Article 15 (1) Domestic workers should be given at the time of each payment an easily understandable written account of the total remuneration due to them and the specific amount and purpose of any deductions which may have been made.

R201 Article 14 (d) ensuring that, when a domestic worker is required to live in accommodation provided by the household, no deduction may be made from the remuneration with respect to that accommodation, unless otherwise agreed to by the worker;



Working Group Recommendations on Payment of Wages

- ✓ The law should be specific regarding payment in kind and deductions including establishing a method to calculate the monetary value of payments in kind.
- ✓ The percentage of deduction allowed should be agreed through consultations.
- ✓ The law should also ensure that when domestic workers are required to live in, accommodation should be provided by the employer and no deduction may be made from the remuneration with respect to that accommodation and food.
- ✓ The following Articles of the Convention and Recommendation can be used for guidance (R201 Articles 7, 8, 13, 14, 15, 21).

4. Disputes Settlement

The Settlement of Labour Dispute Law (SLDL) (as amended in 2019) has a wide application to most workers.

The legal framework relating to labour disputes aims to safeguard the rights of workers and ensure successful employment relationships through peaceful workplaces where settling disputes between employers and workers is done fairly and efficiently. It is in employers' and workers' interests to reach a solution at the workplace level without recourse to the formal dispute settlement system.



In the Settlement of Labour Disputes Law (SLDL) as amended in 2019 disputes are defined as a disagreement between an employer (or employer's organization) and a worker (or worker's organization) in relation to: employment, working and termination; gratuities; bonuses and allowances; compensation for grievances; workplace injuries, deaths and occupational diseases; any matters relating to holidays and leave and in relation to matters relating to the interests of workers.

The first step in resolving disputes that fall within the scope of the SLDL is to try and resolve them at a workplace level. For workplaces where there are less than 30 workers (and therefore no Workplace Coordinating Committee), a grievance shall be submitted to the employer. The employer shall negotiate and settle with the worker or their representative within seven days of receiving the request. Section 9 provides that if a dispute is settled, the parties make a collective agreement although this would not be appropriate in individual disputes such as domestic workers. It also provides a broad mandate for a complaint to be received by a conciliation body. Where no solution is reached, complaints relating to rights or not otherwise under the mandate of the conciliation body must be submitted to concerned departments or the competent court.

However, because domestic workers are excluded from some labour laws it is difficult to identify exactly what rights they are entitled to and therefore whether they have the right to file a complaint under the SLDL. Domestic workers are, however, included in the Labour Organization Law which is one of the main labour laws referred to in the SLDL.

In practice, it is very difficult for domestic workers to lodge a complaint against their employer, particularly if they are living in the same accommodation.

C189 Article 16

Each Member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.

Article 17

Each member shall establish effective and accessible complaints mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.

Working Group Recommendations on Dispute Settlement

- ✓ Institutionalise a 24/7 complaints mechanism which is accessible to domestic workers with systems in place to respond immediately, give remedy for grievances and impose penalties.
- ✓ Other mechanisms could be considered, such as employers and domestic workers registering at the Ward Administration which would then be tasked with receiving and acting on complaints.
- ✓ Review domestic workers' rights to file complaints under the current SLDL.



5. Right to Organize

Domestic workers are one of the named work sectors that are covered by the Labour Organization Law (LOL). According to this law, basic labour organizations may be formed by a minimum number of 30 workers according to the category of trade or activity. In practice therefore it is extremely challenging for domestic workers to form a basic labour organization. Domestic workers work alone and rarely have time off work to meet other domestic workers and many have their freedom of movement restricted.

C189 Article 3 (2 (a))

In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.

Working Group Recommendations on Right to Organize

- ✓ Domestic workers' rights to organize and participate in union activities should be enshrined in the law.
- ✓ The barriers facing domestic workers should be addressed and measures should be developed in consultation with government, employers and unions to facilitate domestic workers right to freedom of association and collective bargaining.

6. Social Security

According to the 2012 Social Security Law, domestic workers can contribute to social security voluntarily but their employers are not obligated to pay into the system. Under the Workmen's Compensation Act, workers, apart from manual labourers, whose monthly wages exceeds 40,000 MMK are not entitled to any compensation. It is not clear if domestic workers are considered manual workers or not.

C189 Article 14

Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity.

Working Group Recommendations on Social Security

- ✓ Social security should be mandatory, with contributions being paid by both the employers and the domestic workers, to ensure that domestic workers have equal access to social protection as other workers.

7. Leave and Holidays

The Leave and Holidays Act (1951) excludes cooks, house cleaners, nannies and security guards. It is however not clear if there are other categories of domestic workers who are included. Without the guarantee of rest days and public holidays, domestic workers are denied a basic right which impacts on their physical and mental health. In addition without rest days they cannot pursue further education, join in family events or organize for their rights.

C189 Article 10

1. Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work.
2. Weekly rest shall be at least 24 consecutive hours.
3. Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice.

Working Group Recommendations on Leave and Holidays

- ✓ The exclusions of certain categories of workers should be repealed from the Act. All domestic workers should be included.
- ✓ Specific legislation on domestic workers should specify leave and holiday arrangements, and overtime pay for holidays, weekends and should guarantee a minimum of 24 consecutive hours of weekly rest. Legislation will need to take into account the particular conditions of domestic workers and to develop the details in consultation with domestic workers and employers. Further guidance can be found in C189 Articles 9, 14 and R201, 13.

8. Domestic Work and Minimum Age

According to **the Child Rights' Law (2019)**, no child shall be employed or forced to work in the worst form of labour and no child younger than 14 years shall be considered employable. The Ministry of Labour, Immigration and Population shall identify types of hazardous jobs and hazardous working environments in consultation with the relevant associations of employers and workers.

According to **the Factory Act (1951)**, a child includes a person who has attained the age of 14yrs but has not yet attained the age of 16, and youth are persons who have attained the age of 16 and not yet attained the age of 18. Children and youth are only permitted to work during 6am to 6pm and for no longer than four hours. They are not permitted work in any hazardous workplace.

In **the Shops and Establishments Act (2016)**, a person, who attained the age of 14 but has not attained the age of 16, is restricted to work in any hazardous workplace and is only permitted to work between 6 am and 6 pm.

No law specifies the minimum age for domestic workers.

C189 Article 4

Each member shall set a minimum age for domestic workers and shall take measures to ensure that work performed by domestic workers who are under the age of 18 and above the minimum age of employment does not deprive them of compulsory education, or interfere with opportunities to participate in further education or vocational training.

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Working Group Recommendations on Minimum Age for Domestic Workers

- ✓ In consultation with domestic workers, labour organisations and employers set a minimum age for domestic workers.
- ✓ If such age is lower than 18 years the law should provide special condition for workers aged 14 years to 18 years in terms of maximum hours of work, restrictions on hazardous jobs, extra safety mechanisms to protect against abuse and harassment; and access to education and vocational courses.

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9. Occupational Safety and Health

The Occupational Safety and Health Law (OSHL) (2019) lists places of work where the OSHL can be exercised. Private households are not included in the list. Nevertheless, the law does give MOLIP the power to add workplaces to the list in consultation with relevant stakeholders.

Adding households to the list would be particularly beneficial to domestic workers especially, the right enshrined in the law which allows workers to stop work and remove themselves when they believe that a work situation puts them in danger. In the case of a domestic worker such situations might occur if they are being forced to clean the outside of windows in high rise apartments or if they are facing sexual harassment or violence of any kind.

Domestic workers would also be affected by the clause obliging employers to reinstate workers who had been restricted from work because of health issues once the health of the worker has improved.

C189 Article 13

1. Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers.

R201

4. Members giving consideration to medical testing for domestic workers should consider:
 - (a) making public health information available to members of the households and domestic workers on the primary health and disease concerns that give rise to any needs for medical testing in each national context;
 - (b) making information available to members of the households and domestic workers on voluntary medical testing, medical treatment, and good health and hygiene practices, consistent with public health initiatives for the community generally; and
 - (c) distributing information on best practices for work-related medical testing, appropriately adapted to reflect the special nature of domestic work.

19 (a) protect domestic workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in order to prevent injuries, diseases and deaths and promote occupational safety and health in the household workplace;

Working Group Recommendations on Occupational Safety and Health

- ✓ Taking into account specific characteristics of domestic work, effective measures should be set to ensure the occupational safety and health of domestic workers in line with C189, Article 13 and R201 Article 4 and 19 (a–e)
- ✓ In terms of violence and harassment at work, the Convention on Ending Violence and Harassment in the World of Work, Convention No 190 should be consulted.

10. Employment Contract

Various laws govern the terms and conditions included in a contract but it is the Employment and Skills Development Law (2013) which makes the employment contract a legal, binding document.

The scope of the work covered by the law, is broad and it does not include domestic workers or households.

Domestic workers are therefore not legally entitled to an employment contract. Without an employment contract they have no legal basis on which to file complaints. Any rules established within the household, whether within the boundaries of other laws or not, would have no legal standing.

C189 Article 7

Each member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements.

Working Group Recommendations on Employment Contracts

- ✓ The Definition of worker and employer in the revised Employment and Skills Development Law should include domestic workers and households as places of work.
- ✓ A standard Employment Contract between employers and domestic workers should be developed in consultation and should be signed and sent to the Labour Exchange Office.

11. Skills

The Employment and Skills Development Law (2013) by excluding domestic workers from coverage under this law, denies domestic workers right to skills training or assessment or certification

R 201 Article 25

Encourage the continuing development of the competencies and qualifications of domestic workers, including literacy training as appropriate, in order to enhance their professional development and employment opportunities;

Working Group Recommendations on Skills

- ✓ Include the development of skills training courses and institutes for domestic workers in law.
- ✓ Provide for assessment and accreditation of skills in the law.

12. Recruitment

Domestic workers are not included in either the Employment and Skills Development Law (ESDL) which only relates to employers with more than five workers³ or the Employment Restriction Law (1959) which only relates to employers with more than fifty workers. The exclusion from both Acts denies domestic workers access to recruitment facilities through the Labour Exchange offices or job fairs organised by the MOLIP. Domestic workers are then dependent on unlicensed brokers or private recruitment agencies.

C 189 Article 15

1. To effectively protect domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abusive practices, each Member shall:
 - a) determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice;
 - b) ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers;
 - c) consider, where domestic workers are recruited in one country for work in another, concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment; and
 - d) take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.

³ According to the Rules to ESDL



Working Group Recommendations on Recruitment Procedures

- ✓ Provide detailed responsibilities and procedures by law for recruitment processes for domestic workers and employers, including through direct hire, public recruitment agencies and private recruitment agencies.
- ✓ Ensure laws have appropriate remedies for domestic workers cheated or exploited in the recruitment process and adequate penalties for employment agencies using fraudulent or exploitative methods.
- ✓ Refer to the ILO Convention on Private Employment Agencies 1997 (Convention No. 181) for further guidance.

The Way Forward: A Domestic Workers Act

The gap analysis highlights the patchy coverage of domestic workers in the current set of labour laws, which leave not only domestic workers but also employers unsure of their rights and responsibilities. Reforming one law at a time may not solve the problem, as pointed out above, exclusion from some laws impacts on the ability to exercise rights under another law. The Working Group therefore recommends a new law specific to domestic workers is developed to provide comprehensive and cohesive protection of domestic workers rights.

In addition, the nature of domestic work is not the same as other work. Regulating hours of work, stand by hours, rest days and holiday leave requires specific regulations responding to the live in nature of their work. Inspecting the conditions also requires specific rules which respect the employers right to privacy in their own home, but which at the same time ensures that there are systems in place to inspect the workplace, the living quarters, the working conditions and payment.

Even where domestic workers are included in current laws, such as the Labour Organization Law, due to the isolation of domestic workers, it is not practical for domestic workers to meet and organize with 30 other domestic workers. The close proximity in work and daily life with the employer also makes using complaints mechanisms or getting access to justice challenging.

The enactment of a law specifically on domestic work will not only benefit domestic workers but will also benefit the employers and all those in the care of domestic workers. There would be systems in place for hiring with clear responsibilities on both sides, domestic worker skills would be accredited so employers would be able to match the skills to those needed in their households as well as to wage structures. Regulating recruitment processes will reduce the risk of fraud and cheating.

Domestic workers form a large and important work sector in Myanmar. The enactment of a Domestic Workers Law could recognize, regulate and reform the domestic work sector.

Working Group on Legal Protection of Domestic Workers

