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Consultations with Labour Attachés and Consular Officials in Malaysia on the Protection of Migrant Workers



SUMMARY REPORT

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Summary report: Tripartite Action for the Protection and Promotion of the Rights of Migrant Workers in the ASEAN Region (ASEAN TRIANGLE project) and The Tripartite Action to Protect Migrants Workers in the Greater Mekong Sub-region from Labour Exploitation (the GMS TRIANGLE project)

The GMS TRIANGLE project is a five-year project to strengthen the regulation of recruitment practices and improve workplace protection. The project aims to strengthen policy, build the capacity of key stakeholders (tripartite constituents, recruitment agencies, civil society organizations and migrant workers), and provide support services to female and male migrant workers, and potential migrant workers.

The ASEAN TRIANGLE project aims to promote and protect the rights of migrant workers in the ASEAN region through increased legal and safe migration and improved labour protection. The project promotes both bilateral and regional approaches to deal with shared concerns, make regionalism more effective, and enhance the capacity of institutions in ASEAN.

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TABLE OF CONTENTS

INTRODUCTION	5
OBJECTIVES	7
SUMMARY OF CONSULTATIONS	8
LABOUR LAWS AND THE ROLE OF LABOUR ATTACHÉS (20 November 2012)	8
ANTI-TRAFFICKING (21 May 2013)	10
ENFORCEMENT AND DEPORTATION OF UNDOCUMENTED WORKERS (17 October 2013)	12
ACCESS TO THE JUDICIAL SYSTEM (30 May 2014)	15
OCCUPATIONAL SAFETY AND HEALTH (30 September 2014)	17
IMMIGRATION DETENTION (16 March 2015)	19
CONCLUSION AND ADDITIONAL RECOMMENDATIONS	22



INTRODUCTION

There are approximately 14 million migrant workers from ASEAN Member States, of whom 6 million moved within Southeast Asia.¹ Nearly 40 per cent of these migrants are women. Migration is a significant driver of economic growth and poverty reduction in countries of origin and destination, with cases where the prosperity of entire industrial sectors and geographical sub-regions are reliant on migrant workers.

The International Labour Organization (ILO) provides technical cooperation on labour migration in Southeast Asia through the GMS TRIANGLE project and the ASEAN TRIANGLE project.² The projects aim to strengthen policy and legislation; build capacity of key stakeholders including governments, employers' and workers' organizations, recruitment agencies and civil society organisations (CSOs); provide support services to migrant workers; and build regional cooperation on labour migration.

One important measure for countries of origin in migration management and the protection of migrant workers is the appointment of labour attachés or consular officials in major countries of destination. As the first point of contact for migrant workers seeking assistance abroad, labour attachés and consular officials are required to vet prospective employers and contracts, respond to grievances and disputes, and facilitate the repatriation of citizens.

In 2012, the ILO and the Bar Council Malaysia (BCM) Sub-Committee on Migrants, Refugees and Immigration Affairs³ collaborated in initiating and organizing a series of consultations for labour attachés and consular officials working in diplomatic missions of countries that deploy migrant workers to Malaysia. The practice has been replicated in Thailand, and has been shared with the relevant stakeholders in Singapore.

In Malaysia, officials who participated in the consultations were from Cambodia, Lao People's Democratic Republic, Indonesia, Myanmar, Thailand, Philippines, Vietnam,

¹ UN Department of Economic and Social Affairs (UNDESA), Population Division (2013).

² Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion (GMS TRIANGLE Project) is funded by the Australian Government Department of Foreign Affairs and Trade. Tripartite Action to Protect the Rights of Migrant Workers in the ASEAN Region (ASEAN TRIANGLE) is funded by the Canadian Department for Foreign Affairs, Trade and Development.

³ Now the Bar Council Migrants, Refugees and Immigration Affairs Committee (MRIAC).

India, Pakistan, Bangladesh, and Sri Lanka. Malaysian Government officers from several departments also took part in the discussions, including representatives from the Ministry of Human Resources (MOHR), Anti-Trafficking in Persons Council, Department of Occupational Safety and Health (DOSH), Department of Immigration, Royal Malaysia Police, and the Malaysian Judicial and Legal Services. Organizations such as the Human Rights Commission of Malaysia (SUHAKAM) United Nations High Commission for Refugees (UNHCR), International Organization of Migration, Malaysian Trades Union Congress (MTUC), Malaysian Employers' Federation (MEF) and Tenaganita also took part. Efforts were made to ensure an equal representation of women and men in these consultations.

This summary of discussions from the six consultations can serve as a reminder of the discussions and the recommendations, so that follow up action can be taken. The document can also serve as a means of ensuring knowledge management and institutional memory within the diplomatic missions given the regular turnover of staff. Full reports of each consultation are available upon request from the MRIAC and the ILO.



OBJECTIVES

The overarching objectives of the consultations were to improve the quality of support services provided to migrant workers by diplomatic missions through: increasing their knowledge of relevant Malaysian laws and procedures, and international labour standards; and strengthening relationships between and among the diplomatic missions and local authorities, social partners and civil society organizations (CSOs).

These objectives were achieved through the following activities:

- Providing information and updates on Malaysian laws, policies and procedures, as well as relevant international standards relevant to the functions of the labour attachés;
- Establishing a platform for labour attachés and consular officials to share practices and experiences in responding to the needs of migrant workers, often drawing on real cases (with appropriate sensitivity to confidentiality); and
- Introducing activities of other key actors involved in protecting and promoting the rights of migrant workers, and exploring the potential for enhanced cooperation.

Topics for the consultations were identified following discussions with key stakeholders, including government officials, staff from diplomatic missions, MRIAC, social partners, CSOs and ILO TRIANGLE project staff:

- Labour laws and the role of labour attachés (November 2012).
- Anti-trafficking in persons (May 2013).
- *Ops Bersepadu 6P* Programme (Crackdown on Illegal Immigrants under Government's Illegal Immigrant Comprehensive Settlement programme) (October 2013).
- Access to the judicial system (May 2014).
- Occupational safety and health (September 2014).
- Immigration detention (March 2015).

SUMMARY OF CONSULTATIONS

LABOUR LAWS AND THE ROLE OF LABOUR ATTACHÉS

(20 November 2012)

The aim of this consultation was to improve the knowledge of labour attachés on Malaysia's laws and procedures governing the protection of migrant workers. Key issues discussed were the provisions of the Employment Act 1955 (Employment Act), and the role of labour attachés and the implementation of the 'one-country team approach' in assisting migrant workers. As the first in a series of consultations, it also served as an opportunity for representative employers' and workers' organizations to introduce their role and functions.

Main points of the presentation

The Employment Act provides minimum standards of protection and conditions of service that are equal for Malaysian nationals and foreign workers – but do not apply to domestic workers. The general provisions of the Employment Act relate to benefits and rights to legal redress including the following: contracts of employment; payment of wages; methods of payment; restrictions on advancement of wages and deduction of wages; hours of work; rest days; public holidays; sick leave; annual leave and maternity protection. There are specific provisions concerning insurance for foreign workers, though foreign and local workers receive the same entitlements in terms of sick leave and annual leave.

Foreign workers who earn less than MYR 2,000 per month (US\$549) are covered under the Employment Act, and work in basic capacities as manual labour in the service, industrial, plantation and construction sectors. The minimum wages for both local and foreign workers have been set at Malaysian ringgit (MYR) 900 (US\$247) for workers in Peninsular Malaysia and MYR800 (US\$220) for workers in Sabah and Sarawak. The wages of professionals are governed by the Malaysia Standard Classification of Occupation while that of foreign domestic workers are based on memorandum of understanding with the respective governments of sending countries.

Role of labour attachés and social partners

The functions of labour attachés are summarized as the '4Ps': protection of migrants, promotion of employment, policy development and promotion of good relations.

The general principles in the protection of migrant workers are:

- To safeguard workers' rights, upholding his or her dignity and ensure that each person/worker is accorded fair treatment;
- To ensure that he or she is not discriminated against;
- To help in cases of inhuman and unsafe conditions;
- To ensure that rights and well-being of women migrant workers are protected; and
- To provide assistance in all phases of the migration cycle.

The Malaysian Employers' Federation (MEF) promotes and safeguards the rights and interests of employers in Malaysia and advocates for direct recruitment of migrant workers rather than reliance on agents or outsourcing companies. It proposes a "one-stop centre" for immigration and labour issues with the involvement of the Ministry of Home Affairs and the labour attachés of countries of origin. The Malaysian Trades Union Congress (MTUC) has been mediating disputes between migrant workers and their employers, and has provided food, shelter and money to displaced workers. MTUC indicated that disputes regarding wages and other grievances with employers should be referred to relevant government departments, such as the Labour Department. Strikes at workplaces are discouraged as they are against the law.

Key issues and recommendations

Key concerns raised by participants related to workplace issues faced by migrant workers when trying to initiate complaints. Disputes brought before the Labour Court primarily concern wages and overtime payments which are not in accordance with conditions provided for in the Employment Act. Foreign workers are often unable to provide sufficient evidence, such as pay slips, to support their complaints as this is withheld by their employer. In such situations, it was recommended that labour officers invoke their legal powers to request this evidence from the employer concerned instead of rejecting the workers' claims.

There have been cases where workers who lodged complaints against their employers were harassed or sent home and it was reported that some employers even cancelled permits or passes while workers were awaiting their court hearing. Participants agreed that this should not be allowed to happen and it was proposed that coordination between the Labour and Immigration Departments be strengthened to ensure that employers are prohibited from cancelling permits in such situations.

Further, the meeting was informed that harassment is not covered in the Employment Act, something which participants considered should be addressed. Unusually long delays in court hearings should also be avoided, noting the Labour Department has provided assurances that all disputes will be settled within 90 days. A related proposal slated for further discussion with the Labour and Immigration Departments was that

unemployed migrant workers awaiting a court decision be allowed to find alternate temporary employment.

In court cases related to wage disputes, money paid to employees in compensation do not reach them if they have already left the country. Labour attachés were encouraged to strengthen their databases of workers from their countries to facilitate the remittance of compensation payments. It was reported that some employers promise to pay their workers' salaries at the end of their stay here but this does not happen. It was proposed that the check-out memo issued by the Immigration Department, required by departing migrant workers, be issued by the respective sending country missions instead so they can ensure that workers' salaries have been paid. The Immigration Department has not yet responded to this proposal. It was also recommended that the number of labour inspectors be increased so that more spot checks can be carried out on employers.

ANTI-TRAFFICKING

(21 May 2013)

The aim of this consultation was to improve the knowledge of labour attachés on Malaysia's Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM Act) and facilitate greater communication between diplomatic missions, authorities, social partners and CSOs to strengthen the protection of migrant workers against human trafficking. Discussion focussed on the framework governing anti-trafficking and issues faced by victims of trafficking.

Main points of the presentation

The 2007 Anti-Trafficking in Persons (ATIP) Act focused on the prosecution of offenders and protection of victims, particularly women and children. This was later amended to the Anti-Trafficking in Persons and Smuggling of Migrants (ATIPSOM) Act to criminalize the smuggling of migrants and allow for more effective implementation of the law with the inclusion of labour inspectors as enforcers, and additional CSOs in the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) which coordinates the implementation of the Act, and formulates programmes and measures to prevent and combat trafficking in persons and smuggling of migrants.

In 2010, the National Action Plan on Trafficking in Persons (National Action Plan) was launched to strengthen the anti-trafficking framework.

The five guiding principles under the National Action Plan are:

- Civil society participation;
- Human rights based treatment of victims;
- Interdisciplinary coordination of governmental and international organizations;
- Systematic evaluation and sustainability; and
- Government ownership.

Key issues and recommendations

Key concerns raised by participants related to potential prosecution of victims of people trafficking, access to legal representation and the ability of migrant workers to work while a case against an employer is pending.

To determine if a person is a victim of trafficking, and institute criminal proceedings against the perpetrator, evidence needs to be recorded by the Magistrate within seven days from the time the victim appears before the latter to give a deposition. Victims are often reluctant to talk to labour officers and sometimes there are discrepancies in their statements, which makes prosecution difficult. There also appears to be some confusion between forced labour and sub-standard treatment and this difference should be more clearly explained to enforcement officers and the victims to facilitate effective prosecution. The cooperation of diplomatic missions in providing accredited interpreters would also be useful in this regard.

There are cases where migrants have been brought to Malaysia and forced to work with no pay. Often, when migrants lodge a complaint they are threatened with arrest for entering the country by irregular means. Police reports in most such cases produced no results and Labour Courts have been ineffective in making employers pay their workers. Participants considered that some means must be found to enforce penalties against make employers who have been found to violate laws.

Recruiting agents or outsourcing companies have often used fake documents and vague promises of employment to recruit workers. More properly trained and full-time enforcement officers can be useful in combating this issue and the recruitment process should be revamped to have more government involvement. The Labour Department should be more aggressive in its enforcement by pressing employers for their migrant workers' contracts and not withholding their documents. MTUC has also offered to work with diplomatic missions of sending countries on this matter.

Frequently, there are delays in Malaysia authorities advising foreign missions that migrant workers may require legal representation and this made it difficult for diplomatic missions to arrange for legal counsel. In some instances the victims have already been deported before diplomatic missions have received such advice.

It was further proposed that the missions of sending countries increase budgetary allocations for legal representation and other forms of assistance for their nationals. It was also proposed that diplomatic missions should educate their nationals about trafficking to decrease the likelihood that they will be cheated.

Victims of human trafficking are placed under protection orders of three months or longer while their case is being investigated, which also restricts their ability to work. This has resulted in some cases where the trafficked victim decided not to pursue their case so that they were free to work. A solution has to be found where the trafficked victim is able to find employment while ensuring that the investigation and prosecution proceed.

ENFORCEMENT AND DEPORTATION OF UNDOCUMENTED WORKERS

(17 October 2013)

The focus of this consultation was on the “*Ops Bersepadu 6P* programme” (6P programme). This programme, initiated in July 2011, dealt with the six processes involved in resolving the issue of undocumented migrant workers and immigrants in Malaysia: registration, legalization, amnesty, monitoring, enforcement and deportation. At that time, there were 2.3 million migrant workers on record, of which 1.3 million were undocumented, including children.

Main points of the presentation

There are a number of key provisions under the Immigration Act 1959/63 (Immigration Act) that govern the entry and exit of foreigners into Malaysia, including:

- Section 5(2) prohibits entry into Malaysia via unauthorized routes. Many such routes exist in Sabah and Sarawak, which neighbours Indonesia, and along the Johor coast.
- Section 6 requires foreigners to possess a valid pass or permit.
- Section 9 relates to staying in Malaysia without proper documents or after documents have expired or been revoked.
- Section 55A relates to bringing migrants to Malaysia to work under false pretences, usually using social visit passes.
- Section 55B relates to those who employ undocumented migrant workers. A fine of between MYR10,000 (US\$2,790) and MYR50,000 (US\$13,952) and imprisonment not exceeding 12 months may be applied.

- Section 55D relates to making, forging or altering a document. This carries a fine of between MYR30,000 (US\$8,371) and MYR100,000 (US\$27,905) or imprisonment of between 5 to 10 years and whipping of not more than six strokes.
- Section 55E relates to a person allowing an illegal immigrant to enter or remain at their premises. Under section 56(1) this offence will be construed as harbouring if one had previous knowledge of their presence, which attracts a higher penalty.

Offences under the Passports Act 1966 include forging documents, falsifying information, impersonation and possession of another's passport, procuring a passport using false information, and making a false passport. The most severe penalty is a fine of between MYR15,000 (US\$4,186) and MYR100,000 (US\$27,905) a jail term between 2 and 10 years and whipping of not more than six strokes.

Participants also discussed the relevant international standards on detention and deportation of undocumented migrants as reference points for developing laws and policies for the protection of migrants. These standards are included in the United Nations (UN) International Convention on the Protection of the Rights of All Migrant Workers and Members of the Families, 1990, the ILO Migration for Employment Convention, 1949 (No. 97) and the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). The UN Convention and Convention 143 include protections for migrant workers regardless of their status.

Key issues discussed included the circumstances in which undocumented migrants travelled to Malaysia, or how they transitioned from regular to irregular status. Many migrant workers are victims of human trafficking. Before leaving their home countries, these workers are promised good jobs and salaries but such expectations are not met upon arriving in Malaysia. Some do not even having a valid work permit, increasing their vulnerability and making them fearful of arrest.

The arrest of undocumented migrants under the 6P programme began in September 2011, in accordance with the Immigration Act and the Passports Act. The majority of migrants arrested were from Indonesia, followed by Myanmar, Bangladesh, Cambodia, Pakistan and India. Many were women and children. A total of 135 agencies were enlisted to assist the Immigration Department in the various processes that were part of the 6P programme. Although 6,500 migrants were arrested under the programme, only 14 cases were investigated and the migrants charged – as it was a difficult task to undertake investigations into all cases.

When migrants were unable to provide valid documents, they were brought before the Immigration Court, charged and deported. Undocumented migrants with employment could apply for amnesty and to regularize their status, although it was not always guaranteed.

