

Migrant Workers' Access to Justice: Malaysia



Bar Council Malaysia

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Eleanor Taylor-Nicholson, Renuka Balasubramaniam and Natasha Mahendran

LIST OF ACRONYMS

AOHD	Archdiocesan Office for Human Development
ASEAN	Association of Southeast Asian Nations
ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants
ATIPSOM Act	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007
CEACR	Committee on Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Convention on the Elimination of All Forms of Discrimination Against Women
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
DoL	Department of Labour, Peninsular Malaysia
DPP	Deputy Public Prosecutor
FOMEMA	Foreign Workers' Medical Examination Monitoring Agency
FWCMS	Foreign Workers Centralized Management System
FWCS	Foreign Workers Compensation Scheme
FWHS	Foreign Workers Hospitalisation and Surgical Insurance Scheme
GDP	Gross Domestic Product
HRC Act	Human Rights Commission of Malaysia Act 1999
i-Kad	Immigration Card
ILO	International Labour Organization
IPO	Interim Protection Order
MAMA	Malaysian Maid Employers Association (<i>Persatuan Majikan Amah Malaysia</i> , in Bahasa Malaysia)
MAPO Council	Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants
MEF	Malaysian Employers Federation
MOHA	Ministry of Home Affairs
MOHR	Ministry of Human Resources
MoU	Memorandum of Understanding

MRIAC	Bar Council Migrants, Refugees and Immigration Affairs Committee
MTUC	Malaysian Trades Union Congress
NGO	Non-Governmental Organisation
OSC	One-Stop Approval Centre
OSHA	Occupational Safety and Health Act 1994
PAPA	Malaysian Association of Foreign Maid Agencies (<i>Persatuan Agensi Pembantu Rumah Asing Malaysia</i> , in Bahasa Malaysia)
PEA Act	Private Employment Agencies Act 1981
PO	Protection Order
PP	Public Prosecutor
RELA	People's Volunteer Corps
RMP	Royal Malaysia Police
SOCISO	Social Security Organisation
SUHAKAM	Human Rights Commission of Malaysia
TPP	Trans-Pacific Partnership
UNHCR	United Nations High Commissioner for Refugees
UNTOC	United Nations Convention Against Transnational Organized Crime
VDR	Visa with Reference
VP(TE)	Visit Pass (Temporary Employment)
WAO	Women's Aid Organisation
WCA	Workmen's Compensation Act 1952
6P	Registration, Legalisation, Amnesty, Supervision, Enforcement and Deportation (<i>Pendaftaran, Pemutihan, Pengampunan, Pemantauan, Penguatkuasaan dan Pengusiran</i> , in Bahasa Malaysia)

GLOSSARY OF TERMS

Access to justice	The ability of individuals to enforce their rights and obtain a just remedy through both formal and informal mechanisms
Foreign worker	Official term for a migrant worker on a temporary employment visit pass in Malaysia
Harm	An act that causes financial, physical, or emotional injury
Immigration Card (“i-KAD”)	An identification card issued by the Immigration Department of Malaysia to migrant workers and indicated in six colours according to the employment sector of work
Migrant worker	Term used in this report for non-citizen workers, documented or undocumented, and working in a low-wage position in Malaysia
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
Remedy	A legal means to recover a right, or to prevent or redress a wrong
Work permit	Commonly used term for VP(TE)
6P programme	An initiative by MOHA of Malaysia for the registration, legalisation, amnesty, supervision, enforcement, and deportation of undocumented migrants

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EXECUTIVE SUMMARY

I Overview

The Malaysian Bar is the independent professional association for legal practitioners operating in Peninsular Malaysia, with a mandate to “uphold the cause of justice” and to “protect and assist the public” in all matters regarding the law.¹ As part of that role, the MRIAC is publishing this first comprehensive study on access to justice for migrant workers in Malaysia. A team of three independent researchers conducted the research and wrote this report with contributions from MRIAC at various stages.

The report examines the rights of migrant workers under the Malaysian law, the mechanisms available to enforce those rights, and the effectiveness of those mechanisms for providing redress to migrant workers who have been wronged. It also identifies gaps in legal protections and cross-cutting systemic barriers that prevent migrant workers from accessing justice in Malaysia. Finally, the report sets out detailed findings on access to justice for migrant workers in Malaysia, and issues 46 recommendations for improving access to justice. These recommendations are targeted to the Government, legal community, civil society organisations, donors, and researchers.

The findings and recommendations contained in this report are based on the perspectives of 101 migrant workers and 44 stakeholders, including government employees, lawyers who represent migrant workers, civil society organisations that support migrant workers in the legal process, private sector employers and recruitment organisations, trade unions, embassies of migrant workers’ home countries, as well as from the Judiciary. The field research was completed over a period of 18 months between January 2015 and October 2016.

This study was made possible with financial support from the Open Society Foundations. It is the fourth in a series commissioned by the Open Society Foundations which examines access to justice for migrant workers in Asia and the Middle East.²

The information in this report is as at December 2017. At the time of writing, the currency exchange rate was approximately MYR1 (Malaysian Ringgit) = USD0.25 (US Dollar).

¹ Legal Profession Act 1976 [Act 166], Section 42(1).

² B. Farbenblum, E. Taylor-Nicholson, and S. Paoletti, *Migrant Workers’ Access to Justice at Home: Indonesia*, New York: Open Society Foundations, 2013, available at <https://www.opensocietyfoundations.org/publications/migrant-workers-access-justice-home-indonesia>; S. Paoletti, E. Taylor-Nicholson, B. Sijapati, and B. Farbenblum, *Migrant Workers’ Access to Justice at Home: Nepal*, New York: Open Society Foundations, 2014, available at <https://www.opensocietyfoundations.org/publications/migrant-workers-access-justice-home-nepal>. See also: A. Gardner, S. Pessoa, and L. Harkness, *Labour Migrants and Access to Justice in Contemporary Qatar*, London: LSE Middle East Centre, 2014, available at http://eprints.lse.ac.uk/60241/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_LSE%20Middle%20East%20Centre%20Papers_Labour%20migrants%20acces%20to%20justice_2014.pdf.

II Migrant Workers in Malaysia and Access to Justice

Migrant workers are a critical part of Malaysia's economy and society. They comprise an estimated 15 to 20 percent of the labour market, making Malaysia the biggest "net importer" of workers in Asia, as a proportion of the labour force. These workers, mainly from countries in South and Southeast Asia, provide the majority of the labour force in critical export industries such as plantations and manufacturing, as well as in the service and construction sector, building Malaysia's roads, offices, and homes. Most domestic workers are temporary migrants, caring for Malaysia's children and elderly, cleaning homes, and tending gardens. Malaysia would be a different place without migrant workers. Yet, migrant workers are particularly vulnerable to abuse and mistreatment on their journeys to and while working in Malaysia. Too frequently, men and women are brought into Malaysia on false promises of the jobs that await them, and then find themselves underpaid, forced to work long hours, denied rest days and leave, housed in unsanitary accommodations, and have their personal identification documents taken from them, exposing them to harassment and arrest by authorities.

The Malaysian Bar believes that access to justice is a human right for all persons, regardless of their citizenship or immigration status. It is essential both for individuals and for the Malaysian society. It provides individuals who have been wronged with the opportunity to be heard and to obtain a legal remedy. For migrant workers, who often come from simple circumstances, access to justice can mean the difference between financial security and an endless cycle of migration and debt. For Malaysia, access to justice for all can strengthen the rule of law, promote structural change, and uphold the principles of the Federal Constitution. As the International Bar Association notes, access to justice is "an indispensable factor in promoting empowerment, in securing access to equal human dignity, and achieving social and economic development."³

III Migrant Workers' Access to Justice in Malaysia: Key Findings

Malaysia has long-standing laws and policies in place for protecting all workers, including migrant workers. In the past 10 years, these have been further strengthened by the introduction of a minimum wage, greater penalties for trafficking and forced labour, and stronger protections for victims of trafficking. Malaysia's courts have affirmed the rights of non-citizens to equality before the law. Where migrant workers do file claims or have their cases heard in court, they appear to be treated fairly and yield satisfactory outcomes. However, many challenges remain, the principal one being that few migrant workers ever have the awareness, willingness and opportunity to engage with the formal system. Most return home without any redress for the losses they have suffered. Lawyers, case workers,

³J. Beqiraj, and L. McNamara, *International Access to Justice: Barriers and Solutions*. Bingham Center for the Rule of Law Report 02/2014, London: International Bar Association, 2014.

union representatives, and other experts were overwhelmingly pessimistic about the ability of migrant workers to access justice in Malaysia. Some of the key findings as to the reasons for this are:

- (1) Migrant workers comprise at least 15 percent of the Malaysian workforce and are essential to the modern Malaysian economy. Yet their importance to Malaysia is rarely publicly recognised, and they are instead portrayed as an economic, social, and security risk to the country;
- (2) Malaysia's labour migration system is poorly regulated; policies and procedures are made in a non-transparent manner; and the system does not enable migrant workers to access justice. Workers are given little information as they arrive in Malaysia, they cannot change employers if the employer violates their employment contract, and licensing and oversight of outsourcing agencies are lacking;
- (3) Migrant workers have substantial rights under constitutional law, employment law, industrial law, contract law, health and safety law, and others. Yet, for migrant workers, these rights are frequently not enforced;
- (4) Malaysia has numerous pathways or mechanisms to resolve disputes and address grievances, including:
 - (a) "Labour Court," an administrative forum that decides disputes over wages;
 - (b) Remedies under the Employment Act 1955;
 - (c) Industrial Court and Department of Industrial Relations, which handle complaints of unfair dismissal;
 - (d) WCA, which provides compensation for workplace injuries, deaths, and occupational diseases;
 - (e) Civil courts;
 - (f) Criminal justice system; and
 - (g) Protections under the ATIPSOM Act;

- (5) Migrant workers face numerous barriers common to all mechanisms that prevent access to justice, including:
- (a) Fear of termination and associated loss of legal status, leading to arrest and removal;
 - (b) Discrimination against undocumented migrant workers through requiring presentation of a passport and work permit to file claims or police reports;
 - (c) Limited legal and practical ability to stay in Malaysia pending resolution of a case due to limitations in the Special Pass system;
 - (d) Passport retention — a common practice by agencies and employers — prevents claims being filed and makes migrant workers liable to be arrested and detained;
 - (e) Lack of information provided to migrant workers about their rights and redress options, or information not provided in a language migrant workers understand;
 - (f) Absence of legal aid services for migrant workers, and lack of lawyers experienced and available to represent migrant workers;
 - (g) Outsourcing of management of migrant workers to agencies by shielding principal employers from accountability for workplace harms, and excluding migrant workers from company grievance procedures;
 - (h) Delays in proceedings and uncertain outcomes mean that cases where migrant workers have to stay in Malaysia in order to seek redress become a high-risk and expensive proposition; and
 - (i) Lack of financial and emotional resources to remain in Malaysia and undergo the taxing process of litigation or a criminal case;
- (6) The Malaysian Government and specific redress mechanisms have made little concerted effort to encourage and facilitate migrant workers accessing justice. Information is not easily available and/or not available in key migrant worker languages. There is no single focal point where case workers or legal advisors could respond to and advise migrant workers in distress;
- (7) Domestic workers face additional challenges accessing justice due to common highly restrictive conditions of domestic work in Malaysia and unequal protection under Malaysian labour laws and enforcement practices;

- (8) Intermediaries, including civil society organisations, trade unions, embassies, legal aid centres, or faith-based organisations, enable migrant workers to access redress mechanisms, but most are chronically under-resourced; and
- (9) Coordination between organisations in origin and destination countries in respect to access to justice is *ad hoc*, and largely directed at rescue and return of migrant workers.

IV Recommendations

Ensuring that migrant workers who have been deceived, exploited and mistreated in Malaysia have meaningful access to justice, will require a concerted effort on numerous fronts. Migrant workers must be better informed of their rights, better able to reach assistance, and better able to remain in Malaysia to bring claims against duty bearers.

Many actors have roles to play, including the Malaysian Government, governments of origin countries as represented by their embassies, the legal community, the Judiciary, civil society including NGOs and community-based organisations, trade unions and the private sector. This report contains 46 recommendations for 10 actors, together with suggestions for further research.

The key recommendations identified by participants in this study are as follows:

- (1) Conduct broad-based public information campaigns targeting migrant workers regarding employment rights and obligations in Malaysia, and where to get help if employment rights are violated. Expand the current hotline at the DoL to receive complaints and provide advice in key migrant worker languages;
- (2) Revise rules of the Special Pass to allow migrant workers who have filed claims to stay in Malaysia automatically pending resolution of their case, and to allow Special Pass holders to work;
- (3) Allow transfer between employers for migrant workers who have reported mistreatment and abuse;
- (4) Emphasise transparency across the system, including in recruitment procedures, oversight of outsourcing agencies, policies regarding migration and labour, and data on migrants;
- (5) Regulate outsourcing agencies and clarify the obligations of agencies toward workers;

- (6) Strengthen enforcement of labour and other laws, particularly for the most common harms such as passport retention, contract irregularities and deception during recruitment;
- (7) Reform existing labour laws to include domestic workers, and ensure that domestic workers are entitled to the same rights, protections, and pathways to redress as workers employed in all other sectors of the economy;
- (8) Allow migrant workers to file claims with forms of identification other than an original passport, such as a photocopy of a passport and identity card, or letter from a home embassy; and
- (9) Expand legal aid programmes to provide representation to all migrant workers charged with criminal offences, and provide legal support and advice to victims of trafficking.

IV Conclusion

The challenges that Malaysia faces in ensuring that all workers contributing to the economy and society are treated justly, are common to many destination countries that rely on non-citizen workers. It is hoped that the detailed analysis and recommendations provided in this report will be a tool not only within Malaysia to strengthen the current system, but also to organisations working with migrant workers internationally, and to other destination country governments grappling with similar questions. It is also hoped that the report will begin to define a new area of legal practice, and encourage and inspire Members of the Bar to take up cases of migrant workers in Malaysia.

1 INTRODUCTION

Equality before the law is a right guaranteed for all persons in Malaysia according to Article 8 of the Federal Constitution. All persons in Malaysia, regardless of their citizenship, have the right to have their grievances heard and resolved efficiently and fairly. Yet, it is well-accepted that in practice, not all persons in Malaysia have equal access to justice. Certain groups, whether due to poverty, discrimination or other barriers, find it more difficult to access the legal system, and face obstacles to having their cases heard efficiently or to receiving a just outcome.

This study is the first comprehensive mapping and analysis of access to justice for one large but vulnerable group — the overseas workers who undertake much of the low-wage labour in Malaysia. The number of migrant workers in Malaysia today is estimated to be at least 3.1 million — 2.1 million documented workers and another one million undocumented workers — comprising some 15 to 20 percent of the labour force. Malaysia is, accordingly, the biggest “net importer” of workers in Asia, as a proportion of the total labour force.⁴ These men and women, overwhelmingly from other countries in South and Southeast Asia, are essential to Malaysia’s domestic and export industries, and send back some USD2.9 billion in remittances each year.⁵

Yet, studies in recent years have documented widespread exploitation and mistreatment of migrant workers during their recruitment or in employment. Common problems include deception and fraud during recruitment; non-payment or under-payment of wages; forced and unpaid overtime work; unsafe working conditions; overcrowded and unsanitary accommodations; and verbal, physical and sexual violence. Migrants who complain say they are threatened with deportation or simply terminated from their positions, allowing abuses to be perpetuated.⁶

The harms suffered by migrant workers in Malaysia have now been well-documented. However little work has been done to identify the available options for legal protection and redress; how these protections and mechanisms are working in practice to provide just compensation, accountability, or meaningful improvement in the lives of migrant workers; and how to reduce the systemic occurrence of these harms.

⁴ D. H., Brooks and E. C., Go, “Trade, Employment and Inclusive Growth in Asia” in Douglas, L. (ed.), *Policy Priorities for International Trade and Jobs*, OECD, 2012, p. 332, available at <https://www.oecd.org/site/tadicite/50258009.pdf>. For more details on the numbers of migrant workers, see chapter 3: Data on Migrant Workers in Malaysia.

⁵ The World Bank, “Migration and Remittances Data”, <http://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data>.

⁶ See for example: Verité, *Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics*, Amherst: Verité, 2014, available at <http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014.pdf>.

This study provides the first comprehensive mapping of both the rights of migrant workers under Malaysian law and the remedies available when their rights have been violated. It also provides an assessment of the effectiveness of these remedies, and the major barriers that migrant workers face in accessing just compensation for their losses and in holding wrongdoers accountable.

The overall aim of this mapping project is to increase awareness and understanding of access to justice for migrant workers, and to identify strategic opportunities for reform. It is hoped that the details contained in this study will provide a resource to the legal community, Government, policymakers, embassies, NGOs, and others who work on the issue of migrant workers or assist migrant workers in Malaysia.

It is also hoped that this study will provide a useful example to other countries with large migrant worker populations, or other organisations working to empower migrant workers and defend their rights in destination countries. Finally, it is hoped that the home countries of the migrant workers in Malaysia will find this study useful in designing support systems for their citizens abroad or when they return home.

1.1 Scope of This Study

1.1.1 Research Questions

The authors, together with Bar Council Malaysia, were guided by four questions when researching and writing this study:

- (1) What are the legal frameworks, institutions, and processes in place in Malaysia to protect the rights of migrant workers living and working in the country, and how effectively do they serve those migrants?
- (2) To what extent do migrant workers know of, have access to, and use, mechanisms for obtaining redress for harms suffered during the migration process?
- (3) If migrant workers fail to engage with relevant mechanisms to resolve disputes or seek redress for rights violations, what accounts for that failure?
- (4) What can be done to improve redress mechanisms and to improve access to justice for migrant workers overall?

Because Bar Council Malaysia operates only within Peninsular Malaysia, the analysis has been limited to the laws and institutions that operate in Peninsular Malaysia. However, given that labour and other laws are similar across Malaysia, many of the findings of this study may be relevant to East Malaysia.

1.1.2 Defining “Migrant Workers”

For the purposes of this study, the term “migrant workers” refers to all non-citizens, documented or undocumented, who are in the country and working in a low-wage position. “Low-wage” is defined as a position paying up to RM2,500 (approximately USD800) per month. Anyone earning above RM2,500 falls into a different visa category and is viewed by the Government as an “expatriate”, rather than a migrant worker (see chapter 4 for an overview of immigration law and policy in Malaysia).⁷

Undocumented migrant workers have been included in this study for several reasons. First, the line between documented and undocumented status is fluid — some participants had started as documented migrant workers but later became undocumented and were seeking to become documented again. Others did not know their status because they were not in possession of their passports and other documents. Second, at the time they seek assistance for labour or other violations, workers are usually undocumented because they have left their employment. Therefore, excluding undocumented workers would exclude the people most in need of justice.

This study has not included the views of other non-citizens working in Malaysia, such as high-wage expatriates, non-citizen spouses who are employed, or non-citizen students who are working illegally. Nevertheless, the explanations of laws and mechanisms contained in this report, as well as the barriers that migrant workers face when accessing justice, may still be of relevance to these groups.

Finally, for the sake of clarity, we note that this study has chosen the term “migrant worker”, as opposed to other terms such as “foreign worker” or “foreign employee”. “Foreign worker” is the term used by the Immigration Department of Malaysia, and the broader public, to describe documented or “legal” migrant workers, although it is not a term used in Malaysian immigration law.⁸ “Foreign employee” is the term used in the Employment Act 1955 to describe non-citizen employees who fall within the scope of that legislation.⁹ “Migrant worker” has been used in this report because it includes all non-citizen workers, regardless of their immigration status, and is the accepted term in international human rights for describing individuals working in a country that is not their own.¹⁰ The Bar Council Malaysia uses the term “migrant worker” in all of its work and communications on this topic.

⁷ Expatriate Services Division of the Immigration Department of Malaysia, “New Employment Pass (Category III) Available on 15 July 2015”, <https://esd.imi.gov.my/portal/latest-news/announcement/new-employment-pass-category-iii-available-on-15-july/> (Last updated on 30 June 2015).

⁸ Immigration Department of Malaysia, “Foreign Worker”, <http://www.imi.gov.my/index.php/en/main-services/foreign-workers.html> (Accessed on 20 September 2016).

⁹ Employment Act 1955 [Act 265], Section 2.

¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990.

1.2 The Importance of Access to Justice

Ensuring meaningful access to justice for all is incredibly important, both as a right in itself, as a necessary condition for enforcing other rights, and for building a just and fair society for all. Access to justice is recognised as a human right both internationally under the United Nations Universal Declaration of Human Rights, and by the Malaysian authorities.¹¹ The Chief Justice of Malaysia has stated that access to justice is “a crucial fundamental right and an important state obligation”.¹²

For individuals, access to justice provides those who have been wronged with an opportunity to be heard, to have the wrong recognised and a remedy granted, the process of which promotes human dignity and respect. For society, ensuring access to justice for those who have been wronged sets norms of behaviour, provides those who have been wronged with an avenue for peaceful resolution, gives voice to traditionally marginalised groups creating a fairer society, and holds wrongdoers accountable. Accordingly, the 2015 Sustainable Development Goals include “the provision of access to justice for all” as part of the same goal as “promoting inclusive societies” and “building effective, accountable institutions”.¹³

These individual and societal benefits are particularly relevant to the migrant labour context. Migrant workers, as described later in this report, often arrive in Malaysia under tenuous financial circumstances with large debts owed to recruiters in their home countries. Access to justice for migrant workers who have been defrauded, exploited, unpaid, unfairly terminated (from employment), or charged illegal fees and deductions is thus a matter of deep personal consequence. For individuals and families, it can mean the difference between financial security and financial ruin and a cycle of poverty, debt, and migration. Holding employers, agents, and others accountable for these harms can also improve the fairness of the larger labour system, levelling the playing field for good and bad employers and for local and overseas workers.

¹¹ Universal Declaration of Human Rights, Article 8.

¹² The Rt Hon Tan Sri Arifin Zakaria, “Access to Justice – A Fundamental Human Right”, *Paper presented at the 17th Commonwealth Law Conference*, Hyderabad, India, 9 Feb 2011, p. 9.

¹³ United Nations, “Goal 16: Promote just, peaceful and inclusive societies”, *Sustainable Development Goals*, Adopted by the United Nations General Assembly on 12 August 2015, <http://www.un.org/sustainabledevelopment/peace-justice/>.

1.2.1 Defining Access to Justice

Despite the recognised value of “access to justice”, there is no commonly accepted definition of the term. For some, access to justice refers simply to access to the courts and to the ability to receive a fair trial. Interventions from this perspective focus on expanding legal aid programmes and improving court structures and procedures to facilitate access for marginalised groups.

At the other end of the spectrum, access to justice is a broad term that encompasses democratic governance; the rule of law; and an understanding of justice that includes protection of civil, political, economic, social, and cultural rights. Interventions may include increasing transparency and participation in law-making, examining the outcomes of various justice mechanisms as well as access for individuals and social groups, and incorporating informal systems of justice such as tribal courts or religious authorities.¹⁴

This study takes an intermediate but comprehensive view, in line with current thinking by both international and Malaysian scholars.¹⁵ It considers all stages of the procedure from the filing of a claim to the final resolution of a case, and includes both judicial and administrative mechanisms as valid pathways to redress. In addition to an analysis of these mechanisms, the study also examines the larger legal and social context that affects the ability of migrant workers to avail of their rights. It seeks to understand the social, cultural, logistical, legal, and institutional barriers to justice that migrant workers face and to ground the findings and recommendations in the reality of migrant workers’ lives.

1.2.2 Measuring Access to Justice

Access to justice, as an ill-defined and complex concept, is notoriously difficult to assess and measure. Whether a group or person has meaningful access to justice must be a subjective as well as an objective inquiry based on numerous factors. This study has drawn

¹⁴ Some organisations and papers that take a broader, although not identical view, include the United Nations Development Programme, *Access to Justice Practice Note*, New York: United Nations Development Programme, pp. 5-6; the American Bar Association Rule of Law Initiative; The World Bank, *A Framework for Strengthening Access to Justice in Indonesia*, Washington, DC: The World Bank, 2004, <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>, cited in Bedner, A., *Towards Meaningful Rule of Law Research: An Elementary Approach*, 2004, unpublished manuscript; and Van Vollenhoven Institute and United Nations Development Programme, *Access to Justice Practitioner’s Guide*, Bangkok: United Nations Development Programme, 2005.

¹⁵ See J. Beqiraj, and L. McNamara; G. K. Y. Chan, “The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia”, *Asian Journal of Comparative Law*, vol 2(1), 2007.

on lists of indicators developed by international institutions, to identify the following five indicators as central to the inquiry:¹⁶

- (1) Clarity of the legal framework defining both substantive rights and the operation of specific mechanisms;
- (2) Awareness of the mechanisms and their procedures by users of the mechanisms and other stakeholders;
- (3) Accessibility of those mechanisms, in terms of geography, cost, language, duration, complexity, need for representation, and other potential barriers;
- (4) Fairness of procedures governing access to those mechanisms and due process; and
- (5) Perceived justness of outcomes that the mechanisms provide.

As far as possible, this report highlights the duty bearers of rights, the extent to which duty bearers are held accountable and, ultimately, whether just and equitable outcomes are achieved.

1.2.3 The Role of Destination Countries in Providing Access to Justice to Migrant Workers

This study was preceded by two earlier comprehensive studies on access to justice in Indonesia and Nepal, the countries of origin for many migrant workers in Malaysia.¹⁷ Those studies, published by Open Society Foundations and others, found that having meaningful access to justice in a worker's country of origin is essential. Home countries are where the migration journey begins, often at the village level. The home country plays a crucial role in regulating recruitment and holding unscrupulous agents and agencies accountable for fraud in international migration.

¹⁶The ABA-ROLI (ABA Rule of Law Initiative) assessment tool includes: a legal framework establishing rights and duties and providing "mechanisms to solve their common justice problems"; citizen knowledge of rights and duties, and mechanisms for achieving justice; access to legal advice and representation; accessibility, affordability, and timeliness of justice institutions; institutions that provide citizens opportunity to present case, independence, and opportunity for voluntary and informed decisions regarding settlement of dispute; and enforceability of decisions. The World Bank, by contrast, considers the existence of: a normative legal framework; legal awareness, looking not just at the awareness of laws, rights and responsibilities, but also how to access the relevant mechanisms; actual access to the mechanisms, both formal and informal; the effective administration of justice through those mechanisms; and, transparency and accountability; J. Vel, "Policy Research on Access to Justice in Indonesia: A Review of World Bank and UNDP Reports", *The Journal of Law, Social Justice & Global Development*, 15, 2010, pp. 1-27.

¹⁷ See footnote 2.

Justice may also be a more realistic proposition for migrant workers who return home because of the lack of language, and cultural and immigration barriers that exist in many destination countries (see chapter 9). Several participants in this study noted that home countries should bear the ultimate responsibility for their citizens through their embassies and domestic redress mechanisms, and that perhaps migrant workers would be best served by returning quickly and seeking redress at home.

Yet, the need for strong origin country redress mechanisms does not negate the role destination countries can and must play in providing migrant workers with access to justice. Migration for work is a journey, and the destination country is ultimately the site of work and often the site of exploitation. It is in Malaysia, for example, where workers are underpaid, beaten, “sold” to new employers, and in some cases trafficked into labour exploitation (see chapter 5). The actors responsible for these actions are Malaysian employers and outsourcing agencies, both licensed and unlicensed, who are subject to Malaysian law. Simply sending workers home to take action against their local agents allows these key actors to continue to abuse workers with impunity.

Other practical reasons also recommend strong redress mechanisms for migrant workers in Malaysia. As the site of harm, it is easier for migrant workers to gather evidence, for example police reports, medical reports, and wage slips, to support their claims both at home and in Malaysia. As the Indonesia and Nepal studies found, it is much harder for a migrant worker to bring a case in the home country without this evidence. Further, Malaysia, as a growing second-world economy, has more resources and a more robust legal system than are available in countries that send large numbers of workers to Malaysia. It has more capacity to provide fair and efficient remedies to vulnerable persons.

Finally, there are moral reasons for urging Malaysia, as a destination country, to ensure migrant workers have access to justice. Migrant workers make an enormous contribution to the Malaysian economy, often at great personal sacrifice. It follows that where these workers are exploited by Malaysian nationals or enterprises, the Malaysian Government should make all efforts to ensure they are justly compensated and wrongdoers are held accountable.

1.3 The Work of Bar Council Malaysia and Others on Access to Justice for Migrant Workers

This report builds on the work of numerous other organisations that have drawn attention to the lack of access to justice for migrant workers, starting with the Bar Council Malaysia as well as other civil society organisations, international institutions, and human rights organisations, and scholars in Malaysia and abroad.

1.3.1 The Malaysian Bar and Bar Council Malaysia

Throughout its 71-year history, the Malaysian Bar has been a staunch advocate of the rights of all persons in Malaysia to access justice when they experience harm or violation of their rights.¹⁸ Pursuant to the Legal Profession Act 1976, the purposes of the Malaysian Bar include, among other things, to:

- (1) uphold the cause of justice ... uninfluenced by fear or favour;
- (2) protect and assist the public in all matters touching ancillary or incidental to the law; and
- (3) make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by an advocate or solicitor.¹⁹

It is the view of the Malaysian Bar that all victims of labour, criminal or other violations have a fundamental right to redress, regardless of whether they are citizens or non-citizens. Not only is denying access to justice a violation of individual rights, but it creates an environment of impunity and undermines the rule of law in Malaysia.

The Bar Council Malaysia, the governing body of the Malaysian Bar, has also been concerned with the situation of migrant workers in Malaysia for many years. The MRIAC²⁰ has been one of the leading voices in advocating for greater access to justice for migrant workers in Malaysia through the organisation of meetings and conferences.

In 2008, the Bar Council Malaysia held a two-day meeting to discuss the need for a comprehensive policy framework for migrant labour. The meeting made numerous recommendations, including the need to improve access to justice for migrant workers by making it easier for workers to stay in Malaysia to bring cases.²¹ This was supplemented by

¹⁸ The Malaysian Bar is an independent bar established pursuant to the Legal Profession Act 1976. Membership of the Bar is compulsory for all practising advocates and solicitors in Peninsular Malaysia. The Bar Council is located in Kuala Lumpur. Each state in Peninsular Malaysia has a State Bar Committee.

¹⁹ Legal Profession Act 1976 [Act 166], Section 42(1).

²⁰ MRIAC consists of a Chairperson and Deputy Chairperson, approximately fifteen members of the Malaysian Bar generally, and various "invited participants" from civil society organisations, and the academic community.

²¹ Bar Council Malaysia, *Recommendations from the Conference: Developing a Comprehensive Policy Framework for Migrant Labour*, Malaysia, 18 and 19 February 2008, published on 16 July 2008, pp. 1-11, available at http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=5243&Itemid=332.

policy briefs on the need for a standard contract for domestic workers, and reform of the Special Pass system (see chapter 9).²²

1.3.2 Other Work on Access to Justice for Migrant Workers in Malaysia

Among the many organisations and individuals who have drawn attention to the treatment of migrant workers in Malaysia, some key contributions to understanding access to justice for migrant workers are as follows.

First, Amnesty International in a 2010 report on migrant workers in Malaysia briefly described barriers to individual claims for labour violations, particularly for workers who are undocumented. It noted with concern the vulnerability of workers who file claims to retaliation by their employers in the form of violence or cancellation of work permits. Overall it found that the “process is burdensome enough that some workers give up their rights to pursue claims even if their cases are compelling”.²³

Alice Nah, a Malaysian scholar based in the United Kingdom has also written extensively on the rights of migrant workers in Malaysia, including their ability to enforce their rights. In one 2013 paper, she analysed mechanisms for enforcing migrant worker rights and found that on top of the barriers that citizens face accessing justice, non-citizens everywhere are “systematically disadvantaged” by immigration rules limiting residency and right to work, and found this to be the case in Malaysia.²⁴

The Right to Redress Coalition organises events and campaigns for better access to justice for migrant workers.²⁵ In 2013, the Coalition launched a campaign calling on the Government to allow migrant workers to stay in Malaysia to bring labour claims, and for migrant workers who bring labour claims to be able to change employers.²⁶ In 2016, it held a series of roundtables — in partnership with the University of Malaya — with the aim of developing a comprehensive framework to guide migrant worker policy.²⁷

²² Bar Council Malaysia, *Memorandum Relating to the Special Pass*, published on 11 February 2008, pp. 1-19; R. Devaraj, “The Need for a Standard and Fair Contract for Domestic Workers”, *Paper Presented at the Bar Council Roundtable Conference on Domestic Workers*, 8 July 2009.

²³ Amnesty International, *Malaysia: Trapped: The Exploitation of Migrant Workers in Malaysia*, 2010, p. 70.

²⁴ A. Nah, “The Rights Illusion: Access to Justice and the Rights of Non-Citizens in Malaysia”, *Paper submitted to the International Sociology Association*, 2013, available at <http://www.isa-sociology.org/uploads/files/EBul-Nah-July2013.pdf>.

²⁵ See the Facebook Page of Right to Redress, <https://www.facebook.com/Right2Redress/>.

²⁶ Coalition for Right to Redress for Migrant Workers, Press Notice: Launch of the Nationwide Right to Redress Campaign for all Migrant Workers, <https://business-humanrights.org/sites/default/files/media/press-release-right-to-redress-sept-2013.pdf>.

²⁷ For more information, see R. S. Bedi, “NGOs want Malaysia to have Comprehensive Policy of Migrant Labour”, *The Star Online*, 11 September 2016, <http://www.thestar.com.my/news/nation/2016/09/11/ngos-want-govt-to-have-comprehensive-policy-of-migrant-labour/>.

Finally, the ILO regional office has advised the Malaysian Government on the strengthening of recruitment policies and labour standards for migrant workers, and has studied the policy framework governing migrant labour in Malaysia.²⁸ It has collaborated with the MEF to document employer practices with respect to migrant workers including the provision of grievance mechanisms.²⁹

This study builds on and goes further than these important works by providing a more in-depth analysis of the legal framework and rights of migrant workers under the Malaysian law, and an assessment of the mechanisms available to enforce those rights. It combines legal analysis with perspectives from migrant workers and other stakeholders.

1.4 Structure of This Report

This chapter has provided the study context, aims, research questions, and scope. Chapter 2 outlines the methods used to gather data and limitations to the study. Chapter 3 provides background and context, including the history, demographics, and economic role of migrant workers in Malaysia. Chapter 4 presents the legal and policy framework governing immigration and provides an overview of recruitment and termination procedures.

Chapters 5 to 8 are the core of the report. Chapter 5 outlines the diverse range of harms that migrant workers suffer, with a focus on migration and work experiences. Chapter 6 reviews the rights of migrant workers under the Malaysian law. Chapter 7 describes the mechanisms that migrant workers can use to enforce their rights. Chapter 8 sets out the cross-cutting barriers to migrant workers accessing justice including institutional, social, cultural, and governance barriers.

The concluding chapter of this study brings together the findings and conclusions and then identifies ways that various actors in Malaysia, including the Government, the legal community, civil society, embassies, academia, and others can contribute to improving access to justice for migrant workers in Malaysia.

²⁸ B. Harkins, *Review of Labor Migration Policy in Malaysia*, ILO Regional Office for Asia and the Pacific, Bangkok, 2016.

²⁹ MEF, *Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia*, Kuala Lumpur: Malaysian Employers Federation, 2014, http://www.mef.org.my/Attachments/MEFReport_PGERPERFWM.pdf.

2 RESEARCH METHODS

2.1 Overview

This study is based on data gathered in Malaysia from January 2015 to October 2016, by a team of researchers collaborating with the Bar Council Malaysia. This team comprised three researchers with diverse backgrounds: a Malaysian lawyer with long experience providing legal assistance to migrant workers; a Malaysia-based field researcher with expertise in social science research methods; and a principal investigator, based abroad, who oversaw the data gathering, analysis and drafting. This combination of skills provided the study with insider insight into the law and the challenges faced by migrant workers seeking to access justice in Malaysia, as well as an outsider's fresh perspective on the legal system.

The researchers took an interdisciplinary approach to address the questions posed in this study, and drew on a variety of methods, including:

- (1) desk research;
- (2) legal and policy research and analysis;
- (3) qualitative research methods, including interviews, focus groups, and roundtables; and
- (4) limited quantitative research, namely the creation of a case database drawn from the files held by an NGO that assists migrant workers in distress.

The legal and policy analysis identified the legal framework, the substantive rights of migrant workers in Malaysian law, and the jurisdiction and powers of various redress mechanisms. Qualitative and quantitative data were used to understand the effectiveness of these laws and mechanisms. In total, 101 migrant workers participated in the study, together with 44 stakeholders.

2.2 Desk Research

The study began by reviewing the literature and existing data on migrant workers in Malaysia, and identifying relevant laws, regulations, policies, and cases. The literature reviewed included works by scholars, international organisations, and local civil society organisations. They were sourced through online searches, as well as from meetings with civil society organisations in Malaysia. The principal sources of data cited are government websites and media reports citing government data.

It should be noted that little data on migrant workers in Malaysia is published and publicly available, and the data that does exist is sometimes contradictory or unclear. It is often not

stated, for example, whether figures include all non-citizens, only migrant workers or only documented migrant workers, or the extent to which there may have been underreporting due to the hidden nature of much undocumented work.

To overcome this, the researchers made written requests for data as well as requesting data during interviews. Some of this data, for example on redress, was provided confidentially. Finally, the researchers prepared nine questions for five Members of Parliament to ask the Government during question time. The questions were asked on the following dates: 21 October 2015, 28 October 2015, 5 November 2015, and 2 December 2015.

2.3 Legal Research

Legal research was used in this study to understand the content of the law in Malaysia as it relates to migrant workers, namely rights of migrant workers, gaps in legal protection, and the structure and powers of various redress mechanisms.

The researchers drew from multiple sources of law to identify the corpus of relevant texts for analysis: the Constitution, legislation, regulation, precedent-setting case law and rules of court, together with international treaties to which Malaysia is a party. The test for inclusion was whether the document addressed a grievance that migrant workers raised in interviews or focus groups.

Many migration-related policies are not published or publicly available (see section 2.6 on limitations). Some information, particularly on immigration policy and procedure, could be gathered from government websites, media reports, and other secondary sources. Further, government officials gave some details of their procedures in interviews. These descriptions have been cited in this study with caution. Much case law is also not published, and due to restrictions on time and resources, only published decisions could be included in this study.

Interpretation of the law was done primarily using a textual analysis, but some context and historical background is given where available.

2.4 Qualitative Research

Qualitative methods were used to understand how laws and policies were being implemented, and to learn the perceptions of the effectiveness of various redress mechanisms, and the barriers to redress. These methods included interviews with migrant workers and other stakeholders, group discussions with migrant workers, and roundtables with stakeholders.

The field research was conducted mainly in the capital city of Kuala Lumpur and the neighbouring state of Selangor. Most embassies, government headquarters and civil society organisations are based in or near the capital.

In addition, the researchers visited three other states in Peninsular Malaysia: Penang, Negeri Sembilan, and Johore. These states were selected due to the presence of civil society organisations and migrant worker community groups that could facilitate introductions to migrant workers. In these locations, the researchers conducted interviews and focus groups with migrant workers and interviewed civil society representatives.

Map 1 | States in Peninsular Malaysia and Federal Territory where Interviews were Conducted



Finally, two countries of origin — Indonesia and Nepal — were chosen as sites to conduct interviews with returned migrant workers. Malaysia is a major destination for migrant workers from both Indonesia and Nepal, and thus it was reasoned that returned migrant workers would not be difficult to locate. Local experts were retained to identify migrant workers for interviews, and to conduct and translate the interviews. In Indonesia, the local researcher travelled to isolated villages in West Java known to have large numbers of migrant workers who had returned from Malaysia. In Nepal, the researcher interviewed migrants in Kathmandu, Nuwakot, and Nawalparasi.

Returned migrant workers were included because they had a more complete picture of access to justice in Malaysia, given that any case they had initiated had been concluded before their return. Further, they were not as vulnerable to retaliation by employers or agents and thus felt more comfortable to speak openly. Finally, some had experienced the process of arrest, detention, and deportation, unlike migrant workers still in Malaysia.

2.4.1 Interviews

The primary qualitative research tool used in this study was in-depth semi-structured interviews. This method was chosen to give general guidance to the researchers while at the same time allowing the conversation to follow new trajectories, and to allow the interviewee freedom to express opinions or raise concerns not covered in the interview guide. Interviewees included migrant workers and a variety of other stakeholders.

Migrant Workers

The interviews with migrant workers followed a standardised interview guide prepared by the research team. This was adapted from guides used in two previous access to justice studies in Indonesia and Nepal, as noted previously in section 1.2.3.³⁰ The questions gathered data on the interviewees' complete migration experiences from the point they decided to seek work abroad; and explored problems faced at different points in the journey, the efforts made to seek redress, and perceptions of access to justice for migrant workers.

The sample of migrant worker interviewees was selected according to two criteria:

- (1) The migrant worker had experienced a problem in Malaysia relating to their migration or employment; and
- (2) The migrant worker had sought assistance, formally or informally, to resolve the problem and seek a remedy, regardless of whether that assistance was actually received.

The interviewees were located primarily through local civil society organisations, including legal aid organisations and unions. This was necessary in order for the migrant workers to trust the interviewer sufficiently to agree to share their experiences.

Thirty-four interviews were conducted in Malaysia itself, and 16 were conducted with returnee migrants in Nepal (10) and Indonesia (6). In all, migrant worker interviewees came from nine countries.

³⁰ Farbenblum, Taylor-Nicholson, and Paoletti, *Migrant Workers' Access to Justice at Home*, 2013; Paoletti, Taylor-Nicholson, Sijapati, and Farbenblum, *Migrant Workers' Access to Justice at Home*, 2014.

Table 1 | Nationalities of Migrant Workers Interviewed

Nationality	Malaysia						Nepal		Indonesia		Total
	Kuala Lumpur		Selangor		Penang		Kathmandu, Nuwakot, Nawalparasi		West Java		By Nationality
	M	W	M	W	M	W	M	W	M	W	
Bangladesh			1			1					2
Cambodia				1		6					7
India				2							2
Indonesia		2	2	3					4	2	13
Myanmar						1					1
Nepal			2				10				12
Philippines				1	2	6					9
Sri Lanka						3					3
Vietnam						1					1
Total Men (M)	21										
Total Women (W)	29										
Total	50										

M: Male, F: Female

The sample consisted of 29 women and 21 men, most aged between 25 and 40 years at the time of the interview. All had been over the age of 18 when they arrived in Malaysia. Many had worked abroad previously in either Malaysia or another country. Education levels varied greatly. One female migrant worker from Cambodia had no formal education at all. She had worked as a rubbish picker before being recruited to work in Malaysia. Many domestic workers, particularly older women, had only a few years of schooling and could read simple words. At the other end of the spectrum, several migrant workers had a university degree or vocational qualification.

The motivation to come to Malaysia for all interviewees was the chance to earn higher wages to support their families at home. Some also wished to travel or to gain work experience.

Of the 50 migrant workers interviewed individually, 28 migrants (ie more than half) were undocumented at the time of interview, either because they had entered Malaysia irregularly (13), or had become irregular while in Malaysia (15). Those workers who entered irregularly all came to Malaysia on social visit passes (see section 4.3.1) on the advice or instruction of their agents, and then worked, contrary to the conditions of the pass.

Stakeholders

In-depth interviews were conducted with 44 stakeholders. These included government officials and other state actors as well as members of civil society including representatives of trade unions, NGOs, lawyers, academics, and private sector representatives. A full list of interviewees is contained in Annex 3.

Table 2 | Stakeholder Interviews by Category

Stakeholder Category	Number of Interviewees
Academic	1
Civil Society	10
Embassy	5
Government	10
International Organisation	2
Legal Practice	10
Private Sector	2
Trade Union	4
Total	44

These interviews sought to understand the nature of the individual's work, the role of the organisation or institution, their experiences with and perceptions of various redress mechanisms, and their recommendations for reform.

2.4.2 Focus Groups and Roundtables

Interactive group discussions, in the form of focus groups with migrant workers and roundtables with stakeholders, provided data on perceptions of the migrant workers' problems and various avenues of redress.

Focus Groups

In addition to the 50 migrants interviewed, a further 51 migrants participated in focus groups. The researchers conducted six focus group discussions in four locations, with five to 14 migrants participating in each (see Table 3). The participants were asked about the problems migrant workers commonly face; and perceptions of common sources of assistance, such as police and NGOs.

Four of the focus groups were grouped according to language so that the participants could discuss the topics freely and a single interpreter could interpret the discussion. Two focus groups were formed according to a common situation. The first was held with women migrant workers who had experienced abuse and were staying in a shelter run by

an NGO. The other focus group comprised Myanmar nationals who identified as refugees. They shared their experiences of being a refugee, being undocumented and working in Malaysia.

Table 3 | Details of Focus Groups in Malaysia

Focus Group Type	Location (State in Malaysia)	Total Migrant Workers	Number of Men	Number of Women
NGO Shelter	Selangor	5	0	5
Bangladeshi Workers	Negeri Sembilan	7	7	0
Nepali Workers	Johore	12	10	2
Nepali Workers	Johore	8	7	1
Myanmar Refugees	Johore	5	5	0
Nepali Workers	Kuala Lumpur	14	14	0
Total		51	43	8

Expert Roundtables

The Bar Council Malaysia hosted two roundtables with stakeholders, some of whom were also interviewed. These meetings began with presentations and questions from the researchers, followed by facilitated discussion and debate among participants.

The participants came from diverse backgrounds and included lawyers, judges, embassy officials, employer and worker representatives, Government officials, and civil society representatives. This mixed format gave participants an opportunity to share experiences of working with migrant workers from different perspectives, to ask questions of each other, and to debate potential ideas for reform.

The first roundtable was held in Kuala Lumpur on 20 January 2015, and was attended by 41 stakeholders. The participants discussed the mechanisms they believed to be most relevant to migrant workers, and key barriers to accessing justice. This discussion fed into the framing of the study and interview questions for migrant workers.³¹ A second roundtable with 54 participants was held on 6 November 2015 to present preliminary findings of the study, seek feedback, and facilitate a discussion on recommendations and ways forward.

³¹ *Report of the Roundtable on Migrant Workers' Access to Justice in Malaysia*, 20 January 2015, Bar Council Malaysia.

2.5 Quantitative Research

To support the qualitative research, a small component of quantitative data was gathered through a case file analysis of cases held by a civil society organisation, Tenaganita. Tenaganita — one of the largest organisations in Malaysia providing social and legal services to migrant workers — had kindly agreed to open its case files to the research team.

A Malaysian lawyer was hired to review Tenaganita's case files and enter key data into a database created by the researchers from March to August 2015. Data collected from the files included the nature of the complaint; details about the claimant and the accused; the legal basis for the complaint; the remedy sought; and enforcement and the result. Key dates for each case were also recorded to capture the duration of each stage of the case.

The cases included 22 labour cases; two workmen's compensation cases; 10 civil cases; six criminal cases in which the migrant worker was the victim of crime; and 22 criminal cases in which the migrant worker was accused of immigration offences. It is not possible to state the proportion of all Tenaganita cases that these cases comprise. Tenaganita explained that individual case workers manage the case files, and ongoing cases were kept in their offices. Further, the information and level of detail contained in the case file varied depending on the case officer. All but three of the case files were opened by Tenaganita between 2010 and 2015.

2.6 Limitations

The findings of this study should be read in light of several limitations.

First, the Government does not publish its policies in respect to migrant workers, or internal departmental materials such as standard operating procedures for handling of cases. The researchers sought this information through letters and in-person requests, but it was not granted. Thus, descriptions of government policy are drawn from government websites and media reports.

Similarly, although the researchers sought interviews with all government departments whose work is discussed in the study, not all interviews were granted. Where interviews were given, the interviewees were usually senior policy-makers or directors within departments rather than individuals who handled migrant worker cases on a regular basis. Some of these officers, however, had handled cases before they were promoted to a policy position.

Finally, identifying migrant workers to participate in the study independently was challenging in that it required locating individuals who had already started seeking a remedy but had not yet finalised their case and departed Malaysia. This was a narrow window of time, and during this time migrant workers felt vulnerable and were not always willing to speak to researchers. The researchers overcame this by relying on trusted NGOs to facilitate introductions, but this meant the sample groups had usually received support and advice not available to other migrant workers seeking redress. The researchers also sought to overcome this bias by conducting additional interviews with migrant workers in home countries after their cases were completed. Many of these migrant workers had not received any assistance from civil society organisations while in Malaysia.

2.7 Ethics

All efforts were made by the authors to protect the rights and well-being of the participants in this study. The researchers fully disclosed the nature and intent of the study to all participants before seeking their consent to participate, and the participants signed a consent and information form at the outset of the interview, allowing their information to be used in the report. The participants were also guaranteed that their identities would be kept confidential, including the identities of specific government and non-government interviewees. No names have been used in this report. Where permission was granted by interviewees, interviews were audio recorded.³²

³² See Annex 3 for details of interviewed persons and their organisations.

3 BACKGROUND AND CONTEXT

Malaysia has a long history of labour migration, and has alternated between welcoming migrants to fill labour shortages, and instituting harsh crackdowns on undocumented populations. Despite these measures, the population of migrant workers in the country is growing and includes both documented and undocumented migrant workers.

This chapter outlines a brief history of labour migration to Malaysia, the policies that have facilitated or restricted immigration, and an overview of documented and undocumented workers in Malaysia today.

3.1 History of Labour Migration and Migration Policy

Traders and settlers from other regions have arrived in Malaysia for centuries, but large-scale labour migration to Malaysia began only with the arrival of the British in the late 19th century.³³ The British colonial administration needed manual labourers for its developing export industries located on the Malay Peninsula: tin mining, coffee, and sugar plantations; and later, rubber plantations. Other workers were needed to build the physical and business infrastructures to support this trade. The Malays, who lived largely in agrarian communities, were either excluded from these positions, or declined to work under the conditions offered.

Migrants in the colonial period came overwhelmingly from three places: south-eastern China, southern India, and Java in modern-day Indonesia. Most migrants were young adult men who came for short periods to save money, but some chose to settle in Malaya, leading to the diverse country that Malaysia is today.³⁴

Initially migrant workers were indentured, meaning that they were required to work for their sponsoring employer until they had repaid their recruitment and travel costs. Later, when the indenture system was outlawed, workers came on employment contracts negotiated by private brokers. Regardless of the means of recruitment, working conditions, particularly on plantations, were notoriously brutal, and accidents and injuries were common.³⁵

³³ For an overview of early migration to Malaysia, see K. K. Kim, "Malaysia: Immigration and the Growth of a Plural Society", *Journal of the Malaysian Branch of the Royal Asiatic Society*, Vol. 71, No. 1 (274), 1998, pp. 1-25.

³⁴ For more information regarding the immigration of Chinese and Indian workers under the British colonial authorities, see S. S. Amrith, "Connecting Diaspora Histories: Indians and Chinese in Colonial Malaya", *Indian and Chinese Immigrant Communities: Comparative Perspectives*, in J. Bhattacharya, and C. Kripalani (eds.), London and New York: Anthem Press, 2015, pp. 13-23.

³⁵ P. Ramasamy, "Labour control and labour resistance in the plantations of colonial Malaya", *The Journal of Peasant Studies*, 1992, 19:3-4, 87-105, DOI: 10.1080/03066159208438489.

Immigration remained virtually unrestricted until the onset of the Great Depression in 1929 reduced the demand for labour. First, the Government enforced quotas on the number of Chinese nationals allowed to immigrate. Then, in 1933, the Aliens Ordinance expanded immigration controls and required, for the first time, the registration of all non-Malays residing in Malaya.³⁶ Immigration virtually stopped during the Second World War and Japanese occupation. It was not until after Malaysia obtained independence in 1957 that the Government reopened the doors to immigrants, but sought to limit immigration to skilled migrants only.³⁷

By the 1970s, as industrialisation and urbanisation led to growing shortages of workers for plantations and in construction, there was new pressure to recruit low-wage migrants from abroad. Employers first began recruiting migrant workers independently until the Government signed labour accords with the Philippines, Bangladesh, and Thailand. In 1991, the Government encouraged the development of a private recruitment industry to manage overseas recruitment through the Comprehensive Policy on the Recruitment of Foreign Workers. This policy facilitated a dramatic increase in the number of migrant workers in Malaysia.³⁸

3.2 Labour Migration in Malaysia Today

3.2.1 The Malaysian Economy

Today, after 60 years of independence, Malaysia has transformed from a low-income country dependent on the export of primary goods, to an upper-middle income country with large manufacturing and services sectors.³⁹ Malaysia still exports commodities such as rubber, palm oil, wood, petroleum and liquefied natural gas, but has added manufactured goods like garments, electronic parts, appliances, and semiconductors. The services sector, from hospitality and tourism to banking and finance, is now the largest segment of the economy by contribution to the GDP.

³⁶ For more information regarding immigration under the British colonial authorities, see S. S. Amrith, *Indian and Chinese Immigrant Communities*, pp. 13-23.

³⁷ A number of authors have traced the history of migration policy in Malaysia. See A. Kaur, "International Migration and Governance in Malaysia: Policy and Performance", *UNEAC Information Papers*, No. 22, 2008, pp. 4-18.

³⁸ A. Kaur, *UNEAC Information Papers*, pp. 4-18.

³⁹ The World Bank, "The World Bank in Malaysia: Overview", 2016, http://www.treasury.gov.my/pdf/economy/er/1617/keydata_forecast.pdf.

Table 4 | Sectors of the Malaysian Economy by Contribution to GDP (2015)

Sector	Percentage of GDP in 2015
Services	53.5
Manufacturing	23.0
Mining	9.0
Agriculture and Plantations	8.8
Construction	4.4
Import Duties	1.3

Source: Ministry of Finance⁴⁰

This economic transformation owes much to government policies, which have promoted industrialisation and free trade through a series of five-year plans. Export-oriented industrialisation began in the 1970s through government incentives to foreign companies and a reduction of tariffs. In the 1980s, the Government supported the creation of heavy industries. In the most recent five-year economic plan, the Government of Prime Minister Najib Razak is intending that Malaysia reach first-world status by 2020.⁴¹

Poverty among Malaysian citizens in Malaysia today is around one percent, education levels are high, and the unemployment rate is extremely low at around 3.5 percent (with four percent being considered full employment).⁴²

Non-citizens have once again become essential to the Malaysian economy by supplementing the local workforce and undertaking low-wage work, particularly the more monotonous, dirty, or dangerous work.⁴³ Documented migrant workers have remained fairly steady between 12 to 15 percent of the labour force since 2010 (see Table 5), but this does not include the unknown number of undocumented workers in the country.

⁴⁰ Ministry of Finance, "GDP2010_2016_05.xlsx".

⁴¹ See eg Z. A. Yusof, and D. Bhattasali, "Economic Growth and Development in Malaysia: Policy-Making and Leadership, Commission on Growth and Development", World Bank, Working Paper No. 27, 2008.

⁴² The World Bank, *Malaysia*, 2016, <http://data.worldbank.org/country/malaysia>.

⁴³ Note that labour shortages are not measured by the Malaysian Government in any systematic way, but are revealed through strong demand from companies, particularly in the construction, plantation, manufacturing and agricultural sectors. See G. Ducanes, "Labour shortages, foreign migrant recruitment and the portability of qualifications in East and South-East Asia", Bangkok: ILO Regional Office for Asia and the Pacific, 2013, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_226476.pdf.

Table 5 | Documented Migrant Workers in the Labour Force in Malaysia

Selected Labour Market Indicators	Labour Force ('000 Persons)	Migrant Workers ('000 Persons)	Percentage of Total
2010	12,304	1,818	14.8
2011	12,676	1,573	12.4
2012	13,120	1,572	12.0
2013	13,635	2,250	16.5
2014	13,977	2,073	14.8

Source: Bank Negara Malaysia⁴⁴

3.2.2 Migrant Workers in Malaysia

Data on Non-Citizens

Data on migrant workers in Malaysia is difficult to obtain; little updated data is published on a regular basis and the presence of an unknown number of undocumented workers complicates available figures.

According to the last Population and Housing Census conducted in 2010, Malaysia had a population of 27 million people, of which approximately 8.2 percent, or 2.5 million, were non-citizens.⁴⁵ This includes all non-citizens residing in Malaysia temporarily or permanently, not only migrant workers. It is unclear whether undocumented non-citizens residing in Malaysia were included in the census.

Of the five states where interviews were conducted for this study, four had a higher proportion of non-citizens than the national average, with Kuala Lumpur having the most at 13.6 percent. Selangor, the most populous state in Malaysia, has around 10.5 percent documented non-citizens in its population (see Table 6). Again, undocumented workers would presumably increase these proportions.

⁴⁴ Bank Negara Malaysia, *Annual Report 2014*, available at http://www.bnm.gov.my/files/publication/ar/en/2014/ar2014_book.pdf.

⁴⁵ Official Portal of Department of Statistics Malaysia, "Population Distribution and Basic Demographic Characteristic Report 2010 (Updated: 05/08/2011)", http://www.statistics.gov.my/index.php?r=column/cthemeByCat&cat=86&bul_id=WWI4QW5TdGw1TGZHamVUanJoTWhpUT09&menu_id=azJjRWpYLOVBYU90TVhpclByWjdMQT09. http://www.statistics.gov.my/index.php?r=column/cthemeByCat&cat=117&bul_id=MDMxdHZjWTK1SjFzTzNkRXZzcVZjdz09&menu_id=L0pheU43NWJwRWVVSzkiWdzQ4TIhUUT09. In 2013, there were 2,408,329 non-citizens counted in Malaysia out of a population of 29.72 million (also around 8%).

Table 6 | Number and Percentage of Non-Citizens by State

State	Total Population ('000 Persons)	Non-Citizens ('000 Persons)	Percentage Non-Citizens
Johore	3,655.1	350	9.6
Kuala Lumpur	1,787.2	243.3	13.6
Negeri Sembilan	1,099.7	79.9	7.3
Penang	1,719.3	147.6	8.6
Selangor	6,298.4	662.6	10.5

Source: Department of Statistics⁴⁶

Approximately 40 percent of non-citizens (817,300) counted in the census were from neighbouring Indonesia. Other significant countries of origin were the Philippines, Thailand, Myanmar, India, Nepal, and Bangladesh. Smaller numbers of people from Cambodia, Sri Lanka, and Vietnam were also recorded as living in Malaysia.

Categories of Non-Citizens Working in Malaysia

Non-citizens working in Malaysia fall within one of several categories:

- (1) Expatriates who are employed in high skill non-executive positions, executive positions or top managerial posts with a minimum two-year contract and a salary of at least RM2,500 per month;⁴⁷
- (2) Documented migrant workers who come to Malaysia through formal channels to work in low-wage positions of up to RM2,500 per month; and
- (3) Undocumented migrant workers who work in Malaysia without a work permit.

The legal definitions and treatment of each of these categories are set out in chapter 4. Data on these three categories is set out in the following sections.

⁴⁶ These statistics were developed through a search on the Population Quick Info search webpage of the Department of Statistics, based on population estimates for 2016, by state and based on ethnicity. The non-Malaysian citizen category appears to include all non-citizens and not only migrant workers. Source: Department of Statistics, Population Quick Info Search, available at <http://pqi.stats.gov.my/searchBI.php?kodData> (last accessed on 30 September 2016).

⁴⁷ Immigration Department of Malaysia, "Process for Employing an Expatriate", notice posted on the Official Portal website in May 2012, available at <http://www.imi.gov.my/images/pegawai-dagang/content-07052012/MAKLUMAN%20PROSES%20PENGAMBILAN%20PEGAWAI%20DAGANG.pdf>.

Expatriates

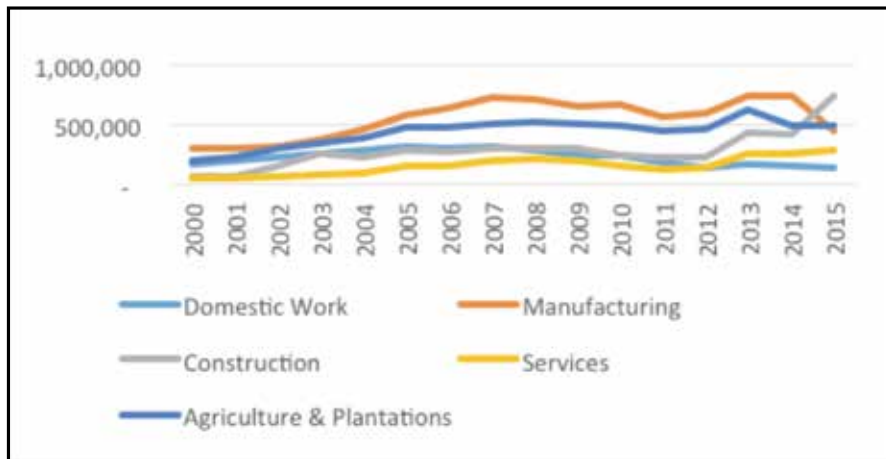
Data on expatriates is limited but one study estimated that in 2013, 44,938 expatriates were living and working in Malaysia, making them a little under two percent of documented non-citizen workers in Malaysia.⁴⁸

Documented Migrant Workers

Low-wage migrant workers comprise around 98 percent of documented non-citizen workers in Malaysia and their numbers have been growing. Whereas in 2000 there were just 807,096 documented migrant workers in Malaysia, this had increased to 2,135,035 workers by 2015, an increase of almost 200 percent over 16 years.⁴⁹

Documented migrant workers can only be employed in one of five sectors: agriculture and plantations, construction, manufacturing, services, and domestic work. As Figure 1 reveals, the manufacturing sector has always recruited the largest numbers of documented migrant workers, followed by agriculture and plantations. In all of these categories except for domestic work, the numbers of documented migrant workers have grown significantly over the past 15 years.

Figure 1 | Documented Migrant Workers by Sector, 2000 to 2015⁵⁰



Source: MOHA, Economic Planning Unit

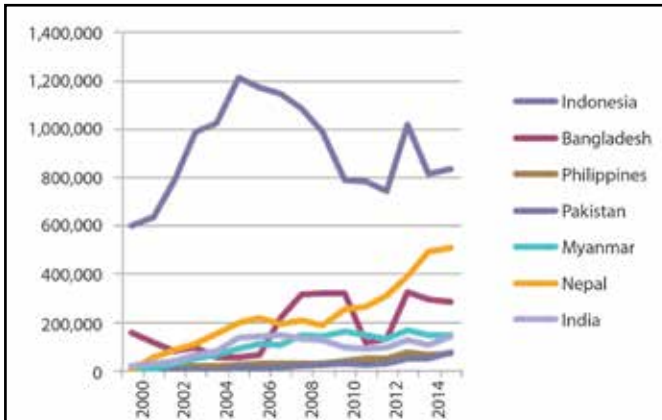
⁴⁸ MEF, *Practical Guidelines for Employers*, 2014, available at http://www.mef.org.my/Attachments/MEFReport_PGERPERFWM.pdf.

⁴⁹ Author's calculations based on MOHA's statistics as cited by the Economic Planning Unit, Prime Minister's Department, "Table 1.5.1: Number of Foreign Workers in Malaysia by Sector, 2000 – 2015", available at <http://www.epu.gov.my/sites/default/files/1.5.1.pdf> (last accessed on 29 September 2016).

⁵⁰ MOHA, "Table 1.5.1".

Documented migrant workers can be recruited from one of only 15 approved “source countries”, all in South, Southeast and Central Asia.⁵¹ Government data indicates that by far the largest number of documented migrant workers has traditionally come from Indonesia, although their proportion of the total has declined from 75 percent in 2000, to 39 percent in 2015. By contrast, the numbers of migrant workers from Nepal and Bangladesh have increased over this period. Figure 2 reveals the countries of origin of documented migrant workers over time between 2000 and 2015.

Figure 2 | Documented Migrant Workers by Country of Origin, 2000 to 2015⁵²



Source: MOHA, Economic Planning Unit⁵³

Undocumented Migrant Workers

The number of undocumented migrant workers in Malaysia is not known with any certainty and, as a politically sensitive issue, is highly contested. Where estimates are given, the sources do not indicate the basis of the estimate, so determining reliability is difficult.

The most common figure cited, from the MOHA, is around 1 million undocumented migrant workers in Malaysia at any one time, equivalent to around half the number of documented

⁵¹ MOHA, “Table 1.5.1”. Approved source countries are in South Asia (Bangladesh, India, Nepal, Pakistan, and Sri Lanka), South East Asia (Cambodia, Indonesia, Laos, Myanmar, the Philippines, Thailand, and Vietnam) and Central Asia (Kazakhstan, Uzbekistan, and Turkmenistan).

⁵² MOHA, as cited by the Economic Planning Unit, Prime Minister’s Department, “Population & Labour Force: 1.5 Foreign Workers by Origin Country”, available at <http://www.epu.gov.my/en/economic-statistics/population-and-labourforce> (last accessed on 29 September 2016).

⁵³ Note that the jump in the number of migrant workers apparent between 2012 (1,571,589 workers) and 2013 (2,250,322) has been attributed by Bank Negara — Malaysia’s Central Bank — to the large amnesty programme called “6P” conducted during this period (See Chapter 3.3.1). Bank Negara Malaysia, *Annual Report 2013*, available at http://www.bnm.gov.my/files/publication/ar/en/2013/ar2013_book.pdf.

workers in the country.⁵⁴ Other reports, for example the United States Trafficking in Persons Report 2015, and some media outlets, suggest that more than two million undocumented migrant workers are present in Malaysia, at least as many as the population of documented workers.⁵⁵ The RMP reportedly estimated three million undocumented migrant workers in 2014.⁵⁶ The highest estimate, from the Minister for Human Resources in November 2014, was 4.6 million undocumented migrants in Malaysia.⁵⁷

Data from immigration raids suggests that, in fact, only around a third of those working in Malaysian enterprises are undocumented. As of 15 June 2016, MOHA reported that the Immigration Department had conducted 5,622 immigration operations in 2016. The officers checked the documents of 91,075 foreign workers during these operations, of which 27,498 were found to be undocumented and were detained.⁵⁸

Counting undocumented migrants is difficult partly due to the challenge of counting a hidden and vulnerable population, and partly due to varied definitions of “undocumented”. For example, it is used sometimes to refer only to people entering the country without valid documents, and at other times includes people who enter as documented migrant workers but later become undocumented by leaving their employer or overstaying their visa.

As chapter 4 describes, being “documented” requires not a single step but rather a series of steps both before and after arrival that result in the worker obtaining and maintaining a work permit. Migrant workers who participated in this study described becoming

⁵⁴ Bernama, “Govt can register 1.2m illegal foreign workers in 10 days”, *The Borneo Post Online*, 31 December 2011, <http://www.theborneopost.com/2011/12/31/govt-can-register-1-2m-illegal-foreign-workers-in-10-days/>, (last accessed on 3 October 2016); A. Minter, “Malaysia’s Immigration Mess”, *Bloomberg*, 21 April 2016, <https://www.bloomberg.com/view/articles/2016-04-21/malaysia-s-immigration-mess> (last accessed on 3 October 2016); R. M. Moreno, X. V. Del Carpio, M. Testaverde, H. E. Moroz, L. Carmen, R. L. Smith, C. Ozden, K. Karakurum-Ozdemir, and P. S. Yoong, “Malaysia - Economic monitor : immigrant labor (English)”, Washington, D.C.: World Bank Group, 2015, available at <http://documents.worldbank.org/curated/en/753511468197095162/Malaysia-Economic-monitor-immigrant-labor>.

⁵⁵ United States Department of State, “Malaysia: Tier 2 Watch List”, *Office to Monitor and Combat Trafficking in Persons: 2015 Trafficking in Persons Report*, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243485.htm>; “Malaysia to ‘rehire’ 2m illegal workers”, *The Straits Times*, 6 February 2016, <http://www.straitstimes.com/asia/se-asia/malaysia-to-rehire-2m-illegal-workers>.

⁵⁶ Asia Pacific Migration Network Migrant Workers of the International Labour Organization, *Malaysia’s ‘Invisible’ Workforce*, <http://apmigration.ilo.org/news/migrant-workers-malysias-invisible-workforce>.

⁵⁷ Bernama, “Migrant workers can possibly control our economy, warns minister”, *The Malaysian Insider*, 11 November 2014, <http://www.mtuc.org.my/foreign-workers-can-control-malaysian-economy-if-given-the-opportunity-richard-riot/> (last accessed on 15 January 2016).

⁵⁸ Bernama, “Govt does not bring in foreign workers — Ahmad Zahid”, *The Borneo Post*, 17 June 2016, <http://www.theborneopost.com/2016/06/17/govt-does-not-bring-in-foreign-workers-ahmad-zahid/> (last accessed on 29 September 2016).

undocumented through various failures by agents and employers at different stages. Some Malaysian outsourcing companies sought to avoid the complex and costly procedures for hiring a documented migrant worker, and instead advised the worker to enter on a tourist visa, promising (incorrectly) that a work permit could be obtained after arrival. Others became undocumented when their employer failed to complete a step in the process to obtaining or renewing a work permit, or when the worker was forced to leave their place of employment due to poor working conditions.

Still others are smuggled into Malaysia without border processing, either by boat or across the land borders with Thailand or Indonesia. Such routes are frequently dangerous and controlled by migrant-smuggling operations. In 2015, police made the shocking discovery of 28 migrant “death camps” along the Malaysian side of the Thai border, in which it was believed hundreds of migrants could be held for ransom until their families paid for their release into Malaysia. Close to the camps were 139 unmarked graves believed to contain the bodies of undocumented migrants, exposing the human cost of migrant smuggling.⁵⁹

Box 1: UNHCR and the Status of Asylum Seekers in Malaysia⁶⁰

Malaysia has been a destination for asylum seekers since around 255,000 Vietnamese arrived by boat during the 1970s. Although people have sought safety from persecution since this time, refugees and asylum seekers have once again attained international prominence following mass arrivals of stateless Rohingya people and Bangladeshi nationals by boat in 2014 and 2015.⁶¹

Since the Vietnamese boat arrivals in 1975, the UNHCR has been operating in Malaysia. Presently, the UNHCR registers individuals who claim to be asylum seekers and then conducts Refugee Status Determination interviews to ascertain their eligibility under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.⁶² The UNHCR

⁵⁹ S. Thiru, “Press Release | Malaysian Government Must Bring the “Death Camps” Human Traffickers and Migrant Smugglers to Justice”, *The Malaysian Bar*, 28 May 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_malaysian_government_must_bring_the_death_camps_human_traffickers_and_migrant_smugglers_to_justice.html.

⁶⁰ Information about the role of UNCHR can be found in “Factsheet on Refugees in Malaysia”, UNHCR, 2014, available at <https://www.unhcr.org/en-my/unhcr-in-malaysia.html> (last accessed on 2 September 2016).

⁶¹ S. Thiru, “Press Release | Rohingya and Bangladeshi Boat People Humanitarian Crisis: Prompt and Concrete Measures Needed”, *The Malaysian Bar*, 19 May 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_rohingya_and_bangladeshi_boat_people_humanitarian_crisis_prompt_and_concrete_measures_needed.html.

⁶² The current system may change in the near future, where a joint task force of Government representatives with UNHCR representatives to oversee the registration process. For more information, see “Joint task force to supervise refugee registration”, *The Star Online*, 19 August 2016, <http://www.thestar.com.my/news/nation/2016/08/19/joint-task-force-to-supervise-refugee-registration/> (last assessed on 20 September 2016).

provides registered asylum seekers and refugees with a UNHCR card that shows the individual's basic biodata, photo and UNHCR case number.

In June 2016, some 150,700 refugees and asylum seekers had registered with the UNHCR, including 34,000 children. Most (136,350) were from Myanmar, with the remaining coming from Sri Lanka, Pakistan, Somalia, Syria, Yemen, Iraq, Afghanistan, and the Palestinian Territories among others.⁶³ In 2016, UNHCR registered 20,100 new asylum claims.⁶⁴

Malaysia is not a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, and the Immigration Act 1959/63 (see section 4.3) does not provide for recognising a person as an asylum seeker or refugee. Therefore, all persons present in Malaysia who are fleeing persecution in their home country are technically undocumented migrants unless they have some other legal status.

In the absence of a national legal framework for asylum seekers and refugees, the Malaysian Government has worked with the UNHCR to provide some *ad hoc* protections for individuals seeking asylum. For example, the Vietnamese boat arrivals were allowed temporary asylum and allowed to stay in camps along Malaysia's east coast, although they had no possibility of resettlement in Malaysia. Syrians, Indonesians from Aceh, and Bosnians, have been invited into Malaysia, granted temporary resident passes and given special privileges, such as scholarships or the right to work, on a humanitarian basis.⁶⁵

Asylum seekers who enter Malaysia outside of these programmes are liable to arrest, detention and refoulement as undocumented migrants. Some government departments have adopted internal circulars and directives that modify procedures for registered asylum seekers. These documents are not public, however secondary sources report that individuals registered with the UNHCR, called "persons of concern" are assured:

- (1) access to government hospitals and clinics, and recognition of a UNHCR Card as a valid identity document in lieu of a passport;
- (2) a 50 percent reduction of the foreign premium rate of treatment at government hospitals and clinics;⁶⁶ and

⁶³ UNHCR, "Figures at A Glance", 2016, available at http://www.unhcr.org/my/About_Us_-@-Figures_At_A_Glance.aspx (last accessed on 20 September 2016).

⁶⁴ UNCHR, *GLOBAL TRENDS: Forced Displacement in 2016*, p. 42, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/5943e8a34.pdf>.

⁶⁵ K. Mayberry, "First-class refugees: Malaysia's two-tier system", *Al Jazeera*, 27 December 2015, <http://www.aljazeera.com/indepth/features/2015/12/class-refugees-malaysia-tier-system-151221061627431.html> (last accessed on 15 September 2016).

⁶⁶ Equal Rights Trust, *Equal Only in Name*, p. 71, available at <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Only%20in%20Name%20-%20Malaysia%20-%20Full%20Report.pdf>.

- (3) some immunity from prosecution for immigration offences.⁶⁷ Malaysian authorities can only detain individuals registered with the UNHCR until UNHCR Malaysia verifies the authenticity of the registration.⁶⁸ Authorities must notify the UNHCR of the arrest of a person of concern on the day of the arrest.⁶⁹

Asylum seekers and refugees are not legally entitled to work in Malaysia and their children are not entitled to attend Malaysian schools. Protection from prosecution does enable them to live with slightly more stability than other undocumented migrants, but does not ensure acceptance or protection from exploitation. This study included one focus group with refugees from Myanmar. They described living in fear and feeling “despised” by Malaysians. Their employment was insecure and they described having to change jobs frequently due to non-payment of wages and other abuses.⁷⁰

Further, it is not guaranteed that immigration officers will always be aware of or follow the directives; the UNHCR reported that in 2015, 2,282 refugees and 5,648 asylum seekers were detained and faced prosecution for immigration offences in Malaysia.⁷¹

3.3 Political and Social Attitudes Towards Migrant Workers

The Malaysian Government has repeatedly expressed an intention to reduce reliance on migrant workers as it transitions the country to a high-skilled economy. The 10th Malaysia Plan, 2010 to 2015, noted:

While we undoubtedly need the services of foreign workers, especially in jobs that are not favoured by locals, the continued reliance on unskilled foreign workers will hinder our aspiration to shift to high value added economic activities.⁷²

⁶⁷ The Malaysian Attorney General's Chambers issued a circular in 2005 that provides asylum seekers and refugees registered with UNHCR some immunity from prosecution for immigration charges. Source: UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019*, footnote 113, p. 59, available at <http://www.unhcr.org/protection/detention/57b579e47/unhcr-global-strategy-beyond-detention-progress-report.html>.

⁶⁸ In a directive from the Director General on immigration enforcement, immigration officers are requested to only detain UNHCR card-holders if the authenticity of the card cannot be determined. This circular is not publicly available. Source: Equal Rights Trust, *Equal Only in Name*, p. 48.

⁶⁹ Comments by the immigration officer at the Roundtable on Complaint Mechanisms, Undocumented Workers, Arrests and Detention, held on 9 September 2016 at the University of Malaya, Kuala Lumpur.

⁷⁰ Focus Group No. 4, male Myanmar nationals identifying as refugees, interviewed in Johore, 21 June 2015.

⁷¹ UNHCR, *Beyond Detention*, p. 59.

⁷² Prime Minister's Department, *Tenth Malaysia Plan 2011-2015*, Putrajaya: The Economic Planning Unit, 2010, available at https://www.pmo.gov.my/dokumenattached/RMK/RMK10_Eds.pdf.

This was reiterated in the 11th Malaysia Plan, released in May 2016, which called for reducing reliance on foreign workers, as a part of increasing labour productivity, and more streamlined management of foreign worker recruitment.⁷³

The Government and public have also described migrant workers as threats to security.⁷⁴ Migrants have been accused (not supported by data) of increasing violent crime, and spreading disease.⁷⁵

Accordingly, the Government has promised to cap the number of documented migrant workers to 1.5 million, first by 2015, which was not achieved, and then by 2020, and to reduce the number of undocumented migrant workers.⁷⁶

Reducing the number of migrant workers has been challenging, however, given the enormous demand for migrant labour among Malaysian employers. At the time of writing, the Government had placed a freeze on new migrant worker recruitment, following public outcry about plans to bring in 1.5 million new workers from Bangladesh.⁷⁷ This has led to criticism from both local employers and foreign companies that say the freeze has hurt their businesses.⁷⁸

⁷³ *Eleventh Malaysia Plan: Anchoring Growth in People*, pp. 5 to 16, available at <https://policy.asiapacificenergy.org/sites/default/files/11th%20Malaysia%20plan.pdf>.

⁷⁴ S. K. Abu Bakar, “Dasar kerajaan mengenai pekerja asing masih keliru”, *Free Malaysia Today*, 9 August 2016, <http://www.freemalaysiatoday.com/category/bahasa/2016/08/09/dasar-kerajaan-mengenai-pekerja-asing-masih-keliru/> (last accessed on 29 September 2016).

⁷⁵ See eg Editorial, “Illegal Workers a Threat to Security”, *New Straits Times Online*, 16 February 2016; The Malaysian Medical Association president, Dr H. Krishna Kumar recently stated, for example, that undocumented migrant workers are the biggest factor behind the rise in tuberculosis (“TB”) cases in Malaysia: “Because those who come in illegally are not screened, they are walking around and spreading the diseases to people here and this is very frightening”; see “Almost Half of Foreign Workers have TB, Doctors Say”, *Malay Mail Online*, 12 March 2015, <http://www.themalaymailonline.com/malaysia/article/almost-half-of-tested-foreign-workers-have-tb-doctors-say#sthash.nD5zUuNr.dpuf>.

⁷⁶ *Eleventh Malaysia Plan*; and B. Harkins, *Review of Labor Migration Policy in Malaysia*.

⁷⁷ P. K. C., “Malaysia Freezes Recruitment of Foreign Workers After Protests”, *Bloomberg*, 19 February 2016, <http://www.bloomberg.com/news/articles/2016-02-19/malaysia-freezes-recruitment-of-foreign-workers-after-protests>.

⁷⁸ “Malaysia Govt to address foreign labour shortage: Minister”, *Channel News Asia*, 13 October 2016, <https://www.channelnewsasia.com/news/asia/malaysia-govt-to-address-foreign-labour-shortage-minister-7763086>; “Freeze on Intake on foreign workers a strain to restaurants”, *The Star Online*, 30 August 2016, <http://www.thestar.com.my/news/nation/2016/08/30/freeze-on-intake-of-foreign-workers-a-strain-to-restaurants/>.

3.3.1 Regularisation and 6P

From time to time, the Government has introduced programmes to legalise or “whiten” the migrant worker population by registering undocumented workers who are employed and deporting others. In 2011, the Government launched the largest regularisation programme it had ever attempted, called “6P”, for registration, legalisation, amnesty, supervision, enforcement, and deportation of migrants. For a period of three weeks, employers could register undocumented migrant employees who were given immigration permits valid for two or three years depending on the industry.⁷⁹ This registration was undertaken largely by private companies contracted to the MOHA.⁸⁰ A reported 1.3 million undocumented workers registered and, of these, 521,734 were granted temporary permits and 303,000 were voluntarily repatriated.⁸¹ As the 6P workers’ contracts drew to a close at the end of 2014, the Government gave a one-year extension before the 6P workers would have to leave.⁸²

On 15 February 2016, the Government reopened regularisation of undocumented workers to fill labour shortages, at the same time as it restricted the recruitment of new migrant workers.⁸³

3.3.2 Enforcement Operations and Deportations

Alongside regularisation programmes are efforts to identify and deport undocumented migrant workers through immigration raids and large-scale operations called “crackdowns”.

⁷⁹ “Press Release: Extension of Period 6P”, MOHA, <http://www.moha.gov.my/index.php/en/kenyataan-media-akhbar/2025-perlanjutan-tempoh-6p>.

⁸⁰ One company, International Marketing and Net Resources Sdn Bhd (“IMAN”) was responsible for registering Indonesian nationals; another, Bukti Megah Sdn Bhd., was responsible for Myanmar nationals; and a third, the PMF Consortium, was responsible for all other migrant workers.

⁸¹ Foreign workers in the service industry were issued two-year work permits, and those in the manufacturing, construction and farming industries received three-year work permits. “Press Release: Extension of Period 6P”, MOHA (last accessed on 15 December 2015).

⁸² S. B. Mun, “Time running out for foreign workers under 6P program”, *The Sun Daily*, 15 December 2014, <http://www.thesundaily.my/news/1267884>.

⁸³ Immigration Department of Malaysia, “Frequently Asked Questions (FAQs): Program Penggajian Dan Penempatan Semula Pendatang Asing Tanpa Izin (PATI) – Program *Rehiring*”, http://www.imi.gov.my/images/fail_pengumuman/FAQs%20Rehiring-27Apr2016Latest.pdf (last accessed on 29 September 2016).

The Government has launched crackdowns every few years since 1992. Between 1992 and 2002, 2.25 million undocumented migrants were deported from Malaysia through these operations.⁸⁴ Between 2007 and 2009, 154,729 undocumented workers were deported.⁸⁵

Crackdowns are now almost annual operations. In 2013, for example, as 6P was about to expire, the Government launched a three-month operation that involved sending 100,000 personnel from various enforcement agencies to arrest undocumented migrants and deport them immediately. In 2014 as 6P formally ended, the Government launched mass raids and arrests around the country, with the aim of deporting 400,000 workers by the end of 2014. It is not known how many workers were in fact arrested and deported through these operations. In January 2014, just several months into the operation, the Government reported that 6,150 people had been arrested, and 1,500 found to be undocumented and deported.⁸⁶

3.4 Summary

Malaysia has a growing and diverse economy with low rates of poverty and unemployment. Migrant workers, both documented and undocumented, have become indispensable to employers in Malaysia as they fill low-wage jobs not wanted by Malaysians. Yet government policy on migration is inconsistent and changes frequently as it seeks to balance economic, security and social concerns. An overall punitive approach to undocumented migration undermines other efforts to regularise the workforce.

⁸⁴ A. M. Nah, "Legitimizing Violence: The Impact of Public 'Crackdowns' on migrant workers and refugees in Malaysia", *Australian Journal of Human Rights*, 2011, vol 17(2).

⁸⁵ A. Shah, "Crackdown on Illegal Immigrants Runs into Problems", *New Straits Times Online*, 23 February 2016, <http://www.nst.com.my/news/2016/02/129037/crackdown-illegal-immigrants-runs-problems>.

⁸⁶ J. Ng, "Malaysia Gets Tough on Illegal Immigrants as Amnesty Program Expires", *Wall Street Journal*, 21 January 2014, <http://blogs.wsj.com/indonesiarealtime/2014/01/21/malaysia-gets-tough-on-illegal-immigrants-as-amnesty-program-expires/>.

4 IMMIGRATION LAW AND POLICY, AND RECRUITMENT OF MIGRANT WORKERS

4.1 Overview

Immigration law and policy frame the experience of all migrant workers in Malaysia. This chapter describes the various actors who implement and enforce immigration law; the immigration law framework regarding entry, exit, and stay of non-citizens in Malaysia; and policy and procedures governing recruitment.⁸⁷

4.2 Actors with Responsibility for Migrant Worker Recruitment and Immigration Enforcement

Immigration management and enforcement is a complex system involving government and non-government actors. Government committees and departments implement the law, passed by the legislature, by developing policies and procedures. Enforcement agencies enforce the law and policies. Finally, private companies are involved in the recruitment and documentation of migrant workers, and the management of workers in Malaysia.

4.2.1 Government Actors

The Cabinet Committee on Foreign Workers and Illegal Immigrants

The central policy-making body relevant to migrant workers is the Cabinet Committee on Foreign Workers and Illegal Immigrants. The Cabinet Committee comprised representatives from 11 ministries, and is headed by the Deputy Prime Minister, who is also the Minister of Home Affairs.⁸⁸

The Cabinet Committee's mandate and work are not public. It does not have a website and its deliberations are conducted in secret; decisions are publicised only in press releases. Nevertheless, press releases reveal that the Cabinet Committee makes all significant policy decisions affecting migrant labour in Malaysia, such as whether to freeze or increase the number of new workers, the launch of interior enforcement operations to identify undocumented migrant workers, details of recruitment procedures, the role of recruitment agencies, and exit and deportation procedures.⁸⁹

⁸⁷ Immigration Act 1959/63 [Act 155]. The Immigration Act was first enacted for Peninsular Malaysia as the Immigration Ordinance 1959, Ordinance No. 12 of 1959. Following the formation of Malaysia in 1963, the immigration rules were extended to Sabah and Sarawak.

⁸⁸ Participating Ministries include Home Affairs; Works; Plantation Industries and Commodities; Agriculture and Agro-Based Industries; International Trade and Industry; Tourism; Foreign Affairs; Human Resources; Health; Rural Development; and Entrepreneur Development and Cooperative Development.

⁸⁹ See A. Abas, and F. Aziz, "Cabinet Committee has decided 3 measures foreign workers employers

MOHA

Policy implementation regarding migrant workers is largely overseen by the MOHA and thus within Malaysia migrant workers are viewed primarily through the lens of security, rather than labour. The MOHA is responsible for, “formulating and implementing policy on security and public order”, and maintaining “public order, harmony and internal security”. Specifically, it is charged with “formulating and implementing policy on issues pertaining to immigration [and] foreign workers”.⁹⁰

The Immigration Affairs Division within MOHA acts as a secretariat to the Cabinet Committee on Foreign Workers and Illegal Immigrants.⁹¹ In addition, the Foreign Worker Management Division supervises recruitment, including applications from employers seeking approval to hire foreign workers, and licensing of outsourcing agencies.⁹²

The MOHA also houses departments with immigration administration and enforcement functions. The powers of each department are gazetted by the Prime Minister.⁹³

The Immigration Department of Malaysia is responsible for performing the functions and exercising powers under the Immigration Act 1959/63 and the Passports Act 1966 (see section 4.3). Under the Immigration Act 1959/63, the Immigration Department has authority for “general supervision and direction of all matters pertaining to immigration throughout Malaysia”.⁹⁴

The RMP is responsible for exercising all powers given to the police, including powers under the Immigration Act 1959/63 to arrest suspected undocumented migrants without a warrant.⁹⁵

The RELA exercises powers under the Malaysia Volunteer Corps Act 2012, which allows citizen volunteers to “assist any security force”, including immigration enforcement officers and police.⁹⁶ The RELA does not have the power to conduct arrests.

should undertake: DPM”, *New Straits Times Online*, 28 August 2015, <http://www.nst.com.my/news/2015/09/cabinet-committee-has-decided-3-measures-foreign-workers-employers-should-undertake-dpm>.

⁹⁰ Ministers of the Federal Government Order (No. 2) 2013, [P.U. (A) 184], pp. 1593-1595, made pursuant to the Ministerial Functions Act 1969.

⁹¹ MOHA, *Immigration Affairs Division: Introduction*, <http://www.moha.gov.my/index.php/en/pengenalan-hal-ehwal-imigresen>.

⁹² MOHA, *Foreign Worker Management: Introduction*, <http://www.moha.gov.my/index.php/en/bahagian-pa-pengenalan>.

⁹³ Ministers of the Federal Government Order (No. 2) 2013, p. 1595.

⁹⁴ Immigration Act 1959/63, Section 3(2).

⁹⁵ Immigration Act 1959/63, Section 35.

⁹⁶ Malaysia Volunteers Corps Act 2012, Section 5.

The MAPO Council and the High Level Committee

The MAPO Council is an interagency body responsible for various policy and coordination functions relating to trafficking in persons and smuggling of migrants. The Secretary General for the MOHA chairs the MAPO Council, which consists of representatives from ministries, departments, the RMP, and the Attorney General.⁹⁷ Up to five representatives from NGOs can join the MAPO Council; three with expertise on human trafficking, and two with expertise on migrant smuggling.

The functions of the MAPO Council are to enforce the ATIPSOM Act (see chapter 7), formulate draft anti-trafficking and anti-smuggling policies and programmes, advise the Government on the situations of trafficking and smuggling in persons, make recommendations, and other policy-level interventions.⁹⁸

In November 2015, a ministerial committee called the “High Level Committee” was established to “deliberate on and decide the recommendations made by the [MAPO] Council”.⁹⁹ It comprises the ministers whose ministries are represented on the MAPO Council.

4.2.2 Private Actors Involved in Migrant Labour in Malaysia

Numerous private actors are involved in migrant worker recruitment and management of migrant workers. They include employers, outsourcing agencies, insurance companies, and government contractors that undertake certain administrative functions.

Employers

Employers are not mentioned in the Immigration Act 1959/63 but they play a large role in the immigration of migrant workers. Under the various recruitment rules set out later in this chapter, it is employers who arrange all approvals and immigration documents for migrant workers to enter Malaysia, and are responsible for the worker while in-country. A migrant worker's employer is endorsed on the work permit, and it is not legally possible for a migrant worker to change employer in Malaysia and still maintain documented status.

A sponsoring employer may be an individual, for example the employer of a domestic worker, or a company. Sometimes, the named employer is the owner of the trade or

⁹⁷ Members include representatives from Ministries including Home Affairs; Foreign Affairs; Human Resources; Women, Family and Community Development; Transport; Information; Defence; Health; Youth and Sports; and others. They are joined by representatives of the Attorney General and the Inspector General of Police, and from the Departments of Immigration; Customs; Maritime Enforcement; Labour; and Social Welfare.

⁹⁸ Interview with the MAPO Council Secretariat, Putrajaya, 13 November 2015; ATIPSOM Act, Section 7.

⁹⁹ ATIPSOM Act, Section 5C.

industry where the work is undertaken such as the owner of a home, plantation, or factory. In such cases, the employer is employing workers directly from abroad.

In other cases, the sponsoring employer is a labour contractor that provides labour or services to various individuals or companies. In Malaysia, these employers are usually termed “outsourcing agencies”. In other countries, they are called temp or staffing agencies. They act as both a recruitment agency, responsible for selecting and hiring workers from abroad, and a management company responsible for managing the workers in Malaysia and payment of wages. Most outsourcing agencies provide accommodation and transport for the workers out to the worksite of a principal employer.

Government Service Contractors

Some bureaucratic responsibilities associated with migrant worker recruitment and entry into Malaysia have been granted to private companies through government service contracts. It is not within the scope of this study to identify or examine these arrangements but some examples identified by the researchers include:

- (1) FOMEMA Sdn Bhd, which was granted an exclusive concession in 1997 to conduct all medical screenings of migrant workers in Malaysia; and
- (2) Bestinet Sdn Bhd, which operates the FWCMS, launched on 16 June 2015 to review and approve visa applications for documented migrant workers.¹⁰⁰

The contracting agency in the above cases is the MOHA. The Ministry argues that these arrangements make for more efficient processes and have reduced waiting times. The arrangements are also controversial, however, because they are often conducted in a non-transparent manner, and contracts are awarded without a public tender process. Malaysia does not have clear laws on public procurement or administrative law controls on government contracting.¹⁰¹ Origin country governments also often protest at the increase in fees and paperwork required by these services.

¹⁰⁰ MOHA, *Foreign Worker Management Division: Service Information*, <http://www.moha.gov.my/index.php/en/bahagian-pa-service-information>; Foreign Workers Centralized Management System, <http://www.fwcms.com.my/index.html>. For criticisms of the processes for managing migrant workers, see reports of Bestinet Sdn Bhd being owned by the former Minister of Home Affairs and Synerflux Sdn Bhd (the Company awarded the bid to recruit 1.5 million Bangladeshi workers) being owned by the current Home Minister’s brother. A. Razak, “Bestinet denies link with Bangladeshi workers system firm”, *Malaysiakini*, 18 November 2015, <https://www.malaysiakini.com/news/320054>.

¹⁰¹ See C. McCrudden, and S. G. Gross, “WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study”, *The European Journal of International Law*, Vol. 17, 2006, pp. 151-181.

4.3 Immigration Act 1959/63

The Immigration Act 1959/63 is the central statute governing immigration in Malaysia. It is supplemented by the Immigration Regulations 1963.

The Immigration Act 1959/63 essentially provides for the control of Malaysia's borders and empowers the Immigration Department of Malaysia to enforce its provisions. It requires that all persons wishing to enter Malaysia must enter and exit at designated checkpoints, and that all non-citizens hold either an entry permit or pass to enter Malaysia. The Act also sets penalties for violations of its provisions and creates procedures for detention and deportation. Details of these provisions are set out in the following sections.

4.3.1 Entry and Passes for Non-Citizens

All persons entering Malaysia must do so through authorised entry points, as designated by the Minister of Home Affairs.¹⁰²

Non-citizens entering Malaysia to remain temporarily must hold "a valid Pass lawfully issued to him".¹⁰³ The Immigration Regulations 1963 define eight types of pass: employment, dependent, visit, transit, student, special, landing, and residence passes.¹⁰⁴ Visit passes are further categorised into social business or professional visit, temporary employment, or tourist passes.¹⁰⁵ Fees for passes are set out in the Immigration Regulations 1963.¹⁰⁶

Work Passes

For those entering Malaysia to work, two passes are relevant: the Employment Pass and the VP(TE). These passes are both commonly called a "work permit" but they are for different kinds of workers.

The Employment Pass is intended for expatriates. It is issued by the Immigration Department to individuals who have a contract of service with a private company or a public authority.¹⁰⁷ The contract must be for a minimum of two years, and for a minimum salary of RM1,200 per month (this has been increased to RM2,500 in policy documents, as detailed in chapter 3).¹⁰⁸ The Employment Pass is valid for up to five years, and entitles the holder to multiple entries and exits.¹⁰⁹ The holder may change employers during the

¹⁰² Immigration Act 1959/63, Section 5(1).

¹⁰³ Immigration Act 1959/63, Section 6(1).

¹⁰⁴ Immigration Regulations 1963, Regulation 11.

¹⁰⁵ Immigration Regulations 1963, Regulation 8.

¹⁰⁶ Immigration Regulations 1963, Regulation 34 and Third Schedule.

¹⁰⁷ Immigration Regulations 1963, Regulation 9(1).

¹⁰⁸ Immigration Regulations 1963, Regulations 9(1)(a) and (b).

¹⁰⁹ Immigration Regulations 1963, Regulation 9(2).

validity of the Pass with the written consent of the Immigration Department.¹¹⁰ Finally, Employment Pass holders can bring their spouses and children with them to Malaysia as dependents.¹¹¹ The Residence Pass, introduced in 2011, is also for “expatriates”: for professionals and their family members.¹¹²

The VP(TE) is governed by much less detailed legal rules. The Pass authorises the holder to enter Malaysia and remain for up to 12 months, subject to the conditions of the Pass.¹¹³ The Department may extend the Pass “for any further period or periods” as the Department thinks fit.¹¹⁴ The Regulations make no provision for multiple entries or bringing dependents, making conditions for migrant workers who hold a VP(TE) much more restrictive than those for expatriates (see Table 7).

Table 7 | Conditions for Employment and Visit Passes

	Employment Pass¹¹⁵	VP(TE)
Minimum Wage	RM1,200	None
Minimum Contract Period	Two years	None
Term of Validity	Up to five years, extendable	Up to 12 months, extendable
Number of Entries	Unlimited	One
Ability to Bring Dependents	Yes	No
Ability to Change Employers	Yes	No

Source: Immigration Regulations 1963

Special Passes

A Special Pass is a temporary pass that an immigration officer can issue to a person who wishes to remain in Malaysia “for any special reason”.¹¹⁶ A Special Pass is valid for one month, and may, at the officer’s discretion, be extended.¹¹⁷ It costs a small fee for the first issue and for each monthly extension.¹¹⁸ Special Passes are the only option for migrant

¹¹⁰ Immigration Regulations 1963, Regulation 9(3)

¹¹¹ Immigration Regulations 1963, Regulation 10(1).

¹¹² Immigration Regulations 1963, Regulation 16A.

¹¹³ Immigration Regulations 1963, Regulation 11(6).

¹¹⁴ Immigration Regulations 1963, Regulation 11(6).

¹¹⁵ Although under the law these benefits are held by all holders of Employment Passes, the new rules in 2016 restricted some benefits such as the ability to bring dependents, for expatriates earning between RM 25,000 and RM 5,000. Expatriate Services Division of the Immigration Department of Malaysia, “New Employment Pass Category III Available on 15 July 2015”, <https://esd.imi.gov.my/portal/latest-news/announcement/new-employment-pass-category-iii-available-on-15-july/>.

¹¹⁶ Immigration Regulations 1963, Regulation 14.

¹¹⁷ Immigration Regulations 1963, Regulation 14(2).

¹¹⁸ Immigration Regulations 1963, Regulation 14(2). Under these Regulations, the Special Pass is

workers whose VP(TE)s have expired but who wish to stay in Malaysia, for example to bring a case.

Legal services providers said that most workers who showed a letter demonstrating they were pursuing a complaint with the DoL or Department of Industrial Relations would be granted a Special Pass and at least two renewals (a total of three months).¹¹⁹ The discretionary, short-term nature of the Special Pass limits its usefulness to migrant workers seeking remedies (see section 8.3).

Procedures for Obtaining and Cancelling Passes

The Immigration Regulations 1963 outline some procedures and have standard forms for applying for different kinds of passes. Immigration officers are empowered to require applicants to submit to an examination by a government medical officer, and to request payment of security deposit “for all costs, charges and expenses” associated with potential repatriation or removal from Malaysia.¹²⁰

The Immigration Department has “absolute discretion [to] cancel any Pass at any time”.¹²¹ The cancellation comes into force on the day that it is signed, and the Immigration Department will then notify the former pass-holder if their address is known.¹²² Remaining in Malaysia after a pass is cancelled makes the former pass-holder subject to removal, and prohibited from entering Malaysia thereafter (see section 4.3.4).¹²³

This broad power means that whenever a migrant worker quits his or her job, the employer can notify the Immigration Department claiming that the worker has violated the terms of the pass. The Department can, and normally will, cancel the pass immediately.

4.3.2 Prohibited Immigrants

Certain non-citizens, even if they obtain a pass, are prohibited from entry into or stay in Malaysia. A “prohibited immigrant” includes any non-citizen who falls within certain prohibited classes. For migrant workers, the most relevant of these categories are persons who:

- (1) cannot show employment in Malaysia or the means of supporting oneself;

to be issued on Form 16, which does not state any prohibition on taking employment. However, interviewees assumed that a Special Pass holder cannot work legally.

¹¹⁹ For more information about the Special Pass system, see Bar Council Malaysia, *Memorandum Relating to the Special Pass*, 2008, pp. 1-19.

¹²⁰ Immigration Act 1959/63, Section 39; Immigration Regulations 1963, Regulation 5(1).

¹²¹ Immigration Act 1959/63, Section 9(1)(b).

¹²² Immigration Act 1959/63, Section 9(3).

¹²³ Immigration Act 1959/63, Section 9(4).

- (2) are entering or have entered Malaysia unlawfully under any Malaysian law;
- (3) are not in possession of valid travel documents or are using “forged or altered travel documents”;
- (4) have a pass or permit that has been cancelled;
- (5) refuse to undergo a medical examination when applying for a pass, or are found to have a contagious or infectious disease; and
- (6) have been convicted of any criminal offence in any country and sentenced to any period of imprisonment. This would include prior conviction for any immigration offence in Malaysia (see section 4.3.3).¹²⁴

A person deemed to be a prohibited immigrant can be refused entry into Malaysia. If the person is already present in Malaysia, he or she is subject to immediate removal.

4.3.3 Immigration Offences

Amendments to the Immigration Act 1959/63 over the past two decades, specifically in 1997 and 2002, have increased penalties and punishments for undocumented migrants and their employers.¹²⁵

Penalties for Undocumented Migrants

The 2002 amendments imposed mandatory whipping of non-citizens convicted of illegal entry, among other changes.¹²⁶ Whipping is done with a *rotan*, similar to a cane. See Table 8 for the key offences and punishments for non-citizens under the Immigration Act 1959/63.

Table 8 | Offences and Punishments for Non-Citizens under the Immigration Act 1959/63

Section	Offence	Penalty
6(3)	Entry into Malaysia without a valid entry permit or pass	A fine of up to RM10,000 and/or imprisonment up to five years, and whipping up to six strokes
9(4) and (5)	Presence in Malaysia after a pass is cancelled	Immediate detention and removal

¹²⁴ Immigration Act 1959/63, Section 8.

¹²⁵ Immigration (Amendment) Act 1997 [Act A985] came into force on 1 February 1997.

¹²⁶ Immigration (Amendment) Act 2002 [Act A1154] came into force 1 August 2002.

5	Entering or departing from Malaysia outside of authorised landing places, airports, or ports of entry	A fine of up to RM10,000 and/or imprisonment for up to five years
8(5)	Entry as a prohibited immigrant without a valid pass	
15	Remaining in Malaysia after a pass has expired	
24(2) and 26(4)	Refusal to be examined by an immigration officer on arrival in Malaysia, or following a decision by an immigration officer denying entry, refusing to return to the vessel	
27(2)	Refusal to enter immigration detention following direction by an immigration official, or escape from immigration detention	
28(2), 30(2), 39A(2)	Refusal to answer questions from an immigration official truthfully, evading questions, or refusing to produce one's documents or producing false documents	

Source: Immigration Act 1959/63

The burden of proof that someone is not a prohibited immigrant rests on the non-citizen.¹²⁷ This means that a migrant worker arrested for a suspected immigration offence is required to positively prove that he or she is not a prohibited migrant, for example by presenting his or her passport with a valid pass. In practice, this means that officers assume any person who appears foreign and is found without their passport is a prohibited migrant and will charge them with illegal entry under Section 6, the most severe charge under the Immigration Act 1959/63, even if they entered Malaysia legally but overstayed.¹²⁸

Penalties for Employers of Undocumented Migrants

Employers who hire undocumented migrant workers can also be fined between RM10,000 and RM50,000 and/or receive a prison sentence of up to 12 months for each undocumented employee.¹²⁹ An employer found with more than five undocumented employees will be imprisoned for between six months and five years, and whipped up to six strokes.¹³⁰ Whipping of employers is rare if it occurs at all, but the Minister of Home Affairs warned in March 2016 that prosecutors will start seeking this sentence in more cases to deter such hiring.¹³¹

¹²⁷ Immigration Act 1959/63, Section 8(4).

¹²⁸ Interview with former DPP of the Attorney General's Chambers, Selangor, 26 September 2016.

¹²⁹ Immigration Act 1959/63, Section 55B(1).

¹³⁰ Immigration Act 1959/63, Section 55B(3).

¹³¹ H. Jamaludin, "Freeze on new foreign workers, those who hire illegals to be caned," *New Straits Times Online*, 12 March 2016, <http://www.nst.com.my/news/2016/03/132318/freeze-new-foreign-workers-those-who-hire-illegals-be-caned>.

4.3.4 Trial, Detention and Removal

Non-citizens convicted at criminal trial of illegal entry are liable to removal (deportation) as an “illegal immigrant”.¹³² Non-citizens “unlawfully present” in Malaysia after the cancellation or expiry of a pass (overstaying) are liable to removal without a trial or conviction.¹³³

The Immigration Department, not the court, takes the decision to deport by making an order for removal of the migrant concerned, called a deportation order.¹³⁴ There is a right to appeal a deportation order, but only to the Minister, and only from a deportation order made on the ground of unlawful presence.¹³⁵

Immigration officers have the power to arrest without a warrant any person they reasonably suspect of being “liable to removal” and to detain them for up to 30 days pending a decision to make a deportation order.¹³⁶ Where a deportation order is made, the person can be detained for “any period as may be necessary” to arrange the deportation.¹³⁷ Detention may be in a prison, police station or immigration depot (detention centre). Within 14 days of the start of any period of detention, the person must be presented to a magistrate to decide whether to authorise continued detention (see also section 6.2).¹³⁸ This provision is respected in practice.

4.4 Other Legislation Relevant to Immigration and Recruitment

4.4.1 Passports Act 1966

The Passports Act 1966 requires that all persons who enter and exit Malaysia hold a valid passport, and that non-citizens hold a valid visa.¹³⁹ It prescribes offences of document fraud; tampering with, or forging a passport or visa; or entering the country on someone else’s passport. As with most immigration offences, violations of the Passports Act 1966 are punishable with a fine of up to RM10,000 and/or imprisonment up to five years, as well as removal from Malaysia.¹⁴⁰

The Passports Act 1966 could also be used to protect migrant workers. The offence of having in one’s “possession any passport or internal travel document issued for the use of

¹³² Immigration Act 1959/63, Section 32(1). The crimes of illegal entry are set out in Sections 5, 6, and 8.

¹³³ Immigration Act 1959/63, Section 33(1). The crimes of overstaying are set out in Sections 9 and 15.

¹³⁴ Immigration Act 1959/63, Sections 32 and 33.

¹³⁵ Immigration Act 1959/63, Section 33(2).

¹³⁶ Immigration Act 1959/63, Section 35.

¹³⁷ Immigration Act 1959/63, Section 34(1).

¹³⁸ Federal Constitution, Article 5(4) and its second proviso.

¹³⁹ Passports Act 1966, Sections 2(1) and 2(2).

¹⁴⁰ Passports Act 1966, Sections 4, 10 and 12(1).

some person other than himself” criminalises migrant workers who use another person’s passport. It may also be used to prosecute an employer or agent who withholds a migrant worker’s passport.¹⁴¹

4.4.2 Employment Restriction Act 1968

The Employment Restriction Act 1968 established the principle that non-citizens can only work in Malaysia if they are issued “a valid employment permit”.¹⁴² It gave responsibility to issuing work permits to the MOHR. Although the work permit requirement remains in place, the statute is no longer enforced and the MOHR has no role today in granting work permits or regulating foreign employment. This role has been assumed by the MOHA.

4.4.3 ATIPSOM Act

The ATIPSOM Act passed in 2007, and amended in 2010, criminalises trafficking in persons and smuggling of migrants.¹⁴³ The provisions addressing human trafficking are intended to protect exploited migrants as well as punish traffickers, and so are described in detail at section 6.5.4. The provisions addressing “smuggling of migrants” target those who facilitate undocumented migration, namely the:

(a) arranging, facilitating or organizing, directly or indirectly, a person’s unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person’s entry or exit is unlawful; and

(b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a);¹⁴⁴

The Government has also indicated a willingness to prosecute employers of undocumented migrants under the ATIPSOM Act for “harbouring” of smuggled migrants or profiting from the offence.¹⁴⁵ The maximum penalty for migrant smuggling is imprisonment of 15 years, and for profiting from smuggling the sentence is between seven and 15 years.¹⁴⁶

¹⁴¹ Passports Act 1966, Section 12(1)(e).

¹⁴² Employment (Restriction) Act 1968 [Act 353], Section 5(1)(b).

¹⁴³ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] (“ATIPSOM Act”), gazetted on 26 July 2007.

¹⁴⁴ ATIPSOM Act, Section 2.

¹⁴⁵ A. Shah, “Employers of illegal workers to get the rotan”, *New Straits Times Online*, 12 March 2016, <http://www.nst.com.my/news/2016/03/132284/employers-illegal-workers-get-rotan>.

¹⁴⁶ ATIPSOM Act, Sections 26A and 26D.

4.4.4 PEA Act

Malaysia does not have a law specifically governing the recruitment of workers from abroad. The only legislation governing recruitment in Malaysia is the PEA Act, administered by the MOHR. The PEA Act establishes a regime for the licensing of any person or company that “acts as an intermediary” between employers and workers for profit. It limits placement fees for workers to no more than 25 percent of the first month’s pay.¹⁴⁷

However, the PEA Act only mentions, and only sets fees for, placement of Malaysian workers in local positions or overseas. It has no provision for recruiting foreign workers from abroad to work in Malaysia. It also does not regulate the operation of outsourcing agencies, which directly employ workers from abroad and place them with companies and businesses.

Various government sources informed the researchers confidentially that the PEA Act is not enforced in respect to migrant workers, and that in any case, outsourcing and recruitment agencies do not want to be registered under the PEA Act because of the limits on recruitment fees. This was confirmed by a representative of PAPA, which brings together recruitment agencies for overseas domestic workers. He described the PEA Act as “long overdue for change”.¹⁴⁸

Recent MoUs with Cambodia also require the use of a Malaysian recruitment company registered under the PEA Act (see Box 4). It is unclear how this works given the limitations of the PEA Act.

4.5 Recruitment Policies and Procedures for Hiring a Documented Migrant Worker

Rules governing recruitment are, in practice, created on an *ad hoc* basis at the ministerial level by the Cabinet Committee on Foreign Workers and Illegal Immigrants or at the departmental level by the Immigration Department. These rules take the form of policies and circulars but they are not published and their content changes frequently. Knowledge of their contents is available only from press releases and third-party web sources.

The recruitment process described by these sources occurs in two stages: first, the employer obtains a VDR for the migrant worker to enter Malaysia; second, after the worker has entered on this visa, the employer applies for the VP(TE) to grant the worker work authorisation. While several government departments are required to give permissions during this process, none of them usually require the employer to show the contract under which the migrant worker will be employed in Malaysia.

¹⁴⁷ Private Employment Agencies Act 1981 (“PEA Act”), Section 14, Second Schedule.

¹⁴⁸ Interview with PAPA, Kuala Lumpur, 5 October 2015.

The whole recruitment process from the search for a worker to obtaining a work permit was estimated in 2014 to take a minimum of five months.¹⁴⁹ Employers in specific sectors say that the post-arrival process of obtaining the work permit alone can take up to six months, during which time the migrant worker works without complete documents. Renewal of work permits reportedly takes between two weeks and a month for one worker, and more than two months for more than five workers.¹⁵⁰

The costs to employers of recruiting a worker from abroad depend on the nationality of the worker and whether a recruitment agency is used. As an example, an opinion piece from December 2014 complained that the cost of recruiting a domestic worker abroad using an agency commonly reach RM15,000.¹⁵¹

The following section outlines the procedures as identified on the MOHA website¹⁵² and the Immigration Department's website.¹⁵³

Box 2: Summary of Steps for an Employer Seeking to Recruit a Migrant Worker

All steps for the recruitment of a worker from abroad are the responsibility of the prospective sponsoring employer. They take place before arrival, after arrival, and each subsequent year the worker remains employed in Malaysia.

Before Arrival

- (1) Employer obtains permission to recruit from abroad from the MOHR. This requires that the employer advertise the position locally. Approval must also be sought from the MOHA at local and national levels.
- (2) Employer applies for a VDR from the Immigration Department. This requires the employer to present:
 - (a) a letter recording the approval of the MOHR to hire from abroad;
 - (b) receipt of payment of the levy (see section 4.5.1);
 - (c) evidence that the required workers have been hired from abroad and personal documentation from the hired workers;

¹⁴⁹ MEF, *Practical Guidelines for Employers*.

¹⁵⁰ MEF, *Practical Guidelines for Employers*.

¹⁵¹ C. Poo, "The cost of hiring a maid", *The Star Online*, 5 December 2014, <http://www.thestar.com.my/news/community/2014/12/05/the-cost-of-hiring-a-maid-huge-financial-commitments-involved-in-securing-a-domestic-helper/>.

¹⁵² MOHA, *Bahagian Pengurusan Pekerja Asing*, <http://www.moha.gov.my/index.php/en/bahagian-pa-maklumat-perkhidmatan> (last accessed in November 2016).

¹⁵³ Immigration Department of Malaysia, *Recruitment Terms and Conditions of Foreign Workers*, <http://www.imi.gov.my/index.php/en/foreign-worker.html> (last accessed on 23 September 2016).

- (d) certificates of insurance under the Foreign Workers Insurance Scheme and the Health Insurance Scheme (see section 7.4); and
- (e) payment of a security bond to the Immigration Department with a RM10 postage stamp.¹⁵⁴

Arrival and Post-Arrival

- (3) The worker clears immigration with the VDR and is collected by the employer, or employer's representative.
- (4) Within 30 days, the worker must undertake and pass a second, in-country medical examination. A worker who is found to be "unfit" must be sent home by the employer. The employer may apply for a replacement worker.¹⁵⁵
- (5) The employer applies to the Immigration Department for a VP(TE) to be placed in the worker's passport. The VP(TE) is valid for up to 12 months.

During Stay in Malaysia

- (6) Each year, the employer must apply for a one-year extension three months before the VP(TE) expires, and pay the annual levy, which can then be deducted from the worker's wages (see section 4.3.1). The cost for the VP(TE) extension is RM60 and for the process, RM125. The worker must also pass another medical examination at FOMEMA during their second and third year extension of stay.

Return to Home Country

- (7) Upon conclusion or termination of the contract, the employer must obtain a Check-Out Memo from the Immigration Department. The worker must then leave Malaysia. It is not possible for a migrant worker to obtain the Check-Out Memo independently.

4.5.1 Pre-Arrival

Malaysian Government Approvals

Approvals are required from three Malaysian government agencies before an employer can recruit from abroad.

¹⁵⁴ Under the Immigration Ordinance, 1959 (F.P.M. 12 of 1969), Immigration of Malaysia Regulation, 1963 (F.L.W. 228/63) PERSONAL BOND (Regulations 18). See link for sample: <http://www.imi.gov.my/images/borang/Pekerja%20Asing/Borang%20Personal%20Bond.pdf> (last accessed on 23 September 2016).

¹⁵⁵ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia is run by Unitab Medic Sdn. Bhd., a private company.

First, the DoL must certify that the employer has given an opportunity to local jobseekers to fill vacancies in their companies before seeking overseas workers. To obtain this certification, the employer must register the vacancy in the Job Clearance System/ JobsMalaysia for all registered local workers to view.¹⁵⁶

Second, the employer must get approval from a MOHA Local Centre of Approval that the employer's request for workers falls within national industry quotas, which are set at the ministerial level. Foreign domestic workers, cooks who are citizens of Thailand, and rubber tappers in the Northern States and East Coast do not require such approval.¹⁵⁷

Finally, the employer must register with the MOHA and submit an application for approval to recruit migrant workers at the OSC located at the Foreign Worker Management Division of the MOHA. The OSC houses representatives from ministries in charge of various economic sectors to approve the application.¹⁵⁸ Applications that satisfy all the conditions for recruiting migrant workers are processed and given the final approval.¹⁵⁹ This approval can be given on the same day at the OSC.¹⁶⁰

Further restrictions are placed on the applications for recruitment of a domestic worker. Further, the employer must demonstrate that:

- (1) the household has a net income of at least RM3,000 per month, or RM5,000 per month if the maid is sought from the Philippines, India, or Sri Lanka; and
- (2) the employer has "children under 15 years of age or parents who are sick/ill".

Only one foreign domestic helper is allowed per family unless the family has a "valid reason", which is not defined in the guidelines. Muslim employers may only employ domestic workers who are Muslim.¹⁶¹

¹⁵⁶ MOHR, *Employment of Foreign Workers*, <http://jtksm.mohr.gov.my/index.php/en/services/pengurusan-pekerja-asing/penggajian-pekerja-asing> (last accessed in November 2016).

¹⁵⁷ Immigration Department of Malaysia, *Visitor's Pass (Temporary Employment)*, <http://www.imi.gov.my/index.php/en/pass.html?id=296#application-for-temporary-employment-pass-for-a-foreign-worker> (last accessed on 28 September 2016).

¹⁵⁸ Immigration Department of Malaysia.

¹⁵⁹ The OSC houses representatives from ministries in charge of various economic sectors to approve the application. Representatives from MOHR; Ministry of International Trade and Industry ("MITI"); Ministry of Agriculture and Agro-Based Industry; Ministry of Plantation Industries and Commodities; Construction Industry Development Board Malaysia ("CIDB"); Ministry of Domestic Trade, Co-operatives and Consumerism; and Ministry of Tourism and Culture are stationed at the OSC to process foreign worker recruitment applications, MOHA, <http://www.moha.gov.my/index.php/en/bahagian-pa-maklumat-perkhidmatan> (last accessed on 28 September 2016).

¹⁶⁰ MOHA, <http://www.moha.gov.my/index.php/en/bahagian-pa-maklumat-perkhidmatan> (last accessed on 28 September 2016).

¹⁶¹ These details are taken from Malaysia My Second Home Programme (MM2H), Ministry of Tourism and Culture, *Guidelines for Bringing Foreign Domestic Helper*, <http://www.mm2h.gov.my/pdf/>

Payment of Levy

After an employer receives certification that the foreign worker application has been approved, the employer must pay a levy for each worker within 48 hours.¹⁶² The MOHA will then issue a conditional letter of approval.¹⁶³

The levy is an annual amount paid to the MOHA, which remits the money to the Ministry of Finance, for every documented migrant worker in the country. The amount of the levy varies by sector and has been rising. In March 2016, the amount was increased by almost 50 percent to RM1,850 for workers in the manufacturing, construction and services sectors and to RM640 for the plantation and agriculture sectors.¹⁶⁴

Although the employer initially pays the levy, since 2013 the Ministry of Labour has allowed the employer to recoup the amount from migrant workers after their arrival.¹⁶⁵ This amounts to almost two months of wages for workers paid the minimum wage of RM1,000 per month, a significant amount for many workers, and is effectively a form of income tax. The shift in burden from the employer to the worker was a concession to employers upset about the introduction of the minimum wage in 2013 (see section 6.4 for more on the minimum wage).

Approvals from Origin Country

The employer has 18 months from the date of the MOHA approval to seek consent from the embassy of an origin country to recruit workers in that country. This usually requires the payment of a fee to the embassy.¹⁶⁶

Hiring of Workers

With the embassy's consent, the employer can approach a recruitment agent in the source country to recruit the workers. According to the FWCMS website, employers must

Guideline%20for%20Foreign%20Domestic%20Helper.pdf. See also Immigration Department of Malaysia, Foreign Domestic Helper, <http://www.imi.gov.my/index.php/en/main-services/foreign-domestic-helper>.

¹⁶² MEF, *Practical Guidelines for Employers*.

¹⁶³ MEF, *Practical Guidelines for Employers*.

¹⁶⁴ M. N. Annis, "Govt revises levy for foreign workers", *The Star Online*, 19 March 2016, <http://www.thestar.com.my/news/nation/2016/03/19/govt-revises-levy-for-foreign-workers-new-rates-for-peninsular-malaysia-following-outcry-from-employ/>.

¹⁶⁵ MEF, Circular AG 17/2013 dated 9 July 2013.

¹⁶⁶ For example, the Embassy of Nepal in Malaysia charges RM300 to attest the relevant demand documents. See Nepal Embassy, Fees for Consular Services, <https://my.nepalembassy.gov.np/rate-of-fees/> (last accessed on 23 September 2016).

ensure that the recruitment agency is registered with both the respective home country government and with FWCMS in Malaysia.¹⁶⁷

To be eligible for employment, non-citizens must be between the ages of 18 and 45, and not be a “prohibited migrant” under the Immigration Act 1959/63. Selected workers must pass a medical test from an approved provider in the origin country.¹⁶⁸ The results of the medical test are valid for three months from the date of issuance.

As of 4 May 2015, migrant workers in Indonesia, India, Bangladesh, the Philippines, and Vietnam also must pass an Immigration Security Clearance, which is subject to a fee.¹⁶⁹

Migrant domestic workers must be female, between the ages of 21 and 45, and from one of eight countries.¹⁷⁰

Malaysia does not have a standard contract for general employees but it does have a sample contract for domestic workers, although its provisions are not mandatory. The sample contract includes obligations for the employer to, among other things, provide the domestic worker with “reasonable accommodation and amenities” and “reasonable and sufficient daily meals”.¹⁷¹ It also allows the domestic worker to terminate the contract for “abuse and ill-treatment” (see also section 6.4.2).¹⁷²

Box 3: The Role of Agencies in the Hiring and Management of Migrant Workers

Agencies play a central role in the experiences of migrant workers in Malaysia. Almost all of the migrant workers in this study spoke of having an “agent” in Malaysia who either hired them out to an employer or placed them with an employer for a fee. It was not always clear from the descriptions whether the agent was a company or an individual, or whether they were licensed or acting in an informal capacity.

¹⁶⁷ FWCMS has an updated list of registered recruitment agencies on their website, and if the selected agency is not on the list, but is a genuine registered agency in the source country, there is a form for them to complete and register with FWCMS. For more details, see FWCMS, *Frequently Asked Questions: Malaysian Employers*, <http://www.fwcms.com.my/faq.html> (last accessed on 22 September 2016).

¹⁶⁸ For a list of approved medical centres, see http://www.imi.gov.my/images/pdf/Senarai_Pusat_Kesihatan_as_at_1Mei2015.pdf (last accessed on 28 September 2016).

¹⁶⁹ Announcement on the Immigration Department website, *Recruitment Terms and Conditions of Foreign Workers*, <http://www.imi.gov.my/index.php/en/foreign-worker.html> (last accessed on 23 September 2016).

¹⁷⁰ The countries are Cambodia, India, Indonesia, Laos, the Philippines, Sri Lanka, Thailand, and Vietnam.

¹⁷¹ Immigration Department of Malaysia, draft of contract of employment for domestic helpers (Section 4), <http://www.imi.gov.my/images/borang/prakontrak.pdf>.

¹⁷² Immigration Department of Malaysia, draft of contract of employment for domestic helpers (Section 8).

Yet, the rules governing the operation of recruitment agencies (which recruit and then place the worker with an employer for a fee) and outsourcing agencies (which act as the direct employer of the worker) are ambiguous and not set out in legislation or regulation.

Until the mid-2000s, agents were mostly used informally by Malaysian employers. Then in August 2005, the Cabinet Committee on Foreign Workers and Illegal Immigrants approved the “Foreign Worker Supply and Management System according to the Outsourcing Method”.¹⁷³ This required companies intending to hire fewer than 50 foreign workers to use the services of labour brokers (labour outsourcing company), while allowing firms recruiting more than 50 migrant workers to recruit directly.¹⁷⁴ Then, in 2006, the Cabinet Committee on Foreign Workers and Illegal Immigrants approved the “Foreign Workers Outsourcing Scheme” and began licensing outsourcing companies by a simple letter of appointment.¹⁷⁵ By 2010, the Minister for Home Affairs had approved 277 outsourcing agencies to recruit overseas workers.¹⁷⁶

In recent years, officials have publicly disavowed the use of outsourcing due to complaints of worker exploitation although they have not issued a new policy or scheme.¹⁷⁷ A representative from the Foreign Worker Management Division stated that the granting of new licences and new labour import quotas was frozen in 2011. Workers brought in before 2011 and still employed by outsourcing companies will be allowed to finish their contracts and any allowed extensions in Malaysia, and then the companies will “die naturally”.¹⁷⁸ The one exception to this is companies who recruit foreign domestic workers, for example through one of two large agency networks — PAPA and MAMA — which may remain in operation.¹⁷⁹

¹⁷³ Like all Cabinet Committee decisions, the text is not publicly available. However, MOHA states that it was “with the aim of providing options for companies which do not intend to recruit foreign workers directly”. See <http://www.moha.gov.my/index.php/en/kenyataan-media-akhbar/89-maklumat-korporat/maklumat-bahagian/bahagian-pengurusan-pekerja-asing?start=10> (last accessed on 1 February 2016).

¹⁷⁴ Verité, *Forced Labour in the Production of Electronic Goods in Malaysia*, p. 31.

¹⁷⁵ Interview with Foreign Worker Management Division, MOHA, Putrajaya, 13 November 2015.

¹⁷⁶ An undated list of 240 approved outsourcing agencies was on the MOHA website: http://www.moha.gov.my/images/maklumat_bahagian/PA/Senarai_Syarikat_Outsourcing.pdf.

¹⁷⁷ The Deputy Home Minister told Parliament in 2013 that “we stopped using outsourcing companies because of all the cheating and confusion that happened under the system. There is no more outsourcing, now we just use direct dealing with source countries.” See J. Sipalan, “Home Ministry: No middlemen to hire foreign labour”, *Malay Mail Online*, 5 December 2013, <http://www.themalaymailonline.com/malaysia/article/home-ministry-no-middlemen-to-hire-foreign-labour#sthash.K9enPyoO.dpuf> (last accessed on 9 February 2016).

¹⁷⁸ Interview with Foreign Worker Management Division, MOHA, Kuala Lumpur, 13 November 2015.

¹⁷⁹ PAPA was created in 1994 as an umbrella organisation for all recruitment agencies, but its role has since been limited to domestic workers. MAMA was created in 2010 to represent the employers of “maids” from Indonesia, previously the largest supplier of domestic workers to the country until Indonesia stopped issuing permits to its citizens to work in Malaysia as a destination country in 2009.

The MEF stated in an interview for this study that companies still use outsourcing agencies to recruit and manage foreign workers, but that the agency's involvement is hidden by the principal employer putting its own name on the immigration documents.¹⁸⁰ Further, the Foreign Worker Management Division website still states that "employers may use the services of outsourcing companies to supply and manage the foreign workers".¹⁸¹

Obtaining a VDR

To enter Malaysia, the employer must apply for a Visa with Reference, commonly called a VDR or "calling visa", for the worker. The VDR is traditionally obtained through manual submission to the Immigration Department, but the MOHA is gradually moving towards a streamlined private system, the online FWCMS.¹⁸²

The Malaysian Representative Office in the source country issues the VDR by placing it in the migrant worker's passport. The cost of the VDR depends on the nationality of the migrant worker, and ranges from no fee for Thai workers to RM50 for Indian workers.¹⁸³

To obtain the visa, the employer must present several documents:

- (1) Malaysian Government approvals;
- (2) Evidence of recruitment from abroad, including documentary evidence of the hired workers — photos; copies of passports, including photographs; the Immigration Security Clearance verification document; and certificates of medical fitness from an approved provider in the origin country;
- (3) Certificates of insurance under both the FWCS and FWHS (see section 7.4 for more detailed discussion of these schemes);
- (4) Receipt of payment of the levy; and
- (5) Payment of the Personal Bond by the employer to the Immigration Department as a guarantee against the worker absconding and requiring removal. The bond amount depends on the nationality of the worker, and ranges from RM250 for workers from Indonesia, Cambodia and Thailand; to RM1,500 for a migrant worker from Vietnam.¹⁸⁴

¹⁸⁰ Interview with MEF, Kuala Lumpur, 1 October 2015.

¹⁸¹ Foreign Worker Management Division, MOHA, <http://www.moha.gov.my/index.php/en/pengenalan-perkhidmatan-pengurusan-pekerja-asing>.

¹⁸² FWCMS, *Frequently Asked Questions: General*, <http://www.fwcms.com.my/faq.html> (last accessed on 28 September 2016).

¹⁸³ Immigration Department of Malaysia, "Table 2: Rates of Visa and security bond based on nationality", *Foreign Worker*, <http://www.imi.gov.my/index.php/en/main-services/foreign-workers.html>.

¹⁸⁴ Immigration Department of Malaysia, *Foreign Worker*.

4.5.2 Arrival and Post-Arrival in Malaysia

Migrant workers with a VDR may only enter Malaysia through the Kuala Lumpur International Airports 1 and 2, except for workers from Thailand and Indonesia, who may enter through other checkpoints.¹⁸⁵ The practice of the worker entering on a visa without a pass, seems in conflict with the Immigration Act 1959/63 requirement for a valid pass to enter Malaysia (see section 4.3.1).

The workers then are held by the Immigration Department until their employer arrives. The employer must collect the migrant worker within six to 24 hours after their arrival.¹⁸⁶

Post-Arrival Medical Screening

The Immigration Department requires migrant workers to undergo a mandatory health screening within 30 days of arrival.¹⁸⁷ If a worker is found unfit, the employer may appeal the decision through the examining doctor within two weeks.¹⁸⁸ Otherwise, the employer must repatriate the worker (see section 4.3.2). If the worker is certified fit, the employer can apply for the VP(TE). The medical exam costs RM190 for men, and RM200 for women (women also undergo a pregnancy test).¹⁸⁹

Application for a VP(TE)

The final step to becoming documented is obtaining the VP(TE), commonly referred to as a work permit. The employer presents evidence of completion of the above steps to the Immigration Department, and the VP(TE) is placed as a sticker in the worker's passport.¹⁹⁰

Migrant workers with valid VP(TE)s are issued an identity card called the i-Kad, at no cost. Each card is colour-coded according to the sector of employment.¹⁹¹ The validity period of

¹⁸⁵ MEF, *Practical Guidelines for Employers*.

¹⁸⁶ The Official Portal of the Immigration Department of Malaysia has conflicting information. In a 2015 press release, the time frame is said to be six hours (*Makluman Tempoh Masa Pengambilan Pekerja Asing Di Pintu Masuk Daripada 24 Jam Kepada 6 Jam*, <http://www.imi.gov.my/index.php/ms/sumber-dan-arkib/pengumuman/344-makluman-tempoh-masa-pengambilan-pekerja-asing-di-pintu-masuk-daripada-24-jam-kepada-6-jam.html>). Whereas the webpage on *Foreign Workers* states that “employers must ensure that the clearance process of foreign workers at the entry points is done within 24 hours from the arrival time”, <http://www.imi.gov.my/index.php/en/main-services/foreign-workers.html>.

¹⁸⁷ Immigration Department of Malaysia, “Phase 2 (Post Arrival)”, *Foreign Worker*, available at <http://www.imi.gov.my/index.php/en/main-services/foreign-workers.html>.

¹⁸⁸ FOMEMA, *Frequently Asked Questions: Process for Appeal of Foreign Workers' Medical Examination*, <http://www.fomema.com.my/index.php/faq>.

¹⁸⁹ FOMEMA, <http://ks.itrack123.com/registration-procedures.html>.

¹⁹⁰ MEF, *Practical Guidelines for Employers*.

¹⁹¹ The following colours correspond to employment sectors: agriculture: green; plantations: orange; construction: grey; manufacturing: maroon; services: yellow; foreign domestic helper: brown.

the i-Kad is the same as the worker's VP(TE). The card is sent directly to the employer or company by an authorised vendor.¹⁹²

Annual Renewal of the VP(TE)

After receiving the VP(TE), the worker can stay for up to 10 years in Malaysia, but the pass must be renewed annually. The VP(TE) costs RM60 to extend plus a RM125 processing fee for all sectors and nationalities. In the second and third year extensions, the worker must undergo another medical examination.¹⁹³

4.5.3 Return Procedures

Upon conclusion or termination of the contract, the employer usually purchases a ticket home for the migrant worker according to the terms of the employment contract and/or the worker's country of origin MoU with Malaysia (see Box 4).

Before the worker travels, the employer must obtain a Check-Out Memo from the Immigration Department.¹⁹⁴ Workers who have left the employer usually need assistance of the embassy to arrange exit from Malaysia. The employer can reclaim the personal bond after showing evidence the worker has left Malaysia.

Box 4: MoUs with Origin Countries Regarding Recruitment

Malaysia has signed non-binding MoUs on the recruitment and employment of migrant workers with eight countries of origin: Bangladesh, Cambodia, China, Indonesia, Pakistan, Sri Lanka, Thailand, and Vietnam.¹⁹⁵ These agreements are negotiated in closed-door meetings by the respective Ministries of Human Resources and the terms of the agreements are not publicly available in Malaysia.

The MoUs with India (general workers), Indonesia (domestic workers) and Cambodia (one agreement for general and one for domestic workers) are available on an external site. A review of these four agreements reveals that the terms and structure of the agreements

Source: Immigration Department of Malaysia, *Foreign Worker*, <http://www.imi.gov.my/index.php/en/main-services/foreign-workers.html>.

¹⁹² Immigration Department of Malaysia, *Foreign Worker*.

¹⁹³ Immigration Department of Malaysia, *Foreign Worker*.

¹⁹⁴ Immigration Department of Malaysia, *Client Charter*, <http://www.imi.gov.my/index.php/en/corporate-profiles/client-charter.html> (last accessed on 20 September 2016).

¹⁹⁵ http://apmigration.ilo.org/country-profiles/mou_list?country=MY; B. Harkins, *Review of Labour Migration Policy in Malaysia*, p. 13 (last accessed on 3 October 2016).

are not uniform and so are not easily comparable, but all provide some rules regarding recruitment of migrant workers.¹⁹⁶ These include the following:

- (1) In all MoUs, the governments agree that the employer must pay for the cost of the worker's flight home at the end of the contract or if the employer terminates or breaches the contract. The two MoUs regarding domestic workers also agree that the employer should pay for the flight to Malaysia;
- (2) All MoUs agree that the employers are responsible to give the worker their i-Kad;
- (3) The two domestic worker MoUs agree that the workers will pay recruitment fees in the home country. The other MoUs make no mention of fees; and
- (4) All agreements except for the Indonesian MoU require that the employment contract be viewed and understood before departure, and the Cambodian MoU requires employers to send a signed copy to the worker for signature before departure. The Indonesian MoU by contrast foresees the worker signing the agreement after arrival in the employer's home.

The effect of these MoUs is unclear. Each MoU agrees to form a joint task force or committee for implementation of the agreement. There is no mechanism for enforcement, however, and certainly no grievance mechanism for individual workers. Two of these agreements for India and Indonesia have expired at the time of writing.

In addition to the MoUs, home countries can also affect the recruitment process with domestic legal requirements that are enforced through their embassies. For example, a government can require that embassies will only approve contracts that pay a certain wage or have certain other protections.

¹⁹⁶ Memorandum of Understanding on Employment of Workers between the Government of India and the Government of Malaysia, signed in New Delhi, 3 January 2009, by the Minister of Overseas Indian Affairs and the Minister of Human Resources Malaysia; Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Malaysia on the Recruitment and Placement of Indonesian Domestic Workers, signed in Indonesia on 13 May 2006; together with the Protocol Amending the Memorandum of Understanding, signed in Indonesia on 31 May 2011 between Minister for Manpower and Transmigration, Republic of Indonesia, and Minister of Human Resources Malaysia; and Memorandums of Understanding Between the Government of Malaysia and the Government of the Kingdom of Cambodia on the Recruitment and Employment of Workers, one for general workers and one for domestic workers; both signed in Kuala Lumpur on 10 December 2015 by the Minister of Human Resources of Malaysia and Minister of Labour and Vocational Training of Kingdom of Cambodia.

4.5.4 Worker and Stakeholder Perspectives on the Recruitment Process

Notable about the entire recruitment process according to the above rules is the lack of control given to the migrant worker. The employer is the applicant for both the visa and pass, and there is no provision for the migrant worker to compel the employer if the employer fails to fulfil these responsibilities.

Not surprisingly then, the workers interviewed for this study described a recruitment process that was highly disempowering, involving multiple agents who were often not clearly introduced, little reliable information about the job that awaited them in Malaysia, and large, sometimes not previously disclosed, fees. These harms are discussed further in the next chapter.

Civil society organisations, academics and other stakeholders have repeatedly criticised the recruitment process as non-transparent, poorly coordinated and leaving migrant workers vulnerable to abuses by employers and agents. More broadly, they critique the lack of a coherent and public national policy on migrant workers.

Specific gaps that have been identified include the lack of:

- (1) rules regarding the fees charged to workers by recruitment agents in Malaysia or abroad;
- (2) clear lines of accountability of Malaysian employers for actions in the home country (sometimes called the recruitment supply chain), including promises made to workers or the charging of excessive fees by overseas agents;
- (3) clarity regarding the role of outsourcing agencies in recruitment and migrant worker management, and lack of standards for outsourcing conduct, such as whether the Malaysian agency is required to interview candidates, provide an accurate job description to prospective workers or to the agents in the home country; and
- (4) a standard employment contract, and no requirement that the contract be in a language the worker understands or that the worker be given a copy signed by the employer prior to their arrival in Malaysia.¹⁹⁷

As detailed in the next chapter, these regulatory gaps contribute to making migrant workers vulnerable to harms and abuses after their arrival in Malaysia. Restrictive immigration laws then make it difficult for migrant workers to leave their employment if they find themselves in exploitative situations.

¹⁹⁷ See Immigration Department of Malaysia, "Foreign Domestic Helper". The standard contract is available at <http://www.imi.gov.my/images/borang/prakontrak.pdf>.

5 HARMS EXPERIENCED BY MIGRANT WORKERS IN MALAYSIA

5.1 Overview

Migration to undertake low wage work in Malaysia entails a host of risks at all stages of the journey, from recruitment, to arrival in Malaysia, to working for a Malaysian employer. No comprehensive data about the harms suffered by migrant workers is gathered on a regular basis. However, recent quantitative and qualitative reports, supported by the views of stakeholders in this study, indicate that abuse and exploitation of migrant workers are widespread, and occur in various sectors including palm oil production¹⁹⁸, electronics manufacturing¹⁹⁹, garment manufacturing²⁰⁰ and domestic work.²⁰¹

It is not within the scope of this study to conduct a detailed analysis of all types or the extent of migrant worker harms. Rather, this study focuses on the harms that occur while migrating to Malaysia, working in Malaysia, and leaving Malaysia. These have been categorised in three sections as harms:

- (1) during recruitment and arrival;
- (2) in the workplace; and
- (3) during arrest, prosecution, detention, and return.

The principal source of data for this chapter is the interviews with migrant workers themselves, as well as stakeholders that advise and support them. In places, the chapter also references data from other studies and government sources.

The chapter concludes with some broader themes that emerged from the interviews and focus groups with migrant workers in respect to their experiences in Malaysia, and responsibility for the harms that they suffered.

¹⁹⁸ A recent study on palm oil plantation sector includes S. Vartiala, and S. Ristimäki, *The law of the jungle: Corporate responsibility of Finnish palm oil purchases*, Helsinki: Finnwatch, 2014, available at <http://www.finnwatch.org/images/pdf/palmoil.pdf>.

¹⁹⁹ Recent studies on electronics manufacturing include Verité, *Forced Labour in the Production of Electronic Goods in Malaysia*; and Centre for Research on Multinational Corporations (“SOMO”), *Outsourcing Labour: Migrant labour rights in Malaysia’s electronics industry*, Amsterdam: SOMO, 2013, available at http://www.somo.nl/publications-en/Publication_3922/.

²⁰⁰ V. Crinis, “Sweat or No Sweat: Foreign Workers in the Garment Industry in Malaysia”, *Journal of Contemporary Asia*, Vol. 40 (4), 2010, pp. 589-611.

²⁰¹ Human Rights Watch, “They Deceived Us at Every Step: Abuse of Cambodian Domestic Workers Migrating to Malaysia”, 2011, available at <https://www.hrw.org/report/2011/10/31/they-deceived-us-every-step/abuse-cambodian-domestic-workers-migrating-malaysia>.

5.2 Harms during Recruitment in the Home Country and Upon Arrival in Malaysia

Recruitment of migrant workers, as described in chapter 4, involves actors in both Malaysia and the home country. Migrant workers described payment of excessive fees, lack of an employment contract and deceptive recruitment practices, which made them more vulnerable to exploitation. The period of recruitment is defined here as from the point of recruitment in the home country, to commencing work in Malaysia.²⁰²

5.2.1 Excessive Fees

Fifteen migrant workers described paying fees before and after arrival. Fees were paid for individual costs (like a passport and flight) or as a lump sum. They were paid both to recruiters in the home country and/or in Malaysia. In three cases the worker paid half before arrival and half after arrival. Three workers also mentioned not receiving any receipt, or receiving an incorrect receipt for an amount lower than they had paid.

Further, the fees were rarely explained to the migrant worker, and in some cases the migrant worker had to pay fees on arrival in Malaysia that were not previously disclosed. As explained by one migrant worker in the electronics manufacturing sector:

In Malaysia, they [the agents] said you have to pay money again. 200 each month. I asked how long I have to pay, they said it is until I pay 2,000. They deceive us like this.²⁰³

Migrants rarely had sufficient funds to pay these fees upfront, and so took loans at high interest rates, or paid after arrival through deductions from their pay. As described by one Indonesian worker:

The last time I went to Malaysia the fee was 5 million rupiah [around RM1,600 or USD400] ... The passport we paid for ourselves, but then the rest [the agents] paid for us and then we owed them the money. Our pay was deducted each month.²⁰⁴

Debt made workers fearful of complaining about poor working conditions, and reluctant to leave their positions, no matter how difficult, for fear they would not be able to repay their debt. This may amount to debt bondage.

²⁰² These challenges were outlined in detail in the two earlier studies on access to justice in countries of origin in this series (see chapter 1).

²⁰³ Interview No. 7, female migrant worker from Myanmar, interviewed in Penang, 9 May 2015.

²⁰⁴ Interview No. 41, female migrant worker from Indonesia, interviewed in Indonesia, 23 August 2015.

5.2.2 No Written Contract or Unable to Read Contract

Thirteen migrant workers never received any written employment contract. Any information they were given about the position in Malaysia was in the form of vague promises by an agent in their home country about the type of work and the pay.

An additional five workers said that they were asked to sign a written contract before they arrived in Malaysia but they did not know the contents. This was either because the contract was promptly taken away from them after they signed, or because it was in English, which they could not read, and it was not explained to them.

5.2.3 Deception Regarding Conditions of Work and Contract Irregularities

Thirty of 50 workers interviewed for this study reported that they were deceived about the nature and conditions of work that awaited them in Malaysia. The oral or written contracts made in the home country later turned out to have no relation to the actual position. Two Nepali migrant workers recounted their story:

They said that I would be working in a hotel and would be paid up to RM1,500 per month with overtime. But when I arrived, I found I was working in a cleaning company, the salary was RM500 with no overtime, and each month they deducted RM250. What was I supposed to do with that? Send it home and die of hunger, or not send it home and let my family starve?²⁰⁵

I did all of the necessary paperwork [in Nepal] ... and [the Nepali recruitment agency] gave me a contract, and I read it, but nothing written in that contract happened. When we arrived we were sold to a completely different employer for a different job. Also I took a big loan to go – 180,000 NPR, and I haven't been able to repay it. [The moneylenders] know I am back in Nepal now, so we will see what they do to me.²⁰⁶

Four workers were presented with new, less advantageous written contracts after they arrived in Malaysia and were told they must sign if they wished to keep the position — a practice commonly called “contract substitution”. One of the four was given a contract in the Philippines that promised a monthly salary of RM1,200, but on arrival the Malaysian agent made her sign a new contract for only RM850. She explained:

An employee of the recruitment agency in Manila brought us to the airport and then distributed a photocopy of the contract.

²⁰⁵ Interview No. 36, male returned migrant worker, interviewed in Nepal, 18 April 2015.

²⁰⁶ Interview No. 31, male returned migrant worker, interviewed in Nepal, 16 April 2015.

They said we could not leave our country without the contract. So I carried my contract. But when I came to the agency [in Malaysia], they gave me another contract, a different contract. I could not refuse and I signed it because I was already here and I could not choose to go back home because I did not have any money to buy a ticket.²⁰⁷

The Philippines embassy said that it received frequent complaints from Filipino migrant workers regarding contract substitution. It attributed this practice to the fact that the Government of the Philippines, through the embassy, approved only contracts agreeing to pay workers at least RM1,400 per month, but the employers often had no intention of paying this amount. When the worker arrived in Malaysia, they would receive the “real” contract.²⁰⁸

Other strategies that agencies used to deceive workers included giving workers contracts with incorrect details, contracts written in a language the workers did not understand, or giving the contract just before the worker’s departure, when it was too late for them to refuse the position. Two workers noted they did not receive a contract outlining their employment terms at all, but rather a notice on the consequences for early termination.

I wasn’t given any contract [in Cambodia]. They just made me sign a document that if I left the job I would have to pay the recruiter USD1,500. We were told there were no fees, but then when we arrived we had to pay RM3,500 to the agent.²⁰⁹

The law of contract and contractual remedies are discussed in chapter 6.

5.2.4 Deception Regarding Immigration Rules and Status

Nineteen migrant workers said they were deceived by an agent or employer regarding their travel and work authorisation documents.

Agents frequently misrepresented to migrant workers that they could enter Malaysia on a social visit pass (commonly called a tourist visa by migrant workers) and then obtain work authorisation after arrival. Four out of 50 migrant workers reported that their employer or recruitment agent applied for the wrong visa, and 18 out of 50 said they were advised to enter on a tourist visa.

²⁰⁷ Interview No. 3, female migrant domestic worker from the Philippines, interviewed in Penang, 7 May 2015.

²⁰⁸ Interview with the Embassy of the Philippines (Overseas Labor Office), Kuala Lumpur, 1 April 2015.

²⁰⁹ Interview No. 23, one of the six female migrant workers from Cambodia, interviewed in Penang, 3 August 2015.

The workers found out too late that adjusting to a work permit from a social visit pass did not allow them to work or obtain a VP(TE) and that they were illegal immigrants in Malaysia. Agents also used this as an opportunity to extract more money from the migrant workers. As described by a domestic worker from India, who is illiterate:

I asked another passenger on the flight about my visa, she said it was valid for only 22 days. It was a tourist visa. So I only found out when the plane was in the air, and if I could, I would have got down from that plane. Then I asked the agent, he said if you want the [work] permit, you have to pay 2 lakh Indian money [approximately RM12,500]. But of course I didn't have the money.²¹⁰

Two groups of undocumented migrant workers were promised a work permit through the 6P Programme if they paid large fees to agents in Malaysia, yet the permit did not materialise. As explained by one group:

We first paid in 2012 because we saw [the agent] got the documents for some people. Some of us paid her in full, RM5,000 or RM6,000, but others just paid in small amounts over time. She took our passports and the payments and then told us to wait and wait. First 90 days and then more and more. Until 2014 we kept paying her, and waited and waited until we couldn't wait anymore. We know personally of 42 people cheated by her, but it could be many more.²¹¹

The long period of uncertainty was extremely stressful for these migrant workers, and some felt compelled to take up irregular work in dangerous conditions while they waited for the work permit to arrive.

In a further six out of 50 cases, the employer failed to apply for a work permit, or failed to renew the work permit in the requisite time, leaving the worker undocumented. The promise of a work permit could be used to control and threaten migrant workers. As described by one domestic worker:

I never received a work permit. I asked my employer, boss why don't I have a permit yet? I am working here but I don't have a permit. She said she didn't want to make one. She said there was no document about me, not even in immigration, so if she just wanted to throw me away she could.²¹²

²¹⁰ Interview No. 12, migrant domestic worker from India, interviewed in Selangor, 10 June 2015.

²¹¹ Interview No. 20, two male and two female Indonesian migrant workers, interviewed in Klang (Selangor), 27 July 2015.

²¹² Interview No. 17, migrant domestic worker from Indonesia, interviewed in Selangor, 15 July 2015.

Some workers in the restaurant sector said they did not know what their employment status was after their arrival in Malaysia because their employers held their passports, and did not answer their questions.²¹³ Notably, almost none of the workers interviewed for this study had received their i-Kad.

A lawyer who represented migrant workers described cases in which migrant workers became irregular through no fault of their own because their employers did not pay their levy, despite deducting money for this purpose:

I had a case of two Bangladeshis and both of them were charged for overstaying ... [T]he employer had deducted the levy, but he did not go and renew the work permit ... So that's the kind of injustice that comes out. A lot of people, through no fault of their own, become undocumented because of this work permit and this levy issue.²¹⁴

5.2.5 Passport Retention

Of the 50 migrant workers interviewed for this study, 43 reported that their passports were retained by a Malaysia-based agent as soon as they arrived in the country. In some cases the agent sought the worker's consent, but made it clear the worker could not refuse. In most cases, however, the passport was simply demanded. The agents explained that the passport was taken for safe keeping, to prepare the worker's work permit, or to prevent the worker from running away. A migrant worker from the Philippines, employed in the hospitality industry, described the experience:

When I arrived in Malaysia the agents immediately took my passport. They told me they need to keep the passport for holding and for the work permit but I told them this is my passport and at the back of the passport it says that only the bearer should hold this passport. Very clear. ... They said the reason why they kept the passport was that I would run away. I told them this is a very stupid reason, I came here and paid a lot of money for the job, I don't want to run away. But they still refused to give it back to me.²¹⁵

²¹³ Some but not all migrant workers receive identity cards that they can carry with them in place of their passports. In 2014, Home Minister Datuk Seri Ahmad Zahid Hamidi said that all foreign workers would need an i-Kad by the end of the year. See E. Fazaniza, "I-Kad for Foreign Workers", *The Sun Daily*, 14 January 2014.

²¹⁴ Interview with the Bar Council Migrants, Refugees and Immigration Affairs Committee, Kuala Lumpur, 10 December 2015.

²¹⁵ Interview No. 10, male migrant worker from the Philippines, interviewed in Penang, 10 May 2015.

The passport would be returned to the worker only on the completion of their contract before departure. If a migrant worker decided to leave the employer earlier than this, for example for mistreatment or non-payment of wages, the passport may never be returned. The worker would have to apply for temporary travel documents from the embassy to depart.

Agents who held onto passports sometimes misused them. One Filipina migrant worker gave her passport to her agent as requested, and he then disappeared, taking her passport with him.²¹⁶ Another Indonesian man had sent his passport to Malaysia from Indonesia on the (incorrect) promise that he was going to get a work permit put into his passport. However, when he received the passport back it had already been used by other people. He was not sure how this had been done. Similarly, an Indonesian woman received her passport back from her agent and found stamps of many places she had never visited.

Workers who do not have their original passports on them are vulnerable to harassment from police, RELA and immigration officers. A community group for migrant workers from the Philippines, called the Pinoy Support Group, described such an incident:

I had a phone call from one Filipina when she was in a van [after being arrested]. The police asked her how much she has got in her wallet. She is legal, she was documented, but because her passport is with the employer she was arrested. The first person she called was me and I spoke to the officer and I asked the police officer who is the [police] supervisor and ... then he hung up and let my friend go.²¹⁷

5.3 Harms Experienced at Work

All but four workers (46 workers in total) experienced problems at work. Employment-based harms were by far the most common problems cited and the problems were diverse, ranging from issues with wages, overtime and time off, housing and food, communications, union membership, and physical and verbal abuse.

5.3.1 Non-Payment of Wages

Migrant workers in all sectors reported not receiving the wages they believed they were owed. Sometimes this was due to the workers being deceived during recruitment about the wages they would be paid. In other cases, the employers did not pay the amount they had agreed, or the amount they were legally required to pay (see chapter 6 for a list of rights under employment law).

²¹⁶ Focus Group No. 1, female migrant workers in a non-governmental organisation shelter, interviewed in Selangor, 27 April 2015.

²¹⁷ Interview with the Pinoy Support Group, interviewed in Penang, 10 May 2015.

Nine of the 50 migrant workers were paid nothing at all either for several payment periods or for the duration of their time with the employer. In several cases the employers told the workers that they were “holding” the wages until the worker completed the contract.

Domestic workers were particularly vulnerable to non-payment of wages because they were not allowed to leave the employers' home to bank or to transmit the wages to their family, and communication with their family was also restricted. The employers would promise that the money was being sent to the worker's family and only later would the worker realise that this was not the case. As an Indonesian domestic worker described, “I was never paid any money at all. My first employer told me the money was going back to Indonesia, but I couldn't check because I didn't have a phone.”²¹⁸

In two other cases, migrant workers were not paid for several months to cover unspecified “recruitment fees” to the Malaysia-based agent. The migrant workers had not been told before arrival that they would be required to pay these fees.

Non-payment of wages was a complaint among documented and undocumented workers alike, however undocumented workers felt particularly vulnerable because they did not believe they had any recourse. As described by one undocumented worker:

Every time you ask for money, they shout at you. They say they don't have money now, they will give later. So I had to leave and find new work.²¹⁹

5.3.2 Illegal Deductions

The majority of migrant workers interviewed, 29 of 50, had monies illegally deducted from their pay. These deductions were usually for recruitment fees, as well as for the levy and health insurance. Some deductions were for accommodation and food and insurance although, as described in chapter 6, the employer must have written permission from the migrant worker and the DoL to deduct for these items. The migrant workers in this study were unaware that the deductions would be made, and did not consent. As a migrant worker in the electronics manufacturing sector noted:

In Malaysia, the [agency] said you have to pay money again. RM200 each month. I asked what is this RM200 for. They said ‘it is to reach RM2,000’. They deceive us like this. This is for the [work permit]... [They] also deduct RM10 for [health] insurance per month, but I never saw the policy.²²⁰

²¹⁸ Interview No. 16, migrant domestic worker from Indonesia, interviewed in Selangor, 15 July 2015.

²¹⁹ Interview No. 35, male returned migrant worker, interviewed in Nepal, 17 April 2015.

²²⁰ Interview No. 7, female migrant worker from Myanmar, interviewed in Penang, 9 May 2015.

In other cases, money was deducted for a legal purpose, but the employer did not use the money for the stated purpose or deducted too much money. The levy and health insurance deductions were a particular target of these fraudulent schemes:

So the levy here [is] RM1,800 yearly, but they deduct RM300 each month from my pay, so that adds up to RM3,500 a year. It should be only 1,800. So they are very deceiving, they didn't follow up the rules and the protocol. Then when I checked the status of my levy [online] it said that until now they had not finished payment of the levy. It means they are cheating me.²²¹

Some of the workers were also recruited before the levy became their responsibility in 2013 and their contracts stated that the employer would pay the levy, making this deduction particularly problematic.

Box 5: Sunil's Experience — Forced Labour and Exploitation

A review of migrant worker statements revealed that harms were often connected to each other, in that deceptive recruitment practices could lead to further vulnerability in Malaysia and workers finding themselves in exploitative work situations. Cases involving deception, coercion and severe exploitation can be classified as trafficking under Malaysian and international law (see sections 6.5 and 6.6).

In one example of these connections, Sunil, a migrant worker who was interviewed after his return to Nepal, described being trafficked to Malaysia. He was deceived about the work awaiting him, and then placed in a situation of severe exploitation, including restriction of movement, withholding of wages, physical violence, threats, and intimidation. He managed to escape his situation but never received any redress for the financial and emotional losses he suffered. According to him:

I am a vegetable farmer in Nepal but it became impossible to support my family on this income so I decided to go abroad. I spent several years working in Iraq and had no problems. Then a Nepali acquaintance told me of an agent looking for workers for Malaysian companies. The agent came to see me and said he had jobs on a ship, a big ship, five star, and it would be security work so not difficult. He also said the days would only be eight hours and we would be paid NPR 50,000 or 60,000 [approximately RM2,115 or 2,537] per month. I agreed to the offer.

After a short while he came back with visas but they were for construction work. He said we could not get the shipping visa in Nepal so we had to go first to India. We went by vehicle, and then rail to Chennai where the documents were prepared. They gave us false certificates saying we had worked on a ship before. I still have those certificates with me. I paid NPR

²²¹ Interview No. 10, male migrant worker from the Philippines, interviewed in Penang, 10 May 2015.

250,000 [approximately RM10,572] for the position — half to the Nepal agent, and half to the Indian agent.

When we arrived in Sibu City [Malaysia] we were collected by another agent and then locked in his house for three days. Other workers there told us the work is actually very dangerous and we found out we were not working on a ship, but instead in a factory making stuffing for furniture. It was from a thorny fruit — we had to boil the fruit in water to soften it and then grind it in a machine. The work was very difficult and very hot — we worked over a big fire and the room was small with only one window. We were drenched in sweat. We were told that several people had been crushed and killed by the machines in that factory.

I told the company that this was not what I was promised but they said they didn't know anything about a ship. We were treated so badly. If we refused to come to work they beat us. The wage was only RM500 per month and from that they deducted food and accommodation. If we were sick for one day they would deduct two days. We ended up with nothing. Also, the agent in Malaysia frequently called my wife back in Nepal and said "Pay us more money, if you want your husband back alive", so she had to pay him. We tried many things to get help, and even ran away, but the police took us back. Eventually one Indian worker got away and told his embassy, and we were somehow released, I don't know how.

5.3.3 Excessively Long Working Hours and No Time Off

Twenty-eight out of 50 workers complained that their employers expected them to work excessively long hours and they had no ability to refuse to work those hours. This was a particular challenge for domestic workers who live in employers' homes and thus could be called upon during the day and night, but it also occurred in other industries where the standard work day is eight hours. One man from the Philippines who worked as a bartender, for example, was made to work 12-hour shifts, seven days per week, despite requesting fewer hours.²²²

Other workers said they were not given leave to handle personal matters, to rest or to visit their families.

I used to work 12 hours, no leave. Only if you get sick. I never got to go away any places. I go to work at 6 in the morning till 8 or 9 in the evening. It was far away too.²²³

I worked from 6 am. I never received a day off in two years. I was not allowed outside. Sometimes, I accompanied the family back to their village in Johore. [...] I was afraid to go out.²²⁴

²²² Interview No. 10, male migrant worker from the Philippines, interviewed in Penang, 10 May 2015.

²²³ Interview No. 36, male returned migrant worker, interviewed in Nepal, 18 April 2015.

²²⁴ Interview No. 37, returned migrant domestic worker, interviewed in Indonesia, 17 September 2015.

[Crying] Even my Madam knows before that I want to go home because [for] a long time I never see my family. The Madam made promises, she said December I could go back but then asked if I could continue to January, then February, then she just said I am not allowed to leave.²²⁵

5.3.4 Control of Movement and Communications

Most migrant worker interviewees described situations in which their movements were highly controlled by their employer or agent, even outside of working hours. Two men in the restaurant industry said that during the times that they were not working, they were confined to a small room above the restaurant. Domestic workers, who live with their employers, could rarely leave the employers' home on their own, or at all.

A number of workers had their telephones taken away from them when they arrived, or were given limited times to make calls, affecting their ability to communicate with family. In one cleaning company, the employer took the worker's telephone and said he would return it only when she had 14 regular clients, however he did not return the telephone when she reached this target. Another domestic worker from India described her experience:

I called my daughter and cried to my daughter and said that, "They brought me to some unknown place, some very rural place I don't know and I'm very afraid." So [my agent] overheard me complaining to my daughter and she said "No, you shouldn't be telling all this, why are you crying and telling all this to your daughter?" Then she took away my phone.²²⁶

5.3.5 Restriction of Right to Return/Terminate Their Employment Relationship

All of the migrant workers who discovered they had been deceived about the nature and conditions of their employment, or who were mistreated at work, believed they could not leave their positions without having to return home. Eight of the 50 workers interviewed specifically asked to terminate their contracts and return home, or to not have their contract renewed when it expired, but their employers forced them to continue. As explained by one Nepali man:

[When we asked to leave] the agent said that once we are there, even to get an exit stamp we have to work for 12 months at least. We said no we will not work we will go to the police —

²²⁵ Interview No. 15, migrant domestic worker from the Philippines, interviewed in Selangor, 15 July 2015.

²²⁶ Interview No. 13, migrant domestic worker from India, interviewed in Selangor, 10 June 2015.

he said they will not sign and so immigration would not let us leave because we were not there as tourists. If we cannot show our attendance at work, they will not let us go. So even though we said we will not work — we had to go to work.²²⁷

Another woman who participated in a focus group wished to leave her job due to illness, but her employer, an electronics manufacturer, ignored her request. In the words of her colleague who attended the discussion with the woman:

She is sick. Her sickness is not improving. She wants to go back but the company won't let her. She asked the company if she could leave, but they said nothing, just silent. She is willing to pay the balance of the levy, everything, but they say no.²²⁸

5.3.6 Violence and Physical Abuse

Fifteen migrant workers reported being beaten by employers, threatened with violence, or witnessing violent acts committed by employers or agents against fellow migrant workers.

Domestic workers were particularly vulnerable to physical abuse. Six of the 15 were migrant domestic workers or cleaners with agencies who were beaten by members of the family or saw other household staff beaten if they made “mistakes” in their work, or complained about their working conditions. An Indonesian domestic worker stated, “Whenever I did anything wrong I was hit and slapped and threatened.”²²⁹ As remembered by a cleaner from Cambodia:

My boss hit my friend who couldn't speak proper Malay or didn't do work well. The boss sent her to the agent and the agent would also hit her. The cleaning service management would be there when the agent slapped our friend. Sometimes, he would also scold me or some other friends and I heard about it.²³⁰

Other migrant workers, particularly those in factories, suffered beatings if they took time off or did not work fast enough. As described by a Nepali migrant worker:

If you do not go for work, [a supervisor] would come and beat you. At work also they come to check and if they see anyone

²²⁷ Interview No. 33, male returned migrant worker, interviewed in Nepal, 13 April 2015.

²²⁸ Focus Group No. 3, female migrant worker from Nepal, interviewed in Johore, 21 June 2015.

²²⁹ Interview No. 26, migrant domestic worker from Indonesia, interviewed in Kuala Lumpur, 28 September 2015.

²³⁰ Interview No. 22, female migrant worker from Cambodia, interviewed in Penang, 3 August 2015.

just take a slight break they would call him and hit him. They beat one of my co-workers. So you can't say you won't work — you have to ... [the supervisor] beat us with his hands in front of the owners. The owners didn't say anything.²³¹

The violence by agents or employers was used as a means of control and intimidation of the workers. Even those who witnessed others being hurt described being profoundly shaken and feeling scared to speak up about problems in future.

5.3.7 Sexual Harassment and Gender-Based Violence

Domestic workers were also at risk of other forms of violence. The sample of case files reviewed at Tenaganita revealed three cases in which domestic workers were sexually assaulted by their employers or other household employees.

According to the WAO, an NGO that provides advice to victims of sexual and gender-based violence, sexual abuse of migrant domestic workers is common because they are vulnerable in the employers' home, but few speak up out of shame. Human Rights Watch documented numerous cases of rape of Indonesia domestic workers by their employers in 2003 and 2004, including cases in which the women endured the abuse out of shame and the need to repay debts to their recruitment agents.²³²

The WAO also pointed to the lack of reproductive rights and women's healthcare for migrant workers, especially those who are undocumented. It noted that becoming pregnant resulted in failing the medical examination. Undocumented workers who became pregnant in Malaysia had to pay high rates at hospitals, and were usually too afraid of arrest to visit a hospital without papers.²³³

5.3.8 Denial of Freedom of Association

As discussed in the following chapter, all workers, whether citizens or non-citizens, have the right to form, join or participate in the lawful activities of, a trade union. However, the freedom of association is not well-enforced in Malaysia generally — a recent report by the MEF and the ILO found that nearly three quarters of the 101 companies surveyed by the MEF prevented their workers from forming or joining a trade union, despite the law. One academic estimated that unions cover only eight percent of the workforce, and a much lower percentage of the private sector workforce in which migrant workers are employed.²³⁴ The MTUC does not keep statistics on the proportion of citizen and non-citizen trade union members.

²³¹ Interview No. 33, returned migrant worker, interviewed in Nepal, 13 April 2015.

²³² Human Rights Watch, *Help Wanted: Abuses Against Female Migrant Domestic Workers in Indonesia and Malaysia*, New York:HRW, 2004.

²³³ Interview with Women's Aid Organisation, Selangor, 30 January 2015.

²³⁴ Interview with retired Professor of the Faculty of Business and Management (Human Resource Management), Universiti Teknologi MARA ("UiTM"), interviewed in Selangor, 19 January 2015.

None of the migrant workers who participated in this study were a member of a Malaysian trade union or participated in trade union activities. However, eight of the interviewed migrant workers had received assistance from the MTUC in either Selangor or Penang. Both workers and trade unionists noted the suspicion directed towards migrant workers who contacted a trade union for assistance.

[A]fter I approached MTUC, the company's [human resources manager] was very angry and wanted to take revenge and scolded me. I said I had approached her many times, but she hadn't helped me so I felt I had no choice. HR said 'But why MTUC? Do they want to make use of you?'²³⁵

An officer of the MTUC, and a representative of the Electronics Union, Northern Region, described how he and colleagues would try to organise training sessions for migrant workers in electronics factories in secret:

We go and organise trainings [about rights at work and the role of the trade union], but they are all underground ... if the employers know that we are having a training then they would definitely not allow their employees to attend.²³⁶

5.3.9 Workplace Accidents Causing Deaths and Permanent Injuries

Three migrant workers who participated in this study experienced personally or saw fellow migrant workers suffering injuries in work-related accidents. In one case, an undocumented migrant worker was paralysed from a work-related accident and took five months to recover, at his own expense.²³⁷ A domestic worker suffered serious injury when she was bitten by her employer's dog,²³⁸ and a third migrant worker in the plantations sector saw two workers lose all of their fingers due to overwork and lack of safety protections.²³⁹

In all three cases, the workers received no compensation, and in the case of the domestic worker, no treatment for the wound:

My first month, the dog I take care of bit me here, bit me on my hands, then the [flesh] come out but they never give me medication, they just say "just put black oil". Then, while I'm working for many weeks, it was so pain[ful] because the

²³⁵ Interview No. 5, female migrant worker from Vietnam, interviewed in Penang, 9 May 2015.

²³⁶ Interview with MTUC Penang, interviewed in Penang.

²³⁷ Interview No. 31, male returned migrant worker, interviewed in Nepal, 16 April 2015.

²³⁸ Interview No. 1, migrant domestic worker from the Philippines, interviewed in Penang, 7 May 2015.

²³⁹ Interview No. 38, male returned migrant worker, interviewed in Indonesia, 17 September 2015.

[wound was open], while I take a bath the children always touch, touch, gets so irritated.²⁴⁰

The number and causes of deaths and injuries in Malaysia is unknown because comprehensive data is not collected. The Department of Occupational Safety and Health told the researchers that in 2014 it received a total of 250 reports of deaths and 767 reports of permanent disability caused by workplace safety accidents, a total of 1,017 incidents. Of these, 12.9 percent (131 incidents) involved foreign workers.²⁴¹ Workplace accidents are also reported to the DoL. In a parliamentary question, the DoL said that only six workers died in a construction accident in 2014.²⁴² However, these figures rely on employer reporting, so are likely only to involve documented workers.

Sending countries gather data on deaths abroad, but this is also incomplete as few investigations are carried out into the cause of death. A 2016 study on deaths of Nepalis abroad, for example, found that 1,562 Nepali migrant workers died in Malaysia from all causes between the 2008/2009 and 2014/2015 financial years, around four workers per week.²⁴³

5.3.10 Inadequate and Unsanitary Accommodation, and Lack of Access to Drinking Water and Food

Sixteen workers described living in inadequate and unsanitary employer-provided accommodation. For example, an Indonesian migrant worker employed in a garment factory was housed in a dormitory with other workers and 30 cats.²⁴⁴ Two Nepali restaurant workers shared a room above the restaurant with 15 other people. They had no mattress or other bedding, so they had to sleep on the floor.²⁴⁵ Another Nepali worker said, “We slept on the floor. We drank water from the toilet. Sometimes there was no water to bathe.”²⁴⁶ Twelve of the 50 workers had inadequate food, either because the employer did not provide enough or they could not afford to purchase food on their wages. As recalled by one returned migrant worker:

They would measure the rice in a plastic bag — only 400 grams and with it they give this cabbage boiled in water. That was it. Three times a day — that’s it. I stayed like this there for four

²⁴⁰ Interview No. 1, migrant domestic worker from the Philippines, interviewed in Penang, 7 May 2015.

²⁴¹ Interview with Department of Occupational Safety and Health (“DOSH”), Putrajaya, 8 October 2015.

²⁴² Parliamentary question asked by Dr. Jeyakumar Devaraj.

²⁴³ “Report: 386 Nepalese migrant workers died here in 2016”, FMT News, 21 January 2017, <https://www.freemalaysiatoday.com/category/nation/2017/01/21/report-386-nepalese-migrant-workers-died-here-in-2016/>.

²⁴⁴ Interview No. 41, male returned migrant worker, interviewed in Indonesia, 18 September 2015.

²⁴⁵ Interview No. 19, two male migrant workers from Nepal, interviewed in Selangor, 22 July 2015.

²⁴⁶ Interview No. 29, male returned migrant worker, interviewed in Nepal, 17 April 2015.

or five months. I never saw any other vegetable a single time when I was there.²⁴⁷

These daily indignities can cause great stress for individual workers, and may also have health implications linked to lack of nutrition and sanitation and poor quality sleep.

Domestic workers are especially vulnerable to these deprivations because they are required to live in their employers' homes. One described how she was forced to sleep in a storeroom with the cleaning supplies. Another slept in the computer room and had to wait for the family to finish using the room before she could rest. Another was given just a thin mat to sleep on the kitchen floor, and no blanket. Many domestic workers said they were given inadequate portions of food, scraps from the family meals, or in one case just a single meal each day. As a result, the workers were often exhausted and weak, and in some cases became ill.

5.4 Harms at the Hands of Officials: Corruption, Extortion, and Discrimination

5.4.1 Extortion and Police Harassment

The participants in focus groups described numerous instances of police extorting money or goods from migrant workers in return for not arresting them for immigration offences or not filing charges after arrest. Migrants were more vulnerable to such harassment if their passport was held by their employer or agent. As explained by one Nepali participant, who worked as a swimming pool cleaner:

I had the same problem all the time — the police kept arresting me. They would ask for my original passport and I could only show the duplicate [photocopy], because my agent held the original. So they asked for money. Five times I was arrested. Two times the agent paid them what they asked. The next three times I had to pay myself.²⁴⁸

As a Bangladeshi migrant recounted, extortion can occur even if the migrant worker was in possession of their identity documents:

Sometimes even if you have a passport and valid [work permit], they still want money. If you give them money, they allow you to pass. If you don't, you cannot pass. They say you cannot go.²⁴⁹

²⁴⁷ Interview No. 33, returned migrant worker, interviewed in Nepal, 13 April 2015.

²⁴⁸ Interview No. 29, returned migrant worker, interviewed in Nepal, 17 April 2015.

²⁴⁹ Focus Group No. 2, Bangladeshi migrant workers, interviewed in Negeri Sembilan, 7 June 2015.

5.4.2 Discrimination against Non-Citizens and Undocumented Migrant Workers

Discussions with migrant workers in a group setting revealed that they viewed themselves as highly vulnerable to abuse and exploitation, that they perceived abuse of migrant workers to be more commonly experienced than by Malaysian workers, and that exploitation of migrant workers was largely tolerated by law enforcement authorities.

In specific instances of perceived discrimination, undocumented workers described either being turned away by police when they sought to report crimes against them because they were undocumented (see section 7.6) or being too afraid to approach any authority because they were sure they would not be taken seriously. Some felt that petty criminals specifically targeted them because migrants were known not to go to the police.

The Equal Rights Trust, an international organisation that works to combat discrimination worldwide, noted discrimination against migrant workers “in all areas of life”. It found that discrimination was facilitated by discriminatory laws and rights protections, and noted with particular concern violence against migrants by state authorities, inhumane conditions of detention and discrimination in healthcare.²⁵⁰

5.4.3 Mistreatment during Arrest and in Immigration Detention

Of the 50 migrant workers interviewed for this study, four had been arrested for suspected immigration offences. One Indonesian man had been arrested during a night-time raid and described excessive force by the arresting officers:

One night, I was at my friend’s house, hanging out and talking to a relative on the phone. Around 11 pm the police came in and arrested us. They were rough, and they kicked us.²⁵¹

Others knew of friends or fellow workers who had been arrested, and described even documented workers being arrested. While under arrest, the workers were denied the ability to make a call to let their family and friends know where they were, causing great anxiety among their friends and other migrant workers who feared being “taken” at a moment’s notice.²⁵²

Those arrested decried enduring unsanitary conditions in detention centres, as well as lack of food, denial of medical treatment and verbal abuse from prison guards. Four different workers described their traumatic experiences in different kinds of facilities:

²⁵⁰ Equal Rights Trust in partnership with Tenaganita, *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*, The Equal Rights Trust: London, 2012, p. XIV.

²⁵¹ Interview No. 39, male returned migrant worker, interviewed in Indonesia, 17 September 2015.

²⁵² Interview No. 18, two male migrant workers from Nepal, interviewed in Selangor, 22 July 2015.

When I think about it, I want to cry. It was very difficult, very difficult. Food was never given on time. And when it was given, it was really a tiny amount of rice, one mouthful and it was finished. In the morning, they give one piece of bread with tea. ...

We just slept on the cold floor. We had no mattress. There were 80 people in that immigration locker. We slept on top of people. People sleep on top of other people. The toilet was very very dirty. It felt revolting to go to the toilet. We stayed in that place for 14 days. I could not contact anyone — they took away our phones. If you have money with you, they take away that money too. I had RM200, which they took away. They returned my phone though. [...] and whatever happens to you, the embassy will never come! ... They told me there was a guy from east Nepal, he died of TB. Even if you are sick, there is no medication.²⁵³

I stayed one night in the airport jail — there were 20 or more women in the room. The next day I was taken to another jail and stayed there 17 days. Forty or more people were in the room. They gave us rice and the toilets were enough, but there were rats.²⁵⁴

The experience of another migrant was:

I was held in immigration detention with hundreds of people from all over for more than a month. No one visited me. They didn't hit us but they abused us verbally, and were so rough — Move!! Sit!!! I felt so low. And I was worried because I didn't know how long I would be held, but it was only 15 days.²⁵⁵

Moreover, lawyers noted the difficulty for migrants' families or those assisting them to locate the detained family member.

Once we almost took a month to find out where the client is, we have to search all the deportation camps. And then they will say, "No, no such name", "Can you get the passport number?", "When was he arrested?" but then these details are not good

²⁵³ Interview No. 36, male returned migrant worker, interviewed in Nepal, 18 April 2015.

²⁵⁴ Interview No. 37, female returned migrant domestic worker, interviewed in Indonesia, 17 September 2015.

²⁵⁵ Interview No. 38, male returned migrant worker, interviewed in Indonesia, 17 September 2015.

enough. After this wild goose chase they said, “Ya, he’s here, we’ve been waiting for his air ticket”, I said “Why didn’t you tell me this a month ago?” It should be very easy.²⁵⁶

5.4.4 Denial of Right to a Fair Trial

Four migrant worker participants were prosecuted for immigration violations during their stay in Malaysia. These migrant workers were interviewed in their home country after their return. They described the trial as bewildering, that they did not know the charges or the offences they had been convicted of, and they received no legal advice or, in the case of a Nepali migrant worker, translation. All pleaded guilty.

After 17 days, I was taken down to the court. I don’t know what court. The agent came to see me and she paid the fine so I could be released. [...] They never told me why I was arrested. I was just taken. This was the same for everyone there, none of them had been told. I don’t know what the fine was or the other costs. The agent just said it was RM5,000. [...] I was afraid. My feeling was of confusion — why is my fate like this? [...] How are my family — are they having troubles? I had no phone to call them.²⁵⁷

The lawyers interviewed for this study were particularly concerned about the treatment of migrant workers before Malaysia’s immigration courts, most of which are in immigration detention centres far from urban centres.

In fact, the demand for legal representation is actually very, very great. Like the state I come from, Pahang, once a week is immigration court day. On an average, you would see about 50–100 persons being charged for some immigration violation or another. The sad thing is almost all of them are not represented. It’s zero representation. And most of them actually plead guilty to these immigration violations.²⁵⁸

²⁵⁶ Interview with Messrs Bernard Francis & Associates, Kuala Lumpur, 4 February 2015.

²⁵⁷ Interview No. 37, returned migrant domestic worker, interviewed in Indonesia, 17 September 2015.

²⁵⁸ Interview with the Bar Council Migrants, Refugees and Immigration Affairs Committee, Bar Council, Kuala Lumpur, 10 December 2015.

5.5 Conclusion: Themes of Abuse and Isolation

Through the words of the individual migrants who participated in this study, several themes emerged about the harms migrant workers face that give context to both their experiences and how to address them.

First, harms occur in all sectors which employ migrant workers. Nevertheless, domestic workers were particularly vulnerable to exploitation at work, likely because their movement is restricted and they are isolated from other workers. All but one of the physical violence incidents mentioned by study participants were reported by domestic workers who were beaten by their employers or assaulted by other household staff.

Second, both documented and undocumented migrant workers were the victims of abuse and labour exploitation as well as other harms. The occurrence or severity of harms did not appear to differ between documented and undocumented migrant workers. However, undocumented workers expressed feeling particularly vulnerable to abuses because they believed they had nowhere to complain.

Third, the persons named as the duty bearers by migrant workers varied, but employers, agents, and the police were named most often. Other offenders were direct line managers, fellow migrant workers, landlords, managers, or members of the public and of state agencies.

Fourth, and related to the above, the harms described by migrant workers were often connected to each other and occurred within a larger context of intimidation and control. Indeed, several experiences described as problematic by migrant workers, such as non-consensual passport retention, control of movement, denying a migrant worker the ability to communicate with family, neglecting to maintain a migrant worker's immigration status, or outright threats and abuses of power, appeared intended to increase control over the migrant worker and prevent them from "running away" or complaining about their working conditions.

This control, in turn, created an environment of impunity in which more abuse could take place. The only option migrant workers felt they had available to them was to simply leave their place of employment, described as "running away", and try to exist as an undocumented migrant worker, with the greater risk of arrest and deportation that this entailed.

Finally, the abuses suffered by migrant workers also took an enormous longer-term physical and emotional toll on many. They described feeling exhausted, sick, hopeless, ashamed, and angry at those who had committed harms and at themselves for "allowing" themselves to be taken advantage of, and in some cases, lingering trauma from their experiences. These feelings of distress followed the workers home and persisted even after some years had passed.

6 RIGHTS OF MIGRANT WORKERS IN MALAYSIA

The rights of migrant workers in Malaysia are not contained in any single unified law or set of rules. Rather, the standards and rules that address the harms migrant workers experience are found across numerous sources of law, and numerous pieces of legislation.

This chapter outlines the sources of law in Malaysia, and then reviews the legal frameworks governing both immigration and labour, identifying statutory rights of migrant workers and, where available, how Malaysian courts have interpreted these rights. It then considers other laws that may be used by migrant workers to seek redress when they have been harmed or to enforce their contractual rights.

The analysis contained in this chapter is drawn from a review of laws, regulations, and applicable case law, as well as secondary sources. Where reference is made to policy documents, these are based on reports in the media and other sources, as the Government often does not make policies publicly available.

6.1 Sources of Rights

Malaysia's current legal system was established largely by the British colonial administration, although Sharia law and traditional law have also played a role in the development of the legal system.²⁵⁹ Malaysia has adopted the Westminster system of government with separation of powers between the Executive, Legislature and Judiciary. British legislation, case law and the rules of equity up to 1956 were directly incorporated into the law of Malaya (as it was then known).²⁶⁰

As in Britain, and other common law countries, several sources of legal authority create what is effectively “the law”. In Malaysia, these sources of law include the following:

- (1) The Federal Constitution: defines the functions of each branch of government, the relationship between the federal government and the states, and fundamental rights of individuals.

Each state in Malaysia also has its own constitution and each state has the ability to pass laws on certain topics. As these relate to local matters, they are not included in the analysis in this report;

- (2) Federal Statutes: statutes, also called legislation, acts, and laws, are passed by Federal Legislature and signed by the head of the Executive, titled Yang di-Pertuan

²⁵⁹ For a comprehensive overview of the Malaysian legal system, see S. M. Noordin, and S. Supramaniam, *UPDATE: An Overview of Malaysian Legal System and Research*, Hauser Global Law School Program, New York University School of Law, October 2013.

²⁶⁰ Section 3 states that, in Peninsular Malaysia, the courts must “apply the common law of England and the rules of equity as administered in England on the 7 April 1956”, Civil Law Act 1956 [Act 67].

Agong. Most core legislation is of British origin, and was introduced in the middle of the 20th century before independence in 1957. The Malaysian legislature has since built upon this foundation to adapt its laws to modern norms and requirements;

- (3) Case law: decisions handed down by Malaysia's superior courts interpret the scope and meaning of law in individual cases. Their interpretations of the law are legally binding in later cases (called "precedent"). Decisions of the higher British courts are still considered persuasive, but are not binding, in Malaysian courts; and
- (4) Regulations and other administrative sources of law: statutes may authorise administrative agencies to make regulations that provide more detail on the implementation of specific aspects of the law. Ministers and administrative agencies also release orders, policies, circulars, directives, or internal standard operating procedures. Of these, only regulations are automatically public. Most orders, circulars, and policy documents are not publicly available.

6.2 Constitutional Protections for Non-Citizens

Malaysia's Federal Constitution came into force upon the independence of the Federation of Malaya on 31 August 1957. The Constitution is the supreme law of the land, and any law or policy that is inconsistent with the Constitution may be declared void.²⁶¹ Individual protections under the Constitution are contained in nine articles that define constitutional rights, called "Fundamental Liberties". These rights can be summarised as follows:

- (1) Article 5: Prohibition on arbitrary deprivation of life or personal liberty;
- (2) Article 6: Prohibition on slavery and forced labour;
- (3) Article 7: Protection from retrospective criminal laws and repeated trials;
- (4) Article 8: (1) Equality before the law and equal protection of the law; and (2) Non-discrimination on the grounds of religion, race, descent, place of birth or gender;
- (5) Article 9: Prohibition of banishment, and the right to freedom of movement;
- (6) Article 10: The right to freedom of speech and expression, freedom to form associations and freedom of peaceful assembly;
- (7) Article 11: Freedom of religion;

²⁶¹ Federal Constitution, as amended, Article 4(1). Note however that the amendment of the Constitution requires a simple two-thirds majority vote in the parliament. As the ruling party has maintained this large majority since independence, the Constitution has been amended 57 times since independence.

- (8) Article 12: Rights in respect to education; and
- (9) Article 13: Rights to private property.

Malaysian courts have recognised constitutional rights for migrant workers. For example, in the *Taj Mahal* case (see Box 14), the Industrial Court referred to Article 8(1) of the Constitution that guarantees equal protection of the laws, and ruled that this applies to all persons, including migrant workers who work without a work permit or pass. It applied the same approach to the Industrial Relations Act 1967.²⁶²

Articles 8(2), 9, 10 and 12 are expressed as applying to citizens only. If it is interpreted by the courts that these articles exclude non-citizens, migrant workers would not be constitutionally protected from discrimination based on race, descent, place of birth, religion or gender, and would not have a constitutional right to freedom of speech, to form associations, or to participate in demonstrations.

Further, a proviso to Article 5 creates a different constitutional standard for non-citizens arrested for immigration offences than persons arrested for other offences. In general, all detained persons have a right to be brought before a magistrate within 24 hours of arrest. However, a non-citizen “arrested or detained under the law relating to immigration” can be held for 14 days before they must be presented to a magistrate.²⁶³

6.3 Rights under the Immigration Act 1959/63 and Regulations

The Immigration Act 1959/63 and regulations contain very few rights for non-citizens. Indeed, the only right granted to foreign citizens is to appeal decisions in limited instances. These instances include certain decisions regarding refusal of entry, cancellation of a pass, or a deportation decision.²⁶⁴ These specified appeals may be made only to the Minister and not to a judicial or independent body. The Passports Act 1966, as mentioned previously, prohibits the holding of another person’s passport, but this is not expressed as a right to hold one’s own passport.

From a rights and protections standpoint, several provisions of the Immigration Act 1959/63 may violate the constitutional right to a fair trial or to freedom from arbitrary arrest and detention:

- (1) Immigration officials, as well as police and customs officials, can search and arrest any person suspected of violating the Immigration Act 1959/63 without a warrant.²⁶⁵

²⁶² *Ali Saleh Khalaf v Taj Mahal Hotel*, Industrial Court of Malaysia, Case No. 22-27/4-1580/12, Award No. 245 of 2014, unpublished.

²⁶³ Federal Constitution, Article 5(4) and its second proviso.

²⁶⁴ Immigration Act 1959/63, Sections 8(6), 9(8) and 33(2).

²⁶⁵ Immigration Act 1959/63, Section 35.

This gives broad and unfettered power to the authorities to stop anyone and ask to see their documentation, potentially based on “looking foreign”;

- (2) Immigration officials can detain any person for an indefinite period when “they are in doubt” as to whether the person entered Malaysia legally;²⁶⁶ and
- (3) Immigration officials can reward any person who assists with the “detection and prosecution” of immigration offences. This allows for ordinary citizens to report suspected undocumented migrants.

6.4 The Labour and Industrial Law Framework — Protections of Workers' Rights

Formal laws regulating the workplace were first passed by the British in Malaysia towards the end of the colonial period in response to labour unrest on plantations and widespread complaints of poor working conditions. Supplementary laws to address labour unions, labour relations and occupational health and safety were passed in the post-independence period. Since 2012, the Parliament and Executive have reformed and modernised the labour law framework to introduce, among other things, a minimum wage, protections against sexual harassment, and maternity leave.²⁶⁷

The statutes that provide rights to workers in the private sector are as follows:

- (1) WCA 1952;
- (2) Employment Act 1955;
- (3) Industrial Relations Act 1967;
- (4) Housing and Amenities Act 1990; and
- (5) Occupational Health and Safety Act 1994.

Malaysian labour law does not distinguish between citizens and non-citizens and thus all workers have the same entitlements. The Federal Court in the decision of *Assunta Hospital v Dr A. Dutt* confirmed that the citizenship of the worker was of no relevance to a claim for reinstatement of employment under the Industrial Relations Act 1967 (see section 7.3 for a description of this process).²⁶⁸ In practice, as detailed in later chapters, labour rights can be harder to realise for undocumented migrant workers.

Finally, the rules are essentially the same for employers and employees in all workforce sectors except domestic work. Several statutes wholly or in part exclude domestic workers from their protections, as detailed further in the following section.

²⁶⁶ Immigration Act 1959/63, Section 27(1).

²⁶⁷ See N. R. Mohd Nadzri, “Malaysian Employment Laws: Tracking the Recent Updates”, *South East Asian Journal of Contemporary Business, Economics and Law*, Vol. 1, 2012.

²⁶⁸ [1981] 1 MLJ 115.

6.4.1 Employment Act 1955

The Employment Act 1955 sets labour standards for low wage and manual workers in Peninsular Malaysia and the Federal Territory of Labuan.²⁶⁹ The Act applies to:

1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed two thousand ringgit a month.
2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which—
 - (1) he is engaged in manual labour ...
 - (2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;
 - (3) he supervises or oversees other employees engaged in manual labour employed by the same employer ...;
 - (4) he is engaged in any capacity in any vessel registered in Malaysia and who—
 - (a) is not an officer ...;
 - (5) he is engaged as a domestic servant.²⁷⁰

For the purposes of this definition, wages do not include any “commission, subsistence allowance or overtime payment”.

As of 2012, it was estimated that this definition covers 70 percent of the Malaysian workforce.²⁷¹ All of the migrant workers who participated in this study earned the minimum wage or just above, and were therefore “employees” covered by the Employment Act 1955. “Employer” is defined broadly to include “any person who has entered into a contract of service to employ any other person as an employee” and, importantly “includes the agent [or] manager” of that person.²⁷²

²⁶⁹ Employment Act 1955 [Act 265], Section 2(2). The Employment Act 1955 was extended to the Federal Territory of Labuan in November 2000, via Federal Territory of Labuan (Extension and Modification of Employment Act) Order 2000 [P.U. (A) 400/2000] w.e.f. 1 November 2000.

²⁷⁰ Employment Act 1955, First Schedule.

²⁷¹ N. R. Mohd Nadzir, “Malaysian Employment Laws”, *South East Asian Journal of Contemporary Business, Economics and Law*, at p. 156.

²⁷² Employment Act 1955, Section 2. Note that “factor” is a colonial term similar to an agent.

Employers who hire migrant workers must inform the DoL within 14 days of the migrant worker's employment, or 30 days if the employee is a "foreign domestic servant".²⁷³ The employer must also notify the DoL of the termination of the migrant worker, whether through dismissal, repatriation or deportation, expiry of the employment pass, or the migrant worker "absconding from his place of employment".²⁷⁴ Employers can also be asked to furnish returns of all details related to their migrant worker employees whenever directed by the DoL.²⁷⁵

6.4.2 Rights under the Employment Act 1955

Employers' obligations to their employees under the Employment Act 1955 are extensive and cannot be set out in full here. This section describes the core provisions regulating issues of concern to migrant workers: contracts, wages, deductions, hours, leave, joining a union, and termination.

The Employment Act 1955 creates administrative remedies for employees whose employment rights are violated, which are discussed in section 7.2. In addition, contravening "any provision of [the Employment Act], or any regulations, order, or other subsidiary legislation whatsoever" is a criminal offence which attracts a maximum fine of RM10,000.²⁷⁶ Prosecution of criminal offences is discussed in section 7.6. The Contracts Act 1950, which applies to employment contracts, is discussed in section 6.5.1.

Right to a Written Employment Contract and Register

Employees employed for longer than one month are entitled to a written employment contract stating the terms and conditions of work.²⁷⁷ The contract is not explicitly required to be explained in a language the worker understands and there is no guidance on when a copy of the contract must be provided to the worker.

The terms and conditions in the employment contract must be either as favourable or more favourable to the worker than the rights and entitlements guaranteed by the Employment Act 1955 and subsidiary regulations. The contract must also include a termination clause.²⁷⁸

Employers must keep a register for each worker (except domestic workers — see Box 6) to include: normal hours of work, agreed holiday and leave, wage rates, wages paid, and dates

²⁷³ Employment Act 1955, Sections 57A and 60K(1).

²⁷⁴ Employment Act 1955, Sections 57B and 60K(3).

²⁷⁵ Employment Act 1955, Section 60K(2).

²⁷⁶ Employment Act 1955, Section 99A.

²⁷⁷ Employment Act 1955, Section 10(1).

²⁷⁸ Employment Act 1955, Sections 7 and 7A.

of payment and deductions, to be signed by the worker.²⁷⁹ The employer must provide the worker with a written copy of the register when they start employment and when any change is made,²⁸⁰ and must provide written notice of wages with each payment.²⁸¹

Rights regarding Wages and Deductions

Malaysia introduced a minimum wage of RM900 per month in 2012, which came into force for migrant workers in December 2013.²⁸² On 1 July 2016, the minimum wage was increased to RM1,000 per month.²⁸³ This wage applies to all employees covered by the Employment Act 1955, except domestic workers who are specifically excluded.²⁸⁴

All workers (including domestic workers) must be paid their wages at least monthly and no more than seven days after the end of the wage period.²⁸⁵ Since 2012, employers have been required to pay wages electronically into a bank account at a Malaysian bank in the employee's name.²⁸⁶ Employers, therefore, who tell employees their wages are either being sent directly to their home country or held until the end of the contract period are violating the Employment Act 1955.

If the contract ends, the employer must immediately pay the worker all wages due.²⁸⁷

Employers can legally deduct money for certain items from an employee's wages up to a maximum of 50 percent of the monthly wage.²⁸⁸ In most cases, the employer must obtain the consent of the worker and of the DoL to deduct any money from a worker's wages.²⁸⁹ Allowed deductions (with consent) include insurance, accommodation, food, and payments to third parties but only up to a certain amount.²⁹⁰

²⁷⁹ Employment Act 1955, Section 61; Employment Regulations 1957, Regulation 5.

²⁸⁰ Employment Regulations 1957, Regulation 8.

²⁸¹ Employment Regulations 1957, Regulation 9.

²⁸² Minimum Wages Order 2012, Minister of Human Resources, 16 July 2012. The minimum wage for Sabah and Sarawak were set slightly lower at RM800 per month and RM3.85 per hour.

²⁸³ Minimum Wages Order 2016, Minister of Human Resources, 29 April 2016.

²⁸⁴ Minimum Wages Order 2016, Section 2.

²⁸⁵ Employment Act 1955, Sections 18 and 19.

²⁸⁶ Employment Act 1955, Section 25.

²⁸⁷ Employment Act 1955, Section 20. There are special rules where the employer terminates the contract for breach by the worker: Section 21.

²⁸⁸ Employment Act 1955, Section 24(8).

²⁸⁹ The only deductions that can be made without consent are repayment of excess overtime payments made in the past three months, or repayment of interest free advances of wages. Employment Act 1955, Section 24(2).

²⁹⁰ Employment Act 1955, Section 24(4).

Any deduction that does not comply with these rules is illegal.²⁹¹ These illegal deductions would include amounts deducted by an employer for payments on behalf of the worker to a third party, including recruitment fees to a labour agent, or loan repayments to a bank or credit agency, unless the employer has received a written request from the worker and the employer has the written consent of the DoL.²⁹²

For example, in 2017, a large outsourcing company in Johore was fined RM24,000 for charging 18 Nepali migrant workers RM100 per month for accommodation, without obtaining approval for the deductions from the DoL. The prosecutor noted that besides not getting consent, the amount deducted was too high as the maximum deduction for accommodation is RM50 per month.²⁹³

Hours, Overtime, Time Off, and Annual Leave

All rights regarding hours and leave are contained in Part XII of the Employment Act 1955. Domestic workers are specifically excluded from protection under Part XII (see Box 6).

Hours of work means the time during which an employee is at the disposal of an employer.²⁹⁴ “Normal” working hours are those agreed between worker and employer but are limited to a maximum of:

- (1) eight hours a day;
- (2) 48 hours per week; and
- (3) five consecutive hours before the worker is entitled to a 30-minute break.²⁹⁵

Any work conducted after normal hours of work is “overtime”.²⁹⁶ Overtime must be paid at the rate of at least one-and-a-half times normal hourly pay.²⁹⁷ Employers cannot force an employee to work overtime but employees may consent to work up to a total of 12 hours per day, except in emergency situations.²⁹⁸ Supplementary regulations limit overtime to 104 hours per month.²⁹⁹

²⁹¹ Employment Act 1955, Section 24(1).

²⁹² Employment Act 1955, Section 24(4)(c).

²⁹³ S. Gunaratnam, “Company fined for unauthorised deductions from workers’ salaries”, *New Straits Times*, 17 May 2017, <http://johor.nst.com.my/news/nation/2017/05/240142/company-fined-unauthorised-deductions-workers-salaries>.

²⁹⁴ Employment Act 1955, Section 60A(9).

²⁹⁵ Employment Act 1955, Section 60A(1).

²⁹⁶ Employment Act 1955, Section 60A(3)(b).

²⁹⁷ Employment Act 1955, Section 60A(3)(a).

²⁹⁸ Employment Act 1955, Section 60A(7).

²⁹⁹ Employment (Limitation of Overtime Work) Regulations 1980.

Box 6: Protection of “Domestic Servants” under the Employment Act 1955

“Domestic servants” (in this report called domestic workers) are defined by the Employment Act 1955 as persons “employed in connection with the work of a private dwelling-house and not in connection with any trade, business or profession carried on by the employer”. They, include cooks, house-servants, butlers, nannies, valets, footmen, gardeners, washerwomen, security guards, and drivers and cleaners of private vehicles. The courts have broadly interpreted a private dwelling house as anything “not for the general use of the public”.

Domestic servants are considered “employees” under the Employment Act 1955 and have many of the same rights as other workers. These rights include:

- (1) to be given a written contract;
- (2) to be paid wages monthly into a bank account;
- (3) to not be charged illegal deductions, for example for repayment of recruitment fees;
- (4) to form or join a union; and
- (5) to not be discriminated against for being a migrant worker.

However, the Employment Act 1955 expressly excludes domestic workers from certain other labour rights and protections enjoyed by employees, namely:

- (1) limitations on work hours, and rights to overtime, time off and annual leave. This exclusion means that a domestic worker can be contracted to work unlimited hours, seven days a week, 365 days a year ;
- (2) sick leave;
- (3) maternity benefits;
- (4) termination benefits; and
- (5) the employer’s duty to keep a register of the worker’s wages, payments, etc.

Special rules also apply to termination of domestic workers’ employment. The employer or domestic worker can terminate the employment contract either on 14 days’ notice, or without any notice if the other party acted in a way inconsistent with the contract. Examples of inconsistent conduct may include, for example, non-payment of wages.

Employees are also entitled to one whole day of rest each week.³⁰⁰ Working on a rest day is not necessarily overtime, but may entitle the employee to additional wages, depending on the type of contract and the number of hours worked.

³⁰⁰ Employment Act 1955, Section 59(1).

Finally, all employees are entitled to at least 11 paid days off for public holidays, and between eight and 16 days of annual leave per year.³⁰¹ The amount of leave increases the longer the same employer employs the employee.

Sick Leave

The Employment Act 1955 has strong sick leave protections for workers other than domestic workers. It requires that a sick employee be given a free medical examination by a doctor appointed by the employer, or any other doctor in an emergency.³⁰² If the doctor certifies that the employee should take time off, the employee can take between 14 and 22 days of fully paid sick leave per year, depending on the length of service.³⁰³ If the doctor certifies that the employee should be hospitalised, the employee is entitled to up to 60 days of fully paid sick leave per year.³⁰⁴

Freedom of Association

It is illegal under the Employment Act 1955 for employers to include any provision in a contract of service which “restricts the right of any employee” to join a trade union, participate in trade union activities, or associate with other employees for the purpose of organising a trade union.³⁰⁵

Termination of Employment, Breaches of Contract, and Unfair Dismissal

The Employment Act 1955 provides for five types of employment contract termination:

- (1) Termination on expiry of the term of the contract;³⁰⁶
- (2) Termination with notice by either party. The period of notice must be the same for both parties and is agreed in the contract. If not in the contract, it is at least four weeks.³⁰⁷ For domestic workers, the standard notice period is less, just 14 days,³⁰⁸

³⁰¹ Employment Act 1955, Sections 60D and 60E.

³⁰² Employment Act 1955, Sections 60F(1)(a) and (b).

³⁰³ Employment Act 1955, Section 60F(1)(aa).

³⁰⁴ Employment Act 1955, Section 60F(1)(bb).

³⁰⁵ Employment Act 1955, Section 8.

³⁰⁶ Employment Act 1955, Section 11(1).

³⁰⁷ Employment Act 1955, Section 12.

³⁰⁸ Employment Act 1955, Section 57.

- (3) Termination for “wilful breach” by either party of any condition of the contract, and by extension the Employment Act 1955.³⁰⁹ Some actions are automatically considered to be a wilful breach. For example, if the employer fails to pay the worker their wages due under the contract, the employer is deemed to have breached the contract.³¹⁰ If a worker fails to come to work for two consecutive days without reasonable excuse he or she is deemed to be breaching the contract;³¹¹
- (4) Termination by the employee without notice if they are immediately threatened with danger, violence or disease at work, and the employee had not agreed to these risks in the contract of service;³¹² and
- (5) Termination by the employer for misconduct, namely conduct that is “inconsistent with an express or implied term” of the contract of service.³¹³ To do so, the employer may first suspend the employee and conduct an inquiry for a maximum of two weeks. If the misconduct is not proven, the employee must be able to return to work.³¹⁴

Terminated employees have a right to termination benefits of between 10 and 20 days’ wages (depending on tenure) if they have been employed by the employer for at least 12 months, and where the employer or worker terminated employment on grounds other than retirement, resignation, or misconduct, or due to wilful breach by the employer.³¹⁵

If the migrant worker’s contract is terminated for any reason, the employer must notify the DoL within 30 days (see section 6.4.1). The employer can also call the Immigration Department, which may cancel the migrant worker’s work permit immediately (see section 4.3.1). The Employment Act 1955 does not control the Immigration Department’s power to do this, even in the case of termination by the worker for wilful breach by their employer.

Discrimination for Being a Migrant Worker

The Employment Act 1955 makes discrimination between local and migrant workers “in respect of the terms and conditions” of employment grounds for a complaint to the DoL.

³⁰⁹ Employment Act 1955, Section 13(2). The contract is deemed to include rights under the Employment Act 1955, which are more favourable than the written contract: Employment Act 1955, Sections 7 and 7A (see above).

³¹⁰ Employment Act 1955, Section 15(1).

³¹¹ Employment Act 1955, Section 15(2).

³¹² Employment Act 1955, Section 14(3).

³¹³ Employment Act 1955, Section 14(1).

³¹⁴ Employment Act 1955, Section 14(2).

³¹⁵ Employment (Termination and Lay-Off Benefits) Regulations 1980, Regulations 4 and 6. Absenteeism counts as misconduct, so an employee terminated for this reason will not be entitled to termination benefits. See *Royal Selangor Club v. Devagi Karpeya* [2010] 10 CLJ 500.

The DoL may give directives to the employer to “resolve the matter”³¹⁶ (see section 7.2 for DoL complaints procedures).

6.4.3 WCA

The WCA was passed by the British colonial administration to “provide for the payment of compensation to workmen for injury suffered in the course of their employment”³¹⁷ It creates a no-fault scheme whereby employers are responsible for compensating workers if they suffer injury or occupational illness in the course of their work. Since 1992, this scheme has only provided for migrant workers (see below).

Employers are required to purchase insurance for all migrant workers in their employ to ensure they can pay the compensation — known as the FWCS.³¹⁸

Since 1992, Malaysian nationals are compensated for employment injuries by state social security, commonly referred to as SOCSO after its administering body, the Social Security Organisation.³¹⁹ SOCSO provides more protection than the WCA in that it does not rely on the employer to compensate the worker. Rather, it pays injured workers a guaranteed amount from compulsory social security contributions. Further, it provides for the payment of ongoing benefits for injured workers or a pension to dependents of deceased workers.³²⁰

See section 7.4 for details of remedies under the WCA scheme.

6.4.4 Industrial Relations Act 1967

The Industrial Relations Act 1967 regulates the relationship between employers, employees and their trade unions. This includes setting collective bargaining rules, and procedures for handling trade disputes. The Industrial Relations Act 1967 also guarantees workers freedom of association, namely:

³¹⁶ Employment Act 1955, Section 60L.

³¹⁷ Workmen’s Compensation Act 1952 [Act 273], Preamble.

³¹⁸ Workmen’s Compensation (Foreign Worker’s Scheme) (Insurance) Order 1993.

³¹⁹ Employees’ Social Security Act 1969. Section 31 bars persons insured under the Act from recovering compensation or damages for an employment injury under any other law. The Employees’ Social Security (General) Regulations 1971 then created SOCSO to administer the scheme.

³²⁰ For a period of some twenty years, all workers in Malaysia, including foreign workers were covered by SOCSO. The WCA, while not repealed, was not widely used. In 1993, however, as the number of foreign workers began to increase and employed in a wider range of sectors, the Government exempted them from SOCSO coverage. The exemption is noted in the timeline on the SOCSO website. This exemption is not stated explicitly in the Employees’ Social Security Act 1969 (First Schedule). It was likely made by ministerial notification under paragraph 13 of that Schedule.

- (1) workers have the right to form or join a trade union and to “participate in its lawful activities”, and “no person shall interfere with, restrain, or coerce” a worker in respect to trade union activities;³²¹
- (2) employer federations must not interfere with “the establishment, functioning or administration” of a trade union;³²² and
- (3) employers cannot include conditions in employment contracts restraining a worker from joining a union, they cannot dismiss a worker for joining a trade union, or discriminate against workers in employment, promotions, or conditions of employment because they are union members.³²³

Migrant workers are not excluded from the above rights. However, the Trade Unions Act 1959, which governs management of trade unions, prohibits non-citizens from holding office in or being employed as staff of a trade union.³²⁴ The Minister has power to lift this ban.³²⁵

Trade unions can negotiate terms of employment with employers on behalf of their members — a process known as collective bargaining. A collective agreement covers all workers in the enterprise, regardless of whether they are union members. The former President of the Industrial Court noted in an interview for this study that employers have at times sought to exclude migrant workers from collective agreements, but that the Industrial Court has held that a collective agreement covers all workers equally.³²⁶

In addition, the Industrial Relations Act 1967 gives individual workers a remedy if they believe they have been unfairly dismissed, including reinstatement or compensation in lieu of reinstatement.³²⁷ The compensation available to workers under the Industrial Relations Act 1967 is significantly greater than the termination benefits payable under the Employment Act 1955 (see section 7.3 for a discussion of unfair dismissal claims under the Industrial Relations Act 1967).

6.4.5 OSHA

The OSHA was enacted “for securing the safety, health and welfare of persons at work”, and protecting others from unsafe work practices.³²⁸ It applies to all sectors, and does not

³²¹ Industrial Relations Act 1967, Section 4(1).

³²² Industrial Relations Act 1967, Section 4(2).

³²³ Industrial Relations Act 1967, Section 5.

³²⁴ Trade Union Act 1959, Sections 28(1)(a) and 29(2)(a).

³²⁵ Trade Union Act 1959, Section 30.

³²⁶ Interview with the Industrial Court, Kuala Lumpur, 5 April 2015.

³²⁷ Industrial Relations Act 1967, Section 20.

³²⁸ Occupational Safety and Health Act 1994 [Act 514], Preamble.

exclude domestic workers. The Act makes it a duty of employers to create safe and healthy workplaces, including, among other things to:

- (1) provide and maintain plant and systems of work that are safe;
- (2) provide instructions and training to workers on safety and health; and
- (3) formulate health and safety policies.³²⁹

Violations of the OSHA are criminal offences, and the penalties are more severe than penalties for violating the Employment Act 1955. Under the OSHA, employers can be fined up to RM50,000 and imprisoned for up to two years, or both, for failing in their duties.³³⁰ However, the OSHA neither articulates an enforceable right to a safe and healthy workplace, nor does it provide an explicit procedure for a worker to file a complaint and receive a remedy for health and safety violations. A migrant worker injured at work has recourse under the WCA (see section 6.4.3) and civil law (see section 6.5.2).

6.4.6 Workers' Minimum Standards of Housing and Amenities Act 1990

Workers employed at any workplace located outside of municipal areas, for example on plantations or farms, are protected by the Workers' Minimum Standards of Housing and Amenities Act 1990.³³¹

The Act "prescribe[s] the minimum standards of housing and nurseries for workers and their dependents".³³² The Act applies to any building used by an employer for the housing of workers.³³³ In these buildings, the employer must ensure, among other things, "free and adequate" running water, adequate electricity and that the buildings are "kept in a good state of repair".³³⁴ Employers must also provide "health, hospital, medical and social amenities" to workers.³³⁵

The Act does not limit the number of people who may share a room, or require that workers be given bedding or other supplies, two issues that arose in interviews with

³²⁹ Occupational Safety and Health Act 1994, Section 15(2).

³³⁰ Occupational Safety and Health Act 1994, Section 19.

³³¹ Pursuant to the Workers' Minimum Standards of Housing and Amenities Act 1990 [Act 446], Section 2, the Act does not apply to places of work which are within the bounds of any city or municipal council, namely urban areas, or within a federal territory. Federal territories are those areas administered directly by the Federal Government and include Kuala Lumpur, the administrative territory of Putrajaya and the offshore financial territory of Labuan.

³³² Workers' Minimum Standards of Housing and Amenities Act 1990, Preamble.

³³³ Workers' Minimum Standards of Housing and Amenities Act 1990, Section 5(1).

³³⁴ Workers' Minimum Standards of Housing and Amenities Act 1990, Section 6(1).

³³⁵ Workers' Minimum Standards of Housing and Amenities Act 1990, Part III.

migrant workers. It also does not mention provision of food. The Court of Appeal has found, however, that where amenities are provided, they must be of reasonable quality.³³⁶

There is no such guidance on housing and amenities for workers employed in urban areas, for example in restaurants, hotels, cleaning services, private homes, or factories within municipal boundaries. Employer-provided accommodation in these areas will likely be subject to other municipal or city ordinances regarding building maintenance and use, but these are beyond the scope of this report.³³⁷

6.5 Other Sources of Rights

In addition to laws that specifically address immigration and employment, Malaysia has other laws which provide important rights and obligations for all persons in Malaysia, including migrant workers and their employers. Some of the most important of these for protecting migrant worker rights are the laws regarding contract, tort, and criminal law which includes laws criminalising trafficking in persons.

6.5.1 Contracts Act 1950

The Contracts Act 1950 governs any kind of lawful agreement between two or more parties that is made for an exchange of promises, and is agreed to with “the free consent of parties”.³³⁸ This includes employment contracts between employers and migrant workers, including migrant domestic workers.

Contract law is a large field, but the following provisions of the Contracts Act 1950 are of particular relevance to migrant workers.

First, a contract is only enforceable if the parties freely consent to the terms of the contract. Where a migrant worker was deceived or misled during recruitment about the nature and conditions of work, or was coerced or unduly influenced by someone in a position of authority to sign the contract, the worker has the right to treat the contract as void.³³⁹

If an employer does not comply with the terms of an employment contract, the employee can claim breach.³⁴⁰ Because of a breach of contract, the injured party is entitled to receive

³³⁶ *Kalam a/p Raman & Others v Eastern Plantation Agency Johore Sdn Bhd, Ulu Tiram Estate, Ulu Tiram, Johore & Anor* [1996] 4 MLJ 674. The employer was specifically found to be in violation of Section 18(1)(b) of the Housing and Amenities Act, which said that the employer “must make such arrangements and ... provide such appliances for the safe transport of a sick worker.”

³³⁷ The High Court has found that where the Housing and Amenities Act conflicts with more general local or regional ordinances, the provisions of the Housing and Amenities Act takes precedence. See *Perwaja Steel Sdn Bhd & another v Kemaman District Council, Terengganu* [1994] 3 MLJ 15.

³³⁸ Contracts Act 1950 [Act 136], Section 10(1).

³³⁹ Contracts Act 1950, Section 19.

³⁴⁰ Contracts Act 1950, Part VII.

compensation for loss or damages caused by the breach.³⁴¹ This applies to oral contracts as well as written contracts, and even, in certain circumstances, to written contracts that the worker has not seen. In the *Chin Well Fasteners*³⁴² case (see Box 7), the Court found that an employer had breached an employment contract that had been approved by the Indian Embassy, but that the workers themselves had not seen.

Box 7: The *Chin Well Fasteners* Case – Contract Substitution and Obligations of Employers

The case known as the *Chin Well Fasteners* case is one of the few cases brought by migrant workers to reach the Court of Appeal, and it sets an important precedent regarding migrant worker employment contracts and substituted contracts.

The facts of the case involved a group of 52 workers who were recruited in 2002 in India to work in a factory in Penang. During their recruitment process, an agent made oral promises to the workers that they would receive a monthly salary of RM750 with overtime, but that the workers would have to pay for their flights and the levy. The workers verbally accepted this offer.

At the same time, the employer company presented a different written contract to the Indian embassy in Malaysia to obtain approval to recruit in India. This contract promised the workers RM600 per month, together with all travel costs and payment of the levy. The workers did not see or sign this agreement during their recruitment.

Based on the first agreement with the agent, the workers paid their own flights to Malaysia, and USD1,000 on arrival for the levy. Then, when they received their first paycheck, the workers discovered they were being paid only RM350 per month, and that the employer was deducting a further RM120 per month for the levy. The workers complained and mentioned the agreement made in India, but the company said the agent had lied and it refused to comply with the terms of that initial, oral agreement.

A group of workers then went to the Indian High Commission where they saw the approved written contract for the first time. On being confronted with this document, the employer decided to send the complaining workers home. When the workers refused to leave their hostel, the employer cut off the water and electricity supply. The workers then filed a claim in the High Court for breach of contract. In response, the employers sought to force the workers to sign a new contract agreeing to a wage of RM350. Some workers, feeling they had no option, signed.

³⁴¹ Contracts Act 1950, Section 74(1).

³⁴² *Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors* [2006] 1 MLJ 117 (“*Chin Well Fasteners*”).

The workers argued to the court that the employers had breached the first contract to pay RM750, or alternatively the second contract promising RM600, and that they had been deceived regarding the levy. They claimed unpaid wages, return of the USD1,000 levy payment, unpaid overtime payments, and the cost of their flights.

The employer company argued that it had never promised RM750, and that the contract presented to the Indian High Commission stating RM600 was simply a formality to obtain the necessary approvals that should not be binding. It argued further that the second contract was unenforceable because the workers had neither seen nor signed it.

The High Court found that, even though the workers had not signed anything, they had come to Malaysia on the representations made by the defendant, through its agent in India, and “there was a contract between the plaintiffs and the defendant”.³⁴³ On appeal, the Court of Appeal agreed with the High Court and held that the relevant contract was the contract approved by the Government of India, which clearly stated that no changes could be made without the embassy’s approval.

Although the workers had not signed this agreement, the court found that they had signified their intention to be bound to an employment agreement by coming to Malaysia and starting work. Further, it was through the employer’s “wilful conduct” that the agreement was not signed, and therefore the company could not rely on the lack of signature to its advantage.³⁴⁴

The Court of Appeal ordered that the workers be paid everything due under the initial verbal contract, including RM750 wages, overtime, plus the cost of their flights, and the levy payments.

Finally, the Contracts Act 1950 clarifies the effect of promises made by agents to migrant workers. It defines an “agent” is any person or company, employed to act for or represent another in dealings with a third party. The person who employs the agent is called the “principal”.³⁴⁵ The principal is responsible for upholding the terms of any agreement that the agent makes within the scope of the agent’s authority.

On this basis, employer companies can be held liable for promises made by their agents to migrant workers or others during recruitment, even if the employer later disavows those promises. For example, in the *MMC Power* case of 2001, the Court of Appeal found an employer liable for promises its agent had made to an overseas recruitment agency.³⁴⁶ In that case, the MMC Power Company used an agent to negotiate with two Filipino recruiters (the plaintiffs) for the recruitment of 490 workers. The agent flew to the Philippines for

³⁴³ *Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors*, p. 127.

³⁴⁴ *Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors*, pp. 129 and 130.

³⁴⁵ Contracts Act 1950, Section 35.

³⁴⁶ *MMC Power Sdn Bhd & Anor v Abdul Fattah B Mogawan & Anor* [2001] 1 MLJ 169 (“*MMC Power*”).

the negotiations, and as a part of the agreement, promised the plaintiffs that MMC Power would pay each recruited worker's airfare to Malaysia.

However, after the plaintiffs had recruited 121 workers, the employer refused to send the tickets. The employer argued that the agent had acted outside the scope of his authority when promising the airfares. The Court of Appeal disagreed. It found that the employer had clearly represented the agent to the plaintiffs as someone with authority to negotiate. Therefore, the employer must fulfil the terms the agent had negotiated.

Most migrant worker contracts provide that the employer is responsible for complying with immigrations formalities and paying the levy. Non-compliance is a prevalent complaint among migrant workers, which may also be remedied by a claim for breach of contract.

6.5.2 Civil Law Act 1956 and the Law of Torts

The law of torts, from British common law, was incorporated into Malaysian law by the Civil Law Act 1956. There are a variety of torts, but the most relevant to the problems faced by migrant workers is that of negligence. Common examples of negligence are reckless driving that leads to an accident, or unsafe facilities that cause a person to fall and suffer an injury.

Claims of negligence are filed in the civil courts (see section 7.5 for a review of this process) and offer the claimant (called the "plaintiff") a wide range of remedies. Plaintiffs can claim compensation (called "damages") for lost wages since the injury, future lost wages if the injury causes permanent disability, pain and suffering caused by the injury, and punitive damages if the actions of the other party were particularly extreme.

The study identified one reported case of a migrant worker seeking damages for negligence from 2008.³⁴⁷ In that case, a migrant domestic worker from Indonesia lost her employment following a car accident in which she suffered serious injuries. Her employer subsequently did not renew her work permit. The trial judge awarded the plaintiff special damages, general damages for pain and suffering, and compensation for the earnings she lost before her work permit expired. On appeal, the Court of Appeal also awarded her damages for lost earning capacity because "her physical shortcoming will expose her to receiving less in the future".³⁴⁸

³⁴⁷ *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608.

³⁴⁸ *Sumarni v Yow Bing Kwong & Anor*, at 23.

6.5.3 Penal Code and CPC

The Penal Code defines criminal offences in Malaysia, and sets guidelines for punishment.³⁴⁹ Introduced by the British colonial administration in 1936, the Penal Code has been amended numerous times, but the core provisions remain largely intact. Punishments can include whipping or the death penalty for some offences.

Several Penal Code offences apply to the harms that migrant workers experience when migrating to or working in Malaysia, as set out in Table 9.

Table 9 | Select Offences and Penalties under the Penal Code

Section	Offence	Description	Penalty
Offences Affecting the Human Body			
321	Voluntarily causing hurt or grievous hurt	Intentionally causing bodily pain, disease or infirmity to another. If the hurt results in permanent injury, disfigurement, or endangers life, it is “grievous hurt”.	Maximum of one year imprisonment for hurt. Grievous hurt is punishable with up to seven years’ imprisonment and a fine.
370, 371	Slavery	Importing, exporting, buying or disposing of a slave.	Maximum sentence of seven years and a fine. Habitually dealing or trafficking in slaves is punishable of up to 20 years’ imprisonment and a fine.
374	Unlawful compulsory labour	Compelling a person to work against their will.	Up to one year imprisonment, a fine, or both.
375	Rape	Sexual intercourse by a man with a woman against her will or without her consent.	Imprisonment for between five and 20 years, and whipping.

³⁴⁹ Originally enacted in 1936 by the British for the Federated Malay States. In 1976, the Government consolidated the separate laws of Peninsular Malaysia, Sabah and Sarawak into one national Penal Code.

Offences Against Property			
378	Theft	Dishonestly taking property out of the possession of a person without their consent.	Maximum seven years' imprisonment or fine or both. For a second offence, the offender will be imprisoned, fined and whipped.
383	Extortion	Threatening a person with any injury to induce the person out of fear to deliver their personal property.	Imprisonment for up to 10 years, a fine or whipping, or any two of those punishments.
390	Robbery	A form of theft (when the thief restrains, hurts or threatens to hurt the victim) or extortion (when the offender is in the presence of the victim when he makes the threat of injury/ death).	Imprisonment for up to 10 years and a fine. If committed at night, the punishment is a maximum of 14 years and a fine or whipping.
405	Criminal breach of trust	Misappropriating or disposing of any property that has been entrusted to the offender.	Imprisonment for between one and 10 years, and a fine, and whipping.
415	Cheating	Using deceit to "fraudulently or dishonestly" induce a person to part with her property or to do something that causes her damage or harm.	A maximum of five years' imprisonment, or a fine, or both.

The CPC regulates investigation of crimes, searches and seizures, prosecution of an accused, and the trial and punishment of offences.³⁵⁰ The procedure under the CPC is described further in section 7.6.2.

6.5.4 ATIPSOM Act

The ATIPSOM Act is a relatively recent statute, passed in 2007, which creates new criminal offences of trafficking in persons and smuggling of migrants.³⁵¹ The law addresses the situation of migrant workers who are deceived from the point of recruitment and then held in forced labour like conditions in Malaysia. It also provides for some protections for trafficked persons, including a possibility of remaining in Malaysia to work instead of being returned home.

³⁵⁰ Criminal Procedure Code [Act 593] enacted throughout Malaysia on 10 January 1976.

³⁵¹ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] ("ATIPSOM Act"), gazetted on 26 July 2007.

Trafficking in Persons and Related Offences

“Trafficking in persons” is defined as:

[A]ll actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person.³⁵²

Sections 12, 13, 14 and 15 criminalise “trafficking for the purposes of exploitation” of both adults and children or profiting from the exploitation of trafficked persons (see Table 10). Exploitation is defined as “all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs”.³⁵³

Table 10 | Offences of Trafficking in Persons under the ATIPSOM Act

Section	Offence	Penalty
12	Trafficking of an adult for the purpose of exploitation	Imprisonment for a maximum of 15 years, and liable to a fine.
13	Trafficking of an adult for the purpose of exploitation by one or more of the following means: (a) Threat; (b) Use of force or other forms of coercion; (c) Abduction; (d) Fraud; (e) Deception; (f) Abuse of power; (g) Abuse of the position of vulnerability of a person to an act of trafficking in persons; or (h) The giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person.	Imprisonment for a minimum of three and maximum of 20 years, and liable to a fine.
14	Trafficking of a child for exploitation	
15	Profiting from the exploitation of a trafficked person	Imprisonment for a maximum of 15 years, and liable to a fine of between RM500,000 and RM1,000,000 and to forfeiture of the profits from the offence.

³⁵² ATIPSOM Act, Section 2.

³⁵³ ATIPSOM Act, Section 2.

Smuggling of migrants is the “arranging, facilitating or organizing ... a person’s unlawful entry into or through” Malaysia, and targets irregular migration. Smuggling may become trafficking if the smuggled migrant is later exploited after their arrival in Malaysia, as per the definitions of the ATIPSOM Act.

The ATIPSOM Act, therefore, overlaps with both the Immigration Act 1959/63 (which criminalises facilitating illegal entry) and the Penal Code (which criminalises slavery and forced labour.) However, the ATIPSOM Act also criminalises associated actions which facilitate slavery or forced labour such as making fraudulent travel documents for the purposes of trafficking persons, harbouring trafficked persons, or recruiting someone to “participate in the commission of an act of trafficking in persons”.³⁵⁴

Further, the penalties under the ATIPSOM Act are higher. Those convicted of trafficking a child, or trafficking an adult using threats, force, fraud, or abuse of power or vulnerability can be sentenced to up to 20 years in prison, compared to seven years for a conviction of slavery under the Penal Code.

Protection of Victims of Trafficking

The ATIPSOM Act also creates a procedure for the “care and protection” of victims of trafficking crimes. This requires that trafficked persons be given food and shelter in a government designated “place of refuge” for the duration of any legal proceedings. Further, they have some ability to get free medical care if the officer who identifies them as potentially trafficked “is of the opinion” that the person needs “medical examination or treatment”.³⁵⁵

The ATIPSOM Act gives trafficked persons immunity from prosecution for offences the person may have committed while being trafficked, for example illegal entry. This immunity is not granted to smuggled migrants. It also guarantees confidentiality and prohibits media outlets from reporting information that would identify the victim.³⁵⁶

In late 2015 and early 2016, protections for trafficked persons were significantly strengthened by the ATIPSOM (Amendment) Act 2015, and the passage of several regulations. Crucially, these amendments to the ATIPSOM Act include:

- (1) a possibility for trafficked persons to move freely in and out of the shelter, and to obtain employment;³⁵⁷

³⁵⁴ ATIPSOM Act, Sections 15A, 18–24.

³⁵⁵ ATIPSOM Act, Section 41.

³⁵⁶ ATIPSOM Act, Section 51A.

³⁵⁷ ATIPSOM Act, Section 66A.

- (2) a possibility to receive restitution for injuries and losses caused as a result of the trafficking, following the conviction of the trafficker;³⁵⁸ and
- (3) steps for a worker to claim payment of wages in arrears, if the trafficker is not successfully convicted.³⁵⁹

6.6 Migrant Workers' Rights under International Law in Malaysia

Malaysia has signed and ratified several international human rights and labour rights conventions. It also participates in regional efforts towards migrant worker protection and empowerment.

International and regional human rights and labour agreements are binding on Malaysia as a matter of international law, and all have some form of supervisory mechanism that requires Malaysia to report its progress toward implementation of its obligations.

International law does not automatically have full effect in the national law of Malaysia, whereby a person in Malaysia could seek a remedy for a violation of their international rights through Malaysia's courts. The Executive makes international treaties, while Parliament makes national or domestic law.³⁶⁰ The Court of Appeal of Malaysia has held that in this "dualist" system, "The practice in Malaysia with regard to the application of international law is generally the same as that in Britain."³⁶¹

In Britain, international law has effect in national law in two ways. First, through express incorporation, when national law states that an international law has effect in national law.³⁶² Second, through the interpretation of national law in light of international obligations.³⁶³

For example, the British Court of Appeal has stated that "Treaties and declarations do not become part of our law until they are made law by Parliament", but held that "if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the [European Convention of Human Rights] as an aid to clear up the ambiguity and

³⁵⁸ ATIPSOM Act, Section 66B.

³⁵⁹ ATIPSOM Act, Section 58.

³⁶⁰ Articles 39 and 74 of the Federal Constitution and *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318, para 43.

³⁶¹ *AirAsia Bhd*, para 41.

³⁶² For example, the Geneva Conventions Act 1962, which gives full effect in Malaysian law to the 1949 Geneva Conventions on the Protection of Victims of War.

³⁶³ A. G. Hamid and M. S. Khin, "Judicial Application of International Law in Malaysia, an Analysis", 1 APYIHL 196, 2005, note 34, available at www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html, (last accessed on 26 October 2015).

uncertainty.”³⁶⁴ The Australian courts have gone further and held that “A statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law”.³⁶⁵

The Malaysian courts have also used Malaysia’s international law obligations to interpret national law in some constitutional cases. In 2012, the High Court in the *Noorfadilla* case, considered the scope of Article 8(2) constitutional prohibition of gender discrimination in public employment in light of Malaysia’s obligations under CEDAW. The bar on gender discrimination had in fact been added to Article 8(2) following Malaysia’s ratification of CEDAW. The High Court ruled that gender discrimination in public employment, considered with CEDAW Article 11, includes discrimination on grounds of pregnancy.³⁶⁶

The 2014 *AirAsia* case concerned an employee of a private company dismissed on grounds of pregnancy. She argued that the *Noorfadilla* case decided that CEDAW itself has the force of law in Malaysia. The Court of Appeal rejected this interpretation of the *Noorfadilla* case, ruling that Article 8(2) does not apply to a private employer, and that CEDAW had not been explicitly incorporated and could not be relied upon directly as part of Malaysian law.³⁶⁷ In September 2016, the Malaysian Government notified the CEDAW Committee that the *Noorfadilla* judgment was a “landmark judgment”³⁶⁸ and a step by “the Malaysian Judiciary ... to affirm Malaysia’s obligations” under CEDAW.³⁶⁹

It follows that Malaysia’s international obligations are relevant to policy advocacy, and to the interpretation of national law in cases brought by individual migrant workers in Malaysian courts, but that international law is not otherwise directly enforceable.

6.6.1 International Human Rights Conventions

The Malaysian Government and Judiciary have often expressed scepticism about the role of international human rights in Malaysia, describing them as “western values”. As the Chief Justice of Malaysia argued in January 2016, western norms, for example in respect

³⁶⁴ Lord Denning, Court of Appeal of England & Wales, in *R. v. Chief Immigration Officer, Heathrow Airport ex p Salamat Bibi* [1976] 1 WLR 979 approved by Lord Ackner, in House of Lords in *R v Secretary of State for the Home Department, ex p. Brind* [1991] UKHL 4.

³⁶⁵ High Court of Australia, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

³⁶⁶ *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832.

³⁶⁷ *AirAsia Bhd.* Article 8(2) refers explicitly to “discrimination against citizens on the ground only of ... gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law ...” It does not mention employment by a private body.

³⁶⁸ Malaysian Government, combined third to fifth periodic reports of States parties due in 2012, paras 109–111. Available at: tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/CEDAW_C_MYS_3-5_5972_E.pdf.

³⁶⁹ “Malaysian Government’s Response to the CEDAW Committee’s Concluding Comments on Malaysia’s Initial and Second Periodic Report”, 2016, available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/INT_CEDAW_ADR_MYS_25048_E.pdf.

to free speech and freedom of assembly “are not always in accordance with the values and culture of Malaysian society”.³⁷⁰

Treaty Ratification and Incorporation

Malaysia has ratified or acceded to just three of the eight core international human rights conventions, as well as two optional protocols, subject to reservations:

- (1) CRC in 1995;
- (2) CEDAW in 1995;
- (3) The United Nations Convention on the Rights of Persons with Disabilities in 2010;
- (4) The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict in 2012; and
- (5) The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography in 2012.

In addition, Malaysia has signed and ratified the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1994.

Malaysia has not signed or ratified the other core conventions, including the United Nations Covenants on Economic, Social and Cultural Rights; or on Civil and Political Rights. It has also, along with most other destination countries, not signed and ratified the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990.

The Malaysian Parliament has transformed explicitly only one of the core United Nations international human rights conventions into domestic legislation — the CRC 1990, which was incorporated into the Child Act 2001.³⁷¹

Following ratification of CEDAW, the Malaysian Parliament has not passed comprehensive legislation protecting women’s rights. It did, however, amend Article 8(2) of the Federal Constitution to prohibit discrimination on the basis of gender (see section 6.6).³⁷² Further, it passed or made changes to legislation, notably passage of the ATIPSOM Act,

³⁷⁰ I. Lim, “CJ says can’t judge Malaysian court decisions by ‘Western rights standards’”, Malay Mail Online, 8 January 2016, www.themalaymailonline.com/malaysia/article/cj-says-cant-judge-malaysian-court-decisions-by-western-rights-standards.

³⁷¹ The Child Act 2001 was enacted partially to incorporate Malaysia’s obligations under the Convention on the Rights of the Child 1990, as well as to consolidate in one statute, all laws regarding children in the justice system and child protection.

³⁷² Constitution Amendment (No. 2) Act 2001, Act A1130, Section 3, came into effect on 28 September 2001.

and outlawing sexual harassment at work in the Employment Act 1955.³⁷³ Article 8(2) is expressed to apply only to citizens, and to laws and actions of public authorities and not, for example, to collective agreements, or private employment contracts.

Treaty Reporting

Each of the United Nations human rights conventions has a supervisory mechanism which monitors implementation of the conventions by states parties. Monitoring is done through the receipt of reports from states describing efforts to implement the convention. NGOs and others can submit shadow reports, drawing international attention to government failures to implement the conventions and protect the rights of certain groups.

For example, CEDAW establishes a CEDAW Committee comprising 23 “experts of high moral standing”.³⁷⁴ All states parties to the CEDAW must submit a report to the United Nations Secretary General, for consideration by the CEDAW Committee that details “the legislative, judicial, administrative, or other measures” adopted to implement CEDAW, “and on the progress made in this respect”. The reports must be submitted in the first year after ratification and every four years subsequently.³⁷⁵ The CEDAW Committee can then “make suggestions and general recommendations based on the examination of reports”.³⁷⁶

Malaysia has only ever submitted two reports to the CEDAW Committee during the past 20 years. The first, submitted in 2006, was a combined first and second period report. The second was a combined third, fourth and fifth report, submitted on 1 September 2016.³⁷⁷

Box 8: Protections of Migrant Workers under CEDAW

Of the three human rights conventions signed and ratified by Malaysia, only CEDAW has specific protections for migrant workers, and more generally, women at work.

First, the text of the Convention requires states parties to take measures, including legislation, “to suppress all forms of traffic in women” (Article 6).³⁷⁸ Second, the CEDAW

³⁷³ Employment Act 1955, Part XVA (Sections 81A–G), inserted by Employment (Amendment) Act 2012. A full list of legislative changes made by the Malaysian Parliament are included in the “Combined Third to Fifth Period Reports of States Parties due in 2012: Malaysia”, received by the CEDAW Committee on 1 September 2016, at pp. 4–8, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MYS/CEDAW_C_MYS_3-5_5972_E.pdf (last accessed in 2016).

³⁷⁴ CEDAW, Article 17(1).

³⁷⁵ CEDAW, Article 18(1).

³⁷⁶ CEDAW, Article 21(1).

³⁷⁷ These reports and all associated documentation are available at “Reporting Status of Malaysia”, *United Nations High Commissioner Office of Human Rights*, tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MYS&Lang=EN.

³⁷⁸ CEDAW, Article 6.

Committee has adopted several General Recommendations which detail the scope of CEDAW obligations. General Recommendation 28, for example, emphasises that states must ensure that private actors do not discriminate against women.³⁷⁹ General Recommendation 26 on Women Migrant Workers, clarifies that women migrant workers are also protected from discrimination under CEDAW. Women migrant workers include legal migrants, migrant spouses, and undocumented migrant workers, and does not exclude domestic workers or caregivers.³⁸⁰ Jobs frequently undertaken by women, such as domestic work, cleaning or caregiving must not be excluded from labour and employment laws and women migrant workers must have access to remedies when their rights are violated, including legal assistance and the ability to use the courts without risking loss of a work permit and deportation.³⁸¹

Following Malaysia's first report to CEDAW in 2006, the CEDAW Committee provided the Government with a List of Issues to address.³⁸² It referred to the report of the Special Rapporteur on violence against women, its causes and consequences which found that:

Abuse of foreign domestic workers, mostly women, is a growing problem in Malaysia ... [which] can take the form of beating, overworking, withholding the salary, malnourishment, and denial of contacts with the family.³⁸³

The Committee requested that Malaysia indicate the actions taken to prevent such abuse and protect domestic workers, including measures being taken to address underlying societal attitudes that perpetuate such abuse. Malaysia responded that domestic workers have protection under the Employment Act 1955 and the Penal Code, and that it is negotiating memorandums with origin country governments.³⁸⁴

In its later concluding observations, the Committee expressed concern about "the lack of legislation and policies on the rights of migrant workers, particularly migrant domestic workers who are mostly women, including employment rights and rights to seek redress

³⁷⁹ "CEDAW and Malaysia: Malaysian Non-Government Organisations' Alternative Report", p. 15, <http://wao.org.my/file/file/Malaysian%20NGO%20CEDAW%20Alternative%20Report%202012%206MB.pdf>.

³⁸⁰ CEDAW General Recommendation No. 26 on Women Migrant Workers, 5 December 2008, UN Doc. CEDAW/C/2009/WP.1/R, www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf.

³⁸¹ Paragraph 26 of CEDAW General Recommendation No. 26 on Women Migrant Workers, 5 December 2008, UN Doc. CEDAW/C/2009/WP.1/R.

³⁸² Committee on the Elimination of Discrimination Against Women, C/MYS/Q/2, 10 Feb 2006: List of issues and questions with regard to the consideration of an initial and periodic report.

³⁸³ 27 February 2003 (E/CN.4/2003/75/Add.1), para 1079.

³⁸⁴ "Responses to the List of Issues and Questions for Consideration of the Combined Initial and Second Periodic Report: Malaysia", CEDAW Pre-Session Working Group, 35th Session, 27 March 2006, UN Doc CEDAW/C/MYS/Q/2/Add.1, tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMYS%2fQ%2f2%2fAdd.1&Lang=en.

in cases of abuse". It urged Malaysia to enact laws, establish procedures to safeguard the rights of migrant workers, provide them with viable avenues of redress against abuse by employers, and make migrant workers aware of such rights.³⁸⁵

6.6.2 ILO Conventions

Malaysia has been a member of the ILO since independence. As a member, Malaysia has an obligation to respect, promote, and realise four fundamental rights, whether it has yet ratified the relevant convention:³⁸⁶

- (1) Freedom of association and the effective recognition of the right to collective bargaining;
- (2) Elimination of all forms of forced or compulsory labour;
- (3) Effective abolition of child labour; and
- (4) Elimination of discrimination in respect to employment and occupation.

These principles are also required to be upheld and maintained by the TPP (see section 6.6.6).

Malaysia has ratified six of the eight fundamental ILO conventions, of which five are in force:³⁸⁷

- (1) Forced Labour Convention, 1930 (No 29);
- (2) Right to Organise and Collective Bargaining Convention, 1949 (No 98);
- (3) Minimum Age Convention, 1973 (No 138);
- (4) Worst Forms of Child Labour Convention, 1999 (No 182); and
- (5) Equal Remuneration Convention, 1951 (No 100).

³⁸⁵ Committee on the Elimination of Discrimination Against Women, 31 May 2006: Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Malaysia, C/MYS/CO/2, para. 25–26.

³⁸⁶ ILO Declaration on Fundamental Principles and Rights at Work, Article 2.

³⁸⁷ Malaysia also ratified the Abolition of Forced Labour Convention, 1957 (No 105), which prohibits forced labour for the purposes of punishment of political points of view or for participation in strikes, among other things. However, both Malaysia and Singapore denounced their ratification of Convention 105 in 1990, effectively withdrawing from compliance, and have not renewed their ratification subsequently.

Malaysia has ratified only 11 of the technical conventions.³⁸⁸ It has not ratified those explicitly related to migrant labour or the labour recruitment industry, the Migration for Employment Convention (revised) 1949 (No 97); the Migrant Workers (Supplementary Provisions) Convention 1975 (No 143); and the Private Employment Agencies Convention 1997 (No 181). Malaysia also has not yet ratified the Domestic Workers Convention 2011 (No 189).

Of the core conventions ratified, Conventions No 29 and 98 are the most relevant to migrant workers. Malaysia has implemented Convention No 29 into domestic law by prohibiting forced labour under the Penal Code and the Federal Constitution, and passage of the ATIPSOM Act. The provisions contained in Convention No 98 are reflected in Article 8 of the Constitution, and the Industrial Relations Act 1967.

The ILO has a supervisory mechanism for monitoring implementation of ILO conventions. For core conventions, state parties must submit a report every two years to the ILO Governing Body describing their efforts towards giving effect to the conventions.³⁸⁹ Employer and worker organisations in Malaysia can submit their own reports in response to a government report.

The ILO's CEACR can then make general observations on questions raised by the country report on the application of a convention. It can also make direct requests for further information.³⁹⁰

Box 9: The Forced Labour Convention in Malaysia

By ratifying the Forced Labour Convention 1930 (No. 29), Malaysia committed to “suppress[ing] the use of forced or compulsory labour in all its forms within the shortest possible period”.³⁹¹ Forced labour refers to “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.³⁹² This is not limited to Malaysian citizens and thus also includes migrant workers, whether documented or undocumented.

The ILO has listed 11 indicators pointing to the fact that a person may be working in a situation of forced labour. Not all indicators are required; sometimes just one will be enough, but the indicators encourage looking at the totality of circumstances:

³⁸⁸ ILO, Countries Covered: Malaysia, undated, <http://www.ilo.org/asia/countries/malaysia/lang--en/index.htm> (last accessed on 15 January 2016).

³⁸⁹ ILO Constitution, Article 22.

³⁹⁰ ILO, Committee of Experts on the Application of Conventions and Recommendations, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>.

³⁹¹ Forced Labour Convention 1930, No. 29, Article 1.

³⁹² Forced Labour Convention 1930, No. 29, Article 2.

- (1) Abuse of vulnerability;
- (2) Deception;
- (3) Restriction of movement;
- (4) Isolation;
- (5) Physical and sexual violence;
- (6) Intimidation and threats;
- (7) Retention of identity documents;
- (8) Withholding of wages;
- (9) Debt bondage;
- (10) Abusive working and living conditions; and
- (11) Excessive overtime³⁹³.

The ILO Labour Standards database indicates that CEACR has made three observations to Malaysia in 2012, 2013, and 2014. In all three observations, CEACR expressed concern on only two topics: trafficking in persons, and the “vulnerable situation of migrant workers in regard to the exaction of forced labour, including trafficking in persons”.³⁹⁴ In the most recent observation, CEACR noted information that migrant workers encounter forced labour at the hands of employers and informal labour recruiters, including restrictions on freedom of movement, deceit and fraud in wages, and debt bondage.

It urged the Malaysian Government to do more to protect migrant workers from abusive labour conditions, and to report on the impact of labour inspections in the identification of cases of forced labour and human trafficking. It also urged the Government to accept a technical assistance team to ensure the effective application of the Convention.

In addition to reviewing country reports, employer and worker organisations can submit complaints to the ILO Governing Body regarding violations of freedom of association. In one complaint lodged in 2008, the MTUC alleged that Malaysia was refusing to allow migrant domestic workers the right to organise. The Committee found that Malaysia was indeed denying migrant workers their fundamental right to organise, and recommended that the Malaysian Government “ensure the immediate registration of the association of migrant domestic workers”.³⁹⁵ In subsequent follow-up reports, it found that Malaysia has taken no action to implement this recommendation.³⁹⁶

³⁹³ Special Action Programme to Combat Forced Labour (“SAP-FL”), 2012, “ILO Indicators of Forced Labour, Geneva: ILO”, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf.

³⁹⁴ For all observations and direct requests to Malaysia on Convention 29, see http://www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:102960.

³⁹⁵ Report in which the committee requests to be kept informed of development is found in Report No. 353, March 2009, Case No 2637 (Malaysia), www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911366.

³⁹⁶ Effect given to the recommendations of the committee and the Governing Body is found in Report No. 376, October 2015, Case No. 2637 (Malaysia); Complaint date: 10 April 2008 — Follow-up.

6.6.3 International Criminal Conventions

Malaysia ratified the UNTOC in 2004.³⁹⁷ It then acceded on 26 February 2009 to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing UNTOC. It had already incorporated many of its obligations under this Protocol into the ATIPSOM Act (see section 6.1.6).

Malaysia has not yet signed the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing UNTOC, but the ATIPSOM Act already criminalises migrant smuggling.³⁹⁸

UNTOC and its supplementary protocols are not subject to any supervisory or review mechanism.

6.6.4 Regional Agreements

As a member of ASEAN, Malaysia signed the ASEAN (draft) Declaration on the Protection and Promotion of the Rights of Migrant Workers at the ASEAN Summit in the Philippines in 2007.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers establishes principles of respect and tolerance for migrant workers. It requires all parties to respect “the full potential and dignity of migrant workers in a climate of freedom, equity and stability” in accordance with local laws. Of particular relevance to this study, it also requires receiving country governments to:

- (1) facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate;
- (2) promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers; and
- (3) provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states.³⁹⁹

The ASEAN Declaration is not binding in international law and does not have a monitoring and enforcement mechanism. Further, it stops short of calling for the human rights protection of migrant workers, including undocumented workers, and for this reason has been criticised as weak and largely ineffective.

³⁹⁷ Signed on 26 September 2002, and ratified on 24 September 2004.

³⁹⁸ UNTS vol. 2241, p. 507; Doc. A/55/383.

³⁹⁹ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Articles 7–9.

The signatories have formed a Committee on the Implementation of the Declaration to develop a more detailed implementation instrument. At the time of writing, this instrument has yet to be agreed.

6.6.5 MoUs on Recruitment and Employment of Migrant Workers

As mentioned in chapter 4, Malaysia has signed non-binding MoUs on the recruitment and employment of migrant workers with eight countries of origin (Bangladesh, Cambodia, China, Indonesia, Pakistan, Sri Lanka, Thailand, and Vietnam).⁴⁰⁰ An MoU is a document that expresses the intentions of the parties where the parties do not wish to assume legally binding obligations.⁴⁰¹

The MoUs were negotiated largely in secret by the MOHR and are not publicly available in Malaysia. Two former agreements with India and Indonesia and two current agreements with Cambodia are available on ILO's website.⁴⁰² Two of these MoUs (with Cambodia and Indonesia) are for domestic workers, and two (with Cambodia and India) are for "general workers", namely non-domestic workers. Rights protections for workers contained in these agreements that are above those set out in law include the following:

- (1) That employers provide decent accommodation to workers. The Cambodian MoU regarding domestic workers obligates the Malaysian recruitment agency to check on a worker's living situation throughout her contract;
- (2) That the employer must allow the worker to communicate with her family (domestic worker MoUs only);
- (3) That the worker must hold their passport except for the purpose of obtaining a medical screening or a VP(TE) (Cambodian MoUs only). The Indonesian agreement notably allows the employer to hold the passport with the worker's consent for "safekeeping"; and
- (4) The two Cambodian agreements also include a standard contract with the agreement, which includes basic labour protections.

It is unclear how the MoUs are enforced, or even how they are domestically implemented, except that implementation is the responsibility of joint working groups established under the MoU.⁴⁰³ Their non-binding nature requires that disputes are resolved by negotiation.

⁴⁰⁰ B. Harkins, "Review of Labour Migration Policy in Malaysia ILO 2016", p. 13, http://apmigration.ilo.org/country-profiles/mou_list?country=MY (last accessed on 3 October 2016).

⁴⁰¹ Victorian Government Solicitors Office, <http://vgso.vic.gov.au/content/memoranda-understanding#definition> (last accessed on 3 October 2016).

⁴⁰² Content extracted from MoUs, http://apmigration.ilo.org/country-profiles/mou_list?country (last accessed on 3 October 2016).

⁴⁰³ The agreements are usually signed by the Minister for Human Resources. However, an earlier

6.6.6 Trade Agreements

In February 2016, Malaysia and 11 other countries signed the TPP, a trade agreement that reduces tariff and non-tariff barriers in a wide range of sectors.⁴⁰⁴ The TPP agreement is extensive, with 30 chapters and numerous annexes and supplementary instruments. Chapter 19 (on labour) of the agreement commits all parties “to uphold and maintain” in both law and practice, the fundamental rights of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998):⁴⁰⁵

- (1) Freedom of association and the right to collectively bargain;
- (2) Elimination of all forms of forced or compulsory labour;
- (3) Effective abolition of child labour;
- (4) Elimination of discrimination in employment and occupations; and
- (5) Acceptable conditions of work with respect to a minimum wage, hours of work and occupational health and safety. The TPP does not, itself, set a minimum wage or recommend a maximum number of hours to be worked.

In addition, Malaysia signed a side agreement with the United States, the Malaysia-United States Labour Consistency Plan, which specifies in detail the changes required for Malaysian law to comply with Chapter 19 of the TPP.⁴⁰⁶ Some of these changes are directed to improving the treatment of migrant workers and include the following:

- (1) Amending the Trade Union Act 1959 to allow non-citizens to hold elected office in unions if they have been in Malaysia for at least three years;⁴⁰⁷
- (2) Amending the Passports Act 1966 to make it explicit that withholding a passport is illegal and requiring that all workers be informed in writing of this fact;

Exchange Note from 1999 with Cambodia was signed by an official of the National Registration Department and Immigration Division in the Ministry of Home Affairs. Similarly the 2006 agreement with Indonesia was pursuant to the minutes of a Joint Committee on Bilateral Cooperation.

⁴⁰⁴The 12 TPP countries are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, Vietnam. See Trans-Pacific Partnership, <https://ustr.gov/tpp/>.

⁴⁰⁵Trans-Pacific Partnership: Chapter 19 (Labour), Article 19.1 Definitions, and Article 19.3 Labour Rights.

⁴⁰⁶Malaysia-United States Labour Consistency Plan, Side Letter to the Trans-Pacific Partnership, undated, <http://fta.miti.gov.my/index.php/pages/view/272>.

⁴⁰⁷Section 10(a).

- (3) Expanding the Workers' Minimum Standards of Housing and Amenities Act 1990 to cover foreign workers in all sectors, and require that migrant workers provided with housing be informed in writing of their rights to freedom of movement and to acceptable housing conditions, and provide information on how to report violations;
- (4) Better oversight of outsourcing agencies by requiring all agencies to be covered by the Private Employment Agencies Act 1981;
- (5) Waiving fees for a Special Pass to remain in the country for investigations and claims;
- (6) Amending the Employment Act 1955 to prohibit contract substitution; and
- (7) Requiring private employers to pay government levies.

The researchers were informed that the Malaysian Government was reviewing numerous pieces of legislation at the time of writing in preparation for amending them to bring them into conformity with the Labour Consistency Plan.

At the same time, it should be noted that the agreement does not address certain crucial barriers to migrant workers accessing justice, or that make migrant workers more vulnerable to violations. It still foresees the payment of recruitment fees. It also does not require the law be amended to state workers be given a contract in a language that they can understand, or strengthening labour protections for domestic workers.

6.7 Summary: Rights Protections and Gaps for Migrant Workers in Malaysia

Malaysia's legal framework protects workers in Malaysia, including migrant workers, against many of the harms migrant workers experience. Protections include rights at work to wages, reasonable hours of work and regular time off, to form and join a union, and to a fair employment termination process. Civil and criminal laws also provide remedies for cheating and fraud during recruitment, for physical and sexual abuse, forced labour and human trafficking. The courts have supported and asserted migrant workers' rights at work and in dealings with agents.

International law further obliges Malaysia to take steps toward protection of women workers, child workers and workers who seek to organise, among others.

Yet, the legal framework also has significant gaps in protection, which were mentioned often by interviewees and stakeholders at roundtables. Specific gaps identified in this chapter include:

- (1) **Limited rights of domestic workers:** Domestic workers are excluded from WCA, and from provisions of the Employment Act 1955 in respect to hours and leave, and from the minimum wage;
- (2) **Lack of protections for workers who file a claim against their employer:** The law does not provide any protection to workers whom are retaliated against by employers for filing a claim or complaint, such as reduction of hours or responsibilities. There is also nothing in the law preventing the Immigration Department from cancelling a worker's pass on behalf of an employer retaliating against a worker for complaining;
- (3) **Lack of standards for accommodation, food and other amenities** for workers employed in urban areas, namely within the area of a city council, municipal council, or federal territory. The law does not provide minimum standards regarding accommodation, the amount of food a worker should receive, or regarding communication with family;⁴⁰⁸
- (4) **No clearly stated right to hold one's own passport** and no clear authority for facilitating the return of a passport. The ambiguity in respect to holding a passport facilitates passport removal and retention by employers;
- (5) **Lack of protections from discrimination:** Some constitutional anti-discrimination provisions do not explicitly cover non-citizens. The Constitution in fact enshrines discriminatory treatment between those detained for general offences and those detained under immigration powers; and
- (6) **Lack of protections for a worker regarding their work permit:** Migrant workers currently have no avenue in the immigration system to complain about or compel an employer or agent to fulfil their responsibilities regarding a worker's pass or payment of the levy.

⁴⁰⁸ Workers' Minimum Standards of Housing and Amenities Act 1990 (Act 446), Section 2. The preamble to the Act notes that it is for "minimum standards of housing and nurseries for workers and their dependents, to require employers to allot land for cultivation and grazing in a place of employment, to require employers to provide health, hospital, medical and social amenities and to provide for matters incidental thereto."

7 REMEDIES AND REDRESS STRATEGIES AVAILABLE TO MIGRANT WORKERS

The previous chapters described mistreatment of migrant workers, rights of migrant workers under Malaysian and international law, and obligations of public and private actors toward migrant workers. This chapter outlines the key mechanisms and pathways available in Malaysia to enforce rights and obligations. It is not a list of all potential pathways to justice, but the Bar Council Malaysia and other stakeholders have identified the following institutions as either most commonly used by migrant workers, or having most potential to address migrant worker harms:

- (1) Labour Court, an administrative forum that adjudicates disputes over wages;
- (2) Other remedies under the Employment Act 1955;
- (3) The Industrial Court and Department of Industrial Relations, which adjudicate complaints of unfair dismissal;
- (4) WCA, which provides compensation for workplace injuries, deaths and occupational diseases;
- (5) Civil courts;
- (6) Criminal justice system; and
- (7) Protections under the ATIPSOM Act.

For each of the above, the authors have reviewed the authority and powers of the relevant institutions, and the procedures for seeking redress as written in relevant laws and regulations or as described by government officials or legal experts.

In addition, the authors have assessed the accessibility of the mechanism, fairness of the procedures and justness of outcomes based on the qualitative experiences of migrant workers, civil society organisations and other stakeholders, as well as government data and academic scholarship, where available. Of migrant workers who participated in this study, just under half (23 of 50) had sought redress through a state-based mechanism. Of those, two-thirds had filed claims at the DoL.

Table 11 | Sources of Assistance and Migrant Worker Interviewees who Contacted Them

Source of Assistance	Number of Migrant Workers
Labour Department	16
Department of Industrial Relations and Industrial Court	0
Workmen's Compensation	0
Civil and Criminal Courts	5
Protection under the ATIPSOM Act	2
Total	23

Other migrant workers attempted to resolve disputes with employers and others privately. A description of this approach is included at the end of this chapter.

7.1 Overview: Institutions with Responsibility for Enforcement of Rights

The redress mechanisms discussed in this section all fall under the purview of the MOHR and the Attorney General's Chambers, and are introduced in the following sections.

Table 12 | Institutions and Mechanisms Addressed

Institution	Mechanism
Administrative Remedies	
DoL	Complaints and inquiries regarding wages and termination benefits
DoL	Labour inspections and prosecutions for violations of labour standards
DoL	Compensation for injury or death in workplace accidents
Department of Industrial Relations	Conciliation following unfair dismissal
Tribunals	
Industrial Court	Deciding claims for reinstatement, non-compliance of terms of collective agreements and trade disputes
Judicial Remedies	
Civil Magistrates', Sessions and High Courts	Claims for breach of contract, personal injury or wrongful detention
Criminal Magistrates', Sessions Courts and High Courts	Prosecution of criminal defendants
High Court	<ul style="list-style-type: none"> • Appeals from Magistrates', Sessions Courts and the DoL • Judicial review of government decisions

7.1.1 MOHR⁴⁰⁹

The MOHR is responsible for national policies on labour and human resources; the employment of local and foreign workers; and numerous other functions regarding the workplace and workforce. As well as overseeing administration of national laws governing

⁴⁰⁹ The functions of the ministry and departments are drawn from the Ministerial Functions Act 1969.

the workplace, it is charged with implementing international labour conventions, and discussing labour issues at regional and international fora.

The MOHR does not have a specific migrant worker division or department, but all departments must address migrant workers to some degree. Key departments include the following:

- (1) The DoL is charged with administering, implementing, and promoting labour standards in Malaysia, through 11 pieces of legislation, most notably the Employment Act 1955 and the WCA, as well as minimum wage rules. The DoL is headed by a Director General and has offices at national, state and district levels in Peninsular Malaysia. At the time of writing, the DoL had approximately 400 labour officers across Peninsular Malaysia, which many participants in the study believed was insufficient;⁴¹⁰
- (2) The Department of Industrial Relations is headquartered in Putrajaya and has offices in every state in Malaysia. It is responsible for administering the Industrial Relations Act 1967, including prosecuting violations of the Act and “handling and resolving” representations for reinstatement (claims of unfair dismissal). The Department of Industrial Relations has a unit for conciliation in reinstatement cases. It describes itself as a “peacemaker ... to promote cordial and sound industrial relations”;⁴¹¹
- (3) The Industrial Court is an arbitration tribunal that adjudicates trade disputes and representations for reinstatement under the Industrial Relations Act 1967. It sits in Penang, Ipoh, Kuala Lumpur, Johor Bahru, and Sabah, and each location is led by a President, Registrar, and Deputy Registrar.⁴¹² The President and Chairmen must be lawyers and can preside over cases. Decisions of the Industrial Court (called awards) are supervised by the High Court; and
- (4) The Department of Occupational Health and Safety is responsible for all laws regarding safety and health in the workplace, including the Occupational Health and Safety Act 1994 and legislation on specific industries.

Other ministries with responsibilities relating to migrant workers include the Ministry of Women, Family and Community Development, which aids trafficked persons; and the Ministry of Health, which oversees medical examinations and medical insurance for migrant workers.

⁴¹⁰ Second Roundtable on Migrant Workers' Access to Justice, Bar Council Malaysia, 6 November 2015.

⁴¹¹ “The Department of Industrial Relations Malaysia (Ministry of Human Resource): An Introduction in Brief”, presentation slides, 22 May 2009, <http://www.iiu.edu.my/kurnia/MOHR.pdf>.

⁴¹² The Industrial Court is located in Kuala Lumpur, Johore, Penang and Perak in Peninsular Malaysia, and Sabah and Sarawak, <http://www.mp.gov.my/en/about-us/top-management>.

7.1.2 Attorney General's Chambers

The Attorney General is appointed by the Executive and must be qualified to be a judge of the Federal Court. The Attorney General's duties are set out in Article 145 of the Federal Constitution, and include advising the Government on legal matters and prosecuting all offences in the federation. In this capacity, the Attorney General is also the PP.

7.1.3 Judiciary

The Chief Justice of Malaysia is the head of the judicial branch.

Although a federation of states, Malaysia has a centralised hierarchy of courts. The highest court is the Federal Court, followed by the Court of Appeal, and then the High Courts; one for Peninsular Malaysia (High Court of Malaya) and one for East Malaysia (High Court in Sabah and Sarawak). Together, these four courts comprise the superior courts.⁴¹³ All superior courts, apart from the High Court in Sabah and Sarawak, are in Putrajaya.

Below the superior courts are the subordinate courts; the Sessions Courts and the Magistrates' Courts.⁴¹⁴ These handle the vast majority of civil cases filed by plaintiffs.

7.2 Labour Court and Other Forms of Redress at the DoL

Many problems reported by migrant workers amount to violations of labour standards, and accordingly can be addressed by the DoL. This section reviews three mechanisms by which DoL officers enforce the Employment Act 1955: wage complaints in the Labour Court, criminal prosecutions, and inspections.

The Employment Act 1955 and the DoL provide essential remedies to migrant workers for harms suffered at work. Officers appear to investigate and decide cases in a balanced manner and were generally viewed favourably by those interviewed. However, awareness and use of this mechanism by migrant workers is extremely limited. The DoL is understaffed, which limits its ability to act proactively to identify and address systemic labour violations in Malaysia. Further, it has no specialised unit for handling migrant worker complaints, or staff selected for fluency in migrant worker languages. It does not do outreach to migrant worker communities, or indeed to workers in general, or otherwise make its services known.

⁴¹³ Part IX of the Federal Constitution of Malaysia; Part II of the Courts of Judicature Act 1964.

⁴¹⁴ Section 59 of the Subordinate Courts Act 1948.

7.2.1 Complaints and Inquiries Regarding Wages and Other Payments Due (“Labour Court”)

Complaints and Inquiries: Jurisdiction and Powers

The principal redress mechanism available to workers whose wages or other monies due are unpaid, is the “Complaints and Inquiries” powers of the DoL, under Part XV of the Employment Act 1955. This mechanism is commonly called the “Labour Court” (*Mahkamah Buruh* in Bahasa Malaysia) although it is an administrative rather than judicial process, overseen by labour officers rather than judges. All labour officers receive basic training in the relevant laws and their duties, and all must attend at least seven days of ongoing training per year, but they do not necessarily have legal training. They also do not receive specific training on migrant workers.⁴¹⁵

Part XV empowers the DoL to decide disputes over wages between employers and employees, including independent contractors or sub-contractors:

69(1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee...

The DoL can receive complaints regarding wages or other payments due under the employment contract, the Employment Act 1955, or minimum wage orders.⁴¹⁶

Jurisdiction is limited to complaints from workers earning up to RM5,000 per month,⁴¹⁷ which covers all migrant workers. The monies claimed can be of any amount; there is no minimum or maximum claim.

The powers of the officer inquiring into a complaint under Part XV are to:⁴¹⁸

- (1) make an order for the employer to pay the worker “such sum of money as [the officer] deems just”;

⁴¹⁵ Interview with the Department of Labour Peninsular Malaysia, Putrajaya, 27 April 2015.

⁴¹⁶ Employment Act 1955, Section 69(1).

⁴¹⁷ Employment Act 1955, Section 69B(1).

⁴¹⁸ Employment Act 1955, Sections 69(1)–(3).

- (2) investigate and confirm or set aside the termination of employment of a worker on grounds of misconduct (see section 6.4.2) and order payment of wages, but not reinstatement; and
- (3) make any consequential orders needed to give effect to the decision.

Labour officers do not have explicit powers to inquire into and make orders regarding other concerns for migrant workers in the workplace, such as the withholding of passports, or payment of a return flight. The exception is if these items can be considered breaches of the employment contract or the parties address them in negotiations.

Complaints and Inquiries: Procedure

The procedure for the lodging and resolution of complaints is set out in Section 70 of the Employment Act 1955 (see Box 10). In summary, it requires the complainant to make an in-person or written complaint at a DoL office. A DoL officer will receive the complaint and has discretion whether to investigate and to order a hearing. The parties, and any witnesses they wish to speak on their behalf, are entitled to attend the hearing. The DoL may summon the employer and other persons to attend the hearing.⁴¹⁹

Other sections of the Employment Act 1955 make it a criminal offence for a person summoned to the hearing by the DoL to fail to attend,⁴²⁰ as the standard form of summons states.⁴²¹ It is also a criminal offence for an employer to stop, or try to stop, a worker attending the DoL to make a complaint or attend a hearing.⁴²²

The hearing will result in a decision and orders by the officer, which are issued to the parties.⁴²³ No reasons are given for a decision unless a party later files an appeal. If the employer fails to attend a scheduled hearing, Section 70(h) empowers the labour officer to make an order in their absence, like a default judgment.

Orders of the DoL under Part XV are not published. However, “any person interested in such decision” is entitled to a free copy of the orders, and can receive a copy of the record of the case upon payment of a fee.⁴²⁴

⁴¹⁹ Employment Act 1955, Section 70: Procedure in Director General’s inquiry; Section 74: No fee is chargeable; Sections 74(2), 82: For issue and service of the summons; Section 83 and also Employment (Procedure – Reciprocal Provisions) Regulations 1957: A summons can be issued to and enforced on an employer in Singapore.

⁴²⁰ Employment Act 1955, Sections 80, 101.

⁴²¹ Forms A and B in the Fourth Schedule of the Employment Regulations 1957.

⁴²² Employment Act 1955, Section 99.

⁴²³ Employment Act 1955, Section 69D.

⁴²⁴ Employment Act 1955, Section 71.

**Box 10: Section 70 of the Employment Act 1955 –
“Procedure in Director General’s Inquiry”**

- (1) The complainant either presents a written statement or makes an in-person statement of their complaint and the remedy sought at the DoL.
- (2) The labour officer, as soon as practicable after receiving the complaint, will examine the complainant under oath and record the substance of the statement in a case book.
- (3) The labour officer can make further inquiries “as he deems necessary to satisfy himself that the complaint discloses matters” which should be investigated. The “person complained against” (the respondent) can either attend the Department in person or the labour officer will summon that person to attend as a part of this inquiry.
- (4) When issuing a summons to a respondent, the labour officer will give notice of the nature of the complaint and the name of the complainant, and will give a date and time for attendance. The officer will also inform the person that they may bring any witnesses to speak on their behalf. The DoL can issue summonses to those witnesses.
- (5) Similarly, the labour officer will inform the complainant of the date, time and place of the hearing, and will instruct the complainant to bring any witnesses he or she may wish to call on his or her behalf.
- (6) At any time before or during an inquiry, the labour officer can summon any other persons whose financial interests could be affected by the outcome of the case, or who he or she believes may have knowledge of the matters in dispute or can give relevant evidence.
- (7) At the hearing, the labour officer will examine under oath all persons summoned or present whose evidence is material to the matters in dispute, and will then give a decision.
- (8) If the person who is the subject of a complaint, or another person whose financial interests may be affected by the case, fails to attend, the labour officer can hear and decide the complaint in their absence.
- (9) The labour officer will record the decision in an order on a prescribed form, so that it can later be enforced by a court.

Regulations under the Act only prescribe the forms, and do not provide further procedural detail.⁴²⁵ The DoL informed the researchers that the Department has an internal standard of procedure for receiving and handling cases, but declined to share it with the researchers on the basis that it is an internal document.⁴²⁶

In practice, labour officers first seek to resolve disputes informally by discussing the matter with the parties by telephone, or holding procedural hearings, called “mentions”. At a mention, the parties have an opportunity to resolve the dispute in the presence of the labour officer. The role of the officer at a mention is not defined in law, for example whether they can actively mediate, or may only observe. Interviewees said that most labour officers refrain from intervening except to clarify the requirements of the Employment Act 1955 to the parties. Where the labour officer approves a negotiated settlement, the officer makes an order in those terms, which can be enforced in the same way as a decision.⁴²⁷

Interviewees noted that if a migrant worker does not attend a mention or hearing, the labour officer will likely deem the complaint withdrawn. If the employer does not attend, the labour officer may make orders in default, namely in favour of the worker. One embassy said that sometimes if the employer does not cooperate, the embassy itself will sometimes request the police to arrest the employer and force them to attend, but the legal basis for such action is not clear unless the employer is being prosecuted (see section 7.2.3).⁴²⁸

Effectiveness of the Complaints and Inquiries Process for Providing Redress to Migrant Workers

Awareness and Accessibility of the Mechanism

The DoL has sought to make the Labour Court accessible to low-wage workers. Complaints can be submitted at the DoL offices in every state free of charge. A written complaint can be submitted by letter or email, and in-person complaints can be made by visiting a DoL office or making a telephone call to the Department hotline, called Telekerja. Parties to a dispute cannot be represented by a lawyer, although they may seek assistance of a trade union or employer’s representative (as in the Industrial Court).

However, few migrant workers lodge complaints at the DoL to resolve disputes over wages. The Minister for Human Resources informed Parliament that between 2010 and

⁴²⁵ Section 102 of the Employment Act 1955 gives the Minister of Human Resource the general authority to make regulations “giving full effect to the provisions of [the] Act, or for the further, better or more convenient implementation of [its] provisions”. The only relevant regulations are the Employment Regulations 1957, as amended.

⁴²⁶ Interview with the Department of Labour, Putrajaya, 2 March 2016.

⁴²⁷ Employment Regulations 1957 prescribes Form C for an Order under Section 69 of the Employment Act 1955. DoL uses Form C for all Orders, as per samples viewed by the researchers.

⁴²⁸ Interview with the Embassy of Indonesia, Kuala Lumpur, 11 November 2015.

2014, the DoL received 65,833 complaints in Peninsular Malaysia, but only 1,435 were filed by non-citizen workers (approximately two percent).⁴²⁹ This is clearly disproportionate to the number of migrant workers in Malaysia, a minimum of 15 percent of the labour force, and a much higher proportion of the low-wage labour force.

Lawyers and civil society organisations advising migrant workers believed that the low number of complaints could be attributed mainly to low awareness of the Labour Court among migrant workers. The DoL informed the researchers that it does not conduct outreach programmes to migrant worker workplaces or community centres, and does not provide information at airports or other locations. It also does not conduct outreach beyond its website. The webpage describing the complaints procedure is only available in Bahasa Malaysia, Hindi and Mandarin — not in English or any other major migrant worker languages such as Bangla, Nepali, Khmer, or Thai. Similarly the telephone hotline is not available in key migrant worker languages.

Workers who may be aware of the Labour Court and wish to file a complaint may be prevented by procedural barriers. In particular, the DoL states that several “supporting documents” are “required” to file a complaint:

- (1) The worker’s passport;
- (2) A copy of the employment contract;
- (3) A payment slip;
- (4) Arrival card (indicating date of arrival in Malaysia);
- (5) Employment termination letter (if applicable); and
- (6) Any other contract-related documents.⁴³⁰

The legal basis for requiring these documents to be submitted with a claim is not stated on the website. As the Employment Act 1955 only refers to the submission of a written or oral statement for an inquiry to be commenced,⁴³¹ it is possible that requiring these evidentiary documents as a precondition to filing a complaint is inconsistent with the law.

These requirements restrict the Labour Court to migrant workers who hold their passport and contract, and documentation supporting their case. For many migrant workers, particularly those who have fled their employers in distress, this is impossible.

⁴²⁹ Oral responses to parliamentary questions submitted by YB Puan Dr Hajah Siti Mariah bt Mahmud, 9 November 2015, *Majlis Mesyuarat Dewan Rakyat, Putrajaya*.

⁴³⁰ Ministry of Human Resources (Malay site), “Aduan Buruh: Tatacara Membuat Aduan”, <http://jtksm.mohr.gov.my/index.php/my/majikan-dan-pekerja/aduan-buruh#3-tatacara-membuat-aduan> (last updated 17 December 2013).

⁴³¹ Employment Act 1955, Section 70(a).

Nine migrant workers who participated in this study had made a complaint to the DoL for unpaid wages. All nine were assisted by an NGO, which helped them to gather the supporting documents.

Another barrier to filing the claim is the need for the worker to attend all mentions and the hearing. Section 70 indicates that the worker can give a statement on oath as “soon as practicable” after the complaint is filed. But in practice, according to those familiar with the process, this statement is not given until the hearing. Leaving Malaysia but coming back for each date at the Labour Court is financially difficult for most migrant workers.

Other migrant workers who were still employed expressed fear about making a claim in case their employer terminated their services — the Employment Act 1955 does not include any specific anti-retaliation penalties for employers who terminate the services or otherwise punish a worker for filing a wage claim. Although it may be possible for an employment-terminated worker to claim termination benefits under the Employment Act 1955, or unfair dismissal at the Industrial Court (see section 7.3), any work permit may be cancelled immediately, before any order for reinstatement is made.

Transparency and Efficiency of Procedures

Most civil society organisations who represented migrant workers at the DoL felt that labour officers were fair in their approach, and helpful to migrant workers. One in Kuala Lumpur said that they are “quite ok”, and another in Penang said that “there are some very good people there, really helpful and they are very supportive. We make a complaint they always investigate it”.⁴³²

The nine migrant worker interviewees who filed claims all attended mentions and, in some cases, hearings. They noted that these occasions were stressful, but the most difficult aspect of the process was the uncertainty about whether it would be resolved before their work permit or pass was cancelled or expired. Service providers said that employers frequently postpone or delay proceedings until the migrant worker can no longer legally stay in Malaysia, forcing them to abandon or withdraw the complaint.

The MOHR figures suggest that labour cases are in fact handled expeditiously and within the target timeline. Of those settled by negotiation, the average length of time from filing to settlement is 34 days. Cases that proceed to a hearing take, on average, 84 days to resolve. Although faster than a civil trial, this may still be too long for a migrant worker who cannot work and relies on renewals of their Special Pass to stay in the country (see section 4.3.1).

Another challenge is that the Employment Act 1955 does not make provision for punishing egregious cases of labour violations. Some labour officers may refer extreme cases to the police for investigation of trafficking, but such a referral is not required (nor would

⁴³² Interview with Tenaganita, Penang, 7 May 2015.

this necessarily be in the workers' interest, see section 7.7 on the ATIPSOM Act). The case analysis at Tenaganita did reveal several serious cases of sexual and physical abuse that the DoL referred to the police for investigation, but also several cases where no referral was made.

Box 11: Michelle and Samantha

Michelle and Samantha (names changed) are from the Philippines, where Michelle obtained a degree in early childhood education, and Samantha a certificate in care-giving. In 2014 Michelle was offered a position in a school in Butterworth, where her recruitment agency, a well-established agency in Manila, told her she would gain teaching experience and do some cleaning. Samantha came to Malaysia as a domestic worker but was eventually sent to work at the same school as Michelle. When they arrived at the school, they found conditions very different to what they had been promised. They spent all their time cleaning the school as well as their employer's several homes, working 6:30 am to 11:00 pm without a day off. Their employer gave them little food, made them sleep in the classrooms, and frequently verbally abused them. For six months they received no payment at all. Eventually, they started to fear for their health, suffering dizzy spells and pains from the lack of food and sleep. They decided to leave and seek help, and eventually found Tenaganita in Penang.

The next day was April 24, and we went to the labour office and we made our complaint. They helped us. Then after that day the two ladies from Tenaganita went to see the school where we worked and talked to our employer. They explained to our employer that we're not talking about them badly, we're just asking for them to provide basic necessities because they don't.

Then on May 6, we heard that we have to meet with the employer at the labour office, they want to settle this. [Our Tenaganita case-worker] told us it is not always easy to settle this. Sometimes the employer or agent doesn't come, and then it is a long process. But they did come and they said they are sorry, they don't want to violate this and that. The employer agreed to pay us and the agent agreed to pay our airfare home.

We are happy with this, but four Indonesian maids are still working at the school and we worry for them. The Labour Department told us we should settle our case first before they do an inspection and help the other maids, because otherwise the employers will be angry and not pay us anything. If people followed the contract, none of these bad things would happen.

Outcome of Cases

The Minister of Human Resources has informed Parliament that just under half of complaints filed by migrant workers are resolved through negotiation at the mention stage of the proceedings. Around 20 percent of filed complaints proceed to a hearing. Of these, around 85 percent are decided in favour of the worker, and 15 percent of cases

are dismissed or decided in favour of the employer and/or agent.⁴³³ He did not explain whether “in favour” meant a complete victory or also partial victories.

Almost 40 percent (38 percent) of cases are withdrawn by the migrant worker, or dismissed because the migrant worker failed to attend the hearing. Stakeholders believed that withdrawal or failure to attend usually occurs when the migrant worker can no longer stay in Malaysia because their pass has expired. The case files from Tenaganita also indicate that cases can be withdrawn if the parties come to a settlement outside of the Labour Court process.

Table 13 | Resolution of Complaints Filed by Foreign Workers, 2010 to 2014

Resolution of Complaint	Number of Cases	Percentage
Resolved by agreement ⁴³⁴	569	43
Withdrawn	206	15.5
Dismissed because complainant failed to attend	288	22
Decision by labour officer following a hearing	256	19.5
(Orders in favour of worker)	(222)	(17)
(Dismissed or in favour of employer)	(34)	(2.5)
Total Complaints Filed	1,320	100

Source: Responses to Parliamentary Questions

The experiences gathered through interviews reflect these figures. In some cases a settlement was reached, and a consent order recorded (see Box 11). Other cases were more difficult, usually because the employer was unwilling to cooperate. Eventually the worker had to leave the country, and so withdrew or abandoned the complaint. As described by one former domestic worker, who sought payment of unpaid wages:

My employer doesn't want to settle, I think he is angry and doesn't want me to go. When we meet with him [at the labour department] he just tells lies, lies, lies about me, like that I would sneak out of the house, even though I was locked in every night and couldn't go anywhere. Other times he just makes excuses and doesn't show. I worked hard for that money but now all I want is my passport back and to go home.⁴³⁵

⁴³³ Oral responses to parliamentary questions submitted by YB Puan Dr Hajah Siti Mariah bt Mahmud, 9 November 2015, *Majlis Mesyuarat Dewan Rakyat, Putrajaya*.

⁴³⁴ Note that in these cases, the Labour Office makes an Order on Form C (see above).

⁴³⁵ Interview No 4, migrant domestic worker from the Philippines, interviewed in Penang, 7 May 2015.

Appeals and Enforcement of Decisions

Either party has the right to appeal a decision or agreement recorded by the DoL by filing an appeal in the High Court of Malaya. The procedure for filing the appeal is the same as for filing a civil appeal from a subordinate court (see section 7.5).⁴³⁶

Enforcement of labour officer orders is also undertaken by the courts, following a reference by the labour officer who signed the orders. If a party does not comply with the order, and does not appeal, the labour officer can send a certified copy of the order to a court for enforcement. The order will be sent either to a Sessions Court or First Class Magistrates' Court, and the court will enforce the order as if it was a judgment of the court (see section 7.5).⁴³⁷ All monies recovered, minus the costs, charges and expenses of enforcing the order will then be paid to the DoL to pay to the worker.⁴³⁸

Finally, labour officers have the option to prosecute an employer for failing to comply with an order of a labour officer, which is an offence punishable with a fine of up to RM10,000, and a penalty of RM100 per day for every day the offence continues after conviction.⁴³⁹

The Minister of Human Resources informed Parliament that the DoL recorded 2,880 cases of non-compliance by employers between 2005 and 2014 (an average of 288 per year), but did not say what proportion of these involved non-citizen complainants. The DoL sought prosecution in 1,541 of those cases, and civil enforcement of the decision in the remaining 1,339 cases.⁴⁴⁰ One lawyer suggested the number of migrant workers seeking enforcement would be very small given that court actions entail further delay.⁴⁴¹

Box 12: A Snapshot of Cases at the DoL

Tenaganita receives several thousand cases each year from migrant workers or their families, many of which include labour violations. Tenaganita staff stated that the vast majority of these cases are settled by agreement between the parties, with Tenaganita acting as a representative of the worker (see section 7.8). A much smaller number of cases are filed at the DoL. A review of Tenaganita's files identified 22 claims filed at the DoL between 2010 and 2015. Tenaganita explained that a complaint may be filed at the DoL for various reasons, including that negotiation has failed, that the migrant worker has a strong case and wishes to make formal claim, or the opinion of the case worker that a formal complaint should be made.

⁴³⁶ Employment Act 1955, Section 77.

⁴³⁷ Employment Act 1955, Section 75.

⁴³⁸ Rules of Court 2012, Order 86A, Rule 7.

⁴³⁹ Employment Act 1955, Section 69E.

⁴⁴⁰ Answers by the Minister of Human Resources to Supplementary Parliamentary Questions of YB Puan Dr Hajah Siti Mariah bt Mahmud, Question 14, asked on 29 October 2015.

⁴⁴¹ Interview with Messrs T. Balasubramaniam, Kuala Lumpur, 19 January 2015.

Analysis of the 22 files revealed that the DoL can be an effective avenue for redress, at least where the claimant had assistance from Tenaganita. Most claims were successful and resolved relatively quickly.

More detailed observations include the following:

- (1) The most common claims were for unpaid wages (18), and unpaid overtime. Several workers also sought return of their passports and payment for a flight home;
- (2) Fifteen of the claimants were female, and nine were male;
- (3) All but two complainants were documented migrant workers. Some later became undocumented as a result of termination of their employment;
- (4) Only two complaints involved multiple complainants. In one case, six male employees at a printing company complained of long hours, no overtime pay, and employment termination without notice. In another case, 35 female employees of a medical disposal company successfully claimed two months of unpaid wages;
- (5) Seven cases were settled at a mention. In most cases, the employer agreed to pay all or very close to all (90 percent or more) of what was claimed. In only two cases the amount agreed was significantly less (around 50 percent) than the claim amount. No reasons were given in Tenaganita's files for the complainant agreeing to these lower amounts;
- (6) Hearings were held in nine cases. In seven cases, the officer ordered payment of the full amount or very close to the full amount (90 percent or more) claimed. In two cases the officer ordered amounts much lower than the claim but Tenaganita's file did not contain an explanation for the lower amount. The complainant in one case appealed the decision but left Malaysia before the appeal was decided. It was not clear from the file whether the appeal continued in her absence;
- (7) In all cases but one, the employer paid shortly after the decision. In the one exception, the employer did not pay any of the RM8,506 ordered. Tenaganita filed an enforcement action, but could not locate the employer to serve the documents. The domestic worker complainant in this case returned home with nothing for her two years of work;
- (8) The labour officer in two cases advised the complainants to withdraw their claims and file elsewhere — the police, or the Department of Industrial Relations. In the criminal case, the labour officer wrote to the Immigration Department to request the worker be allowed to change employers to escape an abusive workplace. The case worker considered that a labour officer making such a request extremely unusual;

- (9) One case was closed because the complainant could not be located; and
- (10) Three cases were withdrawn because the parties settled outside of the DoL. In one case the employer paid the claim before the first mention. In another, Tenaganita mediated a settlement, and in the third the worker accepted an undisclosed sum because she was being threatened by the employer to withdraw the case. She had also filed a criminal complaint against her employer for rape.

7.2.2 Labour Inspections

A third enforcement mechanism available under the Employment Act 1955 is an inspection of a worksite. Malaysia is a party to the ILO Labour Inspection Convention 1947 (No 81), which requires Malaysia to “maintain a system of labour inspection in industrial workplaces”.⁴⁴² A labour inspection, under international law, is intended to “secure the enforcement of the [law] related to conditions of work and protection of workers”, to provide information and advice to employers, and notify the department if abuses are occurring.⁴⁴³

Accordingly, the Employment Act 1955 gives the Director General of the DoL broad powers to enter and inspect all places of employment. Under the Malaysian law, this is not limited to industrial workplaces. The DoL can order an inspection without notice at any time, “where [the labour officer] has reasonable grounds for believing that employees are employed” and to “make any inquiry which he considers necessary in relation to any matter within the provisions of this Act”.⁴⁴⁴ The officer does not have to suspect any violations of the law, although this is often the basis for an inspection.

The officer can also access company records and books, and can ask questions of any person believed “to be acquainted with the facts and circumstances”, and that person is legally bound to answer truthfully every question, except if it would expose him or her to criminal charges.⁴⁴⁵

Trade union representatives said they request inspections frequently to improve conditions at workplaces. Inspections are useful when an employee is still employed and does not wish to complain publicly about conditions because of the risk of employment termination. Employers are not told the identity of a complainant when an inspection is conducted.⁴⁴⁶ An inspection can result in remedial steps that benefit the entire workforce,

⁴⁴² ILO, Labour Inspection Convention, 1947 (No. 81), Convention Concerning Labour Inspection in Industry and Commerce (Entry into force: 7 Apr 1950), Article 1.

⁴⁴³ ILO, Labour Inspection Convention, 1947, No 81, Article 3.

⁴⁴⁴ Employment Act 1955, Section 65.

⁴⁴⁵ Employment Act 1955, Section 67.

⁴⁴⁶ Interview with the Department of Labour Peninsular Malaysia, Putrajaya, 27 April 2015.

not just an individual complainant. As explained by one trade union representative in Penang:

We presume that if one worker complains to us, other workers are having the same issues in the company. The company is not going to violate the rights of only one worker, definitely they will do it to everyone ... So when we make a report to the Labour Department it means that they will do a routine 'spot-check' and they will do their investigation.⁴⁴⁷

The principal complaint about labour inspections is the absence of a clear and transparent procedure or timeline for investigation. Migrant workers and embassy staff noted that they report violations to the DoL, but do not know whether an inspection takes place, and if so whether violations were discovered. This can leave migrant workers feeling exposed and frustrated (see Box 13). The DoL confirmed that its officers do not routinely inform complainants, whether the worker or their advisors, of their findings or of action taken. The DoL noted that if a complainant specifically requests updates and provides a contact number, the officer will usually keep them informed. However, officers do not inform complainants about this possibility.

The Employment Act 1955 is also ambiguous regarding the action labour inspectors can or must take if they find evidence of labour violations, for example whether they can order payment of unpaid wages. The only clear authority is to investigate and then refer the matter to prosecution, but this occurs rarely (see Box 13).

In 2015, the DoL conducted more than 47,000 labour inspections and issued 6,500 citations for violations of labour standards. It referred just seven cases for criminal prosecution (see Box 13).⁴⁴⁸

Box 13: Ganesh and Buddhi's Case – Inspection of a Restaurant

Ganesh and Buddhi came to Malaysia from Nepal in 2014 to work in a 24-hour restaurant. They used agents in Nepal to secure the positions and were required to pay large fees, for which they had to take loans at high interest rates. They were promised a wage of RM900 per month plus overtime, totalling RM1,200, as well as two rest days each month. When they arrived in Malaysia, the restaurant manager told them they would receive only RM700 with no overtime payment, despite having to work 12-hour shifts. They were not allowed to leave the restaurant or the room upstairs, where they slept on the floor, and received only two half-days each month.

⁴⁴⁷ Interview with MTUC Penang Division, Perai, Penang, 8 May 2015.

⁴⁴⁸ US State Department. Country Narrative: Malaysia, "Trafficking in Persons Report July 2016", <http://www.state.gov/j/tip/rls/tiprpt/countries/2016/258814.htm>, 2016.

We were so unhappy, especially that we were paid so little despite all our hard work, and we wanted to complain, but we couldn't leave [because of our debts]. A Nepali security guard used to come into the restaurant, and one day I asked him for advice. He directed me to the MTUC and said they can help workers.

We called MTUC and told them about our situation. We don't know what happened, but one day five government officers came to the restaurant and asked all of the workers a lot of questions — What is your work? What are your hours? Do you have time off?

The boss wasn't there then, but when he came back he was very angry. He yelled at us, "Who has complained!" He said we should be happy because he never deducted money for food or lodging from our pay. Then he made us sign a letter to the labour department saying that we were paid the minimum wage and we were given one rest day every week. If we didn't sign, he held back our salaries. So we all signed.

We don't know what else has happened because we haven't heard anything more from the labour department. We think they are just on the side of the employers, and we are very frustrated.

In January 2016, the MTUC shared the outcome of this case: We sent a letter to the Labour Department so they went to do the inspection, where the workers explained the problems. Then we went to meet with the employer and explained his obligations to the workers. But then we lost contact with Ganesh and Buddhi. We found out that the Department of Labour had dropped the case, based on the letter signed by the employees — it didn't do any further investigation or confirm with the workers directly. We heard that the employer fired both of the men because of their complaint — one was sent home and we don't know where the other one is living.

7.2.3 Investigations and Criminal Prosecutions

Most violations of the Employment Act 1955 by employers are criminal offences — for example, failure to pay wages due under the Act. The DoL has wide powers to investigate possible violations and to summon any person who may have information about a violation whenever the DoL:

79. (1) ... has reasonable grounds for suspecting that an offence under this Act [the Employment Act 1955] has been committed, or wishes to inquire into any matter dealt with by this Act or into any dispute as to such matter or into the death of or injury to an employee ... or into any matter connected with the keeping of registers and other documents, or whenever any person complains to the Director General [Department of Labour] of any breach of any provision of this Act...⁴⁴⁹

⁴⁴⁹ Employment Act 1955, Section 79(1).

If, following these inquiries, the DoL thinks that an offence has been committed, it “may institute such criminal proceedings as the [DoL] may deem necessary”.⁴⁵⁰

Information about offences may arise in the hearing of a complaint, or during labour inspection. Individuals may report violations of the Employment Act 1955 to the DoL, but the researchers were not able to identify any form or procedure for such a report.

Before the DoL brings a prosecution under the Employment Act 1955, the labour officer must obtain the written consent of the PP.⁴⁵¹ Prosecutions under the Employment Act 1955 are tried in a Sessions Court or First Class Magistrates’ Court. The penalties under the Employment Act 1955 are payable as fines to the state. However, the court does have discretion to instead direct the payment to be made to the employee as a form of compensation.⁴⁵²

Few of the stakeholders interviewed were familiar with the Department’s prosecution powers under Section 79 of the Employment Act 1955. The few who were aware believed that prosecution is rare and were frustrated that more exploitative employers are not prosecuted. One church-based organisation said she had only seen employers prosecuted or fined when a worker died, but in her view, “we shouldn’t get to that extreme before we prosecute the employer. You have to solve the situations from the little things as they are growing.”⁴⁵³

The DoL itself stated that in 2015, labour officers instituted 250 criminal prosecutions, and that officers have a key performance indicator of two prosecutions per year. Officers have discretion as to the types of cases they refer for prosecution. The DoL representative noted that initiating a prosecution is time consuming, as it requires preparation of many documents and the gathering of statements, followed by a briefing to the PP. He believed that officers did not have time to do multiple cases per year.⁴⁵⁴

7.2.4 Summary

Overall, lawyers, NGOs and embassies reported favourable views of the DoL, describing it as “quite ok” or “generally fine”. They believed, however, that the Department was under-resourced to effectively monitor all workplaces in Peninsular Malaysia or to thoroughly investigate violations. The migrant workers’ views of the DoL differed depending on their experience.

Some stakeholders expressed frustration that labour officers appear to lack the will to enforce the law against employers, for example through prosecutions or proactive

⁴⁵⁰ Employment Act 1955, Section 79(2).

⁴⁵¹ Employment Act 1955, Section 85.

⁴⁵² Employment Act 1955, Section 87.

⁴⁵³ Interview with the AOHD, Kuala Lumpur, 21 January 2015.

⁴⁵⁴ Interview with the DoL, 2 March 2016.

investigations. The experience of Ganesh and Buddhi, described in Box 10, is an example of a case being dropped prematurely. A source in the DoL agreed with this assessment, and said that he believed labour officers have become less assertive because they are afraid that angry employers will complain about them to their superiors, which could damage their reputations and careers.

Another former labour officer who now advises workers with claims said that labour officers are not receiving sufficient training to handle migrant worker cases, and do not understand the specific barriers migrant workers face when bringing a case against an employer.⁴⁵⁵

Despite these reservations, the DoL is clearly one of the most important institutions for providing redress to migrant workers who experience problems at work. It has relatively broad authority to identify wrongdoing and seek a resolution, and can provide swift, affordable and fair outcomes if it works effectively, and if enough migrant workers are aware of its role.

7.3 Department of Industrial Relations and Industrial Court

A second path to redress for migrant workers who suffer harms at work is the industrial system, comprising the Department of Industrial Relations and the Industrial Court. The Industrial Relations Act 1967 governs this system. It emphasises harmony in the workplace and the overall industrial system, and justice for both employees and employers.

Since 1989, the industrial system has had jurisdiction to resolve cases of dismissal “without just cause or excuse”, commonly called unfair dismissal.⁴⁵⁶ Unfair dismissal claims may be relevant to migrant workers who, for example, are terminated from employment for participating in union activities, complaining about working conditions, filing a complaint with the DoL, or demanding that they be paid according to their contracts.

Unfair dismissal claims in the Industrial Court can result in reinstatement or compensation in lieu of reinstatement, as well as backwages from the date of termination. If a dismissed worker does not wish to be reinstated and seeks only termination benefits and wages in lieu of notice due under the Employment Act 1955, then a claim can instead be brought to the Labour Court (see section 7.2).⁴⁵⁷

This section describes the jurisdiction and powers of the Department of Industrial Relations and the Industrial Court in unfair dismissal cases, the procedures for filing a claim of unfair dismissal (called making a representation for reinstatement) and perceptions of

⁴⁵⁵ Interview with Dr David Kanagaraj, formerly with the Labour and Industrial Relations Department and now a consultant and trainer on the area of employment, 3 October 2016, by telephone.

⁴⁵⁶ Industrial Relations Act 1967, Section 20(1).

⁴⁵⁷ *Sar-Alam Indah Sdn Bhd v Chua Peng Hee* [2010] 6 CLJ 240.

the use of and effectiveness of this system for migrant workers. It is based on analysis of the Industrial Relations Act 1967, secondary sources including decisions of the Industrial Court, academic papers and documents from the Department of Industrial Relations, and interviews with the former President of the Industrial Court, and other stakeholders. The Department of Industrial Relations did not respond to a request for interview.

7.3.1 Department of Industrial Relations

The Department of Industrial Relations has jurisdiction to receive unfair dismissal claims pursuant to Section 20(1) of the Industrial Relations Act 1967:

Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment;

“Workman” includes “any person employed by an employer under a contract of employment to work for hire or reward”.⁴⁵⁸ The phrase “any person” has been held by the Industrial Court to include a migrant worker, regardless of whether they have a work permit or pass to work in Malaysia.⁴⁵⁹ The Department of Industrial Relations can only accept the representation, however, if it is filed at the office closest to the workplace, and if it is made within 60 days of the dismissal.⁴⁶⁰

“Dismissal” includes “constructive dismissal”. In *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd.*, the Supreme Court of Malaysia ruled that there is a “common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has demonstrated an intention no longer to be bound by the contract. In such situations, the employee is entitled to regard himself as being dismissed and walk out of his employment”.⁴⁶¹ Many migrant workers are “constructively dismissed”. Of the 50 migrant workers interviewed for this study, most had left their employment because the employer had broken fundamental terms of the contract, such as non-payment of wages or other harms (see chapter 5).

The Industrial Relations Act 1967 does not define “just cause or excuse”; the courts have stated that the Industrial Court must look at the reasons given by the employer for the termination and whether “the excuse or reason has or has not been made out”.⁴⁶²

⁴⁵⁸ Industrial Relations Act 1967, Section 2.

⁴⁵⁹ *Ali Salih Khalaf v Taj Mahal Hotel*, Industrial Court of Malaysia, Case No. 22-27/4-1580/12, Award No. 245 of 2014, unpublished.

⁴⁶⁰ Industrial Relations Act 1967, Sections 20(1) and 20(1A).

⁴⁶¹ [1988] 1 MLJ 92 at 94.

⁴⁶² *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] MLJ 2.

Retaliation for membership of a union or participation in the activities of lawful union are prohibited by the Industrial Relations Act 1967,⁴⁶³ so these cannot be a “just cause or excuse”.

Officers at the Industrial Relations Department cannot make decisions in unfair dismissal cases. Their role is to arrive at “an expeditious settlement” between the parties. In achieving this, the officer must take “such steps as he may consider necessary or expedient” to reach the settlement.⁴⁶⁴ This can include directing the parties to provide relevant information within a specified timeframe, and to direct the parties and anyone else “connected directly or indirectly with the dismissal” to attend conferences presided over by the officer.⁴⁶⁵

These conferences, called conciliation meetings at the Department of Industrial Relations, are attended by the parties. They can be assisted by a representative of a trade union or employers’ organisation, but cannot be represented by a lawyer.⁴⁶⁶ If the dismissed worker fails to attend any of the conferences “without reasonable excuse”, their representations are deemed withdrawn.⁴⁶⁷ There is no similar provision for employers.

A handbook on representations for reinstatement explains that the role of the officer, called a Peace Officer in the handbook, is to explain the process, and to give opinions and advice to the parties based on the facts of the case, legislation, and decisions of the Industrial Court. If the parties reach a settlement, the officer will prepare a Memorandum of Agreement to be signed by the parties and witnessed by the officer, and the case will be closed.⁴⁶⁸

If the officer handling the representation becomes “satisfied that there is no likelihood” of the parties settling through conciliation, they must notify the Minister of Human Resources.⁴⁶⁹ The Industrial Relations Act 1967 does not set any timeline for the industrial relations officer to make this determination or for any specific steps in the process, such as timelines for conciliation and resolution.

7.3.2 Referral by the Minister for Human Resources

The Minister has discretion under Section 20(3) of the Industrial Relations Act 1967 to either close the case, or refer it to the Industrial Court for adjudication. The Minister may make the reference if they think it “fit”. The courts have confirmed that the Minister’s discretion

⁴⁶³ Industrial Relations Act 1967, Sections 4 and 5.

⁴⁶⁴ Industrial Relations Act 1967, Section 20(2).

⁴⁶⁵ Industrial Relations Act 1967, Section 20(8).

⁴⁶⁶ Industrial Relations Act 1967, Sections 20(5) and 20(6).

⁴⁶⁷ Industrial Relations Act 1967, Section 20(9).

⁴⁶⁸ Department of Industrial Relations, Putrajaya, *Representasi Pemulihan Kerja [Representations for Reinstatement]*, 2013, pp. 8-9.

⁴⁶⁹ Industrial Relations Act 1967, Section 20(2).

is wide, subject to errors of law, improper motive or excess of jurisdiction,⁴⁷⁰ unless they consider the claim to be frivolous or vexatious.⁴⁷¹

The higher courts do review the Minister's decisions, and occasionally overturn them. For example, in August 2016, the High Court overturned the decision of the Minister to refer a claim for reinstatement. The 895 employees in that case had been dismissed from a steel plant when it closed, and thus the High Court said reinstatement was not a real possibility and the matter was outside the jurisdiction of the Industrial Court.⁴⁷²

7.3.3 The Industrial Court

Powers of the Industrial Court in Unfair Dismissal Cases

The Industrial Court is different to the civil courts in that it is driven by “social justice as distinguished from legal justice”, and thus has broad powers to reach a just outcome.⁴⁷³ According to the Industrial Relations Act 1967, the Court “... shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form”.⁴⁷⁴

The Industrial Relations Act 1967 does not prescribe specific remedies in unfair dismissal cases, but rather gives the Industrial Relations Court wide discretion to “include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling [the matter]” and is not “restricted to the specific relief claimed by the parties”.⁴⁷⁵ Nevertheless, in practice and pursuant to guidelines in the Industrial Relations Act 1967,⁴⁷⁶ the award commonly includes:

- (1) reinstatement of the worker “in his former employment”,⁴⁷⁷
- (2) payment of backwages from the date of dismissal to the last day of the hearing, up to a maximum of 24 months of backwages. Backwages are calculated based on the last-drawn wage of the dismissed worker,⁴⁷⁸ and

⁴⁷⁰ *Minister of Labour & The Government of Malaysia v Lie Seng Fatt* [1990] 1 CLJ 195.

⁴⁷¹ *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665.

⁴⁷² Kow Gah Chie, “Court quashes minister’s referral as reinstatement not possible”, *Malaysiakini*, 19 August 2016, <https://www.malaysiakini.com/news/352923>.

⁴⁷³ *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* [2004] 3 ILR i at pp. xiv and xv.

⁴⁷⁴ Industrial Relations Act 1967, Section 30(5).

⁴⁷⁵ Industrial Relations Act 1967, Section 30(6).

⁴⁷⁶ According to Section 30(6A) of the Industrial Relations Act 1967, the Court must consider the guidelines set out in the Second Schedule when making an award.

⁴⁷⁷ Industrial Relations Act 1967, Section 20(1).

⁴⁷⁸ Industrial Relations Act 1967, Second Schedule, Sections 1 and 3.

- (3) if reinstatement is not appropriate, the Industrial Relations Court can award compensation for unfair dismissal. Compensation does not include loss of future earnings, and must also “take into account contributory misconduct” of the dismissed worker.⁴⁷⁹

The Industrial Court theoretically could order other remedies associated with the dismissal as part of their plenary discretion to resolve the case, but it is not the practice of the Court to award payment of losses before the dismissal, such as unpaid wages. Claims for unpaid wages are instead referred to the DoL.

Procedure at the Industrial Court

Proceedings at the Industrial Court are intended to be expeditious and not overly formal or technical. Unlike the Department of Industrial Relations, timelines for the proceedings are set in legislation. The Court must ordinarily fix the first hearing 21 days after receiving the reference, and “where practicable”, make the award within 30 days of the reference.⁴⁸⁰ Cases of unfair dismissal can be heard by a Chairman of the Court sitting alone.⁴⁸¹

The Industrial Court has held that its function in unfair dismissal cases “is twofold, first to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal”.⁴⁸²

The Industrial Court can summon any witness or subpoena any documents or take any other steps “for the expeditious determination” of the case.⁴⁸³ Parties can be represented by their union or their employers’ association or, with the permission of the President, by a lawyer.⁴⁸⁴

The Industrial Court will then hand down a ruling and make an award.⁴⁸⁵ An award from the Industrial Court is binding on all parties.⁴⁸⁶

The only option for a party dissatisfied with an award is to make an application to the Industrial Court for it to refer a “question of law” that arose in the proceedings to the High Court. The bar for making a reference to the High Court is high — the party seeking the reference must convince the Industrial Court that the question is of “sufficient importance”

⁴⁷⁹ Industrial Relations Act 1967, Second Schedule, Sections 4 and 5.

⁴⁸⁰ Industrial Relations Act 1967, Section 30(3).

⁴⁸¹ Industrial Relations Act 1967, Section 23(4). Note that in other cases, the Chairman is joined by one representative of workers and one of employers, each from a panel appointed by the Minister of Human Resources (Industrial Relations Act 1967, Section 21(1)).

⁴⁸² *Milan Auto Sdn Bhd v Wong Seh Yen* (1995) 4 CLJ 449.

⁴⁸³ Industrial Relations Act 1967, Section 29(g).

⁴⁸⁴ Industrial Relations Act 1967, Section 27.

⁴⁸⁵ Industrial Relations Act 1967, Section 20(3).

⁴⁸⁶ Industrial Relations Act 1967, Section 32(1).

and that the Industrial Court’s determination of the question raises “sufficient doubt” to merit the reference.⁴⁸⁷ The Industrial Court’s decision whether to refer the question of law is final and conclusive, and cannot be appealed or challenged in any court.⁴⁸⁸

7.3.4 Effectiveness of the Industrial System for Migrant Workers

The strongly held view among lawyers and civil society organisations was that very few migrant workers use the industrial relations system to seek redress.

The Department of Industrial Relations itself stated that on average only around two percent of representations made under Section 20(1) to the Department of Industrial Relations were made by foreign nationals.⁴⁸⁹ In the first roundtable held for this study, court representatives stated that, in almost all cases, foreign nationals before the Industrial Court were highly paid expatriates rather than migrant workers.⁴⁹⁰

The researchers also wrote to the Bar Council Industrial and Employment Law Committee to identify migrant worker cases at the Industrial Court. One lawyer said the only case he knew of had involved the “retrenchment” (also called redundancy: dismissal when a worker’s post is no longer required) of all employees by a company, which had included some migrant workers. Two other lawyers said they had occasionally taken *pro bono* cases for migrant workers, one of which is set out in Box 14 (*Taj Mahal* case).

One reason for this is that the industrial system may not be appropriate for many migrant workers in distress. The Bar Council Legal Aid Centre suggested that few migrant workers seek reinstatement and instead wish to be paid wages they are owed before their employment termination, and then to return home.⁴⁹¹ However, more migrant workers may be eligible than commonly believed if constructive dismissal cases are also included.

Beyond questions of remedies, several barriers may also limit the use of the system by migrant workers as described in the following section.

Awareness

Knowledge and awareness of the system among migrant workers was believed to be low. None of the migrant workers who participated in this study had made representations to the Department of Industrial Relations, and none mentioned awareness of the possibility. Legal aid providers and civil society organisations also said they rarely advise migrant workers about the Department of Industrial Relations for the other challenges listed next.

⁴⁸⁷ Industrial Relations Act 1967, Sections 33A(1) and (3).

⁴⁸⁹ Industrial Relations Act 1967, Section 33B.

⁴⁸⁹ Anonymous, email from the Department of Industrial Relations Malaysia, 14 March 2014.

⁴⁹⁰ Report of the Roundtable, January 2015.

⁴⁹¹ Interview with Bar Council Legal Aid Centre, Kuala Lumpur, 21 January 2015.

Efficiency of Procedures

Cases in the industrial system can continue for many years due to the lack of clear timelines for the first two stages of the process. One lawyer noted that, in her experience, it commonly takes between one and two years just for a reference to be made to the Industrial Court, after which it may take another year. The former President of the Industrial Court, in an interview, described several cases in which delay and lack of a legal permit to stay denied workers justice. In one extreme case, the resolution took six years due to various challenges, and the worker had returned home by the time a decision was made.⁴⁹²

Only around half of representations for reinstatement made at the Department of Industrial Relations were resolved through conciliation, according to that Department's figures between 2010 and 2014. Of those not resolved, the Minister refers 60 percent to the Industrial Court, and closes 40 percent (see Table 14).

Table 14 | Resolution of Representations for Reinstatement at the Department of Industrial Relations, Annual Average 2010 to 2014⁴⁹³

	Number	Percentage
Resolved through conciliation	1,997	47
Referred to Industrial Court by Minister	1,373	32
Not referred to Industrial Court	922	21
Total	4,292	100

Source: Department of Industrial Relations, Malaysia⁴⁹⁴

The proportion of cases resolving at conciliation is low compared to other countries.⁴⁹⁵ One study determined that industrial relations officers' lack of powers to make determinations or even recommendations in unfair dismissal cases, is a reason for parties preferring to have the case go to the Industrial Court for an award.⁴⁹⁶

It is possible for a migrant worker to leave Malaysia during proceedings, and a Judge of the Industrial Court noted that expatriates frequently leave the country and return for

⁴⁹² Interview with the Industrial Court, Kuala Lumpur, 5 April 2015.

⁴⁹³ Interview with the Industrial Court, Kuala Lumpur, 5 April 2015.

⁴⁹⁴ Department of Industrial Relations Malaysia, Ministry of Human Resources, *2014 Statistics and Key Indicators*, undated.

⁴⁹⁵ One study noted that in Australia, by contrast, 70 to 75% of individual claims were resolved through conciliation, D. Eden, "Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement", unpublished thesis submitted to Victoria University, March 2012.

⁴⁹⁶ D. Eden, p. iv.

hearing dates. However, migrant workers rarely have the resources or time to travel back and forth.⁴⁹⁷

Outcomes of Industrial Court Cases

Given the limited number of cases available for review for this section of the study, it is not possible to determine whether migrant workers are successful in the Industrial Relations Court. In the two cases described by the President, the workers were unsuccessful. In the *Taj Mahal* case (see Box 14), the worker was successful, but the lawyer who represented the migrant worker in the case said that the money awarded to the worker was never recovered because the employer disappeared.

Box 14: *Taj Mahal* Case – Unfair Dismissal of Refugees

The case of Ali Saleh Khalaf and Taj Mahal Hotel has become well-recognised as a court decision that upholds the rights of refugees, and undocumented persons in general, to access the Industrial Court.⁴⁹⁸

Mr Khalaf (the claimant) was a migrant worker, recognised as a refugee in Malaysia by the UNHCR which had issued him a refugee card. He did not have a work permit or pass permitting him to work. The claimant had worked at a hotel, the Taj Mahal, when he was attacked and beaten during an altercation between guests at the hotel. The following day, his employer dismissed him. The claimant argued this was unjust, and sought reinstatement or wages in lieu of reinstatement.

The Industrial Court referred to Article 8(1) of the Federal Constitution (see section 6.2) and ruled that the term “any person” under the Industrial Relations Act 1967 applies to all workers and all migrant workers, meaning that “both documented and undocumented migrant workers have a right to pursue their rights, if infringed, in the IC [Industrial Court]”.

As the employer did not attend the hearing, the Industrial Court heard the case *ex parte*, and found in favour of the claimant. It then decided that reinstatement was not an appropriate remedy, but that as the claimant had been working for the company for less than 12 months when he was dismissed, he was not entitled to compensation. Instead, the court ordered only backwages for 24 months following the dismissal, minus five percent to take account of any other monies he may have earned in this period. The total order was for RM22,800.

A review of the proceedings in this case shows that it took just over three years to resolve. The claimant was attacked on 10 December 2010 and was formally dismissed after the notice period on 12 January 2011. Conciliation at the Department of Industrial Relations

⁴⁹⁷ Interview with the Industrial Court, Kuala Lumpur, 5 April 2015.

⁴⁹⁸ *Ali Salih Khalaf vs Taj Mahal Hotel*, Industrial Court of Malaysia, Case No. 22-27/4-1580/12, Award No. 245 of 2014, unpublished.

appeared to take around 18 months, as the Minister made the reference to the Industrial Court in September 2012.

Following the reference, the Industrial Court held mentions on five occasions between November 2012 and October 2013, and final oral submissions were made on 18 December 2013. The ruling was made on 13 February 2014.

The lawyer in the case explained that he had taken the case *pro bono* and so the claimant was not charged any legal fees or expenses. However, the claimant had not worked during the proceedings and had relied on UNHCR accommodation and support from “generous Malaysians” to be able to continue with the case. Although the claimant was successful, the lawyer noted that the company Taj Mahal had closed down and the owner had disappeared. Therefore the claimant never received the award.

7.4 Workmen’s Compensation and Insurance

Deaths and permanent disabling of migrant workers in accidents on Malaysian worksites is a significant concern (see chapter 5). Migrants who are injured may have immediate medical costs, rehabilitation costs, and potentially permanent disabilities that can affect their ability to find work in future. Families of deceased migrant workers must pay for funeral expenses, as well as the pain of losing a family member and a breadwinner.

In addition to rights under common law, migrant workers also have access to a no-fault compensation scheme for injuries, occupational diseases and fatalities at work. The WCA is a legacy scheme created by the British administration before independence, and modelled on a long-standing British scheme.⁴⁹⁹ From 1992 it has been available only to migrant workers, as citizens are protected by a broader social security scheme called SOCSO (see section 6.4.3).

This section outlines the WCA model and the associated Foreign Workmen’s Compensation Scheme, the procedures for receiving compensation, and perceptions of the scheme among those who use it. The principal sources of information for this chapter were the trade union, MTUC, DoL, and case files from Tenaganita. No workers were located in Malaysia who had received such compensation as they invariably return home after payment.

The section also includes section a more recent and separate insurance scheme for workers in Malaysia that covers hospital and surgical expenses.

⁴⁹⁹ The definition of workman and structure of the WCA have many similarities with the United Kingdom’s Workmen’s Compensation Act 1906; see the original legislation at <https://iif.harvard.edu/manifests/view/drs:609323258i>. In the UK, this was replaced by a system of state compensation under the National Insurance (Industrial Injuries) Act 1946; see http://www.legislation.gov.uk/uk/1926/448/pdfs/uk/19260448_en.pdf

7.4.1 Scope of WCA

The WCA was created “to provide for the payment of compensation to workmen for injury suffered in the course of their employment”.⁵⁰⁰

“Workman” under the WCA is defined broadly to include anyone employed under a contract of employment, whether written or oral, and whether paid by time or by work done. Specifically excluded from this definition, however, are persons engaged in non-manual labour earning more than RM500 per month, domestic workers, casual workers and out-workers (those who take piece-work back to their homes).⁵⁰¹

The WCA does not limit the definition of “workman” to Malaysians. It does not state any exclusion of migrant workers whose employment is not covered by a work permit. Section 2(2) of the WCA states that if “in any proceedings for recovery of compensation under this Act it appears to the [DoL] or the Court that the contract of service . . . under which the person was working at the time of the accident was illegal, the [DoL or the Court] may, if having regard to all the circumstances of the case . . . it thinks proper so to do, deal with the matter as if the injured person had at such time been a person working under a valid contract of service”.⁵⁰²

Where a migrant worker took up employment in breach of her immigration pass, a question arises as to the ‘legality’ of the employment contract.⁵⁰³ In such a case, the DoL can still decide to treat the contract as valid, meaning that the WCA applies to the worker. In New South Wales, Australia this power under an identically worded statute is routinely exercised in favour of undocumented workers.⁵⁰⁴

The Malaysian courts have yet to consider the application of the WCA to an undocumented migrant worker. A former labour officer who now also assists injured workers to make claims at the DoL expressed the view that undocumented migrants are also protected and have a right to compensation under the WCA.⁵⁰⁵ However, the DoL disagreed strongly, and

⁵⁰⁰ Workmen’s Compensation Act 1952, preamble.

⁵⁰¹ Workmen’s Compensation Act 1952, Section 2(1), definition of “workman”.

⁵⁰² Workmen’s Compensation Act, Section 2(2). Similar provision is made in worker compensation laws in Australia and UK. This provision is based on a provision of the UK’s Workmen’s Compensation Act 1906, inserted by the Workmen’s Compensation (Illegal Employment) Act 1918, see Hansard HC Deb 24 April 1918, vol 105 cc 1074. See also Guthrie, “Illegal contracts impropriety, immigrants and impairment in employment law”, *AltLawJl* [2002] 43; *Alternative Law Journal* (2002) 27(3), p. 116, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AltLawJl/2002/43.html>.

⁵⁰³ The Australian Courts have taken different approaches to this, see *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312 (the fact that a migrant is working without permission required by law does not invalidate contract) and *Australia Meat Holdings Pty Ltd v Kazi* [2004] QCA 147 (changed statute prohibiting work did make employment contract invalid); see Berg, *Migrants Rights at Work: Law’s Precariousness at the Intersection*, 2015, chapter 6.

⁵⁰⁴ See *Zhang* [2006] NSWCCPD 15 and other cases cited in Berg, 2015, chapter 6, note 54.

⁵⁰⁵ Interview with David Kanagaraj, formerly with the Labour and Industrial Relations Department and now a consultant and trainer on the area of employment, 3 October 2016, by telephone.

asserted that undocumented workers were not covered by the WCA. It described a case in which an international student had been working illegally and had been killed at work, and said that the labour officer had not been able to give any redress to the worker.^{506, 507}

“Employer” is defined broadly as both public authorities and private individuals or companies, or the legal personal representative of a deceased employer. The original sponsoring employer is still deemed to be the “employer” under the WCA, even if the workman has been hired out to another person temporarily.⁵⁰⁸

The WCA model is one of “employer liability”, in which employers are responsible for paying “compensation and any expenses incurred in the treatment and rehabilitation” of a worker, for any “employment personal injury by accident arising out of and in the course of the employment”.⁵⁰⁹

The following injuries and occupational diseases are compensable:

- (1) Occur by accident;⁵¹⁰
- (2) Arise out of and in the course of employment; and
- (3) The injury disables the worker for at least four days of work.⁵¹¹

An accident is deemed to be arising out of and in the course of employment if it takes place on the work premises, or while the worker is travelling to or from work, but only if the worker is obliged to travel in a vehicle provided by the employer.⁵¹² The Courts have further held that an injury resulting from an assault by a subordinate, or death as a result of a heart attack at the workplace are injuries that have arisen in the course of employment.⁵¹³

As a no-fault scheme, the migrant worker is not required to prove any fault or negligence on the part of the employer to receive compensation, and the employee’s own actions or contributory negligence are irrelevant.⁵¹⁴ Whether the worker was violating a law or

⁵⁰⁶ Interview with the Department of Labour, Kuala Lumpur, March 2016.

⁵⁰⁷ Interview with David Kanagaraj, formerly with the Labour and Industrial Relations Department and now a consultant and trainer on the area of employment, 3 October 2016, by telephone.

⁵⁰⁸ Workmen’s Compensation Act 1952, Section 2(1), definition of “workman”.

⁵⁰⁹ Workmen’s Compensation Act 1952, Section 4(1).

⁵¹⁰ Workmen’s Compensation Act 1952, Section 4(3).

⁵¹¹ Workmen’s Compensation Act 1952, Section 4(2)(a).

⁵¹² *QBE Insurance Ltd v Julaiha Bee Bee* [1992] 1 SLR 406.

⁵¹³ *Jacob Samuel Pillay v Han Yang Plantations Ltd* [1938] MLJ 67; *Eastern Mining and Metals Co Sdn Bhd v Wan Absah Bt. Mohamed & Ors* [1974] 2 MLJ 210.

⁵¹⁴ In *Chen Hsin Hsiong v Guardian Royal Exchange Assurance Plc* [1994] 2 SLR 92, it was held that the right to compensation (or to indemnity) subsists even if the workman was contributorily negligent in his own injury.

regulation in respect to her work, such as safety requirements, or disobeying an order of a superior when the accident took place is also not considered. The only exceptions which exclude the worker from compensation are if the worker is proved to have been under the influence of drugs or alcohol at the time of the accident (unless it results in death),⁵¹⁵ or if the disablement or death resulted from a deliberate self-injury.⁵¹⁶

Compensation under the WCA is excluded if the migrant worker is bringing a claim for damages in the civil courts for that injury, against the employer or anyone else, or has succeeded in that claim.⁵¹⁷ Similarly, a worker cannot bring a civil claim for damages (see section 7.5) if she has asked the DoL to decide a claim under the WCA or has agreed the amount of compensation due under the WCA.⁵¹⁸

7.4.2 Foreign Workers Compensation Scheme

Obligation to Purchase Insurance

To ensure that employers are able to meet their statutory liabilities under the WCA, since 1998 the Act has required that employers purchase and maintain accident and injury insurance for all migrant worker employees — a programme called the FWCS.⁵¹⁹ Since 2005, the insurance must cover employers against claims for compensation from migrant workers who suffer death or permanent disablement outside of working hours.⁵²⁰

Failure by an employer to purchase or maintain FWCS insurance is an offence punishable by a maximum fine of RM20,000 or two years of imprisonment or both.⁵²¹ It is also an offence for an employer to deduct the insurance premium from the worker's wages, punishable by a maximum fine of RM5,000 and imprisonment up to one year or both.⁵²² Failure by an employer to maintain insurance does not affect the employer's liability under WCA, though it may make it harder in practice to recover compensation.⁵²³

⁵¹⁵ Workmen's Compensation Act 1952, Section 4(2)(b).

⁵¹⁶ Workmen's Compensation Act 1952, Section 4(3).

⁵¹⁷ Workmen's Compensation Act 1952, Section 41(1).

⁵¹⁸ Workmen's Compensation Act 1952, Section 41(1). In *Alamgir v Cass Printing & Packaging Sdn Bhd* [2015] 7 MLJ 270, the High Court held that insurance under the FWCS does not bar the Court's power to uphold a civil claim for damages for negligence, but the judgment indicates that the Court's attention was not drawn to Section 41(1).

⁵¹⁹ Workmen's Compensation Act 1952, Section 26(1); inserted by the Workmen's Compensation (Amendment) Act 1996. The Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 1998 has since been replaced by the Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005.

⁵²⁰ Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005, paragraph 4(b).

⁵²¹ Workmen's Compensation Act 1952, Section 26(6).

⁵²² Workmen's Compensation Act 1952, Section 26(5).

⁵²³ Workmen's Compensation Act 1952, Section 26 requires the employer to insure; it does not transfer his/her liability to the insurer or relieve him/her of it through failure to insure and there is no

Under FWCS, employers may only use insurance policies approved by the DoL and sold by insurance companies in the private market.⁵²⁴ Only insurers who are included on a list of approved insurers can offer FWCS products.⁵²⁵ As of September 2016, there were 22 participating insurance providers.⁵²⁶ The maximum premium that insurers can charge under the FWCS is RM72 (plus other taxes and fees) per migrant worker employee.⁵²⁷

The researchers viewed a sample of such policies, and they are generally clear, simple and in compliance with the WCA.⁵²⁸ Notably, insurance policies do not specifically exclude undocumented migrant workers from coverage. The policies do include a requirement to provide a copy of the employee's work permit number and expiry date, which, in practice, creates a barrier to insurance for many. Where insurance is issued, the policy does not appear to exclude cover for a worker whose pass is cancelled.

7.4.3 Compensation and Benefits Available to Migrant Workers under the WCA and FWCS

The WCA provides for three types of payments following the death or injury of a worker covered by the WCA:

- (1) Coverage of medical and rehabilitation expenses;
- (2) A lump-sum compensation payment; and/or
- (3) Periodic compensation payments.

Medical and Rehabilitation Expenses

Medical and rehabilitation expenses arise in the event that an injured migrant worker is so injured that a medical practitioner certifies treatment in hospital is necessary.⁵²⁹ In such cases, the employer must transport the worker to and from the hospital at the employer's

contrary court decision under the WCA. In *Alamgir v Cass Printing & Packaging Sdn Bhd* [2015] 7 MLJ 270, the High Court ruled that the existence of FWCS insurance was irrelevant to whether to uphold a civil claim for damages for negligence.

⁵²⁴ Workmen's Compensation Act 1952, Section 26(3); Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005.

⁵²⁵ Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005, Schedule.

⁵²⁶ See the Foreign Workers Centralized Management System, "Participating Insurance Providers", at <http://www.fwcms.com.my/insurance.html>.

⁵²⁷ Workmen's Compensation (Foreign Workers' Compensation Scheme) (Insurance) Order 2005, paragraph 3(2)(a).

⁵²⁸ Four sample policies and disclosure sheets were viewed from: Allianz, Ace Jerneh, Tokio Marine Insurance Group, and MSIG Insurance (Malaysia).

⁵²⁹ Workmen's Compensation Act 1952, Sections 15(1) and (2)(b).

expense.⁵³⁰ The employer is liable to “pay directly to the management of such hospital all ward fees and treatment fees” and any costs of medicines, surgery, wheelchairs, and prosthetics.⁵³¹ The MOHR caps the amount that an employer is liable to pay for each kind of expense.⁵³²

Lump-Sum Compensation

Compensation depends on the severity of the injury. In the most serious case, ie the death of a worker, the WCA sets an amount of RM18,000 to be paid to the worker’s dependents.⁵³³ The insurers must add RM7,000 to this amount, bringing the total compensation payment to RM25,000.⁵³⁴ Funeral expenses up to RM1,000 must also be provided.

The maximum compensation for a disabling injury or combination of injuries is RM23,000.⁵³⁵ Compensation for an injury resulting in partial disability is set in Schedule 1 of the WCA. For example, the loss of one hand will receive 60 percent of the maximum payment, namely RM15,000.⁵³⁶ An injured worker who will require constant attendance will receive an additional 25 percent of the compensation amount.⁵³⁷

Periodic Compensation

If the injured worker is temporarily disabled for 14 days or more, he is entitled to one-third of their monthly salary every two weeks for the duration of the disablement for up to 60 months.⁵³⁸ This periodic compensation will be deducted from the final compensation payment only if it is received for more than 12 months.⁵³⁹ Note that for the period the employees receive a WCA periodic payment, they are not entitled to the paid sick leave required by the Employment Act 1955.⁵⁴⁰

⁵³⁰ Workmen’s Compensation Act 1952, Section 15(1).

⁵³¹ Workmen’s Compensation Act 1952, Section 15(3).

⁵³² Under the Workmen’s Compensation Act 1952 Section 15(3) proviso, the Minister may do this by notification in the Federal Government Gazette. We assume this is the legal basis for the limits set by approved insurance policies.

⁵³³ Workmen’s Compensation Act 1952, Section 8(a).

⁵³⁴ Workmen’s Compensation (Foreign Workers’ Compensation Scheme) (Insurance) Order 2005.

⁵³⁵ Workmen’s Compensation Act 1952, Sections 8(c) and (d).

⁵³⁶ Workmen’s Compensation Act 1952, Schedule 1.

⁵³⁷ Workmen’s Compensation Act 1952, proviso to Section 8(b).

⁵³⁸ Workmen’s Compensation Act 1952, Section 8(e).

⁵³⁹ Workmen’s Compensation Act 1952, proviso (ii) to Section 8(e).

⁵⁴⁰ Employment Act 1955, Section 60F(4).

Table 15 | Summary of Coverage and Benefits under the FWCS

Description of Coverage and Benefits		
(1)	Workmen's Compensation	
	(a) Accidental Death / Permanent Disablement (During Working Hours)	up to RM25,000
	(b) Accidental Death / Permanent Disablement (After Working Hours)	up to RM23,000
(2)	Medical Expenses (Upon Receipt)	
	(a) Ward Charges, including Surgical Ward Treatment Fees	up to RM300
	(b) Operation Fees	up to RM250
	(c) X-ray Fee	up to RM100
	(d) Other Electric Therapeutic Charges	up to RM100
	Total	up to RM750
(3)	Repatriation (Upon Receipt)	
	(a) Repatriation and Funeral Expenses	up to RM4,800

Source: WCA and various sample policies

Box 15: Health Care and Health Insurance for Migrant Workers in Malaysia

Migrant workers whose medical costs are not met under the WCA face high costs in Malaysia. Public hospitals, which generally serve lower income patients, have different rates for citizens and non-citizens. For example, where Malaysian citizens pay just RM1 for outpatient care and have a free first visit to a specialist doctor, non-citizens must pay RM40 for all outpatient visits and RM120 for every specialist visit. Similarly, third class inpatient stays and treatment in hospital is RM3 per day for Malaysians, but is RM260 per day for non-citizens, not including diagnostic tests and medications.⁵⁴¹ A lengthy stay in hospital can easily run up charges of thousands of ringgit, placing an enormous burden on migrants who need treatment.

In 2011, in response to complaints about unpaid bills at public hospitals, the Government instituted a new mandatory health insurance scheme for all migrant workers except domestic and plantation workers. This scheme, called the FWHS, is in addition to the FWCS. Like the FWCS, the employer must give proof of purchase of a FWHS policy when applying for a visa for the worker to enter Malaysia, and to renew a work permit.

⁵⁴¹ See for example Kuala Lumpur Hospital, "Hospital Charges", undated, available at <http://www.hkl.gov.my/index.php/advanced-stuff/hospital-charges>.

The Ministry of Health, which implements the scheme, released a ministerial circular that includes sample policies.⁵⁴² By 2014, 1.7 million migrant workers were insured under the FWHS.⁵⁴³

The FWHS effectively supplements FWCS coverage in that it also covers ambulance charges and inpatient treatment in a hospital, including for any accident or injury suffered at work. FWHS policies provide up to RM10,000 coverage for inpatient treatment, surgery and care in a government hospital.⁵⁴⁴ However, the scheme does not cover outpatient care for coughs, colds or minor injuries, or treatment for chronic illnesses such as heart disease or cancer.⁵⁴⁵ Further, unlike the FWCS, the RM120 annual premium for FWHS is repaid to the employer by the migrant worker through monthly wage deductions.⁵⁴⁶

When a migrant worker who has FWHS insurance arrives at a hospital, they just need to present their identification, and the hospital seeks payment directly from the insurer.⁵⁴⁷ Uninsured migrant workers must pay a deposit of RM1,100 for a “medical or surgical case” and RM2,800 for a gynaecology case, including childbirth.⁵⁴⁸

Interviews with documented migrant workers revealed that only some were aware of their hospital and surgical insurance, and only because RM10 was deducted from their pay each month. None of the workers had received a copy of the policy or were informed about coverage.

7.4.4 Claims Procedures under the WCA

Notice Requirements

The injured worker, or the DoL on the worker’s behalf, must inform the employer of an accident and injury within seven days of it occurring.⁵⁴⁹ The notice can be given orally

⁵⁴² “Working Procedures for Ward Admission and Hospital Charges and Claims of Foreign Employees Covered under the Foreign Workers Health Insurance Scheme in Ministry of Health Hospitals”, Circular No 1 of 2011 (KKM-58/300/1-5 Jld.2), Finance Department, Ministry of Health Malaysia.

⁵⁴³ EPP 1: Mandating Private Health Insurance for Foreign Workers”, Chapter 16: Creating Wealth through Excellence in Healthcare, p. 560, available at <http://www.moh.gov.my/images/gallery/ETP/NKEA%20Penjagaan%20Kesihatan.pdf>.

⁵⁴⁴ Ministry of Health, “SKHPPA (brochure)”, undated, annexed to Circular 1/2011.

⁵⁴⁵ Ministry of Health, “Foreign Worker Hospitalization and Surgical Insurance Scheme”, annexed to Circular 1/2011.

⁵⁴⁶ Ministry of Health, “Foreign Worker Hospitalization and Surgical Insurance Scheme”, annexed to Circular 1/2011.

⁵⁴⁷ “Foreign Workers With Insurance May Enter Hospital Without Deposit”, Press Release, Ministry of Health, 7 January 2011.

⁵⁴⁸ Ministry of Health Malaysia website, “Frequently Asked Questions”, last updated 10 September 2015, available at <http://www.moh.gov.my/english.php/pages/view/160>.

⁵⁴⁹ Workmen’s Compensation Act 1952, Sections 12(1) and (8).

or in writing to any foreman or supervisor of the migrant worker, or sent to the company headquarters, and must state the date of the accident and cause of the injury.⁵⁵⁰ If the notice is late, defective or inaccurate, it will not be a bar to making a claim, if it is proved the employer knew of the accident, or if the employer is not unduly benefitted by the delay, defect or inaccuracy.⁵⁵¹

The employer also has a duty to notify the DoL of any accident which results in death or immediate disablement within 10 days of the accident.⁵⁵² Failure to make this notification is an offence punishable by a maximum fine of RM5,000 for a first offence and RM10,000 for a second offence.⁵⁵³ The DoL stated that usually the employer will have to visit the DoL to make this notice, bringing the employee along in the case that they are injured, and complete a Form G.

Insurance policies also require the employer to notify the insurer of the accident within a short period of time.

Medical Examination and Hospital Admission

After learning of the accident, the employer “may offer to have the worker examined” by a doctor, at no charge to the worker.⁵⁵⁴ The worker is obliged to submit to a requested medical examination and follow any medical instructions or it may affect later payment of compensation.⁵⁵⁵ The Minister of Health designates approved hospitals for treating injured migrant workers.⁵⁵⁶

Compensation Claims and Payments

The WCA and regulations do not detail procedures for making a compensation claim. They require a claim to be submitted within six months of an accident, but do not define who is responsible for making the claim or what is required.⁵⁵⁷

The DoL explained that, in practice, the employer submits the claim by completing a form and detailing the accident, the worker’s regular earnings, where the accident occurred, and the nature of the injury. The employer is also asked for the worker’s passport number,

⁵⁵⁰ Workmen’s Compensation Act 1952, Sections 12(5) and (6).

⁵⁵¹ Workmen’s Compensation Act 1952, Section 12(3).

⁵⁵² Workmen’s Compensation Act 1952, Sections 13(1) and (2).

⁵⁵³ Workmen’s Compensation Act 1952, Section 13(5).

⁵⁵⁴ Workmen’s Compensation Act 1952, Section 14(1).

⁵⁵⁵ Workmen’s Compensation Act 1952, Sections 14(2) to (6), and 15(4).

⁵⁵⁶ Workmen’s Compensation Act 1952, Section 15(1).

⁵⁵⁷ Workmen’s Compensation Act 1952, Sections 12(1), (4). Failure to make a claim within six months is not a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, absence from Malaysia or other reasonable cause.

work permit number and insurance policy number.⁵⁵⁸ An insurance company explained that the employer must also submit a copy of the medical report, medical receipts or death certificate; and a copy of the worker’s valid work permit and valid passport. These requirements may prevent undocumented and uninsured workers from being compensated, but they are not set out in the regulations.

The regulations provide for the employer and worker to agree on an amount of compensation, and to submit the amount to the DoL for approval.⁵⁵⁹ However, the DoL informed the researchers that in practice a labour officer assesses the claim and notifies the employer of this assessment, copying the worker and insurance company. The insurer pays the compensation to the worker and reimburses the employer for any medical expenses. If the worker is deceased, the insurer pays the compensation amount to the DoL, which will disburse it to the worker’s family.⁵⁶⁰

There is no timeline in the law or regulations for the DoL to make the assessment.

7.4.5 Enforcement of WCA and Resolution of Disputes

The DoL is responsible for enforcing the WCA and for resolving disputes between migrant workers and employers over compensation. The DoL resolves disputes under its power to “hold enquiries”:

27. (1) If any question arises under this Act that question shall be settled by agreement between the Commissioner, the workman and the employer and for the purposes of reaching such agreement the Commissioner may hold an inquiry...

An inquiry is initiated when either party applies to the DoL to settle any question. The application must “contain a concise statement of the circumstances of the accident and of the resulting injury”.⁵⁶¹

The regulations confirm that this application can include a verbal complaint from a worker that he has not been compensated or to inquire into the amount of compensation, or a complaint from a dependent about compensation. The DoL will then write this complaint into a form for the complainant to sign.⁵⁶²

⁵⁵⁸ See Form P.P.2 Laporan Kemalangan, available at <http://jtksbh.mohr.gov.my/images/pdf/form/laporkemalangan.pdf>.

⁵⁵⁹ Workmen’s Compensation Act 1952, Section 28; Workmen’s Compensation Regulations 1953, Part IX, Sections 50-51.

⁵⁶⁰ Interview with the Department of Labour Peninsular Malaysia, Putrajaya, 27 April 2015.

⁵⁶¹ Workmen’s Compensation Act 1952, Section 27(2).

⁵⁶² Workmen’s Compensation Regulations 1953, Part VII, Regulations 23 and 25.

A labour officer can also launch an inquiry independently if they “have reasonable cause to believe” an accident has occurred resulting in the injury or death of a migrant worker.⁵⁶³ The officer can inquire into whether an accident occurred, whether a migrant worker was injured, and whether compensation payable under the WCA is being paid. Further, the officer can request an investigation of the circumstances of the accident by the police.⁵⁶⁴

After an inquiry is initiated, the parties can resolve the dispute by agreement, except regarding amounts of compensation due and distribution of compensation payments, which require a decision from the DoL.⁵⁶⁵

If the migrant worker, employer and the DoL do not agree, the labour officer will record that an agreement was not reached, and any party can take the matter to an arbitrator.⁵⁶⁶ A decision of an arbitrator can be appealed to the High Court if the court considers it raises a legal issue of public interest.⁵⁶⁷ A lawyer who has been involved in many worker compensation claims said that the arbitrator will be a Sessions Court judge.⁵⁶⁸ No arbitration cases were reviewed in this study.

Where the employer had effective insurance under the FWCS, the insurance company should meet the employer’s liability, although the study was not able to determine if this happens in practice. Where the employer is not insured, there is a perception that the WCA does not apply. However, the WCA does not make insurance a condition for the employer to have a duty to pay compensation under the WCA.⁵⁶⁹

7.4.6 Effectiveness of the WCA

Accessibility and Awareness of WCA Protections

Expert stakeholders interviewed for this study were critical of the WCA and its operation. First, they believed the system was difficult for migrant workers to access because it relies on employers to insure workers and to submit claims for compensation. Migrant workers can approach the DoL if their employer fails to submit the documentation, but they may not be aware of their right to do so or how to go about it, or they may have already left the country.

⁵⁶³ Workmen’s Compensation Act 1952, Section 27(2).

⁵⁶⁴ Workmen’s Compensation Act 1952, Sections 27(1) and (3).

⁵⁶⁵ Workmen’s Compensation Act 1952, Section 27(1).

⁵⁶⁶ Workmen’s Compensation Act 1952, Section 30.

⁵⁶⁷ Workmen’s Compensation Act 1952, Section 39.

⁵⁶⁸ Interview with Dr David Kanagaraj, formerly with the Labour and Industrial Relations Department and now a consultant and trainer on the area of employment, 3 October 2016, by telephone.

⁵⁶⁹ See W. M. Chan, “Rights of Foreign Workers in Malaysia”, *Competition Forum*, vol. 6(2), 2008, p. 373.

In interviews for this study, private lawyers and the MTUC believed that many migrant workers are left uncompensated because either the employers do not maintain the insurance, do not know about filing compensation claims, or are unwilling or unable to file the claim. They noted that the MOHR does not do outreach regarding obligations under the WCA. Some unscrupulous employers, they had found, would simply terminate a worker and send them home, rather than incur medical expenses and go to the trouble of seeking reimbursement, or submitting a compensation claim.

Entitlements of undocumented migrant workers are also contested. The law does not exclude workers on the basis of citizenship or immigration status, but the DoL perceives that undocumented migrant workers do not have any protections. The claims process described in section 7.4.4, which requires presentation of the passport and work permit, obstructs undocumented workers from receiving compensation.

Access to the WCA inquiry process at the DoL is relatively accessible, requiring only a verbal report. However, information about this option is not set out on the DoL or MOHR websites.

Fairness and Transparency of Procedures

Stakeholders were also critical of the claims process. Some aspects of the procedures are not transparent as they are not set out clearly in the law or regulations.

The MTUC also felt that the procedures for payment of compensation were too lengthy, as preparation of the medical report alone could take longer than three months. In their experience, seriously and permanently injured migrant workers cannot wait in Malaysia for this length of time without means of support. The MTUC noted that some employers would allow the worker to stay in the employer-provided accommodation but would not provide any food. Others would push the worker to return to work or go home.⁵⁷⁰

Although the law provides for partial wage payments during the period of claim assessment, an expert on worker's compensation said that many employers, and labour officers, were not aware of this and the workers did not regularly receive these payments.⁵⁷¹

Where workers do make complaints to the DoL, the inquiries appear to be handled efficiently. In one case reviewed in Tenaganita's files, a worker complained to the DoL after the employer refused to submit the claim documentation following an accident. The worker had been employed as an airport cargo handler and lost two fingers in a workplace accident. After the worker complained to the DoL, with Tenaganita's assistance, the matter was resolved and the compensation paid within six weeks from the date of filing.

⁵⁷⁰ Interview with MTUC, Selangor, 6 November 2015.

⁵⁷¹ Interview with Dr David Kanagaraj, formerly with the Labour and Industrial Relations Department and now a consultant and trainer on the area of employment, 3 October 2016, by telephone.

The claims process relies on the employer being identifiable and outsourcing has complicated this. In one case reviewed for this study, a female migrant worker employed as a waitress had an accident and could not walk for several weeks. Her employer, an unlicensed outsourcing agent, covered her medical expenses directly, but terminated her employment and refused to submit a claim for compensation. Advocates for the worker sought to contact the agent a number of times, and submitted a complaint to the DoL, but received no response. Eventually, the worker could not wait any longer or she would have become undocumented, and so she went home without any compensation. The case was closed. It was not clear why the owner of the restaurant was not also contacted.

Outcomes for Migrant Workers

Even if migrant workers successfully obtain compensation under the WCA, several interviewees noted that the coverage and compensation available under the WCA is wholly inadequate to cover workers' medical costs and expenses, or to provide just compensation for death or permanent injury. These amounts have not increased since the law was revised in 1996, even to keep up with inflation. Even the High Court has opined that:

... the compensation to be awarded under the WC [Workmen's Compensation] Act is unrealistically low and not appropriate for injuries caused in modern day industrial accidents.⁵⁷²

Immediate medical costs can easily exceed coverage amounts, particularly if the injury or illness is serious. The Nepali embassy noted in an interview for this study that when the coverage fell short, as it often did, the embassy would ask the employer to cover the full amount. Some employers agreed, but most were "reluctant".⁵⁷³

Employers can also deduct expenses from the compensation payment, and in some cases workers are left with very little. In one case described by the MTUC, a man had lost his hand up to his wrist and submitted a claim for compensation. While waiting for the claim to be processed, the employer paid the worker advances on his salary so that he could stay in Malaysia. The advances were deducted when the payment arrived, so the worker received nothing.⁵⁷⁴ It is not clear why the employer was not paying the partial wage payments as required under the WCA.

The High Commission of Bangladesh noted that the construction industry employs many undocumented Bangladeshis, and the labour attaché deals with reports of accidents, including deaths, on a daily basis. Because these workers are not insured, no money is provided to repatriate the remains, or to pay the family compensation. The embassy will often request the employer make a "humanitarian" contribution to the family of the bereaved, but the request is not always honoured.⁵⁷⁵

⁵⁷² *Alamgir v Cass Printing & Packaging Sdn Bhd* [2015] 7 MLJ 270, at para 53.

⁵⁷³ Interview with the Embassy of Nepal, Kuala Lumpur, 28 September 2015.

⁵⁷⁴ Interview with the Embassy of Nepal, Kuala Lumpur, 28 September 2015.

⁵⁷⁵ Interview with the Bangladesh High Commission Kuala Lumpur, 5 June 2015.

7.4.7 Summary

The WCA provides a mechanism compensating workers and their families following workplace accidents, injuries, and deaths. This is extremely important given the dire impacts that a permanent disability can have on a worker or family's future employment and earning capacity.

Nevertheless, the WCA is outdated and the amounts of compensation are insufficient to provide adequate compensation. The procedures, while relatively simple, are not easily accessible, and give too much power to the employer. The law, while seemingly protecting undocumented migrant workers, has sometimes been interpreted by the DoL as excluding any worker for whom the employer has not purchased insurance. This interpretation excludes a large, and potentially the most vulnerable, population from any protection.

Given these challenges, many interviewees and participants in the roundtable believed that the WCA should no longer be operational, and that all migrant workers be brought under SOCSO with Malaysian workers. However, even if this occurred, compensation for undocumented workers and outreach to workers to explain SOCSO and its procedures would still need to be considered.

7.5 Civil Litigation in the Courts

The civil courts resolve disputes between private parties, such as disputes over a contract, personal injuries caused by negligence, family matters, and commercial and banking disputes. They also hear requests for judicial review of government decisions. Decisions of the civil courts, because they have precedential value, can set social and commercial norms of acceptable behaviour.⁵⁷⁶

A civil case is brought by an individual claimant or corporation (the plaintiff) against another party (the defendant). The plaintiff alleges harm caused by the defendant, and/or that the claimant has a legal right against the defendant, such as for unpaid wages.

This section provides a brief outline of the courts and civil procedure, starting with the filing of a claim, and ending with the enforcement of a judgment. It then sets out perceptions and experiences of migrant workers and stakeholders who have used the courts to resolve civil claims brought by migrant workers.

⁵⁷⁶ See for example, H. Genn, "What is Civil Justice for? Reform, ADR and Access to Justice", *Yale Journal of Law and Humanities*, 24(1), 2013.

7.5.1 The Courts in Malaysia

The jurisdictions of the various courts in civil matters are set out in Table 16. These jurisdictions are defined by the Constitution, Rules of Court 2012, and Subordinate Courts Act 1948.

Table 16 | Hierarchy of Courts in Malaysia

Court	Civil Jurisdiction
Superior Courts	
Federal Court	Hears appeals from the Court of Appeal.
Court of Appeal	Hears appeals from the High Courts.
High Courts	Unlimited original jurisdiction, but usually confines itself to trying matters for which the subordinate courts do not have jurisdiction, for example claims exceeding RM1,000,000. The High Courts also hear appeals on questions of law or in civil matters where the amount in dispute exceeds RM10,000.
Subordinate Courts	
Sessions Courts	Any matter involving a motor vehicle accident, landlord and tenant disputes, or involving a claim up to RM1,000,000.
Magistrates' Court — First Class Magistrate	Any civil case where the amount in dispute is up to RM100,000.
Magistrates' Court — Second Class Magistrate	Any civil case where the amount in dispute is up to RM10,000.
Magistrates' Court — Small Claims Division	Any civil case where the amount in dispute is up to RM5,000.

Civil Claims

The vast majority of migrant worker cases for personal injury or contract violations are heard in the subordinate courts. Migrant workers have the same rights as citizens to bring civil claims.⁵⁷⁷ For example, they may bring claims against employers for violating the employment contract, for negligence leading to injury at work, or for pain and suffering following abuse. Workers may also have claims against the Government, for example for wrongful imprisonment or violation of constitutional rights.

Civil remedies depend on the nature of the claim and the applicable law (see section 6.1 on sources of legal rights). For example, plaintiffs can ask a court to declare a contract

⁵⁷⁷ Federal Constitution, Article 8.

void, or to enforce a contract, among other things. In a personal injury case, the Civil Law Act 1956 provides for payment of compensation for losses caused by the injury. The courts can order amounts usually much greater than those available through the Labour Court or the WCA.

Judicial Review and Constitutional Interpretation

Migrant workers who believe that their constitutional rights have been violated by law or action of the Executive can seek judicial review of the policy or decision in the High Court. The Courts of Judicature Act 1964 empowers the High Court to issue “to any person or authority” any order or writ “for the enforcement of the rights conferred by Part II of the Constitution”.⁵⁷⁸

The Federal Court, Malaysia’s highest court, decides questions “on the effect of any provision” of the Constitution. Other courts refer constitutional questions to the Federal Court when they arise in a case.⁵⁷⁹

Note that the Federal Court in 1976 ruled that decisions made under the Immigration Act 1959/63 are precluded from judicial review, except on procedural grounds.⁵⁸⁰

The problem of dealing with illegal immigrants is a matter of public policy to be decided by Parliament and by the Executive ... the court should simply apply the law, no matter how harsh its effect may be on the immigrant.⁵⁸¹

In that case, the appellant non-citizen argued that his detention under the Immigration Act 1959/63 was unlawful because he had not been served the order of detention, had not been given a hearing to challenge the detention, and was being held indefinitely because he did not have the correct documents to be deported. Although outside of the immigration context, these circumstances would be against the principles of procedural justice, the Federal Court held that because the Immigration Act 1959/63 did not make provision for these rights, he was not entitled to them.

⁵⁷⁸ Courts of Judicature Act 1964, Act 91, Section 25(2), Schedule 2. Writs that can be ordered include, but are not limited to, the prerogative writs under British common law, namely *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*.

⁵⁷⁹ Federal Constitution, Articles 18(2) and 128(2).

⁵⁸⁰ Immigration Act 1959/63, Section 59A.

⁵⁸¹ *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156.

7.5.2 Procedure for Resolution of Civil Claims

Civil claims procedure has been broadly the same for all courts since the introduction of the Rules of Court 2012. The main steps in the process in the subordinate courts are as follows:

- (1) **Initiating a Claim:** To initiate a claim in the civil courts, the plaintiff files a document called a writ of summons.⁵⁸² The summons is accompanied by a concise statement of the nature of the claim and the relief or remedy sought.⁵⁸³ The plaintiff chooses the appropriate court to file the writ based on the amount of the claim and the location of the court. The court is usually located in the jurisdiction where the cause of action arose, or where the defendant lives or has a place of business;⁵⁸⁴
- (2) **Service:** The plaintiff must serve the writ of summons, or any other application, on the defendant so that they have knowledge of the proceedings. The papers can be served either in person or by registered post to the last known address of the individual, or registered address of a corporate defendant;⁵⁸⁵
- (3) **Appearance by the Defendant:** The defendant has 14 days to respond to the writ of summons by filing an "appearance".⁵⁸⁶ If the defendant makes no response, the court will order in favour of the plaintiff by default, called a default judgment;⁵⁸⁷
- (4) **Pre-Trial Preparations:** If the defendant files the appearance, the court will set a date for a first mention, and the parties will gather further documentary evidence and witness statements.⁵⁸⁸ During this time the parties can make many other applications (called interlocutory applications), for example to have documents produced, or seek summary judgment.⁵⁸⁹ Courts usually recommend the parties try to mediate the matter, with a judge or registrar acting as a mediator;⁵⁹⁰

⁵⁸² Rules of Court 2012, Order 6, Rule 2. Some courts, eg in Kuala Lumpur, Selangor, Ipoh, Johor Bahru and Penang, are equipped with e-filing facility, which enables a smoother process. In states that only accept manual filing, the process of sealing and extracting the writ can take several days.

⁵⁸³ In simple cases, where there are no substantial disputes over fact and the matter can be decided on a question of law, an originating summons, rather than a writ of summons, is filed. This is not relevant to the cases described by migrant workers however, so it is not discussed further.

⁵⁸⁴ Courts of Judicature Act 1964, Section 23(1).

⁵⁸⁵ Service on an individual defendant is effected by personal service or by sending the papers by prepaid registered post to the defendant's last known address (Order 10 Rule 1, Rules of Court 2012). As for corporations, the plaintiff can serve the documents by leaving a copy at the registered office, sending a copy to the principal office, handing a copy to the company secretary or director, or sending the documents via registered post to the company (Order 62 Rule 4(1) of the Rules of Court 2012 and Section 350 of the Companies Act 1965).

⁵⁸⁶ Rules of Court 2012, Order 12.

⁵⁸⁷ Rules of Court 2012, Order 93, Rules 6 and 8.

⁵⁸⁸ Rules of Court 2012, Order 38, Rule 2.

⁵⁸⁹ Rules of Court 2012, Order 14, Rule 1.

⁵⁹⁰ See Mediation Act 2012.

- (5) **Trial:** At the trial, both parties can present witnesses, who will be examined and cross-examined. At the end, the parties can sum up their case for the court. The plaintiff must prove their case on the balance of probabilities (also known as the “preponderance of evidence”);
- (6) **Settlement:** If the plaintiff is successful in the claim (with or without a trial), the court orders the defendant to pay them the amount won, costs and interest.⁵⁹¹ If the claim is not successful, the plaintiff must pay the costs of the defendant;

There is a prescribed scale of costs for claims in the subordinate courts. For a claim of up to RM5,000 (small claims), basic costs of RM575 may be claimed after the case is resolved. For claims up to RM20,000, costs of RM2,450 may be claimed; and

- (7) **Enforcement:** If the defendant fails to pay the money owed, the plaintiff can institute a new claim to enforce the judgment, called execution.⁵⁹² The various execution methods include applying to the court to take possession of or seize and sell the defendant’s property, petitioning for the defendant’s bankruptcy or winding up, seeking an order for garnishment of the defendant’s income, or to taking committal proceedings for contempt of court.

At an early stage of proceedings, defendants are likely to ask the court to order “security for costs” if the plaintiff is “ordinarily resident outside” Malaysia. This security is an amount held by the court to cover the defendant’s costs if the plaintiff is unsuccessful.⁵⁹³ The amount of security is at the discretion of the court.⁵⁹⁴

Several stakeholders suggested a security for costs order is made in most migrant worker cases, but a review of the case law suggests that finding someone “ordinarily resident” depends on the circumstances of the case. The Malaysian courts have previously looked to the British courts for guidance on this issue.⁵⁹⁵ The House of Lords decided that migrants on a temporary student visa are “ordinarily resident” in the UK; and a migrant who has overstayed their visa could still be “ordinarily resident”.⁵⁹⁶ On this basis, a migrant who is

⁵⁹¹ Interest is 4% per annum from the date of judgment to settlement of claim.

⁵⁹² The time limit for taking enforcement action is 21 days from the order of proceedings against the government, and 12 years in all other cases (Limitations Act 1953, Section 3; Government Proceedings Act 1956, Section 33).

⁵⁹³ Rules of Court 2012, Order 23, Rule 1.

⁵⁹⁴ Rules of Court 2012, Order 59, Rule 22.

⁵⁹⁵ *T.P.C. (M.W.) v. A.B.U. & Anor* [1983] CLJ (Rep) 881; *Neil Duncan Gillies & Anor v Liew Mei Ling & Ors* [2010] 4 MLJ 179, Case No. F25-01-2010 High Court, 8 April 2010.

⁵⁹⁶ *R v Barnet London Borough Council, Ex parte Nilish Shah* [1982] QB 688: ordinary residence refers to “abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration” (*Mark v Mark* [2005] UKHL 42 at pp. 29 to 36).

employed in Malaysia or who has stayed in Malaysia having been employed there and, for example, now has a Special Pass, would have a strong claim to not be “ordinarily resident” outside Malaysia.

7.5.3 Effectiveness of the Courts for Providing Redress to Migrant Workers

Accessibility of the Courts

Malaysia's subordinate courts are physically accessible as they are located in all major population centres. Filing fees for instituting a claim are also relatively low, at RM100 for the Magistrates' Court and RM200 for the Sessions Court, respectively (including the fees for electronic filing). Filing fees for any interlocutory applications that may follow, such as for summary judgment, are RM20. Although in a complex case the fees may become substantial, in simple contract cases, these fees may be manageable for a migrant worker.

Most stakeholders interviewed for this study had little experience of using the civil courts for migrant workers and could point to only a handful of examples. The researchers also conducted a review of reported case law and spoke to practising lawyers about unreported cases. This identified only a few more migrant worker cases, although it is possible that many other cases are filed but not reported in Malaysian law journals. This supports the idea that such claims are infrequent, but not unheard of.

Civil society organisations and lawyers interviewed believed that the courts were not practically accessible to migrant workers. They pointed to a lack of knowledge and awareness among migrant workers of the civil courts and their procedures; the use of technical legal language which can be intimidating for migrant workers; the resulting need for legal representation; difficulty in gathering sufficient evidence to support a claim; the cost and inconvenience of staying in Malaysia while the case proceeds; and social, cultural and language barriers to accessing the court system.

For small claims of up to RM5,000, the small claims process in the Magistrates' Court may reduce some of these obstacles. The parties must be self-represented and the documents to be filed are given as simple forms.⁵⁹⁷ Two groups of migrants who participated in this study, all undocumented, brought claims in the Small Claims Division for immigration fraud. This was a decision of their advisors, who believed the Small Claims Division would be less likely to have the workers arrested for being undocumented. The organisation, Tenaganita, assisted the migrant workers to gather the evidence to support their claims, and complete the claim forms.

⁵⁹⁷ Rules of Court 2012, Order 93, Rule 7.

Transparency and Efficiency of Procedures

Delays

Small claims cases by migrants were heard and decided within several months. Larger claims took up to two years from filing to judgment.⁵⁹⁸ Cases which are heard on appeal, and therefore before several court levels, take several years.⁵⁹⁹ Any delay can be an obstacle to redress. As explained by one stakeholder:

Civil cases take time. They could take from three months to three years, or even four, five or six years. And then even if you get the judgment, the decision has to be enforced, which takes more time.⁶⁰⁰

They noted that a defendant can try to delay proceedings in many ways, such as claiming illness, seeking postponements, filing interlocutory applications, or changing lawyers. Matters may also be delayed by events at the court, such as the absence of a judge for training or illness.

Cases in Malaysian courts are now resolved more expeditiously than in previous years due to a significant court reform programme introduced by the Chief Justice in 2009. These reforms, as well as reducing backlogs, have imposed strict case management procedures and timelines on new cases which aim to have all cases resolved within nine months of filing. In fact, most cases in the subordinate courts are now reportedly resolved within six months of filing, not taking enforcement of appeals into account.⁶⁰¹

Costs

A second procedural barrier identified by interviewees was costs of the process. As well as filing fees, the plaintiff may be required to pay legal fees and expenses, expenses for expert witnesses, and potentially the costs of the defendant. Court orders for security for costs are a significant barrier to the claim progressing. Some lawyers may provide their services

⁵⁹⁸ In the *Chin Well Fasteners* case, the workers discovered the contract substitution in October 2002, issued the claim the same month and received judgment from the High Court in 2003: *Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors* [2006] 1 MLJ 117, see paragraph 12 and headnote. In the *Sumarni* case, the plaintiff was injured in January 2000 and her claim was decided by the Sessions Court in August 2001: *Sumarni v Yow Bing Kwong & Anor.* [2008] 1 MLJ 608.

⁵⁹⁹ In the *Chin Well Fasteners* case, the Court of Appeal took two years to decide on the appeal. In the *Sumarni* case, the appeal from the Sessions Court to the High Court took nine months; the further appeal to the Court of Appeal took five years to be decided on. The case took a total of seven years to resolve.

⁶⁰⁰ Interview with CARAM Asia, Kuala Lumpur, 24 March 2015.

⁶⁰¹ For an overview of the court reform programme, see Justice Azahar bin Mohamed, "Court Reform Programmes: The Malaysian Experience", Lecture given to the Institute of Advanced Legal Studies, University of London, 1 December 2015, available at http://sas-space.sas.ac.uk/6375/1/Azahar_bin_Mohamed_Court%20Reform_Programmes.pdf.

pro bono, but will usually still need their expenses covered, according to one civil society organisation that supports migrant workers to bring legal claims. Fee arrangements, whereby fees are paid only in the event the case is successful, are not common.⁶⁰²

Finally, a migrant worker must have the means to support him or herself in Malaysia while the claim progresses, or the funds to leave and return, if required, for hearings. It would be unlikely that the migrant worker could be employed legally during this time. Remaining in Malaysia then requires the support of other organisations or community groups that can assist the worker with food and board or travel costs.

Box 16: Suing the Malaysian Government for Wrongful Detention

The researchers identified two cases in which migrant workers had sought to sue the Malaysian Government for wrongful detention and whipping. One of these cases resulted in a settlement, and the other in deportation and dismissal of the suit.

In the 2005 case of Mangal Bahadur Gurung, the wrongful arrest proceeded to wrongful imprisonment for 51 days and caning of a documented migrant worker. The case caused a public outcry and received significant media attention.⁶⁰³

Mr Gurung was a documented migrant worker from Nepal whose employer held his passport, as well as 10 months of his wages. He had filed a claim at the DoL to recover his wages, but before it was resolved, the police arrested him on suspicion of being an undocumented migrant. As he did not speak Bahasa Malaysia and was not provided an interpreter, he could not explain that he was in fact documented. He was arrested, tried, and sentenced to whipping, and the sentence was carried out. The MTUC came to know of his case and enlisted a law firm to sue the Government for wrongful imprisonment on a *pro bono* basis. However, Mr Gurung returned home to Nepal, reportedly suffering from depression. Before the matter went to trial, the Government sought security for costs from Mr Gurung, and then finally agreed to settle the matter out of court.

In a similar case, a Bangladeshi migrant worker was arrested, detained, and whipped, despite having a valid passport and work permit held by his employer. He sued the Immigration Department for wrongful imprisonment and for torture and suffering. The worker claimed that he had not been provided an interpreter and had not understood the process when he pleaded guilty.⁶⁰⁴ He successfully had his conviction set aside by the High Court, but he remained in detention because he no longer had a work permit. However,

⁶⁰² Legal Profession Act, Section 112(l)(b).

⁶⁰³ See for example JTB. "Pay Mangal a fair compensation", *Letter to the Editor*, Malaysiakini, 3 April 2006, available at <http://www.malaysiakini.com/letters/49255>; MTS. "Wronged Nepalese – shame on all Msians", *Letter to the Editor*, Malaysiakini, 25 May 2005, available at <http://www.malaysiakini.com/letters/36455>; also interview with the Malaysian Trades Union Congress, 6 November 2015, Subang Jaya, Selangor.

⁶⁰⁴ See eg A. Tan, "Bangladeshi suing Govt over wrongful jail and whipping", *The Star Online*, 12 April 2014, available at <http://www.thestar.com.my/news/nation/2014/04/12/rm1mil-for-one-stroke-of-rotan-bangladeshi-suing-govt-over-wrongful-jail-and-whipping/>.

the High Court denied his second claim to prevent his deportation so he could continue with his case. After he was deported, his claim was reportedly dismissed.⁶⁰⁵

Outcomes of Civil Cases

In the civil case decisions reviewed by the researchers, decisions were mixed, as would be expected in any range of cases. In both small claims regarding immigration fraud, however, the migrant workers were successful. The case worker who assisted both groups of migrants attributed this success to the workers keeping the receipts for the monies they had paid to the agents, and in one case also filing police reports which supported the claim.

Execution of the judgments proved to be a greater challenge. In both cases, the defendant moved and the plaintiffs could not locate him to serve him with execution papers. In one case the defendant eventually agreed to pay the amounts in instalments. In the second case, the judgment had been issued by default because the defendant had never responded (see Box 17).

In a similar unreported case described by a lawyer, a migrant worker who had lost his fingers in a work-related accident at a cement factory successfully sued for damages. However, he was unable to enforce the judgment because the employer could not be located.⁶⁰⁶

Execution of judgments is also a technical area of civil procedure that, in the opinion of lawyers interviewed for this study, usually requires legal advice and representation. It can also be expensive depending on the form of execution sought. For example, where the plaintiff wishes the judgment enforced by a seizure of the defendant's property, the plaintiff is usually required to pay expected expenses upfront, and may be charged additional expenses of the bailiff.

Box 17: Bringing a Small Claim for Losses in a Migration Scam

Plaintiff:

I came to Malaysia to work on a plantation because I could not find work at home. In 2012 when my work permit was about to expire an agent promised he could get me a new work permit to work as a cleaner through the 6P program. He promised this work to a big group of us, maybe 150 people. I agreed and was happy that I could stay. He took my fingerprints and my passport and I paid him RM3,500. After this I believed I was legal.

⁶⁰⁵ O. Mok, "Bangladeshi suing Putrajaya for RM3m now faces deportation", *Malay Mail Online*, 13 June 2014, available at <http://www.themalaymailonline.com/malaysia/article/bangladeshi-suing-putrajaya-for-rm3m-now-faces-deportation>.

⁶⁰⁶ Interview with Messrs T. Balasubramaniam, Kuala Lumpur, 19 January 2015.

