



Advocating for the Rights of Migrant Workers in Malaysia, 2017



Module 2
Kuala Lumpur, 2-5 June 2017



[Draft] PROGRAM REPORT

Summary

Diplomacy Training Program (DTP) in partnership with Migrant Forum in Asia (MFA) Bar Council Migrants, Refugees and Immigration Affairs Committee (MRIAC), North South Initiative (NSI) and Migration Working Group (MWG) organised module-2 of the “*Advocating for the Rights of Migrant Workers in Malaysia*” from 2-5 June 2017.

The yearlong program is designed to build knowledge, skills and networks to enhance and support civil society advocacy for the promotion and protection of migrant workers’ rights in Malaysia. The program brings together Malaysian advocates with advocates from countries of origin, including Nepal, Bangladesh, Philippines, and Indonesia to build links and networks and to develop shared advocacy strategies for greater impact in Malaysia and countries of origin.

The program strategy forms part of DTPs broader theory of change, whereby the direct benefits of the training programs are expected to translate into more effective and strategic engagement with the international human rights system and national governments, and into more systematic participation in policy dialogues and in regional fora such as the Abu Dhabi Dialogue, the Colombo Process and ASEAN. The programs also share good practice from other countries of origin and destination, developed understanding of the situation in countries of destination and built links with NGOs and networks there.

Module – 2 of the program had a focus on case documentation/ management and organising of migrant workers. Module also included sessions on the Malaysian legal and policy framework governing migrant workers, and a practical engagement with a member of Parliament on the role of parliamentarians for the protection of the rights of migrant workers. Participants of the program revisited the issues and expectation of the program identified in module-1 and set priorities for change to develop campaigning strategy. Participants from Nepal and Bangladesh were invited to join this module to build network and collaboration between advocates from country of origin (COO) and Malaysia, and to build their capacity. COO participants shared their perspectives and experience on recruitment practices.

Resource persons for the program were Pathma Santiago – Regional Coordinator Asia Pacific at a Global Union; Apolinar Z Tolention – Regional Representative at BWI; Dato Ramachelvam Manimuthu – Chairperson at Migrants, Refugees & Immigration Affairs Committee Bar Council of Malaysia; Dr. Michael Jeyakumar Devaraj – Member of Parliament; and Sahul Hamid – Vice Chairman at MTUC Penang Division.

This was the second of the five-module capacity building training program in Malaysia. The next module in August will focus on the responsibilities of private sector for the protection of the rights of migrant workers.

Program Content

Module 1 Recap, Participant Introduction, and Module 2 Overview

Participants introduced themselves, their organization, and what they have been doing since March 2017 (Module 1). Recap of module 1 reviewed the key issues faced by migrant workers in Malaysia. During the discussion participants suggested additions to the list identified in module 1. The content of module 1 - the human rights mechanisms, Universal Periodic Review (UPR), the nine human rights Treaty Bodies (TB), Special Procedures (SPs) and Special Rapporteurs (SRs), Office of the High Commissioner of Human Rights (OHCHR), and the United Nations Country Teams (UNCTs), and ILO Conventions relevant to migrant workers were also recapped.

Patrick Earle then introduced the broad agenda of module-2 and participants' expectations and led a review of the overall objectives and expectations from participants.

Updates on Global and Regional Processes

Tatcee Macabuag from MFA updated participants about the current global and regional processes and CSO initiatives.

- The Colombo Process (CP) is an informal and non-binding regional intergovernmental process bringing together 11 countries of origin of migrant workers: Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Vietnam. Governments participate – supported by IOM. The process mostly looks into recruitment practices. Civil society is trying to engage to encourage experience sharing and best practice – and more cooperation among countries of origin – to prevent their workers from suffering from competition for labour markets.
- The Abu Dhabi Dialogue (ADD), brings together member states of the *Colombo Process* and countries of destination including: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates (UAE), and Yemen. The Republic of Korea, Japan and Singapore act as Observer States. The ADD was established to address issues of temporary contractual labour mobility and to optimize labour mobility's benefits for all participating countries. There is no space for civil society officially – but civil society is seeking space in this forum and trying to put rights on the agenda through lobbying member governments – including on issues of recruitment and standard contracts to be brought to the attention of countries of destination within the ADD.
- Global Forum on Migration and Development (GFMD) is a government led process with a limited view of looking at migration from a development perspective only. It is a non-binding process with

discussions focusing on remittances and market discourse. Civil Society have been calling to have a space to talk about migration and human rights. The representing authority at the forum from Malaysia is the Ministry of Home Affairs.

- Global Compact for Migration (GCM): On 19 September 2016, the UN General Assembly set in motion a process (New York Declaration) to develop a Global Compact on Safe, Orderly and Regular Migration (GCM) in response to the growing global phenomenon of large movements of people. The GCM is to build on existing bilateral, regional and global cooperation and partnership mechanisms, and to facilitate migration in accordance with the 2030 Development Agenda. The GCM is functional and pragmatic approach on migration. Civil Society's objective is to find space to push for opportunities to dialogue with own governments and others. Malaysia will play an observer role in the GCM process.
- ASEAN – Declaration 2007 and the Proposed Instrument: ASEAN is finalizing the draft ASEAN instrument to implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu Declaration, 2007). The instrument is expected to serve as a set of guidelines that legally binds all member countries. Sending states, such as Indonesia and the Philippines, have pushed for a legal deal that would ensure the fundamental rights of all ASEAN migrant workers, including their family members, and to have the national policies harmonized with regional minimum standards of treatment pertaining to social protection and security. However, it was noted that Malaysia, Singapore and Thailand may not agree to a binding treaty to protect migrant workers in their countries.

Access to Justice and Remedies: Challenges and Gaps

Dato Ramachelvan started by defining the terms,

Access to Justice: the legal and practical ability of individuals to enforce their rights and obtain a just remedy through both formal and informal mechanisms.

Remedy: A legal means to recover a right or to prevent or redress a wrong.

Redress: To set right or compensate for a wrong. Redress may include financial or other compensation, removing the cause of the grievance (such as returning documents), or seeing wrongdoers held accountable and punished.

The principle of access to justice can be attributed in different legal documents like the UDHR (Article 8), Federal Constitution of Malaysia (Article 8), ASEAN Migrant Workers Declaration (Article 5,7,9) which are relevant to Malaysia. But for migrants there are barriers to justice such as non-nationality, documentation – undocumented status & fear of arrest, accessibility to courts administrative system to address grievance, non-availability of legal assistance, lack of information, language, and lack of financial resources are only some.

There are Malaysian statutes that provide rights to workers. Some examples of Malaysian legal framework that protect Migrant Workers rights are,

- Rights under the Passport Act
 - Prohibits the holding of another person's passport

- Rights under Employment Act 1955
 - Right to a Written Employment Contract
 - Right to Wages & Deduction - Minimum wage of RM 1,000 per month
 - Hours, Overtime, Time Off and Annual Leave:
 - 8 hours per day, 48 hours per week;
 - 5 consecutive hours - worker entitled to 30 minutes break
 - Overtime – up to a total of 12 hours per day, maximum 104 hours per month
 - Rest day – 1 day per week, 11 paid days off for public holidays, 8-16 annual leave per year
 - Sick Leave – 14-22 days sick leave, if hospitalized – 60 days fully paid sick leave per year
 - Freedom of Association - It is illegal for employers to include any provision in a contract of service which restricts the right of an employee to join a trade union or participate in trade union activities.
 - Termination of Employment, Breaches of Contract and Unfair Dismissal - Termination benefits between 10 and 20 days wages upon termination other than end of contract, resignation, misconduct willful breach.

- Rights under Workmen’s Compensation Act 1952
 - No fault scheme whereby employers are responsible for compensating workers if they suffer injury or occupational illness in the course of their work
 - Foreign Workers Compensation Scheme (FWCS)

- Rights under Trade Union Act 1959
 - Non-citizens are prohibited from holding office or being employed as staff of a trade union

- Rights under Worker’s Minimum Standard of Housing and Amenities Act 1990
 - Applicable to workers employed at any workplace located outside municipal areas, e.g plantations or farms which prescribes minimum standard of housing and amenities for workers and dependents - including free and adequate waters, electricity and Employers have to provide health, hospital, medical and social amenities
 - No guidelines for workers employed in urban areas

- Rights under Contract Act 1950
 - Employment Contracts between Employer and workers can be enforced in the Civil Courts

- Rights under Civil Law Act 1956
 - Claim for Negligence at work site, traffic accident and etc
 - Entitled to claim for loss of wages, loss of future earnings or ensuing capacity

- Rights under Criminal Procedure Code (Act 593)
 - Right to make Police Report
 - Rights of Detained persons
 - A person can be detained by Police if there is a reasonable suspicion that a crime has been committed.
 - A detainee has to be produced within 24 hours before a Magistrate before being detained any further.
 - No detention & remand beyond 14 days.
 - Documented migrants are entitled to Bail.

(Note: Immigration Authorities are allowed to detain persons up to 28 days before charging in court or releasing such persons pursuant to the Immigration Act)

- Right to Bail
- Right to be informed of investigations
- Rights of Migrant charged in Court
 - Right to be represented by legal counsel

For Undocumented Migrants who are charged with Immigration Offences – Usually there are no defenses available.

Gaps in Rights Protection of Migrant Workers

The current Malaysian legal framework provides limited rights to domestic workers. They are excluded from key protections in the Employment Act 1955 and the Workmen Compensation Act 1952. There is no protection mechanism for workers who file claims against their employer. The standards for accommodation, food and other amenities are limited to workers living in non-urban areas – there is no provision for workers employed in the urban areas. One of the key issues faced by MWs is lack of protection from discrimination – especially pertaining to immigration offences. Law has no clear penalties for refusing to allow a worker to end a contract. The Immigration and regulations have very few rights for non-citizens – only right is the right to appeal in certain limited circumstances – refusal of entry, cancellation of permit or pass or deportation.

For death penalty cases, high court provides lawyers. There are approximately 1,000 persons on death rows now. Bar council is working for seeking clemency for MWs and locals. All immigration offenses are tried in immigration courts. Immigration law is also enforced by police and not just immigration officers. Courts cannot go against the work/decision of the immigration courts – immigration court has the last say – except only in some cases.

Engaging with Member of Parliament

Member of the Parliament of Malaysia – Dr. Michael Jeyakumar Devaraj spoke about how CSOs can influence MPs and what motivates MPs to pick up issues of workers. He highlighted that every parliamentarian operates differently. New laws usually come from the cabinet rather than from the Parliament floor. Hence, Dr Jeyakumar argues that very few bills are changed/modified – and if they are modified it is because the issue has become a national issue and depending on how much traction the issue has with the general public. He also highlighted that MPs are worried about votes and losing support when taking up issues of MWs. His party is an opposition party and has talked about minimum wage for MWs – but taking up issues of MWs has a repercussion – they lose public support because it is deemed as not caring for the locals.

Dr Jeyakumar believes that there is a need to educate and enlighten the public – need to get Malaysians to feel for MWs' issues. Engagement with MPs does not mean you can persuade them, CSOs should engage them to put the issue in national agenda. Currently, it is not priority of MPs but struggle is to make migration a national priority. He reiterated that the focus for change should not be on MPs but to educate the Malaysia public because MPs follow the public, and engagement should be focused not to persuade MPs but to expose them.

