



MAKING GENDER-RESPONSIVE MIGRATION LAWS

SUMMARY

Women make up approximately half of the 244 million international migrants worldwide. Increasingly migrating autonomously particularly for the purposes of work, women migrant workers face different needs and realities throughout the migration cycle, including the manner of their recruitment, the feminized sectors in which they tend to work, and the way that their remittances are sent and spent. Consequently, it is necessary that the laws that govern migration respond to the distinct needs and priorities of women and girls. Based on research and lessons learned from the joint UN Women- European Union project "Promoting and Protecting Women Migrant Workers' Labour and Human Rights: Engaging with International, National Human Rights Mechanisms to Enhance Accountability", which is piloted in Mexico, Moldova and the Philippines, this Brief provides an overview of a methodology for developing gender-responsive migration laws. While migrant women of various skill levels face discrimination in the process of migrating, this Brief focuses on low-skilled migrants and those who are often migrating through irregular channels, as these women face heightened risks of abuse and discrimination at all stages of migration.

Introduction

In recent years, there has been an increase in the numbers of women migrating autonomously for the purposes of work, sometimes referred to as the feminisation of migration. These migratory flows are in part influenced by the lack of decent work for women in countries of origin, and an increase in the demand for female labour in destination countries, particularly domestic and care work.

Gender influences labour migration at all stages of the migration process, from recruitment to return. Migrant women are commonly subjected to multiple and intersecting forms of discrimination, as women, as migrants, and often on additional grounds such as, inter alia, race, sexuality or belonging to a minority group. Migrant women face higher risks of sexual and gender-based violence (including early and forced marriage, transactional sex/survival sex, domestic violence, rape, sexual harassment and physical assault), psychosocial stress and trauma, health complications, physical harm, injury and exploitation. As women experience migration

differently to men, the laws that govern migration need to respond to these differences. When migration legislation is gender-responsive, women's labour and human rights can be better protected and their risks and vulnerabilities reduced. It can also enhance the likelihood of a positive migration experience as well as the ability of migrant women to contribute to sustainable development.

Formulating gender-responsive and rights-based migration policies

CEDAW and General Recommendation 26

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and its General Recommendation 26 on Women Migrant Workers (GR26) provides a strong framework to support the formulation of gender-responsive, rights-based migration policies.

Ratified by 189 states, and described as the Bill of Rights for Women, CEDAW is the most comprehensive normative framework on the human rights of women.

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By ratifying CEDAW, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including the commitment to:

- incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws;
- establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- ensure the elimination of all acts of discrimination against women by persons, organizations or enterprises.

Specifically, GR26 paragraph 23 provides that CEDAW and GR26 should be used to develop policy, based on equality and non-discrimination, that regulates and administers all aspects and stages of migration in a manner that facilitates access to opportunities for women migrant workers to work abroad, promoting safe migration and ensuring the protection of their rights.

CEDAW comprehensively defines discrimination against women 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...of human rights and fundamental freedoms...”

Article 3 of CEDAW requires that States Parties take all appropriate measures, including legislation to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 11 attends specifically to the elimination of discrimination in the field of employment; Article 12 to equal access to health care services, including those related to family planning and Article 15.4 accords to men and women the same rights with regards to the movement of persons and freedom to choose their residence and domicile.

GR26 provides more specific guidance to States Parties on how to respect, protect and fulfil the human rights of women migrant workers, providing recommendations specific to countries of origin, transit and destination. The scope of GR26 extends to women migrant workers who migrate independently, those who join their spouses or other members of their families who are also workers, and undocumented women migrant workers.

In addition, GR26 paragraph 23 sets out the following common responsibilities of countries of origin and destination: the formulation of gender-responsive migration policy; active involvement of women migrant workers in policy formulation; and the undertaking of quantitative and qualitative research, data collection and analysis to ensure that policies are gender-responsive.

Responsibilities specific to countries of origin include the lifting of restrictions on migration that are sex-specific or that discriminate against women; the implementation of gender-responsive education, awareness-raising and training; procedures and supervision of recruitment agencies; and services for women who wish to return, or have returned.

In relation to countries of transit, responsibilities include taking measures to train all border and immigration officials to ensure that their practices do not discriminate against women; and ensure that women’s rights are protected in transit.

Responsibilities specific to countries of destination include legal protection for all women migrant workers; access to legal remedies; freedom of movement; access to family reunification; and access to services without discrimination.