In early 2013, the police stopped me at a roadblock and checked my documents. They saw that my levy had not been paid and told me I was illegal in Malaysia. They let me pass, but I realised the agent had cheated me. Over the next two years I tried to contact him many times and he always promised he would fix the problem if I paid a little more money. I filed a police report but when I went back, the police turned me away because I was illegal. I went to the embassy but they couldn't contact the agent. They told me the agent is a powerful man with high-level connections in Bangladesh. After this I was scared to go out again in case I was arrested.

Finally, the agent's brother told me my money is gone and I wouldn't get it back. This made me so angry, I didn't know what to do. A friend in London looked online and found the number of Tenaganita, and then helped me to contact them. I went to see them and they helped me file a new police report, and to gather other people tricked by this man. Only 12 others were left from the 150 – some had gone back to Bangladesh and given up on their money, some had been forced to take dangerous, illegal jobs and one had even died, I believe from the stress.

The agent found out that I had gone to Tenaganita and the police and he called me and told me to come and he would give me the money. When I got there three people beat me to an inch of my life. Even so, I would not give up the case. In May 2015, we went to court and I told my story.

Case Worker:

We took the case in the Small Claims Division because they are less strict about a plaintiff's legal status. Because Mohammad does not have his passport or his permit, we were worried he would be arrested if we tried to go to a higher court.⁶⁰⁷ But this meant we could claim only RM5,000 of the RM 6,700 that he had lost. He was very emotional when he gave his testimony, but the defendant did not come so we won on a default judgment. Our client is happy, but these three years have been very hard on him, it will take him a long time to recover.

The defendant has never responded to the claim or the judgment. When the defendant failed to pay the money owed to the workers, Tenaganita filed an application for the defendant to come to court and explain the failure to pay, but he did not attend the hearing. We then proceeded to file a draft order for seizure of his property. The court asked the plaintiffs to pay a deposit of RM500 each [presumably to cover the recovery costs for the bailiff] and the case is still pending.

7.5.4 Summary

Few stakeholders interviewed for this study had been directly involved in using the civil courts as an avenue for redress of migrant workers. Most were highly sceptical, believing that the courts were expensive, time-consuming, and complicated, and the results

⁶⁰⁷ See discussion of a case in which an undocumented migrant worker was arrested, Chapter 7.3.3.

uncertain. Even if a judgment was obtained, this was no guarantee of the worker receiving the money owed to them.

A review of the procedures and the handful of cases brought by migrant workers identified by the study authors reveal that migrant workers do face obstacles that other plaintiffs may not, such as language and cultural barriers, and the possibility of security for costs being ordered in a case. However, recent reforms to the courts — such as the new Rules of Court 2012, the creation of the Small Claims Division at the Magistrates' Court and new case management timelines — make the civil courts more accessible to migrant workers than they once were.

The cases reviewed suggest that the courts can be an effective forum for recovering smaller amounts of money under an employment or other contract. The higher courts can be essential in building new norms around the treatment of migrant workers and clarifying rights and responsibilities.

7.6 Criminal Justice System and Migrant Workers

Malaysia's criminal justice system includes the police, the public prosecution, criminal defence lawyers and the courts. It is responsible for investigating, prosecuting or defending, and punishing crimes in Malaysia. This includes crimes under the Penal Code, as well as offences under other legislation described previously in this study, such as the Immigration Act 1959/63, Passports Act 1966, Employment Act 1955, and the OSHA. Cases of human trafficking under the ATIPSOM Act are also tried in the criminal justice system.

Data on migrant workers as victims of crime is not publicly available. One small study indicated that non-citizens (including tourists, expatriates, students, and migrant workers) are the victims in around 10 percent of violent crime cases, roughly corresponding to their share of the population.⁶⁰⁸ Other interviewees believed this was a significant under-representation of the true figures. Most migrant workers are reluctant to report crimes to the police, especially if they are undocumented.

In this study, the migrant workers described numerous experiences that may amount to criminal acts, including cheating during recruitment, violations of labour and occupational health and safety standards, theft, extortion, physical and sexual violence, and human trafficking.

This section outlines the criminal justice system as it applies to migrant workers, and then perceptions among study participants of the police and the justice system. In addition to migrant workers and organisations who support them, a former prosecutor also agreed to be interviewed. Unfortunately, the police declined to provide information for this section.

⁶⁰⁸ Muhammad Amin B et al, "A Trend Analysis of Violent Crimes in Malaysia", *Health and the Environment Journal*, 2014, vol 5, no 2, pp. 41–56.

The participants mentioned problems that plague the system for all Malaysians, including police corruption, slow investigations, and backlogs in the courts.⁶⁰⁹ However, migrant workers and others also described challenges accessing justice that were directly related to their immigration status, including discrimination, fear of arrest and deportation, and a perception that all actors in the criminal justice system were reluctant to enforce the law against employers.

Although not strictly related to redress, this section also briefly addresses the treatment of non-citizens as defendants in criminal cases.

7.6.1 Criminal Justice System in Malaysia

The criminal justice system in Malaysia is federal and highly centralised — with the same procedural laws and the same institutions operating across Malaysia. The RMP has its national headquarters in Bukit Aman, Kuala Lumpur, and then brigades and contingents in each state and in Kuala Lumpur. All are under the central command of the Inspector-General of Police in Bukit Aman.⁶¹⁰

Prosecution of criminal offences is the responsibility of the PP, who is the Attorney General of Malaysia.⁶¹¹ The Attorney General oversees all criminal prosecutions in Malaysia, and appoints DPPs to exercise their powers in individual cases.⁶¹² In Magistrates' Court cases, the police often prosecute the cases directly, under the overall supervision of the DPP, and immigration officers can also be authorised.⁶¹³ In the Sessions Court, the DPP handles prosecution.

The national hierarchy of courts decides criminal cases under their criminal jurisdiction. Most crimes are tried in the subordinate courts, but capital offences are prosecuted before the High Court.⁶¹⁴ See Table 17 for the criminal jurisdictions of the various courts.

⁶⁰⁹ A 2013 report by Transparency International found that the public saw the police as the most corrupt public institution in the country — 76% of people saw the police as corrupt or extremely corrupt, and 12% had paid a bribe to the police in the past twelve months. See Transparency International, "In Detail: Global Corruption Barometer 2013: Malaysia", available at http://www.transparency.org/gcb2013/in_detail (last accessed on 29 October 2018).

⁶¹⁰ For an overview of the structure of RMP, see "Royal Malaysia Police: Struktur", official portal of the Royal Malaysia Police, available at <http://www.rmp.gov.my/infor-korporate/polis-diraja-malaysia/struktur>.

⁶¹¹ Federal Constitution, Article 145(3).

⁶¹² Criminal Procedure Code, Section 376.

⁶¹³ Criminal Procedure Code, Section 377 gives other public officers authority to prosecute criminal cases under the direction of the Public Prosecutor.

⁶¹⁴ For a succinct overview of the criminal justice system in Malaysia, see A. R. Haji Mohamad Hassan, "The Administration of Criminal Justice in Malaysia: The Role and Function of Prosecution", 107th *International Training Course Participants' Papers. Annual Report for 1997 and Resource Material Series No. 53*, Tokyo: UNAFEI, 1998.

Table 17 | Criminal Jurisdiction of Superior and Subordinate Courts

Court	Criminal Jurisdiction
Superior Courts⁶¹⁵	
Federal Court	Hears appeals from the Court of Appeal.
Court of Appeal	Hears appeals from the High Courts.
High Courts	Unlimited original jurisdiction, but usually confines itself to cases in which the crime is punishable by death. Also supervises and hears appeals from the subordinate courts.
Subordinate Courts⁶¹⁶	
Sessions Courts	May try all cases other than those punishable by death.
Magistrates' Court — First Class Magistrate	Any case where the maximum sentence is 10 years' imprisonment or a fine. Can also sentence convicted offenders to whipping of up to 12 strokes.
Magistrates' Court — Second Class Magistrate	Any case where the maximum sentence is 12 months' imprisonment or a fine only.

The Judiciary has taken steps to expedite certain kinds of criminal cases in the subordinate courts. In 2015, for example, the Chief Justice of Malaysia ordered the subordinate courts to dispose of street crimes, including muggings, thefts, robberies, hits and runs, and cheating on taxi fares, within three days if the accused pleads guilty, and two weeks if the accused claims trial.⁶¹⁷

7.6.2 Criminal Procedure

The CPC regulates investigation of crimes, searches and seizures, prosecution of an accused, and the trial and punishment of offences.⁶¹⁸

Reporting Alleged Crimes to the Police

Any person can report a crime to the police, regardless of their nationality, immigration status or other identifier.⁶¹⁹ The police officer is required to record the complaint in writing

⁶¹⁵ See Courts of Judicature Act 1964.

⁶¹⁶ See Subordinate Courts Act 1948 (revised 1972).

⁶¹⁷ "Arahan Pentadbiran Berkenaan Pengendalian Kes-Kes Jenayah Jalanan Secara 'Fast-Track' di Mahkamah Rendah Malaya" (Practice Direction on the Handling of Cases of Street Crimes By Way of 'Fast-Track' in the Subordinate Courts of Malaya), as referenced in Bar Council's Circular No 091/2015, dated 7 May 2015 to Members of the Malaysian Bar. Available at http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=5009.

⁶¹⁸ Criminal Procedure Code (Act 593) ("CPC"), enacted throughout Malaysia on 10 January 1976.

⁶¹⁹ See Article 8 of the Federal Constitution, set out at 6.2 above.

and read it back to the informant.⁶²⁰ The officer must then enter all of the information in a book or system, and the report must be signed by the informant.⁶²¹ Reports are usually made at police stations, but informants can also report to a police officer outside of a station, who is then required to take down that person's details and forward the report to the relevant person at the station.⁶²²

Police officers do not have discretion to refuse to take a police report, and indeed are "duty bound to receive any information in relation to any offence committed anywhere in Malaysia".⁶²³

Investigation of Reported Offences

Investigations are entirely the responsibility of the police, with no role for the prosecution or courts. If the information received indicates commission of an offence, an officer must be sent "to the spot to inquire into the facts and circumstances of the case" and then to take any necessary measures to locate and arrest the offender.⁶²⁴ However, the officer has discretion not to take these steps if they consider the complaint to be "not of a serious nature", and shall take no further action at all if they consider "there is no sufficient ground for proceeding".⁶²⁵

If an investigation does take place, the investigating officer can examine any witnesses, search "any place" suspected of having relevant documents or other evidence and access computerised data.⁶²⁶ The investigation must be "completed without unnecessary delay" and a report of the investigation submitted to the PP within three months from the date of the original report.⁶²⁷

The person who reported the offence also has the right to ask for an update on the investigation after four weeks have passed, and the officer in charge of the station must give a "status report of the investigation" within two weeks of the request. If the request is not answered, the informant can complain to the PP.⁶²⁸

⁶²⁰ CPC, Section 107(1).

⁶²¹ CPC, Section 107(2).

⁶²² CPC, Section 107(3).

⁶²³ CPC, Section 107(4).

⁶²⁴ CPC, Section 110(1).

⁶²⁵ CPC, Sections 110(1)(a) and (b).

⁶²⁶ CPC, Sections 111, 113, 116B.

⁶²⁷ CPC, Section 120(1).

⁶²⁸ CPC, Section 107A.

Prosecution

Prosecutors are responsible for charging the offender and instituting criminal cases. According to one senior police officer, the prosecutor will only institute proceedings if there is a 50 percent likelihood that the case will succeed, based on the evidence gathered during the investigation.⁶²⁹

Pre-Trial and Trial Proceedings

Malaysia does not have jury trials. All criminal cases are heard and decided by a single judge, according to the CPC. Prior to the trial, pre-trial and case management hearings are held to reduce delays. The victim of the alleged crime does not have a formal role in the trial, except as a witness for the prosecution. Victims do not have their own legal representation to ensure their interests are brought forward during the process (see Box 18).

Box 18: Rights of Victims of Crime in Malaysia

Traditionally, victims of alleged crime have had a limited role and no rights during criminal investigations and prosecutions. A police officer will take a statement and prepare a police report, and then if the offender is charged and the case proceeds to trial, the prosecution may call the victim to testify. The prosecution is not obligated to inform a victim of progress in the case, or the location of the perpetrator. A judge may order a convicted offender to pay a victim compensation for losses incurred by the crime,⁶³⁰ but one lawyer noted that compensation was rarely or never sought by prosecutors.⁶³¹

In recent years, the Government has introduced some “victim-centred” provisions to better protect victims of crime and increase their role in proceedings. In 2009, the Malaysian Parliament passed the Witness Protection Act 2009, which allows for confidentiality of witnesses and relocation or other protective measures.⁶³² In 2012, the Parliament amended the CPC to allow victims to give a written or oral statement during sentencing deliberations to explain the personal costs and trauma that resulted from the defendant’s actions — commonly called a Victim Impact Statement.⁶³³

It is unclear how widely prosecutors advise victims of these opportunities outside of high profile cases. One lawyer said the practice of victim statements, for example, is

⁶²⁹ A. R. Haji Mohamad Hassan, “The Administration of Criminal Justice in Malaysia: The Role and Function of the Prosecution”, *107th International Training Course Participants’ Papers*, Resource Material Series No. 53. 1998.

⁶³⁰ CPC, Section 426.

⁶³¹ Interview with the Bar Council Migrants, Refugees and Immigration Affairs Committee, Kuala Lumpur, 10 December 2015.

⁶³² Witness Protection Act 2009, Act No. 696.

⁶³³ CPC, Section 173(m)(ii).

still “evolving”.⁶³⁴ A former prosecutor said that she had only seen two Victim Impact Statements given in four years on the court. Requests for victim compensation were also rare and she believed most prosecutors were not aware of these options.

Cases where statements were made or compensation requested, in this lawyer's experience, involved a victim with the financial resources to pay for a lawyer to attend the trial as a “watching brief” and advocate on behalf of the victim. In many cases, the prosecutor has no more contact with the victim after they give evidence, and thus the victim may not even know if the accused is convicted, let alone have an opportunity to participate in the sentencing.⁶³⁵

Victims in sexual assault cases also do not have any protection from invasive or inappropriate questions that intend to discredit them, such as questions regarding sexual history. In one case described by a civil society organisation, the prosecutor himself asked the victim graphic details about the accused's body and implied she was lying when she could not remember. Such examinations are likely to make victims of violent crimes extremely reluctant to contact the police, and deepen the shame and trauma following an assault. The challenges that migrant workers face getting justice in cases of rape and sexual abuse may reflect deeper challenges for victims of sexual violence in Malaysia generally.

7.6.3 Perceptions of Effectiveness of the Criminal Justice System for Migrant Worker Victims of Crime

Accessibility

The criminal justice system is not directly accessible to victims of crime. Although victims can report their experiences to the police, it is up to the police whether to investigate, and up to the PP whether to institute criminal proceedings.

Among study participants, 15 had visited a police station with the intention of filing a police report. These workers had mixed experiences. In some cases, the police wrote down the report and even advised the migrant worker on immigration matters where the worker was undocumented. Yet in other cases the police refused to take the complaint and turned the person away without any explanation. In still other cases, the police officer arrested or threatened to arrest the worker for immigration offences if they persisted with the complaint, without documenting or investigating the alleged crime.

Most who successfully filed a police report did so with assistance, such as from their embassy or a service provider. Those who went alone tended to receive less assistance.

⁶³⁴ Interview with the Bar Council Migrants, Refugees and Immigration Affairs Committee, Kuala Lumpur, 10 December 2015.

⁶³⁵ Interview with the former DPP of the Attorney General's Chambers, Selangor, 26 September 2016.

One Nepali man complained, “I went to the police to report a robbery, but they didn’t do anything. Unless [someone] is pressuring them, they don’t care about migrants.”

Other workers who may have had grounds to go to the police declined to make a report out of fear of arrest if they were undocumented, or did not hold their passports. One group of undocumented workers said, “If we go to the police, they will send us back ... I have never heard of anyone who has gone to the police. You need a permit for the police to help you.”⁶³⁶

Investigations following reports varied. In several cases the police investigated and the case progressed. In other cases, however, nothing was done and the migrant worker simply received a copy of the report. In still others, the police actively placed the migrant worker at risk by informing the employers of the complaint. In one case the police came to the house of a domestic worker who had told a neighbour that she was unhappy. He asked the employer about the complaints and why the domestic worker had been crying. However, he did not take the worker out of the house when she asked to leave. After the officer left, the employers beat her and then sent her back to her “agent” (it was unclear whether this agent was an individual or a licensed company representative).⁶³⁷ In another case of serious labour exploitation, a former migrant worker claimed the police returned him to the factory, even after he had told them of the terrible conditions. The only steps the police took were to order the company manager not to beat the workers in retaliation for making the report.⁶³⁸

Overall, lawyers and civil society organisations who assist migrant workers believed that prosecutions for crimes committed against migrant workers are rare. They believed that police and prosecutors were often slow to file charges or follow-up on cases, particularly if the accused is a Malaysian, and that much lobbying of the police was needed to have a case proceed. As a result, they believed that it would be very difficult for a migrant worker to have a case progress without significant advocacy, legal and practical support from Malaysian organisations or friends.

Fairness and Efficiency of Procedures

As well as difficulty accessing the criminal justice system and having crimes taken seriously, stakeholders also expressed concern about the procedures of investigation and trial.

The most frequent concern was, as in the civil courts, the length of time it would take for a case to reach trial and a decision of the court. Even with the reforms to the courts discussed in the previous chapter, it was acknowledged that the courts’ target in criminal cases is to dispose of cases within 12 months, and this does not include the investigation

⁶³⁶ Focus Group No. 2, male migrant workers from Bangladesh, interviewed in Negeri Sembilan, 7 June 2015.

⁶³⁷ Interview No. 13, migrant domestic worker from India, interviewed in Selangor, 10 June 2015.

⁶³⁸ Interview No. 33, male returned migrant worker, interviewed in Nepal, 13 April 2015.

phase. Remaining in Malaysia for 12 or more months is extremely difficult for migrant workers who do not have a work permit or any source of income. Although it may be technically possible for the worker to leave Malaysia and return for court dates, in practice these dates can be scheduled at short notice and multiple adjournments make coming into and going from Malaysia extremely expensive.

Only one migrant worker participating in this study was a victim/witness in a criminal trial. The young woman, a domestic worker from Indonesia, had accused a fellow domestic employee of rape. The employer himself drove her to the Tenaganita shelter when she told him about the crime.

Tenaganita, which was providing shelter and support to the victim, explained that the case had experienced numerous delays due to the poor quality of the investigation, and delay tactics by the investigating officer, such as repeatedly failing to bring in the victim's passport to verify the identity of the victim. The organisation surmised this was done in the hope the victim would give up and return home. Eventually a new judge took over the case and the Indonesian Embassy provided the identity documentation needed by the court.

The case took a total of 18 months, and during this time the migrant worker stayed in the Tenaganita shelter 24 hours a day because she did not have a valid work permit. As a participant in a focus group, she spoke of how she longed to return home, and her frustration with delays in her case:

I have been [in the shelter] for one year and five months now, and I don't know how much longer, just because of this case. I have not called my family in all of this time because [the perpetrator] threw away my phone when it happened so I couldn't call for help, and now I don't have their number. It has been too long.⁶³⁹

Box 19: A Snapshot of Criminal Cases

As a part of this study, the researchers accessed Tenaganita's files and documented all cases filed with the police and proceeding to trial in the past five years. This was a total of six cases — a very small number. The cases indicate that, particularly in violent crimes, the trial process can be long, but can also result in successful prosecutions.

Some observations from the analysis:

- (1) Half (three) of the cases involved sexual offences, namely rape (two) and sexual harassment (one). Two cases of alleged cheating and one robbery;

⁶³⁹ Focus Group No. 1, female migrant workers in an NGO shelter, interviewed in Selangor, 27 April 2015.

- (2) Five of the victims were working in Malaysia with a valid work permit at the time of the offence. The sixth migrant worker was working illegally on a tourist visa;
- (3) All victims sought the return of their passports as a part of their case, indicating the widespread practice of removing passports from workers. Half of the migrant workers also sought repatriation home;
- (4) The time between reporting the crime and having charges filed was short, usually the same day or within the week. However, the trial and judgment took much longer. The three sexual violence cases all took between one year and two years; and
- (5) The accused was convicted in three resolved cases and acquitted in one. The sentence in the rape case was 13 years' imprisonment and seven strokes of the cane. In the cheating case, the defendant was required to repay the money taken from the victims.

Outcomes for Migrant Worker Victims of Crime

The researchers did not locate data which gave an indication of the outcome of criminal cases, or cases involving migrant workers.

In the case described above, the driver was acquitted, reportedly on the basis that the medical evidence did not support the victim's version of events. She had testified that she had been drugged at the time of the incident, but this was not confirmed in the medical report. The worker returned home.

NGOs and lawyers interviewed for the study believed that cases had more chance of success if the victim had local support, including shelter, legal advice, food, counselling, interpretation, and assistance in gathering evidence. An example of this collective approach is the case of Nirmala Bonat, an Indonesian domestic worker who was tortured by her employer. Civil society organisations in both Malaysia and Indonesia supported and advocated for the worker and publicised her case. The employer was eventually sentenced to 12 years in prison. However, the time and resources needed for success is not available to every victim. Also, the researchers did not speak to workers who successfully participated in prosecutions without this civil society support, and so are not able to confirm whether this is always the case.

Box 20: Access to Justice for Migrant Workers Charged with Immigration Offences

Although not strictly related to migrant worker redress, the lawyers interviewed for this study expressed deep concern about access to justice for migrant workers who are accused of committing a crime, particularly an immigration offence.

Besides violations of the right to a fair trial described in chapter 5, lawyers interviewed for this study noted numerous procedural and practical challenges that make justice elusive for migrant workers prosecuted for immigration offences.

First, according to a former prosecutor, migrant workers rarely understand the charges against them. The charge sheets are highly legalistic and “not easily comprehended by a normal person”. A lawyer who represents workers noted that the vast majority of migrant workers charged with immigration offences do not receive adequate translation, so they do not understand the proceedings.⁶⁴⁰

Second, bail practices make it more difficult for non-citizens to be released pending the trial. The courts have discretion to grant bail for all criminal offences except the most serious crimes punishable by death and life imprisonment. The CPC does not set out factors for consideration,⁶⁴¹ but common practice for non-citizens is to require them to have either a valid pass (very unlikely in an immigration case), or for a Malaysian citizen to give a cash surety. In practice this means that few migrant workers seek or obtain bail, and almost none do so in immigration cases.⁶⁴²

Third, police, interpreters and even private lawyers frequently advise migrant workers to plead guilty, even if they are in fact documented, to speed up the process for the worker, and everyone else.⁶⁴³ Claiming trial can result in a long wait in prison, sometimes more than a year. Pleading guilty followed by sentence, transfer to immigration detention camps and deportation can be concluded within four to six months.

All these challenges are heightened because non-residents do not have a right to free legal representation. One lawyer interviewed noted that, likely due to the lack of criminal defence and oversight in immigration cases, judicial decision-making is often arbitrary and does not follow precedent. Thus, lawyers find it difficult to properly advise clients charged with immigration offences. In one case, 52 migrant workers were charged with an offence that, according to precedent, should only attract a one-month sentence. They were sentenced to a year in prison. Their lawyer appealed the decision, but said the migrant workers would be waiting in prison for months while the appeal was heard.⁶⁴⁴

Most migrant workers in immigration cases plead guilty, receive the punishment, and are then deported. The punishment for illegal entry is whipping. According to the Minister

⁶⁴⁰ Interview with Messrs Bernard Francis & Associates, Kuala Lumpur, 4 February 2015.

⁶⁴¹ Chapter XXXVIII of the CPC, deals with bail.

⁶⁴² Interview with the Bar Council Migrants, Refugees and Immigration Affairs Committee, Kuala Lumpur, 10 December 2015.

⁶⁴³ Interview with Messrs Bernard Francis & Associates, Kuala Lumpur, 4 February 2015; Interview with the former DPP of the Attorney General's Chambers, Selangor, 26 September 2016.

⁶⁴⁴ Interview with Messrs Bernard Francis & Associates, Kuala Lumpur, 4 February 2015; Interview with the former DPP of the Attorney General's Chambers, Selangor, 26 September 2016.

of Home Affairs, in 2013, 8,481 prisoners were whipped, of whom 5,968 were non-citizens convicted of illegal entry.⁶⁴⁵

7.6.4 Summary

The police and the criminal courts are the traditional mechanism for seeking to hold wrongdoers accountable for crimes, and for imposing social order. They are an essential pathway to justice for exploited migrant workers, as for any victim of a crime.

However, few migrant workers appear to trust the system, particularly the police, enough to report their cases. Those that do, find discrimination as a barrier to having their cases taken seriously and thoroughly investigated. The dual roles of the police of protecting the community and enforcing the immigration law are in conflict when those reporting crimes are undocumented or have overstayed.

7.7 Remedies under the Anti-Human Trafficking Framework

As noted in chapter 6, the Malaysian Parliament has created a set of offences specifically related to trafficking in persons in the ATIPSOM Act. This Act criminalises those who are involved in the exploitation of migrant workers from the point of recruitment to the final site of exploitation, including those who hire the migrant workers, arrange the transportation of the workers to Malaysia, and ultimately exploit the migrant workers in Malaysia.

The ATIPSOM Act offers victims of trafficking-related crimes the same remedy as the criminal law provides to victims of other crimes, namely seeing the perpetrator tried in a court of law, and potentially convicted and punished. It also offers immunity from prosecution for any offence that occurred in the course of the trafficking, for example immigration offences, certain free medical care, and room and board for the duration of the case. This practical assistance removes a significant barrier to victims remaining in Malaysia to see their case prosecuted.

However, the ATIPSOM framework treats victims of trafficking differently from victims of other crimes. In particular, all suspected victims of trafficking are immediately taken into protective custody and held in protective custody until the investigation is concluded or terminated. If the victim is a non-citizen, they will then be deported. Since November 2015, the Government has been testing allowing some trafficked persons to work during the period of protective custody, but they still remain under protection.

This section describes the investigation and protection procedures under the ATIPSOM Act, and perceptions of this system from interviews with stakeholders and migrant workers.

⁶⁴⁵ M. Yuen, “Zahid: Over 8,000 prisoners caned last year”, *The Star Online*, 12 November 2014, cited in the Global Detention Project: Malaysia: Profile, available at <http://www.globaldetentionproject.org/countries/asia-pacific/malaysia>.

7.7.1 Enforcement, Jurisdiction and Powers

Unlike the Penal Code, which is enforced only by the RMP, the following officers of five agencies in Malaysia are deemed “enforcement officers” under the ATIPSOM Act:

- (1) Any police officer;
- (2) Any immigration officer;
- (3) Any customs officer;
- (4) Any officer of the Malaysian Maritime Enforcement Agency; and
- (5) Any labour officer.⁶⁴⁶

All enforcement officers “may exercise all powers of enforcement”. These powers are broad. In respect to investigations, they include “all the powers necessary to carry out an investigation for any offence under this Act”.⁶⁴⁷ Note that this includes offences of human smuggling, as well as of human trafficking.

Regarding arrests, enforcement officers have the power to arrest any person without a warrant who is either, “found committing or attempting to commit or abetting” any offence under the ATIPSOM Act, or who the officer “reasonably suspects being engaged in” committing or attempting to commit a trafficking or smuggling offence.⁶⁴⁸

Once a person is arrested, the arresting officer must take the suspect to the nearest police station, and the police then process the suspect in accordance with the CPC.⁶⁴⁹

7.7.2 “Care and Protection” of Trafficked Persons under the ATIPSOM Act

As noted above, the principal difference between the ATIPSOM Act and other criminal law statutes is that it treats trafficked persons differently from victims of other crimes. Part V of the ATIPSOM Act addresses “Care and Protection of Trafficked Persons”, and establishes procedures for placing them in protective custody after identification, as well as for medical treatment and participation in legal proceedings.

Protections are given only to individuals suspected of being trafficked persons, not to suspected smuggled migrants. A smuggled migrant is liable to be prosecuted for immigration offences, and thus will be detained in immigration detention, tried and deported, even if he is also called upon to testify against a suspected migrant smuggler.

⁶⁴⁶ ATIPSOM Act, Section 27(1).

⁶⁴⁷ ATIPSOM Act, Section 28.

⁶⁴⁸ ATIPSOM Act, Section 29(1).

⁶⁴⁹ ATIPSOM Act, Section 29(2).

It should also be noted that Part V applies equally to citizen and non-citizen victims of trafficking, with only a few exceptions, detailed in the following section.

Identification of Trafficked Persons

Identification of trafficked persons occurs when an enforcement officer has “a reasonable suspicion” that any person “who is found or rescued” is a trafficked person.⁶⁵⁰ The terms “found” and “rescued” are not defined by the ATIPSOM Act, but presumably refer to individuals caught up in raids of workplaces and brothels, or who report their cases to the police or other officers. The enforcement officer may then take that person into temporary custody (effectively an arrest).

Protection / Detention

After being taken into temporary custody, the enforcement officer will take the potentially trafficked person before a magistrate or to a hospital for treatment.⁶⁵¹ The enforcement officer must bring the person before a magistrate within 24 hours of either the identification or the release from hospital.⁶⁵² The magistrate is required to make an IPO which will place the person in a government designated “place of refuge”, commonly called a shelter, under the care of a protection officer.⁶⁵³ A protection officer is someone charged with “control over and responsibility for the care and protection of the trafficked person”.⁶⁵⁴

The IPO lasts for 21 days.⁶⁵⁵ During this time, the enforcement officer will investigate “the circumstances of the person’s case” and the protection officer will interview the trafficked person and inquire into “the background of that person”.⁶⁵⁹ At the end of this period, if the magistrate is satisfied on the evidence presented by the officers that the person is a “trafficked person” they will make a further PO for up to three months.⁶⁵⁷ Non-citizen victims of trafficking must stay in the shelter during this time, but citizens can have a parent, guardian or other relative apply for release into the family’s custody, and the magistrate can order their release on certain conditions.⁶⁵⁸

Originally, persons held under an IPO or PO were not allowed to leave the shelter of their own accord. However, the November 2015 amendments to the ATIPSOM Act authorised

⁶⁵⁰ ATIPSOM Act, Section 44(1).

⁶⁵¹ ATIPSOM Act, Sections 44(1) and 45(1).

⁶⁵² ATIPSOM Act, Sections 24(1) and 49(1).

⁶⁵³ ATIPSOM Act, Section 44(2).

⁶⁵⁴ ATIPSOM Act, Section 43(2). A Protection Officer is a social worker or other public officer who is appointed by the Minister of Home Affairs in consultation with the Minister of Women, Family and Community Development, to undertake the Protection Officer duties under the ATIPSOM Act, Section 43(1).

⁶⁵⁵ ATIPSOM Act, Section 44(2).

⁶⁵⁶ ATIPSOM Act, Section 51(1).

⁶⁵⁷ ATIPSOM Act, Section 51(3)(a)(ii).

⁶⁵⁸ ATIPSOM Act, Section 53.

the MAPO Council to give permission to individual trafficked persons to “move freely”, or to work during the period of their PO.⁶⁵⁹

The ATIPSOM Act allows for regulations to give detail to the “qualifications, conditions, and procedures” for granting this permission.⁶⁶⁰ The regulations provide that, if a trafficked person applies for free movement, the MAPO Council will consider an expert risk assessment of the person’s physical health, psychosocial condition, and security. If satisfied that the risk is low, the MAPO Council will obtain a Special Pass for the victim and can impose any other conditions for the security of the victim. When the victim has secured employment, the employer must obtain a new work permit. The period of employment authorised under this new pass is limited to three years.

It is unclear how this will work in practice, for example who would inform the victim about the option and initiate the application mechanism, as well as obtain the risk assessment report and ensure that the new employer applies for a work permit.

When a PO expires or is revoked, the migrant is released to an immigration officer to deal with the case under the Immigration Act 1959/63.⁶⁶¹ If the migrant-citizen has a valid work permit and is employed, they will be allowed to stay in Malaysia to continue their employment; but otherwise the person will normally be detained in an immigration detention centre to be removed to their country of nationality.

In May 2016, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Release of Trafficked Person) (Foreign National) Regulations 2016 were adopted. These merely legislate current practice which has been to transfer the victim from protection to immigration detention centres.

7.7.3 Prosecution and Remedies

The PP, as with all criminal offences, makes the decision whether to prosecute a trafficking (or smuggling) case. If criminal prosecution is instituted, the trafficked person can be called upon to testify in the case. All trafficking cases are heard in the Sessions Court.

The ATIPSOM Act also makes provision for a trafficked person, while they are under a PO, to give evidence before the trial. The prosecutor can make an oral application to the court for the victim of trafficking to give evidence under oath before a judge. The victim can be examined and cross-examined. This evidence will be recorded in writing and treated “the same as that of a witness who appears and gives evidence in the course of proceedings”.⁶⁶²

⁶⁵⁹ ATIPSOM Act, Section 51A.

⁶⁶⁰ ATIPSOM Act, Section 66(2)(AA).

⁶⁶¹ ATIPSOM Act, Section 51(3)(a)(ii).

⁶⁶² ATIPSOM Act, Section 52(6).

Amendments in November 2015 also provide for trafficked persons to seek compensation or repayment of wages in arrears. The court can order compensation only after the defendant is convicted of trafficking. Compensation in trafficking cases is handled according to the CPC provisions on compensation for all victims of crime. Payment of compensation does not preclude any civil action by the victim against the trafficker.⁶⁶³

If no conviction is recorded, but “payment of wages is in arrears to an alleged trafficked person”, the court must make an order for payment of those wages.⁶⁶⁴ The prosecutor must apply to the court for this order to be made, and the court will conduct an inquiry to determine the sum of wages in arrears. This inquiry must be held within seven days of the application, and can include any evidence that was presented during trial. It is not clear what the procedures are if the victim of trafficking has already left Malaysia.

In both cases, whether compensation or backwages are owed to the victim, the court has discretion about how the money should be paid. For example, it can be paid in instalments or within a period of time, or the court could order sale of property to pay the debt.

7.7.4 Perceptions of the Process

As with other criminal cases, migrant workers who believe they are a victim of trafficking cannot initiate the procedures under the ATIPSOM Act independently, except to the extent they report the alleged crime to the police. Rather, they must be identified by an enforcement officer.

The MAPO Council data reports that 186 cases were identified in 2014, of which 80 were forced labour cases, and 132 in 2015 of which 54 cases were for forced labour. Almost all of the remainder (more than 50 percent) were identified in raids of brothels and suspected of being victims of sex trafficking.⁶⁶⁵ The Ministry of Women, Family and Community Development shared that in between 2010 and 2015 it had sheltered 4,051 suspected victims of trafficking on an IPO, and that 1,297, or 32 percent, had been confirmed as victims of trafficking and given a PO. In 2015 (January to September) alone, when 94 victims were given a PO, 51 of those came from Indonesia, 24 from Vietnam, 16 from Thailand and the remainder from other countries.⁶⁶⁶

The identification of victims by an enforcement officer has been heavily gendered. Of the seven shelters, only two are for males (one for minors and one for adults). In September 2015 when the researchers visited a shelter in Kuala Lumpur, they were told that no men at all were being held on an IPO or PO in a government shelter.⁶⁶⁷

⁶⁶³ ATIPSOM Act, Section 66A(4).

⁶⁶⁴ ATIPSOM Act, Section 66B.

⁶⁶⁵ MAPO Council, “Types of Exploitation Identified Pursuant to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007”, 29 February 2016, data on file with study authors.

⁶⁶⁶ Ministry of Women, Family and Community Development, “Statistics of All Victims in Shelter 5”, 28 September 2015, on file.

⁶⁶⁷ Interview with a government shelter manager, 28 September 2015.

The Act itself does not state the factors or grounds for having a “reasonable suspicion” that someone is a trafficked person. Further, an enforcement officer is not obligated, even if they do have such a suspicion, to identify the person as potentially trafficked and take them into protective custody, although the shelter manager advised that women arrested in raids of brothels would be automatically put under an IPO and investigated for trafficking.⁶⁶⁸

Implementation of the identification of victims of trafficking has come under significant criticism. The Special Rapporteur on trafficking in persons, who visited Malaysia in 2015,⁶⁶⁹ noted that front-line officers do not have specialised training to identify trafficked persons and that irregular migrants and asylum seekers held in detention are not screened for trafficking. One advocate believed that most victims are likely to have been deported.⁶⁷⁰ Little outreach and public information has been undertaken by the Malaysian Government to explain trafficking in persons and to encourage reporting.

A former prosecutor noted that many prosecutors were also confused by the concept of trafficking and how it differed from immigration violations or migrant smuggling. Thus, in her experience, even where a migrant worker describes paying excessive fees, being cheated by an agent and having his or her passport taken, the prosecutor will still charge the migrant with illegal entry rather than referring them to police.⁶⁷¹

In this study, two migrant worker participants had been identified as trafficked and were interviewed in a government shelter. Other migrant workers described experiences that could fall within the definition of trafficking in persons. However, they were either not identified as trafficked when they reported their matters to the police, or they declined to report because they did not want to be identified and detained as a result.

Fairness and Transparency of Procedures

The ATIPSOM procedure is intended to resolve trafficking cases quickly, and to allow the victim of trafficking to be available to give evidence in the prosecution of a trafficker. It has the advantages of providing clear timelines, a safe place for the victim of trafficking to stay, necessary immediate medical care, confidentiality, and holding traffickers accountable for their offences.

However, stakeholders and migrant workers interviewed for this study were sharply critical of the procedures, particularly in respect to treatment of victims of trafficking. The emphasis on “control and custody” of a victim of trafficking, including effective arrest and

⁶⁶⁸ Interview with a government shelter manager, 28 September 2015.

⁶⁶⁹ M. G. Giammarinaro, “Report of the Special Rapporteur on trafficking in persons, especially women and children”, Mission to Malaysia (A/HRC/29/38/Add.1), 1 June 2015.

⁶⁷⁰ Interview with a member of the Penang Stop Human Trafficking Campaign, Penang, 9 May 2015.

⁶⁷¹ Interview with a former DPP of the Attorney General’s Chambers, Selangor, 26 September 2016.

detention, was viewed as paternalistic and often unnecessary without a clear assessment of the actual risk posed to the victim. Victims felt they were being caught and detained, rather than assisted and protected.

Other rights and protections are also missing from the ATIPSOM Act. The Act does not explicitly state that the victim has the power to consent to or refuse medical treatment, or to consent to or refuse to testify in the trial. The two trafficked persons who were interviewed for the study did not want to participate in an investigation and trial, and wanted to leave Malaysia but were not permitted to do so.

The ATIPSOM Act does not explicitly state that victims or witnesses have a right to be informed about the process, to legal representation, or to be informed of their options or their prospects. The two interviewees said they had been told nothing about the process generally or their cases specifically, and felt angry, confused and anxious (see Box 21).

As well as detention and a limited ability to work, trafficked persons until recently had no prospect of obtaining a work permit to stay in the country or any prospect of compensation or payment of unpaid wages. As explained by one lawyer:

Once they figure out you are actually a trafficking victim, you then stay on for three months until the case is over and then you are sent back home. Within these three months you go to court, you give your statement and then the case goes on and you are sent home so if you work for five years for an employer, you don't get your unpaid salary you don't get any form of compensation, you are just sent back home.⁶⁷²

As a result, migrant workers who have been trafficked were often reluctant to report their case to the police and participate in a trafficking prosecution. Until the 2015 amendments, there was no prospect of compensation. As one lawyer noted:

The problem with labour trafficking, sometimes workers do not want to pursue their case under the trafficking law because it's going to take a long time. They will be taken to and kept at the government shelter, their mobility will be restrained. All these are their concerns so the chances are they don't want to fight under trafficking. They're afraid they might be sent home.⁶⁷³

This was confirmed by the ATIPSOM Enforcement Division and a protection officer at the shelter in Kuala Lumpur. Both said that most women who came to the shelter wanted to return to their country as soon as possible. The enforcement officer attributed this

⁶⁷² Interview with Tenaganita, Selangor, 3 March 2015.

⁶⁷³ Interview with MTUC, Selangor, 19 March 2015.

to the “mentality” of the victims, rather than the process itself, and said that it made prosecutions difficult:

In our cases most victims are not willing to cooperate — the main challenge bringing a case to court is this mind-set ... of the victim as foreigners. When immigration conducts a rescue — [the victims] think they are being caught not rescued — so they just want to go back. It is difficult to get cooperation to assist with investigations or prosecution.⁶⁷⁴

It may be that these perceptions will change if victims of trafficking start to receive compensation and choose to stay and work, but it is too soon to assess these changes at the time of writing.

Box 21: Experiences of Two Women in the Kuala Lumpur Shelter

During a visit to the shelter in Kuala Lumpur, the researchers met with two Indonesian women who were confined to the shelter pending resolution of their cases. Their perspectives highlight the sense of frustration and helplessness victims of trafficking experience, and the failure of the anti-trafficking procedures to address their needs and entitlements.

Dini came to Malaysia as a domestic worker and suffered severe mistreatment from her employers, including excessively long working hours, being made to sleep on the kitchen floor, and verbal and physical abuse. She was not paid for seven months, although her employers claimed her first six months' wages were deducted by her agent. She fled her employers in fear after they hit her with a plank of wood. She was taken in by the police.

The police took me [to the shelter], then one month later they came and asked me about how much was deducted from my salary — I said six months. So they say my case is just for one month of wages. Then they took me to the employer's house to see if it is true that I sleep on the floor. I showed them everything. Now no one tells me anything. I don't know if the police will come back. I don't know if the case will go to court. For me, I want to get my full seven months wages because no one told me my salary would be cut for six months. If [my employers] don't pay me that, they should go to jail.

Ana had been employed by a cleaning company in Malaysia. Her employer paid her the minimum wage and provided accommodation, but he also took her passport and gave her a false work permit, and forbade her from taking a day off or from leaving the employer-provided hostel or workplace. When her contract ended, her employer refused to let her return home and forced her to continue working for several more years. She was identified as a potential trafficking victim when the police pulled over the cleaning van for a routine check.

⁶⁷⁴ Interview with the Enforcement Division of the Immigration Department, Putrajaya, 28 May 2015.

The police took me and gave me [a copy of] my report, then they told me to wait [in the shelter] for 14 days and I would go to court. But after 14 days they just took us back to the police station. They asked us questions about the drivers of the van and said they would be prosecuted. I feel very heavy now, because I want to get back my belongings which are still at the hostel, my jewellery that I bought with my savings. I have only one set of my clothes here, the clothes on the day I was taken by the police. No one has told me anything. They just say wait. If it is going to court, I just want it to happen quickly so I can go home.

7.7.5 Outcomes for Migrant Workers from the ATIPSOM Act

No data is available about the outcomes for migrant workers who have been put through the ATIPSOM Act process. In general, the process appears to provide little justice to migrant workers, and several NGOs said the process instead was retraumatising to victims who had already been traumatised by their trafficking experiences.

Staff of the MAPO Council Secretariat interviewed for this study stated that, although prosecutions have been numerous, convictions are rare. The United States Government, which carries out an annual review of anti-trafficking efforts around the world, reported that in 2014 the Malaysian Government investigated 186 potential trafficking cases and initiated prosecutions in 54, including 26 for forced labour. Only three traffickers were convicted, and sentences ranged from only two to five years for each charge.⁶⁷⁵ In 2015, 158 investigations were carried out, 38 people were prosecuted and seven were convicted.⁶⁷⁶

The 2015 numbers were an improvement on those from 2014 but are still low. The Council said it did not know why this was the case, and would welcome further research into prosecutions and judicial decision-making in trafficking cases. The 2016 Trafficking in Persons Report also said that sentences given in 2015 were weak and did not commensurate with the seriousness of the crime or the requirements of the ATIPSOM Act.

Review of Court Decisions in Trafficking Cases

A review of the few court decisions reported in Malaysian law journals suggests that one reason traffickers are not being convicted is that prosecutors have had difficulty of proving human trafficking versus smuggling, and have failed to prove exploitation of workers.

In the 2011 case of *Siti Rashidah & Ors v PP*,⁶⁷⁷ the High Court considered the overlap between trafficking and migrant smuggling. The facts of the case involved an immigration

⁶⁷⁵ US State Department, “2015 Trafficking in Persons Report, Country Narrative: Malaysia”, pp. 233–236, July 2015, available at <http://www.state.gov/documents/organization/243560.pdf>.

⁶⁷⁶ US State Department, “2016 Trafficking in Persons Report, Country Narrative: Malaysia”, July 2016, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2016/258814.htm>.

⁶⁷⁷ [2011] 6 MLJ 417.

raid in which 10 undocumented migrant workers from Myanmar, including three children, were found living in the house along with evidence they had paid to enter Malaysia illegally. The immigration officers arrested the owner of the house and three others and they were charged with trafficking of the migrants. The “victims” testified that they had come to Malaysia to find work in the building industry and that their employers had treated them well. The accused pleaded guilty in the Magistrates’ Court to trafficking of adults and children but later appealed.

On appeal, the High Court set aside the convictions, finding that trafficking under Sections 12 and 14 required proof of exploitation, and the prosecution had not proved this element of their case. The Court considered factors such as whether the accused had freedom of movement, whether they were provided sufficient food, and whether they were mistreated in their work. Finally, the court stated:

These were not trafficked people, but rather people who came to Malaysia to find decent work such as in construction or goods markets and have a better and more comfortable life. If they had legal travel documents they would be the same as any foreign worker here moving freely and living with their families.⁶⁷⁸

Another case shows the difficulty of proving that courts are demanding an extreme standard of exploitation to consider the case “trafficking” as opposed to violations of labour standards. In *Subramaniam a/l Ramachandran v PP*, the Court held that labour violations under the Employment Act 1955 were not relevant to finding exploitation under the ATIPSOM Act. In that case, the two accused had been convicted of trafficking three Indonesian women to work in their catering company. The victims’ evidence was that they worked long hours with no payment for overtime, were paid less than the minimum wage, and sometimes received no payment at all. Further, the employers confessed to hitting the workers for making mistakes.⁶⁷⁹

The High Court overturned the convictions for trafficking under Section 12. It found that the magistrate had not correctly interpreted “exploitation” under the ATIPSOM Act by viewing the wage violations as evidence of forced labour. The High Court said wage violations, even non-payment, did not constitute exploitation under the ATIPSOM Act. Instead they considered only whether the victims had been forced or blackmailed into working by violence. On this point, the Court found that the victims had given conflicting testimony and dismissed the testimony, and the victims were unable to support their claim. Note that this interpretation of forced labour contradicts the ILO indicators of labour (see section 6.6.2).

⁶⁷⁸ [2011] 6 MLJ 417, para 22.

⁶⁷⁹ [2012] 10 MLJ 795.

Compensation for Victims of Trafficking

Compensation was not available to trafficked persons until the amendments to the law came into force in November 2015. The researchers did not have data at the time of writing regarding whether prosecutors had been seeking compensation, or payment of wages in arrears for victims of trafficking. The fact that the migrant worker must wait until the conclusion of the trial before compensation or backwages can be requested poses a significant barrier, given that migrants can be returned home before the matter even gets to trial.

The ATIPSOM Act as amended makes clear that a trafficked person can also sue a trafficker in the civil courts. It makes no mention of the Labour Court, but also does not prohibit a parallel case in the Labour Court for unpaid wages and cash. It is unclear, however, how a trafficked person under a PO would be able to attend proceedings in other forums, unless they were granted freedom of movement by the MAPO Council.

7.7.6 Summary

Several government officials and NGO representatives said that Malaysia was not yet taking human trafficking seriously. Although enforcement units, councils and committees have been established, funding is still limited. In addition, migrant workers do not seem well-served by the ATIPSOM framework. Although it is intended to protect victims of trafficking and provide shelter and basic needs, the process is highly disempowering and until recently has offered victims little incentive to participate. It remains to be seen if the provisions on compensation and work will change this situation.

7.8 Informal Dispute Resolution

Most migrant workers do not use any official mechanism in Malaysia to seek redress for harm (see chapter 8). Some do still take action though, by directly contacting their employer or agent in Malaysia, contacting their agent in the home country, and contacting their embassy or, in some cases, approaching the agent or employer with the assistance of a third party such as a civil society organisation, legal aid centre, or even SUHAKAM.

Contacting the wrongdoer or another source of assistance directly is a usual first step in all disputes for citizens or non-citizens. Some cases can be easily resolved through a discussion and clarification of the worker's situation, and legal rights and entitlements. The challenge for migrant workers is that they approach the negotiation from a position of weak bargaining power, particularly if they are undocumented or required to leave Malaysia within a short period of time.

This section briefly describes the experiences of workers who took this avenue to seek redress.

7.8.1 Direct Negotiation with Employers

Some migrant workers who participated in this study had expressed their grievances directly with their employers. The employer often verbally conceded to the requests but did not follow the promised action. Two women, for example, one at a commercial cleaning service and one in a private home, completed their two-year contracts but were not sent home. They described their unsuccessful efforts to leave:

I tried to ask my employer to let me go home, but he said no, just wait one more month. I kept asking and then I didn't ask again.⁶⁸⁰

My Madame knew before that I wanted to go home because had been so long since I had seen my family. Madame would make many promises ... then she just said I am not allowed to leave.⁶⁸¹

In a third case, complaining to a supervisor resulted in the employer terminating the employee's service. The worker, an employee of a furniture factory asked his employer if he could work less overtime because he was regularly made to work 12-hour shifts and was fatigued:

When I spoke to the boss, they reduced my salary. Later he called a meeting, but no one would speak, I was the only one talking [about the problems]. So the boss said you have no work here, you go home. So I had to leave there.⁶⁸²

Another migrant worker was threatened with violence if he continued to press his case with his employer.

The workers described feeling isolated from colleagues when they made these complaints, because colleagues were also afraid of being terminated.

Box 22: Employer Grievance Systems

Many companies have grievance mechanisms in which employees may file complaints against the company or manager. Grievance mechanisms are not required under the law, and the law does not state what constitutes an appropriate grievance mechanism. The procedure may be defined in the employment contract, or in the collective agreement signed with the union.

⁶⁸⁰ Interview No. 28, female Indonesian worker, interviewed in Kuala Lumpur, 28 September 2015.

⁶⁸¹ Interview No. 16, female worker from the Philippines, interviewed in Selangor, 15 July 2015.

⁶⁸² Interview No. 31, male Nepali returned migrant worker, interviewed in Nepal, 17 April 2015.

A small study by the MEF found that 84 percent of employers surveyed had an internal grievance procedure, and in 92 percent of those procedures, foreign workers could file a grievance. However, the report noted that foreign workers often did not use the grievance mechanism because of language and cultural barriers or because they feared retribution.⁶⁸³ Other studies have found that many workers in large companies are employed by outsourcing agencies instead of being directly hired, which means they do not fall under the company grievance procedures in any case.⁶⁸⁴

In this study, grievance procedures were mentioned by migrant workers only in the manufacturing sector. Those working in restaurants, homes or services such as cleaning companies did not have any such procedure. In factories, some workers spoke to the human resources department but others spoke just to their manager. This was often unsuccessful and did not appear to follow a ‘procedure’ as such. For example, one worker in a garment factory explained:

*Our salary was not what we expected in our new contract, so I complained to my manager. Nothing happened, she just told me to relax, just like that, take a rest. I don’t know what she meant, I went home and now I am just waiting. Have I lost my job?*⁶⁸⁵

7.8.2 Third-Party Negotiation

If a migrant worker seeks help, the lawyer or service provider will usually try to negotiate directly with the employer before taking the case further. Negotiation with the assistance of a third party may be the best and fastest option in many cases. As a former Human Rights Commissioner at SUHAKAM noted, “It saves a lot of time and it is more mutual.”⁶⁸⁶ A staff member at the Bar Council found most employers willing to pay what they owe:

If it is quite straightforward, then I will just ask/call the employer and speak to the employer asking them what is the problem, why you can’t pay and things like that ... none of them has said, “I am not going to do anything about it.” No, we have never had that kind of situation.⁶⁸⁷

⁶⁸³ MEF, “Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia”, 2014.

⁶⁸⁴ Verité, *Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics*, Amherst: Verité, 2014, p. 40, available at <http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014.pdf>.

⁶⁸⁵ Interview No. 11, female migrant worker from the Philippines, interviewed in Penang, 10 May 2015.

⁶⁸⁶ Interview with SUHAKAM, Kuala Lumpur, 22 May 2015.

⁶⁸⁷ Interview with Bar Council Malaysia, Kuala Lumpur, 5 November 2015.

Box 23: SUHAKAM

SUHAKAM was created by the HRC Act, to promote awareness of and provide education about human rights in Malaysia, and advise and make recommendations to the Government on human rights matters.⁶⁸⁸ Human rights are defined under the HRC Act as the fundamental liberties set out in the Federal Constitution.⁶⁸⁹

The Commission comprises up to 20 commissioners who have knowledge or experience of “human rights matters”. They are political appointees selected by the Prime Minister and appointed by the Yang di-Pertuan Agong.⁶⁹⁰ The commissioners are supported by staff, located in Kuala Lumpur.⁶⁹¹

The Commission also undertakes public inquiries on topics of human rights “to study and verify infringements of human rights” but it has not considered the issue of migrant workers.⁶⁹² It also receives complaints from members of the public and can make recommendations to the relevant authorities about “appropriate measures to be taken” but it has no enforcement power — rather it assists in negotiation (see section 7.9).⁶⁹³

Other lawyers and case workers said that settlements varied greatly, dependent on the employer, the migrant worker’s circumstances, and the knowledge and attitudes of the negotiator. Several organisations and individuals who assist migrant workers in negotiation said that some employers were cooperative, but most were not and would seek to delay the negotiation knowing that the workers had limited time. The employers knew that migrant workers, especially those who were undocumented, were unlikely to take the case further to a formal mechanism because they rarely have the documents to prove a case in court, are undocumented and afraid, or are unable to find assistance (see chapter 8).

A lawyer at the MTUC estimated that through these negotiations most workers would get one third to a half of what they were owed — usually a return ticket and part of their salary, but rarely overtime or other monies due.⁶⁹⁴ Another explained that many migrant workers, especially domestic workers, internalised the blame for their poor treatment and were reluctant to demand all that they were owed.

Some service providers prefer not to negotiate directly, and instead refer a migrant worker to the most appropriate agency. As one such service provider, which provides grassroots support to migrant workers through the Catholic Church, the AOHD explained:

⁶⁸⁸ Human Rights Commission of Malaysia Act 1999 [Act 597] (“HRC Act”), entered into force on 9 September 1999, Section 4.

⁶⁸⁹ HRC Act, Section 2.

⁶⁹⁰ The Prime Minister must consult with a Committee, which includes a representative of the Government, three representatives of civil society, and the current Chairman of the Commission, HRC Act, Section 11(1).

⁶⁹¹ HRC Act, Section 16.

⁶⁹² HRC Act, Section 12.

⁶⁹³ HRC Act, Section 4.

⁶⁹⁴ Interview with MTUC, Kuala Lumpur, 20 January 2015.

We prefer to go through the labour office because technically that is where we engage with the government bodies, we don't want to do it independently and say you better pay the salary... we are not a legal firm.⁶⁹⁵

Box 24: Embassy Support for Migrant Workers

All countries that send a significant number of migrant workers to Malaysia have embassies in Kuala Lumpur, which provide consular services to their citizens. Some also have labour attachés seconded from the DoL or equivalent in the home country.

As well as consular services, some embassies give legal advice, negotiate with employers on behalf of migrant workers or even hire Malaysian lawyers to represent migrant workers in serious criminal cases. One of the most active embassies, the Indonesian Embassy, also assists migrant workers to file claims at the DoL.

In interviews, embassies described many challenges in assisting migrant workers with grievances in Malaysia. Many operate with a small number of staff and resources, especially if they represent smaller and less wealthy countries. Staff members are overwhelmed by the number of migrant workers seeking their assistance. The Indonesian Embassy, for example, has three people to handle up to 4,000 cases per year.⁶⁹⁶ Few embassy officials and labour attachés are trained in the Malaysian legal system or even in how migrant workers can file claims back in their home countries. For this reason embassy officials have also come to rely on Malaysian NGOs to supplement services which they are unable or unwilling to provide.

Of the 50 migrant workers interviewed for this study, 26 had contacted their embassy at some point for assistance. Some had needed assistance with travel documents, advice and repatriation. One woman who had been the victim of forced labour but could not bring a case because she did not know her employer's full name or address, described the embassy staff as kind and supportive:

A stranger took me to the Indian High Commission and dropped me off... when I went there, they told me that in cases like this you need to go to the police station and lodge a report. I said that I'm not educated I don't know where to go, what to do. I just came here to save my life. Just help me. [The embassy staff] were good. They said, "Don't worry, don't be scared. We have a safe place that you can go. So you just stay safe here until we repatriate you."⁶⁹⁷

Others however said that some embassy staff used the migrant worker's desperation to get new documents and return home as a way to extort money from the worker. As recalled by one worker:

⁶⁹⁵ Interview with AOHD, Kuala Lumpur, 21 January 2015.

⁶⁹⁶ Interview with the Embassy of the Republic of Indonesia, Kuala Lumpur, 11 November 2015.

⁶⁹⁷ Interview No. 13, Indian domestic worker, interviewed in Selangor, 10 June 2015.

When I told them [I needed documents] they said only when your turn comes then you can go. Whoever pays more money — they get the first chance. They said I had to pay RM1,300 for document in the embassy, and [RM]400 for the police, I don't know why.⁶⁹⁸

Three workers (in one group) received assistance from the embassy to resolve their cases, through direct negotiation between the embassy and the agent. This group, all domestic workers, were owed RM17,000 each in unpaid wages including overtime. The agent offered them only RM2,000 and the embassy pushed the workers to take it:

The embassy told me just [...] take the money and go back home, no need to fight so long time ... they said like that. I felt like I had no choice then, I had to sign.⁶⁹⁹

Another worker in a focus group explained that Bangladeshi workers were reluctant to bring complaints to the Bangladeshi Embassy because of a general perception that “they never listen to Bangladeshi workers’ problems, they don’t even pick up the phone.”⁷⁰⁰

Malaysian stakeholders, including the Government, NGOs and the legal community, expressed a strong wish for embassies to collaborate and assist their workers where they could. They suggested that more information about embassy services is needed, as well as channels for communication. Some embassy staff, for their part, requested more training in the Malaysian legal system.

7.9 Summary of Mechanisms Available to Migrant Workers

As this chapter has described, migrant workers who wish to seek a remedy for a grievance have various options for seeking redress depending on the nature of the harm. Most options are available to Malaysians and non-citizens alike, including labour claims and labour inspections for unpaid wages, the industrial system for unfair dismissal cases, filing a claim in the civil courts, or going to the police. These options can work well for migrant workers who have strong claims and sufficient evidence.

The two mechanisms available primarily to migrant workers — the FWCS for injuries at work, and the ATIPSOM Act for victims of trafficking — were described in less positive terms. The FWCS was complicated, relied on the goodwill of the employer, and paid very little in compensation. The ATIPSOM Act was not providing workers with compensation or accountability in most cases, although recent amendments to the Act have sought to address this.

In reality, most migrant workers with a grievance attempt direct negotiation or negotiation with the assistance of an interlocutor. The number of workers who take further action, as indicated by the numbers who use each individual mechanism, is extremely small. The cross-cutting barriers that prevent access are outlined in the following chapter.

⁶⁹⁸ Interview No. 30, male migrant worker from Nepal, interviewed in Nepal, 17 April 2015.

⁶⁹⁹ Interview No. 22, female Cambodian worker, interviewed in Penang, 3 August 2015.

⁷⁰⁰ Focus Group No. 2, male migrant workers from Bangladesh, Negeri Sembilan, 7 June 2015.

