

**MALAYSIA submission on Migrant Workers for the 17th Session of the Universal  
Periodic Review**

Submitting organisations:

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The Clean Clothes Campaign (CCC) is dedicated to improving working conditions and supporting the empowerment of workers in the global garment and sportswear industries. Established in 1989, the CCC has worked to help ensure that the fundamental rights of workers are respected. We educate and mobilise consumers, lobby companies and governments, and offer direct solidarity support to workers as they fight for their rights and demand better working conditions.

The CCC is an international alliance that works to improve conditions and support the empowerment of workers in the global garment industry. The CCC has national campaigns in 15 European countries with a network of 250 organisations worldwide, and international secretariat based in Amsterdam. Members and partners include trade unions and non-governmental organisations (NGOs) covering a broad spectrum of perspectives and interests, such as women's rights, consumer advocacy and poverty reduction.

**Name of Organization:**

**Improving working conditions in the global garment industry** 

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WH4C was started in 2007 by a group of concerned persons, working for human rights and worker rights, especially migrant worker rights. Our work has been primarily with Burmese, Nepali and Vietnamese migrants in Malaysia. We also do have a history of working with migrants from Indonesia, India, Bangladesh, Pakistan and Thailand .

WH4C is a member of Asia Pacific Forum on Women, Law and Development (APWLD), the region's leading network of feminist organisations and women. APWLD has consultative status with the Economic and Social Council of the United Nations.

WH4C is an active partner of the global labour rights networks of the Clean Clothes Campaign (CCC) and GoodElectronics Network.

## **Executive summary**

This submission focuses on the rights of **migrant workers to equal treatment at work** (including **equal remuneration** and **freedom of association**), and **non-discrimination** with regard to **hiring procedures**, **access to healthcare** and **access to remedy**.

The Migrant Worker Rights coalition welcomes the support given by Malaysia to the recommendation 50 listed by the Working Group A/HRC/11/30, in which Bangladesh recommended Malaysia to continue its effort to protect the rights and interests of foreign workers. However, the submission calls the attention to the fact that Malaysia has introduced legislation that in its implementation discriminates against migrant workers. In particular reference is made to:

- legislation that transfers the burden of paying the costs of levy from employers to migrant workers (paragraph 4-6), requires migrant workers to pay for high healthcare insurance (paragraph 7-8), and other deductions (paragraph 9-10), which results in lower take-home wages than local workers for equal work
- legislation and practices that deny migrant workers from equal access to redress, in particular when visa and permits are revoked by the employer and migrant workers lose their rights to stay in the country and remain party in any form of conflict resolution, or court procedure (paragraph 11)
- legislation and practices that discriminate against migrant workers with regard to their access to healthcare (paragraph 12), the prices they have to pay for healthcare (paragraph 13) and the compensation they are entitled to in case of occupational diseases and accidents (paragraph 14)
- legislation and practices that discriminate against migrant workers with regard to hiring practices, in particular mandatory health tests (paragraph 15-16)
- legislation whose negative implications affect migrant workers more than local workers, and restrains their rights to freedom of association and collective bargaining (paragraph 17-20)

## **MALAYSIA submission on Migrant Workers for the 17th Session of the Universal Periodic Review**

### **A. BACKGROUND AND FRAMEWORK**

#### **1. Scope of international obligations**

#### RECOMMENDATIONS

- a. Malaysia should immediately ratify the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- b. Malaysia should immediately ratify the ILO Conventions, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Workers' Representatives Convention, 1971 (No. 135)

### **C. IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS, TAKING INTO ACCOUNT APPLICABLE INTERNATIONAL HUMANITARIAN LAW**

#### **Migrants, refugees and asylum-seekers**

*\* This submission raises in particular recent developments that undermines human rights and justice of migrant workers, workers generally and trade unions in Malaysia, which have been a concern of civil society including trade unions, reflected also in Joint Statements and other protest actions*

#### INTRODUCTION

1. There is today about 2.3 million documented migrant workers in Malaysia, who has a labour force of about 12 million.
2. Article 8 of the Federal Constitution of Malaysia provides that "All Persons are equal before the law and is entitled to equal protection of the law" and by the use of term "person" as opposed to 'citizen' makes it most clear that this guarantee of rights extends also to all persons, including migrant workers, be they documented or undocumented. Section 60L of the Employment Act 1955 also prohibits discrimination in respect of the terms and conditions of his employment on the basis that one is a migrant worker (foreign worker).
3. Despite these laws and the support by Malaysia given to recommendation 50 listed by the Working Group A/HRC/11/30, in which Bangladesh recommended Malaysia to continue its effort to protect the rights and interests of foreign workers, Malaysia has introduced legislation that in its implementation discriminates against migrant workers.

#### I RIGHT TO WORK AND TO JUST AND FAVOURABLE CONDITIONS OF WORK

All are equal before the law and are entitled without any discrimination to equal protection of the law (Art. 7 UDHR)

Everyone, without any discrimination, has the right to equal pay for equal work. (Art. 23(2) UDHR)

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Art. 10 UDHR)

4. Undersigned welcomes that Malaysia has introduced national legislation [**Minimum Wages Order 2012**] to ensure the right to Minimum Wages for Malaysian workers, including migrant workers, as of January 2013. However, undersigned express their strong concerns that vide a Cabinet decision dated 30 January 2013, the Malaysian government allowed employers to recover levy from any migrant worker employed. The levy is paid by employers for every migrant worker they employ, to discourage the employment of migrant workers over local workers. Malaysian Labour Director-General Datuk Ismail Abdul Rahim was reported saying that, "...The rationale behind getting employers to bear the levy was to discourage them from employing foreigners..."<sup>1</sup>. However, as a consequence of the Cabinet decision, the burden of the levy has been transferred to migrant workers, and in effect migrant workers risk to receive lower remuneration for equal work Khalid Atan, the President of the Malaysian Trade Union Congress(MTUC) said, "...if workers were asked to pay the levy, the minimum wages policy would not benefit them at all, as whatever little increase in salary they enjoyed, would be wiped out with the levy payment..."<sup>2</sup>. **The undersigned seek to ask if this discriminative practice will be canceled and the obligation to pay levy will return with the employers, in order to ensure that minimum wages are paid to all workers.**
5. A Joint Statement entitled '**Minimum Wages For All Workers, Including Migrant Workers - No to Wage Deduction to recover Levy Payable By Employers –**' which was endorsed by 83 civil society groups and trade unions was issued on 5/2/2013 (see appendix)
6. This discrimination against migrant workers in Malaysia is compounded by the fact that they are now suddenly imposed with an additional unjust burden, not before they decide to enter an agreement with their employers and come to Malaysia to work, but in the midst of their employment in Malaysia. The actions of Malaysia relieve employers the burden of breaching employment contracts, an act which would have allowed the

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<sup>1</sup> Source: Star, 16/4/2009, Employers can deduct levy from wages, again

<sup>2</sup> Star, 10/1/2013, MTUC: Don't give in to employers' demand on foreign workers levy.

migrant worker a legal remedy which would naturally be to the benefit of the workers preventing employers to suddenly vary contractual obligations to the detriment of their employees. **The undersigned seek to ask if Malaysia can guarantee that migrant workers' right to continuation of their employment contract is respected, as well as effective access to legal remedy.**