Applying a CEDAW based legal review

The “CEDAW based legal review”¹ is an approach which provides practical steps for using CEDAW as a framework for enhancing the gender-responsive nature of laws, including those specific to migration. Its key framework is based on eight steps as outlined below:

Step 1: Identify CEDAW obligations

Consider CEDAW, GR26 and any concluding observations received by the country undertaking the review and identify the obligations or undertakings required by CEDAW for the promotion and protection of the rights of women migrant workers.

Step 2: Identify situation, issues and concerns

Undertake a comprehensive review (including primary research where possible) of research papers, white papers, working papers, and literature related to women migrant workers in the context of the State undertaking the review; make a list – using neutral language – of the key issues that need to be addressed.

Step 3: Ascertain points needed in law

Determine the essential points that must be in the law, for it to respond to the issues of women migrant workers, in compliance with CEDAW obligations. For example, if the country under review has identified that women are not being offered the same migrant employment opportunities as men, then in compliance with CEDAW Article 11 (b), the essential point in law would be to apply the same criteria for the selection of women and men.

Step 4: Determine CEDAW legal indicators

Transform the identified points in Step 3 into CEDAW legal indicators by forming the points into questions that are answerable by yes or no. Using the previous example, the indicator would be, “does the law require that selection criteria for

migrant employment opportunities be applied equally to men and women?” Indicators must be specific, attainable and measurable.

Step 5: List relevant laws

Identify the laws that are relevant to each indicator. Using the current example, these may include laws on labour or employment, laws on recruitment, laws on labour migration and laws addressing discrimination more broadly.

Step 6: Analyse compliance

Analyse the relevant laws against the CEDAW legal indicators in order to determine if the laws are compliant. The result of this analysis may be: full compliance (a legal provision that responds in full to the indicator); partial compliance (a provision that responds in part but is inadequate, in its terms or implementation); or no compliance (absence of any provision that responds to the indicator).

Step 7: Draft explanation and comments

Provide comments and explanation to illustrate the reasoning behind the categorisation and analysis in Step 6 on how laws currently affect the issue.

Step 8: Formulate recommendations

Where there is no or partial compliance, create a comprehensive set of recommendations setting out what the law should be. This may include recommendations to repeal a law, drafting an amendment, or developing a new law.

¹ UN Women (2012). “Do our laws promote gender equality? A handbook for CEDAW-based legal reviews.”

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The case of the Philippines

The Philippines has extensive experience in migration governance and administration. Challenges remain, however, in making migration policies and practices more gender-responsive.

Through the EU-funded project, UN Women provided capacity development and technical support to a CEDAW-based legal review which led to the landmark signing of a law governing the operations and administration of the Overseas Workers Welfare Administration (OWWA), Republic Act No. 10801, by the Philippine President on 10 May 2016.

The law institutionalises and strengthens the government's support to overseas Filipino workers and their families through reforms to the OWWA.

Common issues and points for gender-responsive migration laws

The CEDAW-based legal review provides the methodology for making laws gender-responsive. Some of the key challenges facing women migrant workers and the substantive provisions of CEDAW and GR26 that provide guidance to addressing these challenges in law, are outlined below:

Gender issues at pre-departure

Women's lack of access to full and reliable information about legal channels and terms and conditions of work, makes them vulnerable to unscrupulous recruitment agents and traffickers and puts them at risk of physical, emotional and sexual violence.²

Exploitative fees may be charged, which cause women, who often have fewer assets than men, to suffer greater financial hardship.³

Due to the high cost of regular migration, restrictions on their movement, or lack of

opportunities to migrate through regular channels, women may resort to migrating irregularly using smuggling networks.⁴ Women with irregular migration status are particularly vulnerable to exploitation, violence and abuse, owing to their invisibility and lack of labour protection.

Key recommendations to ensuring that legislation governing pre-departure is gender responsive:⁵

- Provide equal access to migration opportunities ensuring there are no restrictions based on age, sex or family background;
- Ensure information on regular migration and regulated recruiters is publicly available;
- Legislate that pre-departure training is gender-responsive and includes information on language and rights;
- Restrict and regulate fees, loans and repayment;
- Adopt regulations and design monitoring systems to ensure that recruitment and employment agencies respect the rights of all women migrant workers;
- Include in the legislation a comprehensive definition of irregular recruitment along with a provision on legal sanctions for breaches of the law by recruitment agencies;
- Implement gender-responsive accreditation programmes to ensure good practices among recruitment agencies;
- Ensure that health examinations and testing are conducted in a non-discriminatory, culturally-sensitive manner that respects women's rights.

