

## Contents Page: NZJER, 2016, 41(3)

Name	Title	Page Numbers
Gordon Anderson	Introduction	1-2
Helen White	Opinion Piece: Creating an Elegant Solution	3-12
Susan Robson	Protections, Loopholes and the Employment Court	13-23
Joss Opie	The Right to Reasonably Limited Working Hours in the Smartphone Era	24-56
Leigh Thomson and Josephine Burke	What are business internships, and do they offer opportunities for a symbiotic relationship?	57-65
Amanda Reilly and Suzy Morrissey	Why New Zealand Should Introduce Paid “Dad and Partner Leave”	66-75
Gaye Greenwood and Erling Rasmussen	Employment Relationship Problem Resolution: A gap between objectives and implementation	76-90
Angelo Capuano	The Meaning of “Social Origin” in International Human Rights Treaties: The Meaning of “Social Origin” in International Human Rights Treaties: A Critique of the CESC’s Approach to “Social Origin” Discrimination in the ICESCR and its (Ir)relevance to National Contexts such as Australia	91-112

## 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 Issue 41(2), the *Journal* published six papers from the conference. A further seven papers are published here.

This issue opens with an opinion piece by Auckland barrister, Helen White, in which she muses on the important question of why some legislative reforms become entrenched and accepted across the political spectrum while others remain vulnerable to significant amendment or repeal. The paper suggests that reforms that create lasting change need to be “elegant” and well-aligned with international and local changes in the way we think about society – but this does not mean they have to be weak. The paper uses a number of examples to make its point.

A second paper that bears on labour reform is that by Susan Robson. This paper, based on the view that effective enforcement of protections relies on consistency of approach by enforcement authorities, considers the implementation and enforcement of statutory protections for those members of the workforce having little or no market power. The paper argues that the Court currently lacks a consistent approach to the issue of protection, that it appears to be overly vulnerable to the way that proceedings are presented and that it fails to consistently privilege the purposive approach to the interpretation of statutory protections. The paper suggests that an understanding of these dynamics is important to understanding the means by which protections are embedded, accepted and institutionalised.

Joss Opie’s paper deals with another area of increasing importance – the work/life interface – and in particular the increasing intrusion of work into the private life through smartphones and similar devices. Opie argues that the understandings of work, work time and the workplace in New Zealand law have to be reassessed to take into account the transformation of these concepts by mobile technology. He suggests that decisions will be needed on how best to protect people’s rights in this age of limitless connectivity and that, as the duty-holder under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees the right to reasonably limited working hours, the New Zealand state needs to take the lead in deciding what to do.

Leigh Thomson and Josephine Bourke address an increasingly prevalent labour market trend – unpaid internships – and considers internships in the New Zealand business context. The paper poses questions around the symbiotic and exploitative aspects of the relationship, including the influence of labour law. It proposes possible options to assist interns and employers develop an appropriate, symbiotic relationship, which includes reciprocal benefits.

Amanda Reilly and Suzy Morrissey’s paper argues that the parental leave debate in New Zealand needs to encompass the introduction of an independent entitlement to a separate period of paid parental leave for fathers and partners. This paper considers the question of the design of such an entitlement and concludes that partner leave should be well-paid, ring fenced for “Dads and Partners” and at least two weeks long. Funding options are also discussed.

Gaye Greenwood and Erling Rasmussen use the example of dispute resolution in the education sector to illustrate a disjuncture between the ERA’s objective of resolving of employment

relationship problems close to the workplace and actual practice, where there is a propensity to bypass these intentions by confidential settlement negotiation or escalation to a personal grievance. The paper suggests that, in education, this disjuncture is a consequence of the complex employment and stakeholder relationships in that sector. The paper sets the scene for the forthcoming publication of a model for collaborative conflict management that provides process guidelines for organisations under the current legislative framework.

In the final paper, Angelo Capuano discusses the meaning of the term “social origin” in international human rights treaties and, in particular, its meaning in relation to Australian legislation which prohibits discrimination based on “social origin”. The paper focusses on the interpretation of the term by the Committee on Economic, Social and Cultural Rights which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. His paper critiques the Committee’s approach and argues that it requires development if it is to have relevance and its intended effect (prohibiting discrimination on the basis of “inherited social status”) in national contexts, such as Australia.

Again particular thanks, on behalf of both myself and the authors, are due to Louise Grey who edited the papers in this issue of the *Journal*.

#### **Guest editor**

Gordon Anderson, Professor of Law, Victoria University of Wellington.

## Opinion Piece: Creating an Elegant Solution

HELEN WHITE\*

### Abstract

This opinion piece by Auckland barrister, Helen White, muses on the reasons why some labour reforms become an enduring and entrenched feature of labour law and others fail to do so. She suggests that reforms are likely to be enduring when they resonate strongly with the public, reflect international thinking and are accepted by the courts and legal profession.

### Key words

Labour law, employment law, reform.

### Introduction

New Zealand is currently experiencing a period in which people of all political persuasions and backgrounds accept the broad problems in the current employment law paradigm, but where governmental efforts to address these problems – on both the left and the right – are specific, crude, and largely ineffective. This opinion piece argues that these problems can be avoided by generalising the principles on which our laws rely, and, instead of protecting individual groups and classes, provide protection to vulnerable parties in all commercial relationships that are characterised by severe power imbalance and dependence. This piece will begin by sketching the successes and limitations of the Employment Relations Act 2000 (ERA) and then proceed to elaborate on the concepts entrenched therein. It will then discuss the limitations of the ERA, as well as the problems with much well-intentioned legislation since its enactment. This piece will then expand upon precisely what principles should be advanced by our law. Finally, it will explain what can be done to solve these problems, and lay out a pathway for necessary reforms in the future.

Since taking office in 2008, the National Government has repeatedly tinkered with the ERA; the Employment Relations Amendment Act 2014 was the fifth such amendment in almost as many years. These changes have not been dramatic, but have steadily eroded the protections originally found in the Act. Since the 2014 Amendment Act, the Government has introduced more changes, again in a haphazard way that reflects a lack of deep understanding of either the extent or the causes of the problems that have become apparent. The attempt to address zero hours arrangements, for example, has been criticised for being more likely to entrench, rather than eradicate, the problem.

The introduction of the ERA radically changed the way New Zealanders approached employment relationships. Margaret Wilson, the then Minister of Labour, successfully integrated concepts that were taking hold in other jurisdictions, such good faith and a distinction between relational and transactional contracts, and extended concepts that were

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already established, such as natural justice. These concepts summed to a legal ethos that is now taken for granted by people of all political persuasions.

This success was for several reasons. Firstly, these concepts resonated with the New Zealand courts and legal establishment because they were part of an international intellectual movement in employment law. Secondly, they were more practical in application than the concepts in the Employment Contracts Act 1991 (ECA), which they replaced. The employment relationship cannot afford to be one of ongoing hostility, is usually sustained, and requires mechanisms and a language that all parties can use to resolve conflict; the ECA ignored this reality, but the ERA understood this implicitly. Thirdly, the independent and specialist institutions that adopted the approach – the mediation service, the Employment Relations Authority and the Employment Court – adequately supported the concepts in the ERA.

## **ERA Concepts**

The changes made by this Government and the approaches to those changes indicate that the following concepts are broadly regarded as entrenched:

- Good faith;
- Employees' personal rights;
- Natural justice (despite 90 day trials);
- Job security for higher paid employees;
- Relational agreements; and
- Legislative protection for the lowest paid employees.

Some concepts are not yet entrenched, or are precarious because they were not successfully dealt with by the ERA in the first place:

- The legitimate place of employment law in addressing the gap between rich and poor and creating higher wages;
- Job security for low and middle income employees;
- The paradigm of employment;
- Collectivity, unions and bargaining; and
- Power imbalance.

New Zealand's latest reforms have further weakened important provisions covering these concepts. These provisions originally existed to advance these ideas, but in practice failed to do so, and certainly failed to entrench them. Although these concepts are taken for granted across the political spectrum, this does not mean they are invulnerable; rather, they are often poorly understood and unappreciated. They are therefore precarious.

### ***Power imbalance***

Addressing power imbalance is the most important concept in the ERA, and the recognition of the inherent imbalance of power between employer and employee is the moral and political foundation for all that follows. It is strongly ideological and therefore remains controversial, however it is still there and this Government has not directly challenged it, despite it being

previously disregarded in the ECA.

The independent courts enthusiastically embraced the concept of power imbalance, relying on it repeatedly. This way of approaching the employment relationship likely appeals because it accords with the experience of specialist judges, so it resonates. The courts can legitimately use this concept to justify their response to issues of consent and agreement, for example.

Power imbalance is not something that many practitioners in employment law necessarily understand. In a politically polarised field of law, many working in the field are working exclusively for large employers or wealthy employees, so the experience of power abuse is not a given. It is a concept that is increasingly alien to wealthy parts of our society. Increasing inequality in our society is well documented, so it should come as no surprise that many people have no concept of the need to redress this imbalance.

### *Collectivity*

The basic purpose of collective organisation is to correct this power imbalance by empowering the workers who are likely to be individually vulnerable. As a society, therefore, popular acceptance of the value of collective organisation necessarily relies upon popular understanding that it plays this role. Unfortunately, public education on this issue has been limited; while it survives, and is judicially applied, there is little understanding of the broader issues at stake.

This failure of understanding manifests in a legislative backlash whenever collectivity is perceived to obstruct some economic goal. Consider the Ports of Auckland dispute,<sup>1</sup> or the changes in collective bargaining within the film industry;<sup>2</sup> in both cases, industrial disputes prompted abrupt legislative changes to weaken unions.

At the 2014 New Zealand Law Society Employment Law conference, Margaret Wilson said plainly that she had failed to foster collective bargaining in the ERA.<sup>3</sup> That is undoubtedly true; at a macro level, the ERA and the last Labour Government failed to address the widening gap between rich and poor. This author contends that these are closely linked; the mechanisms chosen to strengthen the bargaining power of workers failed, workers were weakened, and so the gap between rich and poor widened. This does not mean that collectivity and unions are not entrenched concepts, of course: it is a matter of degree. It is a small irony that, whenever the Rt Hon John Key discusses unions, it is with the assumption that they are still powerful institutions. This is true of many others of his political persuasion; there is an assumption that, no matter how hard unions are kicked, they will continue to exist. There is also an assumption that collective bargaining is here to stay. Unions and collective bargaining may be seen as negative forces that are used to coerce employers, but they are nonetheless assumed, and are therefore entrenched in the popular consciousness to some extent. That is not to say that they are working perfectly, or even well, or that they are not vulnerable; indeed, when they start

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<sup>1</sup> *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2012] NZEmpC 54.

<sup>2</sup> Employment Relations (Film Production Work) Amendment Act 2010, enacted under urgency as a response to concerns that the *Hobbit* film trilogy might be filmed overseas rather than in New Zealand. The issue of whether contractors could collectively bargain sparked significant public debate and led to a dispute between union interests and production company interests.

<sup>3</sup> Professor Margaret Wilson “Employment Relations Act – 15 years on” (Keynote Address, New Zealand Law Society 10th Employment Law Conference, Auckland, 13–14 October 2014).

becoming effective they are eroded, as we have seen with the Ports of Auckland or the *Hobbit* fracas.

## **The Way Forward: Learning Lessons From What Went Wrong**

The successful entrenchment of some concepts, such as good faith, and the failed entrenchment of others, such as collectivisation, pushes the interactions between individuals in employment towards increased individualisation and legalisation of the employment relationship. The area is now highly legalistic; unions may resist that fact, but ignore it at their peril. This is realistically the way in which people are now engaging with their employers or employees when something goes wrong.

The last years of the Labour Government were those of missed opportunity. Changes were made to try to address the failings of the ERA, but these were disjointed and lacked the consistent, easily understood principles evident in the original Act. These changes did not address the fundamental injustices that had become apparent by that time, and were therefore more vulnerable to erosion as a consequence.

For example, by 2006, it was clear that the practice of contracting out was causing serious problems. While permanent employees could negotiate over time for improved conditions and remuneration, contracting out broke up the principle of collectivity and caused a bidding war among the contractors, driving down wages dramatically. The legislative response was Part 6A. The change came about as a result of specific events and specific lobbying, and as a result listed a specific group of occupations for protection, instead of reflecting overall vulnerability. This meant that workers on the same wage and facing the same mischief were not afforded the same protection. Part 6A ensured that an employee on \$120,000 per year had protection of employment terms and conditions when contracted out as a caterer, but an employee on \$40,000 per year doing maintenance in the city parks did not. Protection by occupation was often arbitrary. When I appeared in *Lend Lease*<sup>4</sup> for the maintenance employees who were found not to be covered, counsel for the Auckland City Council noted that the Council of Trade Unions' submission had been that the law meant to protect "Pacific Island women cleaners", which in turn led to the exclusion of the largely male maintenance employees. This arbitrary categorisation means there is no clear and defensible concept to reinforce through case law.

Future changes to the law must instead act through clear and universal principles. This will reinforce the value of concepts and mechanisms that would otherwise be vulnerable to erosion over time, and serve an educational role in persuading the public of their importance.

### ***Job security for people on lower and middle-incomes***

Recent case law has left behind the superficial and impractical view of the employment relationship as a transactional contract. Consider the latest case between Auckland Farmers Freezing Company (AFFCO) and the Meatworkers Union, which reinforces the rights of seasonal employees to their jobs next season;<sup>5</sup> further, other cases indicate the development of

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<sup>4</sup> *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86.

<sup>5</sup> *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204

a right to redeployment for those whose positions are restructured.<sup>6</sup> Change here has been widespread and significant; legal rights to fair treatment, natural justice and substantive justification of termination of employment all reinforce job security for those in permanent employment, and, despite the 90-day provision, there is a real assumption and assertion of these rights by employees who have the money to do so.

These theoretical rights, however, mean very little for those without the ability to pursue them, either through unions or personal means. These principles have been deepened and reinforced through case law, and, unsurprisingly, highly paid or socially elite individuals have taken the lead on many of these cases.<sup>7</sup> Ironically, while these rights were originally intended to protect blue-collar employees, the simultaneous weakening of collectivity means those same blue-collar employees are more likely than ever to miss out.

In theory, these cases reinforce the rights of all employees. In reality, however, a personal grievance system is only usable to the extent that it is affordable; for many blue-collar employees, neither the cost nor the risk of using the system is sustainable, and so their legal rights are irrelevant. This situation is getting worse; for example, consider that there is a likely adoption of a scale of costs akin to the High Court for the Employment Court. The tariffs in the Employment Court will, of course, be lower than those in the High Court, but when I roughly calculated a recent case for a blue-collar employee on the High Court scale, I could have claimed \$63,000.<sup>8</sup> In that case, the employee won, but if the defeat came with that kind of price tag, litigation would be out of the reach of any but the most confident or most well-funded employees. Furthermore, this case was an appeal *de novo*, and the employee had won in the Employment Relations Authority only to have to re-litigate in the Employment Court. Even at the level of the Authority, while the inquisitorial approach eases this problem somewhat, challenge is *de novo* and therefore very expensive.

In summary, therefore, while individual rights and security of employment have been reinforced, they are only the rights of those individuals who can realistically litigate. Employers are aware of this, and can therefore treat employees differently depending upon their capacity to legally challenge their treatment: lower paid or otherwise vulnerable employees may therefore be dismissed for less serious offences.

Blue-collar employees may often find that the cost of litigation is far more than the remedy they seek. Reinstatement rights have officially been eroded under the current National Government but, in the author's opinion, the practice has not changed much as it had become a rare remedy, despite the law stating it was the primary one. Without access to justice, job security and personal rights are worthless, and that access in New Zealand is severely restricted by prohibitive costs and legalistic complexity. Solving this problem should be a fundamental aim of further reforms in this area; perhaps one component of this could be the entrenchment of a right to specific performance, which is to say, reinstatement.

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<sup>6</sup> See, for example, *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825; *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102; *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142; *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39.

<sup>7</sup> For example, in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, the employee was represented by her ex-husband who had been an extremely experienced lawyer.

<sup>8</sup> *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198. Since the time of writing, this case has gone on to be considered for leave to appeal. Leave was declined, but in such cases the cost of litigation severely erodes the awards.



***Extending appropriate protections to all those who should have them***

In recent years, large numbers of New Zealanders have technically become contractors, leaving permanent employment to become self-employed. However, many of these individuals remain employees for all practical purposes; they cannot move freely in the market, and hence have all the disadvantages of employment with none of the protections. There is widespread agreement, from both sides of the political aisle as well as from the judiciary, that this problem exists – s 6 has been expanded and *Bryson* confirmed that the state of being an “employee” could, in actual fact, exist even in the absence of an employment agreement<sup>9</sup> – but these reforms have failed to take hold, and the problem persists unabated. I have previously written papers on this problem,<sup>10</sup> so will not expand upon the exact causes here, but grappling with the issue remains fundamental.

Protecting these individuals is critical to an equitable and self-consistent system of employment law. Rather than focussing on strict legal categories of workers, we should determine whether dependence is present, and, if exploitation of that dependence occurs, the result should be consistent. Recognising and remedying the underlying injustice in a reliable way reinforces expectations of good faith and fair treatment, and achieves better outcomes for all concerned.

I am not claiming that there is no difference between an overbearing franchise and an employment agreement, but fundamentally the mischief is the same and, where the mischief is the same, the solution can be too. This principle can be set in general terms: where a more powerful business partner unjustly exploits a vulnerable party, the legal system is justified in, and indeed obliged to, step in. Broadening the issue from employees, consider the power imbalance inherent in contracts between even quite significant New Zealand businesses and multinational giants. Where the latter acts to abuse that relationship, the state should prevent that abuse. In the case of supermarket chains exploiting their suppliers, for example – suppliers who cannot easily move around in the marketplace, and hence are vulnerable to price setting by the buyer – the state should likewise step in.

***Applying other existing legislation and legal trends to the employment relationship***

Acknowledging the bigger and changing problem of power abuse in the commercial world may provide a key to finding solutions that appeal to New Zealanders from all walks of life. Contract law and consumer law are moving to find solutions and, just as Margaret Wilson did, it is possible to catch the crest of these changing responses in developing a response that is consistent with these developments.

One very interesting example is the Fair Trading Act 1986, which was amended to bring New Zealand in line with Australia’s fair trading laws. Our fair trading laws are identical by virtue

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<sup>9</sup> *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721.

<sup>10</sup> See J Ryan Lamare and others *Independent, dependent, and employee: Contractors and New Zealand’s Pike River Coal Mine Disaster* (2015) 57(1) JIR 72; Helen White “Contracting – Good for business and/or employees?” (presented at the New Zealand Employment Relations Association, Auckland, May 2012), available at <[www.helenwhitelaw.co.nz](http://www.helenwhitelaw.co.nz)> ; Helen White “Employers finding ways around job law” *The New Zealand Herald* (online ed, Auckland, 31 January 2011).

of a free trade agreement between New Zealand and Australia.<sup>11</sup> New Zealand has adopted the Australian test for identification of overbearing consumer contracts and the mechanism of blue-pencilling to remedy the injustice caused. While this only applies to some contracts, it is an effective mechanism not only for fixing problems for the affected consumer but for disincentivising the practice of proffering exploitative contracts.<sup>12</sup>

Changes such as this are not even viewed as ideological. They are not criticised as ‘nanny state’, despite being a direct interference with individuals’ freedom to contract. In consumer contracts that offend by being overbearing, interference has not been criticised any more than it has in areas, such as aged care, where exploitation has resulted in regulation for many years.

### ***Extending and revitalising contract law***

Blue-pencilling exists in the Illegal Contracts Act 1970<sup>13</sup> and now in the Fair Trading Act 1986. This capacity to blue-pencil could be extended to all contracts where there is significant dependence of one party on the other created by the agreement between them, for example, franchises. Overbearing power of one party over the other is a simple and clearly understood mischief. If this exploitation of power in commercial arrangements is repeatedly and consistently rejected, this may change the expected norms and values of our society.

Blue-pencilling has been considered acceptable with regards to illegal contracts for a very long time. Restraints of trade can be blue-pencilled without a judge being viewed as acting politically left-wing. Intervention in unfair contract situations does not need to be done with a sledgehammer, however the power to blue-pencil may help to reinforce expectations of fair dealing. It may also close a door to the avoidance of employment protections where dependency is required, by making contracting less desirable.

Restricting restraints of trade and insisting upon substantial separate consideration may also help to give employees the power to increase their wages. Currently, if the local barista wants to move from his café to one in the same neighbourhood, he cannot.<sup>14</sup> His consideration is his wage, which is likely to be around \$18 per hour.

If strongly implemented, such a move may be criticised for creating uncertainty in the commercial world, but this is the way in which contract law is developing anyway. There has been a movement away from favouring certainty and towards principles of fair dealing. *Wholesale Distributors v Gibbons* is an important indicator of this, and draws on an international trend in jurisprudence:<sup>15</sup>

Notwithstanding its widespread acceptance in most common law and civil jurisdictions in the world and growing judicial support, the courts have not yet incorporated the doctrine of good faith into our law. There is a widespread belief that existing doctrines or judicial devices already encompass a requirement of good

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<sup>11</sup> Australia New Zealand Closer Economic Relations Trade Agreement 1329 UNTS 22307 (signed 28 March 1983, entered into force 1 January 1983).

<sup>12</sup> See Fair Trading Act 1986, ss 46A, 46I and 46J (amended in 2013).

<sup>13</sup> Section 7(1).

<sup>14</sup> See *Fuel Espresso Ltd v Hsieh* [2007] 2 NZLR 651, in which the Court of Appeal held a restraint of trade clause in a barista’s employment contract to be enforceable.

<sup>15</sup> [2007] NZSC 37, [2008] 1 NZLR 277 at [149].

faith. It would, it is said, add nothing to the existing tools and principles of the common law, such as estoppel and implied terms. This case serves to demonstrate that this belief is misplaced. It is clearly arguable that WDL have not acted, and are not acting, in good faith. Indeed, if such a doctrine existed in the law, it is doubtful whether the courts would have been troubled by the company's attempt to achieve an interpretation contrary to its actual intention. I would firmly hold it to that intention.

The footnotes that accompany this dicta indicate the deep thought going on internationally about extending these concepts. The judge cites:<sup>16</sup>

Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433; See for example the observations of Bingham LJ, as he then was, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at pp 439 and 445 (CA); See for example Bridge, "Doubting Good Faith" (2005) 11 NZBLQ 426, p 428. For a refutation of this point, see Bigwood, "Symposium Introduction: Confessions of a 'Good Faith' Agnostic" (2005) 11 NZBLQ 371, pp 374 – 375.

There has been movement at a fundamental level in contract law as judges recognise the injustice of the old approach. In many jurisdictions, courts have replaced the parole evidence rule with a greater concern towards enforcing the good faith intentions of the parties. The law is responding to a new world by giving less priority to certainty and more priority to just enforcement.

### ***Revitalising collectivity***

Collective bargaining and unionisation are proven to be successful mechanisms for increasing living standards and addressing poverty and the increasing gap between rich and poor, but the public tend not to be aware of this. The perception of unions obviously varies, however, many New Zealanders consider unions to be out of date and view collective bargaining as a form of bullying.<sup>17</sup> Proving that unions and collective bargaining are social goods is beyond the scope of this paper, the purpose of which is to consider how best to succeed in changing this view and entrenching proposed solutions or, if that is not practical, to create an environment where other solutions address those problems.

The view of unions and collective bargaining as ineffective and outdated is also, in the author's view, strangely but tellingly loaded with an assumption that the way we relate in the workplace as a result of these features, and these concepts themselves, are entrenched: that unions, for example, will be there forever, no matter how they are treated, protecting New Zealanders and promoting their interests, regardless of whether they are even employees. Unions are blamed for not doing enough, while being starved of resources and repeatedly undermined. The same

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<sup>16</sup> At n 87–89.

<sup>17</sup> I appreciate I am not backing this with any data. It may well exist, but my statement is based on the comments made to me in the course of my work and even comments made by opposing counsel in cases in which I appear. In one recent case, the defence advocated by opposing counsel to justify her client's agreement to a term it did not then honour was that her client had been under a kind of duress (being the threat of lawful strike). Not all New Zealanders share this view of unions, however, this perception is out there and has sympathy from many who still consider the use of these tools by unions very negatively.

people who attack collective bargaining assume that unions are stronger than they are and expect them to carry out a much wider role than they can possibly do without proper support. For example, unions are constantly seen as the voice of the precarious worker, who is not actually even a member of a union and may well not be an employee but a contractor. Currently, the law makes no allowance for the social justice role that unions play. Union members pay the price for the spill over benefit to many other employees of the standards they set and the benefits they win regarding terms and conditions. The reality is that unions set the industry standard, which is then passed on, like it or not.

The role of collective bargaining and unions must be revitalised. However, current proposals from the Council of Trade Unions and the Labour Party tend to ignore the reality that much of the New Zealand public do not support collective bargaining or unions, and need to be won over. In order to be effective, solutions may need to be more subtle and responsive to this view and build upon what the public can see clearly has value.

There has been a growing expectation of compliance with health and safety, for example. There is also a screaming and legitimate need for this. There is plenty of evidence that workplace engagement is vital to really addressing this issue.<sup>18</sup> The recent health and safety reforms are notable for their lack of vision or even common sense. New Zealand has had a health and safety crisis because our laws have that consequence. The Pike River Mine collapse was a dramatic and tragic result of poor health and safety regulation. Any legislative change to health and safety that purports to address this is likely to fail, because it requires strong employee participation that simply does not exist. The safety imperative is, in the author's opinion, more than just a device to make the public understand the value of unions and employee participation; it is one of the most important reasons why collectivity is valuable.

Solutions that appear to directly reinforce the power of the union movement and to dictate terms and conditions, such as awards, are likely to be viewed as backward-looking and a left-wing power grab. However, supporting employee engagement in health and safety is more likely to be received positively by the public. If presented sensitively, employee engagement has the potential to be understood as part of the future of work, rather than the past.

The key is to work with, not against, the public view. Solutions should be designed to foster collectivity, by allowing employees to experience it and enabling society to rediscover its value. New Zealanders need to be reintroduced to the very idea of collectivity. Health and safety representation provides that opportunity, as it has compelling practical benefits and moral weight. Employee participation is very important, particularly given it is often too hard for an individual to challenge their employer.

Present and future changes need to recognise and promote the value of employee participation in addressing the challenges that face this generation:

- Safer workplaces;
- Fairer distribution of wealth; and
- Secure work.

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<sup>18</sup> See Independent Taskforce on Workplace Health and Safety *Main Report of the Independent Taskforce on Workplace Health and Safety* (April 2013), Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy: Volume One and Volume Two* (October 2012); in addition, there is much written on this subject.

## **Conclusion: New Thinking**

As stated above, Margaret Wilson was very successful in entrenching some concepts. Good faith and relational contracts are related concepts that she was aware would resonate with the international and local legal community. She grafted onto this way of thinking, and thus made changes that survived. This author would also cynically suggest that some of the changes that survived also did so because they created a self-interested industry for lawyers.

The next reforms that really create lasting change and a better society must be as elegant and well aligned with international and local changes in the way we think about our society, however, that does not mean they have to be weak. The changes suggested here are quite brave and would let the courts move the law in the right direction further and more quickly.

Both the current National Government and the last Labour Government have tinkered with employment law without really addressing the problem or moving the public perception, for example, the changes to Part 6A, which are misunderstood because they are not principled – they are opaque and messy.

The next changes must address safety, the gap between rich and poor, and the security of work. There is an appetite for this internationally and locally, and there is a very real need. There are a myriad of potential solutions and those proposed here may not be the right ones, but what is important is the way we think about those changes, so that when they are attempted they are both successful in achieving the desired result and in becoming entrenched. Successful solutions need to be as elegant and fundamental as were those that Margaret Wilson successfully entrenched.

## Protections, Loopholes and the Employment Court

SUSAN ROBSON\*

### Abstract

Analysis of the Employment Court's recent approaches to statutory workplace protections in the Equal Pay Act 1972, the Minimum Wage Act 1983, the Wages Protection Act 1983 and Part 6A, Employment Relations Act 2000 suggests that it currently lacks a consistent approach to the issue of protection. The Court appears to be overly vulnerable to the way that proceedings are presented and argued, and it fails to consistently privilege purposive over other approaches to the interpretation of statutory protections.

### Key words

Employment Court, Employment Relations Act 2000, statutory protections, statutory interpretation, union funded litigation, employer funded litigation, individual litigation.

### Introduction

A challenge of regulating future labour markets (for those members of the workforce classified as having little or no market power) lies in the phrase '*implementation and enforcement of statutory protections*'. This paper is based on the premise that effective enforcement of protections relies on consistency of approach by enforcement authorities because that is the means by which protections are embedded, accepted and institutionalised. The focus, therefore, is on the role of the Employment Court in the enforcement of statutory protections in the Equal Pay Act 1972, the Minimum Wage Act 1983, the Wages Protection Act 1983, and Part 6A, Employment Relations Act 2000. This paper examines the Court's recent consideration of proceedings concerning equal pay, minimum wage rates, unlawful wage deductions and transfers of undertakings involving vulnerable employees.

The method of analysis, given the relatively low number of proceedings that consider statutory protections (compared to proceedings about unjustifiable dismissal), compares the Court's approaches to the most recently enacted protection, Part 6A, to its more consistent position on older, less complex legislation: a distinction that applies also (more or less) to the collective or individual status of the employees seeking protection.

The proceedings at issue have been classified into three groups, again for the purpose of comparison. This arises from the existence of three categories of cases:

- proceedings funded by a union;
- proceedings funded by an employer; and
- proceedings funded by individuals.

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A description of the proceedings in each category will be followed by analysis of differing approaches to statutory interpretation. Comparison and some observations about the effects of the union and employer funded litigation will precede a conclusion about the way consistency could be improved.

I argue that the Court currently lacks a consistent approach to the issue of protection; that it appears to be overly vulnerable to the way that proceedings are presented and argued; and that it fails to consistently privilege *purposive* over other approaches to the interpretation of statutory protections.

## Description of the Proceedings

### *Union litigation: Service and Food Workers Union funded claims*

The Minimum Wage Act 1983 was the basis of challenge to sleepover remuneration arrangements that provided for a flat payment (with additions for work performed during the sleep period) to care staff employed overnight in community houses for the intellectually disabled. When the problem was first investigated in 2008,<sup>1</sup> that payment was \$34 (for 8-10 hours workplace presence) and the relevant minimum wage was \$12.50 per hour. A full Court was convened to decide whether sleepovers constituted *work* and, if so, whether the wages that care staff received for day-time work (that were higher than the minimum wage) could be averaged out to satisfy minimum wage requirements. The answers, upheld ultimately by the Supreme Court,<sup>2</sup> were yes to the work question and no to the wage issue.

Salaried employees undertaking sleepovers in school boarding establishments were held also to be entitled to the protections of wage orders made pursuant to the Act.<sup>3</sup>

When rest-home workers had the employer's contribution to their Kiwisaver schemes deducted from their wages, they received less than the minimum wage (\$13.50 in 2012). The Court held that this breached s 6 of the Act.<sup>4</sup>

Statutory minimum entitlements also lay at the heart of proceedings by a relief care worker to be declared a *homeworker* under the Employment Relations Act 2000.<sup>5</sup> She provided relief care for disabled individuals normally cared for by (unpaid) family members, but her pay did not include statutory minima like the minimum wage for the hours worked or holiday pay. The proceeding was defended on the basis that she was not a homeworker because she was not working in her own home, but the Court applied a 1997 decision that professional carers relying on payment for their care services as income are homeworkers.

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<sup>1</sup> *Dickson v Idea Services Ltd (Wellington)* [2008] NZERA 532.

<sup>2</sup> *Idea Services Ltd v Dickson* [2009] NZEmpC 58, at 129; *Idea Services Ltd v Dickson* [2011] NZSC 55.

<sup>3</sup> *Law, Colbert and others v Woodford House and Iona College Boards of Trustees* [2014] NZEmpC 25.

<sup>4</sup> *Faitala and Goff v Terranova Homes & Care Ltd* [2012] NZEmpC 199.

<sup>5</sup> *Lowe v Director-General of Health, Ministry of Health* [2015] NZEmpC 24, compare *Director-General of Health, Ministry of Health v Lowe* [2016] NZCA 369.

In each of these proceedings, the plaintiff/s represented a class of employees in similar circumstances. Except for the *Idea Services* sleepover case, they were female. In 2013, the facilities operated by Terranova Homes & Care Ltd paid its (predominately female) care assistants lower rates of pay than its (male) gardeners, a fact that emerged in a struggle over the basis for establishing pay rates for its workforce in the course of bargaining for a collective agreement. Proceedings alleging breaches of the Equal Pay Act 1972 were begun. The preliminary issue about whether the Act was intended to provide for pay equity (meaning *equal pay for work of equal value* – the union position) or simply *equal pay for the same (or substantially similar) work* – the employer position, was resolved by the Court (and upheld on appeal) in favour of the pay equity option.<sup>6</sup>

The union's involvement in proceedings about Part 6A (Transfer of Undertakings) concerned redundancy entitlements for transferred employees affected by downsizing of client requirements.<sup>7</sup> They were covered by a collective agreement that provided that no redundancy compensation was payable in that circumstance. The Court accepted they could still bargain for other redundancy entitlements. The Supreme Court upheld that position,<sup>8</sup> but, perhaps more importantly, held that subpart 1 of Part 6A is *designed to protect vulnerable employees*.<sup>9</sup>

### ***Employer litigation: Pacific Flight Catering v LSG Sky Chefs***

Pacific Flight Catering lost its catering contract to supply Singapore Airlines to another company, LSG, in late 2010. As part of a wider litigation strategy,<sup>10</sup> Pacific funded individual employees to take proceedings under Part 6A against LSG. The first, John Matsuoka, sought to be included with the employees transferred to LSG.<sup>11</sup> This required the Court to consider whether he was an employee to which the provision applied. It held he was, notwithstanding that he was also a shareholder of related companies, derived an income and benefits of over \$100,000 per annum, was a former brother-in-law of Pacific's owner and had multiple roles in the company. To a submission that the provision was restricted to *vulnerable* employees, the Court held that this was not apparent from the wording of Part 6A.

William Tan, an equipment supervisor, also sought a transfer. Between hearing and decision, the Supreme Court's observation about vulnerability (cited above) became available. Conceding it was bound by this finding, the Court found another reason for dismissing the claim by holding that Tan's role was insufficiently connected to food catering services to qualify him for transfer.<sup>12</sup>

The third former Pacific employee to issue proceedings against LSG was a catering assistant who was accepted for transfer. Nisha Alim alleged she was constructively dismissed as a result of LSG's refusal to recognise her promotion to catering supervisor and some

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<sup>6</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes & Care Ltd* [2013] NZEmpC 157; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516.

<sup>7</sup> *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2010] NZEmpC 113.

<sup>8</sup> *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2012] NZSC 69.

<sup>9</sup> At [10].

<sup>10</sup> See Susan Robson "An orchestrated litany of litigation, the story of an airline food fight in 48 judgments" [2015] ELB 21.

<sup>11</sup> *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2011] NZEmpC 44.

<sup>12</sup> *Tan v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 35.



enhancements to other terms and conditions of employment that were bestowed upon her (and other transferred employees) shortly before the transfer occurred. The Authority determination that she was not so dismissed was upheld.<sup>13</sup>

### ***Individual litigation***

The Court has also considered the provisions of Part 6A, on the issue of coverage, in three other decisions, two of which concerned the same employer.<sup>14</sup> The cleaners in the earlier decision (*Gibbs*) were held not to come within the classes of employee with rights of transfer, but the cleaner in the later decision (*Doran*) did have that right.

The third proceeding was between two employers, notwithstanding that the issue concerned the right of parks maintenance staff to transfer to the successful tenderer for the new maintenance contract. The Court held that, although the staff had some cleaning duties, their work was not covered by the categories of work listed as attracting transfer rights.<sup>15</sup>

A recent decision of a full Court considered the protection from unlawful deductions of wages in the Wages Protection Act 1983.<sup>16</sup> Vineyard pruners employed by a company who deducted the cost of the tools they used did not receive the repayments they were due at the end of the season. They complained to the Labour Inspectorate. Compliance proceedings were begun when the problem could not be resolved. The Court took the view that the proceedings should have commenced in the name of the complainants; so one of them was joined as a plaintiff. The defendants took no part in the proceedings, so the Court appointed an amicus. Then, there was a problem with the definition of the employer (despite, or perhaps because of, a wide definition in the Act). The Court held that the defendants (office-holders in a company liquidated upon the commencement of the claim) were not the employer; so, the unlawful deductions remained the property of the defendants.

## **The Court's approaches to statutory interpretation**

### ***Minimum Wage***

The first task for the Court in the *Idea Services* sleepover litigation was to define *work* in the absence of a statutory definition. It held itself to be bound by the purposive approach mandated by the Interpretation Act 1999, to take judicial note of the means by which the workforce and concepts of work have changed since the legislation was first passed in 1945 and to consider purposes additional to the need for a *bread wage*:<sup>17</sup>

Recognising the inequality of bargaining power in the employment relationship, the minimum wage legislation forms part of what has been described as the “minimum code” aimed at protecting employees from exploitation. It fulfils this

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<sup>13</sup> *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171.

<sup>14</sup> *Gibbs v Crest Commercial Cleaning Ltd* [2005] NZEmpC 72; *Doran v Crest Commercial Cleaning Ltd* [2012] NZEmpC 97.

<sup>15</sup> *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86.

<sup>16</sup> *Hixon (Labour Inspector) v Campbell* [2014] NZEmpC 213.

<sup>17</sup> *Idea Services Ltd v Dickson* [2009], above n 2, at [39].

role together with other legislation such as the Holidays Act 2003, the Equal Pay Act 1972 and the Wages Protection Act 1983.

On what constituted *work*, the Court adopted a test advanced by the union that required analysis of the constraints on the employee, the employee's responsibilities and the benefit to the employer.

In a separate consideration, the Court went on to determine whether the statutory requirements were satisfied by *averaging* the wages for a period of work so that payment at less than the minimum rate for part of the period can be balanced against a greater rate for another part. The Interpretation Act was again called in aid, with the addition of Supreme Court and Court of Appeal citations, but the Court was divided, the majority adopting the union position and the minority the employer position.

The issue whether salaried employees were protected in *Law* was considered by reference to the origins of the Minimum Wage Act 1945:<sup>18</sup>

For almost three decades after the end of the earlier cataclysmic world war and the establishment of the International Labour Organization, it had been recognised that fair and decent conditions of work were important to these objectives as well as to individual workers. It is no coincidence, then, that when nations came to formulate and adopt the Universal Declaration of Human Rights in 1948, work rights were among those proclaimed. Article 23(3) of the Universal Declaration provided, and continues to state that:

Everyone who works has the right to just and favourable remuneration ensuring for themselves and their family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

When combined with the right under art 23(1) of everyone to work, to free choice of employment, and to just and favourable conditions of work, the application of one of the manifestations of those rights in New Zealand (the MW Act) should be interpreted to give effect to those fundamental aspirations to which New Zealand not only committed itself, but indeed was instrumental in formulating. To adopt a narrow and niggardly interpretation of the MW Act in this regard would be to treat that fundamental international human rights declaration in similar fashion.

This passage was followed by excerpts from the ministerial speech at the Second Reading of the Minimum Wage Bill 1945, summarised by the Court as indicating intentions for its breadth and application. It helped to convince the Court of the potential for abuse of wage minima by salarising remuneration for employees expected to sleep over.

Cited in support of that position was New Zealand's ratification of the ILO Minimum Wage-Fixing Machinery in 1938,<sup>19</sup> the Court noting that it appeared only to have been considered judicially in its earlier decision, *Faitala*, where it held that the Convention prohibits

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<sup>18</sup> *Law*, above n 3, at [37]–[38].

<sup>19</sup> Co26 (entered into force 14 June 1930).

abatement of minimum rates by individual agreement. The Court's approach, in *Faitala*, to the Act was consistent with that in the sleepover cases:<sup>20</sup>

It is a statute that is designed to impose a floor below which employers and employees cannot go. It is directed at preventing the exploitation of workers, and is a statutory recognition of the diminished bargaining power of those in low paid employment.

The homeworker case, *Lowe*, was not required to consider the Minimum Wage Act in the Employment Court judgment<sup>21</sup> because the proceeding was limited to the preliminary question whether she was a homeworker. This required an exclusive focus on an earlier decision of the Court of Appeal under the Employment Contracts Act 1991 about homecare workers.<sup>22</sup> If she was a homeworker then wage minima would be relevant. The Court's approach, consistent with its other judgments about minimum wage issues, is apparent from its choice of the following passage from a 1997 case:<sup>23</sup>

...homecare workers are in a vulnerable position of the kind contemplated by those responsible for promoting the extended definition in 1987 if they are ineligible to receive the protections afforded to employees under the Employment Contracts Act and allied statutes. Although their position is quite different from outworkers engaged in piece work they are similarly vulnerable and susceptible of manipulation if allowed to be treated as in dependent contractors...they are very much...the type of worker who needs the protection of the Act by being deemed an employee notwithstanding a contractual description of "independent contractor".

### ***Wages Protection***

A different approach to purpose was adopted in *Hixon*. Its flavor can be detected from a contrasting approach to *old* legislation to that in *Idea Services*, *Law* and *Faitala*:<sup>24</sup>

The Wages Protection Act is part of the so-called minimum code of employee rights and is employee-protective legislation. Some of its provisions are antiquated, for example the requirement to pay wages in money (coins and notes) and the narrow and structured exemptions to this requirement. On the other hand, as may be seen from the introductory quotation above, Parliament has in recent times moved to extend or otherwise amend the Wages Protection Act's provisions to deal with circumstances as they change or arise. It is not legislation that is caught entirely in an early to mid-20th century time warp.

Parliament's retention of the original definition of 'employer'<sup>25</sup> meant that the third

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<sup>20</sup> *Faitala*, above n 4, at [39].

<sup>21</sup> Since overturned by the Court of Appeal: see above n 5.

<sup>22</sup> *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7.

<sup>23</sup> *Cashman*, above n 21, at [166] as cited in *Lowe*, above n 5, at [42].

<sup>24</sup> *Hixon*, above n 16, at [47].

<sup>25</sup> A person employing any worker or workers; and includes any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of the service or work of any worker.

defendant, as the Business Manager who ‘*actively implemented*’ the deduction policy,<sup>26</sup> could be sued personally. However, the Court took the view that the plain meaning of the Wages Protection Act definition could not be applied.<sup>27</sup>

We agree that a plain words/plain meaning interpretation of the definition of “employer” in s 2, and as contended for by the plaintiffs in the circumstances of this case, leads to a counter-intuitive result. It would allow an employee to recover an unlawfully made payment or an unlawful deduction from a person (other than the employing entity) whose role with that employing entity fell within the broad extended definition of any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of service or work of that worker. So, for example, the plaintiffs’ interpretation would allow recovery from a wages clerk or a work supervisor although the employing entity is both identified and exists in a legal sense for the purpose of recovery against that employing entity. We were asked to question seriously whether Parliament would have intended such a result. The implication of this rhetorical question is that Parliament could not possibly have so intended and the definition of employer in a s11 claim must be interpreted accordingly.

It went on to hold that the fact that the (liquidated company) employer could no longer be sued did not require the Court to apply the statutory definition. To do so would force the third defendant (the wife of the director/major shareholder) to become potentially liable for the company’s debts.

The Court’s “rhetorical question” about Parliament’s intentions was answered a few weeks later by the announcement of measures to strengthen the enforcement of employment standards.<sup>28</sup>

Persons other than the employer – such as directors, senior managers, legal advisors and other corporate entities – will also be held accountable for breaches of employment standards if they are knowingly and intentionally involved when an employer breaks the law. These cases can be pursued even if the employer ceases to exist.

### ***Equal Pay***

In its preliminary determination of the purpose of the Equal Pay Act in the *Terranova* decision, the Court adopted the position (same wording, textbook and higher court citations) of the *Idea Service* judgments about the place of the Interpretation Act, with one significant addition – the necessity “*to put any preconceptions, even prejudices, about the subject matter to one side*”.<sup>29</sup> In a wide-ranging inquiry about purpose, the Bill of Rights Act 1990

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<sup>26</sup> *Hixon*, above n 16, at [12].

<sup>27</sup> At [108].

<sup>28</sup> Ministry of Business, Innovation and Employment “The strengthening of employment standards” [2015] ELB 31.

<sup>29</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 239 as cited in *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes & Care Ltd* [2013], above n 6, at [30] (emphasis added).

prescription for statutory interpretation, the need to privilege interpretations consistent with its specified rights and freedoms, the Human Rights Act 1993 anti-discrimination provisions, and international conventions on equal pay and discrimination were called in aid, as were the Government Service Equal Pay Act 1960, the Commission of Inquiry into Equal Pay Report,<sup>30</sup> and the Equal Pay Bill 1972.

### **Part 6A**

In the earliest of the Part 6A proceedings in *Gibbs* described above, the Court introduced the idea of rights to freedom of association as an interpretative device. It took the view that a flaw in the wording of the provision describing the types of transfer subject to protections for employees could be resolved by reference to the Bill of Rights Act 1990 and the common law.<sup>31</sup>

The scheme of the new Part 6A purports to require, in effect, an employer to employ an employee or employees the subject of a restructuring in terms of the Act. It is to give employees an election whether to be employed by the new employer but gives that employer no right of veto...So a new employer has no entitlement to bargain about the terms and conditions of a new employment relationship, unlike the usually applicable position...Section 69H...removes employers' rights of choice and in bargaining.

So a new employer under this legislation is required by law to associate with a new employee or new employees in a way unknown to the previous common law and, very arguably, prohibited by it. It is significant new law setting aside long-established common law. This is therefore a freedom of association issue. It is a long standing principle of employment law that no person may be compelled to engage and continue in an employment relationship with another. Where that involved compulsion of an employee, it once took the form of slavery or servitude.

In this case, freedom of association trumped a purposive approach to the problem, there being a plethora of material (cited in the judgment) suggesting that the cleaners were intended to be protected.<sup>32</sup>

The right to freedom of association for employers was conspicuously absent from the next consideration of the coverage provisions of Part 6A. In *Matsuoka*, the successful tenderer and the Service and Food Workers Union (as intervener) submitted that the protection was limited to vulnerable employees, but the Court was unable to accept that it should form part of the test of whether an employee should be protected by subpart 1:<sup>33</sup>

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<sup>30</sup> Commission of Inquiry into Equal Pay *Equal Pay in New Zealand* (September 1971).

<sup>31</sup> *Gibbs*, above n 14, at [103]–[106].

<sup>32</sup> This intention was given legislative force by the Employment Relations Amendment Act 2006, s 6. It confirmed the Legislature's intention to protect the cleaners and undermined the distinction the Court drew between the *proponents* of the protection and Parliament.

<sup>33</sup> *Matsuoka*, above n 11, at [52].

In the absence of such words appearing anywhere within the relevant parts of the Act, the sections under consideration cannot be limited to such persons. There would be also be a difficult issue as to what, precisely, the word meant. On the facts of this particular case, the plaintiff, with his substantial salary package and protection in the event of redundancy, might not have been regarded as “vulnerable”, should that word have appeared.

Furthermore, this employee had rights capable of protection. Even though he had food catering duties of about an hour a day and the other work he performed for Pacific was not protected by Part 6A, the fact that he was a full-time employee wishing to transfer was sufficient to entitle him to do so. Ignored were the lengths Matsuoka went at an interview with LSG to ensure he would not be offered employment (no experience in shift work, duties mainly in transport, no management or large company experience, \$42 hourly rate, high leave entitlements, imminent overseas holiday). Ignored also was the use to which he put this meeting. At its conclusion, his representative, paid by Pacific, put to LSG its options – employing or dismissing him or settling for the \$75,000 redundancy provision in his employment agreement and holiday pay (said to exceed the redundancy amount).

Freedom to contract in employment did, however, form part of the justification for declining to find that park maintenance staff in *Lend Lease* were protected by Part 6A:<sup>34</sup>

The effect of Part 6A is to require an employer to engage employees, over which the new employer has no control or choice – effectively strangers. It is, in this sense, an exception to the usual principles regarding the freedom to contract in employment.

But here, as in *Tan*, which followed this approach, it was the basis for finding that Part 6A protected a limited range of employees providing particular specified services and that extension of the categories of employee protected by this provision was for the Minister not the Court.

Individual freedoms or rights were subsumed by employer and employee collective interests in the *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* proceedings about redundancy entitlements. The Court considered the intention for Part 6A by citing two sets of objects in the Employment Relations Act: those concerning good faith and inequality of power in s 3; and that in s 69A to protect specified categories of employees from replacement by restructure by giving them a right to elect to transfer to a new employer and to bargain for redundancy entitlements. Additionally cited were the following aids to interpretation: the explanatory notes to the original amendment that resulted in Part 6A (2004) and a successor amendment (2006); a select committee report; the ministerial speech at the second reading of the 2006 amendment.

## Litigation strategies compared

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<sup>34</sup> *Lend Lease*, above n 15, at [81].

Protection, the object of both employer and union strategies, served opposing purposes. The union strategy, selection of claimant/s for the purpose of maintaining the Court's focus on the protection at issue rather than the characteristics of those seeking it, avoided the problem highlighted by the *Crest* employees. Complaints about the quality of their cleaning became part of the evidence against the *Gibbs* cleaners. They were regarded as the reason for the contract transfer. The opposite was the case in *Doran*. Doran was a vast improvement on his predecessor and the owner of the premises he cleaned wanted him retained. This good employee/bad employee dichotomy, apparently relevant in proceedings concerning cleaners but not for employers or employees in employer funded litigation, became a means of diverting the Court from a purposive to a rights-based approach to Part 6A.

The protection at issue in the Pacific funded and the *Lend Lease* litigation was of the outgoing employer. It is possible that this was not initially clear to the Court. The former-employer's desire to off-load accrued but yet-to-be-claimed employee entitlements was never directly articulated as the basis of the Employment Court claims,<sup>35</sup> but it was an obvious inference. Perhaps it was the dropped pretence of employee as claimant that gave the game away in *Lend Lease*. Or the coincidence of timing<sup>36</sup> and counsel<sup>37</sup> in apparently unrelated litigation. Whatever the reason, the Court elected not to adopt its previous approach to *Matsuoka*'s grab for redundancy and holiday entitlements.

The fact, however, that the Court was able to be diverted into believing that Matsuoka was entitled to the protection of Part 6A, and the *Gibbs* employees not, suggests that its desire to protect the employers in *Hixon* from the ravages of the Wages Protection Act is not some odd one-off exception.

Also apparent from the judgments cited above are differences of emphasis on purpose in the advocacy of statutory protections. This accounts for the presence of material from the legislative process relevant to the purpose sought to be advanced in union litigation, and its relative absence in individual and employer funded litigation.

If the Court's approach to statutory purpose relies on advocacy, then this suggests acceptance of a more traditional judicial role than the provisions of s 189, Employment Relations Act, confer. Its power to "*accept, limit and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not*" appears to have been restricted to offering intervenor roles, or appointing an amicus.<sup>38</sup>

## Conclusion

The Court's apparent vulnerability to rights-based arguments in individual and employer funded claims concerning protective provisions can be contrasted with its consistent focus on employer obligations in union funded litigation. Rights-based arguments appear to have the

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<sup>35</sup> It was the basis of litigation in the civil courts.

<sup>36</sup> Coincidence in time refers to the year in which the proceedings were heard (2012), not the month, week, day, hour or minute at which they were commenced and heard.

<sup>37</sup> Pacific's counsel, Anthony Drake, represented the outgoing employer (Lend Lease), and LSG's counsel, Garry Pollak, represented the incoming employer (Recreational Services).

<sup>38</sup> *Idea Services*, above n 2; *Hixon*, above n 16.

power to successfully divert its attention from, and purpose-based arguments reinforce, the statutory protection at issue.

This suggests what policy positions to the challenges of regulating future labour markets might appeal to those who support labour market protections. In the consistent enforcement of such provisions, the role of legal institutions may need to be reframed or refined, along with those of the collective interests (employer and employee) directly affected. If consistency is as reliant on advocacy and coherence of litigation strategy as is argued here, then it is in the interests of collectives to select the protections that require judicial input, and those that can be resolved by other means. That would mean that access to a future Employment Court would depend, for enforcement of protections, on the involvement or consent of the collectives whose interests are in issue.



# The Right to Reasonably Limited Working Hours in the Smartphone Era

JOSS OPIE\*

## Abstract

Under the International Covenant on Economic, Social and Cultural Rights, everyone in New Zealand has the right to reasonably limited working hours. However, New Zealand law does not expressly recognise this right or generally limit the number of hours a person may work. Also, according to figures from the 2013 Census, just over 215,000 people work between 50–59 hours per week, and some 160,000 people work 60 hours or more per week. These figures indicate that many people in New Zealand do not enjoy the right to reasonably limited working hours. This article argues that New Zealand is not complying with its obligations under the Covenant in respect of working hours, or with related obligations concerning the family and health. It also proposes ways in which New Zealand could better comply with these obligations. In this context, the article considers the impact smartphones have on work, and the challenges they create in placing limits on work.

## Key words

Economic, social and cultural rights, working hours, family, health, smartphones.

## Introduction

Figures show Kiwis...work longer hours than many of their OECD counterparts...And experts predict that to increase further as more employees get smartphones and tablet devices, potentially connecting them to their jobs 24 hours a day.<sup>1</sup>

This article is in six parts. Part I summarises the right to reasonably limited working hours as recognised in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> as well as the family and health-related rights set out in the ICESCR. It also explains New Zealand's obligations in respect of those rights, some of the ways in which they may be violated, and the extent to which they are enforceable in New Zealand domestic law.

Part II provides statistics on working hours in New Zealand, and discusses some of the impacts long hours can have, including on health and families. Part III refers to how smartphones affect

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<sup>1</sup> Nicola Brennan-Tupara, Louise Risk and Jenna Lynch "No rest for the wicked" *Stuff* (online ed, New Zealand, 20 October 2012).

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1996, entered into force 3 January 1976) [ICESCR]. New Zealand ratified the ICESCR on 28 December 1978.

the ways people work, as well as the times and places in which they work or can be reached by work. Part IV analyses New Zealand statute and case law relevant to hours of work, and highlights some of the current regime's deficiencies.

Part V argues that New Zealand is not meeting its obligations under the ICESCR in respect of the rights referred to above. Part VI provides a framework for a new maximum hours regime.

## **Part I: Rights to Reasonably Limited Working Hours, Health, and Family**

### ***The Right to Reasonably Limited Working Hours***

Under the ICESCR, New Zealand recognises “the right of everyone to the enjoyment of just and favourable conditions of work”.<sup>3</sup> New Zealand also recognises that such conditions have to ensure, amongst other matters, “rest, leisure and reasonable limitation of working hours”.<sup>4</sup>

The inclusion of these rights in the ICESCR may be seen as one of the products of the struggle to reduce long hours of work in early industrialisation.<sup>5</sup> The ability to enjoy these rights is central not only to a dignified and healthy working life, but also to a dignified life in general.

The ICESCR does not define what amounts to reasonably limited working hours. However, three International Labour Organisation (ILO) conventions<sup>6</sup> and state practice suggest:<sup>7</sup>

...that ‘reasonable’ hours under Article 7(d) of the ICESCR should normally be no more than 40 hours per week, and certainly no more than 48 hours per week.

Consistent with this, the European Working Time Directive defines “maximum weekly working time” as an average working time of 48 hours or less over each seven day period, including overtime.<sup>8</sup>

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<sup>3</sup> ICESCR, art 7.

<sup>4</sup> ICESCR, art 7(d).

<sup>5</sup> See Ben Saul, David Kinley and Jacqueline Mowbray *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, Oxford, 2014) at 472, who refer “to working hours of up to sixteen hours per day during early industrialization”. See also Stephen Blumenfeld, Sue Ryall and Peter Kiely *Employment Agreements: Bargaining Trends & Employment Law Update 2014/2015* (Victoria University of Wellington Centre for Labour, Employment and Work, 2015) at 43, who state that “[r]egulation of working time has been a fundamental issue for unions and collective bargaining around the world since the 19th century. Research indicates that the limitation of working time offers benefits for workers, as well as for employers and society at large”.

<sup>6</sup> Hours of Work (Industry) Convention, 1919 (No 1) (adopted 28 November 1919, entered into force 12 June 1921) [Industry Hours of Work Convention]; Hours of Work (Commerce and Offices) Convention, 1930 (No 30) (adopted 28 June 1930, entered into force 28 August 1933) [Commerce and Offices Hours of Work Convention]; and Forty-Hour Week Convention, 1935 (No 47) (adopted 22 June 1935, entered into force 23 June 1957) [Forty-Hour Week Convention].

<sup>7</sup> Saul, Kinley and Mowbray, above n 5, at 476. Additional hours may be worked in the circumstances and subject to the conditions provided for in the Industry Hours of Work Convention and the Commerce and Offices Hours of Work Convention, above n 6.

<sup>8</sup> See art 6 of Directive 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L299 [European Working Time Directive]. The Directive does, however, permit a Member State to derogate from art 6 in a range of circumstances. These include the option of not applying art 6 where, amongst other matters, the state ensures that no employer requires a worker to exceed the maximum weekly work time unless the worker has

Quantifying ‘reasonable hours’ in this way is also consistent with other definitions which have been used to analyse hours of work. For example, the Organisation for Economic Co-operation and Development (OECD) defines working “very long hours” as working on average 50 hours or more per week.<sup>9</sup> Other research referred to below defines long hours as 50 or more per week<sup>10</sup> or 55 or more per week,<sup>11</sup> and very long hours as 50-59 or 60 plus hours per week.<sup>12</sup> Moderately long hours have been defined as between 40-49 hours per week.<sup>13</sup>

### ***Family and Health-Related Rights***

New Zealand has also bound itself under the ICESCR to recognise certain family and health-related rights. Article 10 of the ICESCR records States Parties’ recognition that “

the widest possible protection and assistance should be accorded to the family...particularly for its establishment and while it is responsible for the care and education of dependent children.

Under art 12(1), States Parties recognise “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

These work, family and health-related rights are dependent on one another for their realisation, and on the other rights recognised in the ICESCR. As discussed in more detail below, the longer a person’s working hours, the less time they will have for rest and leisure. Long working hours may put a person’s relationships under pressure and affect their health, sometimes seriously. A person’s enjoyment of other rights recognised by the ICESCR, such as to education<sup>14</sup> and to take part in cultural life,<sup>15</sup> may also be affected.<sup>16</sup>

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agreed to that, and is not subjected to any detriment by his or her employer if the worker does not agree: see art 22.

<sup>9</sup> OECD “Better Life Index” (2015) <[www.oecdbetterlifeindex.org](http://www.oecdbetterlifeindex.org)> [Better Life Index]. New Zealand is a member of the OECD.

<sup>10</sup> Lindy Fursman “Parents’ Long Work Hours and the Impact on Family Life” (2009) 35 Social Policy Journal of New Zealand 55.

<sup>11</sup> Sarah Johnson and others “Mothers’ and Fathers’ Work Hours, Child Gender and Behaviour in Middle Childhood” (2013) 75 J Marriage Fam 56 at 68.

<sup>12</sup> Sibyl Kleiner, Reinhard Schunck and Klaus Schömann “Different Contexts, Different Effects? Work Time and Mental Health in the United States and Germany” (2015) 56(1) J Health Soc Behav 98 at 103.

<sup>13</sup> At 103.

<sup>14</sup> ICESCR, art 13.

<sup>15</sup> ICESCR, art 15(1)(a).

<sup>16</sup> Saul, Kinley and Mowbray, above n 5, at 473–474.

### ***Progressive Realisation, Legislative Measures, and Respecting, Protecting and Fulfilling Rights***

The ICESCR obliges each State Party to realise progressively the rights referred to above, and other recognised rights,<sup>17</sup> to the “maximum” of its “available resources.”<sup>18</sup> Progressive rather than immediate realisation means that a State Party is not in violation of the ICESCR if the rights recognised in it are not fully guaranteed on ratification. Instead, each State Party is obliged to take deliberate, concrete, and targeted steps towards full realisation (meaning full enjoyment of each right by everyone within the State Party’s jurisdiction).<sup>19</sup> It is for the State to demonstrate that it is making “measurable progress” towards this objective.<sup>20</sup>

Full realisation is to be achieved by “all appropriate means”, particularly by legislative measures.<sup>21</sup> Legislation will be an appropriate means where it is reasonably required to provide adequate protection for an ICESCR right,<sup>22</sup> or otherwise to make that right effective.<sup>23</sup>

In deciding whether to legislate or take other steps, a State Party must consider what measures have been the most effective in ensuring the protection of other human rights in its jurisdiction. There must be compelling justification for employing significantly different measures to give effect to ICESCR rights from those used in relation to other human rights.<sup>24</sup>

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<sup>17</sup> There is a distinction in the ICESCR between “recognized” rights, which are subject to progressive realisation, and rights which must be guaranteed or obligations which must be fulfilled immediately (such as the undertaking of States Parties in art 2(2) of the ICESCR that the rights set out in it will be exercised without discrimination). For a discussion of this, see Joss Opie “Economic, Social and Cultural Rights in New Zealand: Their Current Status and the Need for Change” (LLM Thesis, University of Toronto, 2010), available at University of Toronto Research Repository <<https://tspace.library.utoronto.ca>> at 9–10 [“ESCR: Current Status and Need for Change”].

<sup>18</sup> See ICESCR, art 2(1), which provides that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

<sup>19</sup> Opie “ESCR: Current Status and Need for Change”, above n 17, at 10–12. In certain circumstances, a State Party may take retrogressive measures (meaning measures which reduce the extent to which a recognised right is enjoyed within the State Party’s jurisdiction) or otherwise subject rights to limitations: see Joss Opie “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43 VUWLR 471 at 474 [“A Case for ESCR in the NZBORA”]. The ICESCR’s principal limitations provision, art 4, reads: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

<sup>20</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* E/C.12/2000/13 (2000) at [8].

<sup>21</sup> See ICESCR, art 2(1), above n 18.

<sup>22</sup> CESCR *General Comment No 3* E/1991/23 (1990) at [3]. The Committee on Economic, Social and Cultural Rights (CESCR) was established to assist the United Nations Economic and Social Council in its monitoring of State Party compliance with ICESCR obligations. As with other United Nations treaty bodies, the CESCR reviews State Party reports under the ICESCR and issues observations on those reports. It also provides authoritative interpretations of the ICESCR, including in “General Comments”. Further, the CESCR may consider communications by individuals or groups of individuals who are under the jurisdiction of a State Party to the ICESCR, and who claim to be victims of a violation by that State Party of any of the rights in the ICESCR, provided that State Party is also a Party to the Optional Protocol to the ICESCR. New Zealand is not currently a Party to the Optional Protocol.

<sup>23</sup> As the CESCR stated in *General Comment No 9* E/C.12/1998/24 (1998) at [9], “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”

<sup>24</sup> At [7].

More generally, each State Party is obliged to respect, protect and fulfil the rights set out in the ICESCR, to the maximum of its available resources. A State Party respects rights when it does not interfere unjustifiably with their enjoyment. Meeting the obligation to protect requires a State Party to protect individuals against third party violations of their rights (for example, a State Party failure to ensure that employers meet health and safety standards may constitute a violation of the right to work). Fulfilling rights requires, amongst other matters, that each State Party take action to ensure or improve people's access to the resources (whether material, institutional, legal or otherwise) they need to realise their rights.<sup>25</sup>

### ***Violations of the ICESCR and Remedies***

A State Party may violate the ICESCR by, for example, not taking appropriate steps to progressively realise rights,<sup>26</sup> not reforming or repealing legislation which is “manifestly inconsistent” with the ICESCR,<sup>27</sup> or by pursuing a policy or practice which “deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result.”<sup>28</sup>

Each State Party must ensure that a person whose rights under the ICESCR are violated within its jurisdiction has access to an effective remedy, including compensation.<sup>29</sup>

### ***Enforceability of ICESCR Rights and Obligations in New Zealand, and Good Faith***

While New Zealand has recognised the rights referred to above as a matter of international law, a person cannot directly enforce these rights in the New Zealand courts. Unless Parliament legislates to give them domestic legal effect, their influence is limited to being an aid in statutory interpretation and potentially a relevant consideration in administrative decision-making.<sup>30</sup>

Accordingly, Parliament has a critical role. If it decides not to enact legislation which, for example, gives domestic effect to the right to reasonably limited hours of work, people will not be able to rely on that right directly in New Zealand. Put another way, the enforceability of our internationally recognised human rights depends, to a very significant extent, on Parliament's favour. In that regard, it is important to recall that, as with its other obligations under international treaties, New Zealand is required to perform its ICESCR-related obligations in good faith.<sup>31</sup>

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<sup>25</sup> Opie “ESCR: Current Status and Need for Change”, above n 17, at 25–26.

<sup>26</sup> *Maastricht Guidelines*, above n 20, at [15(a)].

<sup>27</sup> At [15(b)].

<sup>28</sup> At [11].

<sup>29</sup> CESCR *General Comment No 18* E/C.12/GC/18 (2006) at [48].

<sup>30</sup> Opie “A Case for ESCR in the NZBORA”, above n 19, at 512–516; Opie “ESCR: Current Status and Need for Change”, above n 17, at 41–42.

<sup>31</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 26.

## Part II: Working Hours in New Zealand, and Effects of Long Hours

### *2013 Census Statistics*

According to figures from the last Census in 2013,<sup>32</sup> the majority of people in New Zealand usually work between 40-49 hours a week.<sup>33</sup> However, 11.3 per cent (216,366 people) advised that they usually work between 50-59 hours a week, and 8.5 per cent (162,171 people) advised that they usually work 60 hours or more a week.<sup>34</sup> The 2013 Census also recorded 19,194 people as having responded that they normally work 70 hours a week.<sup>35</sup> These figures did not include time worked in secondary or other employment, which some 180,000 people claimed to have.<sup>36</sup> Also, OECD statistics suggest that New Zealand workers work longer than workers in many other OECD countries.<sup>37</sup>

### *The Effects of Long Hours on Health and Family*

#### *Health-related impacts of long hours*

As multiple factors influence a person's health, the relationship between long work hours and health is complex. Also, the financial benefits of working longer hours, together with benefits such as social networks, socio-economic status, and the psychological fulfilment that some work can bring, may have positive effects on health.<sup>38</sup> This is particularly so where the worker has a degree of flexibility about when he or she works.<sup>39</sup> Also, and as one would expect, having

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<sup>32</sup> Statistics New Zealand *2013 Census QuickStats about work and unpaid activities* (2015) <www.stats.govt.nz> at 28. These statistics include both employed and self-employed people. Note that, as stated at 6, the quarterly Labour Market Statistics are the official source of data about work in New Zealand, not the Census. However, while the Labour Market Statistics are derived from "surveying samples of the population, census data covers the population as a whole" and therefore is "useful for detailed regional and demographic breakdowns." Because of that, and because the customised data referred to above is freely available, I have used it for the purposes of this article (rather than, for example, attempting to use the Labour Market Statistics from the last four quarters). While the figures referred to above represent a snapshot in time and have to be treated with some caution (including because they are based on self-reporting), they still provide a useful indication of working hours for the New Zealand workforce in 2013. Note also that Statistics New Zealand does not recommend making any comparison between Census data and the Labour Market Statistics: at 6.

<sup>33</sup> See also Blumenfeld, Ryall and Kiely, above n 5, at 43, who state that "[a]lthough less common in New Zealand than it was 12 months ago, the typical work week across the OECD as well as in New Zealand is still 40 hours."

<sup>34</sup> The OECD's 2015 edition of the Better Life Index, above n 9, states that in New Zealand "some 14 per cent of employees work very long hours" (that being defined as 50 or more a week on average).

<sup>35</sup> Statistics New Zealand "Census Totals By Topic" ("Hours worked per week in main job") (2013) <www.stats.govt.nz>.

<sup>36</sup> Statistics New Zealand "Census Totals By Topic" ("Hours worked per week in other jobs") (2013) <www.stats.govt.nz>. Despite this, and while "Kiwis work 15 per cent longer than the OECD average", we "produce about 20 per cent less output for every hour worked" (Steve Hart "Six-hour work day gains strength" *The New Zealand Herald* (online ed, Auckland, 26 July 2014)).

<sup>37</sup> Blumenfeld, Ryall and Kiely, above n 5, at 46 (referring to 2013 statistics). The OECD's 2015 edition of the Better Life Index, above n 9, states that the "share of employees working 50 hours or more per week is not very large across OECD countries. However, in New Zealand, some 14 per cent of employees work very long hours, slightly more than the OECD average of 13 per cent". See also Brennan-Tupara, Risk and Lynch, above n 1, who claimed in 2012 that "figures show Kiwis, and their Australia [sic] counterparts, work longer hours than many of their OECD counterparts with 13 and 14 per cent, respectively, working long hours (classed as more than 50 hours a week). That's above the OECD average of 9 per cent and higher than Denmark (3 per cent), Canada (4 per cent), Britain (12 per cent), and the United States (11 per cent)."

<sup>38</sup> Kleiner, Schunck and Schömann, above n 12, at 99.

<sup>39</sup> At 99.

insufficient or no work can negatively affect health.<sup>40</sup> Unemployed people report more symptoms of depression than employed people, and are “particularly vulnerable to stressful life events”.<sup>41</sup>

However, as one would also expect, negative associations between long hours and mental or physical health have been identified.<sup>42</sup> According to some research, long work hours are expected to lead to varying levels of stress and stress-related illness.<sup>43</sup> Long work hours have also been associated “with lower satisfaction with work-family balance and chronic feelings of time pressure regarding personal or family time...These challenges, in turn, are associated with distress.”<sup>44</sup>

Cases demonstrate the highly negative effects that long hours can have on people’s health. In *Johnstone v Bloomsbury Health Authority*, Dr Johnstone claimed that in some weeks he had been required to work over 100 hours a week, that on one weekend he worked a 32 hour shift with only half an hour’s sleep, and that on another weekend, he was on call for 49 hours continuously, during which he only slept for seven hours in total.<sup>45</sup> He alleged that working these hours led to him suffering from depression, stress, and a diminished ability to sleep, being lethargic as well as physically sick from time to time due to exhaustion, and feeling suicidal and desperate.<sup>46</sup>

Similarly, in *Carpenter v Mondiale Freight Services Limited* (discussed below), Ms Carpenter suffered from headaches, exhaustion, and depression substantially caused by regularly working between 55-65 hours a week.<sup>47</sup> She resigned, and was unfit to work for four months after her resignation.

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<sup>40</sup> At 100.

<sup>41</sup> At 100.

<sup>42</sup> At 99.

<sup>43</sup> At 99.

<sup>44</sup> At 100. This study also found that cultural factors such as legislative frameworks can have an impact. In comparing the effects of long hours on mental health in Germany and the United States, very long hours (referred to at 103 as between 50–59 hours a week or 60 and greater) were identified as having a strong negative association with mental health in Germany, but not in the United States. The differences between the two countries identified as contributing to this outcome included the differing legal regimes, and the expectations which each created (Germany had comparatively extensive regulation of working hours, while there was no legal limit in the United States). However, if in fact a population such as that of the United States has become habituated to not having rights such as the right to reasonably limited working hours respected, that cannot provide a justification for not protecting those rights in jurisdictions such as New Zealand. Further, the lack of an association at a national level in one country between working very long hours and negative mental health outcomes does not mean that individuals in that country have not experienced such negative outcomes due to very long hours.

<sup>45</sup> [1991] 2 All ER 293 at 296. As well as seeking damages from the Health Authority and other remedies, Dr Johnstone sought a declaration that, despite his contract, the Health Authority could not lawfully have required him to work so many hours in excess of his normal working hours as would foreseeably injure his health. His appeal concerned a lower court decision to strike out those aspects of his claim relating to his working hours. Allowing the appeal in part, the majority of the Court of Appeal held, amongst other matters, that the Health Authority’s express contractual right to require Dr Johnstone to work such substantial hours had to be exercised consistently with its implied duty to take reasonable care not to injure his health (see, for example, at 299 per Stuart-Smith LJ and at 305–306 per Browne-Wilkinson VC). Whether that implied duty had been breached was to be determined by another trial.

<sup>46</sup> At 296.

<sup>47</sup> [2012] NZERA 20.

### *Effects on the family*

As with health, the impacts on families of long working hours are not uniformly negative. In a New Zealand-based study, the benefits of working long hours were found to include having extra money, being able to develop a business, and acting as a role model for one's children.<sup>48</sup> However, the negative impacts included fatigue, less time spent with children, less energy available for parenting, less time available for exercise, and the difficulty or impossibility of having family holidays or special occasions together. Spouses of people who worked long hours had to take on most or all of the household and parental responsibilities, and long hours created stress in some couples' relationships.<sup>49</sup>

Some of the people involved in the study worked well over 50 hours a week. For example, a road crew supervisor, Doug, married to Abbey with two young children, would begin work at approximately 5:30am. He would regularly work at least 12 hour shifts, six days a week, and averaged at least 80 hours of work per week. This was because his shifts could start at 5am and not finish until 10pm at night.<sup>50</sup> Doug was paid a salary, which worked out as being less than the minimum wage on an hours-worked basis.<sup>51</sup> Abbey, who suffered from stress-related health issues, said "Doug basically works, eats, sleeps, and that's kind of his life."<sup>52</sup>

A caregiver, Lani, was married with four children. She worked 75 hours a week on average at two different hospitals, and her husband worked as a bus driver. Lani had a permanent night shift, but would also often work an afternoon shift. This meant that after returning home from her night shift, doing domestic chores and assisting her children to get to school, she would sleep for between three and four hours before going back to work. Lani said:<sup>53</sup>

...the only thing I think about is the time I spend at work [and how it] affects my family life. Like, spending more time working and not enough time here with family...I am afraid that I'm not going to know my children.

The negative impacts of long hours could be ameliorated where, for example, a couple had family support and childcare assistance, and/or flexible work arrangements. On the other hand, they could be exacerbated by, for example, the frequency and duration of work-related travel, or if the person working the long hours had no control over them or their timing.<sup>54</sup> One of the study's conclusions was as follows:<sup>55</sup>

Within the families we spoke with, there were some where a variety of factors converged to exacerbate the impact of long working hours, with the result that the

<sup>48</sup> Fursman, above n 10, at 62.

<sup>49</sup> At 62–63.

<sup>50</sup> At 60.

<sup>51</sup> At 65. Note that in *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, the Employment Court held that salaried employees are covered by the Minimum Wage Act 1983 (MWA). Accordingly, Doug and other salaried employees in his situation would have a claim under the MWA to be paid at least the applicable minimum wage for the hours they work (for example, to be paid the difference between what they actually received as salary for each of those hours and the applicable minimum wage, where the former is less than the latter): see [236]–[241] of the judgment. See also *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95 at [99].

<sup>52</sup> Fursman, above n 10, at 64.

<sup>53</sup> At 62.

<sup>54</sup> At 64.

<sup>55</sup> At 66.



families were under significant stress. For example, families who were on a very low income and had little or no flexibility in their working hours, and had few or no educational qualifications with a resulting lack of occupational alternatives, were without apparent choices regarding their working hours.

