



**Briefing Note on Draft Law on Vietnamese  
Workers Working Abroad Under Contract  
of the Socialist Republic of Viet Nam  
(Draft Law 72)**

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**Implications for  
trafficking in persons**

**Australian  
Aid** 

**ASEAN-Australia  
Counter Trafficking**

### **Snapshot of key points:**

Draft Law 72 concerns labour migration from Viet Nam. Several provisions of the Draft Law, however, raise significant concerns and exacerbate the risks of trafficking of Vietnamese migrant workers. Therefore, in accordance with its international obligations to prevent and combat trafficking in persons, the government of Viet Nam should amend the Draft Law so it does not detract from counter-trafficking efforts and commitments.

Specific recommendations to amend Draft Law 72:

1. Explicitly prevent and combat trafficking in persons
2. Provide information on trafficking in persons, including in pre-departure training
3. Prohibit worker-paid fees and costs including brokerage fees and services charges
4. Remove the use of deposits and guarantors as contractual performance guarantees
5. Ensure non-punishment and non-stigmatization of victims of trafficking and others
6. Provide for screening and referral of trafficking in persons among returning workers and as part of ongoing reintegration services

### **Disclaimer**

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**01.**

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# **Relevant International legal framework on trafficking in persons**



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The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking Protocol), does not specifically address the role of labour migration, recruitment practices, fees or other costs in combating trafficking in persons. However, the definition of trafficking in persons refers to 'recruitment' as an act that can take place in the context of trafficking (article 3).

Prevention of human trafficking is stated in article 2 as a core purpose of the Trafficking Protocol. Among the mandatory obligations that the government of Viet Nam commit to in becoming party to the Trafficking Protocol in June of 2012, is to endeavour to take measures such as information campaigns and socio and economic initiatives to prevent and combat trafficking in persons (article 9(2)). Draft Law on Vietnamese Workers Working Abroad Under Contract of the Socialist Republic of Viet Nam (Draft Law 72) offers significant opportunities to fulfil that obligation, including by providing labour migration and recruitment stakeholders with sufficient information to identify victims of trafficking among them. Further, article 9(4) of the Trafficking Protocol sets out that:

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*States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.*

Accordingly, labour migration practices must not create or exacerbate vulnerability of Vietnamese workers to exploitation. This prevention measure is reinforced in the parent convention to the Trafficking Protocol, the United Nations Transnational Organized Crime (UNTOC) that speaks to the need for States parties to alleviate “the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime” (article 31(7)). Article 9(5) of the Trafficking in Persons Protocol sets out another mandatory prevention provision.

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*States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.*

This obligation to strengthen legislation to discourage demand that fosters exploitation is relevant in the context of labour migration of Vietnamese workers as addressed by of Draft Law 72. Demand for cheap and readily exploitable labour is a contributing factor to trafficking in persons. Vietnamese workers become a preferred target for exploitation over workers of other nationalities who pay lower or no fees; the fees and costs that migrant workers can be charged in Law 72 are more than three times higher than legislated recruitment fees and costs permitted elsewhere in the region.<sup>1</sup> And in practice, excessive payments may even be made contrary to law. The 2020 US State Department Trafficking in Persons Report notes that recruitment firms have been charging workers seeking overseas employment higher fees that the law allows, subjecting them to debts and increasing their risk of forced labour through debt-based coercion.<sup>2</sup> Vietnamese migrant workers have reported paying fees that are illegally high under Law 72, ranging between USD\$7000 and \$16,000, or in some cases even more.<sup>3</sup>

The fact that the legislation is not well understood, means workers often do not know when they are being charged fees that are excessive and illegal. But even payments that are in line with the law raise significant concerns about exploitation. The complexity of the law, combined with worker-paid fees and other costs, creates a market for illegal or unethical recruitment and lending to supply to demand for loans. These are often given at inflated interest rates, creating situations of debt bondage that can lead to human trafficking.

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<sup>1</sup> For instance, in contrast to Viet Nam's Law 72, the legislation in both the Philippines and Indonesia limits the fees and costs that can be charged to workers, with all other costs to be borne by employers.

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<sup>2</sup> Trafficking in Persons Report 2020 (US State Department, 2020) 534

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<sup>3</sup> Making them pay: a study of labour migration costs in Viet Nam and the feasibility of the employer pays model (ILO), drawing on Wako Asato, "Japanese Migration Policy Reform and the Complexity of Channels: From a Control Orientation to Rights-Based Laissez - Faire", presented at HeKKsaGon at Heidelberg University, Germany, Sep. 14, 2019. Ogawa, Reiko, Japan's Multiple Crisis and Immigration, (Chiba University). Also see: Forced labour in the production of electronic goods in Malaysia: A comprehensive study of scope and characteristics (Verité, 2014) and Recruitment fees and related costs: What migrant workers from Cambodia, the Lao People's Democratic Republic, and Myanmar pay to work in Thailand (ILO, 2020) 17. There are other examples of excessive and illegal recruitment fees; one researcher reported interviewing a Vietnamese worker who had paid recruitment costs of US\$26,000 for work in Japan. Naoko Sunai, "Precarity and Migration Industry: The Cases of Vietnamese Migrant Workers in Taiwan and Japan", Presented at the Workshop at the Center for Development and Integration (CDI), Hanoi, Vietnam, May 9, 2019.).