Case Documentation

○ **Why is documentation important?**

Documentation helps to coordinate and evaluate services. It is also a liability tool and risk management, appraisers can apprise themselves of technique, related ethical standards and potential pitfalls they may face in their work. Documentation is important for CSOs and in social work because it helps to gather information, focus on problems, for access to justice, maintain record, as evidence, effective lobbying and advocacy, determine next course of action, continuity of those doing the work (when case worker retires, etc.), official reports to authorities (missions), so that person is not forgotten, reporting to the partners, funding purposes, counseling – to see how and why they need.

Documentation can be kept for 5 years. It is important to keep hard copies and save on digital and other technological means. When documenting MWs cases, it is important to build solidarity, listen, empathize, look for facts, take down notes and not put words into their mouth or have your own interpretation of their recordings. Documentation can provide statistics for MPs. Documentation can be provided as 'evidence' thus the facts must be valid in order to build a solid case and must get permission from clients whether the information is okay to use for research and to disseminate

○ **Functions of Documentation**

1. Assessment and planning – Clear and comprehensive case-related facts and circumstances is essential. Should check if data provided is a reliable source of measuring performance and outcome. Incomplete records may lead to inadequate planning, intervention and poor outcomes for clients and stakeholders.
2. Service Delivery - Comprehensive records are necessary for competent delivery for agency based services and interventions (stakeholders). It provides a solid foundation for CSO, social workers and other stakeholders. Records are useful for evaluation of programs and personnel.
3. Continuity and coordination of services - documentation facilitates professional and interdisciplinary collaboration. For eg. NGOs and faith based communities need to share their observation and have to have up-to-date details concerning client's needs.
4. Supervisions – Under the legal doctrines of vicarious liability and *respondent superior* (“let the master respond”), *supervisors, case managers, administrators, and agencies, can be held liable for, if there is evidence the errors and omissions of their staff* – this is one of the main reasons why social work needs to be carefully documented.
5. Service evaluation – Documentation and records provide essential data for program evaluation. Data and information recorded is vital for future programs and support and to maintain integrity of programs.
6. Accountability to clients and agencies and other stakeholders – Documentation helps to meet request from clients, government bodies such as the immigration, labour department, and others, and amongst civil society – to share information. Consultation obtained needs proper documentation for accountability purposes.

○ **What to document and how to interview?**

It is crucial to make the environment comfortable for a MW to be open and to share information. Interviewer needs to build trust by words and gestures and environment. It is very important to know the language in which MWs find comfort in sharing their stories. Find someone you trust who can and knows how to interview.

The table below outlines some of the essential information that needs to be recorded for documentation and for evidence.

Date of arrival	Valid documentation	Visa issue	Documents withheld
Place of work	Overstaying	Rights restricted	Situation – locked up
Salary	Need of migrant worker – to go home	Discrimination	Salary not given
Accommodation	Type of work		

Having too much content, too little content or wrong content can be harmful – exposure to risk of liability – there have been cases where companies have sued and won against limited information/documentation. Too much or too little details can be vague and quality of service may be compromised.

Wordings in documentation is as important as the context. Avoid loose and casual language and terminology. In documentation, choose the words carefully – clear, specific, unambiguous – taking care to be clear to fully support conclusions drawn to avoid defamatory language.

Migrants Rights Violation Reporting System (MRVRS)

The MRVRS is an online database tool developed by the MFA secretariat to record and manage information on migrants’ rights violations in Asia. MRVRS enables MFA and its members to generate evidence and trends of rights violations, which provides support to their advocacy work to influence policy change. It also serves as one of the platforms where a migrant worker’s situation can be reported and addressed by the network.

The system is user friendly which converts qualitative data into quantitative data, allowing civil society to demonstrate rights violations. MFA provides trainings on the system with individual members on a request basis.