Gender issues in transit and upon entry

A lack of regular entry channels may lead women to use smuggling networks.⁶ Women and girls are particularly vulnerable to abuse, violence and even

² UN General Assembly (2015). Report of the Secretary-General "Violence against women migrant workers" A/70/205, para. 6

³ CEDAW GR26 para. 10

⁴ UN General Assembly (2015). Report of the Secretary-General "Violence against women migrant workers" A/70/205, para. 9

⁵ CEDAW GR26 para. 24

⁶ Ibid

death along irregular migratory routes.⁷ In the hands of smugglers, women migrants are often raped and forced into sexual servitude to repay debts.⁸ When travelling with an agent or escort, women migrants may be abandoned if the agent encounters problems on arrival in the country of destination.⁹

Moreover, women may not have equal and independent access to travel documents.¹⁰ Lack of legal status in countries of transit and destination mean that those who are victims of abuse and exploitation face greater challenges prosecuting their abusers.¹¹

Key recommendations to ensuring that legislation governing transit and entry is gender-responsive:¹²

- Incorporate legal obligations to train, monitor and supervise border police and immigration officials on gender sensitivity and non-discriminatory practices when dealing with migrant women;¹³
- Ensure effective sanctions against actors that violate the rights of migrants in the jurisdiction;
- Provide services and assistance to migrant women who are victims of rights violations in the jurisdiction, including access to justice, social services and healthcare;
- Ensure women have equal and independent access to travel documents.

Gender issues at destination

Migrant women often fill labour demands in destination countries. However, for migrant women this often means informal or low-skilled

employment (including at a lower skill level than they worked back in their home countries, referred to as the de-skilling of labour) based on restrictions on women’s employment in specific sectors of work, discrimination and gendered norms. Gendered occupations may be excluded from legal definitions of work, thereby depriving women of a variety of legal protections.¹⁴ Irregular migration can also increase women’s vulnerability to labour market abuses, characterized by forced labour, low wages, excessively long hours and insufficient rest, which is particularly pervasive for migrant domestic workers.¹⁵

Women in domestic and care work are particularly vulnerable to abuse because of the unequal power relations they face while engaging with labour brokers and employers; because they have limited access to information; their autonomous movement outside homes is restricted in many countries; and due to the invisible nature of their work.¹⁶ They may also be susceptible to debt bondage if upfront recruitment costs are passed on to the employer.

Women of all skill levels may be remitting a portion of their earnings to their families and/or communities. Nevertheless, women migrants may be unable to transmit savings safely through formal channels due to isolation, cumbersome procedures or high transaction costs.¹⁷

Key recommendations to ensuring that legislation in destination countries is gender-responsive:¹⁸

- Remove all discriminatory bans or restrictions on women’s migration, including those based on sectors of work and marriage status;

⁷ UN General Assembly (2015). Report of the Secretary-General “Violence against women migrant workers” A/70/205, para. 12

⁸ UN General Assembly (2015). Report of the Secretary-General “Violence against women migrant workers” A/70/205, para. 10

⁹ CEDAW GR26 para. 12

¹⁰ CEDAW GR26 para. 24(e)

¹¹ UN General Assembly (2015). Report of the Secretary-General “Violence against women migrant workers” A/70/205, para. 10

¹² CEDAW GR26 para. 25

¹³ CEDAW GR26 para. 25(a)

¹⁴ CEDAW GR26 para. 14

¹⁵ UN General Assembly (2015). Report of the Secretary-General “Violence against women migrant workers” A/70/205, para. 13

¹⁶ UN General Assembly (2015). Report of the Secretary-General “Violence against women migrant workers” A/70/205, para. 7

¹⁷ CEDAW GR26 para. 15

¹⁸ CEDAW GR26 para. 26

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- Ensure national laws provide equitable labour protection for all women migrant workers and the sectors in which they work;
- Incorporate mechanisms into law for monitoring workplace conditions;
- Provide equal rights to organize and unionise;
- Promulgate laws and regulations that include adequate legal remedies and complaint mechanisms; repeal or amend laws that restrict access to justice; and provide temporary residences;
- Make the confiscation or destruction of travel and identity documents illegal and establish a legal right to free movement;
- Enact provisions to ensure women have residency status independent of employer or spouse and have a right to stay in the destination country when escaping abuse;
- Oblige public and private actors to incorporate gender-responsive training;
- Incorporate the close monitoring of recruitment agencies into their regulation and make clear that prosecution follows acts of violence, coercion, deception or exploitation;
- Provide linguistically and culturally appropriate, gender-responsive services including residences, sexual and reproductive healthcare, and emergency services;
- In the rare cases that detention facilities are required they should be gender-responsive;
- Develop social inclusion policies;
- Provide legal provisions and training to ensure that undocumented women receive humane treatment as mandated by international law;
- Provide access to safe, low-cost remittance transfer systems.

Additional requirements specific to domestic workers under the ILO Domestic Workers Convention, 2011 (No. 189)

States should incorporate the provisions of ILO C189 into law, specific to the protection of the rights of migrant domestic workers. In particular, States should ensure:

- Minimum age for domestic workers;
- Domestic workers enjoy effective protection against all forms of abuse, harassment and violence;
- Domestic workers who reside in the employer's household enjoy decent living conditions that respect their privacy;
- Domestic workers are informed of the terms and conditions of employment, preferably through written contracts;
- A written job offer or contract of employment is provided to migrant workers before departure;
- Weekly rest of at least 24 consecutive hours;
- Access to a minimum wage or remuneration without discrimination based on sex;
- Payment by cash on a monthly basis or by bank transfer with the worker's consent;
- Law and regulations that specify the obligations of employment agencies and employers towards the domestic workers; create machinery to investigate complaints; provide penalties for breaches; and take measures to ensure that fees charged are not deducted from pay.

Gender issues on return

Upon return, migrant women bring back valuable skills gained from working abroad. They may also experience more autonomy in financial decision making/autonomy over financial earnings.

Nevertheless, women may face increased personal and social costs, especially where their absence is seen as the cause of disintegration of the family.¹⁹

In the absence of gender-responsive reintegration services, women rarely have access to adequate socio-economic, psychological and legal support on their return.²⁰

Women migrant workers may face sex- and gender-based discrimination, including compulsory HIV and AIDS testing for women returnees, and moral “rehabilitation” for young women returnees.²¹ Women face a lack of protection against reprisals from exploitative recruiting agents.²²

Key recommendations to ensuring that legislation governing return is gender-responsive:

- Facilitate the right to return free of coercion and abuse;²³
- Ensure comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned.²⁴

Diplomatic and consular protection

Women in destination countries may require support and services including timely provision of interpreters, medical care, counselling, legal aid and residence. Where States Parties have specific obligations under customary international law or treaties such as the Vienna Convention on Consular Relations, those obligations must be carried out in full in relation to women migrant workers.

Recommendation for diplomatic and consular protection:²⁵

- States Parties must properly train and supervise their diplomatic and consular

staff to ensure that they fulfil their role in protecting the rights of women migrant workers abroad.²⁶

Bilateral and regional cooperation

Bilateral and regional agreements can be used to arrange the sending and receiving of workers between countries. Such agreements can directly or indirectly result in discriminatory recruitment, especially where they focus on sectors that do not traditionally employ women.

Recommendations for bilateral and regional arrangements:²⁷

- Share experience of best practices and relevant information to promote the full protection of the rights of women migrant workers;
- Cooperate on providing information on perpetrators of violations of the rights of women migrant workers;
- When provided with information regarding perpetrators within their territory, States Parties should take measures to investigate, prosecute and punish them.

Conclusion

Migration is not a gender-neutral phenomenon and given the differential experiences, needs and priorities of women migrant workers, it is critical that migration governance is gender-responsive to ensure that the labour and human rights of migrant women are promoted and protected at all stages of migration. This Brief highlights CEDAW and GR 26 as key frameworks for providing a comprehensive and practical methodology to policy makers and practitioners to develop gender-responsive migration laws. In addition, for

¹⁹ CEDAW GR26 para. 11

²⁰ CEDAW GR26 para. 24 (i)

²¹ CEDAW GR26 para. 11

²² Ibid

²³ CEDAW GR26 para. 24(h)

²⁴ CEDAW GR26 para. 24(i)

²⁵ CEDAW GR26 para. 27

²⁶ CEDAW GR26 para. 24(j)

²⁷ CEDAW GR26 para. 27

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domestic migrant workers – one of the most vulnerable labour migrant groups – the provisions of ILO C189 outline clear and gender-responsive recommendations on best practices for protecting domestic migrant workers labour and human rights.

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