7. Despite the existing legislation under the Employees Social Security Scheme, which stipulates that employers should bear the costs of providing for their workers' healthcare, the Ministry of Health (MOH) has implemented the Foreign Workers Health Insurance Protection Scheme (FWHIPS) with effect from 1 January 2011. Under FWHIPS, every foreign worker is required to take an insurance policy under the Foreign Workers Hospitalisation and Surgery Scheme (FWHSS) with a health insurance protection of RM10,000 per year. The premium of RM120 per year for the insurance policy has to be borne by the foreign workers themselves<sup>3</sup>. *For example, in the electronics industry, this amount has to be covered from the 450-700 RM that migrant workers bring home from a six days a week of twelve hours a day (this includes a one-hour break) job<sup>4</sup>.* **The undersigned seek to ask how this new requirement relates to Malaysia's support to recommendation 50 to protect the rights and interests of foreign workers in the last UPR of Malaysia.**
8. A Joint Statement entitled 'Employers must pay all medical cost of workers especially when it is a work-related accident or an occupational disease—' which was endorsed by 58 civil society groups and trade unions was issued on 20/1/2011 (see appendix)
9. Discrimination also occurs to migrant workers when Malaysia fails to prevent (or facilitates) the wrongful deduction from wages of migrant workers matters that are by law not permitted for workers like the deduction of recruitment agency fees/payments and accommodation, all of which requires not just consent of the workers but also the permission from the Malaysian government. Malaysia's failure is the omission to act against this practice, or the giving of permission irrespective of the fact that the worker disagrees.
10. Undersigned note that the above mentioned discrimination on terms of remuneration is in clear breach with the recognition that employers should bear the additional costs of employment of migrant workers in a situation where it is employers that seek out migrant workers in their country of origin to come to work for them in Malaysia – not a case that migrant workers come on their own to Malaysia to find work.

## RECOMMENDATIONS

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There is an understanding that the Government has waived foreign workers in the plantation sector from the scope of FWHIPS. From <http://ahkmalaysiablog.de/archives/397>

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Worker Hub for Change conducted field research for SOMO(2013): **Outsourcing Labour. Migrant labour rights in Malaysia's electronics industry**, [http://somo.nl/publications-en/Publication\\_3922](http://somo.nl/publications-en/Publication_3922)

- c. Malaysia must evaluate the legislation and regulations that have a negative impact on the wages of migrant workers, and abolish any measures that are discriminatory with respect to the right to equal pay for equal work.
- d. Malaysia should guarantee that migrant workers' remuneration will be compliant with the Minimum Wages Act and is not withered away by any deduction of wages to recover levy, recruitment fees or accommodation fees which should reasonably be borne by employers.
- e. Malaysia must ensure that migrant workers rights as workers are not eroded by new laws and policies in favour of employers, going against general principals and protection accorded to workers. Obligation for healthcare of migrant workers, especially when it is occupation related or as a result of an industrial accident must be borne by employers or existing social security law and practice.
- f. Malaysia must revoke the practice of granting special permissions to employers of migrant workers to make what is generally unlawful deductions from wages, unlawful advances and changes to work conditions and rights, including the ability to require migrant workers beyond the maximum limit of 48 hours a week (or 8 hours per day), on rest days and even public holidays.

## II ACCESS TO LEGAL REDRESS

**Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations (...) (art. 10 UDHR)**

11. Undersigned have noted numerous occasions when migrant workers have been terminated by their employers, after they had lodged complaints against their employers' discriminative practices at avenues of redress provided by law. Termination of employment subsequently caused the termination of their visas/permits, thereby allowing for their legal presence in Malaysia to be terminated. Since legal presence is required to use further legal mechanisms to claim their rights, the access to redress and justice has been denied for migrant workers in these cases. In addition, undersigned have noted that many workers whose work permits/passess are terminated, have been arrested, detained, imprisoned, whiped and deported if they had chosen to remain in Malaysia to pursue their case.

## RECOMMENDATIONS

- g. Malaysia should give effect to 'equal protection of law', by not canceling work permits/passess in case migrant workers have submitted a complaint to any court , institution, or mediation body, thus denying migrants the right to legally remain in

Malaysia and proceed with their rightful claims through the legally provided avenues of justice. No migrant should be made 'illegal' (undocumented) and/or deported when there is a pending unsettled claim or case involving the said migrant.

- h. Malaysia should ensure that migrant workers who lodge the complaint on abuse and exploitation are provided with the necessary support and assistance to seek remedies, such as legal aid, interpretation assistance temporary shelters and the right of migrants to stay and work during legal process.

### III RIGHT TO SOCIAL SECURITY AND HEALTH

**Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. (art 22 UDHR)**

**Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, (...) medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (art 25 (1) UDHR)**

12. Migrant workers lack access to medical facilities and health care. *For example, a study in the electronics sector shows that all factories under investigation lacked a medical facility on the factory grounds. If workers are injured or ill they go to a panel clinic near the factory. Workers have a medical card (provided by the factory) with which medical costs up to MYR 25 can be covered. However, additional costs should be paid for by the worker. Migrant workers are not entitled to any paid sick leaves.*<sup>5</sup>
13. However, discrimination is practiced against migrant workers when they seek healthcare at public hospitals and clinics. *For example, the payment required by Malaysians when they visit an hospital seeking treatment, is RM1 (for seeing a doctor) or RM5 (for seeing a specialist). For migrant workers, it starts with RM50 (for seeing a doctor). the deposit payable by Malaysians who require to be warded, vary between 15 and 1.100 RM. However, for migrant workers the same treatment costs between 800 and 2.200 RM*<sup>6</sup> The rates are fixed by the government: the governing Act is Akta Fee 1951 (Fee Act 1951), and the rates now is as per Perintah Fee (Perubatan) 1982 [Fee(Medical) Order 1982].

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Worker Hub for Change conducted field research for SOMO(2013): **Outsourcing Labour. Migrant labour rights in Malaysia's electronics industry**, [http://somo.nl/publications-en/Publication\\_3922](http://somo.nl/publications-en/Publication_3922)

<sup>6</sup> <http://workershub4change.blogspot.com/2011/01/migrant-workers-should-not-be-charged.html>

14. Whilst the social security of local workers are covered by the Social Security Act, migrant workers are covered by the lesser Workmen's Compensation Act 1952, which results in discrimination between migrant and local workers regarding their health care costs. *The Workmen's Compensation Act, unlike the Social Security Act does not provide for continuous regular support and assistance until death for a worker who is a victim of an industrial accident or occupational disease. The Workmen's Compensation Act only provides for a one-off payment to the victim and/or their dependents where death has resulted from the injury/disease, that is a lump sum equal to sixty months' earnings or RM18,000, whichever is the less. In addition, the maximum amount of fees and cost that is payable by an employer under the Workmen's Compensation Act, for ward charges (including surgical ward) is limited to RM300, for operation fees it is limited to RM250, for X-Ray Fees it is limited to RM100 and for other electric therapeutic charges it is limited to RM100. The rates stipulated are outrageously low given the fact that government hospitals and clinics charge migrant workers first class rates, and the lowest deposit for a migrant worker who needs to be warded is RM400, and if it was a surgical case, it is RM800-00. Operation charges can range from RM50 to RM3,000 depending on the type of operation. Ultrasound cost RM100. Radiology charges range from RM50-RM600. Lab charges range from RM5 to RM100 depending on the type of tests, and usually there will be quite a lot of tests needed.*

#### IV EQUALITY AND NON-DISCRIMINATION

**Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." (Article 2 UDHR)**

**Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status.*" ( Article 2(1) ICCPR )**

15. Before migrant workers can obtain a work permit to Malaysia, they are subjected to medical screenings. This entails a discriminatory practice, as local workers are not required to obtain these screenings. There is no specific legislation relating to HIV/AIDS or laws that make screening of blood products mandatory. Neither are there specific laws for the protection of the rights of infected persons, although the constitution and other laws may be invoked in cases where such persons have suffered rights violations. For example, HIV and selected other tests (TB, STDs, Hepatitis A, Hepatitis B, Leprosy,

Urine Cannabis, Urine Opiates, Cancer, Epilepsy, Psychiatric Illness, Pregnancy ,Hepatitis B, VDRL/TPHA and Malaria) are part of medical screenings, mandatory for incoming prospective foreign workers and for the annual renewal of work permits. The purpose is to detect unfit or pregnant migrant workers whom will be disqualified and deported back to their countries of origin. These mandatory testing violates the principle of confidentiality: the Foreign Worker's Medical Examination Monitoring Agency (FOMEMA) is in charge of medical screenings and notifies the Immigration Department of the HIV test results; the Immigration Department then informs the employer. This has led to discrimination, loss of livelihood and even violence against the workers concerned. In most of cases the migrant worker is not the first person to learn about the results, but it is the outsourced agent or their employer who receives the notification of the result of medical checkup.

16. Mandatory HIV testing of migrants is in clear contradiction of the ILO Code of Practice on HIV/AIDS and the World of Work In consonance with the Code of Practice, and on the specific topic of migrant workers, the ILO Committee of Experts has stated that “the refusal of entry or repatriation on the grounds that the worker concerned is suffering from an infection or illness of any kind which has no effect on the task for which the worker has been recruited, constitutes an unacceptable form of discrimination” . The study shows that migrant workers or potential migrant workers who test positive for HIV frequently disappear from the system, whether they were tested prior to their departure or after they had entered the receiving country and were deported following detection of their HIV status.

#### RECOMMENDATIONS:

- i. Lift requirements of compulsory or mandatory health and HIV testing of migrant workers at all points of the migratory process as a condition for employment;
- j. End policies and practices of deportation of migrants on the basis of their HIV-status or for other health conditions, such as pregnancy

#### FREEDOM OF ASSOCIATION

**Right to form and to join trade unions for the protection of his interests (Art. 23(4) UDHR)**

17. Malaysia denies migrant workers the right to form trade unions, as this right is only accorded to citizens. Similarly migrant workers are denied the right to hold office in any trade unions. Migrant workers, however did have the right to join trade unions, and enjoy the rights and benefits contained in any Collective Bargaining Agreement between the union and the employer.

18. In 2005, Malaysia, vide the Cabinet Committee on Foreign Workers in its meeting on 5-July 2005 agreed to the recruitment of foreign workers through labour outsourcing companies (now known as 'Contractor for Labour' in the amended Employment Act that came into force on 1 April 2012, which also gave statutory recognition to this practice). Although there is no longer an employment relationship between the principal (owner of the production facility and manager of the production processes) and the worker, the worker remains working under the direct supervision and control of the principal. These workers thereby become a sub-class of workers that do the same work as other employees but do not enjoy the same remuneration or benefits as other employees. The trend started with migrant workers but today has been extended to local workers. However, migrant workers remain the most affected.
19. As trade unions in Malaysia are sectoral or industry specific, migrant workers whose 'employer' now is a contractor for labour, who supplies workers to many different sectors and industries, do not longer have the right to join as member to a sectoral union, or enjoy the benefits from any collective bargaining agreement that covers their workplace. **The undersigned seek answers as to how Malaysia will guarantee the right to form and join trade unions and profit from collective bargaining agreements for migrant workers under the "contractor for labour" act, as the formation of trade unions in such situations of employment is almost impossible.**
20. A primary reason for the creation of the 'contractor for labour' and the introduction of labour outsourcing is to stifle workers and trade unions capacity to demand and negotiate for better rights and benefits. The MTUC Memorandum to the HR Minister dated October 7, 2008 refers to an interview with Datuk Ishak Mohamed, the Enforcement Director of the Immigration Department that was published in New Straits Time, July 20, 2008, where he, amongst others, said, *'...outsourcing is good as it will attract foreign direct investment. Investors do not want unions to be formed in their establishments. Through outsourcing, it would be difficult for unions to be formed as outsourcing company, and not the factory, would be the employer...'* is indicative of the intention of the Malaysian government
21. A joint statement entitled, ***"Abolish the 'Contractor for Labour' system Withdraw the 2012 amendments to Employment Act 1955"*** endorsed by 93 different groups and trade unions on 3/5/2012. Prior to the passing of this law, in 28/10/2011, 115 groups and trade unions issued a statement entitled, ***" Malaysia Must Protect Worker and Union Rights, and withdraw proposed unjust amendments to Employment Act - Labour Suppliers Should Not Be Employers –"***

## RECOMMENDATIONS

- k. Malaysia must immediately abolish the 'contractor for labour' and the practice of outsourcing labour, hence restoring direct employment relationship between principals, bring owners and operators of workplace and their workers, which effect restore the right

of workers, including migrant workers to be members of trade unions, and enjoy the full benefits of Collective Bargaining Agreements.

- l. Malaysia, by restoring direct employment relationship, assures that all are employees of the principal, will also result in discrimination between workers doing the same work.
- m. Malaysia must amend the laws governing the formation of and existence of trade unions, so that all workers, including migrant workers have the right to form trade unions and also hold office (and be elected into the committee) of Trade Unions