Organising Migrant workers – Trade Union Perspective

Sahul Hamid of the Penang Division of MTUC started by citing the Malaysian Industrial Relations Act 1967 – Section 5 (1) & (2) according to which workers in Malaysia have the right to form and join Trade Union. No employer shall prevent a worker from joining a Trade Union by imposing a condition in the contract of employment. Moreover, no employer shall refuse to employ a worker because they are a Trade Union member. The Act also states that no worker shall be threatened with dismissal or dismissed if they propose to join a TU or to participate in TU activities.

MTUC focuses on grassroots campaigns – using mapping techniques to analyze and target workers from different nationalities to bring them together – to form a union. The strategies for bringing workers together are communication – spreading the news, and collecting information. The Migrant Resource Center Penang focuses on empowering MWs – they talk to workers in their hostel, industrial areas, shopping malls, night markets – to educate workers about their rights, and them aware about the work of MTUC. MTUC also focuses on advocacy work including assisting MWs in filing cases against employer, and to make police complaints.

Sahul highlighted that only 7% of 14 million workers in Malaysia are unionized. Due to high union busting by employers – TU membership has been affected. One of the alternative is to have a Yellow Union or in-house union – a union within the company. To form a TU in Malaysia there needs to be at least 7 workers. MTUC encourages women to join TU. Sahul highlights that in the electronic industry the membership of women is about 30% but in other sectors it is much less. However, migrant workers form almost 30-40% of the members of the MTUC. MTUC, however, has been struggling to unionize domestic workers – but they are working with MW community workers and learning from other COD trade unions to organize domestic workers.

Prioritization of Key Issues

Participants in module-1 identified list of issues faced by migrant workers – which was revisited in module-2. It was identified that participants would work towards prioritizing some of the key issues to make change/impact through campaign strategies. In groups, participants were asked to prioritize three key issues based on the criteria – 1) whether the issue will help in organizing MWs; 2) urgency - groups at risk, external factors; 3) frequency of violations; 4) scale of impact; and 5) practicality - can action have an impact.

Participants identified the following list of issues as the core **Priorities for Change** -

- Health:
 - Lack of health and safety - workmen compensation
 - Excessive cost to access health services
 - To identify area of epidemic/health crisis such as TB
- Contract substitution and violation
- Withholding of passport
 - Case documentation to provide evidence of passport withholding and to lobby for increase in prosecution rates
- To have a paid day off for workers better implemented – eg. Jolovan campaign strategy
- Review of Labour Law
 - To organize a one-day forum/input session to review the amendments of the Labour law
- Stateless children
 - To seek embassies assistance for solution
- Wages
 - Differences in wages between documented and undocumented worker
- Lack of decent work & safe working conditions
 - 3D & OSH

Next Steps

In the final plenary of the program, participants agreed to continue working in-between modules on the group-works identified in module 1,

- **Submission of Cases to Special Procedures and AICHR** – Group members will submit at least 10 cases to SP and AICHR. Will focus on submitting cases related to DWs.
- **Building Knowledge, and Developing CSO Strategy for Engagement with the Process of Global Compact for Migration** – Focus on information collection, and arrange meetings to discuss on thematic issues including with academics. Use briefing thematic paper for guidance. Draft recommendations and best practices.
- **Unexplained Deaths of Young Migrant Workers** – Continue to focus on collating information and evidence for study on unexplained deaths amongst Nepalese migrant workers.
- **Collaboration and Dialogue with MTUC** – aim to maximize and expand to other nationalities - not just Filipinos, to organize workers and continue dialogue with MTUC

Participants also suggested that DTP-MFA to create a database of participants and trainers including their field of work and organization details, and a separate database of country of origin organisations working for the protection of the rights of MWs to be shared with Malaysian advocates.

The module concluded with the completion of evaluation forms, and a final group reflection.

The feedback on the module was positive. Participants valued the presence of country of origin participants, and them sharing their experience and best practices. Program partners thanked participants and trainers for their valuable time and for sharing their knowledge.