Key issues and recommendations

Migrant workers not in possession of a pass or permit can be arrested and detained for 14 days. They are then brought before the Immigration Court, charged and deported. Due to the large number of cases, these investigations are often conducted in a cursory manner and migrants rarely get a fair trial. It is a common practice amongst migrant workers not to carry their documents for fear of losing them. It is proposed that migrant workers who eventually produce documents be released unless there is reasonable suspicion of an offence having been committed.

The inability of migrant workers to communicate effectively due to language barriers, and the lack of legal representation have been major issues for workers. It was proposed that foreign missions provide interpreters to help their detained nationals. Delays in consular officials receiving advice that their nationals had been detained was again noted, with this advice often coming too late to allow for any effective action to be taken.

The protection of Indonesian migrant workers in Malaysia was a particular issue for discussion and it was noted that the response amongst Indonesian migrants towards the 6P programme was poor. Many arrived on social visit passes, worked illegally, then converted their pass to work permits and continued working. Others continued working irregularly until their passes expired, joining the large numbers who were undocumented. Stricter enforcement of deportation was proposed.



ACCESS TO THE JUDICIAL SYSTEM

(30 May 2014)

The focus of this consultation was on migrants' access to the legal and judicial system, particularly through effective complaint mechanisms.

Main points of the presentation

Migrant workers can use available legal mechanisms to ensure their rights are protected, either under their respective contracts of service, or under relevant laws such as the Employment Act 1955 and the Industrial Relations Act 1967. The legal channels available to migrant workers include lodging a complaint to the Labour Department regarding violations of labour legislation, filing a complaint under the Labour Court process, or, in the case of unfair dismissal, filing for representation under Section 20 of the Industrial Relations Act.

Complaints received by the Labour Department relate to breaches of:

- Provisions of the Employment Act;
- Minimum wage entitlements provided under the National Wages Consultative Council Act 2011;
- Workers' amenities provided under the Workers' Minimum Standard Of Housing And Amenities Act 1990;
- Compensation under the Workmen's Compensation Act 1952; and
- Trafficked persons under the APTISOM Act.

Migrant workers can file complaints at the Labour Office, or contact the Labour Department either through the assistance of trade unions, CSOs, and diplomatic missions. These avenues are vital for labour attachés to know so they can provide adequate support to migrant workers seeking legal redress. The locations of the various labour offices throughout Peninsular Malaysia can be found on MOHR's website at www.mohr.gov.my.

After a complaint is filed, the Labour Department has to identify the employer and the issues involved. In many cases, the identification of the employer is difficult as migrant workers usually have more than one employer through the practice of sub-contracting. Another problem faced by the Labour Department is the boundaries of jurisdiction set by the Employment Act. The Labour Court is not contained within the Malaysian hierarchy of courts, and cases involving a person with a salary exceeding MYR5,000 (US\$1,395) immediately become civil cases.

Migrant Worker Resource Centres (MRCs)

MRCs established under the ILO GMS TRIANGLE project, in collaboration with MTUC, have been established in Penang, Kuala Lumpur-Selangor, and Johor. Currently the existing MRC functions include disseminating information on workers' rights, including worker rights in the case of possible arrest and detention; case management; identifying and training peer leaders; training personnel on case management; and networking with CSOs and trade union partners in both countries of origin and destination. MTUC works closely with labour attachés on case management, safe repatriation, identification of forced labour practices, the rescue of victims of forced labour, and sharing of information on government policies and practices.

Malaysian Employers' Federation

Workplace grievances may be due to a number of causes including exploitation and abuse, the working environment, discrimination, and dissatisfaction over terms and conditions of work. The MEF provides workers with a handy guidebook on their rights and responsibilities as well as complaint mechanisms. Grievances should be resolved fairly, amicably and as quickly as possible. If the problem at the workplace cannot be resolved, it should be referred to the Labour Department or the Industrial Relations Department for mediation. The integrity of this formal procedure should be maintained.

The MEF has recommended that grievance procedures be established at the workplace level. This procedure is normally stipulated in the collective agreement, HR policy of the company as well as the employee's handbook. The grievance procedure proposed by MEF is a step-by-step procedure from filing the complaint with the immediate supervisor, to consideration by the Labour Department.

Key issues and recommendations

The view of participants was that the Government must establish clear guidelines that outline procedures for making complaints, based on collaboration between various governmental agencies. An effective system where all complaints are systematically recorded, monitored and filed should also be established, in addition to increasing oversight and accountability of the brokerage system and recruitment agencies.

The role of diplomatic missions in monitoring the conditions of work of migrant workers, and collaborating with trade unions and CSOs should be strengthened. Diplomatic missions should also ensure that migrant workers are made fully aware of their rights, and the ways in which they can access complaint mechanisms.

It was recommended that labour recruitment should be managed on a government-to-government (G-to-G) basis with no third party involvement. Under the G-to-G arrangement between Malaysia and Bangladesh, the average cost for the Bangladeshi migrant worker to get a job in the plantations sector has been reduced from MYR12,000 (US\$3,349) to MYR1,200 (US\$335).

Whereas previously it was incumbent on the employer to pay the foreign worker levy, this is now the responsibility of the worker following a Cabinet decision after the implementation of the Minimum Wages Order 2012. To address this, policy decisions have been made where the employer pays the levy, which is then deducted from the foreign worker's wages. This has resulted in confusion for foreign workers with many arrested for not paying the levy.

OCCUPATIONAL SAFETY AND HEALTH

(30 September 2014)

The focus of this consultation was to increase understanding of the legal framework related to the occupational safety and health of migrant workers, and the accident compensation mechanism in Malaysia.

Main points of the presentation

The occupational safety and health of migrant workers is under the purview of Department of Occupational Safety and Health (DOSH), and the Workmen's Compensation Act and the Foreign Workers Insurance Scheme cover migrant workers who suffer accidents while at work. Under this scheme, employers are required to purchase insurance policies from any of the 31 insurance panellists appointed by the MOHR. These policies provide for temporary disablement, permanent partial disablement, permanent total disablement and death.

Under the ILO's Decent Work Agenda, workers should be provided with a safe and healthy workplace to obtain optimum productivity. Good practices focus on preventing accidents from happening in the workplace. In Malaysia, work-related accidents occur mostly in the construction and manufacturing industries. Crushing and entanglement are the most common accidents and the victims are most often those who have been employed for less than 6 months, receive insufficient training and have language barriers. Workers' misunderstanding of safety rules, poor working conditions and excessive workloads have been identified as the main causes of workplace accidents.

Key issues and recommendations

Concerns by participants focussed on the ability of employers to avoid obligations in respect of compensation, and delays faced by workers in receiving compensation payments. Malaysian laws do not compel employers to obtain insurance for skilled and semi-skilled workers, meaning employers often classify their workers as skilled or semi-skilled to avoid payment. To address this issue, the worker's status should be clearly stated in their work contract.

Payment of compensation is a slow process. This could be expedited if information on the next-of-kin is systematically maintained in a database, with the preferred process of remittance made clear. Some countries have requested that compensation payments be remitted via their diplomatic missions; however, remittance of monies through third parties is not provided for in the Workmen's Compensation Act.

There have also been complaints of unequal treatment between local and migrant workers. Employers often do not report accidents involving migrant workers, especially if they were not properly trained, claiming this is the responsibility of the contractors who supplied these workers.

Participants considered that insurance companies are always looking for ways and means not to pay compensation. Non-payment of compensation should not be based on reasons not stated in the Workmen's Compensation Act such as drugs, deliberate self-injury or under the influence of alcohol.

Undocumented workers who sustain workplace injuries are often not compensated by their employers. When this happens they are unable to lodge complaints or police reports. Workers who complain regarding employers' non-compliance with DOSH requirements are often dismissed. It is proposed that workers complain to their respective diplomatic missions, the MRIAC, BCM's LAC, or to MTUC.

Restrictions may also be placed on the movement of migrant workers. For example, when there is an outbreak of disease at the workplace, it is often difficult to get statements from migrant workers. Migrant workers who are witnesses to crimes are often imprisoned or have their movement restricted.

IMMIGRATION DETENTION

(16 March 2015)

This consultation focused on increasing understanding of the laws and procedures on detention, prosecution and deportation of undocumented migrants; and challenges and good practices in ensuring access to redress, health care and humane deportation.

Main points of the presentation

It is estimated that only half of the migrant workers in Malaysia are documented. The status of a migrant worker can change from regular to irregular for various reasons, for example, where their visa, passport or work permit expires, they leave their designated employer, are dismissed, or become victims of people trafficking. In destination countries, the pervading discourse associates irregularity with criminality, and irregular migration is viewed as a security issue. In Malaysia, undocumented migrants are held in police custody, prisons and detention centres.

