

GUIDANCE NOTE

FORMULATING AND IMPLEMENTING GENDER-RESPONSIVE AND COHERENT MIGRATION AND ANTI-TRAFFICKING LAWS IN THE PHILIPPINES



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ACKNOWLEDGEMENTS

UN Women extends sincere appreciation to Prof. Elizabeth Aguiling-Pangalangan of the University of the Philippines (UP) College of Law and Director of the Institute of Human Rights of the UP Law Center, with research assistance from Mr. Noel Christian Luciano, Ms. Ruth Guinto and Ms. Amirah Penalber.

UN Women also acknowledges the support of the Government of Canada, through the Global Affairs Canada (GAC), for the publication of this paper, through the CEDAW South East Asia Phase II Programme.

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EXECUTIVE SUMMARY

As part of the universal mandate to promote gender equality and the empowerment of women, UN Women actively supports the promotion and protection of the rights of women migrant workers and safe migration for women at the global, regional and country levels. Around the world, a record number of women are now migrating to seek work and better opportunities. Even though migration may provide these benefits for women, it also poses a lot of risks, including unfair treatment, exploitation and vulnerability to different forms of violence especially in the informal sector such as domestic and care workers. Migration policies and practices have been slow to recognize these risks and take steps to make the process safe for women. In the Southeast Asia region, the feminization of migration is most visible and usually associated with out-going flows of women migrants particularly from Indonesia and the Philippines, where women make up 62-75 per cent of workers who are deployed legally on an annual basis.¹

Translating gender mainstreaming into practice to protect women migrant workers requires gender-sensitive legislation on labor migration and trafficking. A CEDAW-based Legal Review of the Magna Carta of Migrant Workers and the anti-trafficking laws in the Philippines is indispensable to give concrete recommendations on improving laws that protect women migrant workers. It aims to identify gender discrimination in laws and underscore state obligations to address existing gender discrimination in laws. The legal review also intends to determine deficiencies in Philippine laws on migration and trafficking and how they fail to comply with the CEDAW legal framework for women's human rights as well as ascertain critical areas for reform and recommendations of ways by which the state can comply with CEDAW obligations.

A well-executed CEDAW-based Legal Review of migration and anti-trafficking laws will ensure

a deeper understanding of gender equality standards that are contained in CEDAW and other international human rights instruments. It will also lay a groundwork for enhanced gender-responsive migration and anti-trafficking laws by relevant government agencies.

Furthermore, a CEDAW-based Legal Review will provide the basis for capacity development activities among lawmakers, government and national oversight institutions on gender mainstreaming. Specifically, it will facilitate the identification of institutions and strategic mechanisms to target capacity development support for formulation, amendment and implementation of gender-responsive and coherent migration and anti-trafficking laws.

¹ UN Women (2011) Gender, Migration and Development – Emerging Trends and Issues in East and Southeast Asia. Bangkok: UN Women.

INTRODUCTION

History

Also known as the Women’s Convention and the International Bill of Rights for Women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the United Nations (UN) General Assembly on 18 December 1979. It was signed by the Philippines on 15 July 1980 and ratified by the Philippine Senate on 05 August 1981. As of May 2015, 189 states have ratified or acceded to the CEDAW. It entered into force on 3 September 1981.

Underlying Principles

The CEDAW has three underlying principles: non-discrimination (Article 1); state obligation and due diligence (Articles 2 - 5); and, substantive equality (Article 4).

The principle of non-discrimination is the first underlying theme that runs throughout the CEDAW text. “Discrimination against women” is defined in Article 1 of the CEDAW as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” By accepting the Convention, States commit themselves to undertake a series of steps to end discrimination against women in all forms.

The principle of state obligation is the second underlying theme that runs throughout the CEDAW text. It is the principle that not only obliges states to pursue *de jure* gender equality, but that they must also do so in practice, and in many different domains. For example, in addition to promoting

women’s rights in the country broadly, State Parties are obliged to seek out legislation on equality before the law regarding marriage, the right of women to vote and the right to choose a domicile and residence (CEDAW, Articles 15 - 17).

Substantive equality is the third underlying theme of CEDAW. It requires that “women be given an equal start and that they be empowered by an enabling environment to achieve equality of results,”² and that special measures to protect women be created in the face of existing unbalanced gender equality. The principle of substantive equality is a two-pronged approach to achieving the fulfillment of women’s equality to men. First, State Parties are obliged to take all actions as necessary to achieve equality between women and men. Second, States are obliged to take special measures to correct existing inequalities in power between men and women. Recognizing that the absoluteness of gender-neutral laws will obscure the differences between women and men, substantive equality accepts that “under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.”³

States Parties to the CEDAW are legally bound to put these principles and provisions into practice. The Philippines has been recognized globally for its good practices in adopting laws in support of gender equality. However, emphasis on further strengthening the legal framework for women’s human rights is necessary.

USEFULNESS OF CEDAW AS A FRAMEWORK FOR LEGAL REVIEW

Translating gender mainstreaming into practice to protect women migrant workers requires gender-sensitive legislation on labor migration and trafficking. A CEDAW-based Legal Review of the Magna Carta of Migrant

² CEDAW General Recommendation 25, paragraph 8.

³ *Id.*

Workers and the anti-trafficking laws in the Philippines is indispensable to give concrete recommendations on improving laws that protect women migrant workers.

One way by which these concerns may be addressed is by identifying the gaps in Philippine laws and recommending changes that will make laws CEDAW-compliant.

A CEDAW-based Legal Review aims to achieve the following:

1. Locate gender discrimination in laws; underscore state obligations to address existing gender discrimination in laws.
2. Identify and highlight deficiencies in Philippine laws on migration and trafficking and how they fail to comply with the CEDAW legal framework for women's human rights.
3. Identify areas for reform.
4. Recommend ways by which CEDAW obligations can be complied with by the State.

A well-executed CEDAW-based Legal Review of migration and anti-trafficking laws will ensure the following:

1. A deeper understanding of gender equality standards that are contained in CEDAW and other international human rights instruments.
2. Enhanced gender responsive migration and anti-trafficking laws.
3. Improved implementation of migration and anti-trafficking laws by relevant government agencies.

In addition, such a review will provide the basis for capacity development activities among lawmakers, government and national oversight institutions on the integration of gender as well as identify strategic

institutions and mechanisms to target capacity development support for formulation, amendment and implementation of gender-responsive and coherent migration and anti-trafficking laws.

THE 8 STEPS OF A CEDAW-BASED LEGAL REVIEW

The handbook *Do Our Laws Promote Gender Equality?* expounds on the steps that have to be taken for a CEDAW-based Legal Review. These 8 Steps and a brief discussion of each step are as follows:

1. Identify CEDAW Obligations
2. Identify Situation, Issues and Concerns
3. Identify Provisions Needed in Law
4. Determine CEDAW Legal Indicators
5. List Relevant Legislation
6. Analyse Compliance
7. Draft Explanation and Comments
8. Formulate recommendations

Step 1. Identify CEDAW Obligations

The CEDAW obligations are found in the General Recommendations of CEDAW, specifically General Recommendations 19 and 26 and Concluding Observations.⁴ Using these resources, the legal obligations flowing from CEDAW can be determined.

The obligations should be further broken down, so that these can be matched with a particular *de facto* situation (Step 2).

Example: General Recommendations 26 and 19 as sources of obligations to protect right of migrant workers during the pre-departure stage can be itemized as duties to:

1. Provide community awareness, including the media (General Recommendation 26,

⁴ Concluding Comments of the CEDAW Committee 36th Session 07-25 August 2006.

paragraph 24 (b)(v) and (vi); also General Recommendation 19, paragraph 24(d)).

2. Provide a list of authentic, reliable recruitment agencies and create a unified information system on available jobs abroad (General Recommendation 26, paragraph 24 (b)(ii)).
3. Deliver or facilitate free or affordable gender- and rights-based pre-departure information and training programs (General Recommendation 26, paragraph 24 (b)(i)).
4. Ensure availability of legal and administrative assistance (General Recommendation 26, paragraph 24 (f)).
5. Provide information for women who wish to migrate independently of recruitment agencies (General Recommendation 26, paragraph 24 (b) (iii)) or via informal channels (Concluding Observations, paragraph 22) on/about methods and procedures for migrating to work.
6. Require recruitment agencies to participate in awareness-raising and training programs with emphasis on specific needs and challenges of women (General Recommendation 26, paragraph 24 (b)(iv)).

Step 2. Identify Situation, Issues and Concerns

Step 2 entails empirical research (quantitative or qualitative) on the *de facto* situation of women and girls on the selected specific issue of migration and trafficking.

For this legal review, research is complemented by the inputs of the stakeholders or grassroots communities through a consultation or a focused

group discussion (FGD). This will help set the benchmark from which to ascertain whether a right is being “progressively achieved.” It is thus vital to ensure the representativeness of the pool of respondents and the integrity of the methodology.

The consultation or FGD may, for example, yield the following issues and concerns faced by women migrant workers:

1. Women migrant workers experience stigma and as well as lack of support from their communities.
2. Women migrant workers still fall victim to unaccredited or unlicensed agencies.
3. Prospective employees do not know where to access relevant information.
4. The Pre-Departure Orientation Seminar (PDOS) mandated by Republic Act (RA) No. 8042 is not gender-sensitive.
5. Women migrant workers sign employment contracts without fully understanding the legal consequences of the provisions embodied in the contract.

Step 3. Identify the Provisions Needed in Law

In this step, essential points that must be in the law for it to comply with CEDAW are identified.

