

The difficulty in regulating child labour in developed countries: A New Zealand perspective

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1 Introduction

New Zealand is among a minority of states that have not ratified ILO Convention 138 of 1973, on the **Minimum Age for Admission to Employment**.

Convention 138 is the basic Convention that deals with child labour. It consolidates 10 earlier ILO conventions on the subject. When the number of ratifications of ILO 138 was slowing down, the ILO adopted **Convention 182 on the Elimination of the Worst Forms of Child Labour** in 1999. This was to target the very worst abuses, such as child slavery, recruitment in armed conflict, and use in sex work and drug trafficking. New Zealand, along with 165 other countries (out of 181 ILO member countries), ratified Convention 182.

But NZ has still not ratified ILO 138, which applies more generally to child labour. ILO138 has been ratified by 150 out of the 181 ILO member countries. It deals with employment and other types of relationships, both contractual and non-contractual, and both paid and unpaid work.

To put New Zealand's failure to ratify ILO 138 into perspective, most of the countries that have gone ahead and ratified ILO 138 are not likely to be fully compliant with it anyway. ILO 138 is not an easy convention to fully conform to because child labour is an activity that has always been difficult to regulate.

But many countries to which NZ compares itself (like Ireland, Britain, and most other OECD countries) have ratified ILO 138. Major exceptions to this pattern are Australia, Canada, the US, and NZ. Australia, like NZ, is currently working towards ratification, but it is a slow process.

In practice, New Zealand does not ratify international human rights treaties such as ILO 138 unless it already complies with the required standards. This is on the basis that there is no point in signing up to a treaty that one is in breach of from the very beginning. Countries are required to submit periodic reports on their compliance with treaties such as ILO 138, and these reports are reviewed by the ILO Committee of Experts, which is the supervisory body for ILO treaties. Countries are publicly criticized if their compliance falls short of the required standard.

The current position regarding New Zealand and ILO 138 is that the government is mulling over what changes it has to make in order to achieve compliance before they sign up to this treaty. With a more conservative government likely to come to power by the end of this year, NZ will probably not ratify ILO 138 for some time now.

ILO 138 overlaps with two other international human rights treaties to which NZ is already a party.

One is the **International Covenant on Economic, Social and Cultural Rights**, adopted by the UN in 1966, and entered into force for New Zealand in 1979. This requires New Zealand to set a minimum age for the paid employment of children. 157 countries have ratified it.

The other treaty is the **Convention on the Rights of the Child**, adopted by the UN in 1989, and entered into force for New Zealand in 1993. This also requires States to set a minimum age or ages for admission to employment, as well as regulate the hours and conditions of work for young people. Every country in the world has ratified this Convention except the US and Somalia. (192 out of 194 countries).

When ratifying this Convention, though, New Zealand made a reservation to it, to the effect that NZ considered that existing law already provides adequate protection for the employment rights of children, and so it reserved the right not to legislate further in the area.

The Committee on the Rights of the Child, which is the supervisory body for this treaty, has stated that although countries can make reservations to the Convention, they should be working towards withdrawing their reservations. In its most recent review of New Zealand's periodic report on compliance with the Convention on the Rights of the Child, the Committee on the Rights of the Child said that it was "disappointed by the slow pace" of NZ's progress in removing its reservation. It also commented that it was "very concerned" that NZ still had no minimum age of employment, and that the protection of workers under 18 years old did not conform to international standards. It wants New Zealand to ratify ILO 138.

A few words on the historical background to the regulation of child labour

The history of the regulation of child labour on both the domestic and the international levels has proceeded on the basis of fixing a minimum age before children should be allowed to do certain kinds of work.

Regulation began on the domestic level in many developed countries in the course of the nineteenth and early twentieth centuries.

In Britain, for example, the very first of this type of regulation concerned climbing boys, or chimney sweeps. In 1788, the law prescribed for the first time a minimum age of 8 years for such work. Before then, children as young as 5 were sent up narrow, dirty, and usually very hot chimneys. Commentators at the time found the situation of climbing boys to be pitiful, and action was taken to ameliorate the situation in Parliament. Often, the chimneys were hot because they were on fire, and the children were sent up to put out the flames. Their masters would commonly leave

calling cards at peoples' homes that quoted the phrase "Little boys for small flues". The flues to ovens and coppers were often less than 9 inches square. The minimum age was fixed in 1788 at 8 years old. It rose to 10 years in 1834, and 16 years in 1840.

A similar pattern of first fixing, and then increasing the minimum age for work occurred in other sectors. For example, in **textile mills** the minimum was set at 9 years old in 1833, and 10 years in 1874. For **underground mining**, the minimum age was 10 years in 1842 (with girls and women prohibited); 12 years in 1872, and 13 years in 1900.

In due course, this fixing of minimum ages for certain types of work on the domestic level in developed countries formed the basis of international standards. Four of the first 10 ILO conventions, dating from 1919-1921, dealt with child labour and the minimum age for work in particular sectors such as agriculture, factories, and shipping.

The general thrust of child labour regulation on both the domestic and international levels, therefore, has always been concerned with setting minimum ages for particular types of work, and regulating the hours of work. In the second half of the nineteenth century, with the introduction of universal compulsory education in developed countries, labour standards developed in tandem with state education requirements, and this linkage continues to be characteristic of this area of law.

2. Regulation of child labour in New Zealand

In a developed country like NZ, child labour is generally not considered to be much of a problem, and normally it isn't. Moreover, the move towards greater rights for children acts as a catalyst to give children the choice to work if they wish to with as little regulation as possible.

Many children in New Zealand work nowadays, and although we don't know a lot about it, it generally seems to be a positive experience. Children work on farms, in convenience stores, fast food restaurants, and on the streets delivering advertising and newspapers. Instilling the work ethic and a sense of responsibility and autonomy in children is thought to be a good thing. Moreover, in our consumer society, children themselves are eager to earn the money to buy what they want or think they need, and this takes some financial pressure off parents. In some cases, families may depend on the extra contribution of their children's work to make ends meet.

Child labour is often performed in the context of family-based work. This sort of work tends to be invisible. There was a NZ case from the mid-1980s where a family sorted and counted laundry pegs and packed them into plastic bags at home. That situation only came to light because the family had not been paid, and a labour inspector took a case on their behalf. But they lost, since they were found not to be employees.

The situation in NZ is that child labour is very loosely regulated, and it is out of step with ILO standards. But there are real practical, social, and political obstacles in the way of raising standards.

It won't take long at all to sum up the rules regulating child labour in New Zealand today, since there are so few.

There is no minimum age for employment in New Zealand. Our labour legislation defines an employee as "any person of *any* age". Similarly, there is no minimum age for a self-employed person or anyone else who performs work. In our system of law, as long as you understand what you are doing, you can enter into a valid contract.

At present, child labour is principally regulated by a combination of education and health & safety legislation.

The **Education Act 1989** (s 30) requires children to attend school until age 16. It prohibits the employment of children under 16 during school hours or when it would interfere with their attendance at school.

Health & safety legislation is also relevant (**Health & Safety in Employment Act 1992 & regulations**):

- This generally requires that persons under 15 should not undertake hazardous work, and it singles out construction, logging, working with machinery, and the manufacture of goods;
- Persons younger than 15 also may not operate or ride on a tractor or other vehicle, but children over 12 are exempted where the tractor is being used for agricultural work, and the young person has been fully trained. As a sidenote here: it has always been particularly difficult to regulate childrens' work on farms and orchards in NZ. It wasn't until 1936 that the Agricultural Workers' Act prohibited the employment of children under 15, but this law didn't apply to the farmer's own children.
- Another limitation is that persons under 15 may not be employed between 10 pm and 6 am.

These regulations, however, only apply to young people who work as employees, and not in any other capacity, such as a contractor. For people who are not employees, there is merely the general obligation that workplaces should be safe and that any hazards should be eliminated or mitigated.

There is also legislation that provides minimum ages for entry into some types of work (such as prostitution & working in pubs: 18 years).

The hours of young peoples' work tend to be much more closely regulated overseas. NZ merely has the general guideline that work hours should not be such that they endanger health & safety, and in the case of young people 15 and under, the hours should not interfere with school attendance. This general standard does not take into

account whether the young person will be tired at school or have time for homework or be able to take part in school cultural or sporting programmes.

There was a recent news story in my local area about several school-aged staff at a McDonalds working 22 and 23-hour shifts because of under-staffing. It was also alleged that staff were told that they would be sacked if they refused to stay on after a shift. McDonalds said that they would look into the allegations. But even if this story is true, McDonalds may well not have broken any laws because of the lack of regulation over young people's hours of work.

3. What do we know about child labour in New Zealand? Not a lot.

Aside from the occasional news report, such as the McDonald's story, or a newspaper story a couple of weeks ago about a 6 year old girl who was run over by a car as she was delivering advertising pamphlets -- we actually have very little information about child labour in New Zealand. Traditionally, a lot of child labour takes place in the informal sector. We do know that young employees tend not to know very much about their legal rights. Very few young people access the DoL's information and complaints services.

What should be our two best sources of information are not helpful.

Firstly, the NZ census does not collect information about the employment of children under 15. Instead, the form asks children to skip all of the job and income related questions and go to the end of the form and sign it. This contrasts with the 1891 and 1901 census, for example, when wage earners under 15 were picked up and sorted by sector of activity.

Secondly, there is no useful information to be obtained from the tax Department either. In theory, it should be possible to get an idea of the extent of child labour through tax statistics. But employee tax does not have to be deducted from children's wages because the tax department has a children's (under 16) tax threshold of \$2,340 (\$45 per week), which virtually all children fail to exceed given the small amounts of money they make (under 16s can make anything from about \$1.50 an hour on up, normally about \$4/5 per hour). For the same reason, there are no records of accident compensation programme deductions or levies. This means that child workers are invisible to the tax system and the collection side of the workers insurance system.

There have been several school-based surveys. The surveys indicate that many children worked for family members, and that they are more likely to attend medium to high decile schools (ie, they would tend to be the better off kids). Most spent their income on themselves. A very small proportion (less than 10%) contributed their income to their families.

Because these surveys have been made on the basis of children who are in school, this is already a self-selected group. History has shown that the kind of children who

perform labour of the economic exploitative kind are difficult to identify and assist. It was recently reported that 30,000 NZ children are truant in any given week, and that there are about 6,400 children who should be enrolled who aren't, but we don't know to what extent work responsibilities are behind these figures, but work has been cited as one factor in some of these absences.

One example of an invisible group of child workers nowadays are carers: those who look after family members who may be physically or mentally ill or incapacitated. In Britain, one study indicated that there are tens of thousands of such child workers, the average age of which is 12. 86% were of compulsory school age, and over half were between the ages of 11 and 15. Over 20% of these children were missing some school, and many more were hampered in their schoolwork by their duties at home, which included looking after younger siblings, or providing physical assistance and care for other family members.

So, there isn't any accurate "front end" information about how many working children there really are out there.

Another approach is to look at some "back end" figures: information that shows up on official records from work-related accidents. This does not tell us how many children are working, but it does indicate that some of the children who do, are sometimes performing hazardous work.

Again, finding the figures is a frustrating exercise. It's not possible to say with much certainty how many children are actually injured in workplace accidents because no one keeps accurate track of the figures, and it is widely accepted that there is under-reporting anyway.

There was an under-15 child work-related fatal injury study done at our local university in 2004, which covered the years 1985-1998. That study used information from the Ministry of Health national mortality database. Over the period being studied, there were 12 fatal work accidents for children (an average of nearly one per year): 9 worked as farm labourers (the most common scenario was riding a motorbike while shifting stock); one child was delivering newspapers; and 2 worked as street milk vendors. Two thirds of these workers were 10-14 years old, one third were under 10.

There are several other categories of information that can be looked at.

Firstly, there are the figures kept by the Occupational Safety and Health Service of the Department of Labour (OSH), but this only covers *reported* accidents. Employers are supposed to notify OSH of all cases of serious harm in the workplace, but this does not always happen. There is also a systematic bias against notification of young peoples' injuries because of the type of work they tend to do. In addition, young people are less likely to report workplace accidents on their own or seek assistance. This is partly due to young people being less aware of their rights, but also because

they may have been told not to. I've heard of several instances where young people in fast food outlets were told not to report burns from deep fat fryers.

The OSH data is also not very useful because of its poor quality. There are 5-6,000 notifications of serious work-related accidents every year, and fewer than 4% of these are recorded as being for workers under 18. However, the data entry error rate is greater than 4%, which swamps the information on young workers. In many cases, the worker's age is recorded as 0, 1, or 2 years old, which, one hopes, is obviously incorrect.

Therefore it is difficult to draw statistically significant conclusions from the OSH data. At best, the information is indicative. The sector with the greatest number of serious accidents is the agricultural sector, and the group with the highest incidence of serious harm is the 16-18 year old age group. The Department of Labour accepts that they know very little about injury rates for workers under the age of 15, and that the information that they do have indicates that young workers as a group are injured at a higher rate than older workers.

There have been 3 prosecutions under OSH regulations since 2004 involving young people: all involved 14 year olds. Two of these related to operating machinery. There are also records of OSH investigations of fatal work-related accidents, and as indicated by the Otago study, there is about one fatal accident per year involving workers under 16: last year, a 12 year old boy helping his father with a rubbish collection was run over by the truck; the year before, a 15 year old was crushed by a tractor; the year before that, a 12 year old was crushed by an ATV; and the year before that, a 15 year old riding on an ATV hit a fence and died.

Finally, there are accident compensation work-related injury figures. There are two classes of statistics here.

First, there are those where the claimant receives weekly compensation for lost earnings or rehabilitative costs such as wheel chair ramps and the like (this is for the more serious injuries). The statistics indicate that:

- for the 9 and under age group, there are no more than about 10 children per year receiving these kinds of entitlements;
- for 10-14 year olds, there are on average about 15 children per year; and
- for 15-19 year olds, we start to get between 1-2,000 young people per year.

There is also another set of statistics for work-related injuries where only medical fees were paid, such as a visit to a GP. These statistics indicate about 300 injuries for 14 year olds and under per year.

Because we have no data for the total number of children who work, it's impossible to make any comparisons between the injury rates of under 15 year olds and other age groups, or between NZ and other countries. Overseas data suggests that the injury rates for younger workers tend to be higher than for other groups.

4. Areas of non-compliance with ILO 138 by New Zealand

Current NZ law does not comply with ILO 138 in several key respects.

The ILO standards apply in terms of 3 separate age groups:

- Under 13s
- 13-15s
- 16-17s

The chief problems with current NZ law are that:

- there is insufficient regulation of the minimum age specified for entry to various kinds of work according to their appropriateness for the different age groups. There is no minimum age for admission to work generally. The only limit is a de facto limit on full time work before the school leaving age, which is 16 (which is fine, since the minimum age under Convention 138 is 15 for developed countries).
- Moreover, the minimum legislative settings that do exist are off the international standard, and are principally aimed at employment relationships only, as opposed to all work done by children in any capacity. New Zealand health & safety law deals with young people in two groups: those 14 and under, and those 15 and over, in contrast to the three age groups that are treated differently under Convention 138.
- New Zealand also has not explicitly regulated the work of children under the age of 13. There are no particular restrictions on work by this age group. Under ILO 138, work by under-13s is very closely regulated, and work by 13-15 year olds is limited to “light work”, which NZ has not regulated for. Moreover, there is a need to beef up protection for workers who are 16 and 17 years old [The desirability of this is supported by the NZ figures that show that workers in the 15-19 age group have a high accident rate]
- Finally, there is a lack of regulation over key aspects of working conditions such as maximum hours of work per day or week. Only now is legislation being enacted to make some minimum legislative provision for meal and rest breaks for all workers.

5. Concluding observations

The current position is that the New Zealand government is continuing to consult with ILO head office as to what NZ needs to do to comply with ILO 138. There are a number of sticking points. NZ wants the Committee of Experts to see if there is some way around some of the clear obligations of ILO 138. NZ would like to persuade the

ILO to change the way it has applied the Treaty in the past so that it can achieve universal ratification. But if New Zealand is to ratify this Convention, it looks like it will have to make some changes to its current law.

One might question whether NZ needs to ratify Convention 138. The main consequence of not ratifying it is that there will be continued pressure in the form of bad reports from the ILO and other UN treaty bodies. NZ could weather such storms, like a number of other countries do (the US and Australia are prime examples), and it will only be the thin-skinned who are bothered by it.

Given NZ's present treaty commitments, however, it would be the responsible thing to ratify ILO 138. It could be argued that if countries like NZ do not comply with international labour standards, how can the international community expect countries such as India, Thailand and Indonesia to comply with them?

Non-compliance with ILO 138 also does not sit well with the NZ government's stated (2001) policy of integrating fundamental labour standards into its trade agreements. It is current New Zealand policy to promote compliance with the ILO's core labour standards as set out in 8 fundamental ILO conventions, which include ILO 138. If New Zealand is not itself compliant, this runs against the policy that it proposes to apply to our trade partners.

The decision whether or not to further regulate child labour in New Zealand is ultimately a political decision, and it won't be a vote getter. It will be viewed by many as an unnecessary constraint on what young people can and cannot do, and this view is probably fair enough as far as most situations of work by children are concerned. History has shown that New Zealanders do not like regulation in this particular area, and experience around the world has shown that child labour is very difficult and cumbersome to regulate.

As far as NZ goes, there is not enough available information to determine whether there is actually a child labour problem there, so a starting point should be the more systematic gathering of data. It is probably premature to conclude with confidence that NZ doesn't have a child labour problem. The NZ government does not seem very keen to confirm whether or not there is a problem in this area. What is reasonably certain, however, is that in a country with a population of 3.5 million, one child each year *will* die from a workplace accident (probably in the farming industry), several hundred will be seriously injured, and the working hours of many will be interfering with their educational development. The assumed consensus, however, seems to be that this is an acceptable price to pay for allowing children to work.