Review of the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985

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The Recommendations made by the Civil Society

For consideration of the Ministry of Foreign Employment, Sri Lanka
and
Sri Lanka Foreign Employment Bureau

March 2017

Preface

This review of the Sri Lanka Bureau of Foreign Employment Act, No. 21 of 1985 has been prepared in consultation with a number of civil society organizations in Sri Lanka engaged in activities at the grass root level as well as at national level and working towards the protection of the rights and the empowerment of migrant workers and their families. This report seeks to provide information from a non-government perspective.

The report is a joint initiative of the Civil Society Organisations mentioned below. The Contributions in preparing this report and the inputs which were provided by the following Civil Society Organisations from various Districts in Sri Lanka, are highly acknowledged.

Civil Society Organisations:

1. Asia Foundation, Bagatalle Rd, Colombo, Sri Lanka
2. Action Network for Migrant Workers (ACTFORM) Colombo, Sri Lanka
3. Caritas SEDEC, Colombo, Sri Lanka.
4. Seth Sarana - Caritas, Colombo, Sri Lanka.
5. Centre for Human Rights and Community Development (CHRCD), Kurunegala, Sri Lanka.
6. Centre for Poverty Analysis (CEPA), Colombo, Sri Lanka
7. Community Development Services (CDS), Colombo, Sri Lanka.
8. Eastern Self-Reliant Community Awakening Organisation (ESCO), Batticaloa, Sri Lanka.
9. Good Shepherd Sisters, Wattala, Sri Lanka.
10. Helvetas Swiss Intercooperation, Colombo, Sri Lanka
11. Institute of Social Development (ISD), Kandy, Sri Lanka.
12. LEADS Sri Lanka, Dehiwela, Sri Lanka
13. Lanka Jathika Estate Workers Union (LJEWU), Rajagiriya, Sri Lanka
14. Lawyers Beyond Borders - Sri Lanka Chapter, Colombo, Sri Lanka.
15. Media Representative
16. Migrant Workers Front, Rajagiriya, Sri Lanka.
17. National Trade Union Federation (NTUF), Rajagiriya, Sri Lanka.
18. National Organisation of Informal Sector Employees, Colombo, Sri Lanka
19. Plantation Rural Education Development Organization (PREDO), Kandy, Sri Lanka.
20. The POWER Foundation, Badulla, Sri Lanka
21. Sarvodaya Women's Movement, Colombo, Sri lanka.
22. Saviya Development Foundation, Galle, Sri Lanka.
23. Social Organizations Networking for Development (SOND), Jaffna, Sri Lanka.
24. Social Welfare Organization Ampara District (SWOAD), Akkaraipattu, Sri Lanka
25. Solidarity Centre, Colombo, Sri Lanka.
26. Stand Up Movement Lanka, Negombo, Sri Lanka.
27. UNI Sri Lanka Affiliates Council, Colombo, Sri Lanka
28. Working Women's Front (WWF), Kandy, Sri Lanka.

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1 Introduction

1. The Ministry for Foreign Employment Promotion and Welfare was created in February 2007 indicating the recognition of the contribution made by migrant workers to the economy by assigning the subject to a Cabinet Level Minister, instead of being handled, as previously, by the Minister of Labour. The Ten Year Horizon Development Framework (2006-2016) of the Government had set out the focus as being safe, skilled migration and the creation of a separate ministry for the sector gave priority to achieving the stated objectives for migration. At present, the Ministry of Foreign Employment is the lead ministry in carrying out the National Labour Migration Policy which was adopted in 2008. The goals of the National Policy are stated as follows:

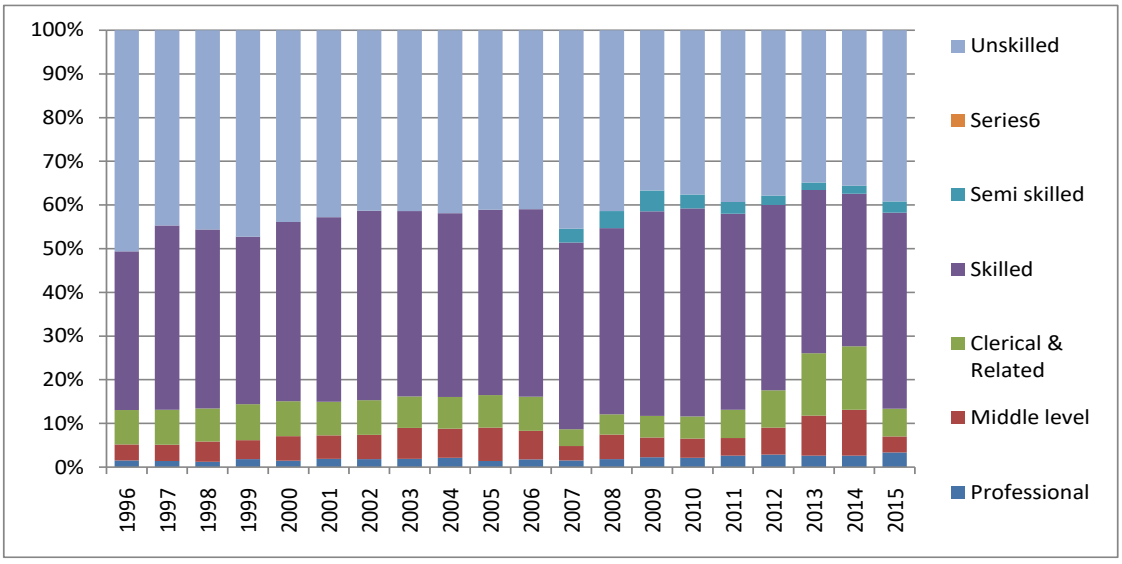
   (1) To develop a long-term vision for the role of labour migration in the economy;

   (2) To enhance the benefits of labour migration on the economy, society, and the migrant workers and their families and minimize its negative impacts;

   (3) To work towards the fulfilment and protection of all human and labour rights of migrant workers.

2. Annually, about 200,000 Sri Lankans migrate for employment overseas and it is estimated that around 1.5 million Sri Lankans are currently employed abroad. Inward remittances by migrant workers provides the highest foreign exchange earnings of nearly one trillion Sri Lankan Rupees million (SLBFE Annual Statistics, 2015), which is nearly two thirds of the total earnings from exports (tea, rubber, coconut and apparel exports combined). The significance of the sector to the economy of the country is therefore self-evident.

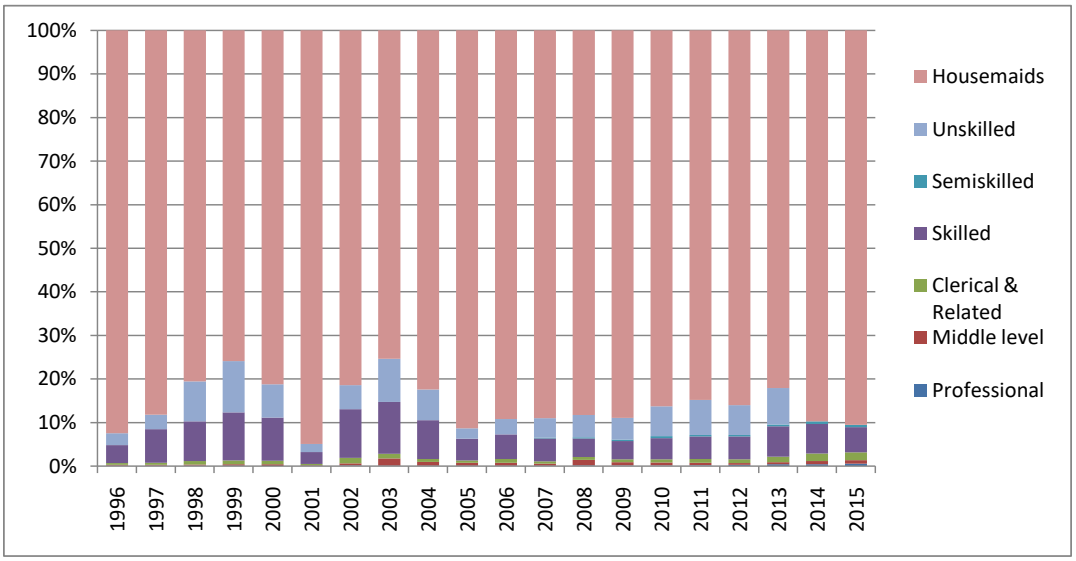
Figure 1. Male migrant workers by Skill level (1996-2015)



