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Introduction

The third biennial conference of the New Zealand Labour Laws Association was hosted by the Faculty of Law at the Victoria University of Wellington on 27 November 2015. In this issue of the *Journal*, we continue the tradition developed after the previous two conferences of publishing a special labour law issue containing a selection of papers presented at the conference. In doing so, it is our intention to disseminate to a wider audience the discussions and issues presented at the conference by a broad range of contributors, both young and old, from academia and from legal practice. In this issue of the *Journal,* we publish six papers, with further papers to be published in a second Issue.

The 2015 conference theme, *Challenges of Regulating Future Labour Markets*, was chosen to recognise that traditional labour law structures are under increasing pressure from a variety of forces. These include the continuing effects of labour market deregulation that have resulted in the deunionisation of the workforce and increased individualised employment. This, in turn, has led to the increased commodification of labour manifested in a number of forms. These include increased job insecurity as new forms of employment relationships are created to avoid traditional employment protections and the increasing intrusion of employment into the private life of employees.

One response to these pressures has been an increasing interest by labour law scholars in the interface between human rights law and labour law. In this issue, we publish three papers dealing with this theme. The first, by the conference's keynote speaker, Dr Virginia Mantouvalou of University College London, looks at this interrelationship from a broad perspective but focusses particularly on developments within Europe through the interpretation of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. These developments are mixed but there has been recognition that at least some labour rights are also human rights, particularly in the case of the exploitative use of labour.

Jonathan Barrett's paper deals with the belief of some that human rights stop at the workplace door. He considers the position of rights-bearing citizens as employees and argues that the rights and responsibilities of citizenship should be fully exercisable within employer organisations and that contractual terms restricting an employee's rights should be void. He stresses the important point that corporations, in particular, should be made more accountable to the societies which enable them to exist and prosper.

The final paper on the human rights theme is by Paul Roth and deals with the review of New Zealand's privacy law and its possible influence on workplace privacy. The paper's conclusion is pessimistic – regulation of the "diabolical partnership" of negative attitudes towards workers combined with technological advances is not in prospect. At the same time, the workplace becomes broader as worker conduct beyond the bounds of the workplace is increasingly seen as the employer's business.

The final three papers deal with aspects of health and safety law, perhaps the most visible challenge for labour law over the last few years. The Pike River mine disaster in 2010 highlighted New Zealand's appalling safety record and the associated regulatory failures. Following the reports of the Pike River Royal Commission and the report of the Independent

Taskforce, the Health and Safety at Work Act 2015, modelled on the Australian Model Health and Safety Act, was passed. However, while the new HSW Act made major reforms to the previous legislative framework, its passage became increasingly politicised and a number of the proposed reforms, especially those relating to worker participation in health and safety, were significantly weakened. The papers by Jeff Sissons and Viktoriya Pashorina-Nichols deal directly with this failure to properly provide for worker participation.

Sissons argues that, while the Government had both public support and a legitimate opportunity to address New Zealand's poor workplace health and safety record, it fell at the final hurdle, resulting in a law that falls far short of comparable countries like the United Kingdom or Australia and which constitutes another chapter in the history of muddled compromise that has led to the death of thousands of New Zealand workers.

Pashorina-Nichols argues that worker participation can support OHS in any workplace and that, of the many worker participation practices available, the two that are the most suitable are H&S representatives and H&S committees. Unfortunately, while the HSW Act provides for those practices, the original proposals were substantially weakened, allowing PCBUs (person conducting a business or undertaking) to undermine them and, in the case of a business with fewer than 20 workers, to reject any request for either practice if the business is not considered high-risk.

The final paper by Dawn Duncan addresses the "tragic paradox" of New Zealand's response to chronic work-related harm and advocates reform in three key areas – the need for the ACC scheme to be reoriented from the nature of the health problem to its 'work-relatedness' and for its coverage to be extended to a wider range of health conditions; a change in willingness and approach to regulating for healthy work; and the development of a new set of enforcement tools. One such tool may be a statutory 'right to request' that enables workers to deal with hazardous work before it results in health problems.

Finally, I would like to acknowledge those who provided the support to make the conference possible and this publication possible. The success of the conference was largely due to the administrative support of Rozina Kahn at the Victoria Law School. Particular thanks, on behalf of both myself and the authors, are due to Louise Grey who edited the papers in this issue and the forthcoming issue of the *Journal*. Louise's work went well beyond proof reading and footnoting and her editorial skills contributed significantly to the transformation of the conference papers into publishable articles.

Guest editor

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Labour Law and Human Rights

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Abstract

This article examines the relationship between human rights and labour law. It first explores the reasons for the resistance to examining labour rights as human rights. Second, it turns to European human rights developments in order to assess the case law of the European Court of Human Rights in this context. It presents an interpretive technique adopted by the Court, the integrated approach, which takes note of social and labour rights in the interpretation of civil and political rights. The article argues that the integrated approach to interpretation needs firm theoretical grounding, and the third part suggests that the prohibition of workers' exploitation is an important underlying principle that should guide our understanding of labour rights as human rights. It develops a definition of workplace exploitation on the basis of theoretical literature, and suggests some of its implications for the adoption of the integrated approach to interpretation.

Key words

Human rights, labour rights, integrated approach, European Convention on Human Rights, exploitation.

Introduction

Some view labour law as a subfield of contract law. On this view, the employment relationship must be regulated by principles of contract law because the employment contract is no different to other contracts. Others believe that "labour is not a commodity".[1] Workers and their labour are not like other things that you buy and sell; workers have dignity and rights, so the employment relationship must be regulated by principles of human rights law, rather than contractual rules. Human rights law developed exactly in order to protect human dignity, and there is no reason to think that the protection of dignity and rights should stop at work. In the last few years, the argument that labour law and human rights are interconnected

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[1] Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), adopted 10 May 1944. See analysis in Hugh Collins *Employment Law* (2nd ed, Oxford University Press, 2010) at ch 1, and see also Paul O'Higgins "Labour Is Not a Commodity" (1997) 26 Ind Law J 225, particularly at 230.

has gathered momentum in scholarship and judicial decision-making.[2] It has been argued that human rights law can offer important insights to the critical development of labour law.[3]

In the sections that follow, I first examine the reasons for the resistance to examining labour rights as human rights. Second, I turn to European human rights developments in order to assess the case law of the European Court of Human Rights in this context. The third part suggests that we need a deeper understanding of labour rights as human rights that is grounded on the prohibition of workers' exploitation.

Labour Rights as Human Rights

It has been said that human rights "has become the lingua franca of global moral thought".[4] There is a proliferation of literature that discusses their legal protection, some scholarship that discusses the relationship between their philosophical foundations and their legal protection,[5] as well as an abundance of governmental and civil society organisations that aim to protect human rights on the ground. When referring to human rights, a good starting point is the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations in 1948.[6] The Declaration is not a legally binding document, but it is extremely influential. The Declaration protects rights such as freedom of expression,[7] the right to life[8] and the prohibition of torture,[9] and also includes labour rights, such as the right to work, the right to free choice of employment, the right to fair remuneration

[2] Some examples include: Keith Ewing and John Hendy "The Dramatic Implications of *Demir and Baykara*" (2010) 39 Ind Law J 2; Bob Hepple "Introduction" in Bob Hepple (ed) *Social and Labour Rights in a Global Context* (Cambridge University Press, 2002) 1 at 16; Colin Fenwick and Tonia Novitz "Conclusion: Regulating to Protect Workers' Human Rights" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) 587–588; Virginia Leary "The Paradox of Workers' Rights as Human Rights" in Lance Compa and Stephen Diamond (eds) *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press, 2003) 22; Virginia Mantouvalou "Are Labour Rights Human Rights?" (2012) 3 ELLJ 151; Guy Mundlak "Labor Rights and Human Rights: Why Don't the Two Tracks Meet?" (2012) 34 Comp Lab L & Pol'y J 237; Lance Compa "Solidarity and Human Rights" (2009) 18 New Labour Forum 38.

[3] Hugh Collins and Virginia Mantouvalou "Human Rights and the Contract of Employment" in Mark Freedland (ed) *The Contract of Employment* (Oxford University Press, 2016) at 188.

[4] Michael Ignatieff "Human Rights as Idolatry" in Amy Gutmann (ed) *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) at 53.

[5] James Nickel *Making Sense of Human Rights* (2nd ed, Wiley-Blackwell, 2007); George Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007); Allen Buchanan *The Heart of Human Rights* (Oxford University Press, 2013).

[6] GA Res 217A, A/810 (1948).

[7] Article 19.

[8] Article 3.

[9] Article 5.

ensuring a life with dignity, the right to form and join trade unions,[10] as well as the right to rest and leisure including reasonable working hours and holidays with pay.[11]

The Declaration was criticised by some at the time that it was adopted for including rights such as holidays with pay alongside other liberal rights. Maurice Cranston said: "[w]hat the modern communists have done is to appropriate the word 'rights' for the principles that *they* believe in".[12] But Cranston's critique has been addressed. David Luban said persuasively that those who criticise art 24 of the UDHR who probably:[13]

> …include academic critics writing during their sabbaticals – have not considered seriously what a working life would be for someone whose day-to-day survival depends on a regular paycheck and who must work at a grinding job fifty-two weeks a year from age fifteen until premature death at fifty.

As Jack Donnelly underlines in response to Cranston:[14]

> …the full right recognized is a right to "rest, leisure, and reasonable limitation of working hours and periodic holidays with pay". Denial of this right would indeed be a serious affront to human dignity; it was, for example, one of the most oppressive features of unregulated nineteenth century capitalism.

However, human rights treaties adopted after the UDHR divided rights into two categories: civil and political rights (such as freedom of expression and the right to life) were protected in documents such as the European Convention on Human Rights (ECHR), while economic and social rights (such as the right to housing, the right to work and the right to decent working conditions) were included in treaties such as the European Social Charter (ESC). Civil and political rights were protected through the courts (the European Court of Human Rights (ECtHR) in the case of the ECHR), and individual petition procedures, while economic and social rights were monitored by committees (the European Committee of Social Rights in the case of the ESC) through reporting mechanisms and sometimes collective complaints procedures.[15]

The development of labour law in the United Kingdom, Europe and elsewhere was relatively resistant to framing workers' claims as human rights. Courts were often

[10] Article 23.
[11] Article 24.
[12] Maurice Cranston *Human Rights To-day* (Ampersand Books, London, 1962) at 38–39.
[13] David Luban "Human Rights Pragmatism and Human Dignity" in Rowen Cruft, S Matthew Liao and Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 263 at 276.
[14] Jack Donnelly *Universal Human Rights* (2nd ed, Cornell University Press, New York, 2003) at 28.
[15] For an overview, see Virginia Mantouvalou "In Support of Legalisation" in Conor Gearty and Virginia Mantouvalou *Debating Social Rights* (Hart Publishing, Oxford, 2011).

reluctant to protect collective labour rights. For this reason, there was in the 1990s a trend in academic literature suggesting that human rights norms and adjudication would not only not help workers, but might even harm their interests.[16] There are many reasons why labour law has been relatively insular, some of which are grounded in historical circumstances, but most of which are normative, in the sense that those who developed the arguments had a normative view about how the employment relationship should be regulated. It is also important to appreciate that the resistance to human rights law reflected beliefs from different ends of the political spectrum – both the left and the right.

Private Law for Private Power

Labour law is primarily a discipline that involves private relations; the employer is a private entity most of the time, and the workers are private individuals. For this reason, it has been suggested that the regulation of the employment relationship requires the application of private law rules: contract law and tort law.[17] Typically, contract law regulates relations between private individuals.

On the most traditional analysis, the purpose of any contractual rule should be to protect freedom and individual autonomy. On a libertarian account of contractual freedom applied to the employment relationship, Richard Epstein argued for a contract at will with as little external intervention as possible.[18] The definition of contract at will used by Epstein is as follows:[19]

> …men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

For authors like Epstein, legal intervention could disturb contractual freedom of both the employer and the worker. For other authors, the contract of employment can be a legal mechanism that helps rebalance the inequality of bargaining power between the worker and the employer and correct the distributional implications of a labour market that may be unjust. Scholars that view the contract of employment as a central regulatory tool of the employment relationship recognise that it has a welfare role too.[20]

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[16] Keith Ewing "The Human Rights Act and Labour Law" (1998) 27 Ind Law J 275; Tonia Novitz, "Negative Freedom of Association: *Gustafsson v Sweden*" (1997) 26 Ind Law J 79.
[17] Paul Davies and Mark Freedland "The Impact of Public Law on Labour Law, 1972-1997" (1997) 26 Ind Law J 311.
[18] Richard Epstein "In Defence of the Contract at Will" (1984) 51 U Chi L Rev 947.
[19] Epstein's definition, quoted in his article, above n 20, at 947–948, is from *Payne v Western & Atlantic Railroad Co* 81 Tenn 507, 518–519, 1884 WL 469.
[20] Hugh Collins *Regulating Contracts* (Oxford University Press, 1999).

With scholarship focussing on the contract of employment as a private law instrument, human rights were, in the past, either absent or had a relatively marginal role in the literature, with very few exceptions.[21] Human rights were traditionally viewed as part of public law, which regulates the relationship between the individual and the state, rather than between private individuals.

Litigation

A second reason why human rights had a limited effect on labour law was that when human rights were invoked, typically litigation and judicial intervention (rather than other types of civil society activism) came to lawyers' minds.[22] Legal scholars and activists used to be skeptical about the effect of litigation in this field. The main reason for this was that the judiciary has been viewed as conservative in many legal orders, including the United Kingdom.[23] Values such as freedom of contract, individualism and property rights have been regarded as "traditional judicial values",[24] so the courts have been presented as a "deeply regressive force in the regulation of employment".[25]

The judiciary at a national and supranational level in many legal orders may have been reluctant to protect workers' rights because these have traditionally been classified as social rights in human rights law, as explained above.[26] The ECtHR itself was often criticised for not protecting workers' claims under the ECHR.[27]

Trade Unions

A third reason why labour law was relatively resistant to human rights law probably stems from the role of trade unions and the importance attached to union power in the employment sphere. In the United Kingdom in the 20th century, collective labour relations were predominantly organised around a system that Kahn-Freund famously described as collective laissez-faire.[28] In this system, it was collective actors, namely employers and trade unions, which negotiated and agreed upon working conditions. For scholars in this tradition, state intervention was desirable only to the extent that it facilitated collective negotiations. When human rights were invoked in this setting, it was mainly in order to stress the importance of workers'

[21] See, for instance, Hugh Collins *Justice in Dismissal* (Oxford University Press, 1992) at ch 6.
[22] See, for instance, Hugh Collins *The Law of Contract* (Oxford University Press, 1986) at 44.
[23] Anne Davies "Judicial Self-Restraint in Labour Law" (2009) 38 Ind Law J 278 at 287.
[24] Davies, above n 26, at 278.
[25] Alan Bogg "Only Fools and Horses: Some Skeptical Reflections on the Right to Work" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* at 175.
[26] See Virginia Mantouvalou "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation" (2013) 13 HRLR 529. The article includes an overview of the case law.
[27] See Keith Ewing, above n 18; Tonia Novitz, above n 18.
[28] Otto Kahn-Freund "Legal Framework" in Allan Flanders and Hugh Clegg (eds) *The System of Industrial Relations in Great Britain* (Blackwell, Oxford, 1954).

right to organise.[29] Apart from that, non-intervention by the state was what both employers and workers sought.[30]

In recent years, with the decline of union membership, trade unions and workers in the United Kingdom and elsewhere seem to have made a strategic decision to turn to human rights as a tool to advance their interests.[31] Human rights litigation emerged as an avenue to make the claims of workers heard, in a way that more traditional union activities did not achieve. The strategic decision to turn towards human rights may have also been triggered by a perception that unions promote their members' economic interests, rather than all workers' human rights or the economy more generally.[32] As Kolben put it:[33]

> Framing labor rights as human rights thus shifts the labor discourse from economics and special interest politics to ethics and morality. In other words, activists and labor law scholars seek to harness the hegemonic status of human rights discourse in order to gain public support for a number of legal, political, and strategic objectives.

By putting claims of workers in the language of human rights, these claims appear morally compelling, as well as universal and inalienable, which are key features of human rights. Human rights are strict entitlements that are resistant to trade-offs, so managerial interests in business efficiency no longer have primary weight when there is a conflict with workers' rights.

The decline in union power is one of the reasons why even some of the staunchest trade union advocates, like Hendy and Ewing, have turned to human rights law in order to find a voice for workers and their unions.[34] Human rights law that once appeared irrelevant to trade union struggles slowly emerged as one of the few opportunities to challenge the employer and be heard.

The international trade union movement has also endorsed the idea that trade union rights are part of human rights. For instance, the International Trade Union Confederation (ITUC), which is a coalition of trade unions, places trade union and human rights at the core of its activities. This has been described as an indication of

[29] See, for instance, Bill Wedderburn *The Worker and the Law* (3rd ed, Penguin Books, Harmondsworth) at 276–277.
[30] Wedderburn, above n 32, at 16.
[31] See, for instance, Ewing and Hendy, above n 2; Lance Compa "Trade Unions and Human Rights" in Cynthia Soohoo, Catherine Albisa and Martha Davis (eds) *Bringing Human Rights Home: A History of Human Rights in the United States* (University of Pennsylvania Press, 2007) at 209.
[32] See Judy Fudge "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 Dalhous Law J 601 at 607; Kevin Kolben "Labour Rights as Human Rights?" (2009) 50 VJIL 449 at 461.
[33] Kolben, above n 35, at 462.
[34] See Ewing and Hendy, above n 2.

a "global shift in labor movements, which are beginning to conceive of themselves as part of the international human rights movement".[35]

Politics

Human rights were also approached with scepticism because labour law, probably more so than any other area of private law, is viewed as a deeply political subject. It relates to economic power and to what many view as the struggles of the working class. Political parties take different approaches to labour law, and often base their political agenda on reforming labour relations. As it is such a political subject, some critics view human rights, with their appeal across the political spectrum, as potentially depoliticising. In addition, some argue that human rights have a confrontational edge that can erode the solidarity between workers.[36] They can be divisive, because they are individualistic by nature, while the interests of labour are collective and must be collectively pursued.

Economic Efficiency

A further reason why there has been resistance to human rights in the labour relationship is that, according to a neoclassical economic analysis, state intervention in the labour market would hamper its efficient functioning.[37] This is because employers will incur transaction costs that make them less competitive, both on a local and global level. An inefficient labour market is undesirable, both for employers and workers, because it would harm the economic interests of both. As human rights involve interventions in the market through law, they might render it inefficient. The issue of legal intervention and economic efficiency is an empirical point, which can be disputed. In any case, there is a different economic framework that is again concerned with economic efficiency but which supports regulation as being essential to correct "market failures".[38] It is also important to note, however, that it has been argued that labour rights may promote economic efficiency.[39]

The Tracks Starting to Meet[40]

The picture has changed in recent years. Academic scholars have been searching for a new framework for labour law in the context of economic globalisation, the increase of non-standard contracts of employment and the decline of union power.[41]

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[35] Kolben, above n 35, at 457.
[36] Bogg, above n 28, at 167.
[37] See Anne Davies *Perspectives on Labour Law* (Cambridge University Press, 2004) at 27.
[38] At 29.
[39] Simon Deakin and Frank Wilkinson "Rights vs Efficiency? The Economic Case for Transnational Labour Standards" (1994) 23 Ind Law J 289.
[40] Leary, above n 2, at 22.
[41] There is much scholarship on these issues. See, for instance, Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, 2011); Joanne Conaghan, Richard Fischl and Karl Klare (eds) *Labour Law in an Era of Globalization* (Oxford University Press, 2002).

Against this background, several authors have turned to human rights law as a new avenue for workers' voice.[42]

Integrated Approach

In this context, the ECtHR (and other courts) have started to take what has been described as an integrated approach to the interpretation of the ECHR, which grants some protection to social and labour rights through the machinery of civil and political rights documents.[43] The ECHR is a traditional civil and political rights treaty that also contains two labour rights: the prohibition of slavery, servitude, forced and compulsory labour (art 4) and freedom of association, including the right to form and join unions (art 11). In the interpretation of these and other Convention rights, and in contrast to its past stance, the ECtHR has begun to take note of materials of the International Labour Organisation (ILO), the ECSR and other social rights bodies, which served as a source of inspiration and a way to understand more deeply the object and purpose of rights guaranteed by the Convention. By adopting an integrated approach to interpretation, the Court became more receptive to workers' claims and appeared to recognise that some labour rights are human rights, and that the dividing line of civil and political, on the one hand, and economic and social rights, on the other, was not as clear as had been assumed in the past.

Some of the landmark cases where the Court demonstrated its openness to workers' claims raised issues under art 4 of the ECHR. *Siliadin v France*[44] involved a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker. She had to clean the house and the employer's office, to look after three children; she slept on the floor in their room; she rarely had a day off; she was almost never paid. When she escaped her employers, she was faced with the fact that French law did not criminalise their conduct. The Court had to assess whether her situation could be classified as slavery, servitude, forced or compulsory labour. In this context, it interpreted art 4 of the ECHR taking ILO materials into account, and for the first time in its history, it ruled that the provision had been violated. It found that the applicant was held in servitude, and that France had an obligation under the Convention to criminalise the employer's conduct. *Rantsev v Russia and Cyprus*[45] addressed trafficking for sexual exploitation for the first time. The Court again took an integrated approach to the interpretation of the ECHR, and ruled that sex trafficking was prohibited under art 4 of the Convention. In these cases, art 4 was interpreted in light of materials of specialist bodies, such as the ILO, and a domestic worker and a sex worker won in Strasbourg.

[42] See above n 2.
[43] Mantouvalou, above n 29.
[44] *Siliadin v France* (2006) 43 EHRR 16 (Section II, ECHR).
[45] *Rantsev v Cyprus and Russia* (26965/04) Section I, ECHR 7 January 2010.

Sidabras and Dziautas v Lithuania,[46] to give another example, involved the applicants' dismissal and ban from access to work in the public and many parts of the private sector, because they were former KGB members. The Court recognised that dismissal and a ban from access to work created "serious difficulties […] in terms of earning [a] living, with obvious repercussions on the enjoyment of […] private lives".[47] It classified the claim as falling within the right to private life under art 8 of the ECHR, and concluded that the employer's conduct violated art 8, read in conjunction with the prohibition of discrimination in art 14. It is important to note that the Court here placed special emphasis on right to work rulings of the ECSR. It underlined that:[48]

> [It] attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights […].

This ECtHR analysis is a good example of the adoption of an integrated approach to interpretation of the ECHR, which integrates civil and social rights into the scope of the Convention in the context of the right to work.[49]

Labour law scholars also celebrated a line of collective labour rights cases. In 2001, the Court in *Wilson and Palmer* for the first time in its history ruled that there had been a breach of art 11 of the Convention in favour of workers.[50] Later, *Demir and Baykara*[51] was viewed as a paradigm of the integrated approach.[52] Here, the respondent Government challenged the use of ILO materials in the interpretation of art 11 of the ECHR because it had not signed up to them. The Court was firm:[53]

> The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

These sources are used in order to find the object and purpose of the Convention provisions, to which Member States have signed up.[54]

Following *Demir and Baykara*, Ewing and Hendy said that in this decision:[55]

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[46] *Sidabras and Dziautas v Lithuania* (2006) 42 EHRR 6 (Section II, ECHR). For analysis of the case, see Virginia Mantouvalou "Work and Private Life: *Sidabras and Dziautas v Lithuania*" (2005) 30 ELR 573.
[47] At [48].
[48] At [47].
[49] Mantouvalou, above n 29.
[50] *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20 (Section II, ECHR). See Keith Ewing "The Implications of *Wilson and Palmer*" (2003) 32 Ind Law J 1.
[51] *Demir and Baykara v Turkey* (2009) 48 EHRR 54 (Grand Chamber, ECHR).
[52] Ewing and Hendy, above n 2.
[53] At [78].
[54] At [76].
[55] Ewing, and Hendy, above n 2, at 47–48.

> …human rights have established their superiority over economic irrationalism and 'competitiveness' in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.

The adoption of the integrated approach meant that the separation between civil and social rights had started to become blurred, which could have important positive implications for the protection of workers' rights.

Uncertainty

The protection of workers' rights through the ECHR has not been entirely consistent. The enthusiasm inspired particularly by *Demir and Baykara* may have been premature; in more recent case law, the Court seems to have returned to its previous reluctant stance. In *Palomo Sanchez v Spain*,[56] for example, delivery workers employed by an industrial bakery company brought proceedings against the company claiming that they should be recognised as employees rather than self-employed or non-salaried workers. They set up a trade union to promote their interests. In the context of their dispute, the trade union newsletter published a cartoon that depicted the human resources manager of the company receiving sexual gratification for favours he had done for some workers. The newsletter also contained other critical passages. The workers were subsequently summarily dismissed. In Strasbourg, the applicants claimed that their dismissal violated their freedom of expression protected in art 10 of the ECHR, which should in this case be read in light of their right to freedom of association in art 11. The claim was that free speech rights should be contextualised and given special protection in the trade union context. The majority of the ECtHR ruled that the dismissal did not violate the Convention.

However, a powerful dissent argued that the majority did not sufficiently appreciate the particularities of the trade union context. In order to do so, the dissenting judges said that the majority should have paid more attention to the context, which it could have achieved to a certain degree if it had adopted an integrated approach:[57]

> …trade-union freedom of expression is unanimously regarded as an essential and indispensable aspect of the right of association, it being a prerequisite to the fulfillment of the goals of associations and trade unions, as is quite clear from the documents of the International Labour Organization and the case-law of the Inter-American Court of Human Rights cited by the Grand Chamber as relevant material.

[56] *Palomo Sanchez and Others v Spain* (28955/06, 28957/06, 28959/06) Grand Chamber, ECHR 12 September 2011.
[57] At [5] (dissent).

The dissent in *Palomo Sanchez* indicates that the ECtHR may have an insufficient grasp of the effect of restrictions on free speech for a trade union in the context of a labour dispute. It may also indicate a broader lack of understanding of the special function and role of human rights against employer interference.

More recently, a case on the right to strike further illustrated challenges in the developing case law on workers' rights as human rights, despite the fact that the applicants argued very strongly for the adoption of an integrated approach to the interpretation of the ECHR. In *RMT v United Kingdom*,[58] the Court addressed the issue of secondary action, which is banned in English law. The applicant union of transport workers suggested that the ban violated their rights under art 11 of the Convention. The applicants were all members of the union RMT. They were initially employed by a company called Jarvis, and were then transferred to a smaller company, Hydrex. Their terms and conditions were at first kept as they were, according to a legal requirement, but deteriorated later on. Industrial action by Hydrex employees only would not be effective, so RMT sought to organise industrial action at the bigger company, Jarvis. As English law does not protect secondary action, it was not possible to do this. The Court accepted that secondary action falls within the scope of art 11.

The trade union relied heavily on ILO and ECSR materials, which were critical of United Kingdom law with regards to secondary actions. When examining materials of expert bodies in interpreting the ECHR, the Court often seeks to establish whether there is an emerging international or European consensus on the topic in question.[59] In *RMT*, the applicants invoked numerous international and regional materials in support of their claim,[60] and the Court said that these might indeed be relevant, but were not decisive because the nature of review in Strasbourg is different to the supervision by the ILO and the ECSR:[61]

> …the Court considers that the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.

Although it seems that the Court seeks to find consensus by looking at a range of materials,[62] it is both questionable what weight it should give to such consensus

[58] *RMT v United Kingdom* (31045/10) Section IV, ECHR 8 April 2014. See Alan Bogg and Keith Ewing "The Implications of the *RMT* Case" (2014) 43 Ind Law J 221.
[59] *Demir and Baykara*, above n 57, at [85].
[60] *RMT*, above n 67, at [57].
[61] At [98].
[62] See *Demir and Baykara*, above n 57.

generally,[63] and unclear how it should use any established consensus. Here, turning to the permitted limitations to the right, it found that the restriction of sympathy action was legitimate. The limitation pursued the aim of protecting the rights of those who are not parties to the dispute, and was proportionate to the aim pursued. This is because, in sensitive matters of labour and social policy, such as a secondary strike, the Court will allow a wide margin of appreciation.[64] In this case, it preferred to recognise discretion to state authorities, rather than challenge English law on industrial action.

The Court's uncertainty regarding the guiding principles for applying the Convention to issues involving workers' rights also emerged in a case on prison work, *Stummer v Austria*.[65] Mr Stummer spent approximately 28 years in prison. During this time, he worked for long periods in the prison kitchen or the prison bakery without being affiliated to the old age pension system. When he applied for an early retirement pension, his application was rejected because he had not accumulated the required amount of insurance months. The reason why no contributions were made for Mr Stummer during the full period of his employment was that the prison authorities kept 75 per cent of his pay, so his salary did not suffice for pension contributions. It should be added that work is compulsory in prison: refusal to work while in prison carries penalties, such as withdrawal of certain rights, and may even amount to solitary confinement.

The applicant claimed that prison work without affiliation to an old age pension system should not be viewed as ordinary in the course of detention, so it violated art 4, as well as art 1 of Protocol 1 (property) together with art 14 (discrimination). The majority of the Court rejected Stummer's claims. However, a strong dissenting opinion suggested that his treatment was a violation of the Convention. The distinction between prisoners and other workers "produces a long-term effect going well beyond the legitimate requirements of serving a particular prison term",[66] and violates the prohibition of discrimination in conjunction with the right to property. In a further dissenting opinion, moreover, Judge Tulkens argued that "work without adequate social cover can no longer be regarded as normal work",[67] and suggested that in this instance there was also a violation of the prohibition of slavery, servitude, forced and compulsory labour.

Recent case law on the protection of workers' rights under the ECHR suggests that, even though the tracks of human rights and labour law have started to meet, there is still uncertainty as to the application of human rights in the employment context. The ECtHR has sometimes been willing to seek inspiration in materials of expert

[63] George Letsas "The ECHR as a Living Instrument: Its Meaning and its Legitimacy" in Andreas Ulfstein, Geir Follesdal and Birgit Peters (eds) *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 106.
[64] On the margin of appreciation, see Dean Spielmann "Whither the Margin of Appreciation?" (2014) 67 CLP 49; and George Letsas "Two Concepts of the Margin of Appreciation" (2006) 26 OJLS 705.
[65] *Stummer v Austria* (37452/02) Grand Chamber, ECHR 7 July 2011.
[66] At [11] (dissent).
[67] At [8] (Judge Tulkens' partly dissenting opinion).

bodies, such as the ILO and the ECSR, but in other instances it has decided to leave workers' rights unprotected, even in the face of strong evidence that bodies with expertise had taken a different approach to the problem in question.

Exploitation

The inconsistencies in the ECtHR case law should probably not come as a surprise. After all, the Court has only recently started to engage with workers' rights (since the early 2000s). At the same time, in recent years, it has faced persistent political pressure by the United Kingdom Government, which has threatened to withdraw from the Convention because it views the Strasbourg Court as having gone too far in protecting human rights.[68]

How should the Court be approaching workers' rights in the ECHR? In order to address this question and the current uncertainty, I will examine a possible justification for workers' rights as human rights on the basis of an idea that is underexplored in labour law and human rights literature: exploitation.

The prohibition of exploitation is not of course explicitly included in the Convention or in other human rights documents. Human rights law does not contain a right not to be exploited as such, however the concept of exploitation has figured in case law and has been linked to slavery and human trafficking. The ECtHR refers to exploitation when examining art 4 in the *Siliadin* case, discussed earlier, and exploitation was further mentioned in *CN v United Kingdom.*[69] In *CN*, which involved a migrant domestic worker in the United Kingdom, the Government argued that English law contained effective legislation on trafficking, and claimed that, for the purposes of s 4 of the Asylum and Immigration (Treatment of Claimants) Act, "exploitation meant behaviour that contravened article 4".[70] The Equality and Human Rights Commission, intervening as a third party in the case, pointed to the low number of prosecutions under the Act, despite the fact that a far larger number of individuals had been recognised as victims of trafficking. It stated that there was a need for clarity in English law as to "what amounted to forced labour as distinct from exploitation".[71] The ECtHR said in turn:[72]

> …domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an

[68] See Anushka Asthana and Rowena Mason "UK Must Leave European Convention on Human Rights, Says Theresa May" (25 April 2016) The Guardian <www.theguardian.com>. See also High Level Conference on the Future of the European Court of Human Rights (the Brighton Declaration), adopted 19–20 April 2012, referring to the margin of appreciation.
[69] *CN v United Kingdom* (2013) 56 EHRR 24 (Section IV, ECHR).
[70] At [57].
[71] At [63].
[72] At [80].