8 CROSS-CUTTING BARRIERS TO ACCESSING JUSTICE

Despite the range of options available under the law to migrant workers who suffer harms in the course of migrating and working in Malaysia, most do not seek any assistance at all. Some of the workers who participated in the study lived in Malaysia for years enduring difficult and illegal conditions without ever submitting a complaint to their employer or any state institution.

The migrant workers gave numerous reasons for not coming forward, or for being frustrated in their attempts to obtain justice if they did come forward. This section details the main obstacles described by migrant workers themselves, as well as those highlighted by lawyers and other stakeholders who support migrant workers in Malaysia.

8.1 Fear of Termination and Loss of Documented Status

The most common reason that migrants gave for not seeking assistance or submitting a complaint about their employer was that they believed this would result in the termination of their services and their subsequent loss of legal status. As a senior officer at the DoL explained:

There's a big fear for the migrant workers that their permits would be revoked. So legal status is their biggest fear and it can be used as an advantage in order to prohibit them to make a report.⁷⁰¹

Many workers assumed that if they complained they would be laid off. As Bangladeshi and Nepali participants in a focus group stated:

If we had a problem, we would do nothing about it, we would just wait. It's because we are afraid ... we don't want to get involved in a fight ... Even if they don't pay our salary, we cannot take any action because if we [group together] and challenge them, they would call the police and then we would be sent back to Bangladesh.⁷⁰²

The only place we know to go is the embassy, but we would never go to the Nepal embassy to ask for help. If the company finds out we have complained about them they will ship us straight back to Nepal. We are scared about that.⁷⁰³

⁷⁰¹ Interview with the Department of Labour Peninsular Malaysia, Putrajaya, 27 April 2015.

⁷⁰² Focus Group No. 2, male migrant workers from Bangladesh, Negeri Sembilan, 7 June 2015.

⁷⁰³ Focus Group No. 3, male migrant workers from Nepal, Johore, 21 June 2015.

Losing employment was a serious matter for many migrant workers in Malaysia because they needed to earn income to meet financial responsibilities at home. Almost all participants were the primary source of income for their families, and some had also taken on debt at high interest rates. Therefore, it was preferable in many cases to simply endure, rather than complain and risk being laid off.

This situation is further exacerbated by the inability of migrant workers to change employers in cases of abuse and exploitation, except in rare cases stipulated in the ATIPSOM Act.

8.2 Undocumented Status and Fear of Arrest

A review of redress mechanisms in the previous chapter revealed that one of the greatest barriers to redress was being undocumented. This is largely a matter of practice rather than law.

More significantly, seeking redress brings the undocumented migrant worker into the open and may expose them to arrest. Undocumented migrants are sometimes arrested when making a police report,⁷⁰⁴ or when attending a court hearing if the employer has informed the Immigration Department that the worker will attend. This risk dissuades many undocumented workers from filing or following up on claims, even if they have been the victim of a serious crime. A former prosecutor noted that, in her estimation, 30 percent of migrant worker victims of crime do not attend the trial of their case because they are afraid of arrest. The case is then dismissed.⁷⁰⁵

8.3 Residence and Work Restrictions on Workers with Pending Cases

Non-citizens whose work permits have been cancelled, for example by leaving their employment, can only stay in Malaysia legally if they obtain a Special Pass, a renewable 30-day permit (see section 4.3.1).⁷⁰⁶ This system presents many challenges to migrant workers seeking redress.

First, a Special Pass is not granted automatically to claimants or victims of crime who have pending cases. Rather the granting, and the later extension, of a Special Pass, is always at the discretion of an immigration officer. Legal services providers said that immigration officers would usually grant a Special Pass and at least two extensions to workers who presented a letter from the DoL or Department of Industrial Relations. However, this is not guaranteed. Only two migrant workers who participated in this study stated that they had a Special Pass, both in Penang. One noted the difficulty of the process and the arbitrariness of the decision-making:

⁷⁰⁴ Interview with WAO, Selangor, 30 January 2016.

⁷⁰⁵ Interview with a former DPP of the Attorney General's Chambers, Selangor, 26 September 2016.

⁷⁰⁶ For more information about the Special Pass System, see "Memorandum Relating to the Special Pass", Bar Council Malaysia, published on 11 February 2008, pp. 1–19, 2008.

My employer cancelled my worker permit so we needed a Special Pass. When we went to get my first Special Pass I had the Labour Department letter with me and my court date was there but, we don't know why, they gave me just eight days. Then the second and third Special Passes were valid for 28 days. I just got my third Special Pass. It is very difficult to get. We would go there at around 7:30 am and we would receive the pass only at around 3 pm or 4 pm.⁷⁰⁷

Even if a Special Pass is obtained and extended, its usefulness is limited for migrant workers seeking justice. Many cases, particularly those in the courts, can take longer than 90 days, and thus the worker may have to give up the case before it is concluded. Further, the Pass does not grant an explicit right to work. Migrant workers who wish to stay and pursue a case must do so at their own expense or with the support of friends.

This was identified as the greatest barrier to redress by several interviewees. As explained by one civil society organisation:

They can't fend for themselves and that, I think, is the biggest hurdle here. Someone has got to help them out financially and with accommodation. I am quite sure that there are many out there that really want to ventilate their grievances, you know, be it in employment or other forums, but it is impossible. How are they going to continue to stay and to sustain themselves?⁷⁰⁸

The MOHA is starting to address this problem for identified trafficked persons who are staying in a government shelter. As of 2012, some provision was made for trafficking victims to work while they waited for their cases to be resolved, and this was reaffirmed in the November 2015 amendment to the law (see section 7.7). How this will be managed, however, is unclear. At present, trafficking victims do not need a Special Pass because the PO gives them protection from deportation.

8.4 Passport Retention

As noted earlier in this study (see chapter 5), the removal of passports from migrant workers against their wishes is common. Despite being illegal, expert interviews noted that authorities rarely enforce the law. Most migrant worker participants in this study had their passports taken by their agent or employer on arrival in Malaysia. Only a handful managed to have their passports returned (see chapter 5).

⁷⁰⁷ Interview No. 3, migrant domestic worker from the Philippines, interviewed in Penang, 7 May 2015.

⁷⁰⁸ Interview with Tenaganita, Petaling Jaya, Selangor, 3 March 2015.

Taking a migrant worker's passport, as well as being illegal, usually has the effect of preventing a migrant worker from accessing justice. Migrant workers who do not hold their passport are effectively bound to their employers, because leaving the house can expose them to arrest and prosecution for illegal entry. Unless the situation is desperate, and they feel they have no other option, many will choose to stay in inferior conditions.

For those that leave, a passport is needed to access key redress mechanisms, although this is a matter of practice rather than law. Labour officers, for example, require workers to present their passport to file a claim, even though this is not a requirement of the Employment Act 1955. The courts also reportedly require presentation of the passport to confirm the worker's identity (see section 7.6).

Identity documents are requested by public hospitals and medical clinics. For non-citizens this means they must produce a passport or UNHCR registration document. Photocopies of passports are often not accepted. One Nepali migrant worker noted that the local hospital refuses service to migrant workers who do not have passports, potentially preventing them from getting critical care.⁷⁰⁹

Finally, not having access to one's passport can delay the return home because the embassy must verify the migrant worker's identity, and produce new documents. Several workers interviewed in government and civil society shelter homes were waiting only for a new passport in order to return home.

Lawyers and civil society organisations assisting migrant workers expressed great frustration with the issue of passport retention, noting that the Government had been criticised for many years for not enforcing the Passports Act 1966 against employers. They were also upset by contradictory policy statements, such as the bilateral agreements with Indonesia which first indicated employers could hold a worker's passport, albeit changed to hold it only with the worker's consent.

Efforts by lawyers to have passports returned to migrant workers are often fruitless as the law is unclear about who is responsible for ordering the return of personal documents. As explained by one civil society representative:

First when we meet a worker, usually their passport has been withheld. Police, immigration, and labour department, all of them think it is somebody else's job to get it back. I personally think it's the police's responsibility, but often they tell the worker to just go to their embassy and get another one.⁷¹⁰

They noted that under the Malaysia-US Side Letter to the TPP, the Malaysian Government has committed to more concerted efforts to reduce passport retention (see section 6.3).

⁷⁰⁹ Focus Group No. 5, migrant workers from Nepal, interviewed in Johore, 21 June 2015.

⁷¹⁰ Interview with Tenaganita's Penang office, Penang, 7 May 2015.

Box 25: Max's Case — Passport Taken in Immigration Scam⁷¹¹

I came to work here in May 2015 with the help of my sister who is married and living in Malaysia. I entered with a visitor's pass and then got a job with a recruitment agency that placed me in a hotel. Soon I was promoted from the front desk to assistant manager.

My sister told me that I could arrange a work permit after arriving and she introduced me to an agent, a Filipino based in Malaysia. I paid him half the amount, RM2,000, and he said it would take three weeks, and at most three months. It has been a year now and I have not received the documents. He wants more money but I am refusing to pay because I want evidence that my passport is in process.

I am still waiting for my agent to return my passport because I cannot do anything without it. Now my recruitment agency is also calling and saying they will provide any documents needed to get the work permit if I have my passport. Finally I went to the Pinoy Support Group and they took me to the police. But the police said I am here illegally. They wouldn't take a police report from me, and they wouldn't do anything to get back my passport. They told me just to go home.

8.5 Lack of Information about Legal Rights, Options, and Procedures in a Language that Workers Understand

Migrant workers interviewed for this study explained that the first barrier to seeking redress was usually a lack of knowledge about rights and redress options. As explained by one Indonesian migrant worker, who had returned to Indonesia without ever seeking assistance:

If you have a problem, who do you tell? ... We don't know where to go. New people arrive all of the time and they don't know anything except to call their agent ... Only friends who have been here a long time know about the consulate and where it is, but new friends if they need to get help, they are afraid.⁷¹²

Several reasons were given for this lack of knowledge. The first is the lack of information made available to low-wage migrant workers by their governments or agencies at home or in Malaysia. The Malaysian Government does not have a dedicated body for providing advice and assistance to migrant workers, despite their large numbers. Significantly, the researchers were not able to identify any materials explaining rights and options to migrant workers either at the DoL or at individual embassies, let alone materials translated into the languages commonly spoken by migrant workers.

⁷¹¹ Interview No. 9, male migrant worker from the Philippines, interviewed in Penang, 10 May 2015.

⁷¹² Interview No. 41 with male returned migrant worker, Indonesia, 24 September 2015.

Expert stakeholders explained that the migrant workers they meet usually had no knowledge of their rights in Malaysia or their redress options. As explained by one lawyer:

Most of the migrant worker clients I had, they don't understand the law, they don't understand Malay, they don't understand how the system works, and they tend to assume that if they've made a complaint to one person, that's going to resolve their issues but probably that is just the tip of the iceberg. It is overwhelming for them.⁷¹³

This was confirmed by embassies who noted that most migrant workers who came to them for help had no knowledge of redress mechanisms available in Malaysia, or how to find that information. One embassy — the Embassy of the Philippines — was trying to address this by conducting orientation seminars with new arrivals that explained, among other things, sources of assistance in cases of abuse. They noted, however, “We still cannot reach a lot of workers so that has to be addressed.”⁷¹⁴

The second challenge to obtaining information is isolation, particularly for migrant workers who are confined to their workplaces and/or boarding houses. Female migrant domestic workers are most vulnerable in this regard, often working without a written contract, and not even told the address of their employer's home. This made leaving and seeking assistance a terrifying prospect.

Some overcame isolation in creative ways, for example by contacting old friends abroad through online messaging systems, or approaching fellow nationals they met in the course of their work, or on the street. But reaching out for help was described as intimidating and also high-risk. Some workers found themselves in new situations of exploitation. One migrant domestic worker participant from India recounted that, after she asked to resign from her position and return home, her employer drove her to an unfamiliar area and left her on the side of the road. Having no idea where to go, she approached strangers who looked to be of Indian background. The couple offered her assistance and so she accompanied them back to their restaurant, but instead of helping her they put her to work and refused to pay her any wages. A kindly wife of a police officer eventually helped her reach the Indian Embassy.⁷¹⁵

Finally, language is a barrier. None of the mechanisms reviewed have a dedicated translation service, except for the courts, which can appoint interpreters for court hearings. Laws, policies, and procedures for migrant workers are not available in any language other than Bahasa Malaysia, and sometimes English. One civil society representative explained:

⁷¹³ Interview with Messrs T. Balasubramaniam, Kuala Lumpur, 19 January 2015.

⁷¹⁴ Interview with the Embassy of the Philippines, Kuala Lumpur, 1 April 2015.

⁷¹⁵ Interview No. 12, a migrant domestic worker from India, WAO Shelter, Kuala Lumpur, 10 June 2015.

Language is a big problem. Even if they can speak some Malay, it is not right to say that they could understand the laws. The laws are not translated into local languages. So, that is one thing — the laws have to be simplified and given and this is done by the Ministry, or by the Government department. If the worker clearly understands [the law], it would actually give them the power.⁷¹⁶

8.6 Absence of Legal Aid Services and Trained Lawyers for Foreign Workers

Malaysia has a dynamic legal community, including a culture of *pro bono* legal services. However, little *pro bono* assistance is available to migrant workers.

Only one legal aid institution, the Bar Council Legal Aid Centre has a mandate to assist non-citizens. The Bar Council Legal Aid Centre is a part of Bar Council Malaysia and operates in each state in Peninsular Malaysia. However, assistance is confined to advice, settlement negotiation and occasional representation in criminal matters. They do not have the resources to represent migrant workers in civil proceedings or all migrant workers charged with crimes.⁷¹⁷ Embassies sometimes fund private lawyers, but usually only in high profile or death penalty cases. No other government or private agency funds lawyers to represent non-citizens, even in criminal cases.

Even if funding is available, finding lawyers to assist migrants to take cases further than negotiation is very difficult. Few lawyers have the expertise, interest, and time to represent migrant workers. The Bar Council Malaysia has institutionalised legal action on migrant workers and refugees as a priority area by creating a committee, but its lawyers focus more on policy reform than individual representation. As one private lawyer explained:

I think it's just me and a couple of other people. I don't really know, because there's no money in [representing migrant workers], it is not really commercially profitable. That seems to be the big setback because there isn't any formal legal aid process for non-citizens.⁷¹⁸

Migrant workers then receive advice about their employment or immigration situation, if at all, from non-lawyers. These advisers may be law students volunteering at a legal aid

⁷¹⁶ Interview with CARAM Asia, Kuala Lumpur, 24 March 2015.

⁷¹⁷ The Legal Aid Centre operates pursuant to the Bar Council charter, Section 42(1)(h) of the Legal Profession Act 1976: "The purpose of the Malaysian Bar shall be to make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by advocates and solicitors."; interview with Kuala Lumpur Legal Aid Centre, Bar Council, Kuala Lumpur, 21 January 2015; interview with Bar Council Migrants, Refugees and Immigration Affairs Committee, Kuala Lumpur, 10 December 2015.

⁷¹⁸ Interview with Messrs. T. Balasubramaniam, Kuala Lumpur, 19 January 2015.

centre or NGO, NGO staff, labour officers at an embassy, or union representatives.⁷¹⁹ Such advisers are of vital assistance, but they may not be equipped or have the time to apprise the worker of all legal rights and options. As explained by one NGO:

It is truly best if we have legal representation because at the end of the day we [the NGO] act as the lawyer, the documenter, the filer, we do everything ... One of the challenges that I also face as a person who receives all this information is that I have to re-tell the story again and again, to the immigration, to the labour office, it is quite tiring. But a lawyer would help by knowing the whole scenario and doing the advocating.⁷²⁰

8.7 Outsourcing

As described several times in this report, outsourcing has been increasingly used by Malaysian employers since the mid-2000s. Although publicly disavowed by the MOHA, new outsourcing is still reportedly taking place by unlicensed agencies or agents.

Civil society organisations, including unions and NGOs, described outsourcing as both a source of vulnerability to harm, and a barrier to many migrant workers accessing justice. The strategy of outsourcing the management of migrant workers to private actors means that both the agency and the principal employer can deny responsibility for any harm the migrant workers suffer. As described by one case-worker:

You have migrant workers coming in and their work permits are registered to the outsourcing agency but they are put to work in a supermarket or convenience store. Then if there is labour exploitation, the store says, "This is not my worker, he is registered to company A", and the outsourcing company will say, "He is registered to us but he is working at the store, so the store must resolve the problem." So workers you know are kicked like a football and there is no redress.⁷²¹

Another organisation said that outsourcing agencies sometimes illegally use a chain of agents and sub-agents and the worker may not know the identity of the sponsoring company. It is, therefore, impossible for the worker to hold the company accountable. Others pointed to the lack of a legal framework for outsourcing agencies, making it difficult to take any kind of legal action against them.

⁷¹⁹ Interview with a retired professor of Human Resource Management, Universiti Teknologi MARA, Selangor, 19 January 2015.

⁷²⁰ Interview with AOHD, Kuala Lumpur, 21 January 2015.

⁷²¹ Interview with Tenaganita, Selangor, 3 March 2015.

8.8 Delay in the Resolution of Cases

Finally, a number of the migrant workers interviewed for the study did not wish to seek redress because they were aware the legal process could be drawn out, during which time they could not work. Many wished to return to their home country. Others were anxious to return to Malaysia and find new employment. Waiting for an uncertain outcome was described as extremely stressful by several migrant workers.

Some embassy officials acknowledged that lengthy claims processes deterred many migrant workers from pursuing redress in Malaysia. As one official noted:

Sometimes because of the lengthy and tedious process, sometimes the victim herself would want to let go. If she really says I cannot take it anymore, we cannot do anymore. Of course we know. We know how lengthy it can be. [Government] themselves are frustrated of how lengthy it is and they cannot do anything.⁷²²

Officials at the Immigration Department and the government shelter expressed frustration that victims of trafficking often wish to return home rather than testify in a case against their trafficker. However, they overlooked the reasons that the migrant workers wanted to leave, namely that they were confined to the shelter and unable to work for many months while their cases were resolved.

It is often possible for a migrant worker to continue with a case, even after returning home, if they have a local address for service, such as a lawyer who is representing her. None of the redress mechanisms in this study specifically prohibit continuing with a case from abroad, and the then-President of the Industrial Court noted several cases in which migrant worker cases for unfair dismissal had continued after the worker had returned home.

However, this can be financially prohibitive for some mechanisms which require attendance by the victim or plaintiff to proceed — such as the Labour Court, or conciliation at the Department of Industrial Relations. Leaving but returning for a trial is more likely in a civil court or industrial court process where the plaintiff or complainant can be represented *in absentia* during the intervening steps. Further, in successful cases, the migrant workers were supported by NGOs which had taken extraordinary steps to maintain contact with the worker.

⁷²² Interview with the Embassy of the Philippines, Kuala Lumpur, 1 April 2015.

8.9 Lack of Financial and Social Resources

Pursuing a case in Malaysia can be expensive and emotionally taxing. A Malaysian sociologist noted, “The extent to which individuals are able to obtain redress through formal mechanisms depends largely on the resources they are able to mobilize” in terms of money, legal advice, social support, and time.⁷²³

Claimants may be required to pay filing fees, the costs of transport to and from meetings and hearings, security for costs, legal fees, and other expenses. In all cases the migrant worker must continue to support themselves, and possibly also continue to send money home to repay debts and support family. Sometimes family members in the home country, or organisations in Malaysia, are able to provide some financial support or shelter to migrant workers seeking justice, but this is by no means the norm.

In addition to financial resources, pursuing a claim is easier with a strong social network to offer encouragement and support. Many migrant workers, particularly domestic workers who have been working in isolation, wish to go back home to their families. As explained by one young woman:

I want to go back home, I don't want to waste my time here because I have a family back home. I just want to go back and tell my friends don't come back to Malaysia. I won't file a complaint.⁷²⁴

Another migrant worker who was waiting in an NGO shelter, also said:

It's okay, I just want to go home. Just want them to send me back home. I'm not expecting anything in return; I just want them to bring me back home.⁷²⁵

As a result, migrant workers who decline to proceed with a case may do so at least in part because of the sense of social isolation in Malaysia.

⁷²³ A. Nah, “The Rights Illusion: Access to Justice and the Rights of Non-Citizens in Malaysia”, *E-Symposium for Sociology e-Bulletin*, vol. 3(2), 2013, available at <http://www.isa-sociology.org/publ/E-symposium/E-symposium-vol-3-2-2013/EBul-Nah-July2013.pdf>.

⁷²⁴ Interview No. 21, one of a group of female Cambodian migrant workers, Penang, 3 August 2015.

⁷²⁵ Focus Group No. 1, migrant domestic worker from the Philippines, interviewed in Selangor, 27 April 2015.

9 CONCLUSION, FINDINGS, AND RECOMMENDATIONS

9.1 Conclusion

This study is the first comprehensive assessment of access to justice for a large but highly vulnerable group in Malaysia: migrants who undertake low-wage work on temporary labour permits. Bar Council Malaysia believes that access to justice is a fundamental right of all persons regardless of citizenship, and regardless of documented or undocumented status. The Malaysian Judiciary, the Malaysian Bar and other institutions in Malaysia have long upheld the importance of meaningful access to justice for individuals and for the creation of a just and orderly society premised on the rule of law.

The findings in this study are based on a combination of legal research and analysis, interviews and focus groups with migrant workers and others, and a review of case files and existing legal precedent. It describes the legal frameworks, institutions, and processes in place to protect the rights of migrant workers in Malaysia, and offers an assessment of how effectively these laws and systems serve migrant workers in practice.

The study concludes that Malaysia has a strong framework for providing redress to migrant workers whose rights are violated. It has laws that protect all persons in Malaysia, including migrant workers, from abuse and exploitation. Migrant workers have rights under the constitution, employment and industrial law, contract law, criminal law, and common law. Malaysia also has judicial and non-judicial mechanisms in place to enforce these legal rights. Migrants have brought successful cases in all mechanisms reviewed for this study.

Yet, despite the existence of this framework, few migrant workers ever engage with the formal justice system to resolve disputes with labour agents or employers or to report violations to the authorities for action. The number of claims filed by migrant workers in any forum is extremely small, and even fewer claims proceed to resolution. The vast majority of defrauded and exploited migrant workers return to their home country without justice. On the basis of this evidence, the study finds that access to justice for migrant workers in Malaysia is poor.

Numerous factors — legal, institutional, social and cultural — account for this situation, and are detailed further in the following section. Some apply to most socio-economically disadvantaged persons in Malaysia, including delays in the court system, high costs of retaining a lawyer, lack of familiarity with laws and legal processes, and ineffective and underfunded bureaucracies and enforcement agencies. Migrant workers have the added challenges of language and cultural barriers, visa restrictions that prevent them remaining in Malaysia to bring a claim, and an inability to change employers or protest mistreatment without losing legal status in Malaysia.

Nevertheless, Malaysia is starting from a strong legal and institutional base, and recent reforms — such as the universal minimum wage, strengthening of the anti-trafficking framework, and greater rights protections in bilateral agreements — give hope. Further reforms were being discussed as this report was written. The purpose of this report is to support reform efforts by providing an evidence base for recommendations, and a resource for lawyers, civil society organisations and government agencies that can support workers to obtain justice.

9.2 Findings

Five Key Findings

- (1) Migrant workers are a crucial part of the Malaysian economy and society, amounting to at least 15 percent of the labour force.
- (2) Migrant workers experience harms at each stage of migration. Vulnerability to abuses is increased by immigration rules that prohibit migrant workers from changing employers or from leaving abusive workplaces without immediately losing rights of residence.
- (3) Malaysia has laws, institutions and processes in place that give both rights to migrant workers and the means to enforce those rights.
- (4) Few migrant workers know of or use mechanisms available in Malaysia for obtaining redress for harms suffered during recruitment, at work or during arrest and detention.
- (5) Numerous factors contribute to poor access to justice for migrant workers, but the most significant is the limited ability of migrant workers to stay and work legally in Malaysia while pursuing a claim.

(1) Migrant workers comprise a significant proportion of the Malaysian workforce and are essential to the modern Malaysian economy.

Malaysia has approximately two million documented migrants and a large but unknown number of undocumented migrants who undertake low-wage work in key economic sectors. Migrants form the majority of the workforce in the construction, manufacturing, commercial agriculture and plantations, and low-wage services sectors. Most domestic workers are also migrants. Migrant workers are essential to the economy, and will be for many years to come.

Yet the role of migrant workers is frequently understated by policymakers and the media. Government policy shifts between reducing the number of migrant workers through hiring freezes and enforcement operations, and facilitating hiring of migrants through

streamlined processes and new bilateral labour agreements. Political and social attitudes toward migrants create an environment in which enforcement of rights is not prioritised.

(2) Malaysia’s labour migration system is poorly regulated, policies and procedures are made in a non-transparent manner, and migration rules make migrant workers vulnerable to exploitation.

The recruitment and outsourcing agencies that hire and manage migrant workers are largely unregulated. Licences are granted in a non-transparent manner, and policy related to outsourcing agencies is unclear. Malaysian law provides no guidance on recruitment fees, and fails to hold employers accountable for promises made or fees charged to migrants before arrival in Malaysia.

Recruitment procedures are similarly not formalised in regulation and change frequently. Current procedures do not protect the rights of migrant workers entering Malaysia. For example, the employer is not required by law to provide a contract to a worker before he or she arrives, nor is the employer required to have the contract approved by the Malaysian authorities. Recruitment procedures are also time-consuming and expensive for employers.

Once in Malaysia, the rules associated with the VP(TE) make migrant workers vulnerable to exploitation. These include a prohibition on changing employers, regardless of evidence of mistreatment or breach of contract by the employer requiring payment of an annual levy by workers that amounts to more than a month of wages; and the ability of the Immigration Department to cancel a VP(TE) immediately and without notice to the worker upon the employer informing the Department that the worker is no longer employed.

Penalties for entering without a valid visa or overstaying a valid visa are harsh, and include whipping. Authorities can search any suspected illegal immigrant without a warrant. Police are included among the agencies with immigration enforcement authority, which dissuades undocumented migrants from reporting crimes. In general, immigration enforcement is pursued zealously and large-scale enforcement operations are conducted on a regular basis, at the expense of other priorities such as public safety and access to justice.

(3) Migrant workers in Malaysia experience harms at all stages of the migration journey, regardless of the sector or whether they are documented or undocumented.

Migrant workers across sectors experienced similar harms during recruitment, employment and departure from Malaysia. Most violations are committed by employers and agents, although state authorities, members of the public, and fellow workers are also mentioned as violators.

Prior to arrival in Malaysia, migrant workers are deceived about the conditions or type of work awaiting them, and they either are not provided with a contract, or they are provided with a contract that does not accurately reflect the position. Malaysian and overseas agents charge some workers high fees.

After arrival in Malaysia, almost all migrant workers immediately have their passports confiscated by their agent or employer, and are sometimes required to pay further fees for unspecified reasons. Agents and employers also deceived migrant workers about immigration rules or failed to fulfil their documentation responsibilities, resulting in workers becoming undocumented after arrival.

The most common harms experienced by migrant workers occurred at work, including widespread non-payment or underpayment of wages, forced and unpaid overtime, restrictions on freedom of movement, and inadequate food and accommodation. Some workers also experienced physical, emotional, or sexual abuse. In some cases, the level of exploitation combined with deception and fees during recruitment amounted to debt bondage, forced labour, and trafficking. Domestic workers were particularly vulnerable to workplace violations because they were isolated and could not leave their employer's home.

Extortion by police, even of documented migrants, is an ongoing risk in public spaces. Where migrant workers were arrested, they described a bewildering process of arrest and trial, in which they were not informed of the charges against them, not provided any legal advice, were kept in inhuman detention conditions, and in some cases not provided translation during their trial.

Data on harms suffered by migrant workers, even of injuries and deaths in the workplace, is not comprehensively gathered and is not publicly available.

(4) Labour, contract, industrial, health and safety and other laws provide protections for all persons in Malaysia, including migrant workers. However, domestic workers are excluded from some key protections.

Malaysia's labour laws provide rights and protections that address most harms migrant workers experience at work. Civil and criminal laws also provide a remedy for cheating and fraud; physical and sexual abuse; and human trafficking. Key rights include the right to have a written contract that guarantees, at a minimum, the standards under the Employment Act 1955, rights to freedom of association, rights to have a contract honoured, and protections from abuse and exploitation. Migrant workers, including undocumented migrant workers, have the same rights for the most part as Malaysian workers.

Gaps in protection nevertheless remain, including:

- (a) exclusion of domestic workers from key protections in the Employment Act 1955 and from provision of workmen’s compensation and insurance in the case of injury at work;
 - (b) lack of protection for workers who file a claim against their employer, such as a prohibition on retaliation against a worker for filing a claim against the employer, whether in the form of termination or cancellation of a VP(TE);
 - (c) lack of standards for accommodation, food, and other amenities for workers employed in urban areas, namely within the area of a city council, municipal council, or federal territory. The law does not provide minimum standards regarding accommodation, the amount of food a worker should receive, or rules guaranteeing communication with family;
 - (d) lack of protection from discrimination. Some constitutional provisions, such as Article 8(2), do not explicitly provide protection for non-citizens. In fact, the Constitution enshrines discriminatory treatment between those detained for general offences and those detained under immigration powers; and
 - (e) inadequate rules on passport confiscation including a lack of a clearly stated right to hold one’s own passport and a lack of penalties for employers who confiscate passports.
- (5) Malaysia has numerous pathways or mechanisms to resolve disputes and address grievances.**

Malaysia does not have a specialised mechanism or institution designated to investigate and adjudicate migrant workers’ grievances against employers. Most redress mechanisms available to migrant workers are available to all persons in Malaysia. The one exception is the WCA.

Table 18 | Summary of Redress Mechanisms Available to Migrant Workers

Mechanism	Harms Addressed	Responsible Agency	Applicable Law
Labour Court	Non-payment of wages, or non-payment of other benefits due under law or contract	DoL, MOHR	Employment Act 1955
Labour Inspections	Poor working conditions across a worksite	DoL, MOHR	Employment Act 1955

Industrial Court	Unfair dismissal	Department of Industrial Relations, MOHR	Industrial Relations Act 1967
FWCS	Deaths and permanent disabilities occurring at the workplace	DoL, MOHR	WCA
Civil claims in the courts	Contract violations, personal injury or tort, <i>habeas corpus</i>	Judiciary	Civil Law Act 1956, Contracts Act 1950, Rules of Court 2012
Criminal investigation and prosecution	Criminal violations	RMP, Attorney General's Chambers, MOHA, Judiciary	Penal Code, CPC
Human trafficking	Forced labour, exploitation, criminal violations	Various departments, MOHA, Judiciary	ATIPSOM Act

More detailed findings on the operation and effectiveness of each mechanism are set out in Finding (8) below.

(6) Migrant workers in all sectors face numerous practical barriers to accessing justice.

Numerous cross-cutting barriers prevent migrant workers from seeking and finding assistance, and filing claims. These barriers can be summarised as follows:

- (a) Fear of termination and associated loss of legal status, and the failure of Malaysian law and authorities to protect workers from retaliation for seeking to enforce their rights;
- (b) Undocumented status, in practice, bars migrant workers who have left abusive employers from filing a complaint, and fear of arrest for being undocumented dissuades workers from seeking assistance;
- (c) Limited legal and practical ability to stay in Malaysia pending resolution of a case due to limitations in the Special Pass system;
- (d) Passport confiscation, a common practice by agencies and employers, prevents claims being filed in that all mechanisms require presentation of a passport for a complaint to be lodged;
- (e) Lack of information provided to migrant workers about their rights and redress options, or information not provided in a language migrant workers understand;

- (f) Absence of legal aid services for migrant workers, and lack of lawyers experienced and available to represent migrant workers;
- (g) Outsourcing of management of migrant workers to agencies shields principal employers from accountability for workplace harms, and excludes migrant workers from company grievance procedures;
- (h) Delays in proceedings and uncertain outcomes, which make staying in Malaysia to seek redress a prohibitively high-risk and expensive proposition; and
- (i) Lack of financial and social resources to remain in Malaysia and undergo the taxing process of litigation or a criminal case.

These specific barriers are heightened by the fact that systems are not currently in place to facilitate low-wage migrant workers filing a claim and then returning to their home country while their lawyer represents them, or filing a claim from abroad. Requirements to be present at mentions and hearings mean that once a migrant worker leaves Malaysia, possibilities for redress are slim.

(7) Government departments and specific redress mechanisms have made little effort to encourage and facilitate migrant workers access to justice. Efforts that have been made have been effective.

Despite the significant population of migrant workers in Malaysia and the frequent reports of widespread harms, the study did not identify any national effort to systematically inform migrant workers about their rights at work or how to seek a remedy for grievances, nor did the study identify any efforts to inform employers about their obligations to migrant workers.

Information that is distributed to workers, for example on the DoL website, is not provided in key migrant worker languages. No agency or single point-of-contact has been created for migrant workers to seek information and advice in any institution.

Some initiatives that have facilitated access to justice include fast-tracking migrant worker cases at the DoL and providing letters to migrant workers to present to immigration officials to obtain a Special Pass.

(8) Each redress mechanism has its own strengths and weaknesses.

DoL — Enforcement of Labour Standards

- (a) The DoL redress mechanisms, including its complaints and inquiries powers (Labour Court), labour inspections and prosecutions, are relatively simple, affordable, and accessible.

- (b) The Complaints and Inquiries Procedure was perceived as fair and effective by most stakeholders, and resulted in satisfactory outcomes for migrant workers.
- (c) However, the number of migrant workers filing claims is extremely low, amounting to just two percent of claims overall. Barriers preventing migrant workers from filing claims include a requirement to show a passport and to provide a contract or other evidence of employment.
- (d) Of claims filed, almost half are withdrawn or abandoned because the worker cannot stay in Malaysia. Employers can delay proceedings and labour officers do not compel attendance or resolution.
- (e) Prosecution of employers for labour violations are rare. Penalties for labour violations are minimal.

DoL – WCA

- (a) The WCA is inadequate to provide efficient and fair redress to migrant workers who are injured, killed, or suffer an occupational illness at work.
- (b) The amounts of compensation and limits on medical coverage are wholly inadequate to cover medical costs of migrant workers or to provide for income support after they return to their home countries. Migrant workers must pay significantly higher prices for medical care in Malaysia than Malaysian citizens.
- (c) WCA claims procedures are complicated, time-consuming, and inappropriate for injured workers with no means of support in Malaysia.
- (d) The reliance on the employer to arrange coverage and submit claims means that many workers are denied coverage through no fault of their own.

Department of Industrial Relations and Industrial Court

- (a) The Department of Industrial Relations and Industrial Court are the only mechanisms that provide for reinstatement or compensation of a worker following unfair dismissal.
- (b) The procedures are relatively simple, affordable, and accessible.
- (c) However, very few migrant workers use the industrial system due to a lack of awareness and long processing times.
- (d) Further, reinstatement is rarely a practical option for migrant workers if they have lost the ability to stay and work in Malaysia after termination of employment.

Civil Claims in the Courts

- (a) Malaysia's superior courts have made important decisions in recent years clarifying the rights of documented and undocumented migrant workers in law and contract.
- (b) The small claims court is an accessible and effective mechanism for migrant workers whose claims are below RM5,000.
- (c) Recent court reforms have also made the civil courts more efficient in their handling of cases.
- (d) However, the need for legal representation in larger and more complex cases, barriers to enforcement, and the likelihood that the defendant will seek security for costs make recourse to the civil courts difficult for most migrant workers.

Criminal Justice System

- (a) Migrant workers report to the police in cases of fraud by agents, passport confiscation, robbery, physical and sexual abuse, and others. Not all cases are accepted, and in some cases police illegally turn away migrant workers who are undocumented.
- (b) Victims in the criminal justice system have few rights, and migrants who may be victims of trauma are not granted any special consideration. Rights that do exist, for example to witness protection or compensation, are rarely sought by prosecutors.
- (c) In prosecutions of migrant workers, difficulties applying for bail, lack of information and advice about the charges against them, and the absence of free legal services for non-citizens mean that most migrant workers do not understand proceedings against them and plead guilty rather than proceeding to trial and waiting in detention.

Protection for Victims of Human Trafficking

- (a) Although the ATIPSOM Act included labour trafficking as an offence only in 2010, a significant number of cases are investigated and charged each year. However, very few prosecutions result in convictions.
- (b) Trafficked persons find treatment under the anti-trafficking framework disempowering. It requires victims of trafficking to be effectively detained pending their testimony, with no right to refuse to testify, to request or refuse medical treatment, or to information about their rights in general or the progress of their case.

(c) Recent positive amendments include providing provision for trafficked persons to leave shelters and work in approved positions, as well as to obtain compensation. It is too early to assess the impact of these changes.

(9) The assistance of intermediaries, including civil society organisations, trade unions, embassies, legal aid centres, or faith-based organisations, significantly improves access to justice.

In all successful cases reviewed in this study, at least one, and usually several, intermediaries assisted the migrant worker to gather personal documents and evidence in their case, file and follow-up on a claim, navigate legal procedure, and provide social and practical support. These intermediaries included NGOs, church groups, legal aid organisations, community groups, trade unions, labour attachés at embassies, and concerned individuals.

The burden on these intermediaries is extreme given the enormous need among the migrant worker community for assistance, which is due in turn to a lack of enforcement of labour and contractual rights by the Malaysian authorities. At the same time, human and financial resources and capacity of these intermediaries are low, as they receive no state support. All described feeling overwhelmed by the number and variety of cases brought to them.

(10) Coordination between organisations in origin and destination countries in respect to access to justice is *ad hoc*, and largely directed at rescue and return of migrant workers.

Organisations assisting migrant workers do, on occasion, coordinate with organisations in the origin country for repatriation of a migrant worker. However, this cooperation is not systematic, and depends on the initiative of individual staff or volunteers. Little cooperation was identified to assist workers in gathering evidence to support cases in the home country, or to maintain communication with the migrant workers who had filed claims in Malaysia after they had departed. Organisations in Malaysia and origin countries expressed a lack of knowledge and understanding about the rights and redress in the other country, limiting their ability to take cross-border actions to hold wrongdoers accountable.

(11) Domestic workers face enormous challenges accessing justice due to the highly restrictive conditions common in domestic work in Malaysia.

Migrants working as domestic workers face the greatest barriers to seeking justice of all sectors. They are the most isolated, are often confined to the employer's home, rarely hold their personal documents, have no guarantee of private space and no demarcation between work and personal time, and may be prevented from communicating with family in their home country. Further, although private homes are their workplaces in practice,

labour inspectors do not inspect homes to assess employer compliance with labour standards.

Access to justice for migrant domestic workers requires that they escape from the employer, and that they be able to locate assistance. Those that do find assistance do not have any community to support the worker during the process of seeking redress, so that most in this situation do not pursue redress and instead seek only to return home. Some workers who manage to escape are then put into another equally exploitative situation.

9.3 Recommendations for Improving Access to Justice for Migrant Workers in Malaysia

Ensuring that migrant workers have meaningful access to justice following deception and fraud during recruitment, labour violations, exploitation and forced labour in Malaysia, and mistreatment by enforcement agencies, will require a concerted effort from many actors on numerous fronts. Migrant workers must be better informed of their rights, better able to reach assistance, and better able to remain in Malaysia to bring claims against duty bearers.

The following recommendations are targeted to the Government, embassies, the legal community, the Judiciary, civil society including NGOs and community-based organisations, trade unions and the private sector. They are drawn from the two roundtables on access to justice held by the Bar Council Malaysia, the suggestions of migrant workers and expert interviewees, and the authors' analysis of law, policy, and implementation.

Five Key Recommendations – Essential First Steps Toward Change

- (1) The DoL, in partnership with civil society organisations, should conduct broad-based public information campaigns targeting migrant workers in key migrant worker languages regarding employment rights and obligations, and where to get help if employment rights are violated. Expand the current hotline at the DoL to receive complaints and provide advice in key migrant worker languages.
- (2) The MOHA should revise the rules of the Special Pass to allow migrant workers who have filed claims to stay in Malaysia automatically pending resolution of the case or claim.
- (3) Allow migrant workers to transfer the employer named on the work permit to a new employer following the filing of a labour claim or the lodging of a report alleging mistreatment or abuse.
- (4) The DoL, the courts, and the police should allow migrant workers to file a claim or make a police report with other form of identification other than an original passport, such as photocopy of a passport, i-Kad or a letter from the migrant worker's embassy.

- (5) The Government and the Bar Council Malaysia should expand legal aid programmes to provide representation to all migrant workers charged with criminal offences, and provide legal support and advice to victims of trafficking.

Specific Recommendations

Federal Executive

- (1) Emphasise transparency and open data in all government programmes, and prioritise access to the law by immediately publishing all circulars, directives, and other policy statements on migrant workers.
- (2) Sign and ratify key international human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and labour conventions including the Domestic Workers Convention 187.
- (3) Extend the services of the National Legal Aid Foundation to provide representation to migrants charged with criminal offences, including immigration offences.

Cabinet Committee on Foreign Workers and Illegal Immigrants

- (4) Immediately publish in paper and electronic formats all current policy regarding migrant workers.
- (5) Allow undocumented migrant workers to regularise their status on their own behalf without penalty if their employers have failed to apply for or renew a work permit.
- (6) Allow migrant workers to transfer to a new employer following the filing of a labour claim or the lodging of a report alleging mistreatment or abuse.
- (7) Develop and publish a unified national policy on labour migration, recruitment and outsourcing, following consultation with all stakeholders addressing:
 - (a) requirements for outsourcing agencies to be granted a licence;
 - (b) recruitment procedures, including contractual requirements, fees, and information to be provided to the prospective migrant worker before arrival;
 - (c) clarity on the roles of institutions and agencies in the management of labour migration; and
 - (d) clarity on grievance mechanisms for migrant worker harms.

The policy should state a clear commitment to international human rights and labour law, and to treating all migrant workers with dignity and respect.

- (8) Establish a welfare fund for migrant workers to fund information campaigns about labour rights and redress options, and to compensate migrant workers and their families in the event that workers are injured or killed and the employer has failed to purchase or maintain insurance. Sources of funding could be a portion of the fees paid by employers or a portion of the levy on migrant workers.
- (9) Improve collection and quality of data on migrant worker harms, including deaths and injuries in Malaysia, both within and outside of working hours, labour claims, and violations identified in labour inspections.

Parliament

- (10) Amend the Employment Act 1955 to:
 - (a) prohibit retaliation by employers against workers who submit complaints to the DoL, and impose penalties for violation of these provisions;
 - (b) increase penalties for extreme or serial violations of the Employment Act 1955;
 - (c) remove the exclusion of domestic workers from certain protections under the Employment Act 1955, and ensure that domestic workers have the same rights as all other workers;
 - (d) make referral of employers for prosecution mandatory in extreme cases; and
 - (e) shift the onus of proving that a worker has been paid correctly onto employers where a migrant worker alleges non-payment of wages and/or illegal deductions.
- (11) Authorise increased budgetary support to the MOHR for enforcement of the Employment Act 1955. The budget should be earmarked to employ labour officers, to streamline case-management, to train labour officers on harms experienced by migrant workers and the intersections of employment and immigration law, to increase prosecutions, and to establish a hotline with key migrant worker languages.
- (12) Reform the WCA to ensure fairer compensation for work-related illness and injury, and to apply to domestic workers. Consider expanding SOCSO to cover migrant workers, or creating a separate fund from migrant worker insurance payments to cover injuries to all workers, regardless of immigration status.

- (13) Revise the Workers' Minimum Standards of Housing and Amenities Act 1990 to include standards of accommodation for workers housed by employers in urban and metropolitan areas, including domestic workers, and include more details on such matters as the number of migrant workers per room, making available secure lockers for holding valuables, and minimum number or caloric content of meals per day.
- (14) Revise and expand the Private Employment Agencies Act 1981 to regulate licensing of recruitment agencies and outsourcing agencies, recruitment of migrant workers from overseas, and management of migrant workers in Malaysia by agencies.
- (15) Revise and expand the Passports Act 1966 to clarify that all persons, including migrant workers, have a right to hold their passports, and that confiscation of an employee's passport is an offence.

MOHA

- (16) Reform the Special Pass system to allow migrant workers to stay in Malaysia while they pursue claims against their employers, agents or other perpetrators. Recommended reforms include to:
 - (a) formalise the Special Pass system in a published circular following consultation with stakeholders, including migrant workers and migrant worker advocates;
 - (b) make the grant of a Special Pass automatic upon presentation of a DoL, Department of Industrial Relations, police or registrar letter of certification that a complaint or claim against an employer is pending;
 - (c) make the initial Special Pass valid for six months and renewable for three-month periods thereafter, until the worker transfers employer and obtains a new work permit, or the case concludes and the worker wishes to leave Malaysia;
 - (d) waive the cost of the Special Pass to applicants who can demonstrate that they have filed a claim against their employers; and
 - (e) make a Special Pass available to migrant workers who cannot present an original passport and allow identification through other means, such as a notarised document from their embassy.
- (17) Allow migrant workers to transfer employers named on the VP(TE) whenever the migrant worker can demonstrate that a case is pending against the current named employer.

- (18) Create a desk for migrant workers within the Immigration Department for providing immigration information and advice to migrant workers, and address grievances for workers who have questions about their status or the employer's immigration responsibilities.
- (19) Strengthen the immigration appeals mechanism by formalising in regulation the grounds and procedures for appeal to the Minister of Home Affairs. We further recommend the creation of an administrative appeals mechanism for reviewing decisions made under the Immigration Act 1959/63.
- (20) Require all employers seeking to employ workers from abroad to provide a written contract signed by both the employer and the worker that complies with Malaysian immigration and labour law before a visa will be issued to the worker. Consider use of a standard contract.
- (21) Streamline procedures for approval and renewal of the VP(TE) to adhere to a three-day timeline. Consider creating a simple online system for renewal of work permits.
- (22) Ensure all trafficked persons are provided with legal advice by an independent third-party lawyer, and for a watching brief to be appointed to monitor the trial and to advise on the prosecution. Consider partnerships with legal aid organisations for this purpose.
- (23) Instruct the Immigration Department, where satisfied that a failure to apply for or renew a work permit was no fault of the migrant worker, to exercise its discretion to extend the work permit with no penalty to the worker.

MOHR

- (24) Create a unit specifically for migrant workers, staffed with labour officers trained in the circumstances of migrant workers and fluent in key migrant worker languages that can conduct workplace inspections and resolve disputes between migrant workers and their employers.
- (25) Clarify and strengthen existing enforcement tools at the DoL, in consultation with stakeholders including to:
 - (a) publish procedures for the submission and handling of claims of unpaid wages or other monies owed such as the identification required, timelines for resolution, and consequences for parties that do not attend scheduled meetings and hearings;
 - (b) publish a referral policy clarifying when employers should be referred to a prosecutor for prosecution under the Employment Act 1955, to police for

retention of passports or investigation of suspected trafficking offences, or to the Department of Occupational Health and Safety for health and safety violations;

- (c) publish guidelines for labour inspections including requirements to interview workers in confidence, steps taken if violations are identified, requirements to inform complainants of identified violations and recommendations for remedying those violations, and follow-up monitoring of errant employers; and
 - (d) establish an electronic case filing and claims management system for ease of access, and clarity regarding timelines and upcoming dates.
- (26) Amend the Minimum Wage Order 2012 to include domestic workers as entitled to the minimum wage.
- (27) Publish data on claims and complaints brought by migrant workers, and on the outcomes of those claims and complaints.
- (28) Implement recommendations of the ILO regarding organising of domestic workers, and creation of a trade union to represent domestic workers.
- (29) Launch an outreach and information campaign targeting migrant workers in key migrant worker languages, including:
- (a) web resources for migrant workers explaining their rights under the Employment Act 1955 and other labour laws, and numbers to contact if they believe their rights are being violated;
 - (b) an improved hotline service to provide confidential advice in labour cases in key migrant worker languages; and
 - (c) simple information materials in common migrant worker languages about rights and redress options for distribution at airports, embassies and community centres.

Other Ministries

- (30) The Ministry of Women, Family and Community Development, in running and staffing government shelters for trafficked persons, should require protection officers to prepare individualised counselling and service plans for each potentially trafficked or trafficked person in the Ministry's care, based on the specific needs and wishes of that person. Ensure identified victims of trafficking are informed of the progress of their cases and understand procedures under the ATIPSOM Act.

- (31) The Ministry of Health should eliminate discrimination in pricing and treatment between migrant workers and low-income Malaysian citizens.

Embassies of Origin Country Governments

- (32) Develop written policies and descriptions of services that the embassy provides to migrant workers, including contact numbers for migrant workers in distress, and documents needed to submit claims.
- (33) Make available clear and simple information to migrant workers about redress options in Malaysia as well as in their home country.
- (34) Assist the Malaysian authorities by providing or arranging translation and interpretation services in national and minority languages for migrant workers attending hearings or mediations.
- (35) Collaborate with diaspora networks and NGOs in Malaysia in the provision of advice and support to migrant workers.

International Donor Community

- (36) Fund capacity building of organisations that provide legal assistance to migrant workers, and legal aid for migrant worker victims of trafficking and forced labour.
- (37) Provide funding for lawyers to bring civil cases that strategically expand or clarify the rights of migrant workers under the Malaysian law.
- (38) Facilitate cross-border projects between organisations in Malaysia and key origin countries to increase mutual understanding of rights under law and redress options, to enhance evidence collection and accountability in specific cases, and to conduct joint advocacy for the protection of migrant worker rights.
- (39) Support funding of public information campaigns for migrant workers, including radio programmes in local languages, and accessible printed materials.

Bar Council Malaysia and Malaysian Bar

- (40) Provide links to relevant laws, regulations, policies, and judicial decisions on the MRIAC website to guide lawyers and legal aid organisations advising migrant workers.
- (41) Prepare summaries of key cases that expand or clarify the rights of migrant workers in Malaysia and distribute to all stakeholders.

- (42) Publish a manual for lawyers and paralegals to prepare simple claims for migrant workers at the DoL and the Small Claims Division of the Magistrates' Court.
- (43) Develop a paralegal programme in partnership with universities and law colleges for providing representation to migrant workers in contract and personal injury cases.
- (44) Organise and train lawyers to participate as watching briefs in trafficking cases.
- (45) Advise on strategic litigation, for example, to challenge discrimination against migrant workers, and clarify the application of constitutional protections to migrants, and protection of undocumented workers under the Malaysian law.

Researchers and Academics

- (46) The study identified areas where further research would be valuable to Members of the Bar, policy-makers, and others. We strongly encourage academics, particularly law schools, to continue to elucidate and critique legal frameworks governing migrant workers, and challenges to accessing justice. Specific areas for further research include the following:
 - (a) Operation of outsourcing agencies, both licensed and unlicensed, in Malaysia, including services provided to employers, training and information to workers, fees charged to migrant workers, and the role of independent “agents”;
 - (b) Research into the costs and timelines of recruitment for employers of migrant workers, and employer perspectives on existing recruitment procedures;
 - (c) Implementation of the ATIPSOM Act, including the types of cases being prosecuted, the handling of those prosecutions, and the experiences of migrant workers. Monitoring implementation of the 2015 amendments to the ATIPSOM Act, including payment of compensation, and the ability of trafficked persons to move freely and work would also be valuable to study;

- (d) Examples of policies and approaches used in other countries for ensuring migrant workers can stay in Malaysia pending resolution of a claim or case and/or continuing to participate in cases in Malaysia after return to the origin country;
- (e) Immigration scams were surprisingly common among the migrant workers interviewed for this study, although it has received little attention in popular media. Further research on how these scams operate, and how they are being investigated and prosecuted would be useful for law enforcement and for those advising migrant workers who have lost money in such scams; and
- (f) Quantitative and qualitative data on the participation of migrant workers in unions in Malaysia, services that unions provide to migrant workers, and retaliation by employers when migrant workers join unions.

**ANNEX 1: LIST OF UNITED NATIONS CONVENTIONS AND PROTOCOLS
TO WHICH MALAYSIA IS A STATE PARTY**

International Instrument	Year
Vienna Convention on Consular Relations, 1963	1991
Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), 1979	1995
Convention on the Rights of the Child (“CRC”), 1989	1995
Convention against Transnational Organized Crime, 2000	2004
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000	2009
Convention on the Rights of Persons with Disabilities (“CRPD”), 2007	2010
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (“CRC-OP-AC”), 2000	2012
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (“CRC-OP-SC”), 2000	2012

International Labour Organization Conventions

Fundamental Conventions	Year
C029 — Forced Labour Convention, 1930 (No. 29)	1957
C098 — Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	1961
C100 — Equal Remuneration Convention, 1951 (No. 100)	1997
C105 — Abolition of Forced Labour Convention, 1957 (No. 105)	1958 (Denounced 1990)
C138 — Minimum Age Convention, 1973 (No. 138) <i>Minimum age specified: 15 years</i>	1997
C182 — Worst Forms of Child Labour Convention, 1999 (No. 182)	2000
Governance (Priority) Conventions	
C081 — Labour Inspection Convention, 1947 (No. 81)	1963
C144 — Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	2002
Technical Conventions	
C050 — Recruiting of Indigenous Workers Convention, 1936 (No. 50)	1957 (Abrogated in 2018)
C064 — Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64)	1957 (Abrogated in 2018)
C065 — Penal Sanctions (Indigenous Workers) Convention, 1939 (No. 65)	1957 (Abrogated in 2018)
C088 — Employment Service Convention, 1948 (No. 88)	1974
C095 — Protection of Wages Convention, 1949 (No. 95)	1961
C119 — Guarding of Machinery Convention, 1963 (No. 119)	1974
C123 — Minimum Age (Underground Work) Convention, 1965 (No. 123) <i>Minimum age specified: 16 years</i>	1974
MLC, 2006 — Maritime Labour Convention, 2006	2013
C187 — Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)	2012

ANNEX 2: SAMPLING OF MIGRANT WORKER INTERVIEWS AND FOCUS GROUPS

The study sought to meet with a broad range of migrant workers, both documented and undocumented, of various nationalities and from various employment sectors in order to reflect the range of experiences, awareness of redress options and the range of pathways used by migrant workers to seek justice. The sample for focus groups reflected these broad parameters, which were limited only by geographical coverage (Kuala Lumpur, Selangor, Johore and Negeri Sembilan).

The sample for in-depth interviewees was limited, however, to migrant workers who had faced problems in their migration process or related to their employment in Malaysia, and who had attempted to seek some form of redress.

Purposive sampling was used to identify migrant workers who met these criteria. The research team began by contacting NGOs and trade unions who conducted case work for migrant workers, as well as government and non-government shelters hosting migrant workers and victims of trafficking. Identifying suitable interviewees was a challenge as most migrant workers who had faced problems and sought assistance, had often already returned home. For this reason, interviews in Malaysia were supplemented with interviews conducted with returned migrant workers in Nepal and Indonesia.

Location and Gender

Of the 101 migrant workers who participated, either as interviewees (50) or focus group participants (51), 64 were men and 37 were women.

In Malaysia, 34 migrant workers were interviewed and 51 migrant workers participated in focus groups. Outside Malaysia, 10 returned migrant workers were interviewed in Nepal and six returned migrant workers were interviewed in Indonesia.

ANNEX 3: LIST OF PERSONS/ORGANISATIONS INTERVIEWED AND INTERVIEW LOCATIONS

- (1) Retired Professor from the Faculty of Business and Management (Human Resource Management), Universiti Teknologi MARA (“UiTM”), Selangor.
- (2) Vice President, Malaysian Trades Union Congress (“MTUC”), Kuala Lumpur.
- (3) Legal Aid Officer, Bar Council Legal Aid Centre (KL), Kuala Lumpur.
- (4) Coordinator — Migrants and Refugees Desk, Archdiocesan Office for Human Development (“AOHD”), Kuala Lumpur.
- (5) Bar Council Human Rights Committee member; and advocate and solicitor from Messrs T. Balasubramaniam, Kuala Lumpur.
- (6) Barrister-at-Law from Messrs Azri, Lee Swee Seng & Co., Kuala Lumpur.
- (7) Executive Director, Women’s Aid Organisation, Petaling Jaya, Selangor.
- (8) Social Worker, Women’s Aid Organisation, Petaling Jaya, Selangor.
- (9) Sole Proprietor, Messrs Bernard Francis & Associates, Kuala Lumpur.
- (10) Programme Manager, Tenaganita, Petaling Jaya, Selangor.
- (11) Labour Attaché, Embassy of The Philippines, Kuala Lumpur.
- (12) President, Industrial Court of Malaysia, Kuala Lumpur.
- (13) Chairman, Industrial Court of Malaysia, Kuala Lumpur.
- (14) Senior Assistant Director, Enforcement Division, Department of Labour Peninsular Malaysia, Ministry of Human Resources, Putrajaya.
- (15) Executive Director, Asylum Access Malaysia, Kuala Lumpur.
- (16) Regional Coordinator, Coordination of Action Research on AIDS and Mobility (“CARAM”) Asia, Bangsar, Kuala Lumpur.
- (17) Project Coordinator, MTUC, Subang Jaya, Selangor.
- (18) Volunteer, Tenaganita, Penang.
- (19) Vice-Chairman and Migrant Workers Resource Centre (“MRC”) Officer, MTUC Penang Division, Perai, Penang.
- (20) Volunteer, Pinoy Support Group, Penang.
- (21) Member, Penang Stop Human Trafficking Campaign, Penang.
- (22) Commissioner, Human Rights Commission of Malaysia (“SUHAKAM”), Kuala Lumpur.
- (23) Labour Wing Representative, Bangladesh High Commission, Kuala Lumpur.
- (24) Retired Court of Appeal Judge, International Association of Refugee Law Judges, Petaling Jaya, Selangor.
- (25) Senior Deputy Assistant Director of Immigration, Enforcement Division, Immigration Department, Ministry of Home Affairs, Putrajaya.
- (26) Deputy Immigration Director, Enforcement Division — Trafficking Section, Immigration Department, Ministry of Home Affairs, Putrajaya.
- (27) Shelter Manager; Department of Women Development; Ministry of Women, Family and Community Development, Kuala Lumpur.
- (28) Labour Attaché, Embassy of Nepal, Kuala Lumpur.

- (29) Senior Consultant in Industrial Relations, Malaysian Employers Federation (“MEF”), Kuala Lumpur.
- (30) President, Malaysian Association of Foreign Maid Agencies (“PAPA”), Kuala Lumpur.
- (31) Deputy Director General — Occupational Safety, Department of Occupational Safety and Health, Ministry of Human Resources, Putrajaya.
- (32) Assistant Director, Bar Council Malaysia, Kuala Lumpur.
- (33) Education Officer, MTUC, Subang Jaya, Selangor.
- (34) Labour Attaché, Embassy of the Republic of Indonesia, Kuala Lumpur.
- (35) Secretary, Embassy of the Republic of Indonesia, Kuala Lumpur.
- (36) Principal Assistant Secretary, Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (“MAPO”), Ministry of Home Affairs, Putrajaya.
- (37) Assistant Secretary, MAPO, Ministry of Home Affairs, Putrajaya.
- (38) Deputy Under Secretary, Ministry of Home Affairs — Foreign Worker Management Division, Putrajaya.
- (39) Chairperson; Bar Council Migrants, Refugee and Immigration Affairs Committee; Bar Council Malaysia; Kuala Lumpur.
- (40) Member, Bar Council Industrial and Employment Law Committee, Bar Council Malaysia, Kuala Lumpur.
- (41) Former Deputy Public Prosecutor, Attorney General’s Chambers, Putrajaya.
- (42) Representative, United Nations High Commissioner for Refugees (“UNHCR”) Malaysia, Kuala Lumpur.
- (43) Representative, UNHCR Malaysia, Kuala Lumpur.

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