For instance, to address the lack of support by the community, the reviewers can point out that the local government units should be tapped as information and support centers. Related to the issue of prospective employees not having access to relevant information, the reviewers can identify the need for a law that obligates government agencies to maintain an updated database readily available to and accessible by the public.

Step 4. Determine CEDAW Legal Indicators

The legal indicators are derived from CEDAW, from the General Recommendation and the Concluding Comments of the CEDAW Committee. The points needed in an effective and CEDAW-compliant law in Step 3 are transformed into question form. They must be answerable with a “yes” or “no” to ensure that the indicators are measurable. Since this is a legal review, questions should focus on law, not policy or problems in the implementation of the law.

The *CEDAW Handbook* has a comprehensive list of indicators that apply to various aspects of women’s rights, such as in trafficking and prostitution. These or other indicators may be used or other indicators may be added to be more suitable to the local or domestic situation where the review is being held.

Where there are no indicators in the handbook, such as in the field of migration, the reviewers must craft their own based on Steps 1-3. For example, since the lack of community support and the stigma experienced by women migrant workers was a concern raised during the consultation, a relevant indicator is: “Are there programs provided by law promoting community awareness?” To the issue of lack of gender sensitivity of the PDOS, the indicator is “Does the law provide for a gender-sensitive and gender-responsive pre-departure program?”

Step 5. List the Relevant Legislation

Step 5 calls for the identification of the specific legislation relevant to the indicator. Both general and specific gender equality laws should be included, such as the Constitution and RA 8042, as amended, respectively. This is by far the most meticulous step in the CEDAW-based Legal Review. It is important to put the specific provision of law and not just the law as a whole. For instance, as regards the PDOS cite:

RA 8042 (as amended by RA 10022) Section 23 (b.1), paragraph 2 mandates the Philippine Overseas Employment Administration (POEA), together with other law-enforcement agencies, to provide comprehensive Pre-Employment Orientation Seminars (PEOS) that will discuss topics such as prevention of illegal recruitment and gender sensitivity.

Implementing Rules and Regulations (IRR) Rule IV, Section 23 on the PEOS covers legal modes such as hiring for overseas employment, rights, responsibilities and obligations of migrant workers, health issues, prevention and modus operandi of illegal recruitment and gender sensitivity.

Step 6. Analyze Compliance

Compliance of the laws with CEDAW could either be fully, partially or non-compliant with CEDAW.

There is ‘full compliance’ when the legal provisions meet the requirement of the indicator. This means that the legal provisions respond to the indicator without need of further amendments or supplemental legislation.

A law is ‘partially compliant’ when only some, but not all aspects of the requirements are met. An example is legislation in which there are legal provisions that address the indicator but such provisions, by themselves, are inadequate. In effect, there is a need for the law to further guarantee the rights of women migrant workers and those who may fall victim to trafficking.

A domestic legislation is ‘non-compliant’ if it does not meet the requirements of the indicator. In such cases, there is a total absence of any legal guarantee in the law to meet the indicator. Legislation is also non-compliant if there are provisions that are in conflict or are diametrically opposed to the indicator.

Step 7. Draft Explanation and Comments

The comments must succinctly clarify what led the reviewer to conclude that the present law is compliant, partially compliant or non-compliant.

As regards the need for a law that provides for a gender-sensitive and gender-responsive pre-departure program, the reviewers may conclude that RA 8042 as amended, particularly Section 23 (b.1), paragraph 2, is only partially compliant. The law states that one of the topics to be discussed in the PEOS is gender sensitivity but the law fails to define the term.

Step 8. Formulate Recommendations

As the last step, recommendations for law reform including amendment or repeal of an extant discriminatory provision of law should be made. The key features of reform of the new provision or law are required.

To illustrate, to make the law fully compliant with the duty to deliver gender- and rights-based pre-departure information and training programs, required in General Recommendation 26, paragraph 24 (b)(i), the reviewer may recommend that RA 8042 be amended to provide that the PEOS must cover, at the minimum, a discussion on (1) rights of women migrant workers, (2) the *de facto* situation of women, (3) services available to them, (4) how to respond during emergency situations and (5) relevant labor laws.

However, if the existing law is considered non-compliant for explicitly discriminating against women, the recommendation should be for the immediate repeal of such law.

LIST OF REFERENCES

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DEDICATED TO GENDER EQUALITY
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TO ACCELERATE PROGRESS ON
MEETING THEIR NEEDS WORLDWIDE.

UN Women supports UN Member States as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to implement these standards. It stands behind women's equal participation in all aspects of life, focusing on five priority areas: increasing women's leadership and participation; ending violence against women; engaging women in all aspects of peace and security processes; enhancing women's economic empowerment; and making gender equality central to national development planning and budgeting. UN Women also coordinates and promotes the UN system's work in advancing gender equality.



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