> understanding of the many subtle ways an individual can fall under the control of another.

When examining art 4, the United Kingdom Supreme Court has also said that "[f]orced labour is not fully defined and may take various forms, but exploitation is at its heart".[73]

The Court generally interprets art 4 by taking account of international and European law on human trafficking, where labour exploitation is described as follows:[74]

> Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

Even though the above are simply examples of exploitation and not a definition of the concept, it is clear that art 4 case law refers to exploitation as a moral wrong, which the Convention can address. The term is used when a worker is found in a situation akin to slavery, which violates art 4. The elements upon which the ECtHR relies to determine whether there is such severe exploitation include: no pay for work performed, isolation, confiscation of legal documents, deception, and background conditions of poverty. The combination of these individual and structural factors may lead to a finding that the worker is faced with serious coercion and hence is in a situation of slavery or servitude.

The classification of some instances of abuse of workers' rights as exploitative and hence in breach of art 4 is a welcome development, for it demonstrates the recognition and protection of workers' dignity in human rights law. Yet it is too narrow. Is it correct to only protect workers from exploitation when they are faced with the most extreme forms of it?

Modern accounts of political theory attempt to explain what is wrong with exploitation.[75] These accounts may help to shed light on our understanding of exploitation in law. The starting point is usually that exploitation occurs when someone takes unfair advantage of someone else.[76] Exploitation of a person occurs when someone takes advantage of that person's vulnerability.[77] Someone may take

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[73] *Reilly & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2013] 3 WLR 1276 at [81].
[74] Article 2, paragraph 3.
[75] Andrew Reeve (ed) *Modern Theories of Exploitation* (Sage Publications, London, 1987); Robert Goodin *Reasons for Welfare* (Princeton University Press, 1988); Alan Wertheimer *Exploitation* (Princeton University Press, 1999); Ruth Sample *Exploitation: What It Is and Why It's Wrong* (Rowman & Littlefield Publishers, Lanham (MD), 2003).
[76] Wertheimer, above n 87, at 10; Robert Goodin "Exploiting a Situation and Exploiting a Person" in Andrew Reeve (ed) *Modern Theories of Exploitation* (Sage Publications, London, 1987) at 171; Matt Zwolinski "Structural Exploitation" (2012) 29 Soc Philos Policy 154 at 156.
[77] Allen Wood "Exploitation" in Kory Schaff (ed) *Philosophy and the Problems of Work: A Reader* (Rowman & Littlefield Publishers, Maryland, 2001) 141 at 147.

advantage of another's various kinds of vulnerability, their needs or desires, but this will not always be classified as wrongful exploitation in the sense discussed here. However, when someone's vulnerability is due to a significantly weaker bargaining position than the other, and the stronger party uses this vulnerability, then a situation of exploitation is present.[78] It has been argued that "those who depend upon particular others for the satisfaction of their basic needs are rendered, by that dependency, susceptible to exploitation by those upon whom they depend".[79]

For exploitation to be objectionable, on Goodin's influential view, a person in "an especially strong position vis-à-vis another" must take advantage of the other's vulnerability.[80] Goodin argues that such extreme vulnerability may consist of asymmetry of power between the parties, the possession by the powerful of what the weaker party needs, a monopoly of the powerful over what the other needs, and control of this object by the powerful. Even though this account contains important insights, such as the role of need and asymmetry of power, it is narrow, particularly because it requires a monopoly of the powerful. As Sample puts it, this account is "not merely taking advantage, but kicking a person when he is down".[81]

What emerges is that, in modern political thought, exploitation is analysed as a wrong, and significant attention has been paid to what may constitute exploitation, namely taking unfair advantage of vulnerability. Vulnerability may consist of someone's need. Most people work because with the income gained through work they can satisfy their basic needs: without this income, most people would be destitute.[82] For this reason, workers are always in a position of need and are therefore prone to exploitation. At the same time, workers are in a weak bargaining position in relation to their employers. They need their job, and they depend upon their employer because there is a scarcity of jobs. Employers may impose working conditions that are exploitative exactly because they know there is job scarcity and they are likely to be able to replace workers without much difficulty. It is clear, in other words, that workers are vulnerable to exploitation. Migrant workers in particular may be especially prone to exploitation, because their immigration status may depend on being employed more generally, or even on being employed by a particular employer.[83]

At the same time, for exploitation to occur, there does not need to be a situation akin to slavery. There are other forms of exploitation that involve violations of workers' rights. For instance, there are many situations where employers underpay or do not pay their employees if they are undocumented workers. In these instances, the

[78] Wood, above n 89, at 148.
[79] Goodin, above n 87, at 121.
[80] Goodin, above n 87, at 125.
[81] Sample, above n 87, at 31.
[82] People, of course, work for other important reasons too. See Hugh Collins "Is There a Human Right to Work?" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, Oxford, 2015) 17.
[83] See Virginia Mantouvalou "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42 J Law & Soc 329.

employers are often aware that the workers are particularly vulnerable because if they go to the authorities they are likely to be arrested and deported. Employers take advantage of this vulnerability by underpaying them or not paying them at all, and sometimes the law in certain jurisdictions, such as the United Kingdom, does not protect workers from such exploitation. Workers do not have a right to be paid for work performed under an illegal contract.[84] The ECHR does not contain a right to a minimum wage, but it can fairly be argued that situations such as this violate the right to property, which is protected in art 1 of Protocol 1 of the Convention, possibly together with the prohibition of discrimination.[85] The prohibition of exploitation can serve as a guiding principle in the interpretation of the ECHR on issues such as this.

As discussed earlier, the Convention is a traditional civil and political rights document, which only contains few labour rights. However, this does not mean that the ECtHR cannot interpret the existing provisions in ways that protect workers from exploitation. The prohibition of exploitation can ground rights, such as a minimum wage, as well as trade union rights that strengthen the vulnerable position of workers. The adoption of an integrated approach, as described above, provides the Court with certain tools that enable it to interpret the Convention in a way that prohibits exploitation. To return to the case law, Stummer, the prison worker, was exploited by the prison authorities because they took advantage of his vulnerability: as a prisoner, he was not free to not work or to work for a different employer. There are many instances of exploitation of prison workers,[86] and it is unfortunate that the majority of the Court did not take the opportunity to acknowledge exploitation in this case. The dissenting judges, on the other hand, rightly stated that his treatment constituted a violation of the Convention.

In collective labour law cases, the idea of exploitation as a guiding principle of the Court's case law suggests that there is very little scope for a margin of appreciation to national authorities when the state or employers interfere with freedom of association. Workers' organisations have the counteraction of the inequality of bargaining power between employers and workers as their main purpose. In this way they help to address workers' vulnerability to exploitation. For this reason, workers' collective labour rights must be given strong protection against employers. In *Palomo Sanchez*, the background dispute about whether the workers were self-employed indicates that the workers may have been exploited. That the Court was unwilling to give their right to free speech strong protection in the context of this dispute did not help to address their vulnerability in bargaining with their employer.

[84] *Hounga v Allen & Anor* [2014] UKSC 47, [2014] 1 WLR 2889; Alan Bogg and Sarah Green "Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts" (2015) 44 ILJ 101; Virginia Mantouvalou "The Right to Non-Exploitative Work" in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, Oxford, 2015) 39.
[85] Mantouvalou, above n 84.
[86] Richard Lippke "Prison Labour: Its Control, Facilitation, and Terms" (1998) 17 Law Philos 533; Howard League for Penal Reform *Business Behind Bars: Making Real Work in Prison Work* (2012) <www.howardleague.org>.

As famously stated in *Handyside*, the Convention protects views that shock or disturb the State or a part of the population,[87] and this protection should extend to the trade union context. Similarly, the unwillingness of the ECtHR to protect sympathy industrial action in *RMT* did little to counteract the inequality of power that leads to vulnerability and exploitation, despite strong indications in ILO and ECSR materials of the importance of such action in the labour context.

Conclusion

Human rights law plays an increasingly important role in the employment relationship context. An examination of the ECtHR and its case law shows that there is some willingness to protect workers' rights through an integrated approach to interpreting the Convention. The Strasbourg Court often takes note of materials of the ILO and the ECSR in order to interpret the ECHR, which has been celebrated in labour law scholarship.[88] Yet the ECtHR is a supranational body and is sometimes faced with hostility by national authorities. Workers' rights, and other social rights, were until recently viewed as non-justiciable through individual petitions before human rights bodies. The employment relationship was also typically viewed as an area that must be regulated through contract and other private law rules, rather than through public law. For reasons such as these, there is much uncertainty as to the future direction of the protection of workers' rights as human rights.

This article suggests that the ECtHR has opened the door to the protection of workers' rights both by taking note of findings of the ILO and other expert bodies, and by protecting certain applicants from forms of exploitation that are akin to slavery and servitude. Yet the approach of the Court, thus far, appears to be both uncertain and narrow. This paper, therefore, argues for the recognition of a different account of exploitation, which consists of taking account of someone's vulnerability. Human rights law can, in turn, address exploitation by safeguarding workers' rights, such as a minimum wage, and by strengthening workers' bargaining power through protection of collective labour rights. The prohibition of exploitation can serve as a guiding principle in Strasbourg case law, as well as the case law of other bodies that explore the legal protection of workers' rights as human rights.

Human rights can provide an important critical perspective for labour law, as well as an important tool for the protection of workers' rights. "The importance of human rights […]", as Joseph Raz puts it in a recent essay:[89]

[87] *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR) at [49].
[88] Mantouvalou, above n 26; Ewing and Hendy, above n 2.
[89] Joseph Raz "Human Rights in the Emerging World Order" in Rowan Cruft, S Matthew Liao, Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 217 at 226.

> …is in affirming the worth of all human beings, and in distributing power away from the powerful to everyone, including any group or association willing to advocate and promote the interests of ordinary people.

One way in which human rights can achieve this rebalancing of power is through the protection of workers from exploitation. The prohibition of exploitation is one, but not the sole, justification for conceptualising workers' rights as human rights.[90] However, a modern understanding of the prohibition of exploitation in the workplace can be an important guiding principle in achieving dignity of workers against employer abuse.

[90] I have previously examined the theory of capabilities as a foundation of workers' rights. See Mantouvalou, above n 26.

Employee-Citizens of the Human Rights State

DR JONATHAN BARRETT*

Abstract

This paper considers the position of rights-bearing citizens as employees. It is argued that the rights and responsibilities of citizenship should be fully exercisable within employer organisations. Contractual terms which restrict an employee's rights should be deemed void. Furthermore, employees should have a basic right to refuse to perform any action that negatively affects their own or their fellow citizens' rights. In this way, full human flourishing will be furthered in the workplace, and corporations, in particular, will be made more accountable to the societies which enable them to exist and prosper.

Key words

Human Rights State, Human Rights, Labour Law, Citizenship, New Zealand Bill of Rights Act 1990, Human Rights Act 1993.

Introduction

In New Zealand, we are fortunate to live in a country where human rights are, in the main, taken seriously.[1] As citizens, we can enforce a panoply of civil, political, social, economic, and cultural claims against the state and those invested with public powers. Certain civil and political rights are considered sufficiently significant to be affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). Because the judiciary is subject to NZBORA, it is plausible that the common law may be developed in accordance with human rights, thereby giving NZBORA the potential for horizontal effect.[2] Furthermore, the Human Rights Commission is charged with promoting all human rights,[3] not only the vertical rights expressly affirmed in NZBORA. Despite this legislative and institutional respect for human rights,[4] New Zealanders can be lax in upholding our rights in the face of corporate and organisational power.[5] In particular, we may find it unexceptional that a citizen's basic rights to respect for

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[1] See, for example, Geoffrey Palmer "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?" (2013) 11(1) NZJPIL 257.

[2] See Lord Cooke "A Sketch from the Blue Train – Non-Discrimination and Freedom of Expression: The New Zealand Contribution" (1994) NZLJ 10 at 11. Unlike vertical human rights, which can only be enforced by a citizen against the state, horizontal human rights can be enforced by one citizen against another citizen.

[3] Human Rights Act 1993, s 5.

[4] The lack of an entrenched, supreme law may, of course, lead to rights being subordinated to populist measures. The most egregious example of this phenomenon is the disqualification of prisoners from voting: see Electoral Act 1993, s 80(1)(d); *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791. Generally, however, the presence or absence of an entrenched, supreme law does not in itself indicate whether a country takes human rights seriously; rather the culture of respect for human rights is determinative.

[5] For convenience sake, in this paper, employers are collectively denoted corporations. Rights should apply whatever the nature and size of the employer. Thus the International Labour Organization ("ILO") says: "All fundamental rights in the labour field apply both to public employment or para-statal enterprises and to private

their dignity, freedom of expression and privacy might be curtailed by an employment agreement. Corporate culture and reporting processes may also prevent employees from honouring their civic obligations to other citizens, such as warning their fellow citizens of corporate malfeasance.[6] This paper argues against such a dilution of the rights and responsibilities of employee-citizens.[7]

This paper is at a developmental stage needing, on the one hand, significant fleshing out of legal details, and, on the other hand, the benefit of Occam's razor. A wide range of issues are broached in this paper, and, necessarily, these issues are considered at a level of basic principle; deeper and more specific analysis is intended in the future. This paper is structured as follows: the basic informing ideas are initially outlined. These are, first, the modern *Rechsstaat* (Human Rights State) is the moral and political community which guarantees rights and within which citizens claim rights and exercise responsibilities; and, second, full inclusion in the Human Rights State constitutes citizenship. It is then argued that the rights and responsibilities of citizenship should be fully exercisable within corporations. A fundamental right of refusal to comply with employer instructions unless they are conscionable[8] will, in particular, further this goal. This paper concludes that full exercise of rights and responsibilities by employees will contribute to their flourishing as human beings. Furthermore, corporations will become more accountable to the moral and political communities in which they operate.[9]

Basic Ideas

This part of the paper outlines the basic ideas which inform the subsequent arguments. The objective here is to present a sketch of the Human Rights State, and to establish citizenship as full inclusion within that moral and political community.

The Human Rights State

The common law rule of law and the civilian *Rechsstaat* are closely cognate concepts.[10] When the liberal democratic state was developing, focus for both English and Continental

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enterprise of any size, cooperatives, self-employed, own-account workers, and so on." As cited by WR Böhning *Labour Rights in Crisis: Measuring the Achievement of Human Rights in the World of Work* (Palgrave Macmillan, Basingstoke, 2005) at 19.

[6] See the section of this paper titled "Whistle-blowing" on the Protected Disclosures Act 2000.

[7] The term "employee" is used loosely here and should be read to include nonstandard workers, those being "[a]gency temporaries, independent contractors, on-call workers, contract company workers, part-timers" and so forth: see Anne Polivka, Sharon Cohany and Steven Hipple "Definition, Composition, and Economic Consequences of the Nonstandard Workforce" in Françoise Carré, Marianne Ferber, Lonnie Golden and Stephen Herzenberg (eds) *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements* (Industrial Relations Research Association, Champaign (IL), 2000) 41 at 41.

[8] According to the *Oxford English Dictionary* <www.oed.co.uk>, "conscionable" means "habitually governed by a sense of what is right" and "scrupulous". See the section of this paper titled "Responsibilities" for a discussion of virtuous employee behaviour which includes scrupulousness.

[9] For a discussion of different conceptions of accountability, see Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) ELJ 447 at 447-468.

[10] See Niklas Luhmann *Das Recht der Gesellschaft* (Suhrkamp Verlag, Frankfurt am Main, 1993) (translated ed: Klaus A Ziegert (translator) Niklas Luhmann *Law as a Social System* (Oxford University Press, Oxford, 2004)) at 362-363.

constitutional theory lay with the processes of the law, rather than its substantive content.[11] Thus, for Alfred Venn Dicey, "the rule of law" meant that government should not possess arbitrary or discretionary power; the ordinary law of the land, administered by the regular tribunals, should apply to everyone; and "the general principles of law, the common law rules of the constitution ... are the consequences of rights of the subject, not their source".[12] Following the Universal Declaration of Human Rights (UDHR),[13] which was crafted principally in response to the atrocities committed during the Nazi era[14]:[15]

> …the liberal *rechtsstaat* with its emphasis on the technical nature of laws was complemented by a deep concern as to the nature of such laws … The *rechtsstaat*, declaring the supremacy of law, not only had to ensure that laws were properly passed, but also that they respected certain minimum notions of justice.

While noting it "is not a principle which would be universally accepted as embraced within the rule of law", Tom Bingham, in his interpretation of the common law conception of the rule of law today, argues "[t]he law must afford adequate protection of fundamental human rights".[16] Likewise, for Gerhard van der Schyff, the contemporary *Rechtsstaat* has:[17]

> …developed a new social dimension, not only does the focus of law rest on the organisation of the state and the accompanying political rights, but also on the quality of life within that state.

Thus, akin to the jurisprudence developed by Germany's Federal Constitutional Court (*Bundesverfassungsgericht*),[18] the South African Constitutional Court has characterised the *Rechtsstaat* as a state:[19]

> …where government is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security.

The South African Bill of Rights explicitly guarantees economic, social and cultural rights, along with civil and political rights,[20] but New Zealand, despite lacking such constitutional guarantees, has nevertheless committed itself to the fundamental United Nations rights

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[11] See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) PL 467 at 473-474. Compare with the Fuller-Hart debate on the moral content of law: see generally HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) and Lon Fuller *The Morality of Law* (Rev ed, Yale University Press, New Haven, 1969).

[12] See Roger Michener "Foreword" in AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) xi at xx.

[13] *Universal Declaration of Human Rights* GA Res 217A, A/810 (1948) at 71.

[14] "Without the Holocaust, then, no Declaration" says Michael Ignatieff "Human Rights as Idolatry" in Amy Gutmann (ed) *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton (NJ), 2001) 53 at 81. In Roger Burggraeve's view, the motivation for declarations of rights arises from "indignation over the evil that is inflicted on vulnerable others": see Roger Burggraeve "The Good and Its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality" (2005) 6(2) Hum Right Rev 80 at 97.

[15] G van der Schyff "The Protection of Fundamental Rights in the Netherlands and South Africa Compared: Can the Many Differences be Justified?" (2008) 11(2) PER 17 at 18.

[16] Tom Bingham *The Rule of Law* (Penguin Books, London, 2011) at 66. Lord Bingham made a major contribution to the jurisprudence of the rule of law.

[17] Van der Schyff, above n 15, at 27.

[18] See Francois Venter "South Africa: A Diceyan *Rechtsstaat*?" (2012) 57(4) McGill LJ 721-747.

[19] *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) per Sachs J at [250].

[20] Constitution of the Republic of South Africa 1996, ch 2.

declarations and covenants.[21] In accordance with the Vienna Declaration, respect for *all* human rights must be an essential element of the rule of law.[22] Indeed, the contemporary *Rechtsstaat* or State under the rule of law may be denoted the 'Human Rights State', and will be referred to as such in this paper.

Citizenship as Full Inclusion in the Human Rights State

Thomas Marshall proposed a triadic conception of citizenship,[23] comprising of a civil element (rights necessary for individual liberty), a political element (electoral rights) and a social element (ranging from a right to basic welfare to living "the life of a civilised being according to the standards prevailing in society").[24] Citizenship in this sense contemplates a person being fully included within and, to the extent they are able,[25] participating in a discursive democracy.[26] At a fundamental level, this conception of citizenship is about membership of a community of citizens in which needs are met, capacities are realised, and, above all, equal human dignity is respected.[27] Unlike the Human Rights State, which may be a temporally and culturally-specific arrangement, it is submitted that membership of such a community as described is a universal expectation. This reservation noted, democracy does not guarantee respect for human dignity but it is currently implausible that one might have respect for dignity without democracy. The expectations of respect for dignity and a voice in the matters that affect us apply in the workplace as well as in our general lives.[28]

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[21] Notably, the UDHR; the *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) at 49; and the *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). The bifurcation of UDHR rights into the different covenants is, it is submitted, a matter of practicableness, not principle.

[22] See *Vienna Declaration and Programme of Action* GA Res 48/121, A/CONF.157/23 (Vienna Declaration), as adopted by the World Conference on Human Rights on 25 June 1993, at [5].

[23] As a sociologist, Marshall presumably sought to describe a particular form of citizenship which was observable in Western countries in the forty year period after the Second World War. However, following Jeremy Waldron, Virginia Mantouvalou observes that the Marshallian model has taken on a normative quality: see Virginia Mantouvalou "Workers without Rights as Citizens at the Margins" (2013) CRISPP 366 at 368.

[24] TH Marshall "Sociology at the Crossroads" in *The Right to Welfare and Other Essays* (Heinemann Education Books, London, 1981) 74 at 74.

[25] See, generally, Bryan Turner *Vulnerability and Human Rights* (Pennsylvania State University Press, Philadelphia, 2006); Martha Nussbaum *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press of Harvard University Press, Cambridge, 2006).

[26] See John Stephens "Social Rights of Citizenship" in Francis Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, Oxford, 2012) 511 at 513. On discursive democracy, see generally Jürgen Habermas *Faktizität und Geltung. Beiträge zur Diskurstheorie und demokratischen Rechtsstaats* (Suhrkamp Verlag, Frankfurt-am-Main, 1992) (translated ed: William Rehg (translator) Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, London, 1997)). Critics argue that the Habermasian model of discursive democracy is, on the one hand, an unattainable ideal – indeed, an undesirable ideal – and, on the other hand, a culturally-specific project, gravid with colonial intent. Thus Chantal Mouffe says Habermas seeks "to establish the privileged rational nature of liberal democracy and consequently its universal validity": see Chantal Mouffe *On the Political* (Routledge, London, 2005) at 84.

[27] On developing human capacities, see, for example, Martha Nussbaum *Creating Capacities: The Human Development Approach* (The Belknap Press of Harvard University Press, Cambridge, 2011).

[28] See Cynthia Estlund "Working Together: The Workplace, Civil Society, and the Law" (2000) 89 Geo LJ 1.

Labour Rights as Human Rights

Labour rights are intrinsic to citizenship. For Virginia Mantouvalou, "citizenship requires respect for labour rights, as much as it requires respect for other human rights".[29] The inference to be drawn is that labour rights are tantamount to human rights, but are they?[30] Certain traditional labour rights, such as freedom of association, have been included in human rights conventions and charters, but may be instruments, rather than ends in themselves. History has taught us that without the ability to combine, workers' dignity is imperilled. And, as Aharon Barak tells us, dignity "is the source from which all other human rights are derived. Dignity unites the other human rights into a whole."[31]

Mantouvalou observes, "certain labour rights are compelling, stringent, universal and timeless entitlements, as much as rights such as the prohibition of torture or the right to privacy."[32] This argument is most plausible when labour rights directly relate to, or further respect for, human dignity. However, some rights are instrumental or procedural, albeit necessary for maintaining dignity.[33] One might then prioritise rights. Thus Roger Böhning notes:[34]

> The discussions surrounding globalization in the 1990s led to a distinction between labour rights that are fundamental [freedom of association; elimination of all forms of compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation] and others that have lower status.

It may be tactically prudent for the International Labour Organisation (ILO) to focus on these so-called core rights. Indeed, relative to, say, child labour, workplace concerns in developed countries, such as privacy of communications, may appear to be petty "First World problems". But both child labour and denial of privacy impinge upon human dignity and should be opposed; otherwise the risk is run of the neoliberal hegemony determining the rights we may claim. Thus Robert O'Brien notes that "[w]hereas many civil and political rights resonate with the globalization trajectory, workers' rights contradict its neoliberal form

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[29] Mantouvalou, above n 23, at 379.

[30] See also Philip Alston *Labour Rights as Human Rights* (Oxford University Press, Oxford, 2005); Paul O'Higgins et al (eds) *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell, London, 1994).

[31] Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton (NJ), 2006) at 85 (footnotes omitted).

[32] Virginia Mantouvalou "Are Labour Rights Human Rights?" 3 Eur Lab LJ 151 at 172.

[33] For example, Stanley Fish argues that freedom of expression is an instrument for attaining other goals, not an end in itself, even though free speech is commonly seen as one of the most important human rights: see, generally, Stanley Fish *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press, New York, 1994).

[34] Böhning, above n 5, at 3. "Core rights", Anne Trebilcock says, "go to the essence of human dignity at work, touching upon bedrock values of freedom and equity": see Anne Trebilcock "The ILO Declaration on Fundamental Principles and Rights at Work: A New Tool" in Roger Blanpain and Chris Engels (eds) *The ILO and Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer Law International, The Hague, 2001) 105 at 107, cited by Judy Fudge "The Discourse of Labor Rights: from Social to Fundamental Rights?" (2007) 29 Comp Lab L & Pol'y J 29 at 39. Following Karel Vasak's taxonomy of rights, civil and political rights constitute the first generation; economic, cultural and social rights represent the second generation; and the emerging third generation rights relate to the environment: see Karl Vasak "Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" (1977) 30(1) UNESCO Courier 28. Vasak's taxonomy is about the historical emergence of rights claims. There is no reason why a sustainable environment should be a less pressing concern for citizen-employees than, say, freedom of speech.

and engender greater resistance".[35] Asserting social rights may be the most obvious response to globalisation,[36] but all rights must be protected and fostered.

To reiterate, the Vienna Declaration recognises that "[a]ll human rights are universal, indivisible and interdependent and interrelated".[37] This declaration may represent an ideal to be attained, rather than an empirical observation; nevertheless, it indicates the inclusiveness and interdependence of human rights. The long-term goal must be to ensure that all rights are respected, always and everywhere. Of course, if we are to move from ethical imperatives to justiciable claims, some prioritisation and strategising is necessary. For example, contemplating the guarantee of freedom of association enshrined in the Canadian Charter of Rights and Freedoms,[38] Judy Fudge proposes that:[39]

> The constitutional protection of freedom of association could, and should, be used to embed labour markets in an institutional framework that requires any derogation from the values of democracy and human dignity to be justified.

Nevertheless, sight should not be lost of the universality, indivisibility, interdependence and interrelatedness of human rights, in the community and the workplace.

Rights and Responsibilities

The principal emphasis of this paper lies with fundamental rights in the context of employment, but it is axiomatic that "human rights come with responsibilities and must be exercised in a way that respects the rights of others".[40] As responsible citizens, rights-bearing employees must exercise their rights responsibly. Following the virtue ethics of Alasdair MacIntyre, who argues that the fundamental moral and political idea is that individuals should pursue what is virtuous for them,[41] all social actors should perform their roles responsibly, that is, to do "*what anyone filling such-and-such a role ought to do*".[42] With regard to freedom of expression, for example, the role of the virtuous speaker is not to ensure that their utterances do not offend anyone but rather to inform others as best they can.

[35] Robert O'Brien "Continuing Incivility: Labor Rights in a Global Economy" (2004) 3(2) JHR 203 at 203.
[36] See Fudge, above n 34, at 29.
[37] *Vienna Declaration*, above n 22, at [5].
[38] Canada Act 1982, c 11 (UK), s 2(d); compare with NZBORA 1990, s 17.
[39] Judy Fudge "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 Dalhousie LJ 601 at 618-619.
[40] Charter of Human Rights and Responsibilities Act 2006 (Vic), preamble.
[41] John Cornwell "MacIntyre on Money" (2010) 176 Prospect 58 at 58.
[42] Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (3rd ed, Duckworth, London, 2007) at 184 (italics in original).

Employee-Citizens within Corporations

This part of the paper considers, at a principled level, the position of employee-citizens of the Human Rights State within corporations.

Responsibilities

Mark Bovens identifies five forms of active responsibility (hierarchical, personal, social, professional and civic).[43] Professional responsibility and loyalty to fellow citizens are currently the most relevant. Herbert Hart designates professional responsibility as role-responsibility, and describes it in the following terms:[44]

> …whenever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them.

Duties such as these are typically "of a relatively complex or extensive kind, defining a 'sphere of responsibility' requiring care and attention over a protracted period of time".[45] A responsible person is for Hart:[46]

> …one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them. To behave responsibly is to behave as a man (sic) would who took his duties in this serious way.

Likewise, MacIntyre's conception of virtue lies in performing the roles we fill in the right way.[47] The virtuous employee should, then, behave responsibly towards their employer. But employees are also – indeed, first and foremost – citizens of the Human Rights State, and must always take that role seriously.

Civic responsibility requires professional responsibility to be understood in the context of citizenship. And yet, Bovens says: [48]

> …when employees or civil servants pass through the company gate or up the steps in the morning, they lay aside their citizenship and only retrieve it at the end of the working day.

This assertion may constitute an exercise in hyperbole or may, indeed, represent an anachronism.[49] Nevertheless, it is plausible that the full exercise of rights and responsibilities

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[43] See generally Mark Bovens *Verantwoordlijkheid en Organisatie: Beschouwingen over Aansprakelijkheid, Institioneel Burgerschap en Ambtelijke Ongehoorzaamheid* (WEJ Tjeenk Willink, Zwolle (Netherlands), 1990) (translated ed: Gregor Benton (translator) Mark Bovens *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, Cambridge, 1998)).

[44] HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968) at 212.

[45] At 213.

[46] At 213.

[47] MacIntyre, above n 42, at 184.

[48] Bovens, above n 43, at 180.

[49] Since Bovens wrote, the principle of whistle-blowing, for example, has received statutory approval: see, for example, Public Interest Disclosure Act 1998 (UK); Protected Disclosures Act 2000.

within the workplace is curtailed. Such suspension of civil rights and responsibilities is incompatible with citizenship in the Human Rights State; indeed, without seeking to trivialise contractual promises made to an employer, those "civil duties and civil rights [must] set limits to one's obligations, to obedience and confidentiality" to an employer.[50]

Employees

Stephen Bottomley observes that the least considered area of the interaction between corporations and people in the human rights sphere is the position of employees within organisations.[51] Nevertheless, it is an important interaction in which the imbalance of power between people and corporations is a critical consideration. This imbalance is not simply about economic wherewithal; as John Kenneth Galbraith explains, "[t]he power in the business firm and the state that once emanated from property – from financial resources – now comes from the structured association of individuals, from bureaucracy."[52]

Imbalance in Power – What Corporations Do to Employees

Power in its various forms is a crucial consideration in the relationship between corporations and their employees. Social power, which Otto Kahn-Freund identifies as "[t]he power to make policy, to make rules and to make decisions, and to ensure that these are obeyed" is central to the employment relationship.[53] Law is therefore "a technique for the regulation of social power".[54] With particular relevance to the typically unequal employment relationship, Edgar Bodenheimer observes, if the law assumes that contracting parties have broadly equal power, "subordination and subjection" are perpetuated.[55] Within the framework of the rules which corporations create to govern their employees, Foucaultian disciplinary power, which drills down to the capillaries of domination, is also highly relevant.[56]

Bovens observes:[57]

> The inequality of power between individual employees and complex organizations and the weak position of most employees on the labour market in practice minimizes their contractual freedom. Most employees cannot afford to give up their jobs in order to regain complete command over their civil rights. De facto their position does not differ all that much from that of a citizen in an authoritarian state.

From a perspective of discursive democracy, many employer-imposed rules lack legitimacy because, as Jürgen Habermas argues, "the only regulations and ways of acting that can claim

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[50] Bovens, above n 43, at 180.

[51] Stephen Bottomley "Corporations and Human Rights" in Stephen Bottomley and David Kinley (eds) *Commercial Law and Human Rights* (Ashgate, Aldershot, 2002) at 47; Bovens, above n 43 at 158.

[52] John Kenneth Galbraith *The Anatomy of Power* (Houghton Mifflin, New York, 1983) at 48.

[53] Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977) at 3.

[54] At 3. Ian Smith and Aaron Baker note that cooperation rather than obedience may be a more appropriate approach to the employer-employee relationship in the contemporary workplace: see Ian Smith and Aaron Baker *Smith & Wood's Employment Law* (Oxford University Press, Oxford, 2015) 178.

[55] Edgar Bodenheimer *Power, Law and Society: A Study of the Will to Power and the Will to Follow* (Crane, Russak, New York, 1973) at 11.

[56] See Michel Foucault "Two Lectures" in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books, New York, 1980) at 78-108; Michel Foucault "Afterword: The Subject and Power" in HL Dreyfus and Paul Rabinow (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics* (University of Chicago Press, Chicago, 1982) at 208-12.

[57] Bovens, above n 43, at 171.

legitimacy are those to which all who are possibly affected could assent as participants in rational discourses".[58] Who would freely agree to or willingly obey the draconian restriction of rights commonly incorporated into employment contracts?[59] For example, vulnerable, low-paid employees working in service stations or supermarkets are commonly required under their employment contracts to compensate their employers for theft by third parties.[60] These abuses of bargaining power may be judicially corrected or reversed following public pressure[61] but nevertheless indicate employers' assumptions about their unfettered prerogative to include stipulations in employment agreements which should be considered an unconscionable exercise of power.[62]

For Bovens:[63]

> Alongside the freedom to strike, which they have long held, employees would also have to be able to claim from their employers the protection of other civil rights, such as the freedom of religion, the freedom of speech, the freedom of association and meetings, protection of their privacy in letters, telephone and e-mail.

Freedom of expression is commonly considered primus inter pares among human rights,[64] and yet employees' freedom of expression is often restricted in numerous ways, for example:[65] views expressed on social media;[66] appearance; cultural expression, such as the display of moko; and expression of religious belief. (In contrast, corporations may be able to claim that they have rights of religious conscience in order to impose restrictions on their employees' health choices.[67]) In New Zealand, the right to privacy is evolving both in statute law and the common law.[68] Despite this evolution, privacy of personal emails and other communications sent and received on corporate systems is typically surrendered under an

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[58] See Habermas, above n 26, at 458.

[59] It may also be noted that people are more likely to disobey rules which they consider immoral: see Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton (NJ), 2006) 36-37.

[60] See, for example, Caleb Harris "Workers charged for petrol drive-off" *The Dominion Post* (online ed, Wellington, 20 November 2014).

[61] It is a moot point whether these kinds of deductions are permissible under the Wages Protection Act 1983, ss 4-6. It is clear, however, that public opinion is opposed to employers giving effect to these kinds of rights to deduct: see, for example, Caleb Harris "Angry customers call for petrol station boycott" *The Dominion Post* (online ed, Wellington, 20 November 2014).

[62] Compare with extensive protections under consumer law. Harry Arthurs' hypothetical "law of economic subordination and resistance" would protect both consumers and employees: see Harry Arthurs "Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?" (2012) 8(3) Osgoode CLPE Research Paper No. 10/2012 (Osgoode Hall Law School).

[63] Mark Bovens "The Corporate Republic: Complex Organizations and Citizenship" in Emilios Christodoulides (ed) *Communitarianism and Citizenship* (Ashgate, Aldershot, 1998) 158 at 171.

[64] See Thomas J's comments in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [152]; compare with Fish, above n 33.

[65] In principle, an employer may not regulate personal issues or out of work activities "unless it can show some special considerations bring such matters within the scope of employment": see Smith and Baker, above n 54, at 178. Of course, as writer of the employment agreement (individual, at least) an employer has licence to identify which special considerations might bring personal expression, such as facial piercings, within the scope of employment. See also Cynthia Estlund "Free Speech Rights that Work at Work: From the First Amendment to Due Process" (2007) 54 UCLA L Rev 1463.

[66] See Paul Wragg "Free Speech Rights at Work: Resolving the Difference between Practice and Liberal Principle" (2015) 44(1) Ind Law J 1.

[67] The United States Supreme Court decision in *Hobby Lobby* recognised the freedom of religious belief for a private, nevertheless economically significant, corporation: see *Burwell v Hobby Lobby Stores Inc* 573 US (2014).

[68] See review of Privacy Act 1993 and the emerging tort of invasion of privacy following *Hosking v Runting* [2004] NZCA 34; (2005) 1 NZLR 1.

employment agreement,[69] and privacy outside work may be ostensibly contracted out.[70] However, the denial of human dignity is the greatest concern. In the Kantian view, because humans uniquely possess dignified autonomy, they can never be instruments for others' ends.[71] It is, then, a radical betrayal of citizenship in the Human Rights State to be complicit in treating human beings as instruments for corporate ends. The dehumanisation of employees by treating them – rather than their labour[72] – as factors of production is far from an innovation,[73] but emerging technology enables workers to be monitored and tracked like machines or packages in a distribution centre.[74]

Recalcitrance and Virtue – What Employees Do to Corporations

Every organisation faces the problem of dissent within; hence the need for internal submission.[75] For Michel Foucault:[76]

> The power relationship and freedom's refusal to submit cannot therefore be separated. The crucial problem of power is not that of voluntary servitude (how could we seek to be slaves?). At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom.

The ability to enjoy full rights in the workplace is, it is submitted, tantamount to experiencing the freedom which the operation of disciplinary power denies. If power is recalibrated in the employment relationship, the liberated employee should have no motivation to engage in petty acts of recalcitrance. Freedom would not, then, constitute a licence to shirk or to sabotage the enterprise. MacIntyre translates the ancient Greek equivalent of "virtue" as "excellence".[77] The responsible employee may, therefore, be expected to strive for excellence and be loyal to the organisation in accordance with their conscience as a citizen of the Human Rights State.

Virtue and Outsiders – What Employees Do to Others

Corporate actors may engage in atrocious behaviour. As Kent Greenfield observes, "the corporate form insulates individuals from responsibility".[78] Indeed, Maury Silver and Daniel Geller argue that "[t]he fragmentation of action and the need for job security explain the ease

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[69] It is a moot point whether copyright in a personal email sent from a corporate system belongs to the employee or the employer: see Copyright Act 1994, s 21(2). Certainly, copyright in an email sent by a non-employee to an employee does not belong to the latter's employer. This rule could have implications for reproduction of the text of the email, say, in disciplinary proceedings.

[70] See, for example, David Kravets "Worker Fired for Disabling GPS App that Tracked Her 24 Hours a Day" Ars Technica (12 May 2015) <www.arstechnica.com>.

[71] Immanuel Kant *Grundlegung zur Metaphysik der Sitten* (Johann Friedrich Hartnoch, Riga (Latvia, then Prussia), 1785) (translated ed: HJ Paton (translator) Immanuel Kant *The Moral Law: Groundwork of the Metaphysics* (Taylor & Francis, London, 2012)) at 30-31.

[72] See also Judy Fudge "Labour Is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 25 Saskatchewan L Rev 67.

[73] See Frederick Winslow Taylor *The Principles of Scientific Management* (first published 1911, Dover Publications, Mineola (NY), 1997).

[74] See Rory Cellan-Jones "Office puts chips under staff's skin" BBC (29 January 2015) <www.bbc.com>.

[75] See Galbraith, above n 52, at 60.

[76] Michel Foucault "The Subject and Power" in James Faubion (ed) *Power* (trans Robert Hurley et al) (The New Press, New York, 2000) 326 at 342.

[77] MacIntyre, above n 42, at 184.

[78] Kent Greenfield *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago, Chicago, 2004) at 73.

with which individuals will accept almost any organizational legitimation".[79] Such exculpation and isolation cannot stand. Employees must be able to exercise their rights and honour their responsibilities to other members of the moral and political community.

Executive Directors

Company law does not distinguish in principle between the roles of executive and non-executive directors.[80] Consequently, the duties of the most senior corporate employees are typically considered from the perspective of the fiduciary duties all directors owe to the company.[81] But, notwithstanding their position of power and control within a corporation, executive directors are employees in basically the same way as other staff members,[82] albeit they are employees who face particular ethical and legal challenges. Thus, in accordance with an extreme expression of shareholder primacy,[83] which is currently dominant in Anglo-American corporate theory, in order to comply with their fundamental duties, directors should cause their companies to break the law if it appears profitable to do so.[84] There is not space currently to consider directors' duties in any but the most superficial way but it is pertinent to note that, first, Corporate Social Responsibility scholars plausibly argue that directors do not owe a single duty to maximise shareholder wealth;[85] and, second, certain corporate statutes specifically mandate multi-fiduciary obligations.[86] For example, in terms of profitability and efficiency, a New Zealand state-owned enterprise (SOE) is benchmarked against privately owned companies, but also owes a statutory duty to be "a good employer" and "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates".[87] Furthermore, in recent decades, dual charter social enterprise vehicles have proliferated.[88] These organisations contribute to the normalisation of the idea that amoral profit does not have to be the sole purpose of a corporation.[89]

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[79] Maury Silver and Daniel Geller "On the Irrelevance of Evil: The Organization and Individual Action" (1978) 34 J Soc Issues 125 at 131, cited in Douglas Litowitz "Are Corporations Evil?" (2004) 58 U Miami L Rev 811 at 841.

[80] See Companies Act 1993, s 126 on who is a director; but see also s 137(c) on the position of a director in a company in relation to their duty of care.

[81] See, in particular, the basic fiduciary duty enshrined in Companies Act, s 131.

[82] See *Lee v Lee's Air Farming Ltd* [1960] UKPC 33; [1961] NZLR 325.

[83] See generally Frank Easterbrook and Daniel Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, 1991).

[84] Frank Easterbrook and Daniel Fischel argue: "[directors] do not have an ethical duty to obey … laws just because the laws exist. They must determine the importance of these laws … [directors] may not only but also should violate the rules when it is profitable to do so". See Frank Easterbrook and Daniel Fischel "Antitrust Suits by Targets of Tender Offers" (1982) 80 Mich LR 1155 at 1177.

[85] See, for example, Thomas Donaldson and Lee Preston "The Stakeholder Theory for the Corporation: Concepts, Evidence, Implications" (1995) 20 Academy of Management Review 65.

[86] On CSR in New Zealand, see Jonathan Barrett and John Horsley "Social Justice and the Veil of Incorporation: A New Zealand Perspective" in Ivan Tchotourian (ed) *Company Law and CSR: Convergence or Divergence, a New Approach about the New Challenge of Law* (Editions Bruylant, Brussels, forthcoming).

[87] See State-Owned Enterprises Act 1986, s 4(1). Furthermore, as the principal SOE shareholder, the Crown must act in a manner consistent with the principles of the Treaty of Waitangi as established in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (Court of Appeal): see State-Owned Enterprises Act 1986, s 9.

[88] See generally Matthew Doeringer "Fostering Social Enterprise: A Historical and International Analysis" (2010) 20 Duke J Comp & Int'l L 291. The Companies Act 1993 is sufficiently flexible to allow dual charter social enterprises to operate as companies: see Jonathan Barrett "Should New Zealand Adopt Hybrid Social Enterprise Legislation?" (2013) 19 NZBLQ 253.

[89] On multi-fiduciary duties, see generally Irene Lynch-Fannon *Working within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding: US and EC Perspectives* (Hart Publishing, Oxford, 2003).

Rather than specifying the corporate stakeholders, whose presumably disparate interests directors must balance (although they all have an interest in the greater community), directors could be granted a safe harbour protection along the lines of a public policy catch all. For example: no breach of the fundamental duty of loyalty to the corporation occurs if the decision is in line with the prevailing norms of the Human Rights State. Such a rule might be considered vague, but is no less nebulous than an injunction to act in the best interests of the company,[90] a fictive legal persona.[91] This protection would represent a return to Edwin Dodd's idea that "business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profits to its owners".[92]

Policy and Legal Implications

This part of the paper sketches the basic policy proposals that may inform the citizen-oriented corporation and employment law.[93] These are: rendering void certain terms in an employment agreement; establishing a general right of refusal; and reaffirming the role of whistle-blowing.

Void Terms

Any terms of an employment agreement which seek to restrict an employee's human rights or their responsibilities to other members of the community should be considered void and excisable from the employment agreement.

Employees' Rights of Refusal

Under the common law, an employer may not order an employee to perform an illegal act, and so it is not an issue of disobedience should the employee refuse to comply.[94] But we need to go further than refusing to commit crimes. Since human rights are essentially ethical in nature, despite their final expression in legal term,[95] employee-citizens of the Human Rights State must have a general right of refusal to perform any action that breaches their own rights or restricts their responsibilities to other members of the community. As Bovens explains:[96]

> …a general right of functionaries to remain indemnified against dismissal or other disciplinary measures when they refuse to carry out an assignment that in itself, or as a result of its consequences, is in conflict with important democratic or legal [or human rights] principles.

Such an indemnity should maintain "the autonomy and personal integrity of individual functionaries" but also contribute to developing "the power of morality within complex organisations".[97] Grounds for refusal would include: violation of rules and regulations;

[90] See Companies Act, s 131.
[91] As Lord Hoffmann observed in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12, there is no such thing as the company, "no ding an sich".
[92] E Merrick Dodd Jr "For Whom Are Corporate Managers Trustees?" (1932) 45 Harv L Rev 1145 at 1149.
[93] The role of executive directors has been noted and the correlative need for changes in company law.
[94] See *Gregory v Ford* [1951] 1 All ER 121.
[95] See Stephen Toope "Cultural Diversity and Human Rights (F.R. Scott Lecture)" (1997) 42 McGill LJ 169 at 180.
[96] Bovens, above n 43, at 180.
[97] At 180.

substantial and specific danger to public health, safety, or the environment; abuse of power or a demonstrable and flagrant conflict with the aims of the organisation; demonstrable, large-scale waste of public funds.[98]

Bovens argues that a right of refusal:[99]

> …is a form of internal control; the functionaries of the organisation are often the first to realise that a policy of assignment is harmful or likely to have otherwise undesirable consequences…[it] emphasises, moreover, the autonomy and personal integrity of individual functionaries – even when they are but small cogs in a large machine. In this way, the development of such a right to refuse can help increase the power of morality within complex organisations. It can contribute to the emergence of bureaucratic morality in which each functionary knows that he is responsible for the consequences of the particular task he performs. The introduction of such a right therefore has an important symbolic function. It does not yet offer any direct protection nor does it lead automatically to virtuous action, but it shows that there are alternatives.

Refusal to obey an unconscionable instruction is not a manifestation of disobedience or recalcitrance.[100] But such a right would need to be exercised conscionably and responsibly. "Compulsory resignation would be appropriate if it could be proved that the refusal was groundless, negligent, or careless [or malicious]".[101]

Whistle-blowing

A consideration of whistle-blowing generally starts with Ralph Nader's definition: [102]

> …an act of a man or woman who, believing that the public interest overrides the interest of the organization he (sic) serves, publicly "blows the whistle" that the organization is involved is corrupt, illegal, fraudulent or harmful activity.

Whistle-blowing performs a critical regulatory function. As Christopher Stone explains:[103]

> The corporate work force ... in the aggregate, will always know more than the best-planned government inspection system that we are likely to finance. Traditionally, workers have kept their mouths shut about "sensitive" matters that come to their attention. There are any number of reasons for this, ranging from the intangible forces of corporate loyalty and peer group expectations, to the employee's more solid fears of being fired or getting his source of income shut down for noncompliance with some law. And there is also at work, of course, the sheer indifference that workers may feel in a huge network of different responsibility.

Whistle-blowing is disruptive; it subverts "the hierarchical principles and role-playing niceties upon which all organizations are built".[104] Consequently, organisational responses to

[98] At 184-185.
[99] At 181-182.
[100] At 182.
[101] At 189.
[102] Ralph Nader, Peter Petkas and Kate Blackwell *Whistle Blowing: the Report of the Conference on Professional Responsibility* (Grossman Publishers, New York, 1972) at vii. See also Maurice Punch and James Gobert "Whistle-Blowing and the Public Interest Disclosure Act 1998" (2000) 63(1) MLR 25.
[103] Christopher Stone *Where the Law Ends: The Social Control of Corporate Behavior* (Harper & Row, New York, 1975) at 213.
[104] At 214-215.

whistle-blowing can be harsh and disproportionate.[105] But legal structures which permit the disruption of misplaced loyalty and fealty to the corporation are necessary if a culture of rights and responsibilities is to permeate organisations. Once more, employees must act conscionably and responsibly – whistle-blowing is justified on the basis of "individual accountability and employee citizenship",[106] but is "an emergency break that is not suitable for use in routine situations".[107]

The Protected Disclosures Act 2000 does, of course, give legislative effect to the principle of whistle-blowing in New Zealand.[108] Nevertheless, the Act does not protect leaks to the media which may be the most effective and expeditious way of bringing corporate malfeasance to public attention.[109] Furthermore, a *Sunday Star-Times* investigation showed that, not only is there great public confusion about the Act,[110] but also public opinions on whistle-blowers varies from "heroes to pond life with an agenda".[111] Whistle-blowers face, among other consequences, harassment and retaliation from co-workers.[112] Indeed, it is the culture of organisations which treat whistle-blowing as betrayal that is most difficult to counter, and it is perhaps impossible for legislation to achieve this alone.[113]

Conclusion

This paper has outlined the concept of the Human Rights State, and has argued that full inclusion in that moral and political community constitutes citizenship. Being a citizen, in this sense, is not optional, partial or negotiable – citizenship cannot be 'swiped-off' at the entrance to the corporation and reassumed on exit. Employers may increasingly seek to control employees' working and non-working lives; citizenship of the Human Rights State demands an opposite momentum so that a culture of rights and responsibilities permeates the workplace.

To paraphrase Norman Kirk, what should really matter to us as citizens of the Human Rights State "is our sense of social and moral responsibility in translating material wealth into human values".[114] Corporations provide jobs and create wealth, but they are no more than a

[105] For example, leaked documents regarding a restructure of the Ministry of Foreign Affairs and Trade led to a draconian witch hunt: see Adam Bennett "Ombudsman investigating complaint against MFAT leak" *The New Zealand Herald* (online ed, Auckland, 17 June 2014).
[106] Bovens, above n 43, at 212.
[107] At 214.
[108] See Catherine Webber "Whistleblowing and the Whistleblowers Protection Bill" (1995) 7 Auckland UL Rev 933; Gehan Gunasekara "News Media Exposure, Corporate Insiders, and the Dilemmas of Whistle-blowers" (2005) NZBLQ 3.
[109] See PACE Resolution 1729/2010 on the Protection of "whistle-blowers" (text adopted by the Assembly on 29 April 2010 (17th Sitting)); Dirk Voorhoof "Whistleblowing and the Right to Freedom of Expression and Information under the European Human Rights System" (EUI Seminar, Centre for Media Pluralism and Media Freedom, Florence, 30 September 2013).
[110] The Ombudsman published a plain language guide to the Protected Disclosures Act a few weeks before the *Sunday Star-Times* article went to press: see Beverley Wakem *Making a protected disclosure – "blowing the whistle"* (3 November 2012).
[111] See Rob Stock "NZ's attitudes to whistleblowers" *Sunday Star-Times* (online ed, New Zealand, 18 November 2012).
[112] See Voorhoof, above n 109.
[113] See Jeanette Ashton "15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger" (2015) 44(1) Ind Law J 29.
[114] Cited by Margaret Hayward *Diary of the Kirk Years* (Reed, Wellington, 1981) at 180.

mechanism for enabling productive human cooperation. This paper has argued that citizenship is full inclusion in the Human Rights State. The workplace cannot be an exception to citizenship. Indeed, given the critical importance of employment for most of us, the workplace is the key space where rights and responsibilities must be nurtured and protected. The power of employers to curtail their employees' rights and responsibilities by contract must be restricted. Yet, following Bovens, even where restrictions are in place, they should be subservient to a fundamental right of refusal. Such a right would not inhibit employees from acting honestly and diligently for their employers. Employees do indeed behave virtuously when they honour the conscionable promises they have made to their employers, but giving effect to those promises must not be at the expense of employees' civic responsibilities owed to other citizens.

In workplaces where respect for human rights and responsibilities are normalised into everyday behaviour, both in the employment relationship and in dealings with the general community, exercise of a right of refusal or whistle-blowing should be a rare occurrence. Furthermore, when corporations are no longer able to gag or otherwise restrict their employees' exercise of their rights and responsibilities, they will become more accountable to the general community.

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Privacy Law Reform in New Zealand: Will it Touch the Workplace?

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Abstract

This paper explores the implications of the introduction of new information-gathering technologies into the workplace. It concludes that, unfortunately, proposed reforms to the Privacy Act 1993 are unlikely to 'step in' to protect workers' rights to privacy. A comparison between privacy complaints in the workplace in New Zealand and Hong Kong demonstrates a regrettably lax approach on the part of New Zealand's privacy regulatory actors and bodies. The issue of workplace surveillance is only going to become more vexed over time, as new emerging technologies develop.

Key words

Privacy Act 1993, labour law, privacy law, Privacy Commissioner, workplace privacy, personal information.

Introduction

The Privacy Act 1993 is currently in the process of being amended in light of some of the Law Commission's recent review recommendations.[1] The short answer to the question posed in the title of this paper is 'probably not'. This would be disappointing, because privacy interests often raise important and difficult issues in the workplace. In particular, the collection of information about workers in relation to their private lives and their on-the-job conduct will continue to be a flashpoint at the employment law / privacy law interface, and this is only likely to increase as technology develops new ways of collecting and analysing such information.

The issue is whether or not the law is ever going to step in to set some firm limits. While there is legal support for business and managerial prerogative, and excitement over new technological developments that can have workplace applications, the fact that workers might have any privacy rights is generally regarded as a subsidiary matter, if it is regarded at all. And yet New Zealand is legally bound to give substance to the right to privacy, as provided for under art 17 of the International Covenant on

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[1] The extensive review, which occurred between 2007 and 2011, generated the following papers: *A Conceptual Approach to Privacy* (NZLC MP19, 2007); *Privacy Concepts and Issues, Review of the Law of Privacy, Stage 1* (NZLC SP19, 2008); *Public Registers: Review of the Law of Privacy stage 2* (NZLC R101, 2008); *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009); *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy, Stage 3* (NZLC R113, 2010); *Review of the Privacy Act 1993* (NZLC IP17, 2010); *Review of the Privacy Act 1993: Review of the Law of Privacy, Stage 4* (NZLC R123, 2011).

Civil and Political Rights 1966 (ICCPR):[2]

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

While it is true that inroads can be made into some human rights with the individual's consent, such as the right to privacy, agreeing to be an employee does not mean that individuals have completely surrendered the right. Interference with privacy must not be "arbitrary". This means that there must be some reasonable basis for employer inroads into the right, and that the interference itself must be reasonable.[3]

Moreover, while individuals may in law consent to intrusions into their personal sphere, it is usually because refusal is not a practical option. In addition to being bound by the ICCPR, New Zealand also has a Privacy Act:[4]

> …to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (OECD Guidelines).

The standards set out in this instrument, however, have been implemented in New Zealand law in a way that is highly flexible, and that tends to be balanced more towards the employer's rather than the employee's benefit. This could be due to the value our society places on material or quantifiable, as opposed to intangible, interests, as well as the political influence of business as opposed to human rights proponents.

Some jurisdictions, such as Hong Kong, have set stricter limits than New Zealand on employer intrusions into employee privacy, though each purports to be acting in accordance with international privacy standards. The Hong Kong position may be a case of human rights protections making up for a lack of employment protections. The efficacy of data protection regulation in protecting workers' privacy interests generally tends to depend on the approach of the data protection authorities and legal institutions that apply and interpret the law. Such limits as have been imposed in New

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[2] 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); ratified by New Zealand on 28 December 1978.

[3] The Human Rights Committee, which is the supervisory body for the ICCPR, has explained that "The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances": *General Comment 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)* HRI/GEN/1/Rev.9 (Vol I) (adopted 8 April 1988) at [4]. See, for example, *Rojas García v Colombia*, Communication No 687/1996, UN Doc CCPR/C/71D/687/1996 (2001); *M G v Germany*, Communication No 1482/2006, UN Doc CCPR/C/93/D/1482/2006 (2008); *Nystrom, Nystrom and Turner v Australia*, Communication No 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (2011); *Naidenova et al. v Bulgaria*, Communication No 2073/2011, UN Doc CCPR/C/106/D/2073/2011 (2012). One commentator notes that "regardless of its lawfulness, arbitrary interference contains elements of injustice, unpredictability and unreasonableness": Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, Engel, Kehl am Rhein, 2005) at 383.

[4] Privacy Act 1993, long title.

Zealand mainly seem to have been set by the specialist employment law institutions rather than through privacy law.

There are arguably two factors that account for a lack of active protection for workers in the privacy context. Firstly, there is the nature of the relationship, which is viewed as consensual rather than one where there is a power imbalance between the parties that needs no more in the way of adjustment than guarantees of minimal employment law rights, as opposed to civil rights. Secondly, the Privacy Commissioner has fallen into a legitimising role in relation to new technologies, facilitated by the lack of any real power to exert control over new and intrusive practices. This characteristic is not unique to New Zealand officials, but is common among privacy commissioners elsewhere who have been left to advise from the sidelines. The New Zealand approach will be compared here to that in Hong Kong, where the law is similarly based on the OECD Guidelines, but standards appear to have been upheld more strongly in the face of employer initiatives to employ new technologies to collect worker information.

Overview of the Privacy Act in Relation to Employment

Privacy legislation covering both the public and private sectors has now been in force in New Zealand for just over 23 years. The Privacy Act 1993 is based around 11 information privacy principles that draw on the 1980 OECD Guidelines.[5] The currency of this legislation is "personal information", which is defined as information about an identified or identifiable individual.[6] The concept of "personal information" in New Zealand also covers both opinion and false information about an individual. "Personal information" need not be in recorded form,[7] and the concept extends to what is held in a person's memory. A case that illustrates the utility of extending the concept to unrecorded information in the employment context is that of an unsuccessful job applicant who requested the interview notes of an appointment panel. Although the panel members destroyed their notes after the employment decision was made, on review the individual panel members were asked "each to supply a written statement of reasons why the other candidates had been considered better suited, or the requester considered less suited, for the position."[8]

There have been many New Zealand privacy cases relating to the workplace. An important feature of the legislation is that a breach of a privacy principle on its own does not necessarily lead to liability under the Privacy Act. Except in the case of denied access or correction rights, the breach of a privacy principle must always be accompanied by some loss or harm, and in the case of emotional harm, there must be "significant humiliation, significant loss of dignity, or significant injury to feelings".[9] This functions as an important sifting mechanism in the legislation to filter out complaints of a minor nature.

[5] Section 6.
[6] Section 2.
[7] See, for example, *Re Application by L [information stored in person's memory]* (1997) 3 HRNZ 716.
[8] *Case No 794* (1987) 8 CCNO 66 (Ombudsmen's Cases), a public sector case dealt with under the Official Information Act 1982; after 1993, it would have been dealt with in a similar manner by the Privacy Commissioner under the Privacy Act.
[9] Section 66(1)(b)(iii).

The Privacy Commissioner oversees the application of the Act and plays an important role in investigating and conciliating complaints. The Privacy Commissioner's views, however, are not legally binding.[10] Only the Human Rights Review Tribunal can determine legal issues at first instance,[11] but it cannot do so unless the Privacy Commissioner has first investigated the complaint. If a complaint has not been resolved by the Privacy Commissioner, it can be taken to the Tribunal by the Director of Human Rights Proceedings if he decides to do so, or else personally by the aggrieved individual. There are rights of appeal from the Tribunal to the higher courts of general jurisdiction in the judicial hierarchy.[12]

The legislation, however, contains a disjunction in the processing of privacy complaints between the approach to be taken by the Privacy Commissioner and that taken by the Tribunal and appellate courts. This results from the Privacy Commissioner's express duty to balance privacy against other important social interests, such as the right of businesses to operate efficiently,[13] a balancing exercise that does not apply to the Tribunal or appellate courts. The Court of Appeal majority in *Harder v Proceedings Commissioner* once commented that s 14(a), although directed to the Privacy Commissioner, implicitly applies to the Tribunal and appellate courts,[14] however this wider reading of s 14(a) has never been subsequently adopted. We are therefore left with a difference in legal approach between application of the Act by the Privacy Commissioner, and that by the Tribunal and other judicial institutions. The reason for the difference in approach is not evident,[15] but it allows the Commissioner to promote the settlement of complaints in a pragmatic way. However, it also tends to permit the Commissioner to operate in a manner that is less strict on employers, as is evident from a number of investigation case notes. It seemingly permits business efficiency considerations to trump workers' privacy interests under the information privacy principles. Neither the New Zealand Law Commission nor the government has indicated that s 14(a) ought to be changed.

New Zealand employment law, however, has been ready to recognize the privacy principles in the Privacy Act and has used them to inform decisions on whether an employer's action has been fair and reasonable, even though the specialist employment institutions do not have the jurisdiction to interpret these principles or apply them directly; only the Human Rights Review Tribunal has such jurisdiction, with the Privacy Commissioner's views being relevant (though of no legal force) for the purpose of conciliating privacy complaints.[16] The Employment Court has

[10] Section 78. The Privacy Commissioner can only make a final and binding decision about an unreasonable charge imposed for access to personal information held by a private sector agency (personal information held by public sector agencies is available free of charge).

[11] There is currently a proposal to amend the legislation to allow the Privacy Commissioner to determine access complaints: see *Government Response to Law Commission report on Review of the Privacy Act 1993* (27 March 2012) at 5.

[12] These are the High Court, the Court of Appeal and the Supreme Court.

[13] Section 14(a) provides that the Privacy Commissioner must "[h]ave due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way".

[14] [2000] 3 NZLR 80, at [23].

[15] This feature of the legislation is perhaps unintentional in relation to complaints. It has greater relevance to the Privacy Commissioner's public advocacy function in promoting privacy.

[16] The earliest employment law case drawing on the principles of the Privacy Act was *Graham v Christchurch Polytechnic* CEC 48/93, 14 September 1993, which was decided just a few months after the Privacy Act came into force. In *NZ Amalgamated Engineering Printing and Manufacturing Union*

recognized that "[t]he Privacy Act's provisions may be said to represent current community standards and expectations",[17] which are considerations that are relevant in deciding whether or not an employer's actions are justifiable.

Collection of Personal Information

The basic international standards relating to the collection of personal information are that collection should not be unlimited, and that the manner of collection should be fair. This is expressed in the OECD Guidelines collection limitation principle, which provides that:[18]

> There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

This principle is transposed into the Privacy Act by principles 1 to 4.[19]

Firstly, the collection of information must be "necessary" for the purpose for which it is being collected.[20] The term "necessary" has been judicially interpreted as "reasonably necessary",[21] and, as will be seen, the Privacy Commissioner tends to take a wide view of what is necessary to collect, since the legislation under s 14(a) requires the Commissioner to have:

> …due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way.

Secondly, personal information must also be collected by lawful and fair means.[22] It should be noted that this requirement refers to the manner of collection rather than the content of the information concerned.

These two aspects of the collection limitation principle are non-derogable, in the sense that there are no exceptions and there is no provision for the individual concerned to waive the right.

Inc v Air New Zealand Ltd (2004) 7 HRNZ 539 at 218, the Court observed that "the Privacy Act 1993 does not give rights or impose obligations that are enforceable in this or any other Court of law. Questions of statutory privacy are to be dealt with by a discrete and exclusive procedure involving, among others, the Privacy Commissioner and the Human Rights Review Tribunal."

[17] *NZ Amalgamated Engineering Printing and Manufacturing Union Inc*, above n 16, at 221.

[18] Council of the Organisation for Economic Co-operation and Development (OECD) *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (1980, updated in 2013) at [7].

[19] Section 6.

[20] Principle 1.

[21] *Lehmann v Canwest Radioworks Limited* [2006] NZ HRRT 35. In Australia, the phrase "reasonably necessary" is employed in the legislation itself: Privacy Act 1988, APP 3.1 and 3.2. In Hong Kong, however, the term "necessary" in the legislation is more strictly interpreted, as will be seen, inter alia, from the cases dealing with the employment context. Both Australian and Hong Kong privacy law were also based around the OECD Guidelines.

[22] Principle 4.

Thirdly, personal information should be collected with the individual's knowledge or consent, where appropriate.[23] There are a number of exceptions to this aspect of the collection limitation principle.

Collection of Personal Information from Job Applicants

Without some legal protection, job applicants are ordinarily not in a position to refuse to disclose information requested by an employer or employment agency. Most jurisdictions now provide remedies for discriminatory hiring practices in their human rights legislation, and New Zealand is no different in that respect.[24] New Zealand also has a spent convictions regime.[25]

Whether or not the collection of particular information is "necessary" in the pre-employment context has in practice involved an assessment of its reasonableness, and due allowance has been made here, as elsewhere generally in employment matters, for the exercise of managerial prerogative. The views of the Privacy Commissioner on a number of complaints indicate that, non-derogable or not, the "necessary to collect" test in principle 1 involves a low threshold that is not difficult for an employer to satisfy.

The Privacy Commissioner has found that personality testing of job applicants is permissible under the Privacy Act. In one case,[26] the complainant had applied for a sales position and was asked to complete a form containing 200 questions. She claimed that the questions were too personal considering the nature of the position. The Commissioner considered that, in terms of principle 1 ("Purpose of collection of personal information"), the collection of information about a prospective employee's personality and attitudes was a lawful purpose connected with the employer's function. He noted that other agencies used such tests, and that:

> …the use of such extensive questions could probably be justified only in the context of obtaining the information as part of a comprehensive personality test to assess aptitude for a particular position.

On the facts of the case, the Commissioner could not say that the test was unnecessary or that the information collected was excessive. The Commissioner could only find a breach of principle 3 ("Collection of information from subject"), because when the information was being collected, the complainant should have been informed that her information would be passed to another agency for evaluation. The Commissioner did not address the intrusiveness of the test or its relevance to the particular position sought by the applicant. The employer, however, ought to have borne the burden of proving that the test was indeed "necessary". This case illustrates that the Act tends to be ineffective in substantively limiting the amount and extent of information collected, and that it is more easily invoked where there has been a technical failure to comply with the proper procedure for collecting personal

[23] Principle 3(1).
[24] Part II of the Human Rights Act 1993 deals with acting on the basis of particular prohibited grounds of discrimination. In particular, s 23 makes it unlawful "to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment" that suggests that a decision will be made on the basis of a prohibited ground of discrimination.
[25] Criminal Records (Clean Slate) Act 2004.
[26] Privacy Commissioner *Case Note 2418* [1999] NZPrivCmr 6.

information. In this case, the Act required that the individual concerned be informed of the intended recipients of the information. This is cold comfort, however, where there are loose restrictions on the extent of information that can be collected.

Employment law drew upon the collection principles in the Privacy Act to assist the Employment Relations Authority in a case where it determined whether or not an employer had justifiably dismissed an employee. The reason for the dismissal was the employee's failure to volunteer information in a pre-employment form that the employer was not entitled to collect in the first place.[27] The employee was dismissed because she allegedly misrepresented her medical condition on the form when she applied for a sales position. The form included a question about whether she had medical problems of any kind. In completing the question, she referred only to a condition that affected her hip joint. Once she was employed, her employer thought she was taking an excessive number of sick days. When dismissing her, the employer accused her of having failed to disclose at least two pre-existing medical conditions that had a serious impact on her ability to perform her job. The Employment Relations Authority determined that the applicant's failure to refer to the two pre-existing medical conditions did not amount to misrepresentation because the employer was not entitled to collect this information since it was likely to be in breach of the Privacy Act collection principles. The scope of the information sought went beyond what was relevant to the employer's compliance with its health and safety obligations or the employee's ability to do her job. The Authority's determination was upheld on appeal to the Employment Court, which remarked that the company's question was "inappropriate" and imposed no obligation on the job applicant to disclose all of her medical problems. Therefore, the employee could not be justifiably dismissed because of this failure to disclose the information concerned.[28]

Covert Recording

In New Zealand, there are few legal controls on surreptitious video or audio recording in the workplace – or elsewhere for that matter. There is a prohibition against the carrying out of surveillance by private investigators on private property without consent of the lawful occupiers,[29] and a prohibition against the surreptitious use of video cameras that also have audio recording capabilities.[30] Although the Privacy Commissioner has long accepted that surreptitious recording is covered under the Privacy Act,[31] this view is questionable[32] and is proposed to be clarified by a change to the law.[33]

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[27] *Attwood v Imperial Industries* WA 72/01, 25 October 2001. Although this case did not arise in the Privacy Act jurisdiction (which would have been heard in the Human Rights Review Tribunal), the Employment Relations Authority member who delivered this decision was also the Chairperson of the Human Rights Review Tribunal.

[28] *Imperial Enterprises Limited v Attwood* [2002] 2 ERNZ 740 at [59].

[29] Private Security Personnel and Private Investigators (Code of Conduct — Surveillance of Individuals) Regulations 2011, reg 6.

[30] Crimes Act 1961, s 216B ("Prohibition on use of listening devices").

[31] See, for example, "Extract from a letter by the Privacy Commissioner concerning video surveillance" in *A Compilation of Materials on the Privacy Act 1993 and the Office of the Privacy Commissioner February 1994-December 1994* (vol 2) at 252–253; and Privacy Commissioner *Case Note 0632* [1994] NZPrivCmr 27 and *Case Note 16479* [2001] NZPrivCmr 6.

However, even if surveillance is covered under the Privacy Act, the legislation would be of little avail in the workplace, to judge by the few reported cases on workplace surveillance. In these cases, the Privacy Commissioner found workplace surveillance to be a permissible practice. In the earliest case,[34] the Commissioner dealt with an employee's complaint about surveillance of a work changing room in order to detect theft. The Commissioner found that the employer was not obliged to take reasonable steps to ensure, in accordance with principle 3 ("Collection of information from subject"), that the employee was aware that the surveillance was being undertaken. This was on the basis of a number of exceptions to that principle that illustrate its ineffectiveness in addressing surveillance activities. The Commissioner found that:

- It was not reasonably practicable to draw on the fact of filming to the complainant's attention as the video surveillance was intended to film covert and unlawful behaviour (principle 3(4)(e));
- It would have prejudiced the purpose of collection if the complainant had been told that he was being filmed prior to the surveillance taking place (principle 3(4)(d)); and
- Non-compliance with principle 3 was necessary to gain sufficient evidence of theft to enable prosecution of an offender before a Court (principle 3(4)(c)(iv)).

Moreover, the Commissioner found that the way the information was collected did not breach principle 4 ("Manner of collection of personal information") because:

- The use of the video camera to collect information was lawful;
- The agency had taken steps to minimise the extent of surveillance;
- The locker room was not a private space intended for the removal of clothing;
- In the videotape viewed, the complainant had only been recorded removing his outer clothing, therefore this limited amount of filming without the use of sound was not an 'unreasonable' intrusion upon the complainant's personal affairs; and
- Given the need to identify the source of the stolen property and that the video camera was used solely for this purpose the covert surveillance was not unfair.

In a similar subsequent case,[35] a union complained on an employee's behalf that a video camera had been installed in a locker room. The union was concerned that employees had not been notified before the camera was installed. The Privacy Commissioner, however, formed the view that none of the collection principles had been breached. The purpose of installing the cameras was to identify the persons responsible for thefts from the lockers. A notice was displayed at the entrance to the worksite, advising that hidden cameras might operate there. The employer also explained that previous warnings to workers about theft had been unsuccessful as a

[32] See *Harder*, above n 14, which found that surreptitious voice recording over a telephone did not constitute a "collection" of information, but was the receipt of unsolicited information, which is excluded from the Privacy Act s 2 definition of "collect".
[33] Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy, Stage 4* (NZLC R123, 2011), recommendation 7.
[34] *Case Note 0632*, above n 31.
[35] *Case Note 32277* [2003] NZPrivCmr 25.

deterrent. The Commissioner therefore believed that the employer had a lawful purpose in installing the camera, and that the collection of the information was necessary for that purpose. The Commissioner, however, considered that the sign at the worksite warning employees generally of hidden filming was insufficient to alert employees that there was a hidden camera in the locker room, as employees would not expect that. However, an exception to the requirement of notification applied in the circumstances, in that the employer reasonably believed that compliance would prejudice the purposes of the collection.[36] The Commissioner also did not consider that the filming was unfair since there had previously been thefts from the locker room, and management had been requested to find the thief. Moreover, the Commissioner did not find that the filming was unreasonably intrusive into workers' privacy, despite the filming taking place in a locker room. This was on the basis that activities in the shower or toilet area were not filmed; the camera was activated only by movement near the target locker; it was necessary that the camera be able to record faces so as to identify the thief; and the camera was to be in operation only until the culprit was identified.

In another workplace case,[37] the Commissioner found it acceptable for an employee to surreptitiously film a colleague with a cellphone. Both worked as caregivers for young people with disabilities, and the worker was concerned about the complainant's conduct towards clients, which could be abusive and inappropriate. Believing the complainant posed a safety risk, he gave the recordings to their employer, who used them in disciplinary proceedings against the complainant that resulted in a warning. The Commissioner observed that the recordings provided the employer with the best evidence against the employee. The Commissioner recognised, however, that "covert recording is intrinsically intrusive, and needs strong justification for its use." While finding this to be a "difficult case", the Commissioner observed that the intrusion was justified in light of the safety reasons for collecting clear evidence of wrongdoing, particularly as the victims were not in a position to complain of mistreatment on their own account. Accordingly, the Commissioner remarked that:

> On balance, this was one of the rare occasions where it will be acceptable for an onlooker to make a covert recording to ensure that evidence of what was said is accurately captured.

As the relevant principle on the fairness of collection (principle 4) does not provide for any exceptions, the reasoning in this case note must depend on the Commissioner's duty under s 14 of the Privacy Act to balance privacy against other important social interests. The Tribunal, however, is not bound by the same requirement, so if the complaint had been taken further, the result might not have been the same.

The Privacy Commissioner did not find it acceptable to surreptitiously record an interview with an employee suspected of stealing stock.[38] The employee was dismissed, but found out about the recording in the course of proceedings contesting his dismissal. The Commissioner found that the employer had not breached the

[36] Principle 3(4)(d).
[37] *Case Note 101213* [2008] NZPrivCmr 4.
[38] *Case Note 16479* [2001] NZPrivCmr 6.

collection principle that covered the lawfulness and necessity for collecting the information (principle 1), as collecting information and evidence relevant to a possible termination of employment was lawful and reasonably necessary for a business. However, the employer had breached the collection principle that requires the individual to be informed of the collection of the information (principle 3), since the employer obtained an accurate reproduction of the exact words and inflections used by the employee when being interviewed. The Commissioner commented that "[t]he fact of recording an interview on tape, rather than merely relying upon written notes and memory, is a matter that the individual should be made aware of." The Commissioner also found that the collection of the information was unfair (principle 4), since the individual would not be aware of all "the minute details of what was said and how it was said" that could be recorded by taping, as opposed to recording by hand or through one's memory. The individual might also have responded to questions differently if he was aware of the recording. The Commissioner added that the nature of the relationship between the parties, being an employment relationship, and the circumstances in which the recording took place, also contributed to the unfairness.

In the specialist employment law jurisdiction, on the other hand, covert recordings of interviews between employers and employees have been found to be admissible as the best evidence of what was said. For example, in the Employment Relations Authority, an employee's covert recording of a conversation with his employer was accepted as evidence in his constructive dismissal case.[39] The Authority held that it would be unfair to deprive the employee of being able to prove the "resign or be dismissed" attitude of his employer. Both sides in that case relied on a Court of Appeal decision on an appeal from the Employment Court that dealt with the admissibility of a telephone conversation that had been covertly recorded by one of the parties.[40] The Court of Appeal held that there could be cases where such recordings could breach the duty of fair dealing between the parties, but the ultimate criterion is fairness in the circumstances. In that case, the recording was found to be admissible.

The position regarding surveillance in the workplace in New Zealand may be contrasted with that in Hong Kong. The case law indicates that Hong Kong's approach is somewhat more strict than in New Zealand, with emphasis placed on the proportionality of the practice in the circumstances.[41]

In one case,[42] a government department installed pinhole cameras at different locations in its regional office, including near the toilets and changing rooms. The purpose of these was to detect crime, since there had been a series of thefts in the office. The Privacy Commissioner referred to his publication *Privacy Guidelines: Monitoring and Personal Privacy at Work*, and stated:

[39] *Simms v Santos Mt Eden Ltd* ERA Auckland AA 254/05, 21 August 2003.
[40] *Talbot v Air New Zealand* [1995] 2 ERNZ 356, [1996] 1 NZLR 414 (CA).
[41] The Office of the Privacy Commissioner for Personal Data (HK) has produced a publication to assist employers who propose to monitor employees: *Privacy Guidelines: Monitoring and Personal Data Privacy at Work* (December 2004). It is not legally binding, nor does it purport to set out definitive statements of the law, but it is in the nature of recommendations for best practice.
[42] Office of the Privacy Commissioner for Personal Data (HK) *Case No 2005C06.*

> … covert monitoring is not to be used unless justified as last resort measures and being absolutely necessary in detecting or gathering evidence of unlawful activities, and the monitoring should be limited in scope and duration. Further, the employer should formulate a clear employee monitoring policy by making known and communicating to the employees the purposes of the monitoring, the circumstances under which monitoring will take place and the kind of personal data that will be collected.

The Commissioner found that, although the employer had a legitimate purpose in protecting property from theft, the evidence did not show so great a risk of loss as to justify large scale hidden filming activities, which was highly privacy intrusive. The Commissioner remarked that:

> The dimension and extensiveness of the monitoring activity carried out was out of proportion to attaining the purpose of collection, and the department was intent upon engaging in continuous and universal preventive monitoring.

Moreover, there was no definite plan or policy regarding its duration. Other, less privacy intrusive means or overt monitoring could have been considered instead. Accordingly, the Commissioner found that the monitoring was carried out in an unreasonable and unfair manner.[43]

In a subsequent case,**[44]** the Commissioner also found that surreptitious recording was inappropriate in the circumstances. Two employees of a residential estate were dismissed for unauthorised absence from duty after a pinhole camera filmed them lingering for more than an hour in a changing room. The camera had been placed in the staircase leading to the changing room, its purpose being to monitor employees and enhance security. No notice was posted in the area being monitored to inform people that it was under surveillance. The Commissioner did not accept that the camera was installed on the property for security purposes, because it was covert rather than overt. The Commissioner also found that the collection of information about the employees without their knowledge was unfair in the circumstances, and so breached the collection principle.**[45]** The employer had no privacy policy on employee monitoring, and so employees would not reasonably expect to be monitored by a hidden device. The Commissioner commented that "[c]overt monitoring is generally regarded as highly privacy intrusive. Employers should not adopt covert monitoring unless it is justified by the existence of special circumstances and reasons."[46]

The Commissioner stated that, even if the employer suspected employees of dereliction of their duties, the lack of seriousness of their misconduct did not justify the highly privacy intrusive measures taken. Other, less privacy intrusive means were available, such as a surprise check. If it was considered that monitoring devices were necessary, overt rather than covert ones would achieve the same result.

Collecting Information from Workplace Computers

[43] Accordingly, there was a breach of Data Protection Principle (DPP) 1(2) ("Purpose and manner of collection of personal data"). Moreover, there was also a breach of DPP 5 ("Information to be generally available") because of the lack of an employee monitoring policy.
[44] Office of the Privacy Commissioner for Personal Data (HK) *R12-4839* (14 February 2012).
[45] DPP 1(2).
[46] At [32].

There are a few employment law cases involving the collection of information from workplace computers by employers, but the Privacy Act plays no significant role, if any, in these. Such cases tend to turn on the justifiability of subsequent disciplinary action. There are no privacy rights per se in respect of employees' workplace email or other internet use, but the justifiability in terms of employment law of any disciplinary action for misuse may turn on whether the employee had a reasonable expectation of privacy in the circumstances, and other factors. For example, there have been cases that turned on whether there had been employer training and policies regarding internet use,[47] the nature of the use (messages containing sexual innuendos and surfing the net for pornography being particularly frowned upon),[48] the length of service,[49] and rights of free expression during industrial negotiations.[50] The emphasis has been on fairness and due process, rather than reliance on the Privacy Act.

One could raise the technical issue of whether an employer who gathers information about an employee's internet use is actually "collecting" information in strict terms of the Privacy Act. This is because the employer already "holds" this information in its computer system, which is a prerequisite for the use and disclosure of it. Much information will also likely be "unsolicited" information (and so it falls outside the Act's limited s 2 definition of "collect").[51] Therefore, the rules relating to individual notification (principle 3), and the requirement that the retention, use and disclosure of such information must relate to the original purpose for collecting it, do not apply. Any rights that an employee has in this area in respect of the collection of personal information therefore arguably stem from employment law, not from the Privacy Act, which technically may not apply.

A Privacy Commissioner's case note on the collection of personal information from a worker's computer by means of monitoring software proceeded on the basis that the employer was indeed "collecting" the information in terms of the Privacy Act.[52] The monitoring took place in the context of an employment investigation, and the information collected included emails sent to and from the computer, and key-stroke logs for the computer. The key-stroke logs were used to access the worker's personal web-based email account, and several emails were copied. The Commissioner dealt separately with the information collected directly from the work computer, and the information collected from the worker's personal email account. The Commissioner considered that the collection of information directly from the work computer did not breach the Privacy Act, since computer monitoring was provided for in both the employment agreement and work rules.

One matter that was not covered, however, was notification that detailed information was being collected through key-stroke logging, and this was a breach of the Privacy Act collection principle that requires making an individual aware of the fact that information is being collected (principle 3(1)). The Commissioner also found that the employer's use of the worker's password through key-stroke logging to gain access to the worker's personal email account breached the Privacy Act collection principles. The access to a significant number of emails sent over a number of years "was

[47] *Clarke v Attorney-General* [1997] ERNZ 600 (EmpC).
[48] *Clarke*, above n 47; *Allerton and Offord v Methanex (NZ) Ltd* WC 23/00 (EmpC).
[49] *Clarke*, above n 47.
[50] *Howe v The Internet Group Ltd (IHUG)* [1999] 1 ERNZ 879 (EmpC).
[51] The definition of "collect" excludes unsolicited information.
[52] *Case Note 229558* [2012] NZPrivCmr 1.

unnecessary and disproportionate to the employer's needs";[53] and workers were not notified that the employer could use key-stroke logging to obtain their passwords to collect further personal information about them that was not held on their work computer.[54] Moreover, given that there was a high expectation of privacy in a password-protected account, "it would require exceptional circumstances to justify an employer directly accessing it". As there were no such circumstances in the present case, "this method of collection was unreasonably intrusive".[55] This complaint was subsequently settled through mediation.

Another Privacy Act case,[56] decided in the Tribunal, concerned an employer who pressured an employee to access Facebook so that a screenshot could be taken of a photograph taken and uploaded by a former employee that was insulting to the company. The Tribunal did not deal with any issues relating to the collection of this information because the complainant's case on this point was "bound to fail" because she would not have been able to prove a causal connection between the alleged breaches of the collection principles and the eventual harm she suffered when the former employee's photograph was disclosed to local employment agencies, harming her chances of finding employment.[57] This was a surprising finding, since, but for the collection of the information, it could not have been subsequently disclosed.

In a Hong Kong case,[58] a worker complained that her employer logged into her computer to collect cookies without notifying her. She had been assigned a username but was able to set her own password. The complainant's supervisor asked for her password for "emergency use". The supervisor later found that she used the computer to play online games during work hours, and the supervisor collected her browsing history (the cookie data). The Commissioner first found that the cookies contained personal data about the complainant, since they contained her name and the websites browsed by her. The Commissioner went on to find that, since the cookies were records gathered by the supervisor to determine whether or not the complainant was breaching work rules, there had been a collection of her personal data by the supervisor. The Commissioner found that the collection of information in the circumstances was unfair,[59] noting that "[t]he employer had not taken any practical measures to stop or prohibit the Complainant from using the Computer for private purposes or storage of private data." The complainant had a reasonable expectation of privacy, given that passwords were private to employees. The supervisor's use of the password was therefore inconsistent with the professed reason for asking for it, which was for "emergency use". Consequently, the Commissioner issued an enforcement notice to stop the employer using employees' passwords to log into their computers and collecting employees' browsing histories unless the employer had their prior consent. The Commissioner also found a breach of the openness principle,[60] in that the employer:

[53] There was therefore a breach of principle 1.
[54] There was therefore a breach of principle 3.
[55] There was therefore a breach of principle 4.
[56] *Hammond v NZCU Baywide* [2015] NZHRRT 6.
[57] At [133]. In the result, the former employee was awarded $168,000 for this harm, the amount stemming from the employer's disclosure of the information (under principle 11), but not from the dubious manner it was collected in the first instance.
[58] Office of the Privacy Commissioner for Personal Data (HK) *Case No 2006C14* (September 2010).
[59] In breach of DPP 1(2).
[60] DDP 5 ("Information to be generally available").

> …had not taken all the practicable steps to ensure that the Complainant was aware of the policy and practices of the Organization on recording employees' browsing history in its computers.

Collection of Workers' Bodily Substances

With the testing of bodily substances, one encounters a conceptual difficulty: are bodily fluids and cells "personal information", or are they merely, and literally, disembodied data that, when analysed scientifically, yield personal information, but are not personal information themselves? Accordingly, unless legislation specifically includes bodily substances in the definition of "personal information", the notion becomes contestable.[61] Thus, for example, the New South Wales Privacy and Personal Information Protection Act 1998 includes "bodily samples" in its definition of "personal information".[62]

The New Zealand Privacy Commissioner has opposed random drug testing in the workplace,[63] but there have been no published Privacy Act complaints on the issue.[64] Assuming that collecting a bodily sample such as urine would amount to the collection of "personal information", the testing would have to be for a lawful purpose connected with a function or activity of the employer and necessary for that purpose (principle 1), and it would have to be carried out fairly and without intruding unreasonably into the individual's personal affairs (principle 4). For better or worse, workplace testing can generally be viewed as reasonably necessary by employers insofar as it ostensibly addresses productivity and health and safety issues. Moreover, in principle at least, testing is a consensual activity, despite the likelihood that an unreasonable refusal to undergo testing will mean losing one's employment.

The permissibility of drug and alcohol testing in New Zealand has turned on employment law rather than privacy law. Unless specifically provided for in an employment agreement,[65] however, an employer would be faced with real difficulties

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[61] For discussion of the issue, see Lee Bygrave "The body as data? Reflections on the relationship of data privacy law with the human body" (conference paper, Office of the Victorian Privacy Commissioner, Melbourne, 8 September 2003); Bruce Alston "Blood rights: the body and information privacy" (2005) 12(4) J Law Med 426; Rohan Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, Oxford, 2007) at 98.

[62] In Norway, on the other hand, which lacks such an inclusive definition, samples were found by the Norwegian Data Protection Tribunal not to be "personal data" under the Personal Data Act 2000 on appeal in Case 8/2002: see Bygrave, above n 61, at n 104.

[63] Bruce Slane "The Privacy Implications" in *Drug Testing: The Sporting Experience: the Employment Possibility* (Legal Research Foundation, Auckland, 1995) 89, and "Critical Privacy Issues for Employers and Employees" (Address to Industrial and Employment Relations' 10th Annual Conference, 19 March 1996).

[64] For discussion of how the Privacy Act might apply, see John Edwards "Workplace drug testing" (1995) 1(1) HRLP 43; Michael Webb "Workplace drug testing: Another perspective" (1995) 1(3) HRLP 131; John Edwards "Privacy Updates – Notes on Recent Developments" (1996) 1(4) HRLP 187 at 187–188; Cordelia Thomas "Drug Testing in the Workplace" (1997) 22(2) NZJIR 159; and Paul Roth "The Privacy Act 1993: Workplace testing, monitoring, and surveillance" (1997) 3(2) HRLP 113.

[65] In an early case concerning the legality of testing, a collective agreement providing for unrestricted random testing was found by the Employment Court to be "harsh and oppressive" under now-repealed industrial legislation: *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418. The Employment Court found that clauses providing for random drug and alcohol testing, as well as medical examinations, were harsh and oppressive in terms of s 57 of the Employment Contracts Act 1991 insofar as they related to giving consent in advance, and the relevant clauses were struck out. On

if an employee refused to submit to a test, particularly random testing where there is no reasonable cause for conducting it in the first place. The employer cannot physically compel the worker to undergo testing, and could only take disciplinary action if a refusal to be tested was unreasonable in the circumstances. If the employer decided to dismiss the worker, the issue would then become whether or not the employer was substantively and procedurally justified in doing so. The Privacy Act does not provide any guidance as to what would be fair and reasonable in such circumstances. Like employment law, it simply requires that any collection of personal information be reasonably necessary and undertaken in a fair and reasonable manner.[66] The only thing added by the existence of the Privacy Act is the background of upholding the societal value of an individual's freedom from unreasonable intrusion into his or her personal affairs unless there are sufficiently important countervailing considerations.

In an interim injunction case where the employee sought reinstatement pending substantive determination of his unjustifiable dismissal case,[67] the Employment Court considered drug testing to be prima facie acceptable if it was carried out in a procedurally fair manner and in a safety-sensitive context. The Privacy Act was not cited. In the absence of a contractual entitlement to require testing, it is more common for employers to carry out tests on job applicants rather than on current employees.

The issue of permissibility when introducing a drug and alcohol testing regime for existing workers was first determined by the Employment Court in 2004,[68] when the full Court found that an employer would be justified in introducing such a regime where health and safety were legitimate concerns. While the Court cautioned that its findings were specific to the case at hand, the points on which the case turned, and the conservative conclusions reached, could be easily generalised.

Air New Zealand wanted to introduce a drug and alcohol policy into the workplace that included provisions for testing existing employees. The six plaintiff unions sought a permanent injunction and declarations restraining the implementation of the announced policy. Among the causes of action raised were that the policy constituted an impermissible unilateral variation of the employees' existing employment agreements, and that the requirement to submit to testing was both unreasonable and unlawful because the provision of bodily samples in such circumstances breached the New Zealand Bill of Rights Act 1990, the Privacy Act, and the Human Rights Act 1993.

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appeal to the Court of Appeal, the case was remitted to the Employment Court to be reconsidered in light of the criticism that the lower court failed to refer in its judgment to "statistical, research or other empirical material in support of the proposition that particular terms of the contract are or are not 'harsh and oppressive'": *Tucker Wool Processors Limited v Harrison* [1999] 1 ERNZ 894; [1999] 3 NZLR 576 at [79]. Upon reconsideration on this basis, the Employment Court found that the requirement to undergo drug and alcohol testing on an undefined fair and reasonable basis was among a number of provisions which in combination rendered the contract "exceptionally burdensome": *Harrison v Tuckers Wool Processors* [2000] 1 ERNZ 572 at [63]–[64]. The Court commented that some of the provisions "could only have provided the satisfaction of exercising domination over the persons of others." The issue by that stage, however, was academic, as the company had gone out of business.

[66] Principles 1 and 4 respectively.

[67] *Philson v Air NZ Ltd* AEC 35/96, 3 July 1996.

[68] *NZ Amalgamated Engineering Printing and Manufacturing Union Inc*, above n 16.

None of these contentions were upheld. The dominant considerations in this case were the employer's statutory and common law obligations in respect of workplace health and safety. These, together with its right to manage, empowered the employer to promulgate relevant policies. The Court considered that testing was permissible in the following circumstances contemplated by the policy:[69]

- On reasonable cause to suspect that an employee's behaviour is an actual or potential cause or source of harm to others as a result of being affected by alcohol or drugs or both;
- On internal transfer to safety sensitive occupations (by analogy with pre-employment testing);
- In post-accident / incident / near miss situations; and
- In random testing in safety sensitive areas only, not across the board.

The issue for subsequent cases, therefore, is what constitutes a "safety sensitive" activity, as many jobs involve potential hazards of one kind or another. The Court acknowledged that defining what constituted a "safety sensitive" area was in itself problematic in the case at hand. It commented that the "exercise of defining it ... is not one for the Court to undertake", but for the employer to discharge in consultation with the plaintiff unions.[70] Although the Court's reluctance to become involved in such an issue is understandable, it is uncertain how this aspect of the case can be transposed to other enterprises or industries in different circumstances. The Court's approach to the permissibility of testing, however, should not mean that it will be a simple matter of justifying testing on real or imagined health and safety concerns. Considerable work and administrative commitment underlay Air New Zealand's introduction of its policy. Air New Zealand was able to satisfy the Court that the scope, means, and rationale of its testing policy were fair and reasonable, with the exception of random "suspicionless" testing of employees employed outside safety sensitive areas.[71]

In a subsequent case on workplace drug and alcohol testing,[72] the Employment Court held that the employer's intended introduction of a drug and alcohol policy would not breach collective and individual agreements covering union members and would be otherwise lawful. Such testing policies "must meet the twin tests of lawfulness and reasonableness if they are to be enforceable."[73]

Drug testing in Hong Kong has mainly been an issue in relation to testing in schools and by the Police. Workplace drug testing appears not to be an issue, and there is no information about it on the Privacy Commissioner's website. In one case,[74] an employer required its female employees to submit to a DNA test after discovering menstrual bloodstains in the female toilet. The employer wished to find the woman responsible and deter a recurrence. The employer proposed to match the DNA test results against the bloodstains found in the toilet. An employee who felt humiliated by being required to undergo such a test complained to the Privacy Commissioner, who upheld her complaint on the basis that the collection of information was neither

[69] At [254].
[70] At [255].
[71] At [262].
[72] *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC).
[73] At [126].
[74] Office of the Privacy Commissioner for Personal Data (HK) *Case No 2004C01*.

necessary nor reasonable (DPP 1(1)). Such a collection was highly privacy invasive and was only justifiable in serious circumstances, such as in a criminal investigation.

In a recent United States District Court decision,[75] an employer was found guilty of breaching the Genetic Information Nondiscrimination Act 2008 (GINA) for illegally DNA testing employees in order to ascertain who was defecating in the company's warehouse during particular shifts.[76] The Act prohibits employers from using an individual's genetic information for employment decisions such as hiring, termination and promotions, or health insurance coverage. The DNA was collected through cheek swab samples. Two of the workers, who had tested negative, sued the company for breach of the GINA. The jury awarded the defendants $250,000 and $225,000 respectively for emotional harm, as well as $1.7 million in punitive damages because the company "acted with malice or with reckless indifference to the Plaintiff's federally protected rights".[77] The case seems somewhat unusual in that the DNA testing was not used to discriminate against the plaintiffs in relation to any employment decisions, and in fact the testing cleared them of any wrongdoing. Such testing might well be lawful in New Zealand, on analogy with drug testing, whereas it might well not be permitted in Hong Kong, on analogy with the DNA testing complaint above.

Use of Biometrics

There is one case where the Privacy Commissioner investigated but rejected a union complaint about the introduction of finger-scanning technology for an employer's payroll system.[78] The union claimed that a system of time sheets and clock cards was sufficient, and that the introduction of the new system, associated with criminal activity, was "overkill". The company claimed that a scanner had become "necessary" in terms of the collection principle due to employee dishonesty in completing time sheets (principle 1). The Privacy Commissioner found that the collection of information through finger-scanning was necessary for the company's purposes in the circumstances.

The union also alleged that the use of finger-scanning technology for hospital cleaners involved an unlawful, unfair, or unreasonably intrusive means of collecting information (principle 4). In particular, the union pointed to the absence of any express or implied term in the employment contract requiring employees to consent to the physical contact involved in having their fingers measured by sensors. The Privacy Commissioner did not find the proposal to be unfair or unreasonably intrusive, even though he declined to consider the contractual issue. The Commissioner held that this issue fell squarely within the jurisdiction of the specialist employment law institutions, and remarked that "[i]t would have been quite improper for me to usurp the role of the Court by dealing with the matter." Given that the collection principle requires agencies not to collect personal information "by

[75] *Lowe and Reynolds v Atlas Logistics Group Retail Services* 102 F Supp 3d 1360 (ND Ga 2015).
[76] This apparently is not a unique type of occurrence. For a similar problem at the Denver office of the Federal Environmental Protection Agency, see Eric Katz "EPA Employees Told to Stop Pooping in the Hallway" (25 June 2014) Fedblog <www.govexec.com>.
[77] *Lowe and Reynolds*, above n 75.
[78] *Case Note 33623* [2003] NZPrivCmr 5. Similar complaints about finger scanning were also rejected by the Canadian Privacy Commissioner (*PIPED Act Case Summary No 185* (2003)) and the Irish Data Protection Commissioner (*Case Study 1* (2005)).

unlawful means", the refusal to consider whether or not the collection of information in this case was going to be carried out in breach of the employees' contracts amounted to a concession to the employer, who ought to have borne the burden of proof. In effect, the Commissioner endorsed the lawfulness of the practice under the contract by declining to consider whether or not it was unlawful.

The union fared better before the Employment Court.[79] The Court found that the introduction of finger-scanning was unlawful in the circumstances because the employer breached contractual and statutory requirements to consult the employees concerned. The employees objected to having their fingerprints scanned, and advised that they would not comply until the dispute was resolved. The company maintained that its direction to the employees was lawful, and it sought a declaration to that effect. The Court found that the employees concerned were not breaching their contracts because the instructions they had been given were themselves unlawful. The Court held that the employer had a statutory good faith obligation to consult on changes in workplace practices.[80] The Court remarked that the requirement of consultation will depend on the context. The context here — and this was the key factor upon which the case turned — was that most of the nearly 50 employees concerned were Samoan. The evidence indicated that these particular workers regarded the introduction of the new technology as culturally offensive because it implied that, like criminals, they were not to be trusted. Expert evidence was introduced to show that the technology raised issues relating to Samoan beliefs concerning the sacredness of parts of the body and the concept of *Va Fealoia*, "the sacred space which governs and manages all relationships between people including employers and employees." The Court also noted that the legislation requires employers in the public health sector to be "good employers".[81]

The wider applicability of this case should be approached with some caution insofar as the Court's reliance upon contractual and statutory obligations is concerned. In particular, the case draws no clear line between workplace matters about which an employer is required to consult, and those which it is not. The Court also set out a number of broad propositions for determining the lawfulness of the introduction of new technologies into the workplace:[82]

1. Is the technology compatible with the contractual obligations of the parties?

[79] *OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (2006) 3 NZELR 558. An earlier, lower level Employment Relations Authority case found the use of finger-scanning was permissible, against the objection of an employee. This was on the basis that the employee's contract provided that he was required "to complete all time and wage records as required by the Company." This was held to be wide enough to encompass a finger scanning system: *PMP Print Limited v Barnes* ERA Auckland AA317/04, 28 September 2004. Among the employee's arguments was that use of the technology would result in his being stamped with the Mark of the Beast, as referred to in the biblical Book of Revelations, with the result that he would not be able to participate in the Rapture. The Authority, however, rejected this indirect discrimination argument. Among other things, the Authority noted that the technology does not actually stamp a mark on a person, or even store the image of a fingerprint; it merely stores a mathematical representation.

[80] Employment Relations Act 2000, s 4(1A)(b) requires "parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[81] Employment Relations Act, sch 1B, cl 5. There was also a specific statutory requirement (via the New Zealand Public Health and Disability Act 2000, s 6(1) and the Crown Entities Act 2004, s 118(2)(f)) to recognise "the cultural differences of ethnic or minority groups".

[82] *OCS Ltd*, above n 79, at [95].

2. There is to be a balance between the need for the technology and the level of personal intrusiveness involved for the individual concerned.
3. The employer has the right to introduce different systems of timekeeping technology subject only to reasonable consideration of valid concerns raised by the union and / or employees.
4. The employer must take the appropriate steps to inform employees of the new measures and to obtain their consent.

These principles were distilled from a number of overseas cases determined in a variety of contexts and under different legal regimes, and so their applicability to New Zealand employment law would need to be determined on a case-by-case basis.

In contrast to the position in New Zealand, Hong Kong privacy law is stricter in its approach to finger-scanning. In one case,[83] finger-scanning was introduced for time-keeping and ensuring office security. The Privacy Commissioner found the collection of personal data to be unnecessary and excessive.[84] This was on the basis that the employer failed to provide sufficient information to help employees understand the adverse impact on their privacy, and failed to implement adequate mitigating measures in relation to the system. The Commissioner observed that there had to be true consent, with no undue influence,[85] and stated:

> In situations where disparity of bargaining power exists, such as in an employer-employee relationship, any presumption of undue influence exerted on the part of the employer can be dispelled by the provision of genuine choices to the data subjects before they decide to provide their personal data.

No true consent had been obtained in the present case. A presumption of undue influence due to an employment relationship had not been rebutted; there was no free choice for employees to decline to provide their fingerprints to the employer; employees were not informed of the purpose of collection or of the availability of alternatives; and no balanced view was presented to employees to enable them to make an informed choice as to whether or not to provide their fingerprints to the employer.[86]

Similarly, in another case,[87] the Commissioner found that an employer's fingerprint scanning system constituted an unnecessary, excessive and unfair collection of personal information.[88] The complainant was a furniture installer and he was surprised that the employer collected and recorded his fingerprint data. The employer explained that it was for recording staff attendance. The employee apparently complained after he left his employment. The Commissioner found that there were less privacy intrusive options, such as passwords, available to the employer. Since there were 400 individuals subject to the system, there was a higher privacy risk due to possible breaches of information security. Because the employer could not reassure

[83] Office of the Privacy Commissioner for Personal Data (HK) *Case No 2008C04* (February 2009).
[84] In breach of DPP 1(1).
[85] The Privacy Commissioner referred to his publication on the topic, *Personal Data Privacy: Guidance on Collection of Fingerprint Data* (Office of the Privacy Commissioner for Personal Data (HK), May 2012), available at <www.pcpd.org.hk>.
[86] In the result, the Privacy Commissioner did not issue an enforcement notice because the employer subsequently offered its employees a less privacy intrusive alternative in the form of a password.
[87] Office of the Privacy Commissioner for Personal Data (HK) *R09-7884* (13 July 2009).
[88] In breach of DPP 1(1) and (2).

the Commissioner as to security concerns, the Commissioner found that there was a likelihood of accidental access or misuse of data. Moreover, the employees were not given sufficient information to form an informed choice as to whether or not to consent to the finger-scanning. There was also an evident element of informational "overkill", since there were also surveillance cameras to monitor against fraud in staff attendance. In addition, the Commissioner noted the disparity of bargaining power in the circumstances, which meant there was no freely given consent by the employees. The employer simply expected employees to cooperate by accepting the system without being offered an informed choice. Employees were threatened with immediate dismissal for failure to cooperate. The Commissioner observed that the scanning was merely for the employer's own administrative convenience, which could not justify such a compulsory collection of data. As a result, the Commissioner issued an enforcement notice to stop the collection of personal data in breach of the collection principles.

Wearable Devices

The new frontier of employment surveillance is the use of wearable devices. These devices measure or monitor bodily functions or activities, and have moved from mere consumer gimmicks for the health-conscious to being deployed for monitoring and maximising workers' health and performance. Some incorporate GPS systems to make monitoring of movements more precise, others have cameras to record what the wearer is doing or seeing. Blood glucose sensors are able to monitor eating habits. They can also measure sleep patterns. New developments are making wearable devices more useful and pervasive for a variety of workplace purposes, ranging from monitoring worker movement and conduct, monitoring and improving worker health and safety, picking up personal and environmental stressors, and performance optimisation.

For example, Fitbit is a company that manufactures a number of different wearables that can track activity, such as the number of steps walked, the quality of one's sleep, the number of steps climbed, and other personal metrics. This information can be combined with other information about the user to calculate distance walked, calories burned, heart rate, floors climbed, and activity duration and intensity. It can also measure sleep quality by tracking periods of restlessness, how long before the wearer falls asleep, and how long they remain asleep. These devices can be clipped to the wearer's clothing or worn as a bracelet. In one study, staff could be classified into two groups based on their shared patterns of behaviour: "busy and coping" and "irritated and unsettled".[89] Employers have been using such devices to "nudge" staff towards healthier lifestyles (particularly if they are contributing to their employees' health insurance),[90] and there can be incentives if certain activity targets are met. One

[89] Sarah O'Connor "Wearables at work: the new frontier of employee surveillance" (8 June 2015) Financial Times <www.ft.com>.

[90] For example, CVS Pharmacy in the US requires its 200,000 employees on health plans to submit their weight, body fat, glucose levels, and other health information or else pay a monthly fine of $50 to cover higher health insurance premiums: see Steve Osunsami "CVS Pharmacy wants workers' health information, or they'll pay a fine" (20 March 2013) ABC News <www.abcnews.go.com>.

of Fitbit's strategic goals is to penetrate this "corporate wellness market".[91] One advertised feature is that:[92]

> Employers who buy from Fitbit have the option of tracking their staff right down to the individual level, if staff agree to share their data, or just in aggregate. In other words, they can choose to see how many steps Bob in accounting is taking each week, or just how active the seven people in accounting are.

While promoting health and safety is one use of such devices, they can also be used to improve productivity or enhance performance. These functions inevitably mean that the information collected by the devices is to be accessed by the employer. They can be used to eliminate "sickies" if the employer is able to examine information collected by the device over the period that the employee claimed to be ill.[93] Employer use of such devices in some circumstances, however, may lead to employees "gaming the system"[94] through attempting to trick the technology by giving the wearable to someone else to wear who could produce the desired statistic, or by taking substances to produce a particular result. Wearables may also distract from productivity as employees become more concerned with producing favourable numbers. Wearables will normally require the employee's consent or cooperation. They can be perceived as highly invasive, and workers may well resent the constant monitoring that wearables involve.

Linking behaviour and physiological data collected from wearables to analytic tools can give employers in some industries an "edge", all else being equal. This area is known as "physiolytics", which is defined as "the practice of linking wearable computing devices with data analysis and quantified feedback to improve performance."[95] For example, a recent article has reported that some of the big hedge funds have been working to link physiological data to trading success.[96] As with athletes, such factors as diet and sleep can affect one's performance. Moreover, some hormones, such as naturally produced steroids and testosterone, can increase a person's confidence and encourage risk-taking behaviour, while stress hormones such as cortisol have the opposite effect. John Coates, a neuroscientist and former Goldman Sachs trader, is working with companies to link such biological signs to trading success. He has observed that:

> You need to figure out whether you should be trading or whether you should go home. If you are trading, should you double up your position because you're in the zone?…A lot of smart managers think their algos have gone as far as they can go. The next step is human optimization.

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[91] See, for example, Parmy Olson "Fitbit on track to sell thousands more devices through Barclays, GoDaddy and other employers" *Forbes* (online ed, America, 20 October 2015).
[92] Olson, above n 91.
[93] Chloe Taylor "Wearable devices: the future of management?" *HRM New Zealand* (online ed, 15 June 2015).
[94] O'Connor, above n 89.
[95] H James Wilson "Wearables in the Workplace (2013) *Harvard Business Review* (online ed, Boston, September 2013).
[96] Olivia Solon "Why your boss wants to track your heart rate at work" (12 August 2015) Bloomberg Buisiness <www.bloomberg.com>.

The workplace privacy implications of such devices are obvious,[97] chief of which is whether or not the employee should be allowed to withhold consent to wearing such devices without any adverse repercussions. Furthermore, such devices will have security vulnerabilities. One commentator has remarked that "your personal data security is only as strong as the weakest link in your quantified ecosystem."[98]

Conclusion

There are three principal conclusions that follow from examination of the application of privacy legislation to the workplace. One is that such legislation is most important for providing employment law with a source of accepted standards of what society regards as fair and reasonable in relation to the handling of workers' personal information and their expectations of privacy. Secondly, it is clear that the effectiveness of privacy regulation as a control over employer practices very much depends on the particular country's data protection authority and the strictness with which it, and the legal forums above it, approach the interpretation and application of privacy law. Thirdly, the world is going to see more, not less, technological innovation that will have workplace applications, and so it behooves lawmakers and officials to actively defend and strengthen workers' human rights to privacy against managerial encroachment.

The modern day motivation for collecting personal information about workers can be traced back to the 'scientific' management techniques of Frederick Winslow Taylor at the turn of the last century. Underlying much of the perceived need for increased supervision was mistrust of the likelihood of workers doing an honest day's work. The current pairing of this outdated management attitude with increasingly sophisticated means of monitoring workers has resulted in a serious workplace imbalance. Meaningful regulation of this diabolical partnership – negative attitudes towards workers combined with technological advances – is not in prospect. Added to this mix has been the relatively recent extension of the common law duty of fidelity to capture worker conduct beyond the bounds of the workplace when what a worker says or does can be labelled as reflecting badly on the employer's business. The difference between today and Frederick Taylor's times is that the right to privacy enshrined in human rights instruments did not exist then, nor did the technological ability to monitor workers to the same pervasive degree.

[97] See International Working Group on Data Protection in Telecommunications *Working Paper on Privacy and Wearable Computing Devices* (Doc No 675.50.15, 57th meeting, Seoul, 27-28 April 2015), available at <www.datenschutz-berlin.de>; Research Group Report *Wearable Computing: Challenges and Opportunities for Privacy Protection* (Office of the Privacy Commissioner of Canada, January 2014), available at <www.priv.gc.ca>.

[98] Michael Carney "You are your data: The scary future of the quantified self movement" (20 May 2013) PandoDaily <www.pando.com>.

A Bad Day at the Sausage Factory: The Health and Safety at Work Act 2015

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Abstract

This paper outlines key concerns relating to New Zealand's new Health and Safety at Work Act 2015. It puts the Act in context as the most recent governmental attempt to reform health and safety in the workplace. The reports of the Independent Taskforce and the Royal Commission provided an opportunity to address New Zealand's poor workplace health and safety record, however the Government has failed to do so effectively. This paper identifies significant issues with the Act, particularly with regards to worker participation and the use of work groups to push for change.

Key words

Health and Safety at Work Act 2015, health and safety, labour law, worker participation, work groups.

Those who believe in justice and those who love sausage should never watch either being made.[1]

Introduction

A casual observer of the progress of the Health and Safety Reform Bill may have been surprised by the abrupt fracturing of the cross-party and cross-industry consensus supporting the Bill as it made its way back from the Transport and Industrial Relations Committee.

The Bill passed its first reading on 13 March 2014 with the support of all parties. By the second reading on 30 July 2015, the Labour, Green and New Zealand First parties had withdrawn their support for the Bill. The New Zealand Council of Trade Unions (CTU) and affiliated unions launched a significant nationwide campaign to push for change in the Bill in concert with the families of workers killed at work (including those who lost loved ones working at Pike River Mine and in the forestry industry).

Despite the disquiet and dissent, the Bill passed into law as the new Health and Safety at Work Act 2015 (the Act) and a series of major amendments to other existing pieces of legislation. Most of the key provisions came into effect on 4 April 2016 and there will be significant work to complete supporting regulations and guidance in the meantime.

The purpose of this paper is to explain the CTU's most fundamental concerns with the new Act. It is important to acknowledge at the outset that legal change is not a panacea for the dismal state of health and safety practice in New Zealand. If New Zealand is to lift its performance we must also tackle fundamental deficits in knowledge, culture and power. However, good regulation should provide the framework that brings about the change needed for a positive health and safety culture

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[1] Otto von Bismarck (attributed).

and, conversely, badly-made law can hinder this cultural change. It is the view of the CTU that the Act will not deliver the change we need. The evidence suggests there is a problem.

This paper explains why changes made by the new Act to existing health and safety legislation some substantially compromise its effectiveness.[2] Before addressing these concerns it is useful to begin with a reminder of how New Zealand arrived at its current health and safety position and the ingredients that have gone into the new Act.

The Pike River Tragedy and Aftermath

On Friday 19 November 2010, a methane explosion occurred at the Pike River Coal Mine on the West Coast of the South Island. 29 men were trapped in the mine by the explosion, condition unknown. Following a second explosion five days later, all were presumed dead. Their bodies have never been recovered.

The Royal Commission on the Pike River Coal Mine Tragedy was convened and found major flaws in the performance of the regulator and the operation of the Health and Safety in Employment Act 1992. The Royal Commission said that "major change [is] required and fast" and that "administrative and regulatory reforms are urgently needed to reduce the likelihood of further tragedies."[3]

The report's findings regarding the regulatory failings led to the then-Minister of Labour, Kate Wilkinson, resigning her ministerial warrant. The Royal Commission identified two particular weaknesses in the Health and Safety in Employment Act 1992: weak legal duties for directors to ensure health and safety and weak worker participation.

While the Royal Commission was investigating, the Government convened an expert taskforce to research, investigate and hear submissions on issues regarding New Zealand's workplace health and safety performance. The Independent Taskforce on Workplace Health and Safety (the Taskforce) was chaired by the Chairman of Shell Oil, Rob Jager, and included representatives of businesses, workers and the agricultural sector.

The Taskforce issued its report in April 2013. The report is a clear-eyed survey of the health and safety landscape in New Zealand. It is also an indictment. The Taskforce noted that there are around 200,000 claims to ACC each year by people injured at work and that, along with an emotional toll, the economic, medical and social costs of these injuries may be as high as four percent of GDP. The Taskforce described this as "appalling, unacceptable and unsustainable."[4]

The Taskforce identified 12 key areas of weakness:[5]

1. Confusing regulation;

[2] Given the scope and complexity of the health and safety reforms, this paper only canvasses a small portion of the Act. For more detail on both the elements of the Act which the CTU supports and other changes, see the CTU submission on the Health and Safety Reform Bill, available at <www.union.org.nz>.

[3] Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy: Volume One* (October 2012) at 29.

[4] Independent Taskforce on Workplace Health and Safety *Main Report of the Independent Taskforce on Workplace Health and Safety* (April 2013) at 4.

[5] Independent Taskforce on Workplace Health and Safety *Executive Report of the Independent Taskforce on Workplace Health and Safety* (2013) at 11-12. The problems in each area are set out in greater detail at Appendix I.

2. A weak regulator;
3. Poor worker engagement;
4. Inadequate leadership;
5. Capacity and capability shortcomings;
6. Inadequate incentives;
7. Poor data and measurement;
8. Risk tolerant culture;
9. Hidden occupational health;
10. Problems in regulating major hazard facilities;
11. Particular challenges to small-to-medium enterprises (SMEs); and
12. Weak protections for at-risk populations.

According to the Taskforce, one fundamental weakness underlies all of the others: a lack of tripartism. To understand the importance of this weakness, it is necessary to revisit the genesis of our current health and safety system.

Robens-Lite

The conception of New Zealand's health and safety system (along with those of most other common law countries) lies in a revolutionary document. Following a series of industrial disasters, the newly-elected Conservative Government commissioned Lord Alfred Robens, the Chairman of the National Coal Board, to carry out a root-and-branch review of the United Kingdom's health and safety law. A Committee on Safety and Health at Work was formed in 1970 and gathered evidence over the next two years, reporting in July 1972. As Eves notes, the Robens Report recommended the implementation of "a more self-regulating system" for employers and workers and criticised the current regime's over-reliance on "prescriptive statutory regulation".[6] It suggested the promotion of industry-led health and safety reform through "agreed voluntary standards and codes of practice to promote progressively better conditions" and the regulation of health and safety through one all-encompassing statute.[7]

The Robens model posits a 'three-legged stool' consisting of a strong regulator, capable employers and informed, empowered workers. Each of these 'legs' acts as a check and balance upon the effective operation of the others.

The Robens Report founded the basis for new health and safety laws in the United Kingdom, Australia, Canada and, eventually, New Zealand by way of the Health and Safety in Employment Act 1992.

There were problems from the start with New Zealand's implementation of the Robens principles. As the Taskforce noted in its report,[8] New Zealand's introduction of the Robens system occurred later, and constituted a "much lighter version" than in other jurisdictions. The Taskforce concluded that:

> The lighter version reflected a range of local and historical factors.

[6] David Eves "Two steps forward, one step back: a brief history of the origins, development and implementation of health and safety law in the United Kingdom, 1802–2014" (April 2014) History of Occupational Safety and Health <www.historyofosh.org.uk>.
[7] Eves, above n 6.
[8] Independent Taskforce *Main Report*, above n 4, at [66].

> a. *Resource constraints.* The late 1980s and 1990s were a period of fiscal discipline, frozen budgets and staff cuts across the public sector. No additional funding was made available to support a comprehensive implementation of the new Act, including the development of adequate levels of supporting regulations, approved codes of practice (ACoPs) and guidance, as well as inspectorate capabilities.
>
> b. *Changing attitudes towards the roles of government and business.* The HSE Act was developed in an era of deregulation and a growing ethos of business self-regulation. This informed low levels of resourcing for and a light-handed approach to regulation, and high levels of reliance on businesses' capabilities and commitment.
>
> c. *Liberalisation of the labour market and the weakening of union representation.* Labour market liberalisation in the 1980s and 1990s resulted in a sustained fall in union membership and growth in casual, part-time and short-term employment relationships…It is likely that this factor influenced omissions from the HSE Act, including the failure to establish a tripartite body and to set obligations requiring employers to have formal worker-participation systems.

The Taskforce attributed weaknesses in New Zealand's health and safety framework to "a fundamental failure to implement properly the Robens health and safety model".[9]

What Works in Worker Participation

Both the Royal Commission and the Taskforce singled out worker participation as a crucial weak link in New Zealand's health and safety system. The Taskforce noted that, compared to other jurisdictions, worker engagement in New Zealand "falls well short," is "generally ineffective and often virtually absent" and is not well supported by legislation.[10]

Australia's Model Act arose out of two reports, both entitled 'National Review into Model Occupational Health and Safety Laws.' The first report quoted and endorsed an earlier review of Australia's health and safety legislative framework called the Laing Review:[11]

> …the election of safety and health representatives and the constitution of safety committees are fundamental if genuine consultation is to develop in workplaces. Without the authority provided under the Act, almost any other consultative approach will result in unequal relationships and consultation may be one sided or tainted by the incapacity to openly and fearlessly put the necessary issues for discussion. As a consequence, while there may be considerable talk there may be little consultation.

Worker engagement is a prerequisite for a well-performing health and safety system. As leading Australian health and safety experts Johnstone and Tooma note, "workers bear the brunt of the effects of work related hazards, and should therefore participate in measures to identify and address hazards."[12] Johnstone and Tooma go on to note that "worker experience and knowledge" of workplace hazards assists in the development of better health and safety practices and, further, that

[9] Independent Taskforce *Main Report,* above n 4, at [61].
[10] At [93].
[11] Robert Laing *Review of the Occuptional Health and Safety Act 1984 (WA)* (2002) at 155, as cited in Department of Education, Employment and Workplace Relations *National Review into Model Occupational Health and Safety Laws Second Report* (2012) at [25.8].
[12] Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act* (Sydney Federation Press, Sydney, 2012) at 137–138.

worker participation in health and safety is necessary to uphold workers' rights over employers' commercial interests.

> The available empirical research suggests that direct participation by means of individual non-unionised employees engaging with managers appears to have little effect on work health and safety. There are very few studies on the use by individual workers of an individual right to refuse to perform dangerous work, and what research there is suggests that this right is little used in small firms, where workers inhabit 'structures of vulnerability'.
>
> There is much stronger evidence on the positive effects of collective worker participation on work health and safety. This evidence comes from a number of countries, including from countries where there is no statutory basis for worker participation. The research shows that participatory mechanisms that enable higher levels of worker involvement are better than those that provide for more limited involvement. Many of the studies prove that there is a relationship between objective indicators of work health and safety performance (such as injury rates or exposure to hazards) in workplaces that have implemented structures for worker participation, such as the presence of trade unions, joint health and safety committees, or union or worker health and safety representatives. International research supports the argument that joint arrangements involving employer, worker, and trade union representatives at the workplace are associated with better work health and safety outcomes than where representative worker participation is absent. Other studies provide more indirect evidence of the impact of worker representation on work health and safety management practices, and suggest that participatory workplace arrangements lead to improved work health and safety management practices and compliance with work health and safety regulatory standards.
>
> Despite their diversity in terms of method and other details, taken collectively these studies support the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than employer management of work health and safety without representative worker participation.

The National Review into Model Occupational Health and Safety Laws Second Report concluded in relation to health and safety representatives that:[13]

> Overwhelmingly, stakeholders and regulators alike are of the view that provision should be made in the model Act for workers to elect HSRs. The election of HSRs has been a common feature in OHS legislation for many years and represents contemporary practice. The benefits of effective representation through HSRs have been demonstrated.

The most complete recent survey of what works in the health and safety representation sphere is a 2014 study of the coal mining industry undertaken by four of the foremost experts in health and safety representation: David Walters, Richard Johnstone, Michael Quinlan and Emma Wadsworth.[14]

Fear and Loathing in Thorndon

The Health and Safety Reform Bill generated a considerable amount of heat but little light. In this, it was reminiscent of the previous reforms in 1992 and 2002. Both were characterised by considerable opposition from employer groups who saw the empowerment of workers in relation to their own

[13] Department of Education, Employment and Workplace Relations, above n 9, at [25.19].

[14] David Walters, Richard Johnstone, Michael Quinlan and Emma Wadsworth *A study of the role of workers' representatives in health and safety arrangements in coal mines in Queensland* (Construction, Forestry, Mining and Energy Union: Mining and Energy Division, January 2014) available at <www.cfmeu.com.au>.

health and safety generally and health and safety representatives in particular as a stalking horse for the union movement.

It seemed as though the clear and sobering messages of the Royal Commission and the Taskforce might temper this opposition. In June 2013, the Business Leaders Health and Safety Forum wrote to senior cabinet ministers stating:[15]

> Ministers you may wonder if business leaders have concerns about the Taskforce's recommendations on worker participation, increased costs and increased penalties. We want to reassure you that our members are not concerned about these recommendations being implemented as part of a comprehensive and balanced approach.
>
> Evidence tells us that meaningful worker participation (that includes representative unions, where relevant) is a core requirement for high-performing safety systems. We believe participation provisions must be flexible, and that checks and balances can be put into place to ensure that they do not encroach on aspects of the employment relationship unrelated to health and safety.

It appeared that New Zealand was experiencing a rare armistice of agreement on what needed to be done. The Health and Safety Reform Bill received unanimous support at its first reading on 13 March 2014 and was widely welcomed. However, many of the other submissions strongly resembled concerns raised in previous attempts at reform.

The Talley's Group submissions on industrial legislation are well-known for their particular style of invective. Peter Talley's submission on the Bill is particularly notable in this respect. He notes:[16]

> With control of such work groups resting with unions and their members, it is inevitable that they will use that power to their own advantage both to increase their power and influence and to make employers fund the Union's favoured members to undertake union activities under the guise of health and safety. Unscrupulous Unions could also use Sections 66 to 68 to intentionally damage or destroy a business, by appointing dozens of their members as representatives, have multiple unnecessary work groups and drive a business to bankruptcy, without an employer having any recourse.

Mr Talley's submission meanders on in a similar vein:[17]

> We believe the changes in the Health & Safety legislation will be used by the Union as another tool to force companies to capitulate to Union desires. eg: during collective bargaining a Union could use Health & Safety as a tool to tie up the time and resources of company executives, and place pressure on the company. Due to the importance of Health & Safety and relating issues, companies would have no option but to investigate any claims, frivolous or not, and it would be difficult to prove that unsubstantiated claims were in essence an act of bad faith on behalf of the Union. As a result either a great deal of resources are wasted on investigations into unfounded Health & Safety claims, or, due to repetitive unfounded Health & Safety claims "crying wolf' mentality sets in and serious Health and Safety issues may be overlooked.

[15] Letter from Julian Hughes (Executive Director of the Business Leaders Health and Safety Forum) to Bill English (Finance Minister), Steven Joyce (Economic Development Minister; Tertiary Education, Skills and Employment Minister) and Simon Bridges (Labour Minister) regarding the Independent Taskforce recommendations (18 June 2013), available at <www.mbie.govt.nz>.

[16] Talley's Group Ltd "Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at 8.

[17] Talley's Group Ltd, above n 18, at 16–17.

> The Talley Group is also worried that the powers to be given to workers through the creation of Health & Safety representatives may undermine existing relationships and activities. We see the extended powers as unnecessarily boosting the power of workers unions using the Health & Safety issue as the vehicle for that agenda. We do not believe the Health & Safety Reform Bill should facilitate or encourage that agenda.

It was not only intemperate employers who weighed in against strengthening of worker representation. Several major employers expressed milder versions of the same sentiments.[18] These submissions lacked any empirical evidence to back claims of misuse and abuse of worker participation and representation systems. We suggest that this may be because there is a strong international and research consensus on these points. The closest the employers' submissions come to engagement with the international research is the EMA Northern submission, stating at [21]:

> We believe the argument for health and safety representatives has been taken from myth to the point of becoming fact. We are often told about research studies which make it clear that health and safety representatives are very effective within the work places. Following our research this is not as clear as the myth may portray. Indeed David Walters who is the instigator of health and safety representatives in the UK, his latest research strongly suggests that there are many variables within a work place that can assist or detract from the effect of this health and safety representative thus to say that a health and safety representative as an item alone is effective is somewhat misleading.

Concerned that the EMA's submission was a misrepresentation of Professor Walter's work, the CTU wrote to him enclosing the EMA's submission and asking for his comment. He responded that the EMA's submission had misconstrued his scholarship, since:[19]

> [The EMA's submission] is a misinterpretation of what I have written. The evidence is not myth – it's a reflection of reality. There is strong quantitative research evidence to indicate that establishments with trade union supported health and safety representatives have better health and safety performance (in terms of both objective outcomes such as improved injury rates and in terms of better management arrangements) than workplaces in which employers manage OHS in the absence of such arrangements. My recent work (including evidence submitted to the Royal Commission Inquiry on Pike River – and verbal evidence to the Task Force…) has cited and discussed this evidence at some length. My discussion of these empirical findings tries to account for the conditions – or preconditions that support this success and of course these include other factors such as a clear regulatory steer and support for its implementation from state inspectors – as well as managerial commitment to the operation of participative arrangements on OHS – as well as trained and informed representatives.

MBIE's Departmental Report on the Health and Safety Reform Bill lacks consistency between the changes and their justifications. Officials comment that:[20]

> Under the HSE Act, one worker can request an employee participation system, which defaults to an election for HSRs, if after six months there is no agreement between the employer and employees on the employee participation system. This approach has not led to an overload of HSRs in businesses where they are not appropriate.

[18] Examples from a long list include Air New Zealand, Business Central, Carter Holt Harvey, Federated Farmers, Fletcher Building, Fonterra, the Meat Industry Association, the New Zealand Forest Owners Association, and Seafood New Zealand.

[19] Email from Professor David Walters to the author regarding the EMA Northern submission on the Health and Safety Reform Bill 2014 (10 September 2014).

[20] MBIE "Departmental Report Part A to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2014" at [179]–[181].

> A more flexible outcomes-based approach also creates risk. To effectively implement the Taskforce recommendations and international conventions, there is a need to have minimum conditions to improve New Zealand's worker participation practices. It is difficult to design a flexible approach which allows workers to have a voice in safety, have some workers who understand health and safety obligations so they can engage effectively, not face unfair consequences, and be able to act, without this simply looking like a HSR system.
>
> This kind of approach would also be difficult to design and enforce, would provide more uncertainty for business, and create a greater ability for abuse, at a time when the health and safety reforms are trying to encourage worker participation and better practices.

Despite this evidence, the Health and Safety at Work Act 2015 takes a substantial step backwards in relation to worker engagement, representation and participation for the following reasons:

- Health and safety representatives are optional for SMEs that are not high risk and may be isolated to small PCBU-determined work groups in all other circumstances (see discussion below);
- Employers have increased powers to push for the removal of health and safety representatives;
- Health and safety committees are optional for all PCBUs;[21]
- There is no requirement to provide training for health and safety committee members;
- The default worker participation scheme where agreement cannot be reached is no longer present; and
- Unions have a greatly reduced role in the set-up of the system, the election of health and safety representatives and the assistance of workers.

Essentially, what constitutes an effective worker engagement system is to be determined by the employer or, in the framing of the new Act, the person conducting a business or undertaking (abbreviated to PCBU). The PCBU will not be required to negotiate with the workers but only to engage with them (a similar process to consultation under general employment law).