Complementing the international legal framework on trafficking in persons, International Labour Organization (ILO) international laws and labour standards introduce obligations that are also relevant to counter-trafficking.<sup>4</sup> Notably, charging of costs and fees is contrary to international labour standards and does not align with ILO Convention No. 181 (article 7(1)); the Maritime Labour Convention 2006 (standard 1.4(5)(b), Convention No. 189 (article 15(e)), and the Employment Service Convention No. 88 Article 1(1). Furthermore, the ILO General Principles and Operational Guidelines for Fair Recruitment and the Definition of recruitment fees and related costs (ILO, 2019) state at points 7 and 17 that “no recruitment fees and related costs should be charged to, or otherwise borne by, workers or jobseekers.”

Further, Objective 10 of the Global Compact for Safe, Orderly and Regular Migration, emphasizes the need to strengthen legislation to discourage demand for exploitation in the context of trafficking in persons. Objective 6 concerns commitment to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work, a core component of which is to “prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers in order to prevent debt bondage, exploitation and forced labour, including by establishing mandatory, enforceable mechanisms for effective regulation and monitoring of the recruitment industry.” These measures emerge again as important components of efforts to prevent trafficking in persons in the context of labour migration.

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<sup>4</sup> See ILO for more guidance on the relevance of the ILO Conventions to Draft Law 72.





## 02.

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# **Relevant regional legal framework on trafficking in persons**

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The ASEAN Convention against Trafficking in Persons (2015) precisely replicates the above-mentioned prevention provisions (article 9(4) and (5)) of the Trafficking Protocol, emphasizing the obligation of ASEAN Member States to alleviate vulnerability factors (article 11(4)) and to discourage demand for exploitation that fosters trafficking (article 11(5)). In support of this objective, the ASEAN Plan of Action against Trafficking in Persons, especially women and children refers to the challenge of discouraging demand that fosters exploitation leading to trafficking (Section II(1)), as well as in Prevention paragraph (j) and again in paragraph (i), speaking to the need to strengthen prevention measures against all forms of trafficking, regardless of the form of exploitation. The ASEAN Plan of Action points to the need for appropriate legislation to combat trafficking in persons (Section II(1) and (2)).

Of critical importance to the amendment of Draft Law 72 is the approach taken in the ASEAN Plan of Action to prevention of trafficking in persons, including at paragraph (e) that sets out action to:

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*Adopt and implement appropriate labour laws or other mechanisms that promote and protect the interests and rights of workers to reduce their risk of being trafficked.*

This crucial linkage between labour laws and the protection of the rights of migrant workers in the context of prevention of trafficking in persons is of acute relevance to Draft Law 72 and its potential impact on the trafficking of Vietnamese workers abroad.

Finally, the 2018 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (ASEAN Consensus) sets out obligations for both receiving and sending States, including the Government of Viet Nam, in protecting migrant workers. The need for receiving States to protect human rights of migrant workers, facilitate their access to resources and remedies, access to justice and employment protections, as well as to court systems for those who have been subject to discrimination, abuse, exploitation or violence, is set out in paragraphs 7 to 10. Sending States commit to enhancing measures to promote and protect the rights of migrant workers (paragraph 11), and at paragraph 14, to:

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*Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.*

In short, through the ASEAN Consensus on Migrant Workers, the government of Viet Nam has committed to promoting and protecting the rights of migrant workers, including by taking concrete measures to prevent or curb trafficking in persons (paragraph 17).



## 03.

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# **Relevant Vietnamese legal framework on trafficking in persons**



Law No. 100/2015/QH13 of 2015 (the Criminal Code) sets out the crime of human trafficking in article 150 where perpetrated for “sexual slavery, coercive labour, taking body parts, or for other inhuman purposes.” Coercive labour is understood to entail forced labour. Article 151 criminalizes human trafficking of children under the age of 16 for the same purposes as above. By requiring means used in relation to children, article 151 does not accord with the international law on trafficking in persons. These provisions also create a gap in respect of victims who are over 16 but under 18 years of age, who may be treated as adults under article 150 for the purposes of this law, contrary to international law that treats persons under 18 as children.