Further, the study's findings included that people with high incomes were most likely to work long hours, but the majority of people working longer hours were in the lower income brackets.<sup>56</sup> Fifty-five per cent of the people working 50 hours or more a week had incomes of less than \$50,000 per annum, and over 90,000 low-income earners worked 50 or more weekly hours, against a little over 51,000 workers earning more than \$100,000 per annum.<sup>57</sup> Some parents in the low-income group were the least likely to be able to negotiate working arrangements which would promote family wellbeing.<sup>58</sup>

These findings from 2009 appear to be broadly consistent with some of the figures from the 2013 Census. For example, in 2013, the most common occupations for people with no formal qualifications were labourers (33.8 per cent) and machinery operators and drivers (37.1 per cent).<sup>59</sup> Machinery operators and drivers also made up the second highest proportion (32.4 per cent) of occupations in which 50 or more hours a week were worked (with managers having the highest proportion at 36 per cent).<sup>60</sup>

#### *Particular effects on boys of fathers' long working hours*

In a 2013 Australian study,<sup>61</sup> an association was identified between fathers in two-parent heterosexual families who worked more than 55 hours, and considerably higher levels of behavioural problems in boys. The comparator group was boys in two-parent heterosexual families where the father worked fewer weekly hours. No association was identified between behavioural problems in children and their mothers' work hours.

The study referred to evidence that long working hours limited the time parents had to interact with their children, including activities important for their development such as playing, talking and teaching. Such hours also limited the time available to assist their children to overcome learning and social difficulties.<sup>62</sup> The study also referred to other research identifying an association between regular and active engagement by fathers, reduced behavioural problems for boys, and less psychological problems for young women, as well as an association between greater work-family conflict and less positive marital relationships when parents worked long hours.<sup>63</sup> In addition, a possible consequence of fathers working long hours was less good parenting by mothers. This was due to the extra pressure which the father's absence put on the mother.<sup>64</sup>

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<sup>56</sup> At 55.

<sup>57</sup> At 61.

<sup>58</sup> At 55.

<sup>59</sup> Statistics New Zealand, above n 32, at 21.

<sup>60</sup> At 29.

<sup>61</sup> Johnson and others, above n 11.

<sup>62</sup> At 59.

<sup>63</sup> At 59.

<sup>64</sup> At 69.

As the researchers noted:<sup>65</sup>

...emotional and behavioural problems in childhood can set a trajectory of psychopathology later in life...and via poorer literacy, numeracy, and school achievement, constrain later employment prospects and life chances in adulthood...

A conclusion of the study was that fathers should be incentivised to work less, and have a greater share in parenting.<sup>66</sup> In that regard, it is noteworthy that one of the findings in the 2013 Census was that men were more likely than women to work longer hours in employment, with men making up 74 per cent (120,039) of those normally working 60 hours or more a week.<sup>67</sup>

### *Summary*

On the basis of the figures from the 2013 Census set out above, while the majority of people in the New Zealand workforce are not working hours inconsistent with their right to reasonably limited working hours, a large number of people are. Working such hours may bring certain benefits, but it can also cause real harm to the people working them and to their families, including the children in those families. Further, these long hours of work may be more prevalent amongst lower income earners, and the families of these people may be worse affected by long hours than more wealthy families.

As with all human rights, the right to reasonably limited working hours is concerned with highly significant interests and values. If the right is not adequately protected, individual and social harm results. Also, and as is often the case, those with fewer resources may well be less able to protect their rights.

The next part explores some of the impacts of smartphone technology on work. While the smartphone brings benefits, it is also a further threat to the extent to which the right to reasonably limited working hours is realised in New Zealand. Instead of assisting to increase the numbers of people who enjoy the right, it may undermine current levels of realisation. It may also worsen the situation of those who do not currently have the benefit of the right.

The ways in which the smartphone operates, combined with its increasing ubiquity (and, therefore, the increasing extent to which a smartphone is required to participate and be seen to participate effectively in work and wider cultural life), promote the erosion or eradication of former work/private life divisions, and a seamlessness between work and private life. In that process, and over time, the intrusion of work into private life may be normalised and ultimately rendered invisible. This would seem to be particularly likely if the work and time-related transformations being wrought by the smartphone remain unrecognised by the law.

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<sup>65</sup> At 57.

<sup>66</sup> At 70. See also in this regard a report by Karen Mangnall, entitled "Fathers' role linked to child behaviour" (2015) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>. The report refers to research which links a "lack of parenting by Pasifika fathers" with a considerably increased risk of their children suffering serious behavioural problems. It states that, according to the lead researcher Dr Tautolo, "the pressure to work long hours as the sole income earner also made it harder for Pasifika fathers to find time for their children. Dr Tautolo is also quoted as saying "[b]ut this is about trying to show him it's really important that you do prioritise some of that time if you can, and perhaps developing strategies or services that allow him to do that more effectively."

<sup>67</sup> Statistics New Zealand, above n 32, at 29.

### Part III: Smartphones and Work

Smartphones are a relatively new phenomenon, in the workplace and outside of it. However, their use is already widespread and rising quickly. While not all adults in New Zealand own or have access to a smartphone, 70 per cent do, up from 48 per cent in 2013.<sup>68</sup> It seems likely that over time this figure will increase to close to 100 per cent, particularly given that in the 18-34 year-old age group 91 per cent own or have access to a smartphone.<sup>69</sup>

The use of smartphones and other mobile technology for work has important implications for the right to reasonably limited working hours. As discussed below, the same smartphone features which facilitate work also expose the user to being perpetually on-call, and to increased work.

The advantages of having a smartphone include the ability to access and respond to work calls and correspondence outside of work. This can increase productivity and the speed with which problems can be resolved.<sup>70</sup> The smartphone may also assist in building and maintaining client relationships, including promoting visibility and accessibility. As a Brazilian lawyer put it in a recent study of smartphone use in a corporate law firm in Brazil:<sup>71</sup>

The device is *on* so that I can get attuned to the client. I work anywhere any time. No one needs to impose it on me. I conceive it as a dire need. The better I respond to a customer, the greater is the chance that I will grow professionally.

The smartphone can also give users a greater ability to work on their terms outside the office.<sup>72</sup> This includes being able to go home and work from there, perhaps after spending time with one's family, doing household chores, or socialising, rather than having to stay in the office or at another place until the day's work is finished.<sup>73</sup>

All of these features, however, allow work to expand, in quantity as well as temporarily, spatially, and mentally. The boundaries between work and non-work space, and work and non-work time, become increasingly blurred,<sup>74</sup> if not broken down altogether. A cultural shift has occurred, according to which working after business hours and expecting others to be available

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<sup>68</sup> Research New Zealand *A Report on a Survey of New Zealanders' Use of Smartphones and other Mobile Communication Devices 2015* (Wellington, 2015) at 3.

<sup>69</sup> At 5.

<sup>70</sup> Diannah Lowry and Megan Moskos *Hanging on the Mobile Phone: Experiencing Work and Spatial Flexibility* (National Institute of Labour Studies Working Paper 153, Flinders University, Adelaide, 2005) at 6 and 9–11. See also Flávia Cavazotte, Ana Heloisa Lemos and Kaspar Villadsen "Corporate Smart Phones: professionals' conscious engagement in escalating work connectivity" (2014) 29 *New Tech Work Employ* 72 at 78.

<sup>71</sup> Cavazotte, Lemos and Villadsen, above n 70, at 83 (emphasis in original).

<sup>72</sup> At 78.

<sup>73</sup> Lowry and Moskos, above n 70, at 13.

<sup>74</sup> Cavazotte, Lemos and Villadsen, above n 70, at 79; Elpida Prasopoulou, Athanasia Pouloudi and Niki Panteli "Enacting new temporal boundaries: the role of mobile phones" (2006) 15 *Eur J Inf Syst* 277 at 281. See also Brennan-Tupara, Risk and Lynch, above n 1, who state that "experts predict [the number of people working longer hours] to increase further as more employees get smartphones and tablet devices, potentially connecting them to their jobs 24 hours a day...Accountant Greg Harris, a partner at Deloitte Hamilton, said he was finding it ever harder to leave work at the door when he left the office."

after business hours is increasingly acceptable and/or required, whether by one's employer or due to competitive pressure.<sup>75</sup> A further study claims:<sup>76</sup>

Professionals fear that not answering their mobile phone after normal office hours, and thus maintain[ing] a rigid temporal boundary, would be interpreted as evading or not delivering on work responsibilities. Consequently, they succumb to a blending of their work and private time without experiencing any transition towards more fluid or lax work habits that would justify such a change.

As another lawyer in the study that focussed on the corporate law firm in Brazil said:<sup>77</sup>

When Friday night comes, I try to turn the Black Berry off, theoretically, not read it any more. But sometimes, when I'm waiting for some client's e-mail, there are many madmen that answer on the weekend. I thought it was just me... Then I turn the Black Berry on, end up reading, answering if I see it's urgent.

Users can experience anxiety, increased pressure, worry about being contacted or not being contacted, and can feel as if they are constantly on-call or needing to be alert.<sup>78</sup>

On many occasions when I was relaxing, having fun, I would then get a message, something I needed to reply to. My mood changes completely. It's complicated... But you can only become aware that it is going to be like that once you begin to experience the device. It's insane!<sup>79</sup>

We are talking about situations and decisions that involve a lot of money. So, a delay might cost you; it's money you won't make. Nobody cares if you are working 24 hours a day... But sometimes I give myself the right to take some time off. It is just that, then, I see the e-mail. You have to stay alert, otherwise... [worried expression].<sup>80</sup>

There are also impacts on familial and other personal relationships. Conflict can arise with partners and spouses over smartphone use out of the office.<sup>81</sup> Children may also resent the

<sup>75</sup> Cavazotte, Lemos and Villadsen, above n 70, at 83; Prasopoulou, Pouloudi and Panteli, above n 74, at 281.

<sup>76</sup> Prasopoulou, Pouloudi and Panteli, above n 74, at 283. See also Steve Randall "Morning Briefing: Law firms see greatest increase in out of hours demands" *NZ Lawyer* (online ed, New Zealand, 29 June 2015), which states: "The data from telephone answering company AllDayPA shows that since 2012 the average increase in calls to businesses before 9am and between 6 and 8pm has been 41 per cent; for law firms it's almost double. While IT and maintenance firms have seen out of hours calls increase by around the average, demand for lawyers out of hours has soared by 80 per cent." Note that it is not clear to which jurisdiction these figures relate.

<sup>77</sup> Cavazotte, Lemos and Villadsen, above n 70, at 81.

<sup>78</sup> Cavazotte, Lemos and Villadsen, above n 70, at 81 and 84; Libby Wilson and Narelle Henson "How smartphone creep can ruin work-life balance" *Stuff* (online ed, New Zealand, 29 June 2013); Lowry and Moskos, above n 70, at 8 and 9; Hannah Rippin "The Mobile Phone in Everyday Life" (2005) 1 *Fast Capitalism* at 8, 9 and 23.

<sup>79</sup> Cavazotte, Lemos and Villadsen, above n 70, at 84.

<sup>80</sup> At 81.

<sup>81</sup> At 80: "So sometimes my husband complains a bit: 'Gosh, give some attention to your family... Today is Saturday, today is Sunday... He feels much more like a slave to me, because he says that I really neglect to be with them, answering messages in moments that would otherwise be theirs.'" In another study, a respondent stated that "[the phone] drives me nuts. He gets called on the mobile at all hours of the night, sometimes two or three times. He's fine at getting back to sleep, but I just lie there in bed awake for hours. I've just started seething about it all, it's like his workplace has entered our bedroom. And the lack of sleep is affecting my own performance at work": see Lowry and Moskos, above n 70, at 13.

diversion to the smartphone or other mobile technology of attention and time which could otherwise be theirs. According to a recent survey, approximately one third of the child respondents between the ages of 8-13 claimed that their parents spent the same or less time with them as on their smartphones and other mobile devices. Forty per cent of those surveyed referred to their parents being distracted by a smartphone or tablet during conversations with them, and said that this made them feel unimportant.<sup>82</sup>

Therefore, as the use of smartphones and other mobile technology increases, and changes societal norms in the process, the greater the risk there is of people working longer, and not being able to disconnect from work. Rather than promoting the right to reasonably limited working hours, as well as to rest and leisure, the smartphone and the expectations engendered by it mostly pull in the opposite direction.

Given the harm which long hours of work can cause and New Zealand's international obligations, one could expect there to be a strong and clear legal framework in place in New Zealand to regulate hours of work. Given also the risks presented by the smartphone in relation to the right to reasonably limited working hours, one could also expect that this framework be re-evaluated to determine whether it is sufficient to meet the challenges posed by new technology, as well as whether it is otherwise suitable for today's workplace and forms of work. As Parts IV and V of this article discuss, however, that is not the case.

## **Part IV: Law Affecting Hours of Work in New Zealand**

Despite the significance of hours of work for people's lives and New Zealand's international obligations, there is no express right to reasonably limited working hours in New Zealand law. In fact, New Zealand legislation has very little to say about hours of work.

The generally applicable section is s 11B of the Minimum Wage Act 1983 (MWA), which is entitled "40 hour, 5-day week". Despite its heading, however, the section does not establish any requirement for such a working week. Rather, it states that "every employment agreement...must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week",<sup>83</sup> unless the parties agree otherwise.<sup>84</sup> Accordingly, s 11B requires that contractual limits on hours of work be negotiated, and it does not limit the number of hours which an employee may agree to work.

A degree of protection against long hours is, however, provided by health and safety legislation (although it does not set any specific limit on hours, and there is no other generally applicable, specific limit in New Zealand law).<sup>85</sup> Under the Health and Safety at Work Act 2015 (HSWA),

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<sup>82</sup> See Lydia Anderson "Kiwi kids want parents to put away mobiles – study" (2015) 3 News <[www.3news.co.nz](http://www.3news.co.nz)>. Of course, parents' use of mobile technology will not all be work-related (and in some cases, the majority or even all use will not be for a work-related purpose).

<sup>83</sup> MWA, s 11B(1).

<sup>84</sup> MWA, s 11B(2). Further, the obligation established by s 11B with respect to the five-day week is only to "endeavour to fix" an employee's daily working hours so that he or she does not work on more than five days a week. Also, s 11B(3) provides that this obligation only applies if the parties to the relevant employment agreement have agreed that the employee's maximum weekly working hours (exclusive of overtime) are not more than 40.

<sup>85</sup> There are some sector-specific limitations on working hours. For example, see pt 4B (Work time and log books) of the Land Transport Act 1998, pt K of pt 135 of the Civil Aviation Rules (Air Operations — Helicopters and

every employer is obliged to ensure, so far as is reasonably practicable, the health and safety of employees and other workers while they are at work in the business or undertaking.<sup>86</sup> An employer will breach its health and safety obligations if it requires an employee to work so many hours that their physical or mental health is put at risk or compromised<sup>87</sup> (and in the author's view this would be the case even if the parties' employment agreement had a clause requiring that such hours be worked).<sup>88</sup> Similarly, an employer may breach its health and safety obligations if it does not do all that is reasonably practicable to prevent an employee from working such long hours.

As the selection of cases summarised below indicate, health and safety law<sup>89</sup> together with contract law may provide a basis for employees to seek redress in respect of excessive hours of work or otherwise to limit their hours of work. However, the cases also illustrate some of the deficiencies of the current domestic legal framework.

### **Case Law**

#### *Carpenter v Mondiale Freight Services Limited*<sup>90</sup>

In this case, Briony Carpenter made various claims against her former employer Mondiale, including that she had not been provided with a safe workplace and had suffered harm as a result, and that she had been constructively dismissed.

Ms Carpenter's employment agreement provided that her normal hours of work were 40 a week. It also stated that she may be required to work outside of those hours and at weekends from "time to time", and that she would not be paid overtime for these additional hours. Rather, her salary was said to be "set at a level that recognises" the possibility of additional work. The salary was \$60,000 per annum.

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Small Aeroplanes), and the Hours of Rest provisions in pt 31A of the Maritime Rules (Crewing and Watchkeeping Unlimited Offshore, and Coastal (Non-Fishing Vessels)), made under the Maritime Transport Act 1994.

<sup>86</sup> HSWA, s 36(1).

<sup>87</sup> See *Gilbert v Attorney-General* [2000] 1 ERNZ 332. This case concerned a probation officer, Mr Gilbert, who left his position with the Department of Corrections on medical grounds and then brought proceedings against the Department. The Employment Court found, amongst other matters, that Mr Gilbert's workload was excessive in both complexity and volume, and that he had to work without the necessary support, resources and supervision. The Employment Court also found that the Department had breached its obligations under the Health and Safety in Employment Act 1992 (HSEA) and express and implied contractual terms by failing to take reasonable precautions against unnecessary stress in Mr Gilbert's working conditions. These breaches caused Mr Gilbert to suffer vital exhaustion and coronary artery disease, and amounted to his constructive dismissal. After some 13 years of litigation, Mr Gilbert secured substantial awards of damages, including general damages of \$75,000 for humiliation, anxiety and distress, and compensation for lost income (see *Gilbert v Attorney-General* [2010] NZCA 421). While the finding in *Gilbert v Attorney-General* concerning workload was not that Mr Gilbert's hours of work were excessive, but rather that his workload was excessive in volume and complexity (see [2000] 1 ERNZ 332 at 380), the legal principles set out would also be applicable to excessive hours of work which put an individual's health and safety at risk or resulted in harm to that individual.

<sup>88</sup> See ERA, ss 54(3)(b)(i) and 65(2)(b)(i); and Illegal Contracts Act 1970, ss 3, 5 and 6. See also *Johnstone v Bloomstone Health Authority*, above n 45, at 344 per Stuart-Smith LJ; and JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 35–37.

<sup>89</sup> These cases were decided under the HSEA, which was replaced by the HSWA on 4 April 2016. While the HSWA differs in some respects from the HSEA, the points set out in the main text above remain valid under the HSWA.

<sup>90</sup> *Carpenter*, above n 47.

During the just over two years of her employment, Ms Carpenter regularly worked between 55-65 hours a week. She sought medical advice, suffering from headaches, anxiety, stress, exhaustion and depression. She advised her employer of these matters, but no steps were taken to address them. In March 2010, she resigned and brought proceedings.

The Employment Relations Authority<sup>91</sup> found that, following her resignation, Ms Carpenter was unfit for work for four months. It also found that her long hours were a significant cause of this, and of the health issues she began to suffer one month after starting work at Mondiale. The Authority considered that Mondiale had breached its statutory obligation to maintain a safe workplace for Ms Carpenter.

In the Authority's view, Mondiale should have systematically monitored Ms Carpenter's working hours, but it did not have any mechanisms in place to do this. As a result, Ms Carpenter was "left to work whatever hours were required to meet the business demands."<sup>92</sup> The routinely long hours of work were also in breach of the parties' employment agreement, which, as set out above, only provided for work in excess of 40 hours from time to time. Further, the Authority found that Ms Carpenter had been constructively dismissed.

The remedies the Authority awarded Ms Carpenter included \$15,000 for hurt and humiliation, and lost remuneration for the period following her resignation until she obtained alternative employment.

*Bao Ho Van Nguyen and Vu Ho Van Nguyen v Hue Kim Thi Ta t/a Little Saigon Restaurant*<sup>93</sup>

*Little Saigon* concerned a series of claims brought by two cooks, Bao Ho Van Nguyen and Vu Ho Van Nguyen, against their former employer. Both had been dismissed from their employment at Little Saigon Restaurant.

Bao's employment agreement required him to work a maximum of 40 hours a week and stipulated that he would not be required to work overtime. Vu's employment agreement was on similar terms.<sup>94</sup> The Authority found, however, that Bao worked an average of 66.5 hours a week,<sup>95</sup> and that Vu also worked 66.5 hours a week for certain periods during his employment.<sup>96</sup> The remedies Bao and Vu were awarded included wage arrears calculated on the basis of the actual number of hours worked.<sup>97</sup>

*Sato v Vice-Chancellor of Massey University*<sup>98</sup>

Dr Shie Sato was employed by Massey as a lecturer. She was covered by a collective employment agreement (CEA) which applied to "Academic" and "General" (non-academic) employees. Under the CEA, "General" employees had their weekly hours of work fixed at 37.5,

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<sup>91</sup> The Employment Relations Authority is New Zealand's first instance tribunal for employment matters.

<sup>92</sup> *Carpenter*, above n 47, at [59].

<sup>93</sup> *Bao Ho Van Nguyen and Vu Ho Van Nguyen v Hue Kim Thi Ta t/a Little Saigon Restaurant* [2014] NZERA 173.

<sup>94</sup> At, for example, [86].

<sup>95</sup> At [43] and [44].

<sup>96</sup> At, for example, [86].

<sup>97</sup> At [49] in relation to Bao and [88] in relation to Vu. Vu was also awarded wage arrears for certain other periods, including a period when he was not working due to the Christchurch earthquake: see, for example, at [79].

<sup>98</sup> ERA Auckland WA 106/07, 30 July 2007.

and were entitled to overtime for additional hours. There was no comparable provision for “Academic” employees. Rather, the CEA stated that “Academic” employees had to devote their full “contracted hours” to their work for Massey, but did not define what “contracted hours” meant.

Dr Sato sought a declaration that the maximum number of weekly hours she could be required to work was 37.5, or in the alternative, 40. Her evidence to the Authority included that sometimes she would work less than 40 hours a week, and other times more.

Massey contended that the CEA did not limit Dr Sato’s hours to any specific number, and that she was required to work as long as it took to complete her work. According to its evidence, academics at various universities had resisted fixed hours as they wanted to have the flexibility to work outside normal hours when that suited them. Also, evidence was provided to the effect that academics may work long hours to complete a project, and following that reduce their hours for a time to compensate.<sup>99</sup>

The Authority found that Dr Sato’s weekly hours of work were not fixed at either 37.5 or 40 hours, and that “the hours worked will be dictated by the peaks and troughs of the Academic work to be undertaken”.<sup>100</sup> It also found that an agreement to work such hours was lawful in terms of s 11B(2) of the MWA.

#### *Cooper v Greenfingers Garden Bags Ltd*<sup>101</sup>

This case was decided under the Employment Contracts Act 1991 (ECA), the predecessor to what is now New Zealand’s principal labour law statute, the Employment Relations Act 2000 (ERA). It concerned Trevor Cooper, who had been employed by Greenfingers as a truck driver. His job involved picking up organic waste from Greenfingers’ clients.

When Mr Cooper was interviewed for the job, he was advised that he would generally need to work over eight hours a day, and often, if not always, for six days a week. Six days would be required when Mr Cooper could not meet the target number of pick-ups Greenfingers had set for him by working five days.

Mr Cooper claimed that meeting his quota of pick-ups required working 10 or 11 hours a day. He also claimed that in his first week of employment he worked 89 hours. Greenfingers did not appear to dispute this. Its position seemed to be more that Mr Cooper was inefficient in comparison with other drivers, as he could not match the number of pick-ups Greenfingers said that other drivers could do.

Mr Cooper took advice about his hours and other issues, including his pay. He then advised Greenfingers that he would not work more than 40 hours a week until his pay had been addressed. Ultimately, Greenfingers dismissed Mr Cooper for refusing to work more than 40 hours a week.

No written employment contract was ever concluded between the parties. The Employment Tribunal found, however, that there was an oral contract in place, under which Mr Cooper had

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<sup>99</sup> At [32] and [33].

<sup>100</sup> At [34].

<sup>101</sup> ET Auckland AT165/01, 21 November 2001.



agreed to work for more than 40 hours a week. The Tribunal noted that this was “expressly permitted by” s 11B(2) of the MWA.<sup>102</sup> Accordingly, Mr Cooper’s refusal to work such hours was a breach of his contract.

While the Tribunal found on procedural grounds that Mr Cooper’s dismissal was unjustifiable, it reduced the remedies awarded to him by 80 per cent. This was essentially on the basis that Mr Cooper’s breach of his contract by refusing to work more than 40 hours a week was the cause of his dismissal, and a dismissal in such circumstances was substantially justifiable (meaning that, but for Greenfingers’ procedural failings, the dismissal would have been upheld).<sup>103</sup>

### ***Deficiencies Highlighted by the Case Law***

The case law summary set out above demonstrates that an employee may be able to achieve some redress under current New Zealand law for having to work in a manner inconsistent with his or her right to reasonably limited working hours. However, for the reasons now discussed, there are significant gaps in the legal framework.

#### *No generally applicable right to compensation for additional hours worked*

While the Authority in *Little Saigon* ordered that the employees in that case be paid for hours worked in excess of the contractually agreed hours, the same order was not made in *Carpenter*. In one email to her employer, Ms Carpenter stated that the company needed to review her remuneration as she was covering two jobs, and that “[t]hey are saving a whole person’s salary by having someone else cover”.<sup>104</sup> However, the awards made by the Authority did not compensate Ms Carpenter for these additional hours.

The reason for the different approaches taken in these two Authority determinations is not clear,<sup>105</sup> and the result in *Carpenter* highlights the need for an express, generally applicable right in New Zealand employment law to recover for hours worked in breach of contract. This is because the approach followed in *Carpenter* meant that Mondiale had the benefit of a large amount of work by Ms Carpenter which it did not have to pay for, despite the fact that having Ms Carpenter work these hours was in breach of her employment agreement and her internationally recognised right to reasonably limited working hours.

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<sup>102</sup> At 11.

<sup>103</sup> At 10 and 12.

<sup>104</sup> *Carpenter*, above n 47, at [29].

<sup>105</sup> The basis for the approach in *Little Saigon* appears to be that, if the employees had not been paid for the additional hours, the pay they received would have amounted to less than the minimum wage (*Little Saigon*, above n 93, at, for example, [49]). Given that, the Authority may have considered that it had statutory jurisdiction to make the award it did: see MWA, s 11. However, the Authority does not refer to s 11 and, if this was the basis for the Authority’s decision, there is an issue about whether the quantum of the award made was correct. This is because the Authority calculated the amount owing for the additional hours on the basis of the employees’ contractual rates, rather than the lower minimum wage rates. In *Carpenter*, there was no issue of any breach of Ms Carpenter’s rights under the minimum wage legislation. As a result, it may have been that, even if the Authority had considered whether to compensate Ms Carpenter for her additional hours, it would have decided that it had no power to make such an award. This could have been on the basis that, as provided in s 161(2)(b) of the ERA, the Authority has no jurisdiction to fix terms and conditions of employment. Ms Carpenter received a salary, and for obvious reasons the parties had not themselves made any express agreement on what rate should be payable for any hours Ms Carpenter was required to work in breach of contract (a point which could also complicate any argument for an implied term that Ms Carpenter should be paid a particular rate for such hours).

It also meant that the return Ms Carpenter got from her work was considerably less than what she had bargained for. Ms Carpenter's salary was \$60,000 per annum or approximately \$1,150 before tax a week. Accordingly, in the weeks where she worked 65 hours, her pay for those hours would have equated to approximately \$17.75 an hour, only \$2.50 more than the current minimum wage of \$15.25. This contrasts with almost \$29 an hour, which is what her pay would have equated to for a 40-hour week.<sup>106</sup> Such an outcome is unjust. It also does not incentivise employers to respect the right to reasonably limited working hours as much as an express right to recover for hours worked in breach of contract would.

*No compensation for hurt and humiliation, or penalties*

In *Little Saigon*, the Authority awarded one of the applicants \$6,000 and the other \$8,000 as compensation for the hurt and humiliation they suffered, principally as a result of their dismissal. However, the Authority did not make any such compensatory award in respect of the excessive hours that the men were required to work. In addition, although the Authority imposed a penalty against the employer for failing to keep wages and time records and failing to produce wages and time records,<sup>107</sup> no penalty was imposed for the gross breach of contract both men suffered due to having to work substantially in excess of their contractually required 40 hours a week.<sup>108</sup>

While the Authority considered that "an unequivocal message" needed to be sent that breaches of "minimum employment standards...are totally unacceptable in New Zealand",<sup>109</sup> the extreme breach of not only the employees' contractual rights but also their human rights in respect of their hours of work was not identified as similarly worthy of condemnation. This was no doubt because New Zealand's generally applicable baseline employment standards do not include any express limits on hours of work.

*Risk related to the lack of any express limits*

In *Sato*, the Authority determined that Dr Sato was contractually obliged to work any and all hours required to do her job. In other words, she had a contractual obligation to work whatever hours were required to meet business demands (subject to health and safety requirements, although this was not identified by the Authority). This was the same situation which was found in *Carpenter* to be in breach of contract and the cause of the considerable harm Ms Carpenter suffered. Mr Cooper was in a similar situation. He also had no set hours, but rather was contractually bound to work as long as it took to meet his pick-up quotas.

From the Authority's determination in *Sato*, it seems clear that Dr Sato did not work as much as Ms Carpenter did. Also, the Authority accepted that academics at Massey were able to take time off if they had been working long hours. This was not, however, the case for Mr Cooper, who had a contractual obligation to work long or very long hours, week out and week in. From

<sup>106</sup> Query whether Ms Carpenter could have made a claim based on quantum meruit in relation to the additional hours she was required to work in breach of contract. In this regard see, for example, *Pretorius v Marra Construction (2004) Limited*, above n 51, at [69] and [77]-[83], the Restitution chapter of *Laws of New Zealand* (online looseleaf ed, LexisNexis) at [47], [67] and [91], and *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [1819]-[1820].

<sup>107</sup> *Little Saigon*, above n 93, at [121]-[132].

<sup>108</sup> Such a penalty could have been awarded pursuant to s 134 of the ERA.

<sup>109</sup> *Little Saigon*, above n 93, at [126].

the hours of work statistics set out above, it seems clear that this will also not be the case in many other New Zealand workplaces.

Making it lawful for parties not to stipulate an express maximum number of hours in their employment agreement creates a clear risk that an employee may be required to work long or very long hours without the possibility of any real remedy unless he or she can show harm (for example, poor health attributable to the long hours).<sup>110</sup> Making any such claim may well be expensive and complex, particularly from an evidentiary perspective.

### *Summary*

The case law shows that, under current New Zealand law, an employee may have some remedy if their right to reasonably limited working hours is violated. However, the absence of an express right to reasonably limited working hours means that a violation of that right will not be recognised (other than indirectly as a contractual or health and safety breach, where that can be shown). This absence also makes it likely that such a violation will either not be reflected at all in remedies or will be inadequately reflected. Further, the degree to which an employee's right to reasonably limited working hours is protected is likely to depend significantly on the hours of work the employee has been able to negotiate with their employer as part of the parties' employment agreement. In other words, the extent to which an employee can protect their human right to reasonably limited working hours is likely to be influenced by their bargaining power.

As argued in the next part, this situation is inconsistent with New Zealand's obligations under the ICESCR.

## **Part V: Is New Zealand Meeting its ICESCR Obligations?**

This Part explains why New Zealand's approach to hours of work does not comply with its obligations under the ICESCR. Many people apparently do not enjoy the right to reasonably limited working hours, legislative steps are not being taken to realise these people's rights, and this has been the case for a long period of time. It also appears that, due to a trend of reducing employees' entitlements to a higher rate of pay for overtime work, long hours of work in some types of employment attract lower rates of pay than they did in the past. Accordingly, the economic reward for working long hours may be decreasing in at least some sectors, as is the economic incentive for employers in those sectors to reduce long hours.

For the right to reasonably limited working hours to be effective, specific legislative protection is required. The current legislative framework (including health and safety law) does not provide such protection, and s 11B of the MWA is manifestly inconsistent with the right.

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<sup>110</sup> In this regard, see also the employment contract at issue in *Weir v Denning t/a St George Motel* ET Auckland AT50/02, 19 March 2002. The contract had two provisions relevant to hours of work, one of which stated "[n]o minimum or maximum number of hours of work per week by the Employee are [sic] prescribed by this Agreement." The other stated "[t]he hours of work shall be those normally required to be worked to ensure the effective control of the business to the satisfaction of the Company and the demands of the business clientele".

### ***A Right Not Realised For Many, and a Lack Of Steps Towards Realisation***

As set out above, 378,537 people were recorded in the 2013 Census as usually working 50 or more hours a week. 162,171 of those people usually worked 60 hours or more. On the basis that reasonably limited working hours for the purposes of the ICESCR should normally be 40 or less, and not more than 48, it appears that hundreds of thousands of people in New Zealand were not enjoying that right as at 2013.<sup>111</sup> It also seems unlikely that the situation has changed significantly from then until now.

Under the ICESCR, New Zealand must proactively realise the right to reasonably limited working hours, in good faith and by all appropriate means (and in particular through legislative measures). However, New Zealand is not currently taking any legislative measures to advance the realisation of this right.

As discussed in Part II above, the impacts on health and on families of long work hours may be considerable. An appropriate means of further realising everyone's "right to the enjoyment of the highest attainable standard of physical and mental health" would appear to be the taking of focussed, active steps to limit working hours to reasonable levels (in conjunction with steps to realise other ICESCR rights).<sup>112</sup> The same applies in relation to New Zealand's obligation under art 10 of the ICESCR to accord the "widest possible protection and assistance to the family", particularly while it is responsible for children. Conversely, the absence of such steps affects people's enjoyment of these rights, and limits their progressive realisation.

### ***A long-standing problem, and deregulation***

According to figures from the 1986 Census, the number of people usually working between 40-49 hours was 732,048 (50.4 per cent). 161,163 people (11.1 per cent) usually worked between 50-59 hours, and 137,739 (9.5 per cent) usually worked 60 hours or more a week.<sup>113</sup> In the 2001 Census, 212,016 people (13.1 per cent) advised that they usually worked between 50-59 hours a week, and 193,116 people (11.9 per cent) usually worked 60 hours or more a week.<sup>114</sup>

There are broad similarities between these figures and those from the 2013 Census. They indicate that there is a significant and long-standing problem in New Zealand in relation to the realisation of the right to reasonably limited working hours.

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<sup>111</sup> Given that the "vast majority" of the New Zealand workforce is made up of employees rather than the self-employed, it may well be that most of these people are employees rather than in business on their own account: see Gordon Anderson and John Hughes *Employment Law in New Zealand* (LexisNexis, Wellington, 2014) at 1.

<sup>112</sup> It is the case that, depending on whether and how much incomes are affected, limiting working hours may have a negative effect on people's health and families. The proposal regarding overtime payments and the guarantee of average earnings for people on wages in Part VI of this article seeks to address this issue. Also, while the right to a fair income is beyond this article's scope, note that the right in art 7 of the ICESCR to "just and favourable conditions of work" includes the right to remuneration which, as a minimum, is fair and provides all workers and their families with "a decent living...in accordance with the provisions of the present Covenant." In art 11(1) of the ICESCR, States Parties recognise everyone's right to an adequate standard of living, "including adequate food, clothing and housing".

<sup>113</sup> According to customised statistics drawn from the 1986 Census which I obtained from Statistics New Zealand. Unfortunately, it was too costly to acquire the same sets of statistics for other periods.

<sup>114</sup> Statistics New Zealand, above n 32, at 28.

The figures also indicate that the legislation in place in 1986, the Industrial Relations Act 1973 (IRA), provided inadequate protection for the right. Section 93 of the IRA required the Arbitration Court to fix weekly hours of work in every award<sup>115</sup> at no more than 40 (exclusive of overtime). The exception to this was if the Court considered that it would be “impracticable to carry on efficiently any industry to which the award relates” if weekly working hours were limited to 40 or less. In this situation, the Arbitration Court had to record in the relevant award the reasons for not limiting normal working hours to a maximum of 40 a week.<sup>116</sup>

It is not clear why the IRA was unable to achieve greater realisation of the right to reasonably limited working hours.<sup>117</sup> However, given the apparent inadequacy of the IRA’s regime in that respect, an appropriate step for Parliament to take in relation to its ICESCR obligations may well have been the enactment of a more prescriptive regime. Instead, in the Labour Relations Act 1987, Parliament chose the opposite course. That Act was the precursor to the current position under s 11B of the MWA, as it allowed parties to an award or agreement to agree on a normal working week of more than 40 hours (or to apply to the Arbitration Commission for a greater number of hours if they could not agree).<sup>118</sup>

Section 11B was then enacted in 1991.<sup>119</sup> Since that time, the only change to s 11B has been to replace the previous reference to the ECA with a reference to the current legislation, the ERA.

Accordingly, in almost 30 years, the only generally applicable legislative measures focussed on the limitation of hours of work have been deregulatory.<sup>120</sup> Also, if any other measures have been taken to realise the right more fully in New Zealand (such as policy measures), it would appear that they have been unsuccessful.

### *Overtime*

Prior to the mid-1990s, hours worked in excess of 40 a week were generally defined as overtime and, therefore, paid at a higher rate than ordinary hours of work (such as time and a half or double time).<sup>121</sup> Since then, however, and while overtime is still paid, “the overall trend has

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<sup>115</sup> As Anderson and Hughes, above n 111, explain at 32–33 (and referring to the Industrial Conciliation and Arbitration Act 1954), “an award was an instrument of delegated legislation, it was an offence to breach the provisions of an award and awards were enforced by a system of government inspectors. Awards provided minimum, legally enforceable terms and conditions of employment [including that] the standard working week be normally a 40-hour, five-day week”.

<sup>116</sup> IRA, s 93(2).

<sup>117</sup> One reason may be that managers and other senior office workers, a category of work in which long hours are common (see Statistics New Zealand, above n 32, at 29), were excluded from the national award system (Anderson and Hughes, above n 111, at 33). The terms and conditions of most other public and private sector employees in New Zealand were determined by awards until at least 1984: see Anderson and Hughes, above n 111, at 33 and 38. Another reason may be that, while the majority of awards would have limited normal working hours to no more than 40, overtime was permitted and no doubt worked by many people.

<sup>118</sup> Labour Relations Act 1987, s 172.

<sup>119</sup> Section 11B was inserted by the Minimum Wage Amendment Act 1991, which began life as pt X of the Employment Contracts Bill 1990 (9-1).

<sup>120</sup> Note that pt 6AA of the ERA provides a statutory framework within which an employee may request a variation to their working arrangements, including to their hours of work. This framework does not, however, set any limits on hours of work. Also, there is a broad range of grounds on which an employer may rely to refuse a request: see ERA, s 69AAF.

<sup>121</sup> Blumenfeld, Ryall and Kiely, above n 5, at 47 and 52. Presumably there were some exceptions to this, such as for managers and other senior employees who were not covered by awards.

been to remove provision [from agreements] for payment of a premium rate for overtime work.”<sup>122</sup>

No legislative steps have been taken by Parliament to address this trend, which has affected a considerable number of collectivised employees. Currently, one in every four employees covered by a CEA is not entitled to overtime payments.<sup>123</sup> There do not appear to be any figures available for employees employed under individual employment agreements (IEAs), no doubt because IEAs are not publicly accessible documents. It seems quite unlikely, however, that IEAs would generally provide for greater overtime entitlements than CEAs.

This trend suggests that the compensation employees receive for work in excess of 40 hours a week may be generally less than it was before 1991.<sup>124</sup> In other words, it indicates that overtime is being worked without it being paid for as it once was. If that is correct, it follows that, not only are some groups of employees earning less for long hours, but the economic incentive for employers to organise their operations so as to minimise overtime has diminished.

### ***The Need For Greater Legislative Protection***

In its third periodic report under the ICESCR, New Zealand advised that its legislation did not set any maximum weekly hours.<sup>125</sup> In its concluding observations on that report, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that this fell “short of the requirements of article 7 of the Covenant regarding the protection of workers’ right to rest and reasonable limitation of working hours”.<sup>126</sup> The CESCR went on to recommend that New Zealand “introduce a statutory maximum number of work hours.”<sup>127</sup>

New Zealand has reportedly ignored this recommendation, without giving any reasons.<sup>128</sup> This approach is inconsistent with New Zealand’s obligations of good faith, as referred to in Part I above.<sup>129</sup> Also, New Zealand’s refusal to follow the CESCR’s recommendation or otherwise

<sup>122</sup> At 52.

<sup>123</sup> At 53. The authors also record that “84 per cent of food retailing employees and 74 per cent of education employees [are] in this category.”

<sup>124</sup> Although in the absence of a comparative analysis of pre-1991 compensation and current wages and salary, no conclusions can be drawn in this regard.

<sup>125</sup> *Third periodic report submitted by States parties under articles 16 and 17 of the Covenant: New Zealand* E/C.12/NZL/3 (2009) at [193].

<sup>126</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand* E/C.12/NZL/CO/3 (2012) at [16].

<sup>127</sup> At [16].

<sup>128</sup> See APNZ “Govt ignores UN recommendation of work-hour limit” *New Zealand Herald* (online ed, Auckland, 17 January 2013), which reported: “The Government has ignored a recommendation by the United Nations for legislation to dictate a maximum number of work hours to reduce the risk to workplace health and safety. Today, Acting Labour Minister Christopher Finlayson would not comment on introducing the statutory work-hour limit, despite the call from the United Nations more than eight months ago.” It is also noteworthy that the article referred to a member of the Labour Party, Darien Fenton, stating that the “‘by agreement’ clause of the 40-hour week under the MWA made it ‘effectively meaningless’”, but that Labour only supported statutory limits on working hours for “dangerous industries”. The reason for this is unclear, as the right to reasonably limited working hours as recognised by the ICESCR is not restricted to people working in dangerous industries.

<sup>129</sup> New Zealand’s approach also appears inconsistent with its obligations under the ILO Forty-Hour Week Convention, above n 6, which New Zealand ratified on 29 March 1938. At art(1)(a) and (b), the Convention provides that, by ratifying it, a State Party “declares its approval of the principle of a 40-hour week applied in such a manner that the standard of living is not reduced in consequence”, and of the “taking or facilitating of such measures as may be judged appropriate to secure this end.” In this regard, see also the commentary on s 11B of the MWA in *Mazengarb’s Employment Law*, above n 106, at [3011B.3], which notes that “[d]uring the passage

amend its working hours legislation disregards the substantial numbers of people in New Zealand who apparently do not enjoy the right to reasonably limited working hours. The hours these people apparently work strongly indicate that the current legal framework is insufficient.

*The inconsistency of s 11B of the MWA with New Zealand's ICESCR obligations*

In this regard, it is important to recall that the purpose of s 11B was not to protect the right to reasonably limited working hours. Rather, it was to maximise flexibility. In relation to the fixing of working hours, a report by the Department of Labour (DOL) on the Employment Contracts Bill 1991 (9-2) (which introduced the provision which became s 11B) recorded a submission that there should only be a very limited ability for employers and employees to agree on normal working hours in excess of 40. The DOL's comment on that submission was that "[t]he purpose of the Bill is to give employers and employees the maximum freedom to negotiate whatever arrangements best suit their circumstances".<sup>130</sup> Accordingly, s 11B represents a view that the number of hours an individual works is generally a private matter for negotiation, and a matter the state and the law should be little concerned with. It leaves the definition of reasonable hours to the parties.

This approach is manifestly inconsistent with New Zealand's recognition that everyone within its jurisdiction has the right to reasonably limited working hours. Its effect is to give legal authority, and thereby strong legitimacy, to arrangements which are inconsistent with that right. It is tantamount to, for example, legislating that the minimum wage shall be \$15.25 an hour unless the parties agree otherwise, that an employee will have four weeks' holidays a year unless they agree otherwise with their employer, or that a woman may not be afforded less favourable terms of employment than a man unless she and the employer agree something different.

*Inequality in bargaining power*

As the ERA recognises, there is an "inherent inequality of power in employment relationships".<sup>131</sup> This inequality may be ameliorated by collective bargaining, but only about 20 per cent of New Zealand's waged or salaried workforce has its terms and conditions of employment determined by collective bargaining and collective agreements.<sup>132</sup> This leaves some 80 per cent of the workforce to determine their terms and conditions by individual bargaining.

While some may have considerable bargaining power (for example, highly-skilled employees or those working in sectors with skill shortages), many do not. This is particularly the case in the lower-income sector of the market. With those employees, employers have much more scope to adopt tougher bargaining positions, including offering hours and other terms on a take it or leave it basis.<sup>133</sup> And, as set out in Part II above, there is research to indicate that the

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of the [Employment Contracts] Bill, the Statutes Revision Committee questioned whether the permissive nature of the then s 11B was compatible with New Zealand's ratification of ILO Convention 47".

<sup>130</sup> Department of Labour *Employment Contracts Bill: Report of the Department of Labour to the Labour Select Committee* (L/91/811, 1991) at 177.

<sup>131</sup> ERA, s 3(a)(ii).

<sup>132</sup> Blumenfeld, Ryall and Kiely, above n 5, at 16.

<sup>133</sup> See in this regard *Law v Board of Trustees of Woodford House*, above n 51, at [52], where Chief Judge Colgan states that "[I]ow and modestly paid employees seeking new employment are not in a strong position to negotiate

majority of people working long hours are on lower incomes.<sup>134</sup> Such people may well be unable to protect their right to reasonably limited working hours through negotiation with their employer or with a prospective employer.

Other rights recognised in art 7 of the ICESCR, such as periodic holidays with pay and remuneration for public holidays,<sup>135</sup> have not been left to bargaining. Instead, they have received specific legislative protection in the Holidays Act 2003, which provides common standards and minimum entitlements for all employees. This is the approach followed for other human rights. It needs to be applied in the case of working hours.

#### *Uncertainty in health and safety law, and in litigation*

While health and safety law provides some protection for the right, it does not set any clear legislative standard or standards to guide conduct or against which an agreement may be judged. Due to this, a job applicant or employee cannot, for example, identify easily if the hours they are being offered or working are in breach of their internationally recognised right. Neither can an employer easily identify how many hours are too many. In the case of employees such as Mr Cooper, hours of work which are inconsistent with the right may be required by the relevant employment agreement.

Similarly, the absence of any national standard(s) makes it difficult for a job applicant or employee to take a stand on hours. The former may jeopardise their chances of being appointed, and the latter may risk their employment relationship. For example, it may be safely assumed that if Mr Cooper had advised Greenfingers that he was not willing to work long hours at his interview, he would not have been offered employment. Also, his refusal to work long hours once he was appointed was in breach of contract and formed the basis for his dismissal.

While an employee may litigate over their hours of work, the lack of any clear legislative standard(s) means that the outcome will be unpredictable (unless a clear standard is set in the employee's employment agreement). And, unless the employee has suffered actual harm from having to work long hours, the cost of litigation would be likely to exceed any potential remedies.

In contrast, if there were a clear legislative standard or standards, employers would be much less likely to offer unreasonable hours or have their employees work such hours. If they did so and a clear legislative standard were in place, enforcement of that standard could be made

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terms and conditions". The Chief Judge also refers at [53] to the difficulties individuals may have in attempting to negotiate changes to terms of standard form employment agreements.

<sup>134</sup> This gives rise to a potential issue of indirect discrimination. As the CESCR explains in its *General Comment No 20* E/C.12/GC/20 (2009) at [10(b)], "[i]ndirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination." The CESCR also considers at [35] that a person's "economic and social situation" is a prohibited ground of discrimination under the ICESCR. A further definition states that "[i]ndirect discrimination is said to occur when an apparently neutral practice or policy disproportionately disadvantages one of the groups against whom it is unlawful to discriminate. Although everyone is treated the same, the condition or requirement affects members of a prohibited group differently": see *Human Rights Law* (online looseleaf ed, Thomson Reuters) at [HR65.01]. If the requirement to negotiate hours of work with one's employer disproportionately affects the enjoyment of the right to reasonably limited working hours by lower income people in New Zealand, that may amount to indirect discrimination contrary to art 2(2) of the ICESCR. However, whether a case could be made that that effect is outside the scope of this article.

<sup>135</sup> ICESCR, art 7(d).



relatively straightforward. Such a standard may also assist in preventing people from being harmed due to overwork.

### *Concerns beyond health and safety*

In addition, even if a person's health is not prejudiced by the hours they work, those hours may still be too many for the person to be able to enjoy his or her rights to rest and leisure under the ICESCR (for example, "the freedom to pursue and enjoy life opportunities outside of work"). They may also be too many for the person to have the benefit of his or her right to family as recognised in the ICESCR.<sup>136</sup>

For example, while it is possible that Mr Cooper may not have been harmed by working long or very long hours for Greenfingers (at least in the short term), such hours would directly impact on the amount of free time he had outside of work. Also, reasonably limited working hours are generally likely to be less than the number of hours which may put a person's health at risk.

As Mr Hunter, the MP for Manawatu, said to Parliament during the debate on the Industrial Conciliation and Arbitration Amendment Bill in 1936,<sup>137</sup> "working from daylight to dark" is "no sort of life for a human being to live."<sup>138</sup> In a further passage which reflects the humanistic values and interests underlying the rights to rest, leisure and reasonably limited working hours, and why they encompass but are also greater than health and safety concerns, Mr Hunter said:<sup>139</sup>

I am looking forward to the time when, with the application of the forty-hours week, with a reasonable retiring age for our people, and following an extension of educational facilities to enable children to attend school for a longer period, we shall be able to give our people more leisure, and leisure which they can enjoy. It seemed to be the aim of the previous Government to ask people to work as much as possible, merely for the sake of working them. On this side of the House we realize that there is something more in life than work from morning till night.

### **Summary**

The analysis above demonstrates that New Zealand is not meeting its obligations under the ICESCR in respect of the right to reasonably limited working hours. Consequently, it is also not meeting its ICESCR obligations in respect of the rights to family and health.

The right to reasonably limited working hours is not recognised in New Zealand law, and there is no statutory guarantee of an effective remedy if the right is violated. Section 11B of the MWA makes arrangements which are inconsistent with the right lawful as a matter of domestic law.

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<sup>136</sup> Saul, Kinley and Mowbray, above n 5, at 473.

<sup>137</sup> This Bill led to the enactment of the Industrial Conciliation and Arbitration Amendment Act 1936, which for the first time in New Zealand's history gave legislative protection to the eight-hour day and 40-hour week: see Blumenfeld, Ryall and Kiely, above n 5, at 45.

<sup>138</sup> (23 April 1936) NZPD 569.

<sup>139</sup> At 568.

Despite there apparently being considerable numbers of people who do not enjoy the right in New Zealand, and legislation being an appropriate means to realise the right further, no legislative steps are being taken. Section 11B has been in place for 25 years. Also, while on the basis of the 2013 Census statistics that the majority of people in New Zealand do not work unreasonably long hours, those that currently enjoy the right have no statutory guarantee in respect of it.

As the status quo is unjustifiable in terms of the ICESCR, legislative and other changes are required.

## Part VI: Reform

### *Alternative Models and Detailed Information*

There are various ways in which the right to reasonably limited working hours could be better realised in New Zealand legislation.<sup>140</sup> Alternative models are available, such as the ILO Hours of Work (Industry) Convention and the Hours of Work (Commerce and Offices) Convention,<sup>141</sup> as well as the European Working Time Directive.<sup>142</sup> The ILO Reduction of Hours of Work Recommendation also provides a useful reference point,<sup>143</sup> as may some of the sector-specific limitations on working hours already in place in New Zealand.<sup>144</sup>

As the CESCR has said, “the essential first step towards promoting the realisation of economic and social and cultural rights is diagnosis and knowledge of the existing situation.”<sup>145</sup> Therefore, and consistent with its obligation of progressive realisation, the state needs to obtain detailed, up-to-date statistics and other information on the numbers of people in New Zealand who do not currently enjoy the right to reasonably limited working hours. Such information needs to include how many such people are employed and how many are self-employed, what sectors they work in, and how much they earn. It should also include whether such people are required to use a smartphone or other mobile technology during their work, and, if so, what conditions are associated with that use and how such use affects them.

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<sup>140</sup> There would be challenges in establishing a more prescriptive regime. As stated by Saul, Kinley and Mowbray, above n 5, at 479, “[i]n many states, work is no longer organized on a regular daily, weekly or annual basis, as a result of various factors: the diversification, decentralization and individualisation of work hours; a multiplicity of different types of work; globalization, competition and productivity considerations; and concerns about family responsibilities, gender equality, and worker choice and control over their working hours.” A similar statement could be made about work in New Zealand. That said, much work in New Zealand is carried out at regular times, and more prescriptive regulation is not impossible. This is demonstrated by the fact that there are already more prescriptive regimes in place for some industries: see above n 85. Further, while some types of work may require exceptions, determining which types of work come into that category and what the exceptions should be is not impossible. Indeed, New Zealand’s obligations under the ICESCR oblige it to carry out this task.

<sup>141</sup> See above n 6. New Zealand was originally a State Party to these Conventions. It ratified them on 29 March 1938, but denounced both on 9 June 1989.

<sup>142</sup> See above n 8.

<sup>143</sup> Reduction of Hours of Work Recommendation, 1962 (No 116) (adopted 26 June 1962).

<sup>144</sup> See above n 85. Note, however, that the Land Transport regime referred to in n 85 allows up to 70 hours’ work in one “cumulative work period”. It is difficult to see how this is consistent with the right to reasonably limited work hours.

<sup>145</sup> CESCR *General Comment No 1* 3rd Sess E/1989/22(SUPP) (1989) at [3].

Once a clear understanding of the extent of non-realisation is obtained, the state needs to consider the ILO and European models in detail, as well as other alternatives. In consultation with employers and their associations, unions, employees, the self-employed and the public generally, the state then needs to decide what steps to take to realise the right to reasonably limited working hours further in New Zealand, and to set New Zealand on the path towards full realisation. Such steps should include, but not be limited to, legislative measures.

In the interests of assisting with this process, I set out below a proposal for a new maximum hours regime. This does not purport to be comprehensive in any sense. Rather, the aim is to sketch a broad framework, and thereby provide a starting point for debate.

### ***A Proposal for a Maximum Working Hours Regime***<sup>146</sup>

#### *Genuine reasons and maximum working hours: using New Zealand's fixed term model*

Section 66 of the ERA provides that an employee may be employed on a fixed term rather than on a permanent basis if certain statutory criteria are met. These include that the employer must have “genuine reasons based on reasonable grounds” for the fixed term, and the employee’s employment agreement must state what those reasons are.

If an employer purports to appoint an employee on a fixed term basis without having a genuine reason for the fixed term, or if the employer fails to meet the other requirements of s 66, the employee may treat the fixed term as ineffective (in which case the employer cannot rely on the fixed term to end the employee’s employment).

A similar system could be used for working hours. An initial maximum of 40 weekly hours for a full-time employee could be prescribed in law, with the parties having the option to agree on a greater number of hours up to an absolute legal maximum if the employer has a “genuine reason” for needing the employee to work additional hours (whether intermittently or regularly).<sup>147</sup>

Different absolute maxima may be required for different types of work,<sup>148</sup> and, therefore, could be set down in regulations (subject perhaps to an overall, definitive statutory limit).<sup>149</sup> However, any such approach would need to be consistent with the right of everyone to reasonably limited working hours, and the rights under the ICESCR to family and health. It would also need to be consistent with the definitions of long and very long hours set out earlier in this article. Accordingly, there would need to be clear justification for any significant differences in absolute maxima (for example, lower absolute maxima for physically demanding work).

A genuine reason for requiring an employee to work hours in excess of the initial maximum would need to be expressly stated in the employment agreement. Considerations which do not amount to a genuine reason could be expressly and non-exhaustively set out in law (for

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<sup>146</sup> I do not attempt here to address the issues of daily and weekly rest periods, or breaks. In relation to those issues, see, for example, arts 3–5 of the European Working Time Directive, above n 8. See also the very loose framework for rest and meal breaks in pt 6D of the ERA.

<sup>147</sup> Different initial and absolute maxima would need to be set for part-time employees.

<sup>148</sup> See, for example, arts 20 (Mobile workers and offshore work) and 21 (Workers on board seagoing fishing vessels) of the European Working Time Directive, above n 8.

<sup>149</sup> See, for example, art 6 of the Industry Hours of Work Convention, above n 6.

example, a general desire to have as much flexibility as possible).<sup>150</sup> As with fixed terms, an employee could elect to treat a requirement to work over 40 weekly hours as ineffective if there were no genuine reason for the requirement. In the event of a dispute, the Authority could determine the issue.

### *Averaging*

To allow for peaks and troughs in work, averaging could be permitted over a set time period for the purposes of calculating whether the applicable maximum had been exceeded, rather than placing an absolute limit on weekly hours.<sup>151</sup>

### *Record-keeping*

To ensure that maxima were not exceeded, employers could be required to keep a record of the actual hours worked by all employees, as part of the wages and time record they are obliged to keep under the ERA.<sup>152</sup>

### *Overtime*

The law could further provide that any employee who works more than 40 hours a week on average, whether waged or salaried, must be compensated for that work by being paid an amount for it which is separate and additional to his or her normal pay, unless that pay is over an amount specified in regulations.<sup>153</sup> A minimum amount for overtime could be set in regulations, with the parties having the ability to agree upon a greater amount.

Such a requirement could assist in ensuring that people on lower salaries are fairly paid for the hours they actually work, while giving greater flexibility to employers paying higher salaries and to those employees who receive them.

The impact on businesses and other organisations of a new requirement to pay overtime for hours in excess of 40 a week would need to be carefully assessed to determine the maximum level of salary a person may receive while still retaining an entitlement to overtime payments,

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<sup>150</sup> As is the case in relation to fixed term employment: see s 66(3) of the ERA.

<sup>151</sup> See in this regard, for example, art 2(c) of the Industry Hours of Work Convention, above n 6, and art 6 of the Commerce and Offices Hours of Work Convention, above n 6, as well as art 16 of the European Working Time Directive, above n 8.

<sup>152</sup> Section 130(1)(g) of the ERA requires an employer to record for each employee “the number of hours worked each day in a pay period and the pay for those hours.” Section 130(1B) goes on to state that where the number of hours and pay are agreed, and the employee works those hours (referred to as “the usual hours”), s 130(1)(g) will be complied with where those usual hours and pay are stated in, for example, the employer’s wages and time record or the parties’ employment agreement. Section 130(1C) then states that the usual hours of an employee remunerated by salary rather than wages “include any additional hours worked by the employee in accordance with the employee’s employment agreement.” Section 130(1D) provides that, despite ss (1C), an employer has to record any additional hours worked that “need to be recorded to enable the employer to comply” with its obligation under s 4B(1) of the ERA. That obligation is to keep sufficiently detailed records so that the employer can demonstrate that it has complied with minimum standards such as the minimum wage. Accordingly, under the current law an employer does not have to record the actual hours worked by an employee remunerated by salary who has agreed to work over and above his or her “usual hours”, and whose salary is at such a level that working these additional hours does not mean that the employee receives at or less than the minimum wage.

<sup>153</sup> See, for example, art 6(2) of the Industry Hours of Work Convention, above n 6, and art 7(4) of the Commerce and Offices Hours of Work Convention, above n 6. See also arts 16–19 of the ILO Reduction of Hours of Work Recommendation, above n 143.

the rate at which overtime should be paid, and whether the requirement to pay overtime should be introduced in stages (for example, a percentage increase every year).

### *Smartphones and other mobile technology*

Given the ability of smartphones and other mobile technology to expand the workplace and increase working hours, their use would need to be taken into account in any maximum hours regime.

One option would be to provide that any time during which an employee is expected to be available for and attend work-related calls and emails on their smartphone or other mobile technology must be taken into account in calculating the employee's weekly hours. That may incentivise employers to, for example, instruct employees not to respond to work-related emails or take calls outside of their normal hours of work.<sup>154</sup>

If that were considered too restrictive, another option would be to provide that any time actually spent on such tasks must be included in calculating weekly hours. Added to that time would be an additional nominal period or periods to reflect the employee being on call outside of their normal working hours, the implications of that for the employee, and the benefit to the employer of having the employee available. The difficulty with this alternative would be determining the length of any such nominal period, including ensuring that it was sufficient to incentivise the reduction of such on-call time.

A key aim in bringing the use of mobile technology into a maximum hours regime would be to reflect that, while an employee who is expected to be available via smartphone or other technology outside of normal work hours may not have to carry out many of their normal responsibilities during those periods, neither is the employee's time completely their own. Although those periods may not be work-time in the day-to-day sense, neither are they not-work time.<sup>155</sup> Instead, work remains present: an imminent potentiality, and then an actuality if the phone rings or beeps. While the best way ahead may not be to treat these periods in the same way as normal working hours, not recognising them at all would be inconsistent with the right to reasonably limited working hours.<sup>156</sup>

<sup>154</sup> See in this regard Lucy Mangan "When the French clock off at 6pm, they really mean it" *The Guardian* (online ed, United Kingdom, 9 April 2014), which refers to "employers' federations and unions" having signed a "new, legally binding labour agreement that will require employers to make sure staff 'disconnect' outside of working hours." According to the article, 250,000 workers are directly affected by the agreement. See further Carmen Fishwick "Work-life balance: what changes could help improve yours?" *The Guardian* (online ed, United Kingdom, 9 April 2014), which states: "New labour laws in France now protect some workers in the digital and consultancy sectors – including the French offices of Google, Facebook, Deloitte and PwC – from having to respond to work emails outside of working hours."

<sup>155</sup> See also in this regard Jade Bate "Finding a work-life balance can save your life" *Stuff* (online ed, New Zealand, 7 May 2015). According to this article, a recent survey has warned that the practice of people checking their phone outside of normal work hours and on holiday is "causing widespread burnout, depression and even death". An executive is quoted as saying: "Aggravating the issue can be an expectation that leaders take their technology home with them each night and even on holidays, so they never really get completely away from their work."

<sup>156</sup> For discussions of, and differing views on, some of the issues which arise in this context, including the concept of work, see *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170 at 175–176; *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)* [2008] ERNZ 62 at 68–69 and 71; *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149 at [33]–[38]; *Idea Services Limited v Dickson* [2009] ERNZ 116 at 125–131 (Employment Court); *Idea Services Limited v Dickson* [2011] ERNZ 192 at 197; and *Law v Board of Trustees of Woodford House*, above n 51, at, for example, [92], [192]–[193] and see the summary of authorities at [178]–[181].

### *Exceptions*

Exceptions to maximum limits would need to be established, such as where additional hours are required, due to events such as accidents, force majeure, or abnormal work pressure. These would need to include stipulations regarding the maximum number of additional hours which can be worked when an exception applies, and the rate payable for such hours.<sup>157</sup>

Consideration would also need to be given to whether exceptions should apply in relation to any category of employee, such as senior managers.<sup>158</sup> Again, however, everyone has the right to reasonably limited working hours and to the other rights referred to in this article; there is, for example, no differentiation between the obligations owed to managers and other employees in terms of health and safety or minimum holiday entitlements, and managerial work commonly involves long or very long hours.<sup>159</sup> Also, under the proposal above, senior managers would be unlikely to have an entitlement to overtime payments and certain averaging would be permitted. On that basis, it is difficult to see how any such exception could be justified (other than perhaps in the case of the most senior executives).

It may also be that a complete exemption should apply for people in business on their own account. While self-employed people can work long hours, ultimately they control the business and, therefore, have the final say on how many hours they work.<sup>160</sup> In other words, they arguably have a greater ability to determine the extent to which their right to reasonably limited working hours is recognised (although this ability is, of course, affected by market forces and the need to ensure the ongoing sustainability of the business). Their exemption would also be consistent with the exclusion in New Zealand of self-employed people from other minimum work-related standards, such as those relating to holidays.

Such an exemption may also assist in ensuring that a maximum hours regime does not unjustifiably limit a person's right to work. While the proposal above would mean that a person could not legally agree to work hours in excess of the maximum limit (or limits) as an employee, they would have the option of self-employment if they wished to work additional hours. Secondary employment may also be an option, unless that type of employment were also brought within a maximum hours regime.<sup>161</sup> If the proposal above applied only to employment relationships, the resulting limitation on a person's right to work would seem justifiable in terms of art 4 of the ICESCR.<sup>162</sup>

If, however, the statistics referred to above demonstrated that there are many self-employed people who do not enjoy the right to reasonably limited working hours, the state would have to

<sup>157</sup> See, for example, art 6 of the Industry Hours of Work Convention, above n 6, and art 7 of the Commerce and Offices Hours of Work Convention, above n 6, as well as art 17 of the European Working Time Directive, above n 8. See also arts 14–15 of the ILO Reduction of Hours of Work Recommendation, above n 143.

<sup>158</sup> For example, States Parties to the Commerce and Offices Hours of Work Convention may exempt managers from its application (above n 6, art 1(3)(c)), and supervisors and managers are excluded from the Industry Hours of Work Convention (above n 6, art 2(a)). Article 17(1)(a) of the European Working Time Directive, above n 8, sets out certain exceptions for the “managing executives or other persons with autonomous decision-taking powers”.

<sup>159</sup> See Statistics New Zealand, above n 32, at 29.

<sup>160</sup> In that regard, see, for example, art 17(1) of the European Working Time Directive, above n 8.

<sup>161</sup> Consideration of this issue would need to include an assessment of the effect on the right to reasonably limited working hours if secondary employment were excluded from a maximum hours regime, balanced against the economic impact of limiting hours of secondary employment on employees with more than one job.

<sup>162</sup> See above n 19.

consider what measures could be adopted to assist those people to realise that right, and then progressively take appropriate measures.<sup>163</sup>

### *Making the transition*

Change could be implemented by requiring all existing employment agreements to include provisions consistent with the new regime from a certain date, as well as requiring all new employment agreements to include such provisions.<sup>164</sup> In that regard, it is worthwhile to note that, if a maximum hours regime were introduced, it seems unlikely that it would affect or significantly affect most employment relationships. While it appears that a large number of people do not currently enjoy the right to reasonably limited working hours, in 2013 most people in the New Zealand workforce reported that they worked between 40-49 hours a week.

Consideration would also need to be given to whether employees earning wages should have their average earnings guaranteed for a period. The purpose of this would be to prevent those average earnings falling due to the introduction of a requirement to pay overtime, and a corresponding decision by their employer to reduce their hours to avoid having to pay overtime. To avoid doubt, the regime would also need to make it clear that employees who normally worked in excess of the initial maximum hours at the introduction of the regime, but whose salary was below the salary cap for overtime, could not have their salaries reduced by reason of the new regime.

### *Enforcement*

The Authority's jurisdiction to issue compliance orders could be extended to encompass compliance with maximum limits on hours.<sup>165</sup> An express jurisdiction could be provided to enable the Authority to award an employee who had worked in excess of any maximum limit compensation for the additional hours worked, and the Authority's penalty jurisdiction could be extended to provide for the imposition of a penalty in such circumstances.<sup>166</sup> An employee could recover any wages or salary owing for overtime by way of an arrears claim.<sup>167</sup>

## **Conclusion**

For a long time now, New Zealand has taken a hands-off approach to the regulation of working hours. This has persisted despite hundreds of thousands of people apparently not enjoying the right to reasonably limited working hours in New Zealand, and despite the considerable and negative effects long working hours can have on other rights and institutions protected by the ICESCR: health, family, and the ability to enjoy life outside of work. And, while some of those who work long hours will be well-paid, most may well not be (at a time when premium payments for overtime increasingly appear to be a relic of the past).

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<sup>163</sup> As the CESCR states in its *General Comment No 18*, above n 29, at [6], "[t]he right to work [including the right to reasonably limited working hours] is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage paid work."

<sup>164</sup> This was the approach followed to implement the right of employees to be paid at time and a half for working on a public holiday: see Holidays Act 2003, ss 52–53.

<sup>165</sup> See ERA, s 137.

<sup>166</sup> See ERA, s 135.

<sup>167</sup> See ERA, s 131.



New Zealand's approach is inconsistent with its obligations under the ICESCR. Protection of the right to reasonably limited working hours can no longer be subject to bargaining, or left to health and safety law. Deliberate, targeted, and concrete action is required.

In accordance with its duties under the ICESCR, New Zealand needs to acquire a clear understanding of the extent to which the right to reasonably limited working hours is not currently enjoyed in New Zealand. It then needs to set legislative standards which effectively protect the right, as well as ensuring that effective remedies are available for breach. It also needs to take all other appropriate steps to realise the right progressively, until full realisation is achieved. All steps taken will have to be reviewed periodically, and revised as appropriate.

Further, the understandings of work, work-time and the workplace in New Zealand law must be reassessed and potentially reconfigured to take into account the transformation of these concepts by smartphones and other mobile technology. Decisions will then need to be made regarding how best to protect people's rights in this age of limitless connectivity, including how to meet the challenges posed by smartphones and other mobile technology to the realisation of the rights discussed in this article. As the duty-holder under the ICESCR, the New Zealand state needs to take a central role in this analysis, and the lead in deciding what to do.

## **What are business internships, and do they offer opportunities for a symbiotic relationship?**

LEIGH THOMSON AND JOSEPHINE BOURKE\*

### **Abstract**

What is a business internship in the 21st century? The common understanding indicates that it is a way for people to gain experience within an industry. However, the range of opportunities available creates difficulty in defining internships, particularly as available places are marketed variously for course credit, overseas experience, general industry experience and summer work.

In the current business environment, there is room for relationships within internships to include similarities to those involved in modern apprenticeships. However, any comparisons with the reciprocal association involved in apprenticeships may ignore emerging difficulties. Many available internships are unpaid, and while they still offer opportunities to gain industry experience, such experiences are subject to economic and other pressures.

This paper considers the New Zealand context, poses questions around the symbiotic and exploitative aspects of the relationship, and includes the influence of New Zealand labour law. Finally, it proposes possible options to assist interns and employers to develop an appropriate, symbiotic relationship that includes reciprocal benefits.

### **Key words**

Business internships, work experience, voluntary work, exploitation, regulation, symbiotic relationships.

### **Introduction**

The concept of gaining work experience through various forms of paid and unpaid work has been around for centuries. Apprentices in the middle ages were often unpaid and bound to their Master for many years. However, the concept was always accompanied by some symbiosis in the relationship, as the Master was also bound to provide the apprentice with appropriate development and usually also kept the worker within their household. There are now differences in interpretation of this term – perhaps the early concept of interns being junior medical staff members is now obsolete and the word now has a meaning which is more uncertain than in the past.<sup>1</sup>

In the 21st century, the term ‘intern’ is changing to include a largely voluntary or part-time group of positions, including such roles as summer temps.<sup>2</sup> The concept of symbiosis in the

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<sup>1</sup> Andrew Stewart and Rosemary Owens *Experience or Exploitation? The nature, prevalence and regulation of unpaid work experience, internships and trial periods in Australia* (The University of Adelaide, Report for the Fair Work Ombudsman, January 2013).

<sup>2</sup> Stewart and Owens, above n 1.

relationship appears to have broadened, with many organisations advertising their opportunities simply on the basis of providing work experience.

## **Understanding internships**

There appears to be broad understanding of the position of business internships, except when you start to ask exactly what these are. While any definition of this practice is fluid, there appears to be general acceptance that business internships represent a trial. Sometimes it is referred to as a “period of training” or a period of time to get experience of a particular type of work.<sup>3</sup>

### ***Why and when they are offered***

A short survey of the available business internship websites indicates that there are a considerable number of opportunities available in the international sphere. Including student and graduate opportunities, these internships can be work experience or transition to full-time work. Most emphasise the value of experience, which can be gained through such programme placements. Hergert has noted the importance of connecting students into the business world to expand their studies from the theoretical aspects often covered in business schools.<sup>4</sup>

For New Zealand students, Otago Business School has an internship programme which is part of their Bachelor of Commerce programme. They offer a practicum in this internship which is worth 18 points at level seven on the New Zealand Qualifications Framework. Students complete reflective field notes, a scholarly case study and a consultant’s report. Christchurch Polytechnic Institute of Technology has a similar opportunity, whereby the students have to complete a research project based on their major with the internship provider. Other education providers appear to have internship programmes, but these are fully student focussed – they may be holiday programmes, or part of a single course. Otago Business School indicates that the internship can be for one semester or up to one year, depending on the opportunity. There is no indication as to how the opportunities will be found.

New Zealand Internships, a private intern placement organisation, has a strong focus on overseas students, highlighting how the successful intern can experience holidays in New Zealand alongside their work.<sup>5</sup> They provide considerable information on budgeting requirements while in New Zealand and also include information that the work experience internships are for a minimum of four weeks. Applicants have to pay the organisation for their placement.

### ***The internship experience***

Referring to the building of experience as being paramount, Perlin considers how people feel when they need to constantly work for free – interns often perform quite important work for

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<sup>3</sup> Cambridge English Dictionary “Internship” <<http://dictionary.cambridge.org>>.

<sup>4</sup> Michael Hergert *Student Perception of the Value of Internships in Business Education* (2009) 2(8) American Journal of Business Education 9.

<sup>5</sup> New Zealand Internships “New Zealand Internships Programs and Prices – New Zealand Candidate” <[www.internships.co.nz](http://www.internships.co.nz)>. Stewart and Owens, above n 1, suggest that overseas students might see such unpaid work as a path to residency.

no pay and even undertake multiple internships.<sup>6</sup> Since the publication of Perlin's book, anecdotal information has surfaced which indicates that young people in particular may not be getting full advantage from internships.<sup>7</sup>

Stewart and Owens refer to potential problem areas in relation to unpaid work: a systematic use of unpaid interns to do work that would be performed by paid employers undermines employment legislation, and the vulnerability of younger workers is concerning, although these workers generally agree to such arrangements to improve their chances of gaining future paid employment.<sup>8</sup>

There appears to be little research into the value of internships in the New Zealand environment. Particular research of the value of unpaid workers in the New Zealand film industry focussed on the position of volunteers obtaining work experience with a view to ultimately gaining paid employment.<sup>9</sup> It noted that work experience gained through this type of approach can be valuable as part of ongoing career management. However, there is also an essence of exploitation, although this may be specific to the type of industry, where work is often project-based rather than permanent.<sup>10</sup>

Overseas research has been undertaken into the value of student internships and some of the outcomes have changed over time. Earlier in the research, there was a clear agreement as to the efficacy of internship programmes, particularly when they led to full-time work. Undergraduates who participated in internships gained considerably more full-time opportunities.<sup>11</sup> When interns performed well, there was also a spinoff that the employers were more satisfied with the programmes.<sup>12</sup> Internships could assist students to become better connected to the world of business, particularly where their study could be enhanced.<sup>13</sup> Graduates who had internships, in their experience, had greater success in the job market.<sup>14</sup> Limited empirical research undertaken to gauge the success rate for undergraduates who had completed internships showed good potential for these types of programme.<sup>15</sup>

Yet, writing from a Malaysian perspective, Jusoh, Simun and Chong noted that there was a gap between the expectations of students and employers when it came to the workplace.<sup>16</sup> While students were expecting well-paid positions, employers were looking for performance,

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<sup>6</sup> Ross Perlin *Intern Nation: How to earn nothing and learn little in the brave new economy*. (Verso, United Kingdom, 2012).

<sup>7</sup> Richard Venturi "Meet the new forever interns" (8 April 2015) BBC Capital <www.bbc.com>; Paul Charman "Unpaid Kiwi Internships on the rise" *The New Zealand Herald* (online ed, Auckland, 30 August 2014).

<sup>8</sup> Stewart and Owens, above n 1.

<sup>9</sup> Lewis Tennant "Finding work in the New Zealand film industry. The creative industries volunteer ten years on: emancipated or exploited?" (MPhil thesis, Auckland University of Technology, 2012).

<sup>10</sup> Tennant, above n 9.

<sup>11</sup> Jack Gault, Evan Leach and Marc Duey *Effects of Business Internships on Job Marketability: The Employers' Perspective* (2010) 52(1) Education & Training 76.

<sup>12</sup> Gault, Leach and Duey, above n 11.

<sup>13</sup> Hergert, above n 4.

<sup>14</sup> Stephen Knouse and Gwen Fontenot *Benefits of the business college internship: a research review* (2008) 45(2) J Employ Couns 61.

<sup>15</sup> Jack Gault, John Redington and Tammy Schlager *Undergraduate Business Internships and Career Success: Are they related?* (2000) 22(1) JME 45.