Minister Woodhouse has argued that all PCBUs will have an obligation to develop effective worker engagement practices and that this will drive the necessary change, with WorkSafe enforcing the requirements if necessary. Section 64 of the Health and Safety at Work Act 2015 obliges PCBUs to "have practices that provide reasonable opportunities for workers… to participate effectively in improving work health and safety… on an ongoing basis."

However, there was an almost identical duty under s 19B of the Health and Safety in Employment Act 1992, which states that "every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work."

The definition of 'reasonable opportunities' is effectively the same in both old and new law. WorkSafe and its predecessors have never taken action for a breach of s 19B and it appears likely that it will struggle to enforce such an inchoate obligation.

[21] Health and Safety at Work Act 2015, s 86A (particularly subss (3) and (4)).

Risky Business

One of the most problematic aspects of Part 3 of the new Act (worker engagement, participation, and representation) is the exemption from requirements to elect health and safety representatives or consider implementing a health and safety committee if a PCBU has less than 20 workers and operates outside of certain 'high risk' industries set by regulations.

The Government was strongly criticised for its initial list of 'high risk' industries. The Health and Safety at Work (Worker Engagement, Representation and Participation) Regulations 2016 contain a modified list of industries designated as high risk including adventure activities, aquaculture; forestry and logging; fishing, hunting, and trapping; major hazard facilities; mining drilling and quarrying; food product manufacturing; water supply; sewerage, and drainage services waste collection, treatment, and disposal services; and construction.

The Regulations see approximately 560,000 workers without the right to have a health and safety representative system if requested.[22] The Minister received advice that this would see 5 out of 6 workers in small businesses lose this right that they enjoyed under the Health and Safety in Employment Act 1992.[23] Workers in small businesses who have lost this right include:

- Transport workers, including water, road and rail freight transport;
- Port operation workers;
- Most manufacturing workers;
- Hospital, health care and disability workers;
- Agricultural workers; and
- Public order, safety and regulatory services workers.

Perhaps wary of the opprobrium that greeted his proposal to retain worm-farming and cat-breeding on the list of high risk activities while leaving out sheep, dairy and beef farming, the Government specifically excluded activities such as curtain installation, snake-catching, crocodile and buffalo hunting from the definition of high risk.

The Minister was advised by officials that in other comparable jurisdictions, strong commonalities emerge amongst what is considered a high-risk industry. Construction, manufacturing, and agriculture are **consistently** represented in any country's assessment of its high-risk industries. Mining, forestry and fishing **usually** appear whenever those industries are present in that jurisdiction.[24]

[22] Document titled "Small Business exclusion from HSRs if requested by worker", undated and anonymous (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety). This estimate was determined when agriculture was considered a high-risk industry.

[23] Email from Kelly Hanson-White to Michael Woodhouse (Minister for Workplace Relations and Safety) regarding the proposed Regulations (16 August 2015) (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety).

[24] Document titled "Guidance to the House", undated and anonymous (Obtained under Official Information Act 1982 Request to the Minister of Workplace Relations and Safety).

Flaws in the model used to assess whether an industry is high risk include:

- No consideration of injury rate generally (outside of serious injury and death). The purpose of a health and safety framework is to protect people at a workplace from injury, not merely injuries that result in a week off work or more;
- No consideration of occupational disease in the categorisation of 'high risk.' This was assessed in earlier iterations of the model but then removed. Gradual process injuries are also excluded;
- The exclusion of deaths and injuries to bystanders and children under 15, which is concerning given that New Zealand has no minimum age of employment and children are often killed (particularly in agriculture);
- Reliance on workers making claims to ACC and those claims being accepted. Many industries systematically under-report;
- The use of an annualised average. Many seasonal industries have periods of much greater risk (such as calving season in dairy and beef farming). Some may have short, perhaps random, periods of very high risk (such as security guards);
- No consideration of the death and injury rate in SMEs in each industry. Evidence strongly suggests that SMEs have higher death and injury rates than larger businesses, so a multiplier effect may be appropriate;[25] and
- No consideration of the effect of previous interventions in the industry (for example, electricians work in an inherently hazardous environment which is controlled by regulation and training).

Other practical hurdles include the question of how and when 20 workers are counted, given that the definition of 'worker' includes contractors, temporary employees and some types of volunteers.

A practical problem with the model is the definition of high risk industries in reg 5(1)(b) as industries where a business "operates predominantly." This seems illogical, given that a business with 18 workers that allocates 49 per cent of its time and resources to operating a forestry crew and 51 per cent to operating a wood chipping business is equally as risky while undertaking forestry as a business with 9 workers that undertakes forestry 100 per cent of the time.

The high risk exemption removes an existing right to request representatives and committees. It is poorly thought-through and confusing. It is symptomatic of other changes wrought by the Government during the Select Committee process.

Setting Work Groups

Other less-understood changes are the restriction of health and safety representatives' powers and duties to a particular work group and the manner in which these work groups are set up.

Under the Health and Safety in Employment Act 1992, the default position was that health and safety representatives can act on behalf of any employee. The Health and Safety at Work Act 2015 follows

[25] See, for example, John Mendeloff and others *Small Businesses and Workplace Fatality Risk: An Exploratory Analysis* (RAND Corporation, 2006), available at <www.rand.org>.

the Australian approach of limiting health and safety representatives from acting on behalf of workers outside of the work group that elected them.[26]

Work groups were seen as unduly bureaucratic by the Taskforce, which recommended that they not be implemented.[27] The CTU, Business New Zealand and the Business Leaders Health and Safety Forum agreed, and made a specific joint approach to the Transport and Industrial Relations Committee to persuade it to remove work groups.

Nonetheless, work groups remain a feature of the Health and Safety at Work Act 2015. The process for their determination has been left to the PCBU, unlike in Australia where worker agreement is required. The default is that one work group covers the entire PCBU, but s 66(3) states that a PCBU may determine one or more work group if the PCBU considers that a work group covering the whole business or undertaking would be inappropriate having regard to the structure of the business or undertaking. This section has the potential to be misused by a PCBU to isolate health and safety representatives to small pockets within the workplace.

Conclusion

The foreword of the Taskforce's Report identified that "[a] key challenge in addressing workplace health and safety is that it requires balancing the interests and needs of a number of participants, particularly employers and workers."[28] The report noted that New Zealand's implementation of the Robens model failed to strike that balance, and that health and safety law has only become more "complex" in recent years. According to the Taskforce, its recommendations adequately address that balance – and any major changes to its recommendations "will lose the vital support of some participants and significantly weaken the potential benefits."

Despite some positive changes, the Health and Safety at Work Act 2015 is a flawed piece of legislation. This hybrid of Australian and New Zealand law has wound up with some of the weakest aspects of both. The new Act fails to strike an appropriate balance between the competing interests of workers and employers.

The Government had both public support and a legitimate opportunity to address New Zealand's poor workplace health and safety record and fell at the final hurdle. It is possible, and perhaps even likely, that the new law will improve New Zealand's health and safety record, however it will still fall far short of comparable countries like the United Kingdom or Australia. These changes constitute another chapter in the history of muddled compromise that has led to the death of thousands of New Zealand workers. However this country dresses the sausage, we suspect it will leave a bad taste.

[26] See Health and Safety at Work Act 2015, sch 2 cl 9. Clause 6 of sch 2 sets out some limited exceptions where health and safety representatives may act on behalf of members of other work groups. However, in what is a worrying but likely unintended consequence, health and safety representatives cannot exercise their powers on behalf of workers who are not members of work groups (even seemingly in situations of imminent serious harm).
[27] Independent Taskforce *Main Report*, above n 4, at [250].
[28] Independent Taskforce *Main Report*, above n 4, at 5.

Appendix I: Independent Taskforce on Workplace Health and Safety Summary of Key Systemic Weaknesses[29]

1. Confusing regulation
The system currently fails to make clear expectations of regulated entities and duty holders, and the regulator does not make compliance easy for the vast majority who want to comply. Sanctions for those who intentionally, or through neglect, break the law are not adequate. The framework is confusing with multiple pieces of legislation, blending hazard- and risk-management specifications, falling across overlapping and ambiguous jurisdictional boundaries. There is a lack of coordination between agencies and gaps in coverage.

2. A weak regulator
Despite efforts in specific areas, and the integrity and dedication of many staff, the primary regulator has failed to deliver on core responsibilities under the Robens model. Overall, it has failed to provide the system with sufficient certainty on how duty holders and regulated entities should comply. The regulator lacks capacity and capabilities, and it has failed to collaborate with other agencies on effective harm prevention.

3. Poor worker engagement
Worker engagement in health and safety is generally ineffective and often virtually absent. New Zealand falls well short of the strength of worker representative legislation and levels of engagement operating in comparable jurisdictions.

4. Inadequate leadership
There is little leadership being shown by a large number of people and organisations who have influence in the workplace. The issues include a lack of capability among managers generally, New Zealand's shortage of large private sector employers who could become exemplars, and defensive attitudes in some industry bodies.

5. Capacity and capability shortcomings
These shortcomings exist among workers, managers, health and safety practitioners, business leaders and the regulator. The shortcomings include insufficient knowledge of workplace health and safety risks and specific hazards, and insufficient knowledge of workplace health and safety regulatory requirements, including of rights and obligations.

6. Inadequate incentives
New Zealand lacks the positive incentives and deterrents needed to drive compliance with minimum health and safety standards or to foster behaviours that lead to continual improvement. The low likelihood of inspector visits, and of prosecution or other action, creates an uneven playing field and effectively rewards non-compliance. The regulators' resources are not applied optimally, penalties are far too low and the tools available are limited.

7. Poor data and measurement
New Zealand has poor information and intelligence on health and safety risk concentrations, causes of workplace injuries and illnesses, and the effectiveness of interventions to improve health and safety outcomes. We do not know the full extent of the issues or what to target. Reviewers and committees have reported on the issues before, but their recommendations have been largely ignored.

[29] Independent Taskforce *Executive Report*, above n 5, at 11-12.

8. Risk tolerant culture

Our national culture includes a high level of tolerance for risk, and negative perceptions of health and safety. Kiwi stoicism, deference to authority, laid-back complacency and suspicion of red tape all affect behaviour from the boardroom to the shop floor. If recognition and support for health and safety are low or intermittent, workplaces are liable to develop, accept and defend low standards, dangerous practices and inadequate systems.

9. Hidden occupational health

New Zealand's estimated 500-800 premature deaths year from occupation ill-health receive little government, media or business attention. Inadequate data systems and research mean the scale and nature of the issues are largely unknown – and the system is unresponsive to new and emerging risks. Activity is fragmented across multiple regulators, disciplines and sectors with no effective co-ordination or leadership.

10. Major hazard facilities

Some major hazard facilities have insufficient oversight. The current framework focuses on certain industries (e.g. offshore petroleum, mining, geothermal energy) but other facilities with comparable dangers are not subject to the same degree of oversight and regulation. This reflects the gaps in knowledge about major hazards, and the fact that the risk landscape in New Zealand is not understood.

11. Particular challenges to SMEs

Challenges arise for SMEs from the generally less formal management style of smaller businesses, their resource constraints, limited access to external advice and support, and lack of systems fit for health and safety purposes. The current regulator has provided insufficient relevant advice to SMEs who are particularly dependent on it.

12. Particular at-risk populations

Some groups experience disproportionate levels of workplace-related poor health and injury. Low literacy and poor communication skills are, in themselves, risk factors especially in workplaces that are inherently more risky. This presents a particular challenge to policy-makers and regulators, as a one-size-fits-all response to population-specific outcomes, without a careful analysis of all underlying causes, may result in poorly targeted and ill-conceived interventions.

Occupational Health And Safety: Why And How Should Worker Participation Be Enhanced In New Zealand?

VIKTORIYA PASHORINA-NICHOLS*

Abstract

This paper provides a brief overview of the international academic commentary on the subject of worker participation in Occupational Health and Safety (OHS) and then considers the character of worker participation in New Zealand OHS management (OHSM) in more detail. The paper highlights how vital worker participation is for the health and safety (H&S) of workers. The paper concludes that the changes introduced by the Health and Safety at Work Act 2015 (HSW Act) provide evidence that New Zealand has taken steps in the right direction, but there is further room for improvement; in particular H&S representatives and H&S committees should be available to all workers without exceptions.

Key words

Occupational health and safety, OHS, worker participation, Health and Safety at Work Act 2015.

Introduction

Occupational health and safety (OHS) law in New Zealand has been in existence since the 19th century.[1] Despite such a lengthy presence, the country's work-related injury fatality rate is comparatively one of the worst internationally.[2] The development of OHS seems to have taken place roughly after major mine explosions occurred in New Zealand.[3] The natural conclusion which flows from such an observation is that OHS reform is reactionary — the most recent evidence stemming from the Pike River mine disaster in 2010, which resulted in the Health and Safety at Work Act 2015 (HSW Act).

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[1] Felicity Lamm "Participative and productive employment relations: the role of health and safety committees and worker representation" in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 168 at 169; and see generally Noel Woods *Industrial Conciliation and Arbitration in New Zealand* (RE Owen, Government Printer, Wellington, 1963).

[2] See Appendix I; Philip Gunby "How Bad is the State of Occupational Fatalities in New Zealand?" (2011) 36(1) NZJER 35 at 39–40; and see also Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health And Safety: He Korowai Whakaruruhau* (April 2013) at [15].

[3] See Appendix II.

This paper begins with a general introduction to the topic of worker participation. This is followed by an explanation of New Zealand's development of worker participation in OHS, including a section on the HSW Act. The bulk of the text discusses international academic commentary on the benefits of granting participation to workers in OHS matters. Based on that international literature, certain factors are discussed that would help to ensure that whatever worker participation practice is implemented, it is done so as to maximise its own benefits. Lastly, certain lessons are drawn for the New Zealand government, employers, workers and other interested parties to consider.

Overview of Worker Participation

There is no precise definition of worker participation; thus, whenever authors use the particular phrase, they often indicate their own personal preference for the term.[4] Worker participation is the "expression [that] is possibly the most common[ly]" used,[5] standing in competition with many other well-known phrases: employee (or worker) involvement, employee participation, industrial democracy, worker control, high-involvement Human Resources Management (HRM), voice and self-management.[6] One of the reasons certain authors prefer to use worker participation is because the term is more inclusive of a great variety of activities and is therefore broader in its scope, whereas the other alternative terms tend to exclude certain activities undertaken by workers.[7]

Despite being generally broader than the other terms, worker participation has a spectrum of meanings of its own. When the term worker participation is used at its broadest, it is typically done in the context of discussing or explaining the various forms of worker activities;[8] but because authors may have strong personal commitments to particular forms of participation, they choose to restrict the definition of worker participation.[9] For instance, the most common practice among some writers is to exclude collective bargaining as an activity covered by worker participation.[10]

Nevertheless, authors are in agreement that worker participation practices, which influence the decision making of the organisation, can be divided into direct and indirect

[4] See Adrian Wilkinson and others "Conceptualizing Employee Participation in Organizations" in Adrian Wilkinson and others (eds) *The Oxford Handbook of Participation in Organizations* (Oxford University Press, New York, 2010) 3 at 3–7 and 10–13; and see also Raymond Markey and others "Exploring employee participation and work environment in hotels: Case studies from Denmark and New Zealand" (2014) 39(1) NZJER 2 at 3–5.

[5] AJ Geare "Worker Participation" in *The System of Industrial Relations in New Zealand* (2nd (revised) ed, Butterworths, Wellington, 1988) 409 at 411.

[6] At 410.

[7] At 411.

[8] At 411.

[9] At 411–412.

[10] See examples at 412, n 1, n 2 and n 3; and contrast Richard Block and Peter Berg "Collective Bargaining as a Form of Employee Participation: Observations on the United States and Europe" in Adrian Wilkinson and others (eds) *The Oxford Handbook of Participation in Organizations* (Oxford University Press, New York, 2010) 186.

participation (also known as representative participation).[11] Some examples of such practices are, inter alia, communication and discussion, face-to-face consultation with a manager, company-wide meetings, collective bargaining, works councils, joint management, self-management and worker ownership.[12]

It is now appropriate to explain the history of worker participation in New Zealand, specifically in the OHS context.

Development of Worker Participation in OHS in New Zealand

The first seed to give all workers a more participative role in OHS in New Zealand was planted by the ACOSH Report in 1988.[13] The conclusions reached by the ACOSH Report were primarily based on the equivalent, but much earlier, United Kingdom report better known as the Robens Report.[14] The two documents advocated for the need to impose:[15]

> …a statutory duty on every employer to consult with his employees or their representatives at the workplace on measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures.

This view became very dominant because it was realised that "real progress is impossible without the full co-operation and commitment of all employees".[16]

The United Kingdom's Health and Safety at Work etc Act 1974 intended to implement the Robens Report recommendations, but it soon drew much criticism on the basis that the new laws were inconsistent with "the scheme which the [Robens] Committee had in mind".[17] The Safety Representatives and Safety Committees Regulations 1977 have, in contrast, had a much bigger impact because, to the Government's considerable hesitation, they provided for the appointment of H&S representatives and committees.[18] In essence, whereas the Act allowed much discretion for having certain participatory practices in place, the Regulations constituted a far stricter imposition on employers.

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[11] Geare, above n 5, at 414–415.
[12] See generally at 414–419.
[13]Advisory Council for Occupational Safety and Health (ACOSH) *A Public Discussion Paper: Occupational Safety And Health Reform* (June 1988); and see generally John Wren "From the 'Balkanisation of Control' to Employer Management Systems: OHS Policy and Politics in New Zealand 1981–1992" in Michael Lloyd (ed) *Occupational Health and Safety in New Zealand: Contemporary Social Research* (Dunmore Press, Palmerston North, 2002) 43 at 43–47.
[14] Committee on Safety and Health at Work (Lord Alfred Robens Chair) *Safety and Health at Work: Report of the Committee 1970-72* (1972) (the Robens Report).
[15] Robens Report, above n 14, at [70]; and see also ACOSH, above n 13, at 11.
[16] Robens Report, above n 14, at [59].
[17] Adrian Merritt "Britain: The Health and Safety at Work etc Act 1974" in *Guidebook to Australian Occupational Health & Safety Laws* (CCH, North Ryde (NSW), 1983) 243 at 252.
[18] At 253.

Following a similar path in the 1970s and 1980s,[19] Australian states and territories have enacted their own statutes granting workers the right of participation in OHS.[20] Hence, the laws governing OHS in Australia varied in many respects for over 30 years, ultimately inciting Australia to begin the process of harmonisation:[21] its 2008 national review resulted in the Model Work Health and Safety Act 2011[22] (discussed in further detail later).[23]

New Zealand was one of the last countries to plant a seed that worker participation is a necessity — the ACOSH Report of 1988 — but, unfortunately, that same seed did not germinate until many years later. For instance, the Health and Safety in Employment Act 1992 did not give workers a statutory right of participation. In fact, it was severely opposed: the then Minister of Labour believed H&S representatives and committees to be a "confrontational approach".[24]

Nevertheless in 2002, approximately 20 years after the United Kingdom and Australia, New Zealand underwent a considerable shift in attitude which demonstrated significant support for employee involvement in OHS. When speaking in 2001, Margaret Wilson — then Minister of Labour — showed her support for the insertion of statutory rights for the participation of workers:[25]

> The [Health and Safety in Employment Amendment Bill] … recognises that health and safety issues are fundamentally employment relations issues. A good culture of health and safety practices requires the participation of everyone.

Consequently, the 2002 Act introduced a general duty to involve employees in OHS matters: "[e]very employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work".[26] The purpose of this new duty was to ensure that all those with relevant knowledge and expertise were involved in OHS, thereby resulting in better decision making by employers on H&S matters at the workplace.[27]

The large number of incidents in employment since 2002 — including road worker injuries, hazardous substances spills, forestry injuries, Ashburton Work and Income shootings, farming accidents, construction incidents and the Pike River mine accident —

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[19] Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, Sydney, 2012) at 4–6, 136–137 and 141–143.
[20] At 6–8.
[21] See generally at 8–25.
[22] See generally at 26–37.
[23] See generally at 26–37.
[24] Ian Campbell "From no fault to own fault? Changes in OSH regulation in New Zealand" (1992) 1 J Occ Health Safety – Aust NZ 3 at 4.
[25] (3 December 2002) 604 NZPD 2442.
[26] Health and Safety in Employment Amendment Act 2002, s 13; and see also Health and Safety in Employment Act 1992, s 19B.
[27] Health and Safety in Employment Amendment Act, s 13; and see also Health and Safety in Employment Act, s 19A.

have highlighted the inadequacy of the OHS legislative framework in New Zealand.[28] In particular, the 2010 Pike River incident, which took the lives of 29 men, was a major wake-up call for the whole country.[29] As a result, two reports have been produced regarding the accident,[30] one of which recommended that New Zealand align its OHS laws with that of Australia — the Australian Model Health and Safety Act 2011 — because:[31]

- It is the most recent expression of the Robens approach;
- It is the result of a long period of investigation and consultation (domestically and internationally);
- Australia has undergone an extensive modernisation process, including the development of regulations and information, and New Zealand can capitalise on that work; and
- There are advantages to New Zealand companies in having a common trans-Tasman approach to workplace health and safety.

As a direct consequence of the Pike River disaster, the HSW Act was passed in August 2015, proving once again the reactionary nature of OHS reform in New Zealand.

HSW Act – Worker Participation

The HSW Act, which is comparable to the Australian Model Act in many respects, began its life as the Health and Safety Reform Bill.[32] What has been described as "the meat and drink of the bill" is Part 3, which deals with worker engagement, participation and representation.[33]

The Twin Duties

The HSW Act places a duty on a PCBU to engage with workers whenever engagement is required.[34] A PCBU is defined as a person conducting a business or undertaking, which has the effect of broadening the scope of persons responsible for their workers.[35] A PCBU and its workers may agree on adequate procedures for engagement, but the procedures must not be inconsistent with s 59, which prescribes what engagement with workers must involve.[36] Even though the Act's notes to the engagement sections suggest

[28] See WorkSafe New Zealand "Workplace Fatalities Summary 2013–2015" <www.business.govt.nz>.
[29] See also JR Lamare and others "Independent, dependent, and employee: Contractors and New Zealand's Pike River Coal Mine disaster" (2015) 57(1) JIR 72 at 82.
[30] Royal Commission on the Pike River Coal Mine Tragedy *Royal Commission on the Pike River Coal Mine Tragedy: Volume 1* and *Volume 2* (October 2012); and Independent Taskforce, above n 2.
[31] Richard Rudman "Health and Safety" in *New Zealand Employment Law Guide* (CCH, Auckland, 2015) 391 at 425; and see Independent Taskforce, above n 2, at [215].
[32] Health and Safety Reform Bill 2014 (192-2).
[33] (19 August 2015) 707 NZPD 5919.
[34] Health and Safety at Work Act 2015, s 58(1).
[35] Section 17(1).
[36] Sections 58(2) and 58(3).

that they are comparable to the Australian Model Act, it is noteworthy that the Australian equivalent is called a duty to *consult* as opposed to engage.[37]

The Act also places a duty on a PCBU to have worker participation practices, which should "provide reasonable opportunities for workers … to participate effectively in improving work health and safety in the business or undertaking on an ongoing basis".[38] In essence, the most substantial change from the Health and Safety in Employment Act 1992 is that instead of a general duty to provide reasonable opportunities for employee participation, employers must now implement practices to ensure the provision of such opportunities.

If a PCBU were to breach either of its twin duties, it would commit an offence and, thus, would be liable on conviction to a fine.[39]

H&S Representatives and Committees

The Act prescribes two practices of worker participation: H&S representatives and H&S committees.[40] A H&S representative may be elected either if a worker notifies a PCBU that he or she wishes to have a representative or if a PCBU wishes to do so on its own initiative.[41] If elected, workers may be divided into work groups with different representatives.[42] A H&S committee may be established if there is a request made and directed at PCBU by a H&S representative or by five or more workers at that workplace.[43]

The controversy surrounding the Health and Safety Reform Bill on these two practices arose because there was a significant change between the Bill's original wording and its post-Select Committee version, which has been adopted in the Act.[44] In summary, a PCBU may decline to respond affirmatively to a worker's request for a H&S representative if that PCBU runs a small business with fewer than 20 workers in a non-high-risk sector.[45] Moreover, the same kind of business may also reject a request for a H&S committee.[46] High-risk sectors, as recently defined in the Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016, are predominantly agricultural and labour-intensive business undertakings only.[47]

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[37] Work Health and Safety Act 2011 (Cth), s 47.
[38] Health and Safety at Work Act, s 61(1).
[39] Sections 58(4) and 61(4).
[40] Part 3, sub-pt 2.
[41] Sections 62(1) and 62(3).
[42] Section 64(1).
[43] Section 66(1).
[44] See WorkSafe New Zealand "Health and Safety Reform Bill – key changes" <www.business.govt.nz>.
[45] Health and Safety at Work Act, s 62(4).
[46] Section 66(3).
[47] Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016, reg 5.

The recently-passed Act is intended to improve the OHS legislative framework in New Zealand, especially because it repeals, inter alia, the Health and Safety in Employment Act 1992.[48] It is true that the recent reform is a step in the right direction because, as explained below, worker participation is very advantageous and the HSW Act places a duty on every PCBU to engage with workers and to implement worker participation practices. However, the enacted exceptions to the twin duties could in practice reduce the potential significance of the recent OHS reform by *effectively* depriving workers at smaller businesses of the right to have H&S representatives or committees (but more on this later). Hence, the New Zealand legislative framework for OHS may need to be revisited shortly.

Goals and Benefits of Worker Participation

As explained above, worker participation does not have a precise definition and, hence, authors use the phrase because of their personal preference for it. The issue that stems from a lack of definition is that generalisations about the outcomes of worker participation are very difficult to make. Some results may be heavily biased due to the writer's own preferences: "evidence is apparently viewed not only though rose tinted glasses, but through rose tinted glasses with distorted lenses".[49] Nevertheless, this section argues that worker participation may achieve a variety of goals, which may result in many benefits for both employees and businesses in an OHS context. It is, therefore, not surprising that worker participation in OHS has been recognised internationally.[50]

Employee Wellbeing

Ethics

The ethical argument in favour of worker participation is that "workers bear the brunt of the effects of work-related hazards", so they should be able to identify and address the various hazards in their workplace.[51] The benefits, which stem from participation, are twofold: (a) managers are able to develop more adequate H&S measures when their workers highlight danger-prone areas, and (b) it is more likely that workers' interests will be protected whenever conflicts may arise "between the drive for production and profits on the one hand, and work health and safety on the other".[52] In essence, democracy will be evident at the workplace.[53]

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[48] Section 231.
[49] Geare, above n 5, at 434.
[50] Occupational Safety and Health Convention, 1981 (ILO Convention C155) 1331 UNTS 280 (entered into force 11 August 1983); and European Union Framework Directive 89/391 on OSH [1989] OJ L183.
[51] Johnstone and Tooma, above n 19, at 137–138.
[52] At 138; and see also Leigh-Ann Harris "Legislation for Participation: an Overview of New Zealand's Health and Safety Representative Employee Participation System" (2011) 36(2) NZJER 45 at 45.
[53] See generally Stewart Johnstone and Peter Ackers "Introduction: Employee voice" in Stewart Johnstone and Peter Ackers (eds) *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford University Press, New York, 2015) 1 at 8.

Social Justice

A related argument for worker participation is the socially just case for representative participation:[54]

> …the rights of workers to form unions, elect representatives, and participate in the running of business through work councils and collective bargaining are … absolute entitlements that must be respected regardless of cost.

In short, the right to participate is an end in itself and, thus, a benefit to workers.

Reduction in the Number of Injuries and Fatalities

Arguably, the main goal of worker participation in an OHS context is to reduce the number of accidents that result in injuries and fatalities. Academic literature is consistent in the view that the number of injuries and fatalities in the workplace decreases as a consequence of worker participation practices:[55]

> A number of studies suggest that indicators of objective OHS performance, such as injury rates, are better in situations in which joint arrangements are in place and/or when trade unions are engaged in worker representation in workplaces. Other studies point to associations between the presence of representative structures and indicators of a more systematic approach to OHSM to determine the extent to which such measures are central to workplace arrangements for OHSM.

Since New Zealand decided to align its laws with the laws of Australia, it is natural to look to our neighbour's statistics for confirmation. The Model Act in Australia has proven to be a success, with the rate of occupational injuries and casualties falling. For instance, in the period of 2011-2012, just after the Act was passed, the injury incidence rate fell by 26 per cent and the fatality incidence rate fell by 41 per cent.[56] Moreover, Australia has recently reported the lowest number of work-related deaths in 11 years,[57] and the lowest compensated fatality rate in a decade.[58]

This segment might lead one to think that any regulation of H&S primarily benefits workers, but the benefits that employers (or management) receive cannot be excluded.

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[54] Edmund Heery "Frames of reference and worker participation" in Stewart Johnstone and Peter Ackers (eds) *Finding a Voice at Work? New Perspectives on Employment Relations* (Oxford University Press, New York, 2015) 21 at 29.

[55] David Walters "Workplace Arrangements for Worker Participation in OHS" in Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds) *OHS Regulation for a Changing World of Wor*k (Federation Press, Sydney, 2004) 68 at 75; and see also Richard Johnstone, Michael Quinlan and David Walters "Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market" (2005) 47(1) J Ind Relat 93 at 94–95.

[56] Safe Work Australia *Comparative Performance Monitoring Report: Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand* (October 2014) at vii.

[57] Safe Work Australia "Lowest number of work-related deaths in 11 years" (15 July 2014) <www.safeworkaustralia.gov.au>.

[58] Safe Work Australia "Lowest compensated fatality rate in a decade" (9 October 2014) <www.safeworkaustralia.gov.au>.

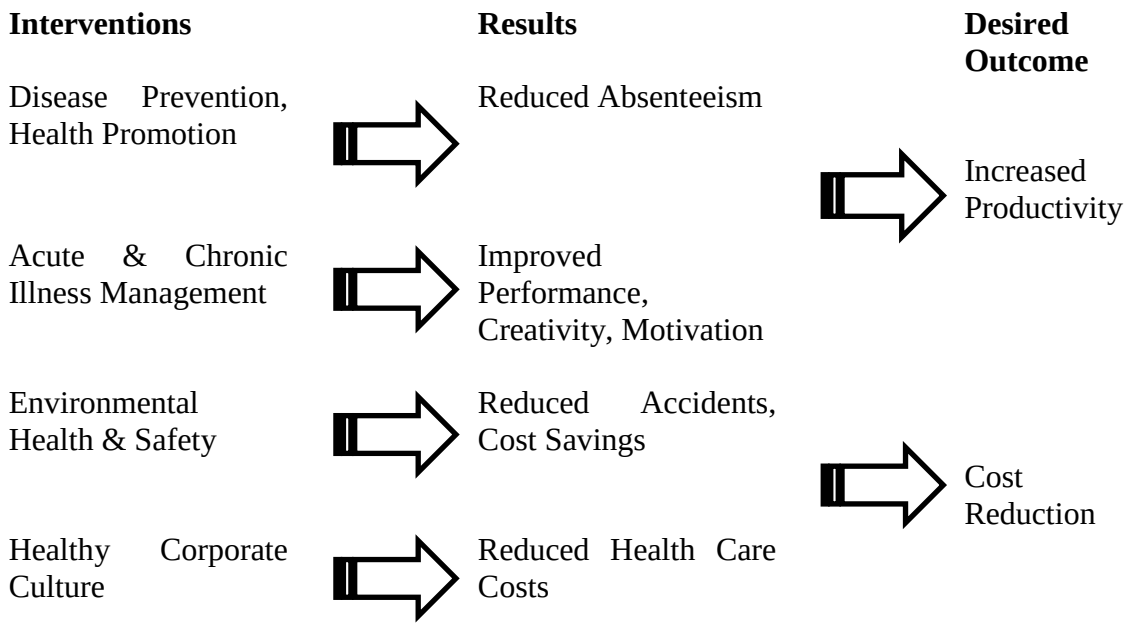
Business Wellbeing

Certain academics are of the view that "the core purpose of worker participation is to improve business performance".[59] In order to attempt to measure business performance, it must be remembered that "[t]he success of any business depends on the employees. That is the bottom line."[60] As discussed above, there are multiple ways in which employee wellbeing can improve if worker participation practices are implemented; as a result, it is natural to conclude that the business where those employees work would also flourish:[61]

> …human performance is higher when people are physically and emotionally able to work and have a desire to work. Higher levels of human performance lead to higher levels of productivity, which in turn can lead to higher profits.