In addition to the Criminal Code, Law No. 66/2011/QH12 on Human Trafficking Prevention and Combat (Law No. 66/2011) prohibits trafficking in persons as defined in the Criminal Code; as well as other offences such as “transferring or receiving persons” or “recruiting, transporting or harbouring” persons for sexual exploitation, forced labour or removal of human organs or other inhuman purposes (article 3). Of relevance to Draft Law 72, Law No. 66/2011 refers to support in “sending of Vietnamese workers or learners abroad” as a component of preventing human trafficking (article 10), and requires Government ministries, sectors and localities to incorporate human trafficking prevention programs into socio-economic programs (article 11). Significantly, article 15 addresses the role of business and service organizations and establishments providing services in job recommendation or sending Vietnamese workers or trainees abroad, requiring them, inter alia, to “observe the law on human trafficking prevention and combat.”<sup>5</sup>

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<sup>5</sup> Article 15 of Law 66/2011 further requires that stakeholders a) sign labour contracts with employees, register employees with local labour management agencies; b) get information on those receiving their services and report it to competent authorities at their request for coordinated management; c) commit to observing the law on human trafficking prevention and combat; and d) coordinate with and create conditions for competent agencies to inspect and example their activities.

**Analysis of these counter-trafficking laws against Draft Law 72 reveals opportunities for legislators to strengthen Viet Nam’s counter-trafficking response, including by:**



- Explicitly referring in Draft Law 72 to Law 66/2011, with a specific focus on article 15 of that law.
- Amending the Criminal Code and Law 66/2011 to harmonize the definition of trafficking in persons in both, and in line with the international definition of trafficking in persons contained in article 3 of the Trafficking Protocol.
- Amending the Criminal Code to ensure victims of trafficking under 18 are captured as children for the purposes, and to ensure that means are not required in establishing that children have been trafficked.
- Addressing inconsistencies between Draft Law 72 and Law No. 66 on Human Trafficking, including to harmonize the definition of ‘forced labour’ in line with article 2(1) of the ILO Forced Labour Convention 1930 (No. 29).<sup>6</sup>

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<sup>6</sup> Article 2(1) of the ILO Forced Labour Convention 1930 (No. 29), defines forced or compulsory labour as “all 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”

The table below reveals the inconsistency between definitions contained in Viet Nam's Criminal Code, Trafficking Law No.66/2011 and Draft Law 72, and the definitions of trafficking in persons and forced labour set out in international law.

Table: inconsistent definitions in domestic legislation of Viet Nam

Trafficking in Persons Protocol (Article 3)	Criminal Code (Articles 150, 151)	Law 66 on Human Trafficking (Article 3)	Draft Law. 72
<hr/> <b>Act:</b> Recruitment, transportation, transfer, harbouring or receipt	<ul style="list-style-type: none"> <li>➤ Transferring or receiving for money, property, or other financial interests</li> <li>➤ Transferring or receiving</li> <li>➤ Recruiting, transporting, harboring</li> </ul>	<ul style="list-style-type: none"> <li>➤ Transferring or receiving persons;</li> <li>➤ Recruiting, transporting or harboring</li> </ul>	[Not included]
<hr/> <b>Means:</b> Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim (except for children for whom means not required)	<ul style="list-style-type: none"> <li>➤ Violence, threatens to use violence, deceives, or employs other tricks</li> </ul> <p>(also for children under 16)</p>	[Means not included. Child trafficking not defined]	[Not included]
<hr/> <b>Purpose:</b> Exploitation including exploitation of the prostitution of others, sexual exploitation, forced labour, slavery or practices similar to slavery, removal of organs	<ul style="list-style-type: none"> <li>➤ Sexual slavery, coercive labour, taking body parts, or for other inhuman purposes</li> </ul>	<ul style="list-style-type: none"> <li>➤ Sexual exploitation, forced labour or removal of human organs or other inhuman purposes.</li> </ul>	[Not included]
Definition of forced labour			
ILO Forced labour Convention 1930 (No. 29) Article 2	Criminal Code	Law 66 on Human Trafficking (Article 2(3))	Draft Law. 72 (Article 3(5))
All work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily	[Not included]	<ul style="list-style-type: none"> <li>➤ Forced labour means using force or threatening to use force or using other tricks to force a person to work against his/her will</li> </ul>	<ul style="list-style-type: none"> <li>➤ Forced labour is the use or threat of force or other subtle means to coerce any person to work against their will</li> </ul>



## 04.

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# **Recommended changes to Draft Law 72**



Against the backdrop offered above, the recommendations below are offered to support Viet Nam in fulfilling its obligations to protect Vietnamese citizens who are migrant workers abroad from trafficking in persons and related exploitation.