Detention centres are immigration depots used to detain immigration offenders for the purpose of investigation, remand hearing or until deportation. There are 14 immigration depots in Malaysia, including two in Sarawak, which can accommodate 13,700 detainees. The Quality Management System MS ISO 9001:2008 is being implemented in all immigration depots with emphasis on the welfare of detainees. The number of meals has increased to four a day and the government spends MYR1.2 million (US\$ 327,600) per month on food for the detainees. Expenditure on detainees is MYR75 (US\$ 20.40) per detainee per day for housing, food, utilities, staffing and medical facilities.

With regards to healthcare, an assistant medical officer is stationed at each of the depots and there are fortnightly visits from the Health Department. In 2014, 16,000 detainees were seen by medical personnel. Common medical complaints experienced by detainees are fever and tuberculosis.

Prosecution of immigration offenders

Under the Immigration Act, detention of an accused is in exercise of an executive, and not a judicial, discretion.

The sanction of the Deputy Public Prosecutor is required before a case can be taken to court. Investigation of a particular case should take no more than 14 days. Immigration offences commonly committed by migrant workers under the Immigration Act and Regulations pertain to lack of proper documentation (section 6(1)(c)); overstaying (section 15(4)); and contravention of conditions of passes or permits (regulation 39(b)).

In addition to sentencing a worker found guilty of a breach, the court will also issue an order for their deportation to their country origin.

Employers can be charged for offences including employing a person not in possession of a valid pass (section 55B); for forging or altering endorsements or documents (section 55D); and allowing an illegal immigrant to enter or remain at his premises (section 55E).

Children in detention

In Malaysia, there are around 1,200 accompanied and unaccompanied children in detention. This is not in line with Malaysia's obligations under the Convention on the Rights of the Child. While some of these children may be stateless or do not have documentation, children born in detention are given birth certificates, although not Malaysian citizenship. The Immigration Department, Ministry of Women, Family and Community Development, SUHAKAM and CSOs are working together to find an alternative to detention for these children.

The role of labour attachés

Article 5(e) of the UN Vienna Convention on Consular Relations, 1963 (Vienna Convention on Consular Relations) stipulates that consular functions involve: "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

Further, Article 361(b) states that consular officers should be informed, without delay, by competent authorities of the receiving state if a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Under Article 361(c), consular officers have to right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with them and to arrange for their legal representation unless there is opposition from the national.

Key issues and recommendations

Participants considered that the effectiveness of detention as a means of deterring undocumented migrants, refugees and asylum seekers from coming to Malaysia, or in maintaining security or preventing social ills, is questionable. Rather, reforms need to be made in the management of the labour recruitment process so that the Malaysian government does not have to spend so many resources on detainees and building more detention centres.

There are cases of migrants who have served their sentences but continue to be detained as they are witnesses in other cases. It is suggested that these detainees be given a temporary right of stay or work permits.

Participants noted that relevant authorities need to avoid injustices, for example, where workers have been charged for contravening the law, but have had their passport withheld and have been unable to apply to extend a permit. In cases where migrant workers without passports are arrested and detained, the authorities should allow some time for their employers to verify their status before proceeding with their prosecution in court. It is also suggested that some form of ID cards be accepted as alternative identification to passports.

Standard operating procedures should be developed and followed when conducting raids at workplaces to verify that workers are documented, especially when there is cooperation from company representatives. Noting that only 45 per cent of refugees will be repatriated, ways should be found to enable refugees to work, and provide refugee children with access to healthcare and formal education, so that they can contribute to the Malaysian community and economy.



CONCLUSION AND ADDITIONAL RECOMMENDATIONS

The labour attaché consultations have proven to be an effective means of sharing information on laws, policies and procedures between the Malaysian Government and the missions of countries of origin. In addition, they have enabled a sharing of experiences and good practices between these countries of origin, and among other key stakeholders, including the MBC, MTUC, MEF, SUHAKAM, NGOs and the ILO.

This regular meeting should continue to convene to discuss new and emerging issues, as well as revisiting some of the topics already covered due to the turnover among the labour attachés and consular officials. In any case, the topics should be identified by the participants themselves.

Key issues discussed and conclusions reached in each of the consultations have generated recommendations which can be pursued in collaboration between diplomatic missions, Malaysian authorities, tripartite constituents, and other stakeholders.