The following figure, created by other authors, is useful in explaining the benefits of worker participation for a business:[62]

Pathways to Productivity



[59] Heery, above n 54, at 25.
[60] James Roughton and James Mercurio "Employee Participation" in *Developing an Effective Safety Culture: A Leadership Approach* (Butterworth-Heinemann, 2002) 116 at 116.
[61] Michael O'Donnell "Health and Productivity Management: the Concept, Impact, and Opportunity – Commentary to Goetzel and Ozminkowsi" (2000) 14(4) AJHP 215 at 215.
[62] Based on the figure of John Riedel and others "The Effect of Disease Prevention and Health Promotion on Workplace Productivity: A Literature Review" (2001) 15(3) AJHP 167 at 168 as cited in Felicity Lamm, Claire Massey and Martin Perry "Is there a link between Workplace Health and Safety and Firm Performance and Productivity?" (2007) 32(1) NZJER 72 at 76.

If an employee is given a chance to participate, then that employee is likely to become more aware and thus more engaged. This may result in a higher enjoyment of the work and a greater responsibility for the job, which in turn results in a better quality product or service.[63]

Furthermore, higher engagement of workers has been found to lead to lesser absenteeism and reduced turnover,[64] which is likely to result in a direct saving of costs to the business. However, it must be remembered that it is difficult to assess specifically the contribution of OHS to the overall productivity of a business because other aspects of business life and management also play a role.[65]

Lastly, it is important to appreciate that worker participation practices may result in the development of a safety culture over time, thereby maintaining employee and business wellbeing into the future.

How To Maximise Benefits of Worker Participation in OHS

The HSW Act does not prescribe which worker participation practices must be implemented, unless there are requests to elect a H&S representative or to establish a H&S committee. Every practice has its own advantages in comparison with others, but a particular practice may prove far more beneficial within one organisation over another because it is better suited to the type of industry, business, workplace size or some other matter. This section explores which factors must be present and considered to enhance any particular type of worker participation. However, before diving into a discussion of these various factors, the special role of H&S representatives and H&S committees in OHS must be emphasised.

The Special Role of H&S Representatives and Committees

There is some empirical evidence available to indicate that direct participation practices, particularly when carried out by individual non-unionised workers engaging with their managers, have little effect on workplace H&S.[66] Instead, indirect (representative) participation schemes have been found to be much more useful.[67] In short, "joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage work health and safety without representative worker participation".[68]

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[63] See Roughton and Mercurio, above n 60, at 121.
[64] At 121.
[65] See Terri Mylett and Ray Markey "Worker Participation in OHS in New South Wales (Australia) and New Zealand: Methods and Implications" (2007) 7(2) Employment Relations Record 15 at 18–21; and see also Lamm, Massey and Perry, above n 62, at 81–82.
[66] Johnstone and Tooma, above n 19, at 138; and see also Walters, above n 55, at 79–80.
[67] Johnstone and Tooma, above n 19, at 138–139.
[68] At 139.

Within the indirect participation umbrella, the 1972 Robens Report emphasised the need for the two forms of worker participation incorporated by the HSW Act: H&S representatives and H&S committees. The Robens Report was of the view that the role of H&S representatives is key to any success in OHS,[69] therefore H&S representatives "should have strong channels of communication with government work health and safety inspectors".[70] The significant role of H&S representatives in OHS is certainly supported by international literature.[71]

The role of joint committees may be more difficult in practice because decision making is not always easy when there are many parties with various interests. However, in order to improve OHS, it is best to have a H&S committee, which would represent the variety of interests at any one workplace, because the skills and experience of multiple teams or departments may prove useful.[72]

Although the two discussed practices are vital for OHS, there are exemptions available under the HSW Act for PCBUs who run a small business with fewer than 20 workers in a non-high-risk sector.

Arguably, this permissible exclusion is inappropriate because many businesses in New Zealand may fall into that category: "small business sectors … represent approximately 90 per cent of the business population and [employ] 60 per cent of the business population".[73] Many New Zealand workplaces, particularly those operating within the construction, forestry and agricultural industries, might not take advantage of the two practices, which are empirically proven to be the most useful in dealing with OHS.

Furthermore, it seems somewhat nonsensical for a New Zealand Act modeled on that of Australia to introduce such an exception when none exists in the Model Act. No doubt some may argue that this decision was made to reflect New Zealand's unique features, but it would be hard to justify such a proposition.

New Zealand could perhaps learn from Sweden, which established regional or territorial H&S representatives for its workers in the 1960s-1970s. This practice underwent substantial evaluations in the 1970s and 1990s, which concluded overall that regional H&S representatives "are amongst the most powerful, effective and sustainable of intermediaries for stimulating and supporting participative arrangements for health and safety in small businesses".[74] In summary, every workplace, no matter how big or small, should be represented by a H&S representative and/or committee.

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[69] Robens Report, above n 14, at [66].
[70] Johnstone and Tooma, above n 19, at 141.
[71] At 139; Felicity Lamm and David Walters "Regulating Occupational Health and Safety in Small Businesses" in Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds) *OHS Regulation for a Changing World of Wor*k (Federation Press, Sydney, 2004) 94 at 109 –110.
[72] See Roughton and Mercurio, above n 60, at 121.
[73] Markey and others, above n 4, at 7.
[74] Lamm and Walters, above n 71, at 110.

Factors That Maximise Worker Participation Practices

In case H&S representatives and/or committees are not established, academic literature suggests that the following factors should help to support and maximise any worker participation practice: legislation, workplace culture, information and training, and trade union involvement.

Legislation

It is important to note that state intervention is crucial if improvements in OHS are to be achieved: "[l]egislation provides guidance on the form and nature of participation and legitimises representatives' rights to resources, thus enabling participation."[75] It is therefore encouraging to see New Zealand trying to solve its OHS problem through legislation, but it is most unfortunate that this legislation permits exemptions to the two most useful worker participation practices.

Workplace Culture and Management Commitment

The fact that culture generally matters is equally applicable to OHS worker participation practices. Before any program or scheme is implemented, it pays to observe and consider the existing organisational and social-relational conditions because these will strongly affect the outcomes of the participatory practice. For instance, one study showed that workers "under more traditional managerial 'regimes'" do not tend to welcome any change, thereby reducing the likelihood of positive outcomes if new worker participation systems are introduced.[76] Overall, it is best if there is evidence of "worker organisation at the workplace that prioritises OHS and integrates it in other aspects of representation on industrial relations".[77]

The workplace culture also extends to (senior) management, which ought to show its commitment to improving OHS performance and participative arrangements.[78]

Information and Training

Training is absolutely crucial when it comes to workplace H&S: empirical evidence suggests that better-trained H&S representatives contribute significantly to OHS at a workplace.[79] It is promising to note that H&S representatives, if elected, are entitled to attend training and be paid for it under the HSW Act.[80]

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[75] Harris, above n 52, at 45 [inline citation omitted]; and see also Lamm and Walters, above n 71, at 112.
[76] Vicki Smith "Introduction" in Vicki Smith (ed) *Worker Participation: Current Research And Future Trends* (Elsevier JAI, Amsterdam, 2006) xi at xiv.
[77] Walters, above n 55, at 78.
[78] At 78.
[79] At 79; and Lamm and Walters, above n 71, at 113–114.
[80] Health and Safety at Work Act, sch 2 s 12.

Any training, however, should extend to all those working in an organisation.[81] It is also desirable to update workers regularly on OHS matters because some will undoubtedly forget what the correct procedures are.

Trade Union Involvement

Trade unions' involvement significantly increases the voice and representation of workers and consequently OHS statistics are likely to improve.[82] Specifically, the role of trade unions in the provision of information and training to workers and H&S representatives is desirable.[83]

However, it is important to note that the role of trade unions has diminished since the 1980s around the world and most certainly in New Zealand. Hence, the falling influence of trade unions is a phenomenon that must be accepted, despite it being extremely unfortunate for OHS. It must be emphasised, however, that non-union participation may have just as much, if not greater, contribution to OHS.

Conclusion: Lessons for New Zealand

This paper argues that worker participation can support OHS in any workplace. Consequently, due to the HSW Act's imposition on PCBUs of a duty to engage with workers and to adopt worker participation practices, the recent reform is a step in the right direction for the legislative framework of OHS in New Zealand. The Act was modeled on a similar Australian Act, which has fortunately helped to reduce the incidence of occupational injuries and fatalities in Australia.

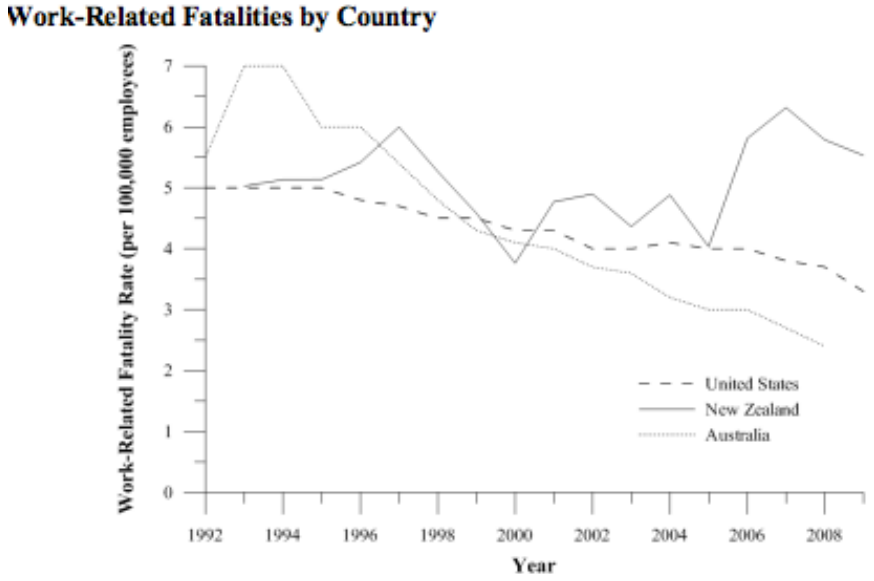
This paper also suggests that, out of the many worker participation practices available, the two that are the most suitable for OHS are H&S representatives and H&S committees. It is pleasing that the HSW Act actually provides for those practices in its provisions; however, the problem lies in the fact that the Act allows PCBUs to reject any request for either practice if the business has fewer than 20 workers and is considered not high-risk.

A lesson ought to be learnt from the United Kingdom's Health and Safety at Work etc Act 1974, as mentioned earlier, which gave too much discretion to employers, thereby weakening the spirit of the Robens Report. The 1977 Regulations, which placed an imposition upon employers to appoint H&S representatives and committees, proved to be more effective than the Act in advocating for appropriate OHS. Moreover, the Australian Model Act does not have a similar exception in its provisions, thus the exception in the New Zealand HSW Act is illogical and should not exist. The bottom line is that every worker is susceptible to injuries no matter where they work, so it is crucial for everyone to have access to practices of worker participation that truly work.

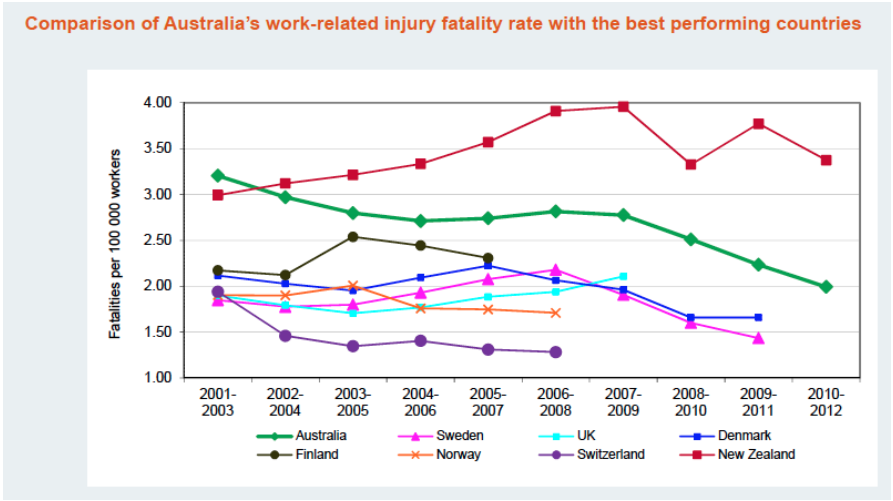
[81] See Roughton and Mercurio, above n 60, at 130.
[82] Lamm and Walters, above n 71, at 111–112.
[83] Walters, above n 55, at 78–79.

If, nevertheless, H&S representatives and committees are not implemented, the following factors may prove useful in improving OHS if taken into account by the government, employers and other interested parties: legislative support, workplace culture, provision of information and adequate training, and trade union involvement.

Appendix I



Work-Related Fatalities by Country.[84]



Comparison of Australia's work-related injury fatality rate with the best performing countries.[85]

[84] Philip Gunby "How Bad is the State of Occupational Fatalities in New Zealand?" (2011) 36(1) NZJER 35 at 39.

[85] Safe Work Australia *National OHS Strategy 2002-2012: Progress against targets* (February 2015) at 3.

Appendix II

Major mine disasters in New Zealand	Casualties	Response
21 February 1879 Kaitangata	34 deaths	Mines Department was given the power to inspect mines. The 1890s Liberal government's reforms such as the introduction of Factories Act 1891, which set out minimum standards of work.
26 March 1896 Brunner	65 deaths	
12 September 1914 Ralph's mine, Huntly	43 deaths	The Workers Compensation Act 1900 mentality of compensating for injuries, as opposed to preventing them, was dominant.
3 December 1926 Dobson mine	9 deaths	
24 September 1939 Glen Afton mine, Huntly	11 deaths	
19 January 1967 Strongman mine	19 deaths	The OHS reforms of 1970s/1980s in New Zealand (explained in the paper) and introduction of ACC.
19 November 2010 Pike River mine	29 deaths	Health and Safety at Work Act 2015.

Mining accidents in New Zealand.[86]

[86] Based on Alan Sherwood and Jock Phillips "Coal and coal mining: Mining accidents" (17 November 2015) Te Ara: The Encyclopedia of New Zealand <www.teara.govt.nz>.

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Regulating Work That Kills Us Slowly: The Challenge of Chronic Work-Related Health Problems

DAWN DUNCAN*

Abstract

New Zealand has a long history of neglecting the chronic health effects of work. Recent health and safety reforms, including the new Health and Safety at Work Act 2015, risk continuing this neglect, with serious negative consequences for worker health. This paper proposes three areas of legislative reform needed to begin to tackle the growing challenge of chronic work-related health problems in New Zealand.

Key words

Health and safety, psychosocial hazards, compensation.

Introduction

The Health and Safety at Work Act 2015 (HSWA) was a response to New Zealand's poor record of occupational health and safety, highlighted in the *Report of the Royal Commission on the Pike River Mine Tragedy*[1] and the *Report of the Independent Taskforce on Workplace Health and Safety*.[2] The HSWA forms part of the Working Safer Reform Package,[3] which includes greater powers for the regulator, tougher penalties, and the establishment of a national target to reduce serious injuries and fatalities.[4] While these measures are good, they do little to address New Zealand's systemic failure in responding to chronic work-related harm. The Independent Taskforce described New Zealand's response as a "tragic paradox":[5]

> While New Zealand's acute harm and workplace safety statistics are woeful and rightly attract considerable attention, the much more damaging occupational health impacts of the workplace go almost completely under the radar.

The chronic work-related health problems going under the radar in New Zealand include depression, anxiety, drug and alcohol abuse, pain syndromes, neurological and reproductive disorders, sleep disorders, respiratory disease, suicide, heart disease and many cancers. These chronic health effects of work are a significant problem, estimated by WorkSafe to result in an

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[1] Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (October 2012).

[2] Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (April 2013).

[3] Ministry of Business, Innovation and Employment (MBIE) *Working Safer: Blueprint for New Zealand's Health and Safety System* (August 2013).

[4] Ministry of Business, Innovation and Employment (MBIE) *Working Safer: Reducing Work-Related Fatalities and Serious Injury by 2020: Progress Toward the Target* (March 2015).

[5] Independent Taskforce on Workplace Health and Safety, above n 2, at 16.

additional 600-900 deaths,[6] and affecting tens of thousands more workers,[7] each year. Chronic work-related health problems pose an urgent challenge for New Zealand's health and safety and accident compensation laws, which were designed for the "accidents" that occurred in 20th century factories, mines and workshops and not for the health consequences of poor job design, bullying or stress.

New Zealand has a long history of ignoring the chronic health effects of work. In 2008, the National Occupational Health and Safety Advisory Committee (NOHSAC) technical report concluded that New Zealand's response is less favourable than in comparable countries, and results in injustice, reduced rehabilitation and return to work prospects, inappropriate and delayed interventions, increased costs to public health, and a lack of reporting and prevention activity.[8] In the current *Occupational Health Action Plan*, WorkSafe acknowledges that "workplace exposure to identified health hazards often ends up as a 'poor cousin' to injury prevention and management of safety hazards."[9] Despite recognising the problems, successive governments have decided not to address the issues due to "cost implications" and "policy difficulties."[10] This pattern has sadly continued in the *Working Safer* reforms, with occupational diseases excluded from the current *Working Safer* national targets because this area is "too difficult to monitor."[11] While the policy documents are full of high-sounding statements on the importance of occupational health, there is little concrete change being proposed. In a climate of waning political enthusiasm for health and safety there is a real risk that chronic work-related health problems will be placed back in the "too hard basket."[12]

This paper proposes three areas of legislative reform needed to address New Zealand's chronic work-related harm problems. First, the chronic health effects of work need to be given equal treatment to accidental workplace injury in the Accident Compensation Corporation (ACC) cover provisions, including chronic work-related mental health problems. Second, New Zealand needs to set regulatory standards for a healthy job, not just a safe one, including prevention and monitoring requirements beyond "plant, substances, and structures".[13] Third, the HSWA needs a different set of inspection and enforcement tools, including a new statutory 'right to request' in relation to health and safety.

Reforms to ACC Coverage Provisions and Data Collection

The ACC scheme is a significant, but sometimes overlooked, part of New Zealand's occupational health and safety regime. Its "primary function" under statute is to "reduce the incidence and severity of personal injury" and to provide "a framework for the collection, coordination, and analysis of injury related information."[14] Any meaningful attempt to address

[6] Latest estimate on the WorkSafe website as at 24 August 2015 <www.worksafe.govt.nz>.
[7] Although there are no reliable figures on this, the National Occupational Health and Safety Advisory Committee (NOHSAC) 2004 figures were estimated at over 20,000.
[8] Allen and Clarke *National Occupational Health and Safety Advisory Committee Technical Report to Government No 11 Defining Work-Related Harm: Implications for Diagnosis, Rehabilitation, Compensation and Prevention* (NOHSAC, 2009).
[9] Department of Labour *Occupational Health Action Plan to 2013: Workplace Health and Safety Strategy for New Zealand to 2015* (Originally issued December 2011 but revised) at 5.
[10] *NOSHAC Technical Report*, above n 8.
[11] MBIE *Working Safer: Reducing Work-Related Fatalities*, above n 4, at 20.
[12] Independent Taskforce on Workplace Health and Safety, above n 2, at 32.
[13] HSWA, s 36(3)(d).
[14] Accident Compensation Act 2001, s 3.

the "tragic paradox" of chronic work-related harm requires reform to the coverage provisions of the ACC legislation. At present, a large number of work-related health conditions are excluded from the cover of the ACC scheme. This leaves large numbers of workers without support and assistance and creates unfair distinctions between workers in different industries. Further, in New Zealand work-related harm statistics come almost exclusively from ACC administrative data, which means where there is no ACC cover, there is no resulting data. The lack of information on excluded occupational health conditions is a recognised problem by WorkSafe[15] and is part of the reason for the prior lack of policy response, and the exclusion of chronic harm from the *Working Safer* targets. The current package of reforms anticipate ACC and WorkSafe "working together" more to "coordinate" the data they collect,[16] but do not address the fundamental issues of patchy and inconsistent occupational health coverage.

A Lack of ACC Cover for Chronic Work-Related Health Problems

The ACC scheme covers "accidents" as defined in s 25 of the Accident Compensation Act 2001 (ACA) and some work-related harms resulting from "gradual processes, diseases or infection," so long as they meet the test in s 30, or are included in the Occupational Diseases Schedule. The schedule provides a list of classic occupational diseases such as lead or arsenic poisoning, silicosis, a limited range of zoonosis diseases (from animals and carcasses) and a limited range of diseases from inhaling toxic substances containing dusts or fumes. Section 30 provides a test for any other gradual processes, diseases or infections (except mental harm). It is essentially formulated to cover an "occupational disease", being a disease contracted by the employee who is employed in the type of work where the particular disease has been accepted as more likely to occur, rather than simply a disease that can be factually shown to have been caused by the particular person's work. The difference may seem nuanced but matters a great deal at the margins of cover, as discussed further below.

A particularly significant exclusion from cover are chronic mental health problems arising from work. Mental injury is defined in the ACA as "a clinically significant behavioural, cognitive, or psychological dysfunction."[17] Cover is limited to mental injuries that arise "because of a physical injury"[18] and those caused by certain criminal acts.[19] Section 21B, inserted in 2008, extended cover to work-related mental harm resulting from very narrowly defined single incident trauma (for example, a train driver whose train hits a suicidal person and develops post-traumatic stress disorder (PTSD)). There is no cover for chronic work-related mental conditions, such as a police officer who develops PTSD due to multiple traumatic exposures,[20] pain syndromes as a result of repetitive work,[21] stress-related mental illnesses such as depression or anxiety,[22] or any stress-related physical illness, which at its most expansive includes heart attacks, strokes and alcohol and other drug addictions resulting from stressful work.[23]

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[15] MBIE *Working Safer: Blueprint*, above n 3, at 10.
[16] At 32.
[17] Section 27.
[18] Section 26(1)(c).
[19] Schedule 3 lists the covered sexual offences.
[20] *ETN v ACC* [1998] NZACC 227; *Gable v ACC* [2003] NZACC 212.
[21] *Meikle v ACC* [2008] NZACC 158; *Teen v ACC and Telecom Ltd* [2002] NZACC 244.
[22] *Nilson-Reid v Attorney-General in respect of the Director-General of the Department of Conservation* [2005] 1 ERNZ 951 (EC); *Rosenberg v Air New Zealand Ltd* ERA Auckland AA311/09, 1 September 2009; *Davis v Portage Licensing Trust* [2006] 1 ERNZ 286.
[23] *Attorney-General v Gilbert* [2002] 2 NZLR 342.

Consequences of Exclusion from ACC Cover

If an employee suffers from an excluded condition caused by their employment they must sue their employer to obtain compensation. The claim for compensation usually takes the form of a personal grievance for unjustifiable disadvantage, (the disadvantage being the employer's failure to meet their health and safety obligations to the employee), breach of an implied term of the employment contract, or, less often, a tort claim for breach of statutory duty or negligence. These actions require the employee to prove the employer's fault, which the New Zealand Court of Appeal has described as posing "formidable obstacles."[24] For many chronic health conditions, especially those with long lead-in times, it is nearly impossible to prove the required relationship of causation between employment and resulting illness. Time limitations on bringing claims (90 days for grievances) also limit the potential of such claims for many illnesses.

If successful, an employee's personal grievance remedies are usually limited to the remedies of reimbursement of lost wages (generally capped at 12 weeks' ordinary time) and compensation for "humiliation, loss of dignity, and injury to the feelings."[25] Personal grievance compensation, however, is intended to be an award for the intangible harms of the employer's unjustifiable conduct, not to provide for treatment, ongoing income support for incapacity, or rehabilitation. The sums awarded in these employment cases (including the contractual and tortious claims) are rarely generous and are often not equivalent to the compensation available under ACC for a physical accident. If a worker is not an employee, then their options are limited to claims of negligence, breach of contract (if the contract provides for health and safety), or breach of statutory duty (assuming they are owed a duty).

In the absence of a successful compensation claim, a worker suffering from an excluded work-related health condition has only the benefit system to fall back on. In 2013, research was conducted into the socioeconomic impact of the difference in financial support between ACC and Work and Income New Zealand on a group of people of a similar age and level of functional impairment.[26] The study concluded that those in the illness group (not covered by ACC) had "considerably poorer socio-economic outcomes," did not return to work as early, and were the "most vulnerable for decline into poverty and ill health."[27]

Codifying an Outdated Mind/Body Dualism

The blanket exclusion of chronic work-related mental health problems has a particularly detrimental effect on attempts to improve occupational mental health, codifying an outdated division between mind and body and potentially affirming the belief that mental health problems are less 'real' or 'deserving' than physical health problems. Advances in medical science have resulted in the abandonment of a strict separation between mental and physical illnesses.[28] The *Diagnostic and Statistical Manual of Mental Disorders,* the bible of diagnostic criteria for psychologists, concludes that the "term mental disorder unfortunately implies a distinction between 'mental' and 'physical' disorders that is a reductionist anachronism of

[24] *Attorney-General v Gilbert*, above n 23, at [87].
[25] Employment Relations Act 2000, s 123(1)(c)(i).
[26] Susan McAllister and others "'Do different types of financial support after illness or injury affect socio-economic outcomes? A natural experiment in New Zealand" (2013) 85 Soc Sci Med 93.
[27] McAllister and others, above n 26.
[28] See discussion on the use of the term 'mental' in medicine in Robert Kendell "The Distinction Between Mental and Physical Illness" (2001) 178 BJP 490 at 493.

mind/body dualism," retained in the title only "because we have not found an appropriate substitute."[29] A review of the growing literature on illnesses such as depression reveals complex disease processes that defy a strict mind or body categorisation.[30]

Maintaining a legislative line between mind and body has also resulted in the judiciary being handed the unenviable task of declaring which medical conditions are 'mental' or 'physical' in the absence of medical consensus.[31] The factual difficulty in distinguishing between mind and body is highlighted in the ACC cases of workers suffering with chronic pain conditions, as in *Teen v ACC and Telecom Ltd* and *Meikle v ACC.* For example, consider the position of two employees performing a data-entry job involving long hours of typing. Employee A develops carpal tunnel syndrome in the right wrist and employee B develops a complex regional pain syndrome in the right wrist. Both employees experience physical pain associated with the nerves in that wrist. Employee A's condition is caused by pressure on the nerves. Employee B's condition is thought to be caused by a psychological interaction with the nervous system that causes the involuntary misfiring of pain signals to the nerves, rather than specific tissue damage (although it may be triggered by specific tissue damage). Although there is a recognised psychological component to employee A's condition, it is considered physical, and although there is a recognised physical component to employee B's condition, it is considered psychological by ACC, and thus excluded from cover.[32] Leaving aside any question of whether it is fair to treat employees A and B differently, the distinction between their conditions is, as a matter of fact, very difficult to draw.

The exclusion of mental health problems from ACC cover also has an impact on employers operating businesses in industries where the work performed has a greater mental hazard profile than physical. The lack of ACC cover has a direct consequence for the cost and management of sick leave, employee absence, rehabilitation and return-to-work planning. Employers are also exposed to civil liability for an employee's work-related mental harm in a way they are not with physical harm. The absence of standards and enforcement activity in this area[33] has resulted in little guidance for employers on what amounts to "all reasonably practicable steps" in relation to employee mental health, meaning that it is both more difficult to prevent and defend against employee claims if they are brought.

The Need to Address Work-Related Mental Health Problems

The lack of statistical information on excluded health conditions makes it hard to say how big the problem of work-related mental health in New Zealand is. Helpfully, there is data from Australia, where work-related mental harm is compensable and from which some extrapolation is possible.[34] The Australian research concludes that "mental illness is now the leading cause

[29] American Psychological Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, Washington DC, 1994) at Introduction 1.

[30] See Brian Shenal, David Harrison and Heath Demaree "The Neuropsychology of Depression: A Literature Review and Preliminary Model" (2003) 13(1) Neuropsychol Rev 33, and Dominique Musselman, Dwight Evans and Charles Nemeroff "The Relationship of Depression to Cardiovascular Disease: Epidemiology, Biology and Treatment" (1998) 55(7) Arch Gen Psychiat 580.

[31] See *ETN v ACC* and *Gable v ACC*, above n 20; *Teen v ACC and Telecom Ltd* and *Meikle v ACC*, above n 21.

[32] Based on case law. For discussion of these disorders see Richard Mayou and others "Somatoform Disorders: Time for a New Approach in DSM-V" (2005) 162 Am J Psychiat 847.

[33] The only prosecution in the area has been *Department of Labour v Nalder & Biddle (Nelson) Ltd* DC Nelson CRN 04042500, 13 April 2005.

[34] Safe Work Australia, *The Incidence of Accepted Workers' Compensation Claims for Mental Stress in Australia* (April 2013).

of sickness absence and long-term work incapacity in most developed countries,"[35] costing Australian businesses between $11-12 billion each year in absenteeism, reduced work performance, increased turnover rates and compensation claims.[36] The 2013 Safe Work Australia report, *The Incidence of Accepted Workers' Compensation Claims for Mental Stress,* stated that such claims amounted to about 10 per cent of the total claims made, but were the most expensive, requiring longer periods of absence from work.[37] The highest number of claims was for "work pressure related illness." Harassment and bullying had the second highest number of claims, and then "exposure to workplace violence."[38] Claims increased with worker age, with men aged 55-59 and women aged 50-54 making the most claims.[39] Younger workers were more likely to be exposed to occupational violence and women were more likely to be sexually harassed. Women accounted for 58.6 per cent of mental stress claims (women making up only 33.6 per cent of total workplace injury claims).[40] Those most at risk were drivers for public transport, law and order occupations, those in caring and health professions and teachers.[41]

The rise in work-related mental health problems in Australia has been attributed to changes in the labour market and the nature of work, with more employees involved in "mental" work.[42] These changes can also be seen in New Zealand. According to the latest *New Zealand Sectors Report 2014*, "services" make up 52 per cent of the total work force, with government, education and health a further 28.1 per cent. This dwarfs the numbers of people employed in mining, primary industries, manufacturing and the booming construction sectors (35.5 per cent combined),[43] which are the focus of occupational health and safety and injury prevention activity. Service industries, education and health also generated 90 per cent of job growth in 2002–2012,[44] suggesting a growing number of people potentially affected. The number of employees in New Zealand performing what could be described as primarily mental work, and thus exposed to the hazards of that work, is considerable. While not all service, health and education sector workers will develop health problems, it is important to ask why these workers are not entitled to ACC cover for the harms that logically result from the type of work they do.

The lack of ACC cover for these workers jars with the approach of the occupational health and safety legislation. The Health and Safety in Employment Act 1992 (HSEA) and the new HSWA provide for no difference in the employer's general legal obligations to prevent mental or physical harm to employees. Nor is there a difference in the legal obligations to prevent acute

[35] Samuel Harvey and others *Developing a Mentally Healthy Workplace: A Review of the Literature* (A report for the National Mental Health Commission and Mentally Healthy Workplace Alliance, November 2014).
[36] See National Occupational Health and Safety Commission *National Occupational Health and Safety Commission Annual Report 2002-2003* (Canberra, 2003), and Anthony LaMontagne, Kristy Sanderson and Fiona Cocker "Estimating the Economic Benefits of Eliminating Job Strain as a Risk Factor for Depression" (2011) 68 Occup Environ Med A3.
[37] Safe Work Australia, above n 36, at 6.
[38] At 8.
[39] At 10.
[40] At 9.
[41] At 11.
[42] See National Occupational Health and Safety Review Panel *National Review into Model Occupational Health and Safety Laws: First Report to the Workplace Relations Ministers' Council* (October 2008) at chapter 2 for discussion of the impact of changing labour market demographics on rates of work-related mental harm.
[43] MBIE *New Zealand Sectors Report 2014: An Analysis of the New Zealand Economy by Sector* (April 2014) at 39-50.
[44] At 39-45.

or chronic occupational diseases. Since 2004, "harm" has been defined to mean "illness, injury, or both" and expressly includes "physical or mental harm caused by work-related stress."[45]

Applying the hazard management approach required under the HSEA (strengthened under the HSWA), the starting assumption is that each job has a set of hazards associated with the work being done, or working environment, that are "an actual or potential source of harm."[46] There is a set of identifiable hazards associated with building work that expose a builder to injuries, such as falling from a ladder and breaking a leg, or crushing fingers between pieces of wood. Likewise, a social worker working with children who have suffered abuse and neglect may face risks that relate to the psychological impact of that work, be it exposure to traumatic information, emotional exhaustion or the impact of threats of violence. It is, from the perspective of hazard identification, just as foreseeable that a social worker might develop a stress-related illness as it is that a builder might fall from a ladder and break a leg. The presence of the hazards impose the same legal obligation on the employer, yet the employees do not receive the same access to compensation for the resulting harm.

Moving Beyond the 'Accident'

Chronic occupational health problems have had a difficult history in the ACC scheme. "Occupational disease", the term used for non-accidental work-related harm, became a casualty of the type of argument used in the Woodhouse Report[47] to extend cover beyond the workplace. The Woodhouse Report asserted that accidental harms from whatever source were equally deserving.[48] An injury at work was seen as no different from an injury in a traffic collision, an injury on the rugby field, or an injury sustained by tripping over the cat. What made harm compensable in this analysis was not the circumstances of the cause, nor the breach of a legal duty, but rather the harm and resulting incapacity itself. As the report stated, "[i]njury, not cause, is the issue."[49] Essentially, the same harms should receive the same treatment. The problem with this analysis for chronic occupational health problems is that they were not the same harms as the accidental injuries being compared. Occupational diseases were compensated under the prior workers' compensation regime because they were harms "arising out of, or in the course of, employment."[50] It was not the harm, but the cause (employment) which gave rise to compensation. This is perhaps the fundamental distinction between a 'workers' compensation' and an 'accident compensation' scheme. The purpose of workers' compensation is to compensate workers harmed at work. The nature of the harm is less important to determining entitlement than whether the harm was caused by work. The purpose of accident compensation is to compensate accidents and so the entitlement question focuses on whether the harm is an 'accident.' Occupational diseases are not accidents.

Although occupational diseases did not fit the new scheme, they could not be excluded from it, as to do so would deprive workers of an existing entitlement. The original Accident Compensation Act 1972 imported the occupational diseases provisions, as they stood, from the Workers Compensation Act 1956, and described them as an "extension of cover", making their

[45] HSEA, s 2 "harm".
[46] HSEA, s 2 "hazard".
[47] Royal Commission to Inquire Into and Report Upon Workers Compensation (Owen Woodhouse Chair) *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (1967). Known as 'the Woodhouse Report.'
[48] The Woodhouse Report, above n 49.
[49] At 20.
[50] See discussion in the Woodhouse Report, above n 49, at Part 4.

status as an exception to the 'accident' focus of the legislation clear.[51] The Woodhouse Report anticipated ACC developing into a scheme of universal coverage for all the "hazards of modern living,"[52] including, at a later stage, all diseases.[53] The occupational disease provisions in the original ACC legislation were intended as an interim measure until the broader vision of the scheme could be realised. However, that did not happen. The 1989 attempt to extend ACC cover to all sicknesses and diseases, following an Officials Committee Report[54] and a Law Commission Report (headed by Sir Owen Woodhouse)[55] was scrapped by the incoming National Government in 1990.[56]

The ACC legislation has since been re-enacted and amended many times with attempts to improve the cover of chronic work-related harm,[57] but provisions remain essentially the same, as an uneasy exception; a workers' compensation provision inside an accident compensation statute. The problem with an accident compensation scheme, as opposed to a workers' compensation scheme, is that to ration cover when budgets are tight, the legislation must distinguish between medical conditions. Because it is the harm itself, and not the cause, that gives rise to compensation, lines must be created between different types of harms (physical or mental, accidental or disease) and these lines can be seen in the drafting of the current ACC coverage provisions. For example, what is the difference in principle between catching a disease from handling sheep carcasses and catching a disease from handling chicken carcasses? Yet the eligibility test for cover is different. Why should contracting a disease at work "via an arthropod as an active vector" (for example, a mosquito carrying infected blood),[58] or a dirty syringe, be more compensable than contracting the same disease via infected blood directly? Why should lung cancer caused by asbestos exposure be more compensable than larynx or ovarian cancer caused by asbestos exposure? Why should an ambulance officer who develops PTSD after witnessing a single traumatic event be entitled to cover, when an ambulance officer who develops PTSD after witnessing 500 traumatic events is not? Why is the heart attack of an office worker who lifts a box in the course of employment, but outside of his normal duties, compensable, when a heart attack as a result of years of mental stress or heavy lifting at work is not? The answer is that ACC compensation for work-related harm, although requiring the harm to be caused by work, is still primarily focused on the harm itself and not the work-relatedness of the harm.

To address this exclusion of chronic work-related health problems from ACC cover, the entitlement question needs to be reoriented from the nature of the harm to the causal relationship between the person's work and the harm they have suffered. One approach may be to have a single legislative test for cover that applies to any health conditions that are caused

[51] See Accident Compensation Act 1972, ss 65 and 67.
[52] The Woodhouse Report, above n 49, at 34.
[53] At 144.
[54] New Zealand Officials Committee *Review of the Officials Committee of the Accident Compensation Scheme* (August 1986).
[55] Three reports occurred in the period leading up to the Labour Government's introduction of proposed reforms. See Law Commission *Accident Compensation Scheme: Interim Report on Aspects of Funding* (NZLC R3, 1987), Law Commission *Personal Injury Prevention and Recovery: Report on the Accident Compensation Scheme* (NZLC R4, 1988) and New Zealand Royal Commission on Social Policy *April Report: Report of the Royal Commission on Social Policy* (1988).
[56] See William Birch *Accident Compensation: A Fairer Scheme* (Supplementary paper to the Budget, 1991).
[57] Compare reformulation in the Accident Compensation Act 1982, s 28 "disease due to nature of employment." The Accident Compensation, Rehabilitation and Insurance Act 1992 further amended and reformulated the test for "personal injury caused by gradual process, disease or infection arising out of or in the course of employment" in s 7. Section 30 was most recently amended by the Accident Compensation Amendment Act 2010.
[58] Accident Compensation Act 2001, s 25(2)(c).

by work, whether accidental or disease, acute or chronic, mental or physical. That entitlement test also needs to be drafted widely enough to encompass a broader range of health effects resulting from work. It may be time to accept that ACC is performing a workers' compensation function and to draft the parts of the legislation related to compensating workers towards that function.

Data Collection Implications of Expanded ACC Cover

An extension of ACC cover to any health conditions, mental or physical, that are causally related to work would result in a more comprehensive set of work-related harm statistics being produced by ACC. A more comprehensive dataset would allow for greater research, planning and enforcement activity. Presently, in the absence of ACC data, researchers must either extrapolate from international data or cobble together what they can from Notifiable Occupational Disease System (NODS) notifications, coronial reports, wider public health information and smaller surveys and research projects. The *Report of the Independent Taskforce* highlighted the lack of available occupational health information, stating:[59]

> The Taskforce is left with a profound unease about the quality of data in New Zealand. We are deeply concerned that we do not have a clear, reliable picture of New Zealand's performance.

The Government has responded to this by directing WorkSafe to improve data collection[60] and there is talk of resurrecting and reforming the voluntary NODS. This system has been in New Zealand since 1992, and allows medical practitioners, or the individuals suffering an occupational disease, to notify WorkSafe of their condition.[61] However, even at the height of operation, the NODS only produced a few thousand notifications,[62] and it fell into neglect as a result of policy and internal changes, with its most recent figures at 270 notifications a year (about 20 of which are for stress-related illnesses).[63] The obvious problem with a voluntary notification system is its voluntariness. Unlike applying for ACC cover, informing WorkSafe of an occupational disease will not result in compensation for the worker, or funding for the doctor, so there is little incentive to do it. Extending ACC cover would result not only in better support to workers, but also in better information being collected.

Setting Standards for Healthy Work

The second important way in which New Zealand can start to address chronic work-related harm is through the establishment of clear regulatory standards for healthy work. Regulating for chronic work-related health problems requires two key shifts in thinking. The first shift needed is a move from regulating for 'safety' to regulating for 'health.' The second shift, and perhaps the more difficult one, is an acceptance of the need to regulate areas of the working relationship that have not previously been regulated. Current standards tend to focus on safety over health, and the risk of physical injury over the development of disease. There is a conspicuous absence of regulations, Approved Codes of Practice (ACOPs) and guidelines to address health effects that result from exposure to hazards that are not "plant, substances, and

[59] Independent Taskforce on Workplace Health and Safety, above n 2, at 9.
[60] MBIE *Working Safer: Blueprint*, above n 3, at 20.
[61] Occupational Safety and Health Service of the Department of Labour (OSH) *An Introduction to the Notifiable Occupational Disease System* (May 1994).
[62] OSH *Report on the Notifiable Occupational Disease System to the end of June 1996* (1996).
[63] Department of Labour *Occupational Health Action Plan*, above n 9, at 5.

structures."[64] While there are many improvements to be made to New Zealand's hazardous substances regulation, this paper will focus on the need for standards that relate to health hazards in the working environment, arising from worker interaction with people, poor job design, excessive workload and stress. There are presently reforms in hazardous substances regulation being made and it is the 'non-substance' exposures that are at the greatest risk of neglect.

The Gap Between Act and Regulation

WorkSafe has issued the exposure drafts for the first phase of regulations under the HSWA. The regulations are, in many ways, where the real detail of the *Working Safer* reforms will emerge and where the real battle for chronic work-related health conditions needs to occur. One lesson to be learnt from the HSEA is that the broad and progressive drafting of general duties can be undermined by the absence of regulatory detail in what is required to comply. As mentioned above, since 2004, the HSEA made explicit that occupational health hazards, including mental stress, imposed the same duties on employers as hazards associated with physical injury. The general duties did not distinguish between mind and body, or injury and disease, but the regulations, guidelines and ACOPs certainly did. Anyone looking for concrete direction as to what "all practicable steps" were required to ensure the health of employees would be out of luck. One of the only guidelines available, *Healthy Work: Managing Stress and Fatigue in the Workplace*, was published in 2003 and outlined the available research and provided some tools for responding to stress and fatigue.[65] However, it was focused on encouraging dialogue, rather than setting standards or requiring action. The document explained its approach as follows:[66]

> Creating healthy work is a shared, co-operative venture, where both employees and employers have roles and responsibilities, including the maintenance of a balance between work and non-work activities. It is not something that can be imposed – and it will require mutual understanding, accommodation, respect and the normal processes of give and take for its success.

This approach paints workplace health as 'nice to have' and is a far cry from the "every employer must" approach taken in the asbestos and pipelines regulations.[67] It is an approach that can still be seen. In 2014, WorkSafe adopted the *Preventing and Responding to Workplace Bullying: Best Practice Guidelines*,[68] based on Australian guidelines. While the guidelines document does represent a substantial move forward and provides useful resources for employers in responding to bullying, it still encourages the taking of personal grievances and mediated settlement as its primary enforcement mechanism.[69] It is a gentle 'should' document, not a 'must' regulation, which tries to convince employers that tackling bullying is good for the bottom line, and admits only a very begrudging role for WorkSafe. We would never accept that sort of approach in other areas of health and safety. It would be incomprehensible to tell miners or forestry workers that their only option was to negotiate with the Person Conducting a Business or Undertaking (PCBU) to provide a safe place of work.

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[64] Accident Compensation Act 2001, s 36(3)(d).
[65] OSH *Healthy Work: Managing Stress and Fatigue in the Workplace* (June 2003).
[66] At 2.
[67] See Health and Safety in Employment (Asbestos) Regulations 1996, and Health and Safety in Employment (Pipelines) Regulations 1999.
[68] WorkSafe New Zealand *Preventing and Responding to Workplace Bullying: Best Practice Guidelines* (February 2014).
[69] At 23.

Section 36 of the HSWA requires a PCBU to maintain a "work environment that is without risks to health and safety," provide and maintain "safe systems of work" and "facilities for the welfare at work of workers."[70] There is a large gap between the general duties set out in the legislation and the draft regulations proposed to provide the details of what is required. One example of this gap is in relation to health monitoring. Section 36(3)(g) of the HSWA requires:

> …that the health of workers and the conditions of the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

This drafting is clearly broad enough to include health effects from exposure to psychosocial hazards, unhealthy working environments and unsafe arrangements of work. Yet Part 4 of the draft Health and Safety at Work (General Risk and Workplace Management) Regulations 2015, which provides the detail of this duty, imposes health monitoring duties only where workers are exposed to hazardous substances, and not to other hazards. While these exposure drafts are still being developed and will hopefully change in their final form, it is essential that the new regulations do not continue the old patterns of ignoring chronic occupational health problems.

Moving from Regulating for Safety to Regulating for Health

Regulating for chronic work-related health problems requires a shift in thinking from 'safety' to 'health,' and an awareness that the nature of work, and the workforce, has changed a great deal from that which existed when earlier regulations were drafted. New Zealand's approach to health and safety regulation originates in the Factories Acts of the 19th century and continues to carry the flavour of that time.[71] The American industrialist Henry Ford is often quoted as asking "why is it every time I ask for a pair of hands, they come with a brain attached?" Work in the factories of the 19th and 20th centuries involved hands, more than brains, and, correspondingly, much of the earlier safety regulations were aimed at protecting hands (keeping them from getting caught in machines). As we move into the age of "lights-out" factories without human workers, it is now very possible to buy as many pairs of mechanical hands, unattached to brains, as you might need.[72] Predictions that the majority of workers will soon be replaced by robots[73] may well be overstating things and oversimplifying the nature of the labour market, but there is no doubt that the relationship between technology and work is changing rapidly.

Forbes Magazine releases a top ten list of the skills most sought after by employers. In the 2015 list, all of these sought after skills were mental skills, with collaborating with others, influencing people, and analytical skills dominating the list.[74] Employers are hiring for workers' brains, more than for their hands.[75] Ensuring the health of workers' brains, sadly,

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[70] Sections 36(3)(a)(c) and (e).

[71] Richard Johnstone, Elizabeth Bluff and Alan Clayton *Work Health and Safety Law and Policy* (3rd ed, Thomson Reuters, New South Wales, 2009), see origins discussion in chapter 2.

[72] See "Making the Future" *The Economist* (online ed, 21 April 2012), and Aaron Smith and Janna Anderson *Digital Life in 2025: AI, Robotics, and the Future of Jobs* (Pew Research Centre Report, 6 August 2014) for broader discussion on manufacturing trends.

[73] See public discussion in Ashley Lutz "Three Reasons why Retail Workers Could Soon be Replaced by Robots" *Business Insider Australia* (online ed, 14 March, 2014).

[74] Susan Adams "The 10 Skills Employers Most Want In 2015 Graduates" *Forbes Magazine* (online ed, 12 November 2014).

[75] See Roger Bennett "Employer Demands for Personal Transferable Skills in Graduates: A Content Analysis of 1000 Job Advertisements and an Associated Empirical Study" (2002) 54(4) J Vocat Edu Train 457.

requires very different mechanisms than ensuring the safety of their hands. As set out above, more than three quarters of New Zealand workers now work in services, education or health. These workers deserve regulations designed for the work they do and the health problems that arise from that type of work. The intention of this paper is not to diminish the need for traditional safety regulations, as New Zealand's injury and fatality rates are inexcusably high, but our failures in these areas should not excuse us from continuing to ignore chronic occupational health problems in a changing world of work.

It is common for policy makers, including in the *Working Safer* documents, to fall back on the argument that regulating for healthy work is simply too complex. One common argument advanced against creating standards for healthy work is that the present state of knowledge is too uncertain and we do not really know what a 'healthy' job looks like, or what hazards may result in negative health effects for workers. A second, related argument is that there is simply too much variation in human response to stressors; what may be tolerable for one worker may be overwhelming for another, and so regulating would be ineffective. The first argument, although it sounds reasonable, has the least basis. Quite simply, over the past 30 years, a large and increasing volume of research into worker health and the human effects of work has emerged.[76] We now have decades of research into the subject, including the large longitudinal studies such as Whitehall II,[77] comparative studies, animal studies on blood and brain cortisol levels,[78] neurological studies based on worker fMRI scans, countless case studies, small trials and pilot studies, interviews and surveys. It is simply not true to say that we do not know what a healthy job looks like or which work and organisational practices negatively impact on worker health.

New Zealand can also look to other jurisdictions that are much further ahead in this respect. In November 2014, *Developing a Mentally Healthy Workplace: A Review of the Literature* was produced for the Australian National Mental Health Commission and the Mentally Healthy Workplace Alliance.[79] The United Kingdom Health and Safety Executive (HSE) produced *Management Standards*, which "cover six key areas of work design that, if not properly managed, are associated with poor health and well-being, lower productivity and increased sickness absence."[80] The HSE website states that employers following these standards are adopting an approach that is considered "suitable and sufficient." A similar approach has also been taken by the HSE with musculoskeletal disorders and back pain.[81] Guidance on what amounts to healthy management practice in New Zealand would be a good place to start. There are also a large number of resources available from the Canadian Council of Occupational Health and Safety (CCOHS) on its *Healthy Minds @ Work* platform.[82] There are considerable

[76] For a good review of the literature, see Samuel Harvey and others *Developing a Mentally Healthy Workplace*, above n 37.

[77] The Whitehall II study was set up to investigate the causes of social gradient in morbidity and mortality, based on a cohort of British public servants. The study has produced a large number of scholarly papers including, for example, Stephen Stansfield and others "Work and Psychiatric Disorder in the Whitehall II Study" (1997) 43 J Psychosom Res 1 at 73.

[78] See Robert Sapolsky and Glen Mott "Social Subordinance in Wild Baboons is Associated with Suppressed High Density Lipoprotein-Cholesterol Concentrations: The Possible Role of Chronic Social Stress" reproduced (2013) 121 Endocrinology 5, original produced in 1986. There have been many studies by Sapolsky and others following this significant article.

[79] Above n 78.

[80] HSE "Management Standards" (2007) <www.hse.gov.uk>.

[81] Above n 82.

[82] CCOHS "Healthy Minds @ Work" <www.ccohs.ca>.

resources that New Zealand could draw on, as well as practical assessment tools and measurable standards that might be useful as the basis for developing a New Zealand response.

The second argument against regulation is that the variability of human response to health hazards such as poor management, excessive workload and workplace violence is too great to allow for standards of healthy work to be set. While it is true that workers will react differently to different exposures, this is also the case with physical injuries and hazardous substances. Not all workers will fall from unsafe scaffolding or get their hands caught in unguarded machinery. Not all workers exposed to asbestos will go on to develop cancer. This variability does not prevent us creating a regime in which standards are set for scaffolding, machinery or asbestos, which represent the best available science at the time, and which can be considered safe for most workers. It is also argued that non-work causes of chronic health conditions are too hard to separate from work causes, especially in cases of mental health, heart attack or cancer. Genetics, diet, lifestyle and early life exposure may impact on the development of a disease. This is also true for accidental injury and hazardous substance exposure. Childhood asthma or smoking may make a worker more susceptible to developing occupational respiratory diseases, but that does not prevent the development of standards for the inhalation of hazardous substances containing dusts or fumes. Being older and overweight may make a worker more likely to trip and fall, but that does not prevent us requiring safe lighting levels or safety barriers around hazards.

Accepting the Need to Regulate for Worker Health and Wellbeing

The second shift in thinking required to regulate for chronic occupational health problems is to accept the need to regulate working conditions that lead to poor worker health, including potentially management practices, job design, working hours, social interaction in the workplace, worker autonomy and participation, performance and remuneration systems. This shift is likely to be much more difficult than determining 'how' to regulate for worker health. There is considerable resistance to regulating for healthy work, as such regulation ventures into fiercely guarded managerial prerogative and is perceived to create a level of state involvement in business decision-making that is unpopular in the current political climate. Addressing the chronic health effects of work, especially effects on mental health, also requires a recognition of workers as human beings, complete with all the social, psychological and emotional needs that humans have.

New Zealand's approach to health and safety regulation reflects the wider political changes that took place in the 1980s, when the HSEA was being drafted and redrafted.[83] When it was finally enacted in 1992, the HSEA was hailed as the "completion of 'the triad'" by employers, following the introduction of the Employment Contracts Act 1990 and the Accident Rehabilitation and Compensation Insurance Act 1991.[84] It was intended to move control of health and safety from a paternalistic government to the hands of employers and managers in individual enterprises. The *Working Safer* reforms continue to place primary control of health and safety in the hands of employers, declaring that an overly prescriptive approach would stifle the innovation and creativity needed to grow new businesses.[85] However, as set out above, regulating for worker health does not need to look like, nor should it not look like, 20th century

[83] For discussion of this history, see Allen and Clarke *Occupational Health and Safety in New Zealand: NOHSAC: Technical Report 7* (NOHSAC, 2006).
[84] See discussion in New Zealand Council of Trade Unions *The Dupes of Hazard: A Critical Review of the Health and Safety Act 1992 in Practice* (CTU, Wellington, 1994) at iii.
[85] MBIE *Working Safer: Blueprint*, above n 3.

regulations for factories and mines. Regulations do not need to prescribe what each job must look like, what tools and equipment must be used, or when and where a worker must perform their tasks. Regulations for healthy work should take a very different form and should be coupled with a very different enforcement mechanism to traditional safety regulations.

New regulations could, for example, set out a list of the requirements for a healthy job (including that the job must have a fair and manageable workload, have appropriate training and supervision, allow for variation in tasks and an appropriate level of decision-making, and so on). An individual's job can be measured against this list of characteristics and the PCBU can, based on this assessment, make changes to the job. If a job falls short, a worker can use this assessment in combination with the proposed new HSWA tools to request that changes to the job be made. Where the changes requested by the worker are "reasonably practicable", the PCBU would be obliged to carry them out in order to meet their primary duty under s 36. Having a regulatory standard for a healthy job would require the health of workers to be considered in the process of job design or redesign, including organisational restructuring. Ideally, it would make the consideration of worker health a clearer legal requirement when making decisions about how work is to be performed, and assist in forcing the duties contained in the HSWA onto the boardroom table.

Reforms to HSWA Enforcement Machinery

The third reform proposed in this paper is the development of a new enforcement tool under the HSWA. Aside from *Nalder & Biddle*[86] in 2004, there has been little prosecution action in relation to the types of chronic health problems that are the focus of this paper. It remains to be seen whether the newly empowered regulator will take a stronger role in relation to occupational health, but the exclusion of these conditions from the national targets and the focus on 'priority industries' makes this seem unlikely. The previous position of the Department of Labour in relation to mental health problems, stress-related illnesses and health problems resulting from the arrangement of work was to encourage mediation provided by the Employment Relations Mediation Service and resolution through negotiated settlement. As discussed above, in the absence of ACC cover, the personal grievances regime has also stepped in to fill the void. This de facto enforcement role for the personal grievances regime looks set to continue under the HSWA, if not expand further.

Enforcement by Prosecution or Personal Grievance

The WorkSafe New Zealand Act 2013 and the HSWA create a regime of increased regulator power and tougher penalties. The goal of reducing fatalities and injuries by 25 per cent in 2020, along with the appointment and training of additional inspectors, seems to have driven a renewed emphasis on prosecution.[87] However, an increased willingness to prosecute where serious accidents have occurred does not necessarily translate into an increased willingness to require employers to make structural changes to a person's job in the name of mental health. It is unclear what action the inspectorate will feel empowered to take when health and safety problems relate to staffing levels and skill mix, rostering and hours, supervision and management, or the alteration of remuneration and performance systems. Historically, there has been a reluctance to 'tell businesses how to run their organisations.' This makes sense, as

[86] *Department of Labour v Nalder & Biddle (Nelson) Ltd*, above n 35.
[87] MBIE *Working Safer: Blueprint*, above n 3.

intervening may be politically unpopular, complex and potentially embarrassing for the government. Take, for example, the situation in public hospital nursing. The inspectors are unlikely to require hospitals to improve staff-to-patient ratios and reduce health practitioner workloads in the name of safety as that would, almost certainly, require additional public health funding, alterations to the budget and to health policy.

The HSWA allows for private prosecutions under s 144. Private prosecutions provide unions an option to pursue test cases in industries with high mental hazard profiles, but are unlikely to offer a solution to New Zealand's occupational chronic harm problems, especially given the difficulties in proving causation 'beyond a reasonable doubt' and the associated costs. In all likelihood the personal grievances regime, civil claims and mediated settlement will continue to operate as the primary mechanisms for addressing chronic health problems caused by work and excluded from ACC. The role for private enforcement through civil claims may expand further, with the potential for an 'adverse action grievance' and a rise in breach of statutory duty claims on the back of a widening number of people owed a duty under the HSWA.

Subpart 5 of Part 3 of the HSWA creates offences in relation to adverse conduct, such as dismissing an employee from employment, depriving a worker of benefits or refusing to renew an engagement in retaliation for a worker's involvement in health and safety action.[88] It also allows for civil proceedings under s 95 to be brought. However, s 95 excludes employees and their representatives from using this action. From the drafting of s 97, it would seem the HSWA anticipates that adverse conduct would be dealt with by an employee taking a personal grievance, but that this is confined only to a personal grievance and not to other types of proceedings an employee may have available. The courts are yet to interpret s 97, but it does appear that employees have a lesser ability than other 'non-employee' workers to take civil proceedings to challenge adverse conduct by their employer. This provision departs from the approach taken in the Australian Model Laws, which allowed for all workers, employees or otherwise, to bring proceedings under the equivalent section.[89] Assuming the employee can prove a grievance, they would then be limited to the personal grievance remedies, as opposed to the wider range of remedies under s 95, and also be limited by the personal grievance timeframes, usually 90 days as opposed to one year under s 95. The drafting of these provisions seems to push yet another key health and safety protection into the personal grievance regime and mediated settlement.

The second potential change in enforcement under the HSWA may be an expansion in claims for breach of statutory duty. The shifting of duties from employer to PCBU has expanded the number of people owed duties under health and safety legislation and regulations. In a recent article, Foster and Apps trace the use of breach of statutory duty claims under the Model Work Health and Safety Law in Australia,[90] offering insights into the way the claim may be used under the New Zealand HSWA. Recent Australian decisions have held that safety regulations may impose a higher standard of care than the general duty of care imposed on employers, and that a finding of breach of statutory duty can be made without a finding of negligence.[91] This was also decided in a recent United Kingdom case. In *MacDonald v National Grid Electricity*

[88] Section 88.
[89] Model Work Health and Safety Act, s 112.
[90] Neil Foster and Ann Apps "The neglected tort – Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law" (2015) 28(1) Austl J Lab L 28 57.
[91] *Veljanovska v Verduci* [2014] VSCA 15, 42 VR 222 at [28] and *Pasqualotto v Pasqualotto* [2013] VSCA 21 at [216].

Transmission plc,[92] McDonald sought compensation for lung disease caused by asbestos exposure. His claim in negligence against his employers failed as the circumstances of his exposure did not create a "foreseeable risk at the time," but his claim that the occupier of the plant breached its statutory duty under the Asbestos Industry Regulations 1931 was successful in the Court of Appeal. As Foster and Apps point out, the breach of statutory duty claim may expand the situations in which liability may be established.[93] For those cases excluded from ACC cover, or those workers excluded from the personal grievances regime, the expanded duties under the HSWA may offer a new option for seeking compensation. If new regulations for healthy work are established, the options for workers affected by these health conditions are also potentially increased.

Despite the creativity of New Zealand employment lawyers in moulding personal grievances, contract and tort actions to fill gaps in the law, these claims remain a fundamentally unsuitable mechanism for obtaining treatment, rehabilitation or compensation for work-related harm, or for the enforcement of New Zealand's health and safety standards. These actions simply were not designed to do the job that ACC and occupational health and safety legislation should be doing. An effective response to chronic occupational health problems requires reforms to ACC coverage provisions and a better set of regulations and enforcement tools.

Is a 'Right to Request' Needed in the Health and Safety at Work Act 2015?

One possible way of addressing the enforcement difficulties above, while still working within the overall framework of the HSWA, could be the introduction of a 'right to request,' similar to the flexible work right to request under s 69AAB of the Employment Relations Act 2000. With such a tool, a worker, health and safety representative or union is granted an explicit statutory right to request certain actions on the part of the PCBU, which could only be refused if the action requested was not "reasonably practicable." For example, the worker(s) or their representative(s) might request:

- Changes to work (including working patterns, job design or workload allocation) on the grounds of worker health or safety;
- Changes to a workplace policy, practice or decision on the grounds of worker health or safety;
- That particular actions be taken to ensure a worker can perform their job without risk to safety and health;
- An independent review of a worker's job or workload to assess whether the job is capable of being safely performed by the worker; or
- That tests or an independent assessment of worker health be carried out.

A right to request would be consistent with the primary duty of care imposed on a PCBU under s 36 of the HSWA. A PCBU has a legal obligation "to ensure, so far as is reasonably practicable, the health and safety of workers,"[94] and a statutory right to request simply creates a mechanism for workers to ensure those reasonably practicable actions are taken.

The power behind a right to request tool is that a PCBU refusing such a request exposes itself to a claim that it failed to discharge its general duty of care under s 36. A PCBU decision to

[92] [2014] UKSC 53, [2015] 1 AC 1128.
[93] Neil Foster and Ann Apps, above n 92, at 59.
[94] Section 36.

refuse could be subject to review, either by the regulator or the court in a public or private prosecution. This process would allow the inspectorate to take a greater enforcement role in relation to occupational health without the problems associated with the inspection of complex psychosocial hazards. Essentially, an inspector could review a written request made by the worker(s) and the written response by the PCBU to assess its 'reasonableness.' This is a far easier (cheaper and quicker) task than attempting to evaluate job design, management structures and working patterns to assess whether they amount to a breach. The task of assessing the reasonableness of a decision might also allow for judicial determination in situations where there has not been a notifiable event. For example, a decision that a particular employer's refusal to make changes in working practices was not a reasonable one might serve as a precedent for that industry more broadly.

A statutory right to request, as opposed to merely an obligation to be consulted with, could greatly strengthen workers' abilities to address occupational health issues, either individually in relation to a specific job or collectively in relation to organisational policies that have a negative effect on worker health. Unlike a private prosecution or a breach of statutory duty claim, workers do not have to sue the PCBU, prove fault or wait until someone is harmed, they are enabled to request specific changes to ensure their health and safety and are provided with an assurance under legislation that the PCBU must make those changes unless they are unreasonable or some other alternative can be negotiated between the workers and the PCBU. A right to request also allows for an action which is not barred by ACC legislation, as it is not based on seeking compensation for harm, but rather changes to working practices. A right to request tool is directed at changing behaviour and prioritizing health and safety and could potentially allow for more complex occupational health issues associated with shift work patterns, poor job design or staffing levels to be addressed.

Conclusion

This paper argues that addressing the "tragic paradox" of New Zealand's response to chronic work-related harm requires reform in three key areas. First, the coverage provisions of the ACC scheme need to be reoriented from the nature of the health problem to its 'work-relatedness' and extended to cover a wider range of health conditions. An extension of cover would provide financial support and rehabilitation to a greater number of workers and allow for better information collection on occupational health. Second, this paper argues that a change in willingness and approach to regulating for healthy work is needed. Setting standards for the health of workers' minds is different to setting standards for the safety of workers' hands. The changing nature of work and the workforce in New Zealand requires us to challenge our assumptions and develop a new form of regulation for worker health. Thirdly, this paper argues that to accompany a new set of standards, New Zealand needs to develop a new set of enforcement tools. One such tool may be a statutory 'right to request' that enables workers to deal with hazardous work before it results in health problems.