## **4.1. Explicitly prevent and combat trafficking in persons**

Draft Law 72 concerns labour migration, not trafficking in persons per se.<sup>7</sup> While the Draft Law prohibits forced labour (article 7(5)), it does not explicitly prohibit trafficking in persons. Yet forced labour and trafficking in persons are often related; trafficking is often perpetrated for the purpose of forced labour meaning that fair recruitment practices are crucial to prevent both forced labour and trafficked in persons.<sup>8</sup> Therefore, to the extent that the Draft Law 72 does not provide for fair recruitment practices, it allows for conditions that can lead migrant workers into forced labour and trafficking in persons, or situations that amount to both.

Law No. 66/2011/QH12 on human trafficking prevention and combat (Law No. 66/2011) requires agencies and organizations to regularly examine their own functions and tasks and detect trafficking in persons (article 20). Article 41 of that Law sets out state management responsibilities of various government Ministries for preventing and combating human trafficking.<sup>9</sup> Significantly, the Ministry of Labour, War Invalids and Social Affairs is responsible for integrating counter-trafficking into programs on employment generation (at article 44(3)) and at article 44(6):

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*To manage, guide, examine and inspect activities related to job recommendation, sending of Vietnamese workers abroad and recruitment of foreigners to work in Vietnam to prevent and combat the abuse of these activities for human trafficking.*



Photographer: Stephen Leonardi / Unsplash

Accordingly, Draft Law 72 should be amended to support the State's efforts to prevent and combat trafficking, including by explicitly linking to the domestic counter-trafficking framework. Specifically, amendments can be made in Chapter VI (concerning State management of Vietnamese workers on overseas employment under contracts) to set out the responsibility of the Government to protect workers from trafficking in persons, including for forced labour and other forms of exploitation, by maintaining a recruitment agency licencing system that guarantees fair recruitment.

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<sup>7</sup> Indeed, the only mention made of trafficking in persons is in the context of it being listed as a topic for 'basic issues' pre-departure orientation training (article 65(1)(h)).

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<sup>8</sup> For more on trafficking in persons for the purpose of forced labour, see Trafficking in Persons for the Purpose of Forced Labour, Inter-Agency Coordination Group against Trafficking in Persons, Issue Brief 09/2020.

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<sup>9</sup> The Ministry of Public Security (article 42), Ministry of National Defense (article 43), Ministry of Labour, War Invalids and Social Affairs (article 44) Ministry of health (article 45), Ministry of Foreign Affairs (article 46), Ministry of Justice (article 47), Ministry of Culture, Sports and Tourism (article 48), Ministry of Education and Training (article 49), Ministry of Information and Communication (article 50), People's Court (article 51) and People's Committee (article 52).

## Recommendations to amend Draft Law 72:



- Make explicit reference in the Draft Law to Law No. 66/2011/QH12 on human trafficking prevention and combat and the Criminal Code prohibition on trafficking in persons
- Add trafficking in persons to Article 3 of Draft Law 72 (Interpretation of Terms), in line with the international definition of trafficking in persons in article 3 of the Trafficking in Persons Protocol
- Explicitly emphasize the obligation to protect workers from trafficking in persons (in article 4 of the Draft Law) in accordance with Law No. 66/2011/QH12 on human trafficking prevention and combat
- Separate the prohibition of discrimination and the prohibition of forced labour into two distinct provisions (in article 7(5))
- Add an explicit provision to prohibit trafficking in persons, as a separate and distinct provision from both forced labour and discrimination (article 7)  
Include trafficking in persons as a ground for turning in or revoking licences at article 16(2)(d)
- Include trafficking in persons as a ground for turning in or revoking licences at article 16(2)(d).
- Promote international cooperation against trafficking in persons (article 69(5))
- Provide for inspecting, supervising and handling violations of legislation including violations of human trafficking legislation (Criminal Code and Law No. 66/2011) (in article 69(8))
- Make the Ministry of Labour, War Invalids and Social affairs responsible for ensuring the rights of migrant workers, including to protect them from trafficking (article 70)
- Explicitly obligate Vietnamese diplomatic missions and consulates to screen migrant workers for signs of trafficking in persons and referring them to authorities for screening and referral (article 71).
- Refer explicitly to the application of criminal law (Criminal Code and Law No. 66/2011) to situations of human trafficking and require referral to appropriate authorities where situations of trafficking in persons arise (in article 72).





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## **4.2. Provide information on trafficking in persons including in pre-departure training**

Article 7 of Law No. 66/2011 on human trafficking prevention and combat requires information, communication and education about human trafficking for individuals, families, agencies and organizations to prevent and combat trafficking in persons. Furthermore, article 19 of Law No. 66/2011 on Human Trafficking requires individuals as well as agencies or organizations to report information concerning human trafficking to authorities. However, beyond mentioning trafficking in persons as a topic for ‘basic issues’ pre-departure orientation training (article 65(1)(h)), no further mention is made of trafficking in persons in the Draft Law to ensure that relevant information is disseminated to increase the capacity of stakeholders (aside from potential victims) to prevent trafficking of Vietnamese workers abroad.



## Recommendations to amend Draft Law 72:



- Require that information be provided to Vietnamese migrant workers on where to seek assistance and support from counter-trafficking authorities and service providers in the country of employment and in Viet Nam pre-departure and during and after return to Viet Nam (in article 6(1)(a))
- Require that entities placing Vietnamese workers abroad provide explicit information about potential risks of trafficking in persons and other forms of exploitation (in article 9(2))
- In pre-departure orientation training, include explicit information on what to do in the event that trafficking-related risks arise (article 9(4))
- Clearly set out the contents of pre-departure orientation training on counter trafficking (in article 69(3)) to emphasize the risks of trafficking in persons, human rights and gender equality obligations of Viet Nam and States of destination to protect migrant workers from trafficking (article 65(1)(h)).
- Provide for formulating, promulgating and implementing the propagation, dissemination of, and education about legislation on Vietnamese workers working abroad, including trafficking in persons legislation (in article 69(2))
- Provide professional training of specialized staff working on migrant worker placement about risks of human trafficking and how to make referrals (article 69(4))
- Provide information about human trafficking and exploitation risks in overseas labour markets to enterprises, state owned non-profit entities and workers (article 69(6))
- Require that information and services are provided to migrant workers to support them in accessing national referral mechanisms and assistance services in destination countries (article 9(5))
- Require that service enterprises as well as state-owned, non-profit entities sending workers for overseas employment (article 27, article 43) are equipped with indicators of human trafficking and required to report any signs of trafficking to relevant authorities for further screening and referral; and provide persons who may be victims of trafficking with information on how to access services for assistance in Vietnam and in the country of employment.

### 4.3. Prohibit worker-paid fees and costs including brokerage fees and service charges

Charging fees or other costs to workers, whether in the form of fees, deposits or other costs, increases the vulnerability of migrant workers to trafficking in persons and related phenomena.<sup>10</sup> High recruitment fees or other costs combined with low wages, compounds vulnerability of migrant workers who may be pressured to succumb to increasingly exploitative conditions.<sup>11</sup> This vulnerability is exacerbated where workers incur debts in order to pay fees and costs. Throughout Southeast Asia, migrants routinely borrow money to finance their migration, with the cost of doing so reportedly increasing.<sup>12</sup> Concern has been raised that labour recruitment firms in Viet Nam (including those affiliated with state-owned enterprises) and unlicensed brokers charge Vietnamese citizens seeking work abroad with high recruitment fees and related costs, resulting in them incurring debts that make them vulnerable to exploitation, including through debt-based coercion.<sup>13</sup>

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<sup>10</sup> For this reason, many States have taken action to ensure that workers do not pay recruitment fees or other costs. For instance, the United States Federal Acquisition Regulation 52.222-50 Combating Trafficking in Persons, prohibits charging employees recruitment fees as a form of trafficking-related conduct. On 22 January 2019, a new rule was added to make clear that the term 'recruitment fees' is understood broadly to mean "means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

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<sup>11</sup> See for instance, The Role of Recruitment Fees and Abusive Fraudulent Practices of Recruitment Agencies in Trafficking in Persons (UNODC, 2015); Debt and the Migration Experience: Insights from South-East Asia (IOM, 2020)

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<sup>12</sup> Debt and the Migration Experience: Insights from South-East Asia (IOM, 2020) 24

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<sup>13</sup> Trafficking in Persons Report 2020 (United States Department of State, 2020) 523, 534

In order to pay fees, some workers exhaust their savings, mortgage their home or land, or take out loans. Relatives or friends who have loaned money look at this as an investment in that person's migration labour, with the expectation of its yielding future returns. In some cases, workers take loans from recruiters or third parties, who may have explicit links with traffickers. In other cases, debts may be incurred directly to employers, heightening the risk that the person will enter into a situation of debt bondage.<sup>14</sup> Some recruitment companies in Viet Nam offer services to workers to obtain a bank loan to finance their migration and employment, or bear the cost upfront against repayments deducted from workers' salaries.<sup>15</sup> These situations make workers more susceptible to exploitative offers and circumstances in order to repay debts. Further, charging of fees and other costs to migrant workers may also be accompanied by deception about the work and its conditions, making recruitment of migrant labour a lucrative and sometimes exploitative business.