Recommendations

Legal and policy framework

The Immigration Act, the Employment Act and the Industrial Relations Act are the primary laws governing employment and other issues related to migrant workers. However, there are gaps in their application which can be clarified:

1. Written policies are needed to clarify whether complaints can be taken to court under legislation;
2. Greater clarity and additional policies and procedures are required with respect to issues such as: early repatriation; unlawful imprisonment; dismissal; non-payment of wages and unlawful salary deduction, passport retention; unfair or illegal conditions attached to work permits or contracts; employers terminating work permits and rendering workers undocumented; and exposure of workers to arrest when making complaints, to ensure the protection of migrant workers;
3. Depositions should be taken from workers in detention who are witnesses in pending cases to avoid prolonged detention and additional means for remote testimony (including by video) should be explored;
4. Consular officials should write to the courts requesting the cases where workers are held in detention awaiting testimony be expedited;

5. Consular officials should be present during court cases involving their nationals and ensure fair and accurate translation, where applicable;
6. Coverage under the NLAF should be extended to non-citizens; and
7. In the case of a death in custody, repatriation of the body should be the responsibility of the relevant diplomatic mission and/or employers.

Cancellation of work permits

Employers retain the right to cancel their employees' work permits. This results in documented workers becoming undocumented:

8. Circumstances should be outlined under which migrant workers are able and encouraged to change their employer, particularly in cases of exploitation or abuse. Work permits and legal status should not be dependent on a single employer; a practice enables abuses of vulnerability;
9. Workers should be permitted to work while disputes are pending to ensure they can adequately support themselves and their families. This would reduce the dependence on the immigration detention centres.

Workers' compensation

The immigration status of migrant workers should not affect their right to claim compensation for injuries sustained in the workplace and payment of due wages:

10. Migrant workers should be included under the Employees' Social Security Act 1969.
11. Access to mechanisms by which migrant workers can claim compensation should be improved, including consideration of provision of translation.

Role of labour attachés

There are a number of ways in which the roles of labour attachés could be enhanced:

12. Having regard to the consular functions provided for by the Vienna Convention on Consular Relations, missions should arrange for legal representation of nationals as required;
13. Subject to the NLAF being extended to migrants, missions should assist in providing legal representation for nationals, and if there is any shortfall, call upon the MBC's Legal Aid Centre;
14. Missions should provide interpretation assistance when nationals are in court;
15. When a court order is given for repatriation, the mission concerned should take responsibility for their national's repatriation.

One-stop Centre

Migrant workers usually seek assistance for multiple issues that require interventions from multiple government agencies:

16. It is proposed that a dedicated one-stop centre for migrant workers be set up to deal with labour, as well as immigration, issues. This centre would operate with the assistance of foreign missions.

Best Practices

17. It is proposed here that labour attaché consultations be continued to promote information sharing of best practices vis-à-vis complaints mechanisms, recruitment practices and other issues related to the employment, protection and repatriation of migrant workers.

Migration Works Campaign (MWC)

Noting the contribution that migrant workers make to the economy and society in Malaysia, and in line with the UN Secretary-General Eight-Point Agenda for action made at the UN General Assembly High-Level Dialogue on Migration and Development in 2013:

18. The ILO, other international organizations, social partners and CSOs should continue to promote a positive image of migrant workers through the Migration Works campaign. The campaign aims to sensitise society, particularly youth, to the contribution and experiences of migrant workers in Malaysia.



Consultations with Labour Attachés and Consular Officials in Malaysia on the Protection of Migrant Workers

SUMMARY REPORT

Consultations with Labour Attachés and Consular Officials in Malaysia on the Protection of Migrant Workers Summary report: Tripartite Action for the Protection and Promotion of the Rights of Migrant Workers in the ASEAN Region (ASEAN TRIANGLE project) and The Tripartite Action to Protect Migrants Workers in the Greater Mekong Sub-region from Labour Exploitation (the GMS TRIANGLE project)

The GMS TRIANGLE project is a five-year project to strengthen the regulation of recruitment practices and improve workplace protection. The project aims to strengthen policy, build the capacity of key stakeholders (tripartite constituents, recruitment agencies, civil society organizations and migrant workers), and provide support services to female and male migrant workers, and potential migrant workers.

The ASEAN TRIANGLE project aims to promote and protect the rights of migrant workers in the ASEAN region through increased legal and safe migration and improved labour protection. The project promotes both bilateral and regional approaches to deal with shared concerns, make regionalism more effective, and enhance the capacity of institutions in ASEAN.

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