<sup>16</sup> Mazuki Jusoh, Maimun Simun and Siong Choy Chong *Expectation gaps, job satisfaction, and organizational commitment of fresh graduates* (2011) 53(6) Education & Training 515.

even in entry level workers. Knouse and Fontenot also talked about expectations, particularly the creation of ‘realistic’ expectations for students entering internships.<sup>17</sup>

There is increasingly more information about internships in relation to what happens when economic conditions are poor. Venturi considered the importance of internships not being a permanent situation. He noted that the difficulty in getting employment, particularly amongst younger workers, has led to an increase in unpaid internships being a requirement.<sup>18</sup> This is confirmed by the Council of European Union Committee, which noted the importance of making sure that internships are not given in place of proper employment.<sup>19</sup> Internships should be a way into employment, not a way of keeping people out of employment.

## The legal position in New Zealand

This section will look at the definition of an employee and then move into understanding the crossover from volunteer and/or intern into an employee relationship. It then briefly considers overseas law, which provides insight into the current New Zealand law.

### *Definition of employee*

An employee is defined by statute<sup>20</sup> as a person of any age employed by an employer to do any work for hire or reward<sup>21</sup> under a “contract of service” (the latter term deriving from the historical Master and servant concept). A worker who comes within the meaning of ‘employee’ has protection under minimum code legislation.<sup>22</sup>

The Court in *MacGillivray v Jones* stated that the approach required to determine if an employment contract existed was not whether the work was for hire or reward, but whether the contract was one of employment and whether the contract of employment was for hire or reward.<sup>23</sup> The appellant worked in a shop for a reward, but this did not mean there was an employment contract. There was a lack of intention to create legal relations and a lack of certainty about the terms of any contract.

The meaning of ‘employee’ focusses on the real nature of the employment relationship. The Supreme Court in *Bryson v Three Foot Six Ltd* noted that all relevant matters include the written and oral terms of the contract, since that will usually include an indication of any common intention concerning the status of the relationship.<sup>24</sup> It is important for the Court or Authority to consider the way in which the parties actually operated in implementing their

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<sup>17</sup> Knouse and Fontenot, above n 14.

<sup>18</sup> Venturi, above n 7.

<sup>19</sup> Recommendation on a Quality Framework for Traineeships [2014] OJ 2014/C 88/01.

<sup>20</sup> Employment Relations Act 2000, s 6.

<sup>21</sup> The phrase “hire or reward” was discussed in *MacGillivray v Jones (t/a Tahuna Camp Store)* [1992] 2 ERNZ 382. The Court referred to Lord Pearson’s judgment in *Albert v Motor Insurers Bureau* [1971] 3 WLR 291, which stated that “hire” was (historically) remuneration for carriage in some vehicles, and “reward” was wider and covered other forms of remuneration. The term “reward” can comprise benefits such as accommodation, lodgings or groceries. In *Edmonds v Lawson* [2002] 2 WLR 1091, a trainee pupil barrister was found to have provided consideration to a contract (but ultimately not an employment contract) by agreeing to a close and “potentially” very productive relationship, which pupillage involves.

<sup>22</sup> For example, the Minimum Wage Act 1983, Wages Protection Act 1983 and Holidays Act 2003.

<sup>23</sup> *MacGillivray*, above n 21.

<sup>24</sup> [2005] NZSC 34.

contract. All relevant matters includes the intention of the parties, although intention and labels attached to the agreement are not decisive.<sup>25</sup> Intention is objectively, not subjectively, determined.<sup>26</sup>

### ***Volunteer, intern or employee***

The term ‘employee’ excludes volunteers who do not expect to be rewarded for certain work performed and who in fact are not rewarded for such work.<sup>27</sup> An intern may be a volunteer, but neither term is defined by statute.

A volunteer arrangement will usually be one that is flexible; the volunteer decides what, where and how to do the agreed work. They can refuse to make themselves available for voluntary work if they so desire for any reason. Receipt of an honorarium does not on its own convert an arrangement to one of employment.<sup>28</sup>

To come under the volunteer exemption, the voluntary work performed must be linked to the lack of an expectation of a reward. This is a matter of fact dependent on the actual arrangement between the volunteer and employer. The fact that a volunteer may have significant responsibilities together with a title such as “Collections Manager” may not be conclusive evidence that the volunteer is an employee.<sup>29</sup>

If a worker is not found to be a volunteer, they are not necessarily an employee. This will depend upon the applicability of the statutory criteria, including the common law tests, to the particular arrangement.<sup>30</sup> Certainly internships or work experience arrangements that are in fact testing the work suitability of the intern for a specific job are likely to be found to constitute a work trial requiring compliance with the statutory trial period requirements.<sup>31</sup>

### ***From intern to employee***

The judicial approach to identifying an employer/employee relationship is well established. A stumbling block for an intern intent on being recognised as an employee is likely to be establishing an intention to create contractual relations and mutuality of obligations. This is illustrated in *Strachan v Moodie*.<sup>32</sup> Ms Strachan was an observer and occasional legal assistant who wanted to gain experience and skill as a barrister. She initially agreed to undertake some ‘work’, although it was unpaid. The Court found that this was a “volunteer” arrangement, as there was a willing but unpaid person, who was more an observer of and occasional assistant in the practice. There was no mutuality of obligations to respectively provide or undertake observation or have input into cases run by the practice.<sup>33</sup> The Court observed that there was an understanding the practice would reimburse her for out of pocket costs, but this did not create an employment relationship.<sup>34</sup>

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<sup>25</sup> *Koia v Carlyon Holdings* [2001] ERNZ 585.

<sup>26</sup> *Muollo v Rotaru* [1995] 2 ERNZ 414.

<sup>27</sup> Employment Relations Act 2000, s 6(1)(c).

<sup>28</sup> *Hambly and others v Museum of Transport and Technology Board* [2011] NZERA Auckland 33.

<sup>29</sup> *Hambly*, above n 28.

<sup>30</sup> *Brook v Macown* [2014] NZEmpC 79.

<sup>31</sup> *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152.

<sup>32</sup> *Strachan v Moodie* [2012] NZEmpC 95.

<sup>33</sup> The Court did not directly refer to an intention to create legal relations. This has to be inferred from the context of the judgment at [41]–[44].

<sup>34</sup> *Strachan v Moodie*, above n 32.

This reasoning has been criticised for assuming the initial agreement that any work would be unpaid was the end of the matter without assessing the real nature of the relationship.<sup>35</sup> The Court had, however, concluded on the facts that at this earlier stage of the arrangement there was no mutuality of obligations.

The arrangement changed when Ms Strachan discovered Mr Moodie was not doing pro bono work, but was invoicing clients. She then insisted upon being remunerated for her work.<sup>36</sup> The Court concluded that this had the effect of changing her status to that of an employee. Ms Strachan had been given responsible legal work and was also undertaking the role of administrative manager of the practice.<sup>37</sup> The Court, in applying the common law tests, had no hesitation in finding that Ms Strachan was an employee.

This approach seems to diverge from some Australian and United Kingdom case law, where an employment contract can be found to exist where a claimant is undertaking full time work (usually) with the payment of some expenses.<sup>38</sup> The apparent narrow construction adopted in *Strachan v Moodie* that requires the claimant to have requested remuneration should not be seen as a conclusive factor.<sup>39</sup>

It is suggested in the New Zealand context that there is an employment contract where an intern is undertaking what can be shown to be productive work for the business that is expected by the business operator,<sup>40</sup> and is working a significant number of hours within the business operation over a significant period of time.

### ***Future intern environment and reform of the law***

The ideal for all parties to internships is to develop an appropriate, symbiotic relationship, which includes reciprocal benefits. How might this be achieved? There are a number of suggestions which might be of assistance, including the following proposals.

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<sup>35</sup> Stewart and Owens, above n 1, at [8.59].

<sup>36</sup> *Strachan v Moodie*, above n 32, at [41].

<sup>37</sup> Mr Moodie subsequently claimed that a proposed equal sharing of profits with Ms Strachan was to be at his sole discretion. That claim caused the matter to come before the Employment Court.

<sup>38</sup> In *Vetta v London Dreams Motion Pictures* ET/2703377/2008, the claimant responded to an advertisement that described a “great opportunity to get experience”, and referred to the payment of expenses only undertook fulltime work. The company unsuccessfully argued she was employed by a contractor to the company. She was found to be an employee. In another case, a claimant worked eight hours a day for six weeks although there had been an earlier discussion about her being paid: see *Keri Hudson v TPG Webb Publishing* ET/2200565/11. The United Kingdom Government website states that an intern who does regular paid work may qualify as an employee and an intern will be entitled to the minimum wage if counted as a worker. A person will not be entitled to the minimum wage if they are a student doing work experience as part of a higher or further education course or are “work shadowing” (observing): see “Employment rights and pay for interns” (23 November 2015) United Kingdom Government <[www.gov.uk](http://www.gov.uk)>. See also the Australian case of *Cossich v G Rossetto and Co Pty Ltd* [2001] SAIRC 37, where a work experience participant worked on for eight months after a limited and certified period of work experience. She was paid a flat rate of \$50 a week, allegedly for travel expenses, and was found to be an employee.

<sup>39</sup> It may be that the context of the Court’s reference to the effect of the request for remuneration being to change her status to that of an employee can be read to be a factor that merely confirmed the “real nature of the relationship”.

<sup>40</sup> This assumes that the characteristics of the arrangement are not that of a volunteer where there will be no intention to create legal relations and no mutuality of obligations.

The first step may be the development of an internship code of practice. The current draft Code of Practice for New Zealand Apprenticeships would provide assistance to everyone, particularly in relation to clarifying expectations. It appears that there is confusion about what exactly a business internship involves, and more clarity around this would be beneficial.

Another stage in the development of an appropriate internship model might be the defining of 'ethical business internships' in the New Zealand environment. Alongside the proposed Code of Practice, this grouping could include providers who fully define what they offer, including the benefits that future interns could expect from their service. There might be a 'star' rating for internships, which would also give all parties clarity about work expectations.

In conjunction with the development of a Code of Practice and introduction of 'ethical business internships', there might also be more public competitions for internship opportunities. Similar to the apprentice-type selections, interns should be able to see a clear pathway to jobs through performance.

Realistic expectations and recording of achievement may be next on the list of improvements. This is an interesting area as, while 'work experience' might be beneficial, there should be more detail available around what might be expected for an internship. For example, would a business intern really benefit from being part of an office clean up? Would working at reception or in a contact centre be more beneficial, or is any work experience enough?

Braun suggested in the United States context that a legislative standard to regulate internships might be developed.<sup>41</sup> This would recognise the dynamics between student, employer and institution and improve allocation. Students, and interns in general, need to be more informed about the nature and legal status of 'intern'. Institutions should educate students, with the government playing an intermediary role. For employers, there should be a synergy that benefits both participants and a structured system that engages with interns. The educational institution should provide oversight of the business internship to prevent exploitation.

Australia has attempted to deal with internships and work experience through a limited statutory unpaid vocational placement exception to employment. This must be as a requirement of an education or training course authorised under law, or as an administrative arrangement of the Commonwealth, a State, or a Territory. The Fair Work Ombudsman advises that, if an internship is for a short period where the intern is not required to undertake productive work (not defined) and is an arrangement mainly for the benefit of the intern, then it is a vocational placement. However, it is unlikely to be a vocational placement if the arrangement is for the significant commercial gain of the business.<sup>42</sup>

Anecdotal evidence suggests that unpaid internships may be increasing in New Zealand. The introduction in New Zealand of a vocational placement exception to the definition of employee would, in theory, focus employers' attention on the status of interns, particularly with regards to unpaid interns.<sup>43</sup>

Regulation and registration can be considered a last resort suggestion, should this type of approach stifle innovative responses. The lack of certainty in terminology in the Australian

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<sup>41</sup> Sarah Braun *The Obama "Crackdown": Another failed attempt to regulate the exploitation of unpaid internships* (2012) 41(2) SW L Rev 281.

<sup>42</sup> Fair Work Ombudsman *Unpaid Work fact sheet* (Australian Government, February 2014).

<sup>43</sup> Modelled on the Australian exception.



context has been criticised for lacking clear statutory definitions of “vocational placement” and “training course”.<sup>44</sup>

However, there may be an argument that all employers who wish to use interns should need to be registered, and all business internships should be classified. This may be more important in light of the new health and safety provisions, as all employers and interns will need to be fully acquainted with their responsibilities in this area.

What if internships required the payment of a minimum wage, but with a reasonable vocational placement exception? The probable concern would be that this would result in a reduction of internship opportunities, because of the minimum wage cost to businesses of internships that fall outside the exception.

The research of Card and Krueger is to the effect that a minimum wage has little or no effect on employment (in the United States context),<sup>45</sup> although there are some contrary views.<sup>46</sup> Perlin suggests an initial reduction of internships resulting from paying the minimum wage to unpaid interns would be countered by (again in the United States context) the wide distribution of internships across businesses.<sup>47</sup>

Business New Zealand considers an increase in the minimum wage would reduce job and training opportunities for youth.<sup>48</sup> In contrast, the Ministry of Business, Innovation and Employment claims a constraint on employment growth would occur only where there is an increase in the ratio of the minimum wage to the average wage.<sup>49</sup>

In principle then, an option is to institute a vocational placement exception, and signal to businesses that any period greater than the specified period of internship may trigger an obligation to pay the minimum wage. Admittedly, this could be abused by a churning effect with new interns being regularly brought through by businesses. However, this exception could be complemented by robust regulatory oversight that is well resourced with a non-binding Code of Practice for internships along the lines of the Quality Traineeships framework initiated by the European Union.<sup>50</sup> The acceptance of such an environment could be encouraged through an extensive educational programme for interns and businesses that included the use of social media.

## Conclusion

If both interns and employers wish to achieve the most from their internship experiences, it is likely that more work needs to be done to improve the current model. Interns who are forced

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<sup>44</sup> Stewart and Owens, above n 1.

<sup>45</sup> David Card and Alan Krueger *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton University Press, Princeton, 1995).

<sup>46</sup> Tim Worstall “Seattle’s \$15 An Hour: Measure The Unemployment Effects And There They Are” (10 August 2015) [www.forbes.com](http://www.forbes.com); Daniel Aaronson, Eric French and Isaac Sorkin “The minimum Wage – will job losses be minimal?” (24 August 2015) Institute of Economic Affairs [www.iea.org.uk](http://www.iea.org.uk).

<sup>47</sup> Perlin, above n 6.

<sup>48</sup> Ministry of Business, Innovation and Employment *Minimum Wage Review 2015: Officials’ Report* (2015) at [136].

<sup>49</sup> At [109].

<sup>50</sup> Recommendation on a Quality Framework for Traineeships, above n 19.

into poverty simply to participate in work experience may not achieve the positive response that they intended. Conversely, employers who use interns without understanding their personal situations may create an international impression which they neither need nor actually deserve.

It is hoped that more understanding of the issues around internships will be gained through recent international publicity. However, without a change in how we understand the needs of both employers and business interns, it seems that the overall concept will continue to be regarded differently by each group.

Where an employer might see the opportunity to gain free assistance while providing some work experience and an intern may see the proposal as a stepping stone to full-time work, perception issues remain. The introduction of more clarity around the whole area of business internships would provide considerable assistance to all parties as they seek to attain symbiotic relationships which would be most beneficial to all.

# Why New Zealand Should Introduce Paid “Dad and Partner Leave”

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## Abstract

Paid parental leave was introduced in New Zealand as a 12-week period in 2002, expanded over a number of years to 16 weeks and, from 1 April 2016, became available for 18 weeks. Debate in New Zealand has focussed on the desirability of further extending the period of leave available and on widening eligibility. This paper, however, makes the case that the introduction of an independent entitlement to a separate period of paid parental leave for fathers/partners should be a priority. It argues that such a measure would further equality between men and women and would bring New Zealand law into line with corresponding policies in other developed economies and with International Labour Organization (ILO) recommendations. This paper also considers the question of the design of such an entitlement. It concludes that partner leave should be well paid, ring fenced for ‘dads and partners’ (as the equivalent Australian provision is), and at least two weeks long. The options that it could potentially be funded by employers rather than the state, and could be made compulsory, are also discussed.

## Key words

Fathers, paid parental leave, gender norms, New Zealand, International Labour Organization.

## Introduction

There is growing recognition of the importance of fathers as caregivers and not just as breadwinners.<sup>1</sup> However, 49 per cent of fathers in a survey carried out by the Families Commission felt that New Zealand society did not value fathers,<sup>2</sup> and it is clear that New Zealand lags behind other developed countries in terms of its provision of a period of paid partner leave. Australia, for example, on the recommendation of the Productivity Commission, introduced “Dad and Partner Pay” on 1 January 2013.<sup>3</sup> This statutory entitlement consists of a 2-week payment at the rate of the national minimum wage for eligible working fathers and partners. The central thesis of this paper is that New Zealand fathers should have a similar independent entitlement to paid parental leave.

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<sup>1</sup> Laura Addati, Naomi Cassirer and Katherine Gilchrist *Maternity and paternity at work: Law and practice across the world* (ILO, 2014); R Levtoy and others *State of the World's Fathers* (MenCare, 2015).

<sup>2</sup> Francis Luketina, Carl Davidson and Penny Palmer *Supporting Kiwi Dads: Role and Needs of New Zealand Fathers* (Families Commission, Research Report No 5/09, 2009) at 12.

<sup>3</sup> The Productivity Commission found that a paid parental leave scheme incorporating paid partner leave for fathers and partners would have significant benefits, “including reducing the pressures of caring and working on parents when their children are young, increasing the involvement of fathers in the early months of a child's life, and providing a strong signal that taking time out of the paid workforce to care for a child is viewed by the wider community as part of the usual course of life and work for parents.” See Australian Government: Department of Social Services “Paid Parental Leave: Dad and Partner Pay” (2011) <[www.dss.gov.au](http://www.dss.gov.au)>.

Some qualifications are necessary: although this paper focusses on fathers, there is no reason that paid partner leave should be reserved exclusively for the male partners of biological birth mothers and that is not what is here advocated. Naturally, same sex couples or couples adopting children should be entitled to equal treatment and not subject to discrimination. While this point will not be further addressed, it is acknowledged and it can be easily achieved if the eligibility is framed in the legislation as turning on the status of designated “partner to a primary caregiver”. It also must be acknowledged that a nuclear family of two parents and child is not the only possible family configuration, nor is it inherently a superior arrangement more deserving of support. However, a detailed analysis of the ramifications of all possible family structures is beyond the scope of this paper, which is focussed on progressing equality between men and women and proposing a modest incremental improvement on the status quo.

The first part of this paper summarises existing entitlements, including their recent expansion. The second part comprises of an argument that men should be entitled to a separate right to paid parental leave. The third part discusses issues relevant to the possible design of a separate entitlement to paid parental leave for men. It is concluded that shifting entrenched gender norms and practices to improve equality between men and women, both at home and at work, is likely to prove a difficult and lengthy task. Nonetheless, recognition of a separate entitlement to paid leave for ‘dads and partners’ could prove to be an important first step.

## Existing entitlements

Currently, New Zealand fathers who have been employed continuously for 12 months are entitled to two weeks’ unpaid partner leave upon the birth of a child under the Parental Leave and Employment Protection Act 1987.<sup>4</sup> However, it appears that uptake of this is very low; the most recent data suggests that just four per cent of men exercise the right to take this unpaid leave.<sup>5</sup> Some men use accumulated annual leave to take some time off around the birth of a child, but not all fathers have the opportunity to do this.<sup>6</sup>

There is some paid leave potentially available. Since 1 July 2002, eligible women and men have been entitled to paid leave from employment upon the birth or adoption of a child under the Parental Leave and Employment Protection Act 1987.<sup>7</sup> This period of parental leave is theoretically available to either or both parents. This is in keeping with international trends; shared parental leave is normally available for both men and women, and countries which reserve leave exclusively for mothers are rare.<sup>8</sup> However, in New Zealand, as elsewhere, this theoretically shared leave is largely taken by women and transfers of the paid leave entitlement

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<sup>4</sup> Part 2.

<sup>5</sup> Paul Callister *Parental Leave in New Zealand: 2005 / 2006 Evaluation* (Department of Labour, May 2007) at 40. This study found that fathers who took leave chose to take it as annual leave rather than unpaid leave for financial reasons.

<sup>6</sup> More than 40 per cent of fathers in the Families Commission survey reported that they had no opportunity to take leave: see Luketina, Davidson and Palmer, above n 2, at 12, although in the Callister survey only 27 out of 150 fathers took no leave: see Callister, above n 5.

<sup>7</sup> Parts 1 and 7A. The budgeted amount of paid parental leave in the 2014–2015 financial year was NZD \$176 million: see *The Treasury Vote Revenue: The Estimates of Appropriations: Finance and Government Administration Sector* (B5 Vol 5, 2014) at 186. For those who are not eligible for paid parental leave, there is an alternative called the Parental Tax Credit (PTC). This short term payment is part of the Working for Families tax package. One-off payments at the birth of a child (often referred to overseas as a ‘baby bonus’) have not been a feature of the New Zealand welfare system.

<sup>8</sup> Addati, Cassirer and Gilchrist, above n 1, at 62.

to a partner occur in less than one per cent of cases.<sup>9</sup> It has become apparent that, when parental leave may be taken by either women or men, in practice, it is usually women that take it.<sup>10</sup> There are a range of reasons for this, but one of the most significant is that recovery from childbirth and breastfeeding are seen as being supported by paid parental leave.<sup>11</sup> It is, therefore, understandable that, where there is a choice between who takes the leave, women usually take it.

Within New Zealand, proposals for change have focussed on extending the length of the payment period.<sup>12</sup> Initially set at a period of 12 weeks, it was extended to 13 weeks in 2004. The 2014 Budget amended the Act to extend paid leave to 16 weeks from 1 April 2015, and to 18 weeks from 1 April 2016. Calls to extend it further continue. In 2014, Labour MP Sue Moroney introduced the Parental Leave and Employment Protection (Six Months' Paid Leave) Amendment Bill as a Members Bill and established the '26 for Babies' coalition to support the cause. The Bill was defeated in February 2015 but, in a surprise outcome, was redrawn in the Ballot and went through the parliamentary process again.<sup>13</sup> This Bill aimed to extend paid parental leave to 26 weeks from 1 April 2018, but was vetoed by the National Government at its third reading on 29 June 2016.

The Parental Leave and Employment Protection Amendment Act 2016, which came into force on 1 April 2016, widened eligibility for paid leave to a larger group of workers. Prior to this, a mother was eligible for paid parental leave if she had worked for the same employer for either six or 12 months before the due date. Additionally, she must have worked an average of at least 10 hours a week, including at least one hour every week or 40 hours in every month before the expected date of delivery of the child. Effectively, paid parental leave was targeted towards those with stable, regular employment patterns. The new legislation, however, extends the eligibility for payment to "primary carers" who have been employed by the same employer for at least an average of 10 hours per week over any 26 of the 52 weeks immediately preceding the date of the delivery of the child.<sup>14</sup> This means that workers previously excluded from the entitlement due to an inability to meet the continuity of employment requirements will be better off.

As the previous legislation did, the new law provides that a portion or the entirety of the paid leave may be transferred to partners or to other caregivers.<sup>15</sup> However, it remains very much targeted at mothers. A primary carer is defined as the biological mother of the child,<sup>16</sup> or "the spouse or partner of the biological mother" if that person has succeeded to, or received transfer of, the biological mother's parental leave payment entitlements.<sup>17</sup> Hence, the change does not provide any additional incentive or reason for a portion of this leave to be transferred to a partner than the previous legislation did. There is, therefore, no reason to expect any increase in the occurrence of men and women sharing leave.

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<sup>9</sup> Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Modernising Parental Leave* (2015) at 4.

<sup>10</sup> Addati, Cassirer and Gilchrist, above n 1, at 65.

<sup>11</sup> Callister, above n 5.

<sup>12</sup> See Paul Callister and Judith Galtry "'Baby Bonus' or Paid Parental Leave – which one is better?" (2009) 34 *Social Policy Journal of New Zealand* 1, advocating for an extension to six months to support breastfeeding.

<sup>13</sup> Parental Leave and Employment Protection (Six Months' Paid Leave and Work Contact Hours) Amendment Bill 2016 (51-2).

<sup>14</sup> Section 2BA(4).

<sup>15</sup> Sections 7(1)(c) (other caregivers) and 71E (spouses or partners).

<sup>16</sup> Section 7(1)(a).

<sup>17</sup> Section 7(1)(b).

Recent changes, including the introduction of a longer period of paid leave and the extension of eligibility to a wider range of workers, are commendable in that they will assist families during a financially challenging time. However, the next section argues that, if equality between men and women is to be served, a separate period of paid leave for fathers/partners should be a priority in the future, rather than further extension of the existing paid parental leave entitlement.

## **Why fathers/-partners should have a separate entitlement to paid parental leave**

### *Equality between men and women*

It is uncontroversial to note that the position of women in the workforce is unequal to that of men. This is demonstrated by the gender pay gap and the dominance of men in senior roles in almost all sectors. While the reasons for women's continuing disadvantage in the workplace are complex, according to Holmstrom and others "[w]hat helps maintain this situation of unequal pay for equal work... for women, is their role in the family".<sup>18</sup> This is borne out by the New Zealand Time Use Survey, which indicates that men and women spend a similar amount of time on paid and unpaid work activities combined, but most male work is paid (63 per cent) and most female work is unpaid (65 per cent).<sup>19</sup>

Improving equality for women in the workplace requires addressing men's inequality in the home. Young suggests that "the sharing of child care responsibilities by women and their male partners is an essential step in women's struggle for equality."<sup>20</sup> Gornick and others note "the potential costs of increasing and strengthening women's labour-market ties – without achieving gender parity in unpaid work".<sup>21</sup> The risk is that women will have to spend more time on paid work without any reduction in their unpaid workload – in effect, they will be required to work a Second Shift<sup>22</sup> at home upon completing their day's work. Also, as long as women carry a greater burden of caring work in the home, they will be unable to compete with men on equal terms in the workplace and workplaces will continue to be structured around the norm of an ideal worker who has no care responsibilities.<sup>23</sup>

Increased shared parenting will not only benefit women by improving their ability to participate in the paid workforce. Okin argues for "shared child rearing for justice between the sexes",<sup>24</sup> and there are emotional benefits to men in having greater involvement with their children. Notwithstanding these benefits, Cunningham-Parmeter summarises core insights drawn from the emergent field of masculinities theory which clarify some of the barriers to men's

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<sup>18</sup> Nancy Holmstrom "Women's Work: the Family and Capitalism" (1981) 45(2) *Science & Society* 186 at 197.

<sup>19</sup> Statistics New Zealand *Time Use Survey: 2009/2010* (21 June 2011) at 1.

<sup>20</sup> Claire Young "Child Care – A Taxing Issue?" (1994) 39 *McGill LJ* 539 at 550.

<sup>21</sup> Janet Gornick "Gender Equality in the Labour Market" in Diane Sainsbury (ed) *Gender and Welfare State Regimes* (Oxford University Press, Oxford, 1999) 210 at 213. See also Nancy Fraser "After the Family Wage: What Do Women Want in Social Welfare?" (1994) 21(1) *Social Justice* 80.

<sup>22</sup> The concept of the second shift was first articulated by Arlie Hochschild: see Arlie Hochschild and Anne Machung *The Second Shift: Working Parents and the Revolution at Home* (Avon Books, New York, 1990).

<sup>23</sup> Joan Williams *Unbending Gender: Why Family and Work Conflict And What To Do About It* (Oxford University Press, New York, 2000).

<sup>24</sup> Susan Okin *Justice, Gender and the Family* (Basic Books, New York, 1989) at 116.

engagement in caregiving.<sup>25</sup> This theory posits that gender is socially constructed and that hegemonic masculinity requires men to prove that they are not like women or non-dominant men. As carework, dependency and emotiveness are associated with women, masculine identity requires fathers to be stoic providers and breadwinners who do not engage in carework. Cunningham-Parmenter notes that few men can satisfy this ideal, yet the breadwinner myth persists and men who do not comply with gender norms and hierarchies face backlash.

It is arguable that new gender norms are emerging to challenge hegemonic masculinity. A number of studies suggest that New Zealand men want to spend more time with their families and to be more involved with the care of their children.<sup>26</sup> Notably, however, one study suggested that, while 92 per cent of New Zealand parents believe that a father should be as heavily involved in the care of his children as the mother, only 53 per cent report that they do actually share childcare responsibilities.<sup>27</sup>

If women have a right to equal participation in the workplace, the corollary of this is that men must have a right to equal participation in the home: a right to be actively engaged as parents and not just as breadwinners. Equality in this context does not mean that men and women must be viewed and treated as exactly alike in every respect. With very few exceptions, pregnancy is unique to women,<sup>28</sup> as is breastfeeding, and should be treated as such. This suggests that some accommodation for women around recovery from childbirth and breastfeeding, such as the current availability of a period of leave following childbirth, are necessary. Thereafter, however, parenting is a learned practice<sup>29</sup> which men and women are equally capable of and, as argued by Fredman, true substantive equality requires “a levelling up option extending women’s parenting rights to fathers.”<sup>30</sup>

### ***Paid partner leave as a first step towards addressing inequality***

No single measure can, by itself, achieve the dual goals of improving women’s equality in the workplace and men’s equality in the home. However, further extension of the existing right to paid parental leave, which is currently almost exclusively taken by women, runs the risk of being counterproductive in that it may reinforce the gender norm that childcare is the responsibility of women. Also, women who remain out of the workforce for extended periods of time lose seniority and earnings, which is damaging to their long term career prospects.<sup>31</sup>

By contrast, the introduction of a period of paid leave for fathers around the time of birth could encourage men to take on more responsibility in the home. Research suggests that fathers who take leave, especially those taking two weeks or more immediately after childbirth, are more likely to be involved with their young children.<sup>32</sup> This also empowers fathers as parents, as

<sup>25</sup> Keith Cunningham-Parmenter “Men at Work, Fathers at home: Uncovering the Masculine Face of Caregiver Discrimination” (2013) 24(3) Colum J Gender & L 253.

<sup>26</sup> Luketina, Davidson and Palmer, above n 2.

<sup>27</sup> Callister, above n 5.

<sup>28</sup> Although, note Thomas Beatie as a rare example of a transgender man who underwent pregnancy three times.

<sup>29</sup> Cunningham-Parmenter, above n 25, at 279.

<sup>30</sup> Sandra Fredman “Reversing roles: bringing men into the frame” (2014) 10 Int J Law Context 442.

<sup>31</sup> Discussed in Vanessa Long “Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination” (2012) 9 Equal Rights Review 52.

<sup>32</sup> Maria Huerta and others *Fathers’ Leave, Fathers’ Involvement and Child Development: Are They Related? Evidence from Four OECD Countries* (OECD Social, Employment and Migration Working Papers No 140, 14 January 2013) at 52. See also Linda Haas and Tine Rostgaard “Fathers’ rights to paid parental leave in the Nordic countries: consequences for the gendered division of leave” (2011) 14(2) Community Work Fam 177; Linda Haas,

noted by Rehel.<sup>33</sup> By drawing fathers into the daily realities of childcare, free of workplace constraints, extended time off provides the space necessary for fathers to develop the parenting skills and sense of responsibility that then allows them to be active co-parents, rather than helpers, to their female partners. This shift from a manager-helper dynamic to that of co-parenting creates the opportunity for the development of a more gender equitable division of labour.

Evidence suggests that improving men's access to leave has a positive effect on women's workplace participation. It seems that more equitable parental leave policies increase the likelihood that women will return to employment after leave and spend more time in paid work.<sup>34</sup> One study indicates that "each month the father stays on parental leave has a larger positive effect on maternal earnings than a similar reduction in the mother's own leave."<sup>35</sup>

Greater involvement by fathers at an early stage could even have implications for future generations. One study indicates that fathers taking parental leave may correlate to adolescent daughters spending less time on housework.<sup>36</sup> There are other advantages too, as research indicates that fathers taking leave contributes "positive long-term effects for both father and child",<sup>37</sup> a reduction in violence towards children and women,<sup>38</sup> and an improvement in women's post-birth health, including less sickness and depression.<sup>39</sup>

### *ILO recommendations and international comparisons*

Given the potential for a period of paid paternal leave for men to improve equality, the Human Rights Commission has called for a separate entitlement for men to be introduced.<sup>40</sup> The Commission has also noted that New Zealand currently compares poorly on an international basis.<sup>41</sup> It is true that, in only providing two weeks' unpaid leave to fathers, New Zealand is out of sync with other countries. The ILO has indicated that, in the vast majority of countries that provide partner leave, it is paid (70 countries out of 78, or 90 per cent in total).<sup>42</sup> There are only eight countries where national legislation does not provide for benefits to cover work absences due to partner leave where there is an entitlement to take time off: Azerbaijan, the Bahamas, Ethiopia, Kazakhstan, Republic of Korea, New Zealand, Norway and the Syrian Arab Republic.

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and C Philip Hwang "The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships With Children: Lessons from Sweden" (2008) 11(1) Community Work Fam 85. See also Australian Government: Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children* (Inquiry Report No 47, 28 February 2009) at 4.52: "evidence suggests that partner leave has emotional benefits for fathers, facilitates bonding between fathers and children, positively affects children's emotional and educational achievements and provides support for the mother."

<sup>33</sup> Erin Rehel "When Dad Stays Home Too" (2014) 28(1) Gender & Society 110 at 52.

<sup>34</sup> Olivier Thévenon and Anne Solaz *Labour Market Effects of Parental Leave Policies in OECD Countries* (No 141, OECD Social, Employment and Migration Working Papers, OECD Publishing, 2013) at 8.

<sup>35</sup> Elly-Ann Johansson *The effect of own and spousal parental leave on earnings* (Institute for Labour Market Policy Evaluation, Working Paper 2010:4) at 4.

<sup>36</sup> Andreas Kotsadam and Henning Finseraas "Causal Effects of Parental Leave on Adolescents' Household Work" (2013) 92(1) Soc Forces 329.

<sup>37</sup> Brad Harrington and others *The New Dad: Take Your Leave: Perspectives on paternity leave from fathers, leading organizations and global policies* (Boston College Center for Work & Family, 2014) at 2.

<sup>38</sup> Fatherhood Institute *Parenting Leave Arrangements: Which 'architecture' is best for young children?* (2013) at 7-8.

<sup>39</sup> Harrington and others, above n 37, at 3.

<sup>40</sup> Human Rights Commission *Human Rights in New Zealand 2010* (2010) at 299.

<sup>41</sup> At 299.

<sup>42</sup> Addati, Cassirer and Gilchrist, above n 1, at 57.



In failing to have a separate paid entitlement for men, New Zealand is not only lagging behind other developed countries, but is implicitly failing to follow ILO recommendations. While some rights set in place by the ILO implicitly reinforce “women’s primary responsibility for childcare”<sup>43</sup> and the ILO has not devoted much attention to the role of fathers, the ILO Workers with Family Responsibilities Convention 1981 (No 156) does refer to fathers responsibilities, stating at art 3(1):

...each member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and to the extent possible, without conflict between their employment and family responsibilities.

More recently, the International Labour Conference Resolution concerning gender equality at the heart of decent work called for member states to develop policies “allowing for a better balance of work and family responsibilities for both women and men in order to allow a more equal sharing of these responsibilities.”<sup>44</sup>

Although paid partner leave in and of itself will not be sufficient to shift entrenched gender norms, it has been suggested that:<sup>45</sup>

Leave measures have transformative potential when the achievement of effective equality at work and in the household are an explicit objective in line with the ILO Workers with Family Responsibilities Convention 1981.

## **How should paid partners’ leave be designed?**

### *Addressing barriers to uptake*

The previous section argued that paid partner leave is a mechanism that may help to promote gender equality in the labour market and in caregiving, which may also have other advantages. To be effective, such a mechanism must take account of interlocking barriers that might discourage men from taking up an entitlement to leave. These include socialisation and gender norms,<sup>46</sup> financial pressures,<sup>47</sup> and lack of support from employers.<sup>48</sup>

Incentives to counter gender norm pressures are critical.<sup>49</sup> The more individual men are encouraged to take leave, the more socially acceptable this becomes. As noted above, where there is a possibility that leave may be shared, it is generally women that take it. For this reason, there has been a movement towards allocating exclusive, non-transferable individual rights to

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<sup>43</sup> Fredman, above n 30, at 449.

<sup>44</sup> Addati, Cassirer and Gilchrist, above n 1, at 52.

<sup>45</sup> At 52.

<sup>46</sup> SB Burnett and others “Fathers at work: A ghost in the organisational machine” (2013) 20(6) Gender, Work and Organization 632 as cited in Addati, Cassirer and Gilchrist, above n 1, at 52.

<sup>47</sup> “After the birth of a child the majority of fathers feel increased pressure as the main income earner and have greater concern about financial security”: Callister, above n 5, at 46.

<sup>48</sup> For example, male lawyers who take parental leave are seen as “wimp-like”: Okin, above n 24, at 126.

<sup>49</sup> Addati, Cassirer and Gilchrist, above n 1, at 52.

fathers, sometimes known as ‘daddy quotas’,<sup>50</sup> on a ‘use or lose it’ basis.<sup>51</sup> Evidence suggests that parental leaves which allocate non-transferable portions to the father lead to higher take-up by fathers.<sup>52</sup> It is notable that “fathers in Denmark stopped taking leave when the quota was removed there”.<sup>53</sup>

Another option to encourage fathers to take leave is to offer additional leave if both parents take parental leave, and currently eight countries offer such a bonus.<sup>54</sup> However, it appears that, although fathers may take their ‘daddy quota’ period of leave, where there is additional leave available to either parent, the “vast majority [of fathers] do not take any of that additional period of leave”.<sup>55</sup> Therefore, this may not be a desirable option in the New Zealand context.

Financial concerns can also operate as a significant impediment to fathers taking leave. Due to the gender pay gap, it is likely that a father would be providing more financial resources to the family. If only unpaid, or poorly paid, leave is available, the father being at home may not be an option, due to the financial stress the loss of the father’s income would cause to the family. Currently, in New Zealand, regardless of whether paid parental leave is taken by the father or the mother (assuming both are eligible), the same maximum amount of \$516.85 per week before tax is payable. As this is significantly below the median weekly income from wages and salaries (\$882)<sup>56</sup> and the minimum wage for a 40 hour week (\$590), families are likely to face financial pressure after a birth.<sup>57</sup>

Accordingly, dedicated partner leave must be paid at a generous rate. Internationally, where partner leave is paid, use of leave entitlements has been shown to be highest when compensation is at least 50 per cent of earnings.<sup>58</sup> However, it may be seen as discriminatory if parental leave, almost entirely taken by women, is paid at below the minimum wage, while partners’ leave, almost entirely taken by men, is paid at a higher rate. In Australia, Dad and Partner Pay is paid at same the rate of the National Minimum Wage (currently around \$590 a week before tax), which is the same weekly rate as Parental Leave Pay. A single, flat rate that equates to minimum wage would send a signal that parenting by both parents is equally valued, so this may be the best option as a first, modest step.

<sup>50</sup> Linda Barclay “Liberal Daddy Quotas: Why Men Should Take Care of the Children and How Liberals Can Get Them to Do It” (2013) 28(1) *Hypatia* 163 at 164.

<sup>51</sup> Addati, Cassirer and Gilchrist, above n 1, at 62. This is the approach of the European Union under Directive 2010/18/EU on Parental Leave [2010] OJ L68/13.

<sup>52</sup> Berit Brandth and Elin Kvande “Flexible work and flexible fathers” (2001) 15(2) *Work Employment & Society* 251 as cited in Addati, Cassirer and Gilchrist, above n 1, at 61; M O’Brien “Fathers, parental leave policies, and infant quality of life: International perspectives and policy impact” (2009) 624(1) *The ANNALS of the American Academy of Political and Social Science* 190 as cited in Addati, Cassirer and Gilchrist, above n 1, at 61; C Rutten “Parental leave in Europe and social [exclusion] of women from the labour market” (postgraduate paper for Inter University Centre, Dubrovnik, 2012) as cited in Addati, Cassirer and Gilchrist, above n 1, at 61.

<sup>53</sup> Elizabeth Lindsay “Father’s leave still a burning issue” (20 September 2013) *News in English* <[www.newsinenglish.no](http://www.newsinenglish.no)>.

<sup>54</sup> Peter Moss and Fred Deven “Leave policies in challenging times: reviewing the decade 2004–2014” (2015) 18(2) *Community Work Fam* 137.

<sup>55</sup> Barclay, above n 50, at 168.

<sup>56</sup> Statistics New Zealand *New Zealand Income Survey: June 2015 quarter* (2 October 2015) at 1.

<sup>57</sup> In Norway, the same portion of wages are payable as paid leave (either 100 per cent or 80 per cent), whether taken by the father or mother. This ensures any financial stress on the family is minimal and optional, as the shorter period paid at 100 per cent could be chosen.

<sup>58</sup> M O’Brien “Fathers, parental leave policies, and infant quality of life: International perspectives and policy impact” (2009) 624(1) *The ANNALS of the American Academy of Political and Social Science* 190 as cited in Addati, Cassirer and Gilchrist, above n 1, at 52.

It also seems that men are more likely to take leave when the duration is at least 14 days.<sup>59</sup> Two weeks' paid leave would bring New Zealand in line with other developed economies. As mentioned previously, Australia introduced a two week paid partner leave at the beginning of 2013 and, according to the ILO, only five countries among the developed economies (Finland, Iceland, Lithuania, Portugal and Slovenia) provide a partner leave of more than two weeks.<sup>60</sup> However, consideration could be given to a longer period. The 2006 Department of Labour Survey indicated that, while it is currently not uncommon for men to take two weeks' annual leave around the birth of the baby, for the men in the survey, the ideal length of leave would be four weeks' concurrent leave with the mother.<sup>61</sup>

### ***Who should pay for it?***

Paid parental leave is currently funded by the state and employers are not required to make any contribution towards it. One of the reasons for this was a recognition that it would largely be women who took advantage of the entitlement, and there were fears that requiring an employer contribution could deter employers from hiring women of childbearing age. This logic is, of course, not applicable to men, so this may provide some weight to the suggestion that employers could be compelled to contribute to all or part of the costs of funding paid paternal leave. If New Zealand were to adopt this option, it would be in keeping with developments in other parts of the world. According to the ILO survey, in 45 countries out of 78 (58 per cent), the entitlement is paid by the employer. However, payment through social security is the prevalent funding system in developed economies (15 out of 24 countries, or 63 per cent).<sup>62</sup>

On the other hand, a case could also be made that differential funding regimes for men and women are inequitable in that they suggest the state values the care that women provide more than that which men provide.

Legislation is, of course, not the only mechanism to confer an independent entitlement to paid leave upon men. In a number of countries, partner leave is provided through collective bargaining agreements instead of through legislative provisions.<sup>63</sup> For example, in Norway, the majority of men receive reimbursement during the two weeks of partner leave as part of a collective agreement between the social partners.<sup>64</sup> While it is not possible to say how many men in New Zealand may receive a separate entitlement to paid parental leave through individual employment agreements, data exists on collective employment agreements. Of these, only three per cent of collective agreements in New Zealand contain a period of separate paid leave for a spouse/partner upon the birth of their child.<sup>65</sup> Although there is scope for an increase in paid paternal entitlements in collective employment agreements, if unions and employers agree to this, the low and declining coverage of collective bargaining (15.7 per cent of the employed labour force, mostly in the central government sector)<sup>66</sup> makes reliance on universal union-negotiated provision of Dad and Partner paid leave unfeasible.

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<sup>59</sup> Addati, Cassirer and Gilchrist, above n 1, at 61.

<sup>60</sup> At 53.

<sup>61</sup> Callister, above n 5, at 41.

<sup>62</sup> Addati, Cassirer and Gilchrist, above n 1, at 57.

<sup>63</sup> At 58.

<sup>64</sup> Berit Brandth and Elin Kvande "Norway country note" in Peter Moss (ed) *International Review of Leave Policies and Research 2013* (International Network on Leave Policies and Research, June 2014).

<sup>65</sup> Stephen Blumenfeld, Susan Ryall and Peter Kiely *Employment Agreements: Bargaining Trends & Employment Law Update 2014 / 2015* (Victoria University of Wellington Centre for Labour, Employment and Work, 2015).

<sup>66</sup> Blumenfeld, Ryall and Kiely, above n 65.

### *Should it be compulsory?*

It is arguable that paternal leave should be compulsory. Due to social conditioning and gender norms, as noted by Fredman, “fathers are subject to as much or more pressure than mothers to forego any rights to leave which are offered to them.”<sup>67</sup> Fredman notes that this issue was considered by the European Parliament, and the following argument was made:<sup>68</sup>

Partner leave should be established on a binding basis so as to ensure that men will not be made on account of social pressure to forgo their entitlement. A signal should be sent to the labour market to the effect that men too have to spend time away from the workplace and their job when they have children.

This proposal was ultimately rejected by the Council of Ministers.<sup>69</sup> However, in some countries, a separate period of paternal leave is compulsory in the first month of the birth, for example, in Chile a five day period is compulsory, in Portugal there are 10 days of compulsory leave, and in Italy (on a trial basis) a period of one day was made compulsory.<sup>70</sup>

If this leave was unpaid, it would likely cause financial hardship for families. However, providing that it was paid, making the leave compulsory would send a strong signal about the value that is placed on fathers’ involvement with the care of their children. To make all or some paternal leave compulsory might be a step too far for New Zealand, as it could be seen as overly aggressive social engineering that does not sufficiently respect individual choice. Nonetheless, it is worth noting that this exists as an option.

### **Conclusion**

Shifting entrenched gender norms and practices to improve equality between men and women, both at home and at work is likely to prove a difficult and lengthy task. The present focus on continuing to extend the existing paid parental leave entitlement, which, thus far, has almost exclusively been taken by women, runs the risk of entrenching a gender norm of women as primary caregivers for extended periods, with consequent related disadvantages in the workforce. Recognition of a separate entitlement to paid leave for men may prove to be a feasible step towards more equal outcomes for both men and women at home and at work. At the very least, it would provide a public affirmation that New Zealand society values the care work of fathers.

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<sup>67</sup> Fredman, above n 30, at 451.

<sup>68</sup> European Parliament Committee on Women’s Rights and Gender Equality *Report on the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding* (2009) at 14 as cited in Fredman, above n 30, at 451.

<sup>69</sup> Fredman, above n 30, at 451.

<sup>70</sup> Addati, Cassirer and Gilchrist, above n 1, at 56.

# **Employment Relationship Problem Resolution: A gap between objectives and implementation**

GAYE GREENWOOD\* AND ERLING RASMUSSEN\*\*

## **Abstract**

This paper identifies a disjuncture between the policy objectives of the Employment Relations Act 2000 (ERA) and the Employment Relations Problem Resolution system. One objective of the ERA was the early resolution of employment relationship problems close to the workplace. The framing of workplace conflict as Employment Relationship Problems (ERP) heralded a paradigm shift from adversarial escalation of disputes to collaborative problem solving by early negotiation and mediation. Our research suggests that in practice there is a propensity to bypass the intentions of the ERA by confidential settlement negotiation or escalation to a personal grievance; thus, the aim of strengthening employment relationships through processes of early, low-cost, fast and fair conflict resolution by state sponsored institutions appears yet to be fully realised in the education sector.

Our research of ERP in the New Zealand education sector indicates the shortfall in meeting the original intentions of the ERA is related to three factors: 1) the complexity of contemporary employment relationships in education; 2) the state provision of processes for early resolution does not include conflict in complex stakeholder relationships; 3) a culture of complaint has a negative impact on trust in school employment relationships. Given that background, this paper sets the scene for the forthcoming publication of a model for collaborative conflict management that provides process guidelines for organisations under the current legislative framework.

## **Key words**

Employment Relations Act 2000, employment relationships, workplace conflict management, dispute resolution, education complaints, conflict resolution, good faith, education law.

## **Introduction**

In New Zealand, there is growing interest in workplace conflict management in the education sector, highlighted by media reports about how principals and boards of trustees are dealing with escalated conflict between stakeholders. This paper presents findings from

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PhD research<sup>1</sup> about the management of Employment Relationship Problems (ERP) in New Zealand primary schools. The paper begins by outlining the methodological approach taken in the research.<sup>2</sup> The second section presents international and New Zealand literature on workplace conflict management. The third section presents research findings and discussion of the following three emergent propositions:

- 1) School ERP are more complex than the Employment Relations Act 2000 (ERA) prescribes between an employer and employee. ERP involve relationships between stakeholders in the wider school community; parents are influential.
- 2) There is a gap in the institutional provision of processes for early resolution of education ERP involving complex stakeholder relationships other than the employer and employee (for example, teacher/parent).
- 3) A culture of complaint has a negative impact on trust in school employment relationships.

## Methodology

The goal of the research<sup>3</sup> was to build empirical insights into the nature and the management of workplace conflict. While the study was located in New Zealand primary schools, our research interest is wider as we wished to find out: 1) what types of workplace conflict and ERP had been experienced; 2) what organisational conflict and dispute resolution policies, processes and practices were implemented in the workplace; 3) how participants understood ongoing ERP; 4) how conflict and ERP had been resolved; and 5) why problems had been avoided, managed, escalated, resolved or settled.

This interpretive research was inductive and iterative with data collection, analysis, literature review and application of extant literature occurring simultaneously. There were 38 qualitative narrative face-to-face interviews conducted. Participants<sup>4</sup> were asked to recount recent stories of ERP they had experienced. The interviews were transcribed; memos of observational data about settings, processes, communication and relationships within schools were recorded. In excess of 260 ERP episodes surfaced. Drawing on grounded theory method (GTM),<sup>5</sup> the data analysis involved coding ERP and comparing the numbered ERP by participant (illustrated in Table I), substance process and outcome.

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<sup>1</sup> Gaye Greenwood "Transforming Employment Relationships? Making sense of conflict management in the workplace" (PhD Thesis, Auckland University of Technology, 2016).

<sup>2</sup> Greenwood, above n 1.

<sup>3</sup> Greenwood, above n 1.

<sup>4</sup> The participants were 9 principals, 6 deputy, assistant or associate principals, 6 past or present members of boards of trustees, 4 employment relations investigators, 6 mediators, 6 experts in education and/or employment relations including a representative of the New Zealand Education Institute primary teachers' union (NZEI) and The Board of Trustees Association (NZSTA) and one significant case of a teacher who requested participation toward the end of the study.

<sup>5</sup> Kathy Charmaz *Constructing grounded theory: A practical guide through qualitative analysis* (Sage Publications, London, 2006); Juliet Corbin and Anselm Strauss *Basics of qualitative research: Techniques and procedures for developing grounded theory* (Sage Publications, Los Angeles, 2008); Cathy Urquhart *Grounded theory for qualitative research: a practical guide* (Sage Publications, Singapore, 2013).

**Table I**

n ERP/ Participant <i>in vivo</i> open codes	Chronology of episode/actions/ events/	Relationships/ identities/parties	Process of conflict management	Outcomes
<b>1. Martin</b> <i>Respecting children</i> <i>High-performance</i> <i>school</i> <i>Parental</i> <i>complaints</i> <i>Racism</i> <i>Parental</i> <i>expectations</i> <i>Low trust</i> <i>Teacher</i> <i>commitment</i>	Parental complaints about teacher's performance & absences, <i>claimed</i> <i>teacher was</i> <i>abrasive towards</i> <i>children.</i> <i>Ours is a high</i> <i>performance school</i> The teacher resigned.	Principal–parents– team leader– teacher. <i>Pākehā people</i> <i>complaining about</i> <i>a Māori teacher.</i> <i>Parents concerned</i> <i>about teacher's</i> <i>level of</i> <i>commitment.</i>	Conversation to support teacher at parent–teacher meeting, <i>but trust</i> <i>was low</i> Team leader led an open process of support for the teacher & meeting with parents.	<i>Parents sent racist</i> <i>emails complaining to</i> <i>the principal &amp; team</i> <i>leader about the</i> <i>teacher.</i> Teacher left without saying goodbye or giving notice.

The episodes were then re-tabulated into emergent sub-categories. Coded constructs (for example, parental complaints) were compared. ERP that resolved were compared with problems that escalated and/or the employment relationship ended. From the analysis of the coded, categorised and tabulated data, four themes emerged. The participants' metaphors provided the titles of the themes in four findings chapters presented as: 1) building the emotional bank account: relational trust; 2) percolating problems: negotiating power and influence; 3) blurred boundaries: governing, leading and managing ERP; 4) learning and transforming ERP. The propositions that emerged from these four themes were compared and contrasted with extant literature. The next section of this paper reviews conflict management literature relevant to three significant propositions and then presents empirical evidence of a disjuncture between objectives and implementation of ERP resolution under the ERA.

## International literature

Internationally, policies, processes and systems of workplace conflict management have been difficult to evaluate, however, there have been repeated calls for research that provides empirical evidence of effective workplace conflict management processes.<sup>6</sup> Lipsky had found growth in alternative dispute resolution (ADR) practices at the level of the organisation in the United States,<sup>7</sup> but there is a lack of research about phases of emergence,

<sup>6</sup> David Ewing *Justice on the job: Resolving grievances in the Non Union Workplace* (Harvard Business School Press, Boston, 1989); David Lewin "Dispute Resolution in the non-union firm: a theoretical and empirical analysis" (1987) 31(3) J Conflict Resolut 465; Douglas McCabe *Corporate Nonunion Complaint Procedures and Systems: A Strategic Human Resources Management Analysis* (Praeger, New York, 1988); E Patrick McDermott "Survey of 92 Key Companies: Using ADR to settle Employment Disputes" (1995) 50(1) Dispute Resolut J 8; Jessica Jameson "Employee perceptions of the availability and use of interest based, rights based and power based conflict management strategies" (2001) 19(2) CRQ 163; Lisa Bingham and Denise Chachere "Dispute Resolution in Employment: The need for research" in Adrienne Eaton and Jeffrey Keefe (eds) *Industrial Relations Research Association Research Volume: Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Industrial Relations Research Association, Champaign (Ill), 1999) 95; John Budd and Alexander Colvin "Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice" (2008) 47(3) Ind Relat 460; Bernie Mayer *Beyond Neutrality: Confronting the crisis in conflict resolution* (Jossey-Bass, San Francisco, 2004); Lisa Bingham "Employment dispute resolution: the case for mediation" (2004) 22(1-2) CRQ 145.

<sup>7</sup> David Lipsky and Ronald Seeber "The Social Contract and Dispute Management: the transformation of the social contract and dispute management in the US workplace and the emergence of new strategies of dispute management" (2003) 9 IERA 87.

transformation, resolution, settlement, escalation from problems to conflict/grievance, and escalation to dispute.<sup>8</sup> In-depth understanding of effective processes and practices for managing workplace conflict is important because ongoing unresolved relational problems manifest in increased stress, labour turnover, sickness, absenteeism, and escalation for individuals, teams and the organisation.<sup>9</sup> There has been debate about whether workplace conflict management processes such as mediation should be provided internally or externally.

Comparative international research about processes and outcomes of ERP has been hindered by differences between internal and external dispute resolution systems and those delivered through the private and public sectors across federal or nation states and different legal and policy contexts.<sup>10</sup> International literature on mediation is dominated by North American field research on internal systems design in large organisations. Jameson argued there was a lack of workplace conflict management training in interest based mediation processes.<sup>11</sup> Building on the work of Lind and Tyler,<sup>12</sup> Bingham and Pitts reported mediation was successful when there was procedural justice (process fairness) and where parties in mediation “felt they had control over the process” and were “able to participate meaningfully in it”.<sup>13</sup> From comparative research of individuals’ experiences of internal and external mediation, they demonstrated that external models were satisfactory if there was “an absence of an integrated internal conflict management system”.<sup>14</sup> However, external processes were considered a last resort, and early internal processes were preferable. Colvin also identified a positive relationship between commitment-oriented human resource management, and employee satisfaction and empowerment when employee participation, information sharing, training and development, and decision making were practised.<sup>15</sup> Colvin emphasised the need to investigate how employee involvement in self-managing teams had developed new and informal processes for conflict resolution.<sup>16</sup> Overall, there was acknowledgement of the positive value of internal systems for workplace conflict management.

The role of training in conflict management has become a site of empirical research. In Ireland, Teague and Roche found a lack of training in workplace conflict management by

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<sup>8</sup> James Antes, Joseph Folger and Dorothy Della Noce “Transforming conflict interactions in the workplace: Documented effects of the USPS Redress Program” (2001) 18(2) *Hofstra Lab & Emp LJ* 429; Bingham, above n 6; Bingham and Chachere, above n 6; Robert Bush and Joseph Folger *The promise of mediation: Responding to conflict through empowerment and recognition* (2nd ed, Jossey-Bass, San Francisco, 2005); William Felstiner, Richard Abel and Austin Sarat “Emergence and transformation of disputes, naming, blaming, claiming” (1981) 15(3-4) *Law Soc Rev* 631; Mayer, above n 6; William Roche and Paul Teague “Firms and Innovative Conflict Management Systems in Ireland” (2011) 49(3) *BJIR* 436.

<sup>9</sup> Roche and Teague, above n 8, at 436–437.

<sup>10</sup> Bingham, above n 6; Bingham and Chachere, above n 6; Blaine Donais *Workplaces that work: A guide to conflict management in union and non-union work environments* (Canada Law Book, Ontario, 2006); Peter Feuille, Denise Chachere and John Delaney “The individual pursuit of organisational justice: grievance procedures in non-union workplaces” (1992) 10 *Res Pers Hum Res Man* 187; Bernard Walker “For Better or For Worse: Employment Relations Problems under the Employment Relations Act 2000” (PhD Thesis, Canterbury University, 2009).

<sup>11</sup> Jameson, above n 6.

<sup>12</sup> E Allan Lind and Tom Tyler *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988).

<sup>13</sup> Lisa Bingham and David W Pitts “Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project” (2002) 18(2) *Negotiation J* 135 at 135.

<sup>14</sup> At 138.

<sup>15</sup> Alexander Colvin “The dual transformation of workplace dispute resolution” (2003) 42(4) *Ind Relat* 712.

<sup>16</sup> Alexander Colvin “Adoption and use of dispute management practices in the non-union workplace” (2004) 13 *Adv Ind Labour Relat* 69.



line managers.<sup>17</sup> They found empirical support for Lipsky and Avgar's<sup>18</sup> claim of a positive association between line and supervisory engagement in conflict management and labour productivity. Longitudinal research undertaken by Amsler encompassed 15 years of training and development in systems and processes of conflict management, including the evaluation of transformative mediation.<sup>19</sup> Over time, after training and implementation of several approaches to workplace conflict management in the United States Postal Service, Amsler found transformative mediation to be the most satisfactory early intervention process compared with in-house facilitative mediation.<sup>20</sup> Roche, Teague and Colvin reported "innovative ADR practices across a number of countries and a growing interest in measures to prevent conflict".<sup>21</sup> However, they noted a lack of empirical evidence for "portentous claims about how outcomes for stakeholders affected organisations, employees and trade unions".<sup>22</sup> There is international consensus of a growing trend for conflict management at the level of the workplace, but empirical research has been slow because there are ethical, privacy, safety and commercially sensitive barriers to access for studying real time workplace conflict. Scepticism about conflict management literature and debate about effectiveness of in-house conflict and dispute resolution will continue until creative in-depth research design is implemented. The ground breaking longitudinal studies conducted in the United States Postal Service<sup>23</sup> could be replicated in other jurisdictions if organisations permitted academic researchers access.

## New Zealand Workplace Conflict Management

Over the last decade, New Zealand research about the ERP resolution system focussed on external provision of dispute resolution services by state sponsored employment institutions, processes for collective bargaining, rates of grievance handling, the relationship between unions and employers, union density, strikes and lockouts. Academic literature<sup>24</sup> and state commissioned research<sup>25</sup> identified a lack of understanding about resolution of ERP, which are widely defined as:<sup>26</sup>

...a personal grievance or a dispute, and any problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

<sup>17</sup> Roche and Teague, above n 8.

<sup>18</sup> David Lipsky and Ariel Avgar "Toward a strategic theory of workplace conflict" (2008) 24(1) Ohio State Journal on Dispute Resolution 143 at 176–177.

<sup>19</sup> Lisa Amsler "Using mediation to manage conflict in the United States Postal Service" in William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 279; formerly Lisa Bingham "Transformative mediation at the United States Postal Service" (2012) 5(4) International Association for Conflict Management and Wiley Periodicals Inc 354; Bingham, above n 6; Bingham and Pitts, above n 13; Bingham and Chachere, above n 6.

<sup>20</sup> Amsler, above n 19.

<sup>21</sup> William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 1.

<sup>22</sup> At 1.

<sup>23</sup> Amsler, above n 19.

<sup>24</sup> Ian McAndrew "The Employment Institutions" in Erling Rasmussen (ed) *Employment Relations in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 74; Bernard Walker and Robert Hamilton "Grievance process: research rhetoric and directions for New Zealand" (2010) 34(3) NZJER 43.

<sup>25</sup> McDermott Miller Ltd *Social & Economic Costs and Benefits of Employment Relationship Problems: Technical Report* (Department of Labour, 2007); Bernard Woodhams *Employment Relationship Problems: Costs, Benefits and Choices* (Department of Labour, August 2007).

<sup>26</sup> ERA, pt 2, s 5(c).

One objective of the ERA was to enable a “free, fast and fair” state sponsored mediation service to provide “a problem-solving” approach to ERP and “reduce the need for judicial intervention”.<sup>27</sup>

State provision of mediation services has been a feature of the highly regulated industrial relations landscape for over 100 years,<sup>28</sup> yet a significant gap in research about conflict management at the level of the workplace remains. We do not know what types of conflict and ERP emerge within the workplace, nor do we understand how employers and employees manage processes that help resolve, trigger escalation or settle ERP. An evaluation of the New Zealand Department of Labour’s mediation service asserted the service had been perceived as a “formal route to settlement” and “often a last resort”,<sup>29</sup> rather than an early step in the process of ERP resolution. Walker’s study of employer-employee grievances noted that little was known about conflict and dispute emergence at the level of the workplace.<sup>30</sup> However, the day-to-day requirement for good faith negotiation behaviour replicates the principles of interest based negotiation and the facilitative problem solving approach to mediation.

The principle of *good faith* is a requirement of the ERA. Good faith is expected to influence behaviour during day to day negotiation and bargaining of the ongoing relationship, especially during proposed changes, restructuring, and any matters that arise under or in relation to an employment agreement while it is in force.<sup>31</sup> Parties are expected to “be active and constructive in establishing and maintaining a productive relationship” where both parties are “responsive and communicative”.<sup>32</sup> The requirement for good faith negotiation was an attempt to reframe negotiation behaviour from a positional rights based competitive process to an integrative interest based process of open communication.

The direction to *mediation as a primary problem solving mechanism* suggests a facilitative approach to mediation where a neutral third party assists parties to collaboratively negotiate agreement, mirroring integrative negotiation<sup>33</sup> on common interests, a problem solving approach rather than zero-sum positional bargaining. Reflecting principled negotiation,<sup>34</sup> where the mediator surfaces interests and frames communication in terms of common or mutual goals, the approach has been critiqued for its focus on settlement<sup>35</sup> and for its lack of attention to communication in relationships.<sup>36</sup> While subjectivity and emotion are acceptable, the aim is for the parties to negotiate in a structured, objective manner to move away from personalising a problem. However, in employment grievance mediation ‘the person’ may be perceived as ‘the problem’ and taking action for a ‘grievance’ attributes

<sup>27</sup> Margaret Wilson “Free, fast and fair – a new Mediation Service for New Zealand businesses and employees” (media release, 13 July 2000) at 1.

<sup>28</sup> Judy Dell and Peter Franks “Mediation in the statutory context: Employment mediation in New Zealand” (paper presented to LEADR 9th International Alternative Dispute Conference, Wellington, 21 September 2007).

<sup>29</sup> Department of Labour 2006–2007 Annual Report (2007) at 3.

<sup>30</sup> Walker, above n 10.

<sup>31</sup> ERA, s 4(4).

<sup>32</sup> ERA, s 4(1A)(b).

<sup>33</sup> Richard Walton and Robert McKersie *A Behavioural Theory of Labour Negotiations* (McGraw-Hill, New York, 1965).

<sup>34</sup> Roger Fisher and William Ury *Getting to Yes: Negotiating an Agreement Without Giving In* (Houghton Mifflin Co, Boston/New York, 1981).

<sup>35</sup> Bush and Folger, above n 8.

<sup>36</sup> Peter Carnevale and Dean Pruitt “Negotiation and Mediation” (1992) 43(1) *Annu Rev Psychol* 531.

blame for disadvantage or injustice. Walker's observation of 14 personal grievance mediation cases suggested that the imbalance of power negatively impacted outcomes.<sup>37</sup> Ministry of Business, Innovation and Employment mediation was effective for employers to negotiate exit packages, but not for employees. Godard critiqued the assumption that conflict management processes provide 'individuals' with a voice as equals.<sup>38</sup> He asserted the imbalance of power was hidden during confidential dispute resolution processes such as mediation. Confidential negotiation and mediation were utilised to exit staff from schools in some of the cases reported in this research.

### ***Workplace conflict management in the New Zealand education sector***

Conflict management in the education sector is in the spotlight. Workplace conflict and ERP are vulnerable to escalation. In *Lewis v Howick Board of Trustees*, Colgan J, the Chief Employment Court Judge, claimed the management of ERP required caution in regard to procedural legalism. Colgan J associated formal legal processes by the Board of Trustees with the escalation of conflict involving the whole school community. The commentary of the Judge in *Lewis* reflected earlier research across industry sectors where there had been resistance to informal resolution by some lawyers. Parties and advocates had favoured more adversarial processes to settle ERP.<sup>39</sup>

The education sector operates in a highly unionised environment with a wide range of legislative requirements, regulations and processes in the interests of children. There are tensions related to the special interdependent relationship between governance by boards of trustees and their management of staff and the principal. The governance structure emerged from reforms in the education sector in 1989, where boards of trustees were established by the Tomorrow's Schools policy under the Education Act 1989. Boards became the employer responsible for recruitment, discipline and dismissal, with the principal both a member of the board of trustees and an employee of the board. Each board of trustees is a democratically elected group of community representatives, the majority of whom are usually parents. This research identified the potential for escalation before engagement in early problem solving processes. The propositions reported in this paper are concerned with ERP that emerged from complex employment relationships between boards, principals, teachers and parents and identify how a culture of complaint can fuel escalation of conflict.

## **Research Findings: discussion of three emergent propositions**

In this section we report findings and three propositions.

***Proposition I: School ERP are more complex than the ERA prescribes between an employer and employee. ERP involve relationships between stakeholders in the wider school community; parents are influential.***

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<sup>37</sup> Walker, above n 24.

<sup>38</sup> John Godard "Labor-Management Conflict: Where it comes from, why it varies, and what it means for conflict management systems" in William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 48 at 48.

<sup>39</sup> Tony Waldegrave, Diane Anderson and Karen Wong *Evaluation of the Short Term Impacts of the Employment Relations Act 2000* (Department of Labour, 2003); K Wyse "The Employment Relations Act 2000: A failed attempt?" (dissertation, University of Auckland, 2003).

The former Attorney General responsible for the drafting of the ERA provided a reminder that the intention of the legislators was a focus on relationships and processes for early informal resolution of ERP. As an expert participant in this study, the Hon Margaret Wilson, Professor of Public Policy at the University of Waikato, stressed the emphasis on relationships rather than formal contractual legalism:

To use the language of relationship was to try and get people to recognise that it isn't entirely legal, that we're not just talking about a legal relationship, but we're talking about a human relationship that is, by and large, hopefully ongoing. So therefore, it requires a different approach, I suppose, than the strict adversarial legal approach to everything (Margaret Wilson, named interviewee).

In this study, the 'employment relationship' was widely constructed by research participants. Figure I compares the legal definition with parties to ERP reported by participants. A mediator reflected on gaps between the legislative definition of the employment relationship and common understandings of parties to an ERP mediation. She treated problems between employees as ERP even though they were not officially in an employment relationship under the Act:

It's becoming common to receive written complaints about performance and competence between staff members—teachers. The Act does not formally cover many of the conflicts and disputes we have in schools. Usually it's been between the principal and the staff member or between two equal complainers. Well, strictly speaking under the ERA, two employees don't have an employment relationship. How I think of it is that it's the employer who wants these two to get on, so there is an employment relationship between each of them (Sarah, mediator, ERP n156).

The important words to note from Sarah's observations above are "two equal complainers". The emergence of employee–employee ERP was associated with problems that affected employment relationships but did not always emerge from interactions between parties strictly in an employment relationship. Nevertheless, the conflicts, problems and disputes were interpreted as ERP. Hence the legal definition did not capture the experience of the research participants.

**Figure I***Definition v reported ERP***Employment relationships defined**

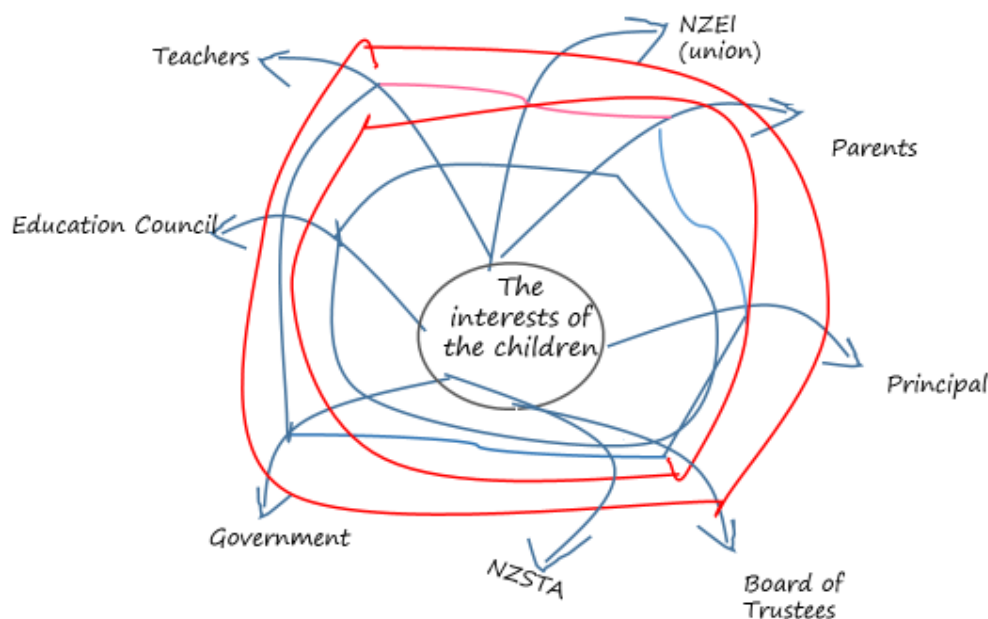
4(2) ERA 2000, includes those between:

- (a) an employer and an employee employed by the employer,
- (b) a union and an employer,
- (c) a union and a member of the union,
- (d) a union and another union that are parties bargaining for the same collective agreement, or
- (e) a union and another union that are parties to the same collective agreement.

**ERP reported from interviews**

Relationship	
Principal—senior/team leader(s)	Principal—parent(s)
Senior leader(s)—teacher(s)	Principal—teacher(s)
Teacher—parent(s)	Principal—BoT—Teacher(s)
Teacher—teacher	Principal—BoT
Principal—union—teacher(s)—Government	Principal—BoT Chair

The ERP involved complex relationships between stakeholders. At the centre of ERP were the interests of children. However, ERP were dynamic and adult alliances shifted over the life cycle of conflicts. The complex web of employment relationships reported during the research is represented in the diagram below (Figure II).

**Figure II**

The propensity for ERP to escalate was a disadvantageous outcome of the dynamic complexity of relationships. ERP were reported to involve stakeholder relationships between board of trustee members, teachers and principals. The involvement of lawyers and insurance companies influenced escalation of ERP. The participants reported a range of stakeholder involvement in ERP, beyond the employer-employee relationship (see Figure I). Relationships between parents and board of trustee members, employee and employee were common sites of ERP. The findings reinforced Patten's assertions that the school employment relationship is emotional and complex.<sup>40</sup> Decision making required effective

<sup>40</sup> David Patten "An Examination of an Investigative Model of Dispute Resolution for Boards of Trustees Involved in Staff Disciplinary Disputes" (LLM Dissertation, Victoria University of Wellington, 2002).

leadership, strong trust<sup>41</sup> and collaborative governance.<sup>42</sup> Government representatives, the teachers' registration board, agents of the Ministry of Education, individual teachers, unions, principals, parents and boards of governors were involved in ERP. ERP were successfully resolved when there was early collaborative problem solving, but where there was escalation or an employment relationship ended, neither the voice of collective nor legal advocacy protected the teachers or principals. When groups of parents complained, problems escalated. Teacher-parent or parent-principal problems did not resolve without early intervention, exemplified by the episodes below.

**Table II: Complex ERP escalated**

Relationship	
<b>Descriptor or type of ERP</b>	ERP that escalated
<i>Problem Resolution Process</i>	
Principal–teacher–insurance companies–BoT	In a situation where it gets too adversarial too quickly, it may be a lawyer trying to score points...A lawyer said, “ <i>Oh you’d better get your insurance company on deck because it’s going to be potentially a personal grievance</i> ”. But on the other hand, she’d also flagged a possible mediation, so she was keeping open both things & threatening you with the most expensive legal process...I’d hold out the olive branch of mediation. But unfortunately, by the time it gets to an investigation, there’s a polarisation. Unfortunately, a majority of investigations lead to an agreed-upon exit (Adam, mediator, academic, ERP n197).
<b>Early adversarial investigation, notification of insurance company</b> <i>Negotiated exit settlement</i>	
BoT–principal–teacher	There were professional competency issues. A principal, and then board, began to have competency concerns with a teacher. The union was brought in, insurance companies were notified, lawyers were called; there was a mediation. But the relationship was beyond repair by then and it wouldn’t have mattered who mediated...no one was going to fix it. Exit settlement at state-sponsored mediation was the outcome (Eron, lawyer, mediator, board of trustees chair, ERP n135).
<b>Competency</b> <i>Exit settlement mediation, legalism, insurance-ism</i>	

There was evidence of a risk of double jeopardy for teachers and principals to lose their job and career when problems escalated. Where ERPs have not emerged from actions of the parties to the formal legal employment relationship, for example, where conflict emerged between a parent and a teacher, then the board of trustees was responsible, and this research confirmed Colgan J’s warning in *Lewis* of the risk of escalation when a board engaged early in formal legal processes. However, board of trustees’ recourse to formal legalism may be related to gaps in conflict management training and a gap in the provision of processes for early problem resolution in the institutional system.

***Proposition II: There is a gap in the institutional provision of processes for early resolution of education ERP involving complex stakeholder relationships other than the employer and employee, for example, teacher-parent.***

The episodes in Table II (above) highlight the risk of conflict between board of trustees, principals, parents and teachers escalating. An Employment Court Judge interviewed during the study suggested that schools need a specialised, education-focussed problem resolution system because teachers face a very real risk of losing their career if an ERP goes badly. The

<sup>41</sup> Viviane Robinson, Margie Hohepa and Claire Lloyd *School Leadership and Student Outcomes: Identifying What Works and Why: Best evidence synthesis iteration* (Ministry of Education, 2009).

<sup>42</sup> Cathy Wylie *School governance in New Zealand – how is it working?* (New Zealand Council for Educational Research, 2007); Chris Ansell and Alison Gash “Collaborative Governance in Theory and Practice” (2007) 18(4) J Public Adm 534.

Judge's comment below highlights the need to move to a more specialised dispute resolution service for education than the current state provision of mediation services for employees in the education sector:

The Mediation Service can take a while and they're not particularly focussed on education. Mediators are focussed on getting a resolution of the problem and they may handle an engineering works problem, [then] a shop assistant the next. They try to get a resolution quickly because there's a lot of pressure on them, they do two or three of these a day; they're not going to be able to take the time to get outside educational input. If you have early mediation, it needs to be expert mediation and people in the education sector probably need to think about their own problem resolution mechanisms (Employment Court Judge, ERP n225).