While some recruiters have been convicted for crimes of trafficking in persons, oftentimes, the failure to recognize the connection between trafficking in persons and abusive recruitment practices has resulted in some traffickers being subject only to labour-related laws and regulations, and escaping criminal liability for their role in trafficking migrant labour.<sup>16</sup> On the basis of the above considerations, legislators in Viet Nam should eliminate all worker-paid recruitment fees and related costs, and other financial burdens imposed on Vietnamese workers abroad, as a key measure to prevent trafficking in persons. Indeed a key recommendation in the US State Department Trafficking in Persons Report is for Viet Nam to:

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*[t]ake steps to eliminate all worker-paid recruitment fees and predatory recruitment practices for workers migrating abroad or to Vietnam, including by strengthening efforts to monitor labour recruitment companies and third-party sub-brokers and prosecuting predatory or illegal sub-brokerage network.*<sup>17</sup>



Photographer: Florian Wehde /  
Unsplash

Specifically, amendments should be made to Article 23 of the Draft Law which concerns brokerage contracts, defined as “a written agreement between service enterprises and intermediary organizations, individuals on introducing overseas parties wishing to receive Vietnamese workers for the signing of labour supply contract in line with this Law and in line with the Law in receiving countries” (article 23(1)). It is unclear what how implementation of this provisions will be reconciled with legislation in destination countries that prohibits such fees. More disconcertingly from a human trafficking point of view, although the provision applies a ceiling to commission fees, it does not prohibit fees from being passed to migrant workers. Where migrant workers do not understand complex legislation and the legislation does not clearly articulate what service charges or fees entail, there is a risk that brokerage costs / commissions will be passed on to them, heightening their vulnerability. This risk should be mitigated by the inclusion of a provision explicitly prohibiting brokerage commissions or other fees from being passed on to migrant workers.

Further, Article 24 of the Draft Law governs the payment of service charges, being “the amount of money that service enterprises receive from the workers and from foreign labour receiving parties upon agreement to dispatch Vietnamese workers for overseas employment under contracts” (article 24(1)).<sup>18</sup> However, abusive practices such as worker-paid recruitment fees and related costs play a significant role in human trafficking.<sup>19</sup> Finally, the requirement for migrant workers to contribute to the ‘fund for overseas employment support’ set out in Chapter V of the Draft law should be reconsidered.

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<sup>14</sup> A 2018 ILO study found that 70.1% of workers had asked for their employer to pay for them to come to Malaysia, the majority of whom were paying the amount back through salary deductions over the course of 25 to 36 months. Worker-paid migration costs in the Viet Nam-Malaysia corridor (ILO, 2018) 17

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<sup>15</sup> Worker-paid migration costs in the Viet Nam-Malaysia corridor (ILO, 2018) 16

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<sup>16</sup> See for instance The Role of Recruitment Fees and Abusive Fraudulent Practices of Recruitment Agencies in Trafficking in Persons (UNODC, 2015) 47-53, 56

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<sup>17</sup> Trafficking in Persons Report 2020 (United States Department of State, 2020) 532

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<sup>18</sup> The amount is to be paid by workers only after a service contract has been signed (article 24(2)), and a proportionate amount is to be repaid if the worker has to return home prematurely (article 24(3)). The amount of the service charge is to set by article 24(5), being not higher than one month's month salary for one working year (for contracts of no more than 3 years), or one and a half months salary for officers and crew members in maritime transport vessels. For contracts of more than three years, the service charge paid by workers is not to exceed a half-month salary for a working year. The obligation for workers to make pay service charges is confirmed in Article 46(5) of the draft law.

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<sup>19</sup> Recruitment fees or related costs are defined by ILO General Principles and Operational Guidelines for Fair Recruitment and the Definition of recruitment fees and related costs (ILO, 2019) as “any fees or costs incurred in the recruitment process in order for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection.” The Principles and Guidelines further confirm that “Recruitment fees or related costs should not be collected from workers by an employer, their subsidiaries, labour recruiters or other third parties providing related services. Fees or related costs should not be collected directly or indirectly, such as through deductions from wages and benefits.”

## Recommendations to amend Draft Law 72:



- Remove provisions requiring workers to bear costs for overseas-employment related expenses or amend these provisions to clarify what these expenses entail (article 6(2)(d))
- Explicitly prohibit the passing on of any brokerage fees to migrant workers and prescribe penalties for violations of that provision (article 23)
- Remove the obligation for workers to pay service charges (article 24 and 46(5)) 6(2)(h) and 68(1)(b))
- Clarify whether support for migrant workers who fall victim to trafficking in persons is derived from the fund for overseas employment support or is obtained from another source (article 67).
- Explicitly prohibit and consider introducing penalties for entities charging workers recruitment fees or other costs including: 'Vietnamese enterprises sending workers abroad under contracts willing, accepting overseas constructions, projects' (article 33), 'Offshore-investing organizations and individuals sending Vietnamese workers abroad' (article 36), 'Enterprises sending workers abroad to work under skill improvement internships' (article 37, article 41) and 'State-owned, non-profit entities sending Vietnamese workers abroad' (article 43).



## 4.4. Remove the use of deposits and guarantors as contractual performance guarantees

Article 26 of Draft Law 72 concerns worker-paid deposits, specifying that workers and service enterprises shall reach an agreement on deposits to ensure that workers properly exercise their obligations under contracts (article 26(1)).<sup>20</sup> The Draft Law further provides for contractual performance guarantees in articles 43(c), 46(6) and 49(3), imposing an obligation on workers to make a deposit or introduce a guarantor according to the agreement with the service enterprise in order to secure the performance of the contract.<sup>21</sup> While the Draft Law prohibits the application of other obligation-performance guarantee methods beyond the specified deposit and guarantee measures (article 7(11)), the use of those two methods raises significant risks of trafficking in persons and related exploitation of workers.

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<sup>20</sup> The deposit is to be placed in a blocked bank account accessible only to the service enterprise (article 26(2), and to be refunded to the worker upon the liquidation of the contract (article 26(3)). Where the deposit is not paid to them, workers can file a complaint with the Ministry of Labour, War Invalids and Social Affairs, to request that enterprises return the deposit to the worker (article 26(4)). Where workers violate obligations under contracts, the deposits shall be used to compensation for damage caused by workers to the service enterprise. The remainder of the deposit not used for that purpose is to be returned to the worker. However, where the amount is insufficient, the worker shall make additional payment (article 26(5)). The government is to specify the ceiling of the worker's deposit, management, use and refund as appropriate to each labour market (article 26(6)).

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<sup>21</sup> The role of guarantors is also governed by Article 57 setting out the duration of the guarantee obligations, article 58 concerning contracting and article 59 concerning measures to ensure the performance of the guarantee obligations.

Contractual performance guarantees are not in the best interest of workers, and may provide employers with opportunities to control and exploit migrants, trapping them in situations that can descend into forced labour.<sup>22</sup> It may be difficult to practically differentiate the role of recruitment agencies, employers, sponsors, or guarantors.<sup>23</sup> Abusive practices can emerge from this dynamic. Performance guarantees, whether through deposits and/or the use of guarantors can result in debt bondage, and constitute the ‘menace of penalty’ captured in the definition of forced labour set out in the ILO Forced Labour Convention 1930 (No. 29). These features of forced labour also constitute indicators of trafficking in persons.

Additional provisions of the Draft Law may create the conditions for trafficking and other exploitation by further disempowering workers in their relationship with employers. For instance, the obligation for migrant workers to “Work at the assigned workplace; be compliant with working rules and disciplines; abide by management and supervision of foreign employers” (article 6(1)(d)), further tips the power dynamics in favour of employers. Migrant workers are generally not as well connected as their employers are, nor fully understand their rights, and may not have meaningful access to mechanisms to report grievances or otherwise seek support where their work conditions become rights abusive and/or exploitative.

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<sup>22</sup> Use of contractual performance guarantees is contrary to Convention No. 181 (Article 7(1), Convention No. 97 (Article 7(2)), Convention No. 189 (Article 15(e)) and the ILO General Principles and Operational Guidelines for Fair Recruitment and the definition of Recruitment fees and related costs as well as the Forced Labour Convention, 1930 (No. 29).

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<sup>23</sup> Where the role of guarantors is not carefully administered it may in practice be akin to the use of sponsorship or ‘kafala’ systems in use elsewhere in the world, that tie a migrant’s immigration and labour status to a specific individual or entity.

### Recommendations to amend Draft Law 72:



- Remove the use of contractual performance guarantees from articles 26, 43(c), 46(6), 49(3), 57, 58 and 59.
- Explicitly ensure that migrant workers are given copies of their contracts in a language they can understand and prohibit recruiters, employers, enterprises, guarantors, or others from confiscating contracts (article 20)
- Qualify article 6(1)(d)) to ensure that workers are not required to comply with any working rules and disciplinary measures that are contrary to law or that otherwise diminish the enjoyment of the rights.

## **4.5. Ensure non-punishment and non-stigmatization of victims of trafficking**

Contrary to international standards, victims of trafficking may in practice be punished for crimes they have committed or activities they have participated in as a direct result of being trafficked. Such punishment is a key barrier to their identification and protection, and the prosecution of traffickers. For these reasons, non-criminalization and non-punishment of victims of trafficking is a key principle in counter-trafficking.<sup>24</sup> Related to this, is the stigmatization of trafficked or otherwise exploited people, which can also obstruct their identification, hamper their recovery, and deter their cooperation in criminal justice processes against traffickers. The Vietnamese government has recognized stigmatization of trafficked persons as a barrier to effective response, by explicitly prohibiting stigmatization of and discrimination against victims in article 3(9) of Vietnamese Law No. 66/2011 on Human Trafficking Prevention and Combat.