Source: SLBFE, 2015

3. Initially, female migrant workers formed the majority of those migrating for employment, but in the recent past this pattern has undergone rapid changes as indicated below. From 1996, over a period of two decades, female to male migration has reversed positions almost completely: from 73 per cent and 26 per cent respectively in 1996 to 65 per cent and 34 percent in 2015 (see Figure 1). The number of females migrating for employment has also decreased in absolute terms, from a high of 138,312 in 2012 to 60977 in 2015; the number of male migrant workers has increased steadily (Figure 2).[1]

Figure 2. Female migrant workers by Skill level (1996-2015.

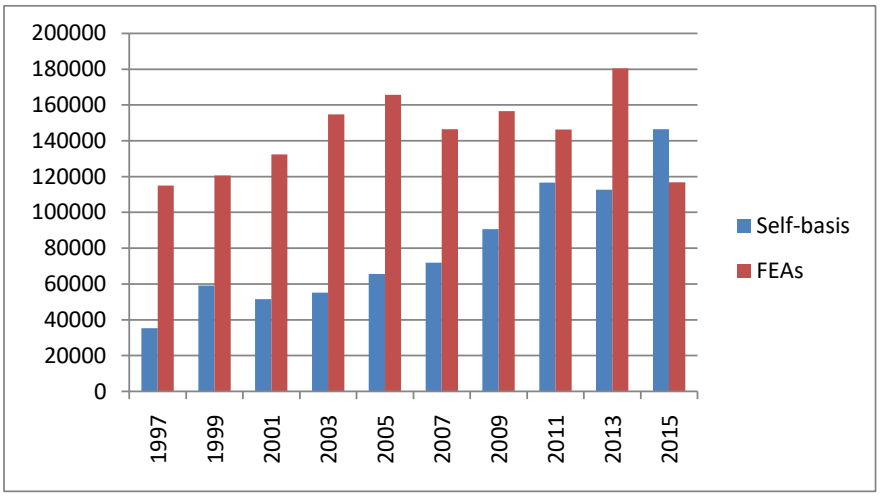


Source: SLBFE, 2015

4. Skill levels of migrant workers differ based on gender, with over 90 per cent of female workers continuing to migrate as unskilled workers or housemaids; by contrast, just under 40 per cent of male workers are unskilled, with over another 40 per cent migrating for work that is skilled or higher (Figures 3 and 4). Male Professional workers are also increasing but hardly any female workers migrate for middle-leave or professional work. This continued reliance by female migrant workers as unskilled or domestic workers has a negative impact on the quality of work, decent work environment, occupational safety and health and rights in employment of such workers, as it is difficult to ensure these conditions for unskilled and domestic workers.

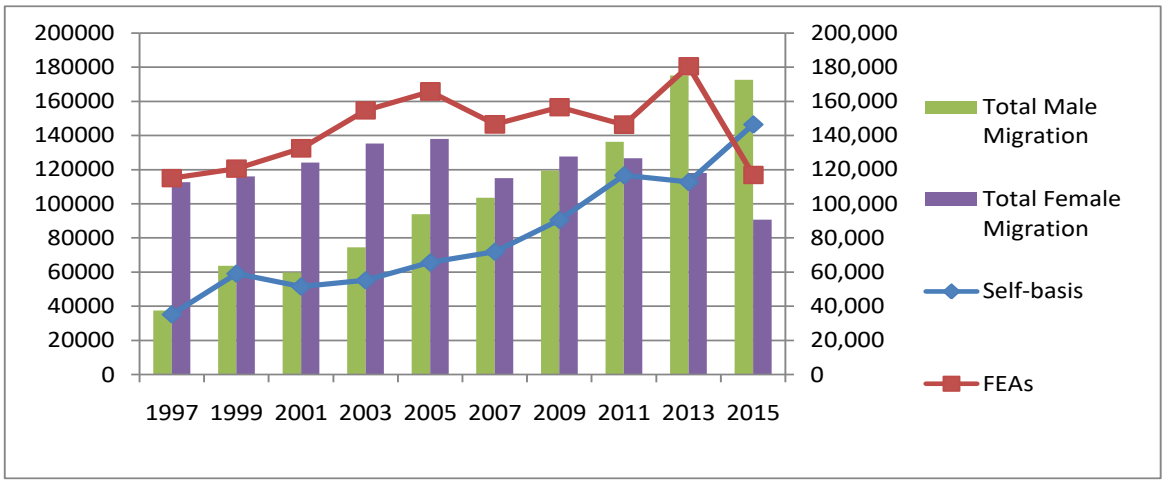
[1] For further details on data and trends on migration for employment in Sri Lanka, please refer to annexure 1.

Figure 3. Migration for employment by source (1997-2015 (two year intervals))



Source: SLBFE, 2015

Figure 4. Migration by source in relation to Male/Female migration (1997-2015 (two year intervals))



Source: Compiled from SLBFE, 2015.

5. It is clear from the above data that, despite the stated intention to move towards 'skilled, safe, migration' there is no improvement in the skill levels of migrant employment. Given also that the majority of employment opportunities at higher skill levels remain unfulfilled, it would seem that a more strategic approach is required to change this pattern in migrant work.

6. Until the last decade, the large majority of workers were placed in migrant work through Foreign Employment Agencies ("FEAs") which placed these Agencies in a position with high bargaining power. However, as can be seen in Figure 5 this reliance on FEAs as a source of employment placement is changing, and for the first time in 2015 more migrant workers have obtained employment abroad through their own sources than through FEAs.

7. This reduction in sourcing of employment through FEAs may be due to the increasing number of male migrant workers who obtain employment through word-of-mouth, direct recruitment, friends and family, etc., than female workers who continue to access

employment opportunities through FEAs, their agents and sub-agents due to incentives given to female migrant workers by FEAs. Typically, FEAs do not charge a fee from applicants for migrant employment, whereas male migrant workers need to pay high facilitation and processing fees; indeed, in Sri Lanka, FEAs pay female migrant workers a fee between Rs. 100,000 – 200,000 as a 'signing bonus' in order to persuade migration for work which is essentially poorly paid and risky.

8. While it is not possible to draw any conclusions from the decrease since 2013 in the number of women migrating for employment, given the socio-cultural problems associated with the migration of women for employment, and the low economic benefit to the families of such migrant workers of the type of jobs for which women migrate in Sri Lanka, such a decrease may signal an opportunity to encourage migration for higher skilled jobs for both men and women.

2 Policy and Legislative Framework on migration

9. The National Policy on Labour Migration sets out the following goals:
   - To develop a long-term vision for the role of labour migration in the economy;
   - To enhance the benefits of labour migration on the economy, society, and the migrant workers and their families and minimize its negative impacts;
   - To work towards the fulfillment and protection of all human and labour rights of migrant workers.

10. The National Policy looks at migration from a broader perspective, going beyond the mere economic advantage of migration for employment, by bringing together the key elements of decent work for migrant workers, the creation of productive employment opportunities for men and women in conditions of freedom, equity, security and human dignity. However, the Policy is intended to apply only to migrant workers from Sri Lanka who seek employment in other countries; it is stated to exclude "… in-bound migrant workers from foreign countries who are employed (contractually or without valid contracts and other documentation such as work visas) in Sri Lanka" (p.8). As Sri Lanka has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, there is an obligation to ensure the rights of migrant works from other countries who are employed in Sri Lanka, and it may therefore be appropriate to seek tripartite agreement on formulating an addendum to the National Policy to give effect to such international obligations.

2.1 The Foreign Employment Agency Act No 32 of 1980

11. This was the first legislative provision aimed at regulating the recruitment of Sri Lankans for employment abroad. The Act focused on licensing existing Foreign Employment Agencies and on supervising the contracts of employment entered into by individual migrants; it is clear that the Act did not foresee the mass migration that became a reality within a few years, as it contained provisions that were far too cumbersome to be of practical effect, such as those requiring the Foreign Employment Agency to obtain prior written approval from the Commissioner of Labour before recruiting any persons for employment abroad.

2.2 The Sri Lanka Bureau of Foreign Employment Act

12. The Sri Lanka Bureau of Foreign Employment Act, No 21 of 1985 was enacted to overcome the deficiencies of the Foreign Employment Agency Act and was stated "…. to provide for the establishment of the Sri Lanka Bureau of Foreign Employment and to regulate its powers and duties; to repeal the foreign employment agency act, No. 32 of 1980; and to provide for matters connected therewith or incidental thereto." This Act was amended in 1994, and most recently in September 2009. It is currently being reviewed for amendment to bring it in line with the changing migration situation, and this review is intended to facilitate that review.

13. The Sri Lanka Bureau of Foreign Employment Act ("SLBFE Act") established the Sri Lanka Bureau of Foreign Employment (SLBFE) as the lead agency for the regulation of overseas employment administration. In addition to providing for the establishment of the SLBFE and for its functions which are set out in the detailed objectives (section 15) and general powers (section 16) of the Act, it also provides for licensing of employment agencies, data collection on migrant workers and the setting up of a Worker's Welfare Fund.

14. Section 15 of the SLBFE Act sets out the objectives of the Sri Lanka Bureau of Foreign Employment (the Bureau). These objectives can be summarized as follows:

    (i) To promote/develop foreign employment opportunities (a, c, k,l)
    (ii) Regulation of foreign employment agencies;(e,f,)
    (iii)Assist Foreign Employment Agencies to grow and develop; (b)
    (iv)Set standards for foreign employment; (d, g, h, i)
    (v) Recruit Sri Lankans for foreign employment (e);
    (vi)provide for the welfare and protection of migrant workers (m,n,p,q,r,s)
    (vii) Undertake the training and orientation of migrant workers (o)
    (viii) Verify documentation of migrant workers (j)

15. Some of these objectives seem to be contradictory: regulating Foreign Employment Agencies may conflict with assisting them to grow and develop; and recruiting Sri Lankans for foreign employment may conflict with setting employment standards. From a worker protection point of view, however, it is quite clear that protecting and providing for the welfare of migrant workers is not intended to be the focus of the Bureau: the language in which section (m) is drafted makes it clear that the objective of 'undertaking' the welfare and protection of migrant workers is much less than a duty to protect migrant workers. To complicate matters, section 25 also provides that "The Bureau may carry on the business of a foreign employment agency and charge fees for any services rendered by the Bureau." Not only is the Bureau intended to function as regulator and protector, but it is also entitled to become a player. Any analysis of the SLBFE Act must therefore take this fundamental contradiction into account: that it is not an agency which has as its primary and fundamental duty the protection and welfare of migrant workers.

2.2.1 Composition of the Sri Lanka Bureau of Foreign Employment

16. Section 4 provides that the members of the Board of Directors of the Bureau shall be the members of the Bureau; the composition of the Board of Directors is comprised of eleven members, all appointed by the Minister (in charge of foreign employment), as follows:

- one member appointed by the Minister in consultation with the Minister in charge of the subject of Finance;
- one member appointed by the Minister in consultation with the Minister in charge of the subject of Foreign Affairs;
- one female member appointed by the Minister in consultation with the Minister in charge of the subject of Women's affairs;
- eight other members appointed by 'the Minister of whom four shall be representatives of foreign employment agencies licensed under this Act.

17. The period of office is two years; a Member of Parliament is disqualified from appointment as a Director. The Act provides that the Chairman shall be appointed from among the Directors by the Minister (section 12). The query that has been raised many times in other research and other discussions is the fundamental conflict of interest in appointing representatives of Foreign Employment Agencies (and as many as four of eleven members) to the Board of Directors of the SLBFE. The Bureau may then be in the anomalous position of having to regulate a Foreign Employment Agency that may have been represented on the Board. Although section 7 prevents a Director 'who is in any way directly or indirectly interested in any contract made or proposed to be made by the Bureau' from taking part in any decision on such contract, that does not exclude such Director/s from participating in any other decision regarding general regulation of Foreign Employment Agencies or a particular Agency in which such Director may have an interest.

18. The presence of not one, but four, representatives of the Foreign Employment Agencies gives rise to all the more concern in view of the absence of a requirement to appoint representatives of any other stakeholder to the Board of Directors, such as a representative of any migrant worker association or a trade union representing such migrant workers, or any other recognised non-governmental or civil society organisation working with migrant workers or their families; the representation on the Board of only one stakeholder makes it likely that the interests and/or rights of others may not be adequately protected.

2.2.2 Governance and Transparency of the SLBFE

19. The affairs of the Bureau are administered by the Board of Directors numbering eleven; but all are Ministerial appointees, with three being appointed in consultation with the Ministers for Finance, Women's Affairs and Foreign Affairs. The appointment of Directors in consultation with such Ministers is important in that other line Ministries closely allied with the interests of migrant workers will have an input into the decisions of the bureau. Members are appointed for two years but the Minister may remove any Director without assigning a reason at any time. Although this is the principle on which all such appointments are made to most statutory bodies, this holding of office 'at the pleasure of the Minister' is unsatisfactory in many ways as it tends to hamper independent action on the part of the Board as well as encouraging arbitrary or capricious behaviour on the part of the Minister. Especially coupled together with section 14 which states that "the Minister may give to the Bureau directions in writing as to the performance of the duties and the exercise of the powers of the Bureau, and the Bureau shall give effect to such directions" the ability of the Directors to act independently appears to be considerably hampered.

20. The ability of the SLBFE to operate in a financially independent manner is also a critical issue. At present, much of the operational budget of the Bureau is derived from the Registration fee paid by departing migrant workers. The provision in sections (2) and (3) to require the Bureau provide the Minister with information on various aspects of the Bureau's activities and to enable the Minister to appoint a person to investigate the activities of the Bureau are likely to foster a degree of transparency and accountability, as do the provisions that require audited accounts to be submitted to the Minister annually. However, the absence of a requirement that the Minister to publish or disclose such accounts or details (unless requested under the Right to Information Act No.12 of 2016) makes it difficult to assess the operational efficiency of the Bureau, or to assess the degree of financial stability of the Bureau in order to make recommendations on its fee-levying operations.

2.2.3 Regulating Foreign Employment Agencies

21. The regulation of Foreign Employment Agencies must have as its purpose the protection of potential migrant workers and workers who do migrate with the assistance of such Agencies from exploitation or other unscrupulous conduct. To that end, only licensed foreign employment agencies are permitted to operate under the Act as section 24(1) states that "a person other than the Bureau shall not carry on the business of a foreign employment agency unless he is the holder of a license issued under this Act and otherwise than in accordance with the terms and conditions of that license". The Act goes on to set out detailed provisions for licensing conditions pertaining to such licenses, renewals and cancellations.

22. Section 31 of the Act provides that the SLBFE may cancel a license issued to a Foreign Employment Agency if it is satisfied that the licensee -
    (i) has contravened any of the provisions of this Act or of any regulation made thereunder or of any agreement or bond entered into by the licensee under this Act;
    (ii) has been convicted of an offence under this Act or any regulation made thereunder;
    (iii) has not complied with any directions issued by the Bureau to the licensee under section 42 or section 43 [for additional information];
    (iv) has failed to pay any cess he is required to pay under this Act;
    (v) failed to pay any person, any sum he has been directed to pay by the Bureau under section 44 ; or
    (vi) has furnished in any application or in any return or in any written information or written explanation sent by the licensee under this Act, any particulars which to the knowledge of the licensee are false or incorrect.

23. Where the SLBFE refuses the grant or renewal of a license or cancels the license of a Foreign Employment Agency it is required to communicate same to the Foreign Employment Agency with the reasons for that decision. The following subsection provides that any person aggrieved by such a decision of the SLBFE with regard to a license as above shall not take effect until the time for appealing against the decision of the Bureau has expired or if an appeal has been made within time unless and until the appeal is disallowed. It is in the provision made with regard to such appeal that the fundamental weakness of the Act is revealed.

24. Section 33 states that any person aggrieved by a decision of the SLBFE to refuse to grant, renew or cancel a license, may appeal to the Secretary of the Ministry against that decision, and the Secretary shall allow the appeal and direct the SLBFE to grant, renew or

revoke the cancellation (with which direction the SLBFE is compelled to comply under the Act), or disallow such appeal. This provision is a subversion of the authority of the SLBFE and is a clear obstacle in protecting the rights of migrants because, firstly, a decision of the SLBFE for reasons at section 31(i) to (vi) which constitute serious irregularities can be set aside by a mere appeal to the Secretary of the Ministry; not even a written appeal is stipulated; and secondly, there is no duty cast upon the Secretary to conduct an inquiry and there is no duty to communicate reasons for his decision.

25. This provision is an extremely unusual one, in that a decision of a competent statutory authority is being set aside by an administrative officer, completely outside the regulatory or operational mechanism of that authority: it is not the Minister that is granted the right to review the decision of the SLBFE, but the Secretary. Further, under the Civil law of the country, any administrative decision of a statutory authority such as the SLBFE can be subject to review through the regular judicial system, usually by way of Writ Application to the Court of Appeal; that is a process where both parties are entitled to present their case. However, in this instance, the Secretary to the Ministry is not obliged to take note of the position of the SLBFE in overturning its decision. In informal discussions with the SLBFE it was revealed that there have been a notable number of successful appeals against such decisions of the SLBFE by the Secretary to the relevant Ministry.

26. In addition to the above provisions, the Act, in section 62, makes the recruitment of workers for employment overseas an offence punishable except in conformity of the Act, an offence punishable on conviction after summary trial by a Magistrate, by a fine not less than twenty thousand rupees and not exceeding one hundred thousand rupees and an additional fine of one thousand rupees for each day on which such offence is continued. This section includes the running of an unlicensed agency as an offence. However section 62(3) states that no prosecution shall be instituted without the sanction of the Secretary to the Minister and this raises a further question of the actual and independent power of the SLBFE as a regulatory body; as the incurring of a penalty for contravening the Act may be avoided by the use of political influence by the wrongdoer to prevent the Secretary to the Ministry from sanctioning such prosecution.

27. The Act also places penal liability on licensed agencies not conforming to the requirement of providing valid contracts to employees and on failure by agencies to furnish prescribed information on Sri Lankans recruited for employment abroad to the SLBFE.

28. With regard to trafficking and illegal migration, the Act does make some provision regarding offenders. Section 63 provides that any person who –

    a. forges or alters any document required for, or relating to, the emigration of any person for the purpose of employment or has, in his possession or under his control any instrument or article which may be used for the purpose of such forgery or alteration; or

    b. by means of intoxication, coercion, fraud or willful misrepresentation, causes or induces, or attempts to cause or induce, any person to emigrate , or enter into any agreement to emigrate or leave any place with a view to emigrating for the purpose of employment, shall be guilty of an offence under the Act, and shall on conviction after summary trial by a Magistrate be liable to a fine

not less than one thousand rupees and not exceeding one thousand five hundred rupees and to imprisonment of either description for a term not less than twelve months and not exceeding two years.

29. Although the problem of Sri Lankans migrating or attempting to migrate illegally has become more persistent, trafficking of Sri Lankans has not as yet reached noticeable proportions; however, the above sections cover the provision of false documents or the use of any inducement or coercion to convey any person overseas for the purpose of employment. Thus, exclusive of provisions in the Penal Code of Sri Lanka relating to the trafficking of persons from Sri Lanka (which deals primarily with trafficking for sexual exploitation), the SLBFE Act does make trafficking a punishable offence.

30. However, in relation to all of these penal provisions, the difficulty arises in the making of the complaint: since the Act contemplates only a situation where the actual victim or aggrieved party personally makes a complaint situations where the migrant worker is unable to return as a result of the illegal acts perpetrated upon him/her are not covered. For instance, in not making an inquiry possible upon an affidavit of a family member of a migrant worker, there is a possibility that the offender may evade any punishment where a migrant worker is stranded or captive abroad. Some provision to move the Bureau to Act in such circumstances would therefore be advantageous in providing protection to migrant workers, with suitable protection against the making of false or baseless complaints by family members serving to deter frivolous prosecutions.

2.2.4 Registration of migrant workers

31. Section 53(3) of the Act states that "every Sri Lankan leaving for employment outside Sri Lanka shall, prior to such leaving, register with the Bureau". While the Act provides space for the improvement of the status of migrant workers, especially unskilled workers, a serious issue remains in that the Act covers only those workers who are registered with the SLBFE. Undocumented workers or the thousands that leave the country through unrecorded sources not registered with the SLBFE are thus not eligible for the benefits and protections set out the Act. The positive aspect of this compulsory registration is that it enables the SLBFE to maintain information not only of the country of employment of each migrant worker but also the name and address of the employer of each migrant worker. This is important in instances where an employer has breached an employment contract with a Sri Lankan migrant worker, the SLBFE is able to blacklist the employer and prevent Sri Lankan workers from being further employed in such a situation.

32. A migrant worker can access insurance schemes, training programs, concessionary loans upon return, and a number of other benefits by registration. However, a major cause for concern is that insurance cover lapses after the end of the period of validity of registration (two years). Although renewal of both registration and insurance is possible at a nominal fee, many migrant workers remain overseas after that period and may not be able to obtain such renewal. The SLBFE should therefore pursue with the insurance providers the need to inform the next of kin in Sri Lanka prior to the expiry of the insurance cover, and make it simple for such person to renew registration/insurance in Sri Lanka.

33. The registration fee is distributed as follows: If a licensing agency has secured employment for the worker, of the total sum paid as registration fees -
    (i) seventy per cent is paid to the licensing agent
    (ii) twenty percent is retained by the SLBFE

(iii) Ten per cent of the share retained by the Bureau is deposited in the Workers' Welfare Fund.

34. As an example, at present the Registration fee for a domestic worker leaving for Dubai as a Domestic worker for which employment the stipulated monthly salary is USD 300 (approximately Rs.45,000) is charged a sum of Rs.17890 which would be distributed under the above provision in these amounts:
    - The registration fee is Rs. 17,890 + USD 50 (embassy fee) = Total Approximately Rs.26000; however, only the registration fee is considered for the purpose of section 51, and no explanation was given for the purpose of the 'embassy fee'[2].
        - 70% (**Rs.12590**) is paid to the licensing agent
        - 20% (**Rs.3578**) is retained by the SLBFE
        - 10% (**Rs.1789**) is deposited in the Workers' Welfare Fund.

35. However, in the current context where self-migration exceeds migration through FEAs (Figure 4 above), there is a question on the justifiability of the allocation of 70% of the registration fee to the FEA as there is no agent in the majority of migrations; even if it could be assumed that giving 70% of the fee to a FEA who would already be paid by the employer for facilitating the contract is acceptable, the question then is whether it is justifiable for the SLBFE to retain 70% of the fee for its own use. This is all the more questionable considering that only 10 per cent of the fee is used for the welfare of workers.

36. Under the Act, the funds lying in the Workers' Welfare Fund are utilized for the rehabilitation of migrant worker returnees, providing information to families of workers, training programmes for recruits and providing assistance to migrant workers and their families. The requirement to register with the SLBFE is irrespective of the source of recruitment and the registration fee is graded according to the promised salary. Under the provisions of the amending Act of 1994, section 67A makes any contravention of the Act an offence and such offence punishable by a fine not exceeding one thousand rupees or to imprisonment of either description for a term not less than twelve months and not exceeding two years. This would in effect mean that migrant workers failing to register are liable to a fine or imprisonment. The SLBFE maintains a 24 hour vigil at the airport where a number of SLBFE officers carry out inspections to detect unregistered workers, and a considerable drop in unregistered departures has been recorded since 1998. Looking at regularizing departures further, the SLBFE has also instructed Airlines to insist on SLBFE registration prior to the issue of air tickets to prospective migrant workers (Dias, 2000).

37. This approach suggests that the requirement for registration is not primarily for the protection of the worker but to ensure that every migrant worker pays the requisite fee to the Foreign Employment Agencies and the SLBFE and that migrant worker data is kept up to date. A migrant worker is likely to avoid or evade registration mainly due to ignorance of this provision, or to avoid the fee that is levied, which such worker may consider unfair especially if s/he has found such employment by legitimate means (e.g.

[2] The Act only provides for the registration fee and therefore the additional 'embassy fee' may not be justifiable, especially as the SLBFE Information Officer contacted via telephone for the purpose of this study was vague as to the purpose of this fee, responding that 'as the Embassy there [presumably in the host country] can't charge each migrant worker individually the fee is levied here.' Further information would be required before the purpose and legality of this fee can be determined, and as it is not directly relevant to this study, no further inquiry has been made at this time.

through a family member resident abroad) but without having recourse to Foreign Employment Agencies. Penalising such a worker makes it clear that the Bureau is more focused on ensuring that the relevant fees are collected for the benefit of the Bureau.

38. The entitlement of the Foreign Employment Agencies to 70% of the registration fee is also inequitable, considering that the employee (especially male migrants) would also have been required in all probability to pay a fee to the Agency in order to obtain such employment; this is in addition to the fee received from the employer to the Foreign Employment Agency for facilitating such employment. The apportionment is particularly to be regretted as it is contained in the SLBFE Act itself, thus making the State a channel for collecting revenue for Foreign Employment Agencies. Therefore, the impression that the rights and protection of migrant workers are being subsumed to the interests of the Foreign Employment Agencies and the Government in collecting revenue for the fund of the Bureau would appear to be not unjustified, especially given the representation as of right for Foreign Employment Agencies on the Board of the Bureau.[3]

2.3 Amendment to the SLBFE Act enacted on 24th September 2009

39. This amendment was stated to be to strengthen the SLBFE to take action against persons violating the Act; however, its' provisions raise some concern as they place additional burdens on migrant workers, legally sanctioning Foreign Employment Agencies to recover recruitment expenses from migrant workers. Section 51(a)(1) provides that if any Foreign Employment Agency "does not receive any commission or any other payment to secure employment opportunities outside Sri Lanka, he may charge the actual expenses to be incurred, in addition to the registration fee from any recruit, after having obtained prior approval for the same from the Bureau. Where the Bureau believes that the expenses requested are unreasonable, the Bureau may refuse to grant approval under section 37. " The issue that arises here is how is the SLBFE to ascertain whether the Foreign Employment Agency has in fact been paid such commission by the employer or not; i.e. an unscrupulous agent may well conceal such commission and seek approval to obtain payment from the migrant worker leading to further hardship for such workers. Section 52 as amended also appears to give the SLBFE wide discretionary powers in determining what an appropriate commission should be in assessing the additional cess levied from Foreign Employment Agencies.

40. However, the main cause for concern arises from the amendment to section 16 of the SLBFE Act empowering SLBFE officials to 'examine any document in the possession of persons going abroad at ports of embarkation and enable it to receive social security levies from employers abroad' which again appears to confer powers on SLBFE officers to carry out a scrutiny which could much more effectively be carried out by officers of the

[3] It is worth noting that the ILO Convention on Migration for Employment Convention (Revised), 1949 (No. 97), which has not been ratified by Sri Lanka, in Article 7(2) requires that "the services rendered by [the State's] public employment service to migrants for employment are rendered free." Given the current requirement of the SLBFE Act that requires migrant workers to pay the Bureau a registration fee, the ratification of this Convention would not be possible without the repeal of all such provisions and regulations even though ratifying this Convention is important considering the position of Sri Lanka as a sending country for migrant workers. Therefore, charging a fee that is about 40% of the standard monthly wage of a worker is clearly against the intention of the Convention. Moreover, since the penal provisions apply to any breach of the provisions in the Act, any migrant worker that fails to pay the registration fee runs the risk of being prosecuted for violation of the Act. This would be unacceptable, especially given that only 10 per cent of the registration fee accrues to the welfare of the worker.

Department of Immigration and Emigration at all Ports as they are better trained and equipped to handle such examinations; this amendment once again reflects the tendency in Sri Lankan legislation to approach an isolated approach in enforcing statutory provisions instead of making use of the existing judicial and regulatory mechanisms. The potential for litigation in the case of stoppage or delay of a person other than a migrant by such officers is also a real risk; even though section 60D appears to provide immunity for official actions of such officers, the fundamental rights jurisdiction of the Supreme Court flowing from the Constitution supersedes such immunity.

41. Moreover, this power to act as de facto inspectors of all immigrants is likely to dilute the focus of the officers of the SLBFE on what should be the main objective of the Act: to provide protection to the migrant worker, vis-à-vis errant Foreign Employment Agencies, abusive or exploitative employers, etc., and not to serve as an additional unit to raid bogus visa agencies or international migration centres, etc.; such functions are best left to the regular legal process of the country, with the SLBFE supporting and facilitating the detecting activities of the relevant law enforcement authority through the sharing of information, etc. That would be a far more effective sharing of resources than the setting up of a parallel law enforcement authority.

42. The introduction of new sections 60B and 60C defining officers and servants of the Bureau to be peace officers within the meaning of the Code of Criminal procedure, effectively granting them powers equal to a police officer, and new section 69A which enables 'police officers and employees of the Bureau to arrest persons committing offences under the Act without warrants are extremely risky changes to existing legislation. The power to arrest, without warrant, by officers not trained in the Code of Criminal Procedure or the legal formalities governing arrest and detention (and especially, the fundamental rights relating to the freedom of the person) is out of proportion for the type and nature of offences and violations contemplated by the Act. Litigation arising from wrongful or ill-conceived arrests is also likely to overshadow any intended benefits to the State or to migrant workers, as, the fundamental rights jurisdiction of the Supreme Court would continue to prevail over any statutory limitations.

43. Newspaper reports refer to SLBFE officials as stating that the new laws would enable the bureau to deal effectively with errant foreign job agents who charged exorbitant amounts from job seekers as the Bureau did not have legal powers to deal with errant job agents. The SLBFE states that even when it had evidence of wrongdoing, the Bureau could only record the statement of the culprits who were released as the Bureau had no powers of arrest. The report stated that the Bureau had evidence that about 150 job agencies were operating illegally but it did not have powers to take them to courts. This raises the fundamental question of why the SLBFE did not report such offenders and/or evidence to the police or criminal justice agencies for investigation; if there had been some procedural or administrative difficulty in obtaining assistance from the Police, and amendment of the SLBFE Act to enable the Bureau to request the assignment of a police officer to make such arrest alongside Bureau officials would have been more than sufficient. By granting such wide powers to the SLBFE officers that are likely to create more problems than it solves, the amendments ignore the far simpler deterrent of cancellation of the license of any errant Foreign Employment Agency.

2.4 Supplementary Provisions

44. The legislative provisions are supported by subsidiary legislation based provisions mainly governing the constitution and operation of Association of Licensed Foreign Employment Agencies ("ALFEA") ALFEA, the Constitution of ALFEA and the Code of Ethics of ALFEA formulated by its members. The Code of Conduct contains general obligations on members of ALFEA to refrain from acting in a manner which could bring discredit to the association or its members and to the 'business' of Foreign Employment; members pledge by way of a document executed before a Justice of the Peace to abide by the Constitution, Code of Ethics and the Pledges of ALFEA. In the pledge members undertake to "….strictly observe ethical standards and business practices in the best interests of the Country and the Members of the Association [ALFEA}." None of these documents refer to or cast an obligation on members with regard to ensuring the well-being and security of migrant workers, and it is therefore unrealistic to expect Foreign Employment Agencies to act in the best interests of migrant workers. The Regulations made by the Minister of Labour under section 61 of the SLBFE Act, provides for procedural matters of ALFEA such as conduct of meetings, voting rights, composition of the Executive Committee, maintaining of register of members, etc., but it makes no reference to a duty or obligation towards migrant workers: indeed, the SLBFE Act (section 55) sets out the functions of the Association as follows:

    (i) to resolve disputes and disagreements between licensees;
    (ii) to make recommendations to the Bureau in regard to the promotion and regulation of employment outside Sri Lanka;
    (iii) to advise on, and assist in, the promotion of employment opportunities for Sri Lankans outside Sri Lanka;
    (iv) to formulate a code of good conduct for licensees and to ensure its enforcement;
    (v) to make representations to the Bureau and to the Minister on matters relating to the recruitment of Sri Lankans for employment outside Sri Lanka.

45. Both primary legislation as well as supplementary provisions therefore are mainly designed to regulate the conduct of Foreign Employment Agencies to ensure that the business of obtaining foreign employment for Sri Lankans is carried on smoothly. The regulation constituting ALFEA and setting out provisions for its operation, for instance, can be considered superfluous as other representative bodies for private enterprises forming trade associations are created without the need for State intervention; for instance, associations of hoteliers, travel agents, printers, etc., are regularly formed to further the interests of its members without the State having to provide for their operation under a statute setting up a Statutory Board[4]. There is also no added advantage from the point of migrant worker protection in such mandatory regulations on operational matters such as the holding of Annual General Meetings and voting at meetings. Moreover, even the members of ALFEA may contest, by way of a fundamental rights petition under the Constitution, that their right to equality has been violated as their right to regulate the

[4] For instance, the Coconut Development Act No. 46 of 1971 which establishes the Coconut Development Authority and various other institutions does not contain a requirement for the state to establish an association of Coconut plantation owners. If the owners wish to organise themselves for any purpose, they would be free to do so without the need for the State to facilitate such association by statute. Therefore, the SLBFE Act is unique in its patronage to the establishment of ALFEA.

operation of their association has been restricted whereas other trade associations are not so regulated.

3 Recommendations

46. This study and a summary of the evaluation of the SLBFE Act were presented to a workshop consisting of trade unions representing or providing services to migrant workers, Community Service Organisations/Non-governmental organisations providing services to migrant workers, Women's organisations, academics/researchers studying migration and migrant workers, held on 15th March 2017 at Colombo. After considering the evaluation at a plenary session, the participants recommended the following:

(i) Separation of functions of the SLBFE

(a) At present there is considerable conflict of interest in the different roles assigned to the SLBFE under the Act. The functions of the SLBFE need to be clearly defined and separated according to the main objectives of Regulation, Employment Promotion and Welfare/protection of Migrant workers. These three functions should be assigned to separate Divisions of the SLBFE and should be monitored/administered by the Board of Directors.

(b) The objectives of the Act should give more prominence to the Welfare and Protection of migrant workers than at present; of all the objectives listed in the SLBFE Act, welfare and protection appears to be the least important of its functions in terms of the visibility and focus of its activities.

(ii) Equal representation for all stakeholders

(a) The number of representatives (4) for FEAs on the SLBFE Board of Directors should be reduced.

(b) In addition to the Ministries that are entitled to be represented on the Board of Directors under the Act, other Line Ministries should also be included on an ex-officio basis including the Ministry of Labour, Ministry of Health, Ministry of Social Services, and Ministry of Justice.

(c) At least one representative each from Civil Society Organisations and Migrant Worker Organisations should also be included. A mechanism for receiving nominations for representation from these organisations and representation on a rotating basis should be considered to ensure wider access to policy making and regulatory functions by such organisations.

(d) Provision should be made for adequate gender representation on the Board of Directors.

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(iii)Accountability and Transparency

(a) The independence and autonomy of the Board should be ensured, and the power of the Minister to direct the operations of the Board should be reduced to an advisory provision.

(b) There should be transparency in the financial and operational aspects of the SLBFE and accounts should be accessible to stakeholders to ensure the fiduciary wellbeing of the SLBFE.

(c) The welfare provisions available to Migrant workers should be increased, and the details of the insurance scheme provided to Migrant workers should be widely disseminated.

(d) The services provided to migrant workers by the Labour Attaches and the SLBFE in receiving countries should be monitored and should clearly be carried out directly under the Embassy officials and the Ministry of Foreign Affairs to ensure that migrant workers receive all diplomatic assistance.

(e) The present appeal procedure in relation to cancellation of licenses where the Secretary to the Ministry is granted review powers should be abolished. Any appeal should be directed to the relevant judicial authority as is the case in relation to other regulatory authority decisions, such as the Department of Labour.

(iv) Reduction or removal of registration fee and recruitment fee

(a) Revise the registration fees charged from the migrant worker with the intention of making it commensurate with the services provided and make it a 'facilitation fee' which would not be burdensome to the migrant worker.

(b) Increase the percentage of the registration fee allocated for welfare activities.

(c) Explore the possibility of cancellation of the recruitment fee currently levied by FEAs and to explore the adoption of Government to Government (G2G) recruitment procedure wherever possible.

(v) Better regulation of FEAs

(a) The monitoring and regulation of FEAs should be revised to hold all agents and sub-agents of FEAs responsible equally in the event of a violation of the Act or any other statutory provision (such as trafficking).

(b) FEAs should be regulated in a way that prevents or reduces the practices of closing down an FEA under investigation and restarting under another identity.

4 Conclusion

47. Given the stated objective of the Government of 'safe, skilled migration' the SLBFE Act does not focus primarily on this objective but instead regulates the 'process' of migration that takes place within Sri Lanka. Its mandate outside of Sri Lanka is limited to repatriation or recovery, and with regard to the safety of the migrant worker while in the host country the present Act does not contemplate its reach extending beyond Sri Lanka to protect or offer services to migrant workers whilst in employment.

48. The Act also focuses on providing services only to migrant workers that have registered under the Act, which leaves some vulnerable workers outside the protection of the State; it is also in breach of Sri Lanka's obligations under the International Conventions it has ratified as rights under these Conventions are the entitlement of all migrant workers, regardless of their ability to pay or the legality of migration. Any review therefore needs to examine the international obligations with regard to migrant workers.

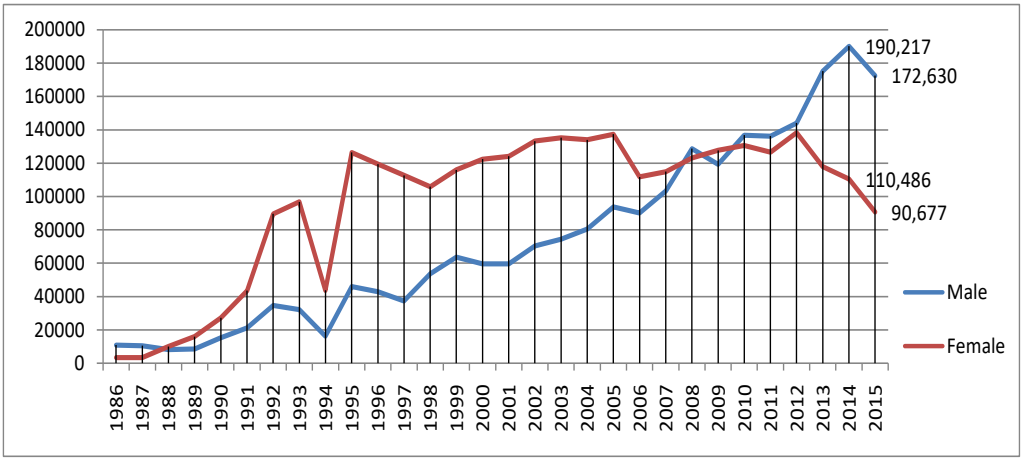
49. Similarly, inward-bound migrants are excluded both in the National Policy and the SLBFE Act. Although, at present, Sri Lanka is not a host country with a significant number of foreign workers employed in Sri Lanka, there are steadily increasing numbers of such workers that are attracted by the economic conditions and social amenities of the country. It is reported that a significant number of foreign workers employed in the entertainment and hospitality sectors (including Spa and Therapeutic service providers) and that many of them are undocumented or irregular workers who are not being paid statutory and social security benefits. Any review would therefore need to ensure that inward-bound migrants are also covered by the provisions of the Act, especially as it is likely that these numbers will increase in future, given the changing nature of the labour supply in Sri Lanka.

Annexure

Annexure 1: Overview of Migration for Employment from Sri Lanka

The liberalization of the economy, and the easing of overseas travel restrictions for Sri Lankans with the change of Government in the General Elections of 1977, coincided with the economic boom in the Middle East fuelled by oil-exports in the late 1970's; and as a result of the rapid expansion in construction and development activities in that region young, semi-skilled, male Sri Lankans increasingly migrated for employment and in 1986 constituted 76 per cent of all migrants. Thereafter, although overall migration continued to rise the gender composition changed dramatically.

Figure 5: Migration for Employment by gender (1986-2015)



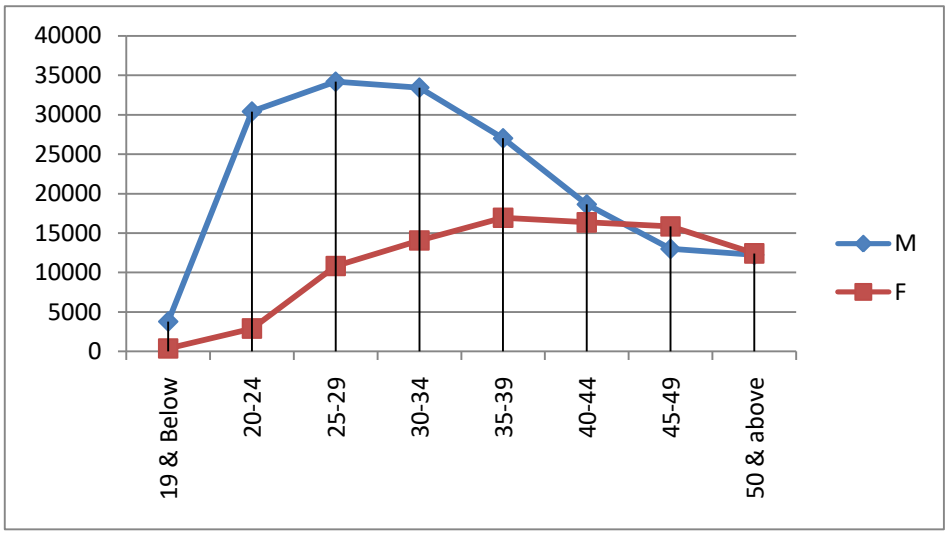
Source: Compiled from SLBFE Statistics (various years)

By the end of the decade opportunities for construction workers tapered off, mainly as a result of the large numbers of male workers from the Asian region competing for those jobs; but the rapid increase in prosperity in middle-eastern families created a demand for domestic workers, especially for low-skilled female workers. By the late 1990's female migrant workers amounted to 67 per cent of all migrant workers, and remained dominant until 2008, when the implementation of the Government-to-Government agreement between South Korea and Sri Lanka saw increasing numbers of males migrating for employment; at the same time, the low-skilled and domestic worker jobs for which females migrated lost its appeal due possibly to increasing wages for women in Sri Lanka. In 2014, male migration peaked at around 190,000 with female migration being only just over half that number, and the gap has continued to widen in 2015.

Male migrant workers tend to be largely below the age of 50, with the majority being in the 25-29 age group, whereas women are more evenly distributed between age groups with the largest representation of women being a decade older than men at 35-39. This is probably due to the direct and indirect discouragement of migration of younger women with young children migrating for employment, and women may wait to migrate until after their children have started junior or secondary education. However, older female migrants continue to migrate in larger numbers than their male counterparts, probably due to the fact that males migrate more for skilled employment and there may be less older men with the skills that are

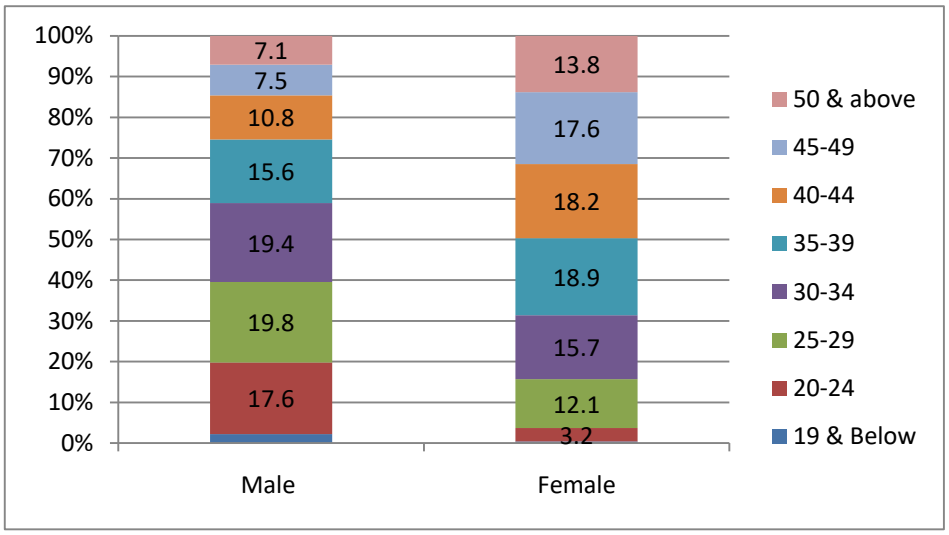
currently in demand; the large numbers of younger men migrating to South Korea may also lower the age profile of male migrant workers.

Figure 6: Migration by gender and age group (2015)



Source: Compiled from SLBFE Statistics (2015)

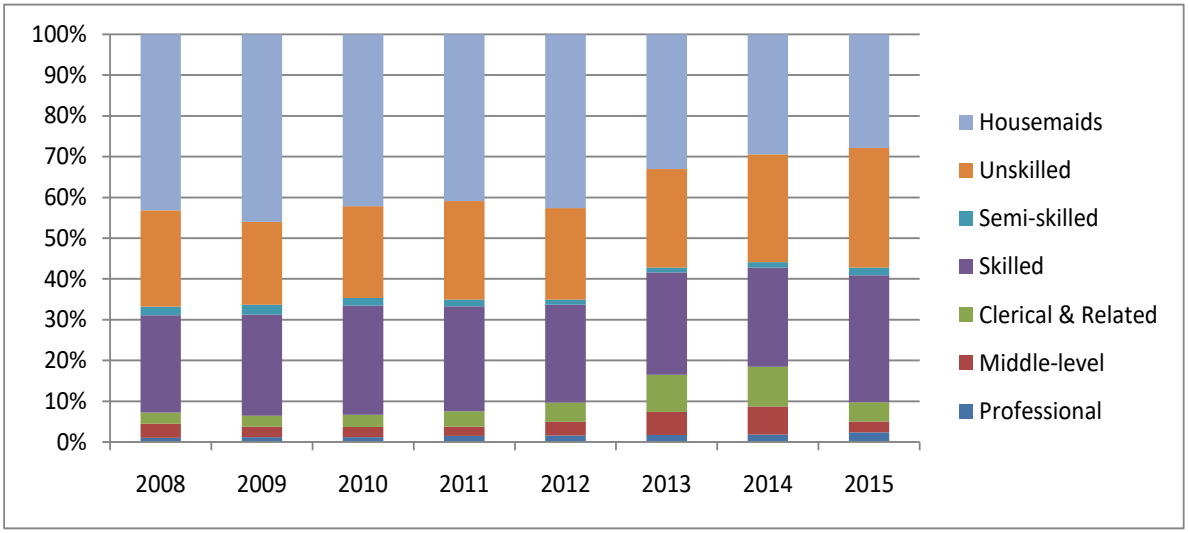
Figure 7: Percentage distribution of age of male/female migrant workers (2015)



Source: Compiled from SLBFE Statistics (2015)

A feature of migration from Sri Lanka since the 1980's has been the reliance on low-skilled/domestic work for employment. Due to difficulties faced by low-skilled workers in accessing higher wages and better working conditions, the need to increase the skill level of the jobs available to migrants has been the stated National Policy for some time. However, the distribution of migrant workers by skill level over time in Figure 4 indicates that this has not been achieved, especially as the number of professional and middle-level workers has not increased significantly; nearly 60 per cent of Sri Lankans still migrate for unskilled and domestic work, although the number of skilled workers has increased considerably, due mainly to the highly selective migration to South Korea.

Figure 8: Migration by Skill Level (2008-2015)



Source: Compiled from SLBFE Statistics

The skill-levels of male and female migrant workers also indicates clearly that women continue to migrate for unskilled/low skilled employment, which are inherently lower-paid and more vulnerable to abuse and exploitation; in 2015, over 90 per cent of women migrated as domestic workers.

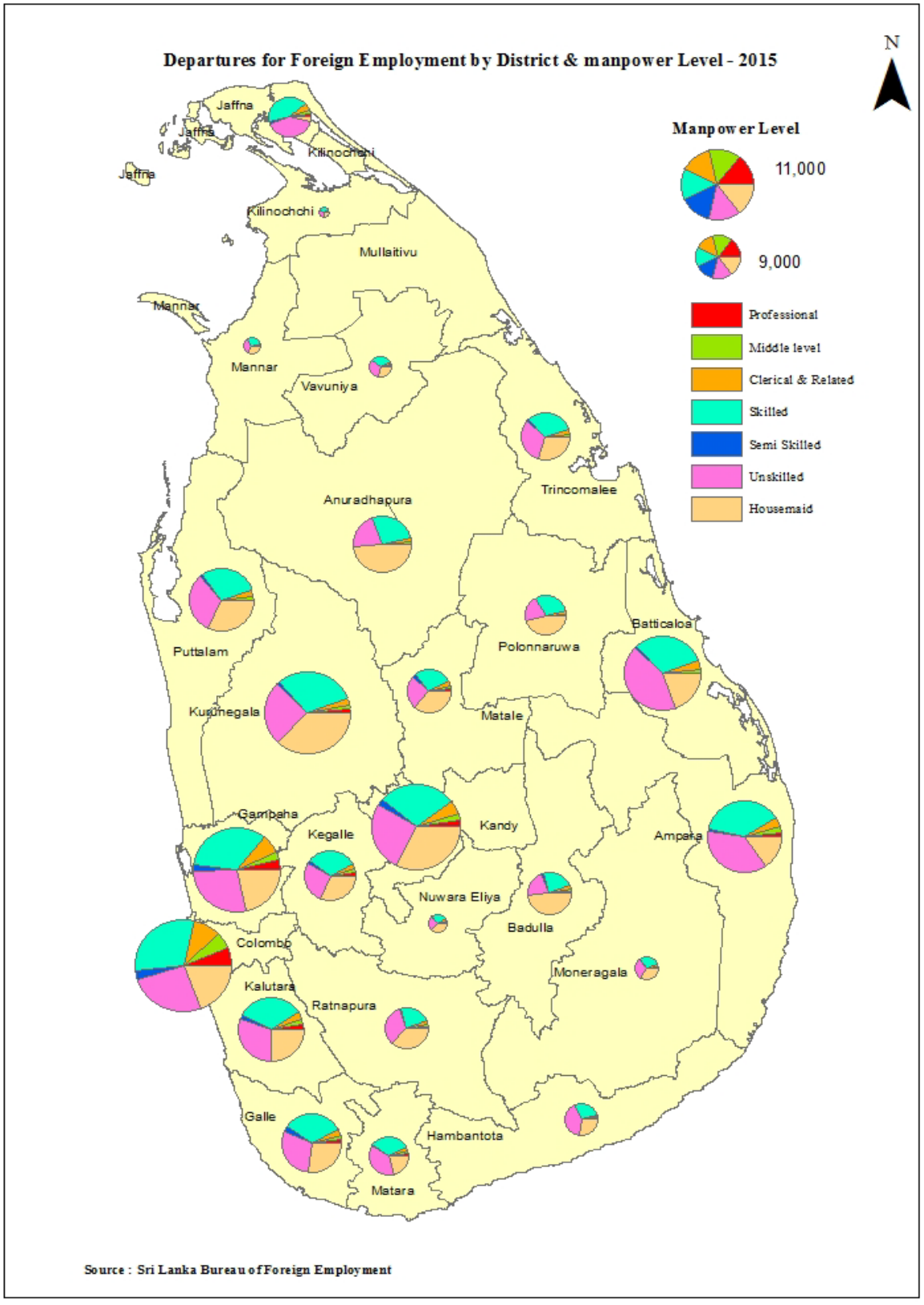
The significance of the Middle East in providing foreign employment to Sri Lankans is evident in that 54 per cent of private remittances originated from the Middle East in 2015, with the share having increased over time from just over 50 per cent in 1991. The heavy reliance on the Middle East for foreign employment therefore has an element of risk from the point of view of economic stability as well, as any prolonged disturbance in the region is likely to impact adversely on Sri Lanka as well. This has been experienced in the past, where more than 30,000 workers lost employment in the 1990's in Kuwait during the Gulf War. The country also relies heavily on private remittances from migrant workers as a source of foreign exchange earnings, with such remittances now contributing two thirds of foreign exchange earnings in comparison with total industrial and agricultural exports from Sri Lanka. This indicates clearly the interest of the State in regulating foreign employment and in also encouraging Sri Lankans to migrate for employment.

Of particular importance to Sri Lanka in reviewing migration patterns is that 85 per cent of all migrated to the Saudi Arabia, Qatar, U.A.E. and Kuwait in the Middle-East and 87 per cent of housemaids and 66 per cent of unskilled workers also migrated to these four countries. In encouraging those with higher and professional skills to migrate, Sri Lanka will need to develop markets outside the Middle-east as this sector continues to attract lower-skilled workers into significantly more vulnerable occupations.

Migration for foreign employment appears to be a feature in all districts, but is more marked in more urbanized areas such as Colombo, Gampaha, Kurunegala and Kandy. Ease of access to Employment Agencies and other facilities enabled more persons to seek foreign employment from these areas; however, with the expansion of the branch networks of the SLBFE, there is a rapid increase in migration from other Districts, notably areas which have large plantation worker populations (Nuwara Eliya and Badulla) as well as the North and East of the country where the three decade-long civil war has ended. However, outside of

Colombo, Gampaha and Kandy, migration from other areas are predominantly for unskilled and domestic employment.

Figure 9: Departures for Foreign Employment by District and Skill level (2015)



Source: Annual Statistics (2015), SLBFE