In practice, the government mediation service informally addressed some ERPs involving interpersonal employee-employee problems at the discretion of the mediators, but there was no process provision for ERPs beyond assistance and negotiation advice. The employer-employee relationship was the focus of the mediation service. The parent-teacher relationship has in the past been conceptualised as co-parenting or *loco parentis*. This responsibility for safety and achievement of the children is shared, but the relationship of *loco parentis* is complex. Coleman and Fergusson claimed they found mixed messages in schools.<sup>43</sup> There was a dissonance between school goals to be child centred and defensive actions from teachers. The outcome was struggle and resistance which made it difficult to negotiate "shared power".<sup>44</sup> In our research, we identified an association between positional negotiation and escalation of problems when there were complaints from parents.

Participants reported that a lack of attention to problems resulted in ongoing festering, escalation and/or diminished trust in some school communities. Conflict contagion<sup>45</sup> involving the spread of emotional involvement and mistrust between stakeholders in the school community provoked increased complaint. Just as conflict contagion occurs over time in teams from "dyadic conflict" to "when conflict perceptions are broadcast to other[s]",<sup>46</sup> conflict contagion involved alignment with perspective taking and emotional contagion spreading over time.<sup>47</sup> Conflict contagion was a risk associated with ERP in schools, especially where there was a lack of confidence in processes for the management of conflict that emerged from complex stakeholder relationships.

Once lost, trust was difficult to rebuild and where parents were dissatisfied by unresolved problems, complaints bubbled above and below the surface of everyday interactions within and outside the school community. The legislative intentions of the ERA of a paradigm shift to collaborative interest based problem solving from adversarial fault finding may not have been fully realised in education or the government mediation service. We identified a culture of exit settlement negotiations following complaints by parents and boards of trustees. Explicit communication of the principles of good faith behaviour in the school setting is a double edged sword, as parents requested open communication in the interests of their

<sup>43</sup> Peter Coleman and Robert Fergusson *Making Conflict Work: Harnessing the power of disagreement* (Houghton Mifflin Harcourt, Boston/New York, 2014).

<sup>44</sup> At xviii.

<sup>45</sup> Karen Jehn and others "Conflict contagion: a temporal perspective on the development of conflict within teams" (2013) 24(4) Int J Confl Manage 352.

<sup>46</sup> At 353 and 355.

<sup>47</sup> At 368.

children and teachers negotiated reasonable expectations to protect themselves from complaint. The next proposition is focussed on what appears to be an ongoing everyday phenomena in schools that undermines trust. We have categorised this as *a culture of complaint*.

***Proposition III: A culture of complaint has a negative impact on trust in school employment relationships.***

In the cases reported below in Table III, the culture of complaint was based on parental dissatisfaction with teacher performance and alleged disrespectful treatment of children by teachers. However, this culture of complaint was associated with high socio-economic areas rather than schools in lower socio-economic zones. Principals in fast-growing urban schools claimed parental complaints were influenced by demographic factors such as parents' professional status and other high socio-economic indicators. Lisa, a principal in a high decile 10 school, said:

If I compare complaints and problems to when I worked in a low-decile school, parents are scared stiff of the teachers in a really big way; they think we are godly things, you know, that aren't to be taken on. Decile 10 is the whole other end of the spectrum. You'll get taken on over every little wee thing. I have teachers putting up signs on their doors saying they are not available before 8.45am otherwise complaint and problem conversations take up class preparation time before school (Lisa, principal, ERP n21).

Lisa's assertions that complaint was a product of unreasonable expectations of parents for teacher availability and that parents from high socio-economic decile 10 schools were likely to be more demanding with teachers more likely to experience complaint, were reinforced by leaders from other schools. The following episodes provide examples of complaints, outcomes of ERP and problem resolution processes, as reported by participants.

**Table III: Complaints > ERP**

Relationship	
<b>Descriptor or type of ERP</b>	ERP where trust was damaged by complaint
<i>Problem Resolution Process</i>	
Parents–teacher–team leader–principal <b>Parental complaints - disrespectful treatment of a child</b> <i>Racist rhetoric from parental emails—principal avoided problem, team leader supportive but teacher resigned</i>	I had a lot of issues with a staff member and parents who had some legitimate concerns about a teacher...I didn't have any issues with her competence but the complaints were about performance, timeliness, as well as her abrasive relationship with children. She had lots of time off; but the racism, disgusting rhetoric [and] emails from parents to the principal escalated the problem. There are high parental expectations...and she put in [the] bare minimum of effort; it was really hard. A school like ours is a high-performance school, you have to be fully committed to your job, otherwise you don't last. The teacher left [with] no notice to go to another job...She didn't even say goodbye, she just left, boom, two days after parent meetings where she had asked me to come support her cause (Martin, team leader, ERP n1).



Relationship <b>Descriptor or type of ERP</b> <i>Problem Resolution Process</i>	ERP where trust was damaged by complaint
Teacher–parents–principal <b>Complaint about disrespectful treatment of a child</b> <i>Avoidance of managing the dispute</i>	I find the stand-off between “he said/she said” (between parents and teachers) quite hard...Well, I don’t know what it is that makes me kind of hesitant to say...this but, I mean, I can think of one example maybe more...if I kind of dig deeper about that teacher’s behaviour, one example...[pause] I did see [the teacher] move the head of the child. The Board has had two complaints in writing but there are also some other issues around parents’ perceptions of her teaching and her leadership (Anita, principal, ERP n50).
Parents–teacher–principal <b>Complaint -disrespectful speaking to children</b> <i>Difficult conversation, loss of confidence, teacher exit</i>	I had a staff member with a hearing impairment who appeared to yell constantly at the children and parents were concerned they complained...He lost confidence and left the profession. We talked - it was a difficult conversation. He decided he was not suited to the classroom...Parents take you on, complain about anything, in a decile 10 school (Lisa, principal, ERP n10).
Parent–teacher <b>Complaint -disrespecting a child, poor performance or misconduct</b> <i>Investigation, teacher exit</i>	A child stepped on a piece of equipment and the teacher abused the child saying he/she is “hopeless and useless”. An investigation found that’s a poor way to teach. I think that’s poor performance, but abusing the kid for stepping on the equipment could also be misconduct. We did not agree on whichever it was. I can’t give you a clear, bright line between a concept of poor performance resulting in a bad outcome, and misconduct resulting a very bad outcome; it was the same thing (Adam, mediator, academic, investigator, ERP n146).
New principal–parents <b>Complaint -children’s placement in classes</b> <i>Unsuccessful negotiation, family exited</i>	We hadn’t put a child with their friend in a classroom. I said, “but there will be kids in there that you know.” So friendship is not driver of school, and...every time we talked about that kid’s behaviour it was always blamed back at us because previously in this school they said we used to put children with their friends first. So that caused a whole lot of grief for a year till they finally left the school. We now have a complaints policy and [the] only thing they can complain about is my process, not my decision (Peter, principal, ERP n41).
Teacher–parents–BoT–principal <b>Parental complaint about ill-treatment of a child</b> <i>Escalated/negotiated teacher exit</i>	There was a complaint against a teacher’s perceived ill-treatment of a student. Through the maelstrom of conflict relationships and [the] complicated raft of legal and social obligations, they rushed for lawyers and an external investigator; and none of it saved it from escalating. They had no education input. It would have been better to have sought dispute resolution advice, problem-solving advice, [or] interest-based advice rather than simply looking to lawyers to get rights-based processes (Adele, mediator, ERP n174).
Ministry of Education <b>A culture of complaint</b> <i>Ministerial appointments of commissioners or statutory managers</i>	Basically, it’s a culture of complaint. The problem is that the Ministry of Education responds to complaints [and] puts in statutory intervention when a sufficient number of complaints go directly to them, or a year report, which itself will be usually dealing with a barrage of complaints when the ERO team turned up in the school. Now, I think that results in the Ministry getting a comment from the board and from the principal about what sort of intervention is required, but the appointment of a statutory manager or whatever to achieve outcomes is sometimes just the ministerial predetermined direction of the intervention (Carl, investigator, lawyer, ERP n210).

Carl (above) articulated the complexity of interests when the state is a stakeholder in complaints, however, conflicts of interest also exist for teachers who need access to an early dispute resolution process when the problem is between the principal and a teacher:

What do I do if I am a teacher and I want to make a complaint? I’m unhappy, I don’t like the way the principal talks with me, I have to interact with him every

day and he/she just makes me feel like crap. Now what do I do about this, who do I complain to? I go and complain to the principal, that's hard, I don't know how to do that but the principal says, "Don't go to the board. You have to come to me; if you've got a complaint, you have to come to me". All right, I go to the principal and I make a complaint and he just says, "Well, you are just challenging my authority". So now where do I go? (Carl, investigator, lawyer, ERP n215).

The conflict of interests in the situation of discord between a principal and a teacher highlights an important tension; the teacher's attempt to seek support from colleagues can be viewed as strategic alliance building and acting in bad faith, undermining the principal. The exemplars above highlight the need for systems and processes across the school community where problems could be dealt with fairly and quickly to retain and build trust in relationships as parties work through inevitable workplace conflicts.

The Government is currently encouraging parents to request robust information from teachers and schools. However, this is not always simple. Parents and students recently gained access to nationwide complaint processes beyond the school, which could add to teachers' anxieties about how much autonomy and authority they have in the classroom. The Education Council's online complaint form, uploaded in July 2015, allows for written complaint about a teacher. There is one caveat: "the first point of contact of any contact for any complaint will be the teacher's employer" and the complainant is warned, "the complaints assessment committee (CAC) is unlikely to consider a complaint that is frivolous or vexatious".<sup>48</sup> However, the complainant may report the conduct of the teacher, quality of the teaching and/or the character of the teacher. The potential impact of the new complaints procedure suggests that a culture of complaint is a significant institutional phenomenon for the education workplace.

Principals may become more defensive of their teachers because scrutiny may increase the fear of complaints, in parallel with the expectations of the administration of National Standards. There may be increased workplace stress about how to negotiate problems. Classical negotiation theory recognises defence as a feature of competitive positional bargaining.<sup>49</sup> A collaborative interest based approach is less likely to involve defensive reasoning. If parents and principals or teachers engage in dualistic, right-and-wrong thinking, attributing blame before making sense of the situation or assumption checking, complaints are likely to escalate. Internal systems for complaint handling have required the recording of investigative processes, but now parents and students can electronically lodge complaints centrally with the Education Council and this is a powerful lever, forcing schools to predict, prevent and resolve issues as early and as close to problems as possible. However, a defensive mindset cues ongoing conflict.<sup>50</sup> The new process of complaint to the Education Council will require a shift in mindset from a defensive and positional rights based, adversarial negotiation to an early collaborative learning approach at the level of the school. The concept of *loco parentis* could be explicitly constructed as a good faith relationship of

<sup>48</sup> Education Council *Complaint Form* (1 July 2015) at 1, available at <[www.educationcouncil.org.nz](http://www.educationcouncil.org.nz)>.

<sup>49</sup> Walton and McKersie, above n 33; Fisher and Ury, above n 34; Roy Lewicki and others *Negotiation* (3rd ed, McGraw-Hill, Boston, 2010).

<sup>50</sup> Bernie Mayer *The dynamics of conflict resolution: A practitioner's guide* (Jossey-Bass, San Francisco, 2000); Bernie Mayer *Staying with conflict: A strategic approach to ongoing disputes* (Jossey-Bass, San Francisco, 2004); Mayer, above n 6; Kenneth Cloke *Mediating dangerously: The frontiers of conflict resolution* (Jossey-Bass, San Francisco, 2001); Walton and McKersie, above n 33; Fisher and Ury, above n 34; Lewicki and others, above n 49.

open, transparent communication, thereby, building trust in individuals and processes for workplace conflict resolution in schools.

## **Conclusion**

Our research identifies a policy and practice gap between intentions and outcome of the ERA for the resolution of complex ERP in the primary education sector. The paper has identified policy and practice contradictions where the language of the ERA encourages early collaborative informal problem solving, while the current Government education policy focusses on complaint. The language of complaint infers rights based grievance, criticism and blame, which may provoke early formal processes of investigation, associated with formal legalism and evidence gathering rather than informal processes for collaborative conflict management. The goal was to resolve conflict early, by problem solving before escalation to legal causes of action. Our research suggests there is a need to embed early workplace ERP resolution processes that include complex relationships in education where parties in conflict are not strictly party to the employment relationship. A forthcoming paper will present findings that demonstrate how explicit sensemaking processes can enable early collaborative conflict management at the level of the workplace.

# **The Meaning of “Social Origin” in International Human Rights Treaties: A Critique of the CESCER’s Approach to “Social Origin” Discrimination in the ICESCR and its (Ir)relevance to National Contexts such as Australia**

ANGELO CAPUANO\*

## **Abstract**

A number of international human rights treaties prohibit discrimination on the basis of “social origin”. This paper discusses the meaning of the term “social origin” in international human rights treaties. It articulates what meaning United Nations (UN) treaty bodies attribute to the term “social origin”, and the concept of “social origin” discrimination, in the international human rights treaty each body monitors. This paper finds that the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the only UN treaty body which provides a clear and detailed interpretation of the term “social origin” in an international human rights treaty (the ICESCR). It argues that the meaning which the CESCR attributes to the term “social origin” in the ICESCR may have some value to understanding what the term might mean in Australian legislation which prohibits discrimination based on “social origin”. This paper finds that, according to the CESCR, “social origin” in the ICESCR refers to “inherited social status”. This paper critiques the CESCR’s approach to “social origin” and “inherited social status”. It argues that the CESCR’s approach to “social origin” requires development if it is to have relevance and its intended effect (prohibiting discrimination on the basis of “inherited social status”) in national contexts such as Australia. This paper thus proposes a view of discrimination based on “inherited social status” (and therefore “social origin”) that has relevance and application in settings such as Australia.

## **Key words**

Social origin, discrimination, social origin discrimination, ICESCR, CESCR, discrimination law, human rights, international human rights law, social status, inherited social status, ascribed status, Australia, labour law.

## **Introduction**

In an article which has been published in the UNSW Law Journal this author discusses the meaning of the term “social origin” in International Labour Organization (ILO) Conventions and the relevance of “social origin” discrimination principles to the Australian context.<sup>1</sup> This paper will build on that research and consider what “social origin” discrimination means in international

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<sup>1</sup> See Angelo Capuano “Giving Meaning to ‘Social Origin’ in ILO Conventions: ‘Class’ Discrimination and its Relevance to the Australian Context” (2016) 39(1) UNSWLJ 84.

human rights law, and whether this meaning has relevance in national contexts such as Australia. This is important because the concept of “social origin” discrimination is ambiguous and largely unexplored in case law and academic literature. To determine what meaning “social origin” bears in international human rights treaties, this paper will look to interpretations of the term by United Nations (UN) treaty bodies.

Based on a detailed study of a number of reports of various UN treaty bodies, this paper finds that the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the only UN treaty body which provides a clear and detailed interpretation of the term “social origin” in an international human rights treaty. This interpretation is found within the CESCR’s *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* dated 2 July 2009 (General Comment 20). This paper will, therefore, focus primarily on discussing and critiquing the approach to “social origin” discrimination by the CESCR, though for completeness it will also cover the reports of other UN treaty bodies.

This paper will consist of several parts. Part I of this paper will identify the core international human rights treaties which prohibit discrimination on the basis of “social origin”. Part II of this paper will then briefly discuss the UN treaty body system, and the reports each of these bodies produce when interpreting specific international human rights treaties. Based on these reports, Part III of this paper will articulate what meaning these UN treaty bodies attribute to the term “social origin” and the concept of “social origin” discrimination in the international human rights treaty each body monitors. Based on the finding that the CESCR is the only UN treaty body which provides any useful guidance on the concept of “social origin” discrimination in an international human rights treaty (the ICESCR), Part IV of this paper will then critique the approach to “social origin” discrimination by the CESCR. This part will, in particular, focus on whether the approach to “social origin” by the CESCR has any relevance in national contexts such as Australia, and it will ask whether this approach should be broadened to be more useful within such contexts. Part V of this paper will, after critiquing the CESCR’s approach to “social origin”, propose a view of “social origin” discrimination that is likely to have more relevance in the Australian context. This view of “social origin” will also likely be relevant to other countries, such as New Zealand and Canada for example.

## **“Social Origin” Discrimination and International Human Rights Treaties**

Each of the nine core international human rights treaties addresses a particular area of human rights. These are the:<sup>2</sup>

- International Covenant on Civil and Political Rights<sup>3</sup> (ICCPR);
- International Covenant on Economic, Social and Cultural Rights<sup>4</sup> (ICESCR);

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<sup>2</sup> UN Office of the High Commissioner for Human Rights “The Core International Human Rights Instruments and their monitoring bodies” (2016) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>3</sup> 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

<sup>4</sup> 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

- Convention on the Rights of the Child<sup>5</sup> (Convention RC);
- International Convention on the Elimination of All Forms of Racial Discrimination<sup>6</sup> (ICERD);
- Convention on the Elimination of All Forms of Discrimination against Women<sup>7</sup> (CEDAW);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>8</sup> (CAT);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>9</sup> (ICMW);
- International Convention for the Protection of All Persons from Enforced Disappearance<sup>10</sup> (CPED); and
- Convention on the Rights of Persons with Disabilities<sup>11</sup> (CRPD).

Discrimination on the basis of “social origin” is prohibited in only four of these treaties: the ICCPR,<sup>12</sup> ICESCR,<sup>13</sup> Convention RC<sup>14</sup> and ICMW.<sup>15</sup> These treaties do not define “social origin” and none of the optional protocols supplementing these treaties elaborate on the meaning of “social origin”.<sup>16</sup> The International Court of Justice (ICJ) has also not, in any of its decisions, defined or given meaning to the term “social origin”, as it appears in an international human rights treaty. Accordingly, guidance on what meaning “social origin” bears in the ICCPR, CESC, Convention RC and ICMW must be sought from sources which have interpreted the meaning of “social origin” in these treaties. Such interpretations, it will now be argued, can potentially be found within the reports of UN treaty bodies.

## UN Treaty Body System

A country “assumes a legal obligation to implement the rights set out in” the ICCPR, CESC, Convention RC and/or ICMW when it accepts those treaties through “ratification, accession or

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<sup>5</sup> 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

<sup>6</sup> 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

<sup>7</sup> 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

<sup>8</sup> 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

<sup>9</sup> 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003).

<sup>10</sup> 2716 UNTS 3 (opened for signature 6 February 2007, entered into force 23 December 2010).

<sup>11</sup> 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008). While the CRPD does not prohibit “social origin” discrimination, in its preamble it expresses concern “about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of...social origin”.

<sup>12</sup> See ICCPR, above n 3, arts 2, 4, 24 and 26.

<sup>13</sup> See ICESCR, above n 4, art 2(2).

<sup>14</sup> See Convention RC, above n 5, art 2.

<sup>15</sup> See ICMW, above n 9, arts 1 and 7.

<sup>16</sup> See *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* GA Res 63/117 (2009); *Optional Protocol to the International Covenant on Civil and Political Rights* GA Res 2200A, XXI (1966); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* GA Res 54/263 (2000); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* GA Res 54/263 (2000).

succession”.<sup>17</sup> To assist countries that have accepted human rights treaties to meet their obligations under those treaties, treaty bodies (with “a mandate related to a specific treaty”<sup>18</sup>) were developed to monitor the implementation of a specific treaty. In relation to the four core international human rights treaties that prohibit “social origin” discrimination, the four corresponding treaty bodies are the:<sup>19</sup>

- Human Rights Committee (HRC), which monitors the implementation of the ICCPR;
- Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR;
- Committee on the Rights of the Child (CRC), which monitors the implementation of the Convention RC; and
- Committee on Migrant Workers (CMW), which monitors the implementation of the ICMW.

The HRC, CRC and CMW were “created in accordance with the provisions of the treaties they monitor”,<sup>20</sup> while the CESCR was established by the Economic and Social Council of the UN (ECOSOC).<sup>21</sup> Membership of each of these treaty bodies is determined by elections held by the state parties to each treaty (except for the membership to the CESCR, “whose members are elected by ECOSOC”).<sup>22</sup> Candidates for election are nominated by the countries in which they are nationals as required by each treaty (except the ICESCR, but this has “nevertheless become practice”).<sup>23</sup> Once elected, members to each treaty body can serve fixed terms of four years<sup>24</sup> and are expected to serve the treaty body in their personal capacity as independent experts<sup>25</sup> and not their particular country or government.<sup>26</sup> These members are held to certain criteria which are expressed in each treaty (or in the case of the ICESCR, the ECOSOC Resolution) and require, among other things, “high moral standing and recognised competence in the field of human rights”<sup>27</sup> or “the specific subject-matter of the respective treaty.”<sup>28</sup> Lawyers and legal experts are strongly represented in most treaty bodies.<sup>29</sup>

<sup>17</sup> UN Office of the High Commissioner for Human Rights *The United Nations Human Rights Treaty System* (Fact Sheet No 30 Rev 1, 2012) at 19, available at <www.ohchr.org>.

<sup>18</sup> At 21.

<sup>19</sup> At 19–20. See also Kerstin Mechlem “Treaty Bodies and the Interpretation of Human Rights” (2009) 42 Vand J Transnat’l L 905 at 914.

<sup>20</sup> Mechlem, at 914.

<sup>21</sup> See *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ESC Res 1985/17 (1985); ESC Res 1985/17 (1985) ESCOR Supp 1 at 15–16.

<sup>22</sup> ESC Res 1985/17, at 2 as cited in Mechlem, above n 19, at 915.

<sup>23</sup> Mechlem, above n 19, at 915.

<sup>24</sup> UN Office of the High Commissioner for Human Rights, above n 17, at 20.

<sup>25</sup> At 19. Members of the treaty bodies are described as “independent experts”.

<sup>26</sup> Mechlem, above n 19, at 915.

<sup>27</sup> CAT, above n 8, art 17(1); CPED, above n 10, art 26(1); ICERD, above n 6, art 8(1) (which requires only high moral standing); ICCPR, above n 3, art 28(2); ESC Res 1985/17, above n 21 (which requires only competence in the field of human rights): all as cited in Mechlem, above n 19, at 915. See also UN Office of the High Commissioner for Human Rights, above n 17, at 20.

<sup>28</sup> Mechlem, above n 19, at 915. See, for example, Convention RC, above n 5, art 43(2). See also UN Office of the High Commissioner for Human Rights “Elections of Treaty Body Members” (2016) <www.ohchr.org>.

<sup>29</sup> Mechlem, above n 19, at 917.

The treaty bodies which monitor human rights treaties prohibiting “social origin” discrimination – the HRC, CESCR, CRC and CMW – perform various functions when monitoring the implementation of the ICCPR, ICESCR, Convention RC and ICMW respectively. These functions result in the publication of reports by a treaty body in which that body interprets, and, therefore, gives meaning to the treaty it monitors. These publications can take several forms, but the most relevant for the purposes of this paper are: (1) “general comments”, which can be undertaken by the HRC, CESCR, CRC and CMW; (2) “concluding observations”, which can also be undertaken by the HRC, CESCR, CRC and CMW; (3) “views” in response to individual complaints, which can only be undertaken by the HRC (of the four treaty bodies discussed in this paper); and (4) “country inquiries”, which can only be undertaken by the CESCR and the CRC (of the four treaty bodies discussed in this paper).<sup>30</sup>

“General comments” and “concluding observations”, as just noted, are published by the HRC, CESCR, CRC and CMW.<sup>31</sup> “General comments” include the “comprehensive interpretations of substantive provisions” within the treaty that the treaty body monitors<sup>32</sup> and are usually of an abstract and general nature<sup>33</sup> rather than in response to any particular state, complaint or facts.

In contrast to general comments, “concluding observations” are published by the HRC, CESCR, CRC and CMW after these bodies consider periodic reports submitted to them by state parties which address compliance with the relevant treaty each body monitors. After examining the report in the presence of delegates of that state party and engaging in dialogue with those delegates, the body then publishes its recommendations and concerns which are called “concluding observations”.<sup>34</sup>

The HRC and CRC<sup>35</sup> are the only UN treaty bodies of the four discussed in this paper that can hear complaints and petitions from individuals regarding non-compliance with the ICCPR (to be heard by the HRC) and Convention RC (to be heard by the CRC) when domestic remedies have been exhausted.<sup>36</sup> The HRC can, in response to these complaints, adopt “views” that set out whether it believes the complaint is warranted and substantiated. The interpretation of the ICCPR by the HRC may, therefore, be reflected in its “views”.

The CESCR and CRC are two UN treaty bodies of the four discussed in this paper which can conduct country inquiries under certain conditions based on reliable information that a treaty is being seriously, gravely or systematically violated in a certain country.<sup>37</sup> These country inquiries

<sup>30</sup> UN Office of the High Commissioner for Human Rights “Monitoring the core international human rights treaties” (2016) <www.ohchr.org>.

<sup>31</sup> UN Office of the High Commissioner for Human Rights, above n30.

<sup>32</sup> UN Office of the High Commissioner for Human Rights, above n 30; UN Office of the High Commissioner for Human Rights “Treaty Bodies – General Comments” (2016) <www.ohchr.org>; UN Office of the High Commissioner for Human Rights, above n 17, at 36.

<sup>33</sup> Nisuke Ando “General Comments/Recommendations” in *Max Planck Encyclopedia of Public International Law* (2010, online ed) at [2].

<sup>34</sup> UN Office of the High Commissioner for Human Rights, above n 30.

<sup>35</sup> See UN Office of the High Commissioner for Human Rights “Committee on the Rights of the Child” (2016) <www.ohchr.org>.

<sup>36</sup> See *Optional Protocol to the International Covenant on Civil and Political Rights*, above n16, art 2.

<sup>37</sup> UN Office of the High Commissioner for Human Rights, above n 30. See UN Office of the High Commissioner for Human Rights, above n 35.



can also shed light on the way the CESCR interprets the ICESCR and the CRC interprets the Convention RC.

The above text has established that four UN treaty bodies – the HRC, CESCR, CRC and CMW – actively interpret the ICCPR, ICESCR, Convention RC and ICMW respectively, through the publication of “general comments”, “concluding observations”, “views” responding to individual complaints (for the HRC and CRC) and “country inquiries” (for the CESCR and CRC). This paper will now consider whether any of these UN treaty bodies has interpreted the term “social origin” within the treaties it monitors, and if so, what meaning “social origin” has been given by the body or bodies.

## How Have UN Treaty Bodies Interpreted the Term “Social Origin”?

An extensive search of UN treaty body databases reveals that the concept of “social origin” discrimination has received very little attention by UN treaty bodies. Three UN treaty bodies have considered the idea of “social origin” discrimination within the treaties they monitor – the CESCR, the CRC and the HRC. The below text will discuss the way each of these bodies has addressed the concept of “social origin” discrimination.

### The CESCR on “social origin” in the ICESCR

The CESCR is an organ of the UN that reports to its “parent body”, ECOSOC.<sup>38</sup> It is described as an “independent and impartial body” with its membership made up of “experts”.<sup>39</sup> The CESCR consists of 18 independent experts.

The CESCR has turned its attention to “social origin” discrimination in two of its publications: General Comment 20 and its *Concluding observations...relating to the United Kingdom of Great Britain and Northern Ireland including its Crown Dependencies* (concluding observations to the UK).<sup>40</sup> These two publications of the CESCR, and their potential usefulness in understanding the meaning of “social origin” in the ICESCR, will now be discussed.

#### *General Comment 20 of the CESCR on “social origin”*

On 2 July 2009, the CESCR<sup>41</sup> released General Comment 20 which directly interpreted the meaning of “social origin” in art 2(2) of the ICESCR.<sup>42</sup> Article 2(2) of the ICESCR prohibits

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<sup>38</sup> Mechlem, above n 19, at 915.

<sup>39</sup> At 915.

<sup>40</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights relating to the United Kingdom of Great Britain and Northern Ireland including its Crown Dependencies* E/C.12/1994/19 (1994).

<sup>41</sup> See UN “Index to the Proceedings of the Economic and Social Council” (2010) <www.un.org>.

<sup>42</sup> See *Committee on Economic, Social and Cultural Rights Report on the forty-second and forty-third sessions: Supplement No 2* E/C.12/2009/3 (4–22 May 2009, 2–20 November 2009) at 110. Justice Ariranga Govindasamy Pillay of Mauritius served as Chairperson, and Professors Zdzislaw Kedzia of Poland and Nikolaas Jan Schrijver of the Netherlands served as Vice-Chairpersons. See United Nations *Index to the Proceedings of the Economic and Social Council* (2010) at [xvi].

discrimination on the basis of “social origin” and other grounds. In its General Comment 20, the CESCR defined the term “social origin” in art 2(2) of the ICESCR, noting that:<sup>43</sup>

Social origin’ refers to a person’s inherited social status, which is discussed more fully below in the context of ‘property’ status, *descent-based discrimination* under ‘birth’ and ‘economic and social status’.

On this basis, a person may experience “social origin” discrimination where they face discrimination based on their “inherited social status”. It also appears that “property status”, “descent” and “economic and social status” are viewed by the CESCR as useful indicia of a person’s “inherited social status”. This seems to be the case because just after the CESCR notes that “social origin” refers to a person’s “inherited social status”, it clarifies that “inherited social status” “is discussed more fully [in General Comment 20]... in the context of ‘property’ status, descent-based discrimination under ‘birth’ and ‘economic and social status’”.<sup>44</sup> General Comment 20 does refer to property status, descent based discrimination, and economic and social status. Accordingly, the below text will proceed on the basis that the CESCR’s discussion of these three concepts in its General Comment 20 can clarify what the CESCR means by “inherited social status”.

In relation to “property status”, the CESCR noted in its General Comment 20 that:<sup>45</sup>

Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement.

Based on this text, it seems that “property status” refers to, and is determined by, land ownership (or lack thereof), tenure over real property (such as whether a person rents or lives in public housing or an “informal settlement”<sup>46</sup>), and/or the extent of a person’s personal property or *lack* of such property. It, therefore, seems that, for the CESCR, discrimination against a person on the basis of their ownership (or non-ownership) of land, tenure over real property or the extent of their personal property (or lack of such property), can be “social origin” discrimination if such property or lack of such property is inherited.

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<sup>43</sup> CESCR General Comment 20: *Non-Discrimination in Economic, Social and Cultural Rights* (art 2, para 2) E/C.12/GC/20 (4–22 May 2009) at [24].

<sup>44</sup> General Comment 20, above n 43, at [24].

<sup>45</sup> General Comment 20, above n 43, at [25].

<sup>46</sup> CESCR General Comment 4: *The right to adequate housing* (art 11 (1)) E/1992/23 (adopted at the Sixth Session of the CESCR, 13 December 1991) at [8]. In General Comment 4, the CESCR wrote: “Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property.” General Comment 4 was cited in General Comment 20, above n 43, at [25], after the CESCR explained “property status”.

In relation to “descent-based discrimination”, the CESCER notes that this form of discrimination includes discrimination on the “basis of caste and analogous systems of inherited status”<sup>47</sup> and membership to a “descent-based community”.<sup>48</sup> When the CESCER defined descent-based discrimination as discrimination on the basis of “caste” and “analogous systems of inherited status”, it referred to a “comprehensive overview of State obligations in this regard” in *General Comment No 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on Article 1, Paragraph 1, Regarding Descent*.<sup>49</sup> However, as this overview does not appear to clarify in any helpful way the meaning of “caste” or “analogous systems of inherited status” it will not be discussed any further in this paper.<sup>50</sup> When discussing discrimination based on “birth”, the CESCER also noted that “[d]istinctions must...not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons”.<sup>51</sup>

In relation to “economic and social status”, the CESCER refers to its comments on “economic and social situation” in [35] of its General Comment 20, which reads:<sup>52</sup>

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

It, therefore, seems that, for the CESCER, discrimination on the basis of a person’s “economic and social status” (such as poverty or homelessness) can be “social origin” discrimination where that “economic and social status” is inherited.

Based on the above material, it is clear that the CESCER defines “social origin” in terms of “inherited social status”. Therefore, for the CESCER, “social origin” discrimination may include discrimination on the basis of “inherited social status”. While there may be some mystery as to what the CESCER means by “inherited social status”, this is addressed somewhat by the CESCER when it notes, in General Comment 20, that “inherited social status” is more fully discussed in the context of, and presumably refers to, “property status” (such as the extent of a person’s real or personal property, or land tenure), social stratification based on “descent” (such as caste) and “economic and social situation” (such as poverty and homelessness).

In addition to this position of the CESCER in its General Comment 20, the CESCER also refers to “social origin” discrimination in one of its “concluding observations”, which will now be discussed.

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<sup>47</sup> General Comment 20, above n 43, at [26].

<sup>48</sup> At [26].

<sup>49</sup> At [26], n 15.

<sup>50</sup> *CERD General Comment 29 (art 1, para 1)* (23 August 2002).

<sup>51</sup> General Comment 20, above n 43, at [26].

<sup>52</sup> General Comment 20, above n 43, at [35].

*Concluding observations to the UK*

In its concluding observation to the UK, published on 21 December 1994, the CESCR noted “the grave disparities which appear to prevail in the level of education depending on the social origin of the pupil”.<sup>53</sup> This particular observation appeared to relate to the dependent territories of the UK,<sup>54</sup> so clues as to what the CESCR might have meant by “social origin” can potentially be found within the four state party reports by the UK<sup>55</sup> to which the CESCR was responding when making this concluding observation - three second periodic reports<sup>56</sup> and one report with additional information.<sup>57</sup>

The state report that provides the most clues about what “social origin” might have meant to the CESCR appears to be E/1990/7/Add.16 because it focusses on the question of education in the UK and its dependent territories. At the outset it must be stressed that these clues will not be particularly clear because, as the CESCR notes:<sup>58</sup>

The State party reported no specific factor or difficulty affecting the implementation of the Covenant. The Committee, however, notes that notwithstanding the absence of such an [sic] information in the reports it is clear that certain economic and social difficulties continue to be faced by the most vulnerable segments of society, partly as a result of the imposed budgetary constraints.

The CESCR, therefore, appears to rely on the tenor of these reports and the economic and social difficulties faced by certain people, rather than specific references to “social origin” discrimination, to conclude that a pupil’s “social origin” can influence that pupil’s level of education. Read as a whole, E/1990/7/Add.16 appears to suggest that access to higher education was heavily contingent on where a person grew up, such that support to attend educational institutions in England, for example, differed for residents of the dependent territories of the UK depending on where they came from. For example, people from the Falkland Islands were only required to gain admission to a UK university to receive generous financial support by the Falkland Islands government to attend that university<sup>59</sup> while in other territories access to higher education or other opportunities seemed to be much more difficult.<sup>60</sup> Further clues as to what the CESCR might have meant by “social origin” may be able to be found within the annexes to

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<sup>53</sup> E/C.12/1994/19, above n 40, at [12].

<sup>54</sup> At [8].

<sup>55</sup> At [1].

<sup>56</sup> E/1990/7/Add.16 (1993), E/1986/4/Add.27 (1993), and E/1986/4/Add.28 (1994).

<sup>57</sup> E/1989/5/Add.9 (1993).

<sup>58</sup> E/C.12/1994/19, at [6].

<sup>59</sup> *Second periodic reports submitted by States parties to the Covenant concerning rights covered by arts 13 to 15, in accordance with the third stage of the programme established by the Economic and Social Council in its resolution 1988 (LX) Addendum, United Kingdom of Great Britain and Northern Ireland and Dependent Territories* E/1990/7/Add.16 (1993) at [230].

<sup>60</sup> Some children in Bermuda were also described as particularly disadvantaged, and this required intervention and a special program called the Child Development Project. See: *Second periodic reports submitted by States parties to the Covenant, concerning rights covered by articles 10 to 12, in accordance with the second stage of the programme established by Economic and Social Council resolution 1988 (LX), United Kingdom of Great Britain and Northern Ireland: Dependent Territories* (24 November 1993), E/1986/4/Add.27, para [17].

E/1990/7/Add.16 to which the state party refers in [90] of the report,<sup>61</sup> but unfortunately these annexes cannot be located by the UN library.<sup>62</sup> Summary records of the sessions and meetings at which the state reports were considered by the CESCR can, however, be found, but these records do not seem to be of much assistance.

The CESCR considered the relevant state reports in its 11<sup>th</sup> session<sup>63</sup> as well as its 33<sup>rd</sup><sup>64</sup> and 34<sup>th</sup><sup>65</sup> meetings held on 23 November 1994. In its 11<sup>th</sup> session (33<sup>rd</sup> meeting), the CESCR noted that children from “poor families” were at a disadvantage in education resulting from what was recognised as a “growing tendency...to solicit voluntary contributions from parents”.<sup>66</sup> However, beyond this, there appear to be no further clues as to what the CESCR might have meant by the term “social origin” when it noted the “grave disparities which appear to prevail in the level of education depending on the social origin of the pupil”.<sup>67</sup>

The CESCR’s concluding observation relating to the UK does specifically refer to “social origin”, but, based on the above text, this reference appears to be quite cryptic such that it is very difficult to conclusively determine what the CESCR meant by “social origin”. More to the point, there is no indication that the CESCR’s mention of “social origin” specifically referred to the term within art 2(2) of the ICESCR. It is, therefore, uncertain whether the CESCR’s reference to “social origin” in its concluding observation relating to the UK was in fact an interpretation of the term “social origin” within art 2(2) of the ICESCR. There is a chance it may have been a reference to a person’s “social origin” in the ordinary sense and not a legal sense. For these reasons, the CESCR’s concluding observation relating to the UK should be disregarded as a potential source of guidance on the meaning of “social origin” within the ICESCR.

Only General Comment 20 of the CESCR can, therefore, be regarded as potentially useful in giving meaning to the term “social origin” within the ICESCR. Having considered what meaning “social origin” might bear in the ICESCR, this paper will now turn to consider what “social origin” might mean in the Convention RC and the ICCPR. In relation to the meaning of “social origin” in the Convention RC and the ICCPR, appropriate guidance may be sought from the CRC and HRC respectively. The attention that each of these bodies have given to the idea of “social origin” discrimination will now be discussed.

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<sup>61</sup> E/1990/7/Add.16, at [90].

<sup>62</sup> Email from Angelo Capuano to United Nations Library, and corresponding reply regarding E/1990/7/Add.16 (3 September 2014–4 September 2014).

<sup>63</sup> UN Office of the High Commissioner for Human Rights “CESCR – International Covenant on Economic, Social and Cultural Rights 11 Session” (21 November 1994–9 December 1994) <[www.ohchr.org](http://www.ohchr.org)>; *Report on the tenth and eleventh sessions* ESC Supplement No 3 E/1995/22(SUPP) (2–20 May 1994, 21 November–9 December 1994).

<sup>64</sup> *Eleventh Session, Summary Record of the 33rd Meeting* ESC E/C.12/1994/SR.33 (28 November 1994).

<sup>65</sup> See: Committee on Economic, Social and Cultural Rights, Eleventh Session, Summary Record of the 34<sup>th</sup> Meeting, (Geneva, 23 November 1994) E/C.12/1994/SR.34 dated 30 November 1994 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1994%2fSR.34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1994%2fSR.34&Lang=en)>.

<sup>66</sup> E/C.12/1994/SR.33, at[34] and [40].

<sup>67</sup> E/C.12/1994/19, at [12].

## The CRC on “social origin” in the Convention RC

A study of CRC publications reveals that “social origin” discrimination is only mentioned in the CRC’s concluding observations relating to Bangladesh dated 26 June 2009,<sup>68</sup> in which the CRC expressed concern that “children face discrimination on the basis of social origin”.<sup>69</sup> Within the text of this concluding observation, the CRC did not elaborate on this point, but guidance as to the way the CRC might have understood “social origin” can be drawn from the state report to which the CRC was responding when it made this concluding observation.

In this concluding observation relating to Bangladesh, the CRC was considering “the combined third and fourth periodic report of the People’s Republic of Bangladesh at its 1411th and 1412th meetings, held on 3 June 2009”.<sup>70</sup> The third and fourth periodic report of the People’s Republic of Bangladesh is a very large document of 141 pages. The section of the state report that is perhaps most relevant to “social origin” discrimination is the one dealing with non-discrimination. This section focuses heavily on gender inequality and the underrepresentation of girls in education,<sup>71</sup> but it also refers to other categories of children such as:

- child brides;<sup>72</sup>
- street children;<sup>73</sup>
- tribal children;<sup>74</sup>
- orphans;<sup>75</sup> and
- marginalised people and children living in remote areas, including “the Gypsy (*Bede*), tea garden workers, *haor/beel* (large water bodies) inhabitants, *challrlanders* (people living in small island of rivers), so on.”<sup>76</sup>

With the exceptions of “social origin” and “birth”, it can be argued that many of these categories of children – without more information – do not seem to fall under the other grounds upon which the Convention RC prohibits discrimination (race, colour, sex, language, religion, political or other opinion, national origin, ethnic origin, property or disability<sup>77</sup>). This suggests that children within these categories (street children or orphans, for example) may project a “social origin” or “birth” and descent that can make them prone to discrimination. The CRC’s attention to the idea of “social origin” discrimination is, however, extremely brief, and there is no guarantee that the CRC actually

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<sup>68</sup> During this time, membership of the CRC consisted of: Ms Agnes Akosua Aidoo, Ms Hadeel Al-Asmar, Mr Luigi Citarella, Mr Kamel Filali, Mr Peter Gurán, Ms Maria Herczog, Ms Azza el-Ashmawy, Mr Sanphasit Koompraphant, Mr Hatem Kotrane, Mr Lothar Friedrich Krappmann, Ms Yanghee Lee, Ms Marta Maurás Perez, Ms Rosa Maria Ortiz, Mr Awich Pollar, Mr Dainius Puras, Ms Kamla Devi Varmah, Ms Susana Villarán de la Puente and Mr Jean Zermatten. See UN Office of the High Commissioner for Human Rights “Membership of the Committee on the Rights of the Child” (1 March 2005–28 February 2007) <[www.ohchr.org](http://www.ohchr.org)>.

<sup>69</sup> *Concluding observations of the Committee on the Rights of the Child: Bangladesh* CRC/C/BGD/CO/4 (26 June 2009) at [32].

<sup>70</sup> At [1]. See CRC/C/BGD/4, CRC/C/SR.1411 and CRC/C/SR.1412.

<sup>71</sup> *Third and fourth periodic report of the People’s Republic of Bangladesh* CRC/C/BGD/4 (23 October 2008) at [88]–[94].

<sup>72</sup> At [89].

<sup>73</sup> At [95].

<sup>74</sup> At [96]–[97].

<sup>75</sup> At [96].

<sup>76</sup> At [98].

<sup>77</sup> Convention RC, above n 5, art 2. The Convention RC also refers to “social origin” and “other status”.

thought that these categories of children were relevant to “social origin”. For this reason, the concluding observation of the CRC relating to Bangladesh should not contribute to the meaning of “social origin” in the Convention RC. This means that the publications of the HRC are the only remaining guides which can potentially clarify the meaning of “social origin” in an international human rights treaty, the ICCPR (in addition to General Comment 20 of the CESCR, which interprets the term “social origin” in the ICESCR). The approach of the HRC to the question of “social origin” discrimination will now be discussed.

### The HRC on “social origin” in the ICCPR

The HRC has published a number of views, which are described as having a legal character,<sup>78</sup> in response to complaints by individuals who have alleged “social origin” discrimination contrary to the ICCPR. In *Gennadi Sipin v Estonia*,<sup>79</sup> *Vjatšeslav Borzov v Estonia*<sup>80</sup> and *Vjatseslav Tsarjov v Estonia*<sup>81</sup> the complainants alleged that measures taken by the Estonian government to deny Estonian citizenship or residence to people that had served as members of foreign armed forces was “social origin” discrimination and a violation of art 26 of the ICCPR.<sup>82</sup> In response to these complaints, the HRC was of the view that there was no violation of art 26 of the ICCPR because the prohibition by the Estonian government was justified on national security grounds.<sup>83</sup> It may be, based on the complaints, that national extraction is an aspect of “social origin” but this was not made clear by the HRC. The meaning of “social origin” was also not discussed by the HRC, which means that these views offer no guidance as to the meaning of “social origin” discrimination. Other complaints of “social origin” discrimination made to the HRC have similarly shed very little light on what the term “social origin” means in the ICCPR.<sup>84</sup> Accordingly, these views of the HRC that address complaints of “social origin” discrimination are not helpful to understanding what “social origin” might mean in the ICCPR, because they find no violation of the ICCPR and/or do not explain what “social origin” means.

<sup>78</sup> Mechlem, above n 19, at 924.

<sup>79</sup> Communication No 1432/2005 CCPR/C/93/D/1423/2005.

<sup>80</sup> Communication No 1136/2002 CCPR/C/81/D/1136/2002.

<sup>81</sup> Communication No 1223/2003 CCPR/C/91/D/1223/2003.

<sup>82</sup> Art 26 of the ICCPR reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>83</sup> See *Gennadi Sipin v Estonia*, above n 79, at [7.1]–[7.5] and [8]; *Vjatšeslav Borzov v Estonia*, above n 80, at [7.1]–[7.4] and [8]; *Vjatseslav Tsarjov v Estonia*, above n 81, at [7.1]–[7.6] and [8].

<sup>84</sup> See *George Kazantzis v Cyprus*, Communication No 972/2001 CCPR/C/78/D/972/2001; *Mohammed Sahid, on his own behalf and on behalf of his daughter and his grandson v New Zealand*, Communication No 893/1999 CCPR/C/77/D/893/1999; *Amalia Castaño López v Spain*, Communication No 1313/2004 CCPR/C/87/D/1313/2004; *Sucha Singh Shergill et al v Canada*, Communication No 1506/2006 CCPR/C/94/D/1506/2006; *VH v Czech Republic*, Communication No 1546/2007 CCPR/C/102/D/1546/2007; *Pohl et al v Austria*, Communication No 1160/2003 CCPR/C/81/D/1160/2003; *Monika v Cameroon*, Communication No 1965/2010 CCPR/C/112/D/1965/2010; *Pezoldova v Czech Republic*, Communication No 757/1997 CCPR/C/76/D/757/1997 (in which the Human Rights Committee was of the “view that the facts before it reveal a violation of article 26” but did not discuss the meaning of “social origin”); *Ivan Somers v Hungary*, Communication No 566/1993 CCPR/C/53/D/566/1993; *Arenz, Paul; Röder, Thomas and Dagmar v Germany*, Communication No 1138/2002 CCPR/C/80/D/1138/2002; *Mariano Gallego Díaz v Spain*, Communication No 988/2001 CCPR/C/82/D/988/2001; *Gobin v Mauritius*, Communication No 787/1997 CCPR/C/72/D/787/1997; *Mrs Alzbeta Pezoldova v The Czech Republic*, Communication No 757/1997 CCPR/C/75/D/757/1997 (2002).

For the above reasons, it can be argued that the only report of a UN treaty body that provides a clear, direct and reasonably detailed interpretation of “social origin” in an international human rights treaty is the CESCR’s General Comment 20, which interprets the meaning of “social origin” in the ICESCR. This paper will now turn to critique the CESCR’s approach to “social origin” and ask whether it is likely to be relevant to national contexts such as Australia.

## **A Critique of the CESCR’s Approach to “Social Origin” and its (Ir)relevance to National Contexts such as Australia**

Section 351 of the Fair Work Act 2009 (Cth) (FW Act) prohibits adverse action on the basis of “social origin” and s 772 prohibits termination of employment on the basis of “social origin”. The prohibition against “social origin” discrimination was introduced into Australian labour legislation by the Industrial Relations Reform Act 1993 (Cth). The new principal object of the Industrial Relations Act 1988 (Cth) was to “help prevent and eliminate discrimination on various grounds” and, as the Industrial Relations Reform Bill 1993 Supplementary Explanatory Memorandum explains, “some or all of these grounds are referred to in Article 2.2” of the ICESCR as well as in ILO instruments.<sup>85</sup> The object of the FW Act is, among other things, to “take into account Australia’s international labour obligations”.<sup>86</sup> Australia has international labour obligations under the ICESCR and other instruments<sup>87</sup> and Australian courts have noted that Australian labour laws “should be construed conformably with Australia’s international obligations”, including the ICESCR.<sup>88</sup>

In Australia it is recognised that “subject to any clear contrary intention, statutory provisions are to be interpreted consistently with Australia’s international obligations under treaties and covenants, as far as language permits”.<sup>89</sup> This “principle makes relevant the articles of” the ICESCR when interpreting the provisions of domestic legislation in a manner consistent with Australia’s international obligations.<sup>90</sup> Australian courts have used general comments of the CESCR to interpret the ICESCR.<sup>91</sup> While not legally binding,<sup>92</sup> the general comments of the CESCR – which aim to assist states in interpreting and understanding their obligations under the

<sup>85</sup> Industrial Relations Reform Bill 1993, Supplementary Explanatory Memorandum, at 12. See also Industrial Relations Reform Bill 1993, Explanatory Memorandum at 5.

<sup>86</sup> See FW Act, s 3.

<sup>87</sup> Fair Work Bill 2008, Explanatory Memorandum at [2251].

<sup>88</sup> *Australian Meat Industry Employees’ Union v Beldra Pty Ltd (with Corrigendum dated 5 November 2003)* [2003] FCA 910 at [197].

<sup>89</sup> *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [75] (Maxwell P) as cited in *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 at [67], [81] and [95] (Bell J). See further *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (Teoh’s case)* [1995] HCA 20 at [26]; *Coleman v Power* [2004] HCA 39 at [17]–[19] (Gleeson CJ); *Kruger v Commonwealth (Stolen Generations case)* [1997] HCA 27 (Dawson J). See also Benedict Coxon “Human Rights at Common Law: Two Interpretive Principles” (2014) 35(1) Stat LR 35 at 45.

<sup>90</sup> See *ZZ v Secretary, Department of Justice & Anor*, above n 89, at [80].

<sup>91</sup> See *W B M v Chief Commissioner of Police* [2012] VSCA 159 at [170]; *ZZ v Secretary, Department of Justice & Anor*, above n 89. See further *Sheather v Daley* [2003] NSWADT 51 at [51].

<sup>92</sup> Eibe Riedel “Committee on Economic, Social and Cultural Rights (CESCR)” in *Max Planck Encyclopedia of Public International Law* (2010, online ed) at [12].



ICESCR<sup>93</sup> – are seen to carry weight as the most authoritative interpretations of the ICESCR and as jurisprudence on rights in the ICESCR<sup>94</sup>. In particular, general comments of the CESCR “may be considered the most important interpretation aids for the rights enshrined in the ICESCR”.<sup>95</sup> It is notable that the CESCR comprises of 18 independent experts and in drafting general comments the CESCR “draws on its expert knowledge of state practice in the application of the Covenant”.<sup>96</sup> It can be argued that the reports of the CESCR have a role to play in helping to clarify Australia’s obligations under the ICESCR and, in turn, informing a construction of domestic legislation which is consistent with such obligations. Therefore, the meaning which the CESCR attributes to the term “social origin” in the ICESCR may have some value to understanding what “social origin” might mean in the FW Act if this statute is to be interpreted consistently with Australia’s international obligations, including under the ICESCR.

An important question sought to be answered by this paper, however, is whether elucidations of the concept of “social origin” discrimination by the CESCR are relevant to national contexts such as Australia. It can be argued that, while legislation should be interpreted consistently with Australia’s international obligations and the reports of the CESCR may be valuable guides which can help clarify those obligations, the legislature would intend “social origin” discrimination laws to have relevance in the Australian context so that these laws can address the mischief they are designed to remedy – “social origin” discrimination in employment.

The CESCR in its General Comment 20, which provides an interpretation of the meaning of “social origin” in art 2(2) of the ICESCR, clearly notes that “social origin” refers to “inherited social status”. “Inherited social status”, according to the CESCR and as discussed above, is to be understood in the context of “property status” (such as ownership or non-ownership of land, tenure over real property or the extent of a person’s personal property, or the lack of such property), descent-based discrimination (such as caste) and “social and economic status” (such as homelessness or poverty). It therefore seems that, for the CESCR, discrimination based on

<sup>93</sup> *Rules of Procedure of the Committee on Economic, Social and Cultural Rights* E/C.12/1990/4/Rev.1 (1993), rule 65.

<sup>94</sup> UN Office of the High Commissioner for Human Rights *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (Professional Training Series No 12, HR/P/PT/12, 2005) at 7; Ashfaq Khalfan “Division of Responsibility Amongst States” in Malcolm Langford and others (eds) *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, Cambridge, 2013) 300; David Keane and Yvonne McDermott “Introduction” in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing, Cheltenham, 2012) 1, at 7; International Council on Human Rights Policy *Duties Sans Frontieres: Human Rights and Global Social Justice* (2003) at 28; Takele Soboka Bulto “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?” (2011) 12 Melb J Int Law 290; Dianne Otto and David Wiseman “In Search of ‘Effective Remedies’: Applying the International Covenant on Economic, Social and Cultural Rights to Australia” (2001) 7(1) AJHR 5. See further Kerstin Mechlem “Treaty Bodies and the Interpretation of Human Rights” (2009) 42 Vand J Transnat’l L 905 at 920, 922, 927 and 929; Blake Conway *Normative Instruments in International Human Rights Law: Locating the General Comment* (Center for Human Rights and Global Justice, Working Paper No 17, 2008) at 38; Paula Gerber, Joanna Kyriakakis and Katie O’Byrne “General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?” (2013) 14 Melb J Int Law 1 at 9.

<sup>95</sup> Riedel, above n 92, at [12].

<sup>96</sup> Holger Hestermeyer “Access to Medication as a Human Right” in *Max Planck Yearbook of United Nations Law* (2004) vol 8 at 121.

inherited social status is “social origin” discrimination, and “inherited social status” is measured predominately by reference to property and wealth.

It will be argued that the CESCER’s view of “social origin” (and, in particular, “social status”), as it is currently framed in General Comment 20, is unlikely to have any real application in (and is thus largely irrelevant to) the Australian context. This paper will, therefore, argue that, for laws prohibiting discrimination on the basis of “inherited social status” to have more relevance and any real application in the Australian context, the CESCER’s view of “social status” must be broadened and developed. This paper will, after critiquing the CESCER’s approach to “social origin”, propose a view of “inherited social status” discrimination that has more relevance in the Australian context.

It will now be argued that the CESCER’s approach to “social origin”, as it is currently expressed in General Comment 20, will not likely have much relevance in the Australian context.

### **Will the CESCER’s approach to “social origin” catch cases of discrimination based on “social status” or discrimination based on wealth and poverty?**

The first reason why the CESCER’s approach to “social origin” will not likely have much relevance in the Australian context is because of the way that the CESCER seems to give content to the concept of “social status” in its General Comment 20. The CESCER’s view of “social origin”, as just noted, is that it refers to “inherited social status” and “social status” appears to be understood in the context of, and by reference to, property status, wealth and economic status, including homelessness and poverty.<sup>97</sup> The CESCER, therefore, takes a view of “social status” that is predominately formed by economic factors. The following discussion will not aim to define “social status”,<sup>98</sup> but rather show that a person’s “social status” is reflected more by prestige and esteem rather than merely property status, wealth or economic status. The CESCER’s view of “inherited social status” therefore does not seem to accurately capture the idea of “social status”.

Ralph Linton is credited with giving “social status” “a very concrete meaning in the social sciences”.<sup>99</sup> For Linton, social status can be determined by a person’s sex,<sup>100</sup> age,<sup>101</sup> biological relationships<sup>102</sup> such as with “close relatives”,<sup>103</sup> sexual associations such as marriage,<sup>104</sup> race or religion.<sup>105</sup> Linton explains:<sup>106</sup>

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<sup>97</sup> General Comment 20, above n 43.

<sup>98</sup> For a discussion of status, see Yoram Weiss and Chaim Fershtman “Social status and economic performance: A survey” (1998) 42 Eur Econ Rev 801 at 804–807.

<sup>99</sup> Juan Díez Nicolás “Socio-Demographic Conditions” in *Encyclopedia of Psychological Assessment* (online ed, 2003).

<sup>100</sup> Ralph Linton *Study of Man* (reprint, D Appleton-Century Company, New York, 1936) at 115–118.

<sup>101</sup> At 118–122.

<sup>102</sup> At 122.

<sup>103</sup> At 123.

<sup>104</sup> At 124.

<sup>105</sup> Linton clearly states that being a “Negro” or “Catholic” would have influenced a person’s ability to become president of the United States.

<sup>106</sup> Linton, above n 100, at 127.

The factor of social class or caste rarely if ever replaces the factors of sex, age, and biological relationship in the determination of status. Rather, it supplements these, defining the roles of individuals still more clearly.

More to the point, Linton is credited with the view that a person's status or "social position...is viewed in terms of the degree of attributed prestige, esteem, and respect rather than in terms of possessing wealth and power."<sup>107</sup> For example, an uneducated janitor or office cleaner may own several houses in their old age from living a frugal life and saving money over the course of a number of decades, but their social status is likely to be lower than most university educated professionals. By way of another example, public figures such as Fr Frank Brennan (a law professor and leading legal thinker in Australia) and many other prominent Jesuits are likely to have high social status despite presumably having taken a vow of poverty. Therefore, it seems that a person can have high social status despite being poor and low social status despite being wealthy. Social status is, thus, a very difficult concept, and it would be unwise to measure it predominately in terms of wealth or poverty as the CESCRR appears to do.

The CESCRR, in contrast to Linton, appears to adopt a view of "social status" that is formed almost exclusively by economic considerations – property, or the lack of it, and economic status such as homelessness or poverty. This view of "social status" by the CESCRR does not seem to capture the complex nature of "social status", but rather merely "wealth" or "poverty". Accordingly, the approach to "social origin" by the CESCRR will not likely address, in countries such as Australia, most cases of discrimination on the basis of "social status", as it purportedly sets out to do, but rather will address discrimination on the basis of wealth and poverty, for example.

### **Is the CESCRR's approach to "social origin" likely to have much relevance in Australian workplaces?**

The second reason why the CESCRR's approach to "social origin" will not likely have much relevance in the Australian context is because the criteria which the CESCRR seems to use to give content to the concept of "social status" – property status, caste, and economic and social status such as homelessness and poverty – are not likely to be bases upon which an employer will commonly have the opportunity to discriminate. This is certainly not to suggest that discrimination on the basis of such criteria in employment never occurs, but rather that it is likely to be very rare in Australia.

These criteria are unlikely to be common points of distinction between most employees or job candidates. Such criteria are also unlikely to be on a job candidate's resume, known to an employer or be requested (or obvious) in interviews. Discrimination on the basis of homelessness appears to be widespread in "accommodation and the provision of goods and services".<sup>108</sup> This is not to say that discrimination on the basis of homelessness does not occur in employment. However, it appears that people experiencing homelessness are likely to be more prone to face discrimination in the provision of accommodation, goods and services. This makes sense, because efforts can be

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<sup>107</sup> See Vasiliki Kantzara "Status" in *Blackwell Encyclopedia of Sociology Online* citing M Zelditch Jr "Social Status" in *International Encyclopedia of Social Sciences* (1968) at 250–257.

<sup>108</sup> See Philip Lynch and Bella Stagoll "Promoting Equality: Homelessness And Discrimination" (2002) 7(2) *Deakin LR* 295. See further Homeless Law in Practice "Discrimination against Homeless People" (2016) <[www.hlp.org.au](http://www.hlp.org.au)>.

made to conceal homelessness from a potential employer. While discrimination in employment on the basis of inherited social status, as measured by homelessness, poverty or caste for example, may occur it is likely to be infrequent. This means that, if “social origin” is to be understood in terms of “inherited social status” and “inherited social status” is to be measured by reference to criteria such as poverty, homelessness or caste, the concept will not likely have much of an application to Australian workplaces.

Therefore, for reasons discussed above, it is proposed that the CESC’s approach to “inherited social status” (and therefore “social origin”) discrimination be broadened to make it more relevant in national contexts such as Australia.

## **Proposing a View of “Inherited Social Status” that is (more) Relevant to the Australian Context**

According to Linton, “status” “means the sum total of all the statuses” which a person occupies, and it represents a person’s position “with relation to the total society”.<sup>109</sup> “Status” as a member of a community may, therefore, derive “from a combination of all the statuses” a person holds, including in professional life and personal life.<sup>110</sup> These statuses held by a person can be understood as rights and duties which “find expression only through the medium of individuals”.<sup>111</sup> When that person puts these rights and duties which constitute status into effect they are performing a “role”<sup>112</sup> within society. Linton describes two types of statuses in his seminal work *Study of Man: ascribed status and achieved status*.<sup>113</sup>

A status is *ascribed* when it is assigned “to individuals without reference to their innate differences of abilities”<sup>114</sup> which means that it is determined by “accident of birth”.<sup>115</sup> In other words, an *ascribed* status is “inherited”. Linton writes that “[t]he bulk of” ascribed statuses “in all social systems are parcelled out to individuals on the basis of sex, age, and family relationships”.<sup>116</sup> In other words, ascribed statuses are involuntary characteristics that “have nothing to do with an individual’s efforts or input”.<sup>117</sup> Examples of “ascribed status” can, therefore, include son, daughter, grandson, granddaughter, niece, or nephew. For example, by virtue of being the son of Charles, both William and Harry have an ascribed status as the son of Charles. Additionally, because Charles is the son of Elizabeth Windsor (Elizabeth II) he, William and Harry have ascribed statuses as Princes. By way of another example, because John is the son of a judge he would have some degree of status in the legal community because of his ascribed status as the son of a judge.

A status is *achieved* when it requires “special qualities”, although it is “not necessarily limited to these”, and achieved statuses “are not assigned to individuals from birth but are left open to be

<sup>109</sup> Linton, above n 100, at 113.

<sup>110</sup> At 113.

<sup>111</sup> At 113.

<sup>112</sup> At 114.

<sup>113</sup> At 115.

<sup>114</sup> At 115.

<sup>115</sup> Irving Foladare “A Clarification of ‘Ascribed Status’ and ‘Achieved Status’” (1969) 10(1) *Sociol Q* 53 at 53.

<sup>116</sup> Linton, above n 100, at 126.

<sup>117</sup> Amber Thompson “Ascribed Status” in *Encyclopedia of Diversity and Social Justice* (2015) at 74–75.

filled through competition and individual effort.”<sup>118</sup> An *achieved* status therefore has, in theory, very little to do with “inheritance” because it is determined by “performance or effort or volition”.<sup>119</sup> It is, in other words, based on merit or effort rather than birth. Examples of “achieved status” may therefore include doctor, lawyer, rapist, thief, Olympian and athlete. For example, although John is the son of a judge he worked very hard to become a doctor and has the achieved status of doctor.

A person’s ascribed status can also assist that person to develop achieved status. It does seem “very likely that an individual’s ascribed status whether physical, mental, or social in nature, will provide an advantage or disadvantage in pursuit of achieved status”.<sup>120</sup> For example, if a person is born into a wealthy high status family (ascribed status) they will have more resources available to them which can be used to complete tertiary education and then “achieve” entry into an occupation of choice. In contrast, a person born into a poor low status family will likely not have access to the same level of resources to “achieve” entry into the same occupation. As Thomson explains, there is a blurring of ascribed and achieved status<sup>121</sup> – a relationship between the two – whereby ascribed status (family wealth) can influence achieved status (an occupation)<sup>122</sup>. This suggests that a person has the opportunity to “achieve” a certain status due to opportunities resulting from their “ascribed” status. In Linton’s own words, many ascribed statuses “can be predicted and trained for from the moment of birth”.<sup>123</sup> This is reflected by the existence of elite private schools in Australia, which demand extremely high fees and which in most cases only the wealthiest Australians can afford.

When one thinks of “inherited” social status, the most privileged Australians who “inherited” family businesses tend to come to mind.<sup>124</sup> While these Australians may have been required to exert some personal effort to maintain or grow their inheritances it can be argued that, for them, status is largely inherited. Any (or most) achieved status is likely to be contingent on ascribed status. However, it is likely that “social origin” discrimination laws will be used most not by people who inherit property or who inherit powerful positions in life but, rather, by those who *do not* inherit property (because such people will be more in need of protection from discrimination, in contrast to people who inherit, and thus own, family businesses for example). For the purpose of laws which prohibit discrimination on the basis of “inherited social status” (as an aspect of “social origin” discrimination), what precisely constitutes “inherited” social status in Australia requires some careful thought.

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<sup>118</sup> Linton, above n 100, at 115.

<sup>119</sup> Foladare, above n 115, at 53.

<sup>120</sup> Thompson, above n 117, at 74 citing Pierre Bourdieu *Outline of a Theory of Practice* (Cambridge University Press, New York, 1977) and Pierre Bourdieu and Jean-Claude Passeron *Reproduction in Education, Society and Culture* (2nd ed, SAGE Publications, London, 1990).

<sup>121</sup> Thompson, above n 117.

<sup>122</sup> See also Margaret Andersen and Howard Taylor *Sociology: Understanding a Diverse Society* (4th ed, Thomson/Wadsworth, Florence (KY), 2008) at 114.

<sup>123</sup> Linton, above n100, at 115.

<sup>124</sup> Examples of such people might include Gina Rinehart (the daughter of iron ore magnate Lang Hancock who is now Chairman of Hancock Prospecting Group), Anthony Pratt (the son of Richard Pratt and grandson of Leon Pratt, who is the Chairman and CEO of Pratt Industries), Daniel Grollo (the son of Bruno Grollo, who inherited Grocon Party Limited from his father), James Packer (son of Kerry Packer, who inherited Consolidated Press Holdings Limited from his father), and Rupert Murdoch (son of Sir Keith Arthur Murdoch, who inherited News Limited from his father).

While discrimination on the basis of “inherited social status” may be difficult to conceptualise, Linton’s concepts of “achieved status” and “ascribed status” can serve as a useful foundation upon which to build a view of “inherited social status” discrimination which is likely to have more relevance in national contexts such as Australia. It can be argued that, in most cases, the criteria by which the CESCER appear to measure “social status” – for example, poverty and homelessness – are likely to be intergenerational and “inherited”.<sup>125</sup> Caste, no doubt, is inherited from one’s parents and discrimination on the basis of caste will likely be discrimination on the basis of “inherited social status”.<sup>126</sup> However, as discussed above, in Australia “social status” is unlikely to be accurately measured by reference purely to economic factors (such as wealth or poverty) and a person’s homelessness, poverty or caste in Australia is perhaps only in very limited circumstances likely to be a point of distinction in employment decisions. The CESCER’s view of “social origin” discrimination is, therefore, likely to have very little application in Australian workplaces, and it may, thus, be largely irrelevant. This paper will now, based on Linton’s view of “ascribed status” and “achieved status”, set out to propose how the CESCER’s view of “inherited social status” can be broadened to more effectively prohibit in employment its conception of “social origin” discrimination (“inherited social status” discrimination).

It will now be argued that, in Australia, there are at least three ways which “inherited social status” (and therefore “social origin”) discrimination can occur, in addition to what has been noted by the CESCER.

First, “ascribed status” discrimination can occur where an employment decision is based on family relationships. For example, if a law firm bases a hiring decision on the fact that the successful candidate’s mother is a Chief Executive Officer (CEO) of a large client of the firm, this would be based on the candidate’s ascribed status as a son or daughter. This is likely to mean that, because the unsuccessful candidate’s mother is not a CEO who can bring business to the firm, the decision is based on the unsuccessful candidate’s ascribed status as a son or daughter of factory workers for example.

Second, “ascribed status” discrimination can occur where an employment decision is based on attending a particular primary school or secondary school. For instance, suppose an employer bases the decision to hire a person on the basis that this person attended the same elite private school as the employer. The employer enjoys chatting with ‘old collegians’ because they tend to have things in common with them, and they also tend to have parents who can bring business to the employer. Attending an elite private school, especially without a merit based scholarship, is an ascribed status because it tends to be an accident of birth – parents in the know will often plan a child’s education from conception, and such education tends to be contingent on the ability of the parents to pay the schools. In contrast, a child does not choose to attend disadvantaged schools and be exposed to gangs and drugs. Therefore, being an ‘old collegian’ of an elite school or a disadvantaged school

<sup>125</sup> See further Paul Flatau and others *Lifetime and intergenerational experiences of homelessness in Australia* (Australian Housing and Urban Research Institute, UWA Research Centre, UNSW-UWS Research Centre, Monash University Research Centre, February 2013, AHURI Final Report No 200).

<sup>126</sup> ‘Ascribed status’ discrimination can occur where an employment decision is based on caste. As the CESCER does not define or clarify caste, it is not possible to elaborate on this point, though not hiring a person because the person is of a particular caste, or born to parents of a particular caste, is caste discrimination. This might include a situation where a *Brahmin* shop owner does not hire a person because he or she is *Dalit*.

is an ascribed status. This is likely to mean that, if a person is preferred for a job because they attended an elite school, an unsuccessful candidate for that job who did not have the opportunity to attend the elite school in question will likely face discrimination on the basis of an “ascribed status” as a person who did not attend that elite school.

Third, “ascribed status” discrimination can occur where an employment decision is based on certain circumstances of childhood. For example, if an employer bases a hiring decision on the fact that the unsuccessful candidate experienced homelessness, refugee status or immigrant status etc *as a child*, this would be based on the candidate’s “ascribed status”. Homelessness, being an immigrant or refugee and many other factors in childhood are “ascribed statuses” because a child is most certainly not able to choose whether to be homeless, an immigrant, a refugee, or, in some cases, even a criminal. Whilst, admittedly, discrimination on the basis of such circumstances of childhood may not be likely to occur in Australian workplaces, such conduct would still be an example of discrimination that is based on “ascribed status” (and therefore “inherited social status”).

The above three examples are clearly purely “inherited” or “ascribed” status because these circumstances tend to be determined by birth, usually do not change throughout a person’s life, do not tend to require effort to build or maintain, and are usually not the result of one’s own efforts (or lack of effort). The above three examples are also clearly relevant to social status, because a person’s family relationships (son of a judge or owner of a multinational company), ‘old school tie’ or circumstances of childhood can contribute to a person’s esteem and prestige. This, in turn, can contribute to the person’s social status.

Additionally, there is evidence that discrimination based on family relationships and attending a particular primary or secondary school occurs in Australia. This is evident in findings that nepotism is “rife” in the Victorian public service,<sup>127</sup> which signals that discrimination based on family connections occurs. There are allegations from lawyers that the law firms within which they work select candidates based on the school they went to (on the basis that people who attend private schools are likely to have connections which can benefit the firm).<sup>128</sup> These very recent examples show that discrimination in Australia based on the forms of ascribed (inherited) status just discussed are likely to be relevant in the Australian context, and occur quite frequently in employment. Additionally, a person’s primary or secondary school history and family connections (or assumptions about the person’s family connections, based on schooling) are very likely to be known to an employer, requested at interviews or detailed in resumes. This means that there is considerable scope for discrimination in employment on the basis of the ascribed statuses just discussed: family connections, and primary and secondary schooling in particular.

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<sup>127</sup> Victorian Ombudsman *Report on issues in public sector employment* (tabled in Parliament 27 November 2013). See also Victorian Ombudsman *Conflict of interest in the Victorian public sector – ongoing concerns* (tabled in Parliament 12 March 2014).

<sup>128</sup> Rebecca Douglas “Did public school kids ever have a chance?” *The Drum, ABC* (29 July 2013).

## Conclusion

This paper set out to determine the meaning of “social origin” in the ICCPR, ICESCR, CRC and ICMW, which are four core international human rights treaties which prohibit discrimination on the basis of “social origin”. Given that the term “social origin” is not defined within the text of any of these treaties, this paper relied on interpretations of the term “social origin” by the UN treaty bodies that are responsible for monitoring the implementation of these treaties. After extensively researching reports of UN treaty bodies which discuss “social origin” discrimination and carefully analysing these reports to adduce a meaning of “social origin”, this paper found that only the CESCR (which monitors the ICESCR) has interpreted and given meaning to the term “social origin” in a useful, direct, reasonably detailed and clear manner. This interpretation is found within the CESCR’s General Comment 20, and many commentators would argue that this general comment of the CESCR is an authoritative interpretation of the ICESCR.

This paper has argued that, according to the CESCR in its General Comment 20, “social origin” in art 2(2) of the ICESCR refers to “inherited social status”. It further argued that, in the view of the CESCR, “inherited social status” is to be understood in terms of property status (such as ownership or non-ownership of land, tenure over real property or the extent of a person’s personal property, or the lack of such property), social stratification based on descent (such as caste), and economic and social status (such as homelessness or poverty).

An important question posed in this paper is whether the CESCR’s approach to “social origin”, as it is found within the CESCR’S General Comment 20, has any relevance in the Australian context. This paper argued that the CESCR’s approach to “social origin” requires development if it is to have its intended effect (prohibiting discrimination on the basis of “inherited social status”) in national contexts such as Australia. It was argued in this paper that the CESCR’s view of “social origin” is unlikely to have much relevance in the Australian context, as it is currently framed in General Comment 20, for two reasons. First, the CESCR’s approach to “social status” will not likely address “social status” discrimination in Australia, but rather discrimination on the basis of “wealth” or “poverty”. Second, the CESCR’s approach to “social origin” is unlikely to have much relevance in Australian workplaces.

This paper proposed that the CESCR’s view of “inherited social status” discrimination (and therefore “social origin” discrimination) should be broadened if it is to have more relevance in national contexts such as Australia. Based on Linton’s theory of social status, it was argued that in Australia there are at least three circumstances, in addition to the (limited) role of the CESCR’s approach to “social origin” discrimination, where an employee or job candidate can experience discrimination based on an “ascribed status” or, in other words, “inherited social status”. Such discrimination might occur where an employment decision is based on an employee’s or job candidate’s: (1) family relationships (“ascribed status” as a son, daughter, grandson, granddaughter and/or some other unchangeable and unearned family relationships); (2) attending a particular primary school or secondary school (“ascribed status” as an ‘old collegian’); and (3) circumstances of childhood (such as parentage, homelessness, refugee or immigrant status, or, in some cases, drug use, criminal charges and convictions). It was argued that discrimination in employment based on these forms of “inherited social status” (particularly the first two) are likely to be much



more prevalent in Australia than the forms of “inherited social status” which appear to be advanced by the CESC.

For these reasons, the position in this paper is that the view of the CESC (in its General Comment 20) that “social origin” refers to “inherited social status” should be accepted, while its view of “social status” should be broadened. The refined and broadened view of “social status” adopted in this paper covers conduct that can properly be regarded as “inherited social status” (and therefore “social origin”) discrimination. It is contended that this broadened view of “social status” should inform, and be included within, the concept of “social origin” in Australian labour law. Thus, the concept of “social origin” discrimination will have relevance and application in Australian workplaces.

The CESC’s view of “social origin”, and the refinements of this view which are proposed in this paper, are not inconsistent with the meaning which ILO supervisory bodies attribute to the term “social origin” in ILO Conventions. The position that “social origin” refers to “inherited social status” enriches the meaning of “social origin” in ILO Conventions. The term “social origin” in ILO Conventions comprises of a number of constituent elements: class, caste and socio-occupational category.<sup>129</sup> The CESC’s view of “social origin” adds “inherited social status” to that mix. Whilst “inherited social status” may overlap with caste and aspects of class, for example, the concept is consistent with these elements and it seems to clearly cover discrimination on the basis of “ascribed status”.

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<sup>129</sup> See generally Capuano, above n 1.