However, contrary to counter-trafficking law, provisions of Draft Law 72 may result in victims of trafficking and others (including labour migrants), being punished or stigmatized. For instance, workers have obligations in article 6(2) of the law to “follow and promote the cultural traditions of Vietnam” and “respect the customs and practice of the receiving countries and territories.” It is not clear from these provisions what is specifically required of or prohibited to migrant workers, and what the consequence for failing to adhere to this obligation is. In the context of human trafficking, this provision may raise the risk that migrant workers may be accused of not respecting customs and traditions in violation of this provision, where for instance, migrant workers fall victim to trafficking for sexual or other forms of exploitation including forced labour.

Furthermore, the Draft Law prohibits massage therapists from working at restaurants, hotels or entertainment centres in the Annex referred to in article 7(6). It is not clear what health or other risks massage therapists are exposed to in these venues to warrant the prohibition of this type of work, and why massage therapists who work massage venues or other non-listed venues (including residential or other private premises) are not exposed to the same risk. If the intention of this prohibition is to prohibit Vietnamese migrant workers from engaging in sex work, legislators should consider making this explicit and/or otherwise clarifying the purpose and intention of article 7(6) and the Annex it refers to.<sup>24</sup>

Beyond stigmatizing or even criminalizing people who engage in certain forms of work or other activities abroad, the lack of clarity and precision of such provisions may pose practical challenges to international cooperation through mutual legal assistance between Viet Nam and countries where Vietnamese citizens have been fallen victim to trafficking or otherwise been exploited.

For the reasons stated above, legislators should consider amending these provisions of Draft Law 72 to ensure that they do not have a stigmatizing or discriminatory effect on migrant workers, including victims of trafficking, or contribute to their criminalization.

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<sup>24</sup> See for instance, UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, UN Doc. CTOC/COP/ WG.4/2009/2, para. 12; Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (E/2002/68/Add.1); Interagency Coordination Group against Trafficking in Persons, Non-punishment of victims of trafficking (ICAT, Issue Brief 8/2020); The importance of implementing the non-punishment provision: the obligation to protect victims, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children (OHCHR, July 2020)



### Recommendations to amend Draft Law 72:



- Explicitly prohibit sex and gender as grounds of discrimination (in article 3(4)).
- Clarify the intention of prohibiting forms of employment and specific sectors for workers included at Annex (referred to in article 7(6)).
- Clarify what is meant by the responsibility of overseas workers to follow and promote the cultural traditions of Viet Nam (6(2)(b)).

## **4.6. Provide for screening and referral of trafficked persons among returning workers and as part of ongoing reintegration services**

Article 26 of Law No. 66/2011 on Human Trafficking concerns receipt and verification of victims of trafficking returning from abroad. Further, article 55 of that law sets out that victims of trafficking must be returned in accordance with law and treaties between Vietnam and other countries and assure safety of life, health, honour and dignity of victims. In respect of return, article 61 of Draft Law 72 encourages organizations and individuals to provide support for returning migrant workers to access voluntary psychosocial counselling services for social integration. However, the Draft Law makes no explicit connection between returning migrants and relevant provisions of counter-trafficking Law No. 66/2011.

Repatriation that is not carried out in a way that rights-based may result in victims of trafficking, forced labour or other forms of exploitation losing access to justice in countries they were exploited, meaning that they may not be able to achieve restitution and recompense damage suffered. Any returns must therefore be carried out in due regard for the status of any legal proceedings related to the person having been trafficking.<sup>25</sup>

Vulnerability of Vietnamese workers who were exploited abroad does not cease once they have left or been removed from their trafficking situation. Even though their exploitation may have ended, vulnerability – including as a result of debts still owed – may remain. In some cases, a returning worker’s vulnerability may even be exacerbated where he or she returns to a situation of being surrounded by debtors and is potentially stigmatized as a result of having ‘failed’ to earn enough money abroad to repay loans. However, very often, migrant workers are returned to Viet Nam from abroad without being proactively screened for human trafficking, meaning they remain unidentified and the State is unable to fulfil its obligations to them.<sup>26</sup>

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<sup>25</sup> Trafficking in Persons Protocol, article 8(2)

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<sup>26</sup> Trafficking in Persons Report 2020 (United States Department of State, 2020) 533

### **Recommendations to amend Draft Law 72:**



- Explicitly refer to article 26 and article 55 of Law No. 66/2011 on trafficking in persons in Draft Law 72 (in article 61).
- Provide for proactive screening for victims of trafficking among migrant workers including those returning from abroad (in article 61).
- Specifically provide for access to national referral mechanisms for identifying, protecting and assisting victims of trafficking in persons among returning migrant workers (in article 61).