

(1) Submitting Organisations

The International Centre for Trade Union Rights (ICTUR) was founded in 1987 in order to defend, extend, and raise awareness of trade union rights and their violations worldwide. ICTUR has consultative (roster) status with the UN ECOSOC and it is accredited to the ILO Special List of INGOs, since 1993. ICTUR publishes: *International Union Rights* journal; the *World Map of Freedom of Association*; and the reference book *Trade Unions of the World*.

The New Zealand Council of Trade Unions *Te Kauae Kaimahi* (NZCTU) brings together over 320,000 New Zealand union members in 30 affiliated unions and is the united voice for working people and their families in New Zealand. The goal of the New Zealand trade union movement is to improve the lives of working people and their families. The role of the NZCTU is to promote unionisation and collectivism through programmes of active campaigns. The NZCTU exists to unite democratic trade unions, to enable them to consult and co-operate with each other for the common good, and to help achieve the agreed aims and objects of the NZCTU by acting in unison and in accordance with democratic majority decisions.

(2) Our concerns

Our primary concerns with respect to trade union rights in New Zealand are:

- **failure to ratify ILO Convention No. 87 on freedom of association, and ‘reservations’ against freedom of association under the ICCPR and ICESCR.**
- **Under the 2008 – 2017 National Government, legislative measures to undermine collective bargaining and to fetter the right to strike in New Zealand were implemented.**

We also wish to raise the following human rights concerns:

- **failure to ratify ILO Convention No. 138 on child labour (minimum age), and Convention No. 169 on the rights of indigenous and tribal peoples**

And by the following:

- **The maintenance of a punitive social welfare system.**

(3) International Human Rights Obligations

The Universal Declaration of Human Rights makes it clear that “everyone has the right to form and to join trade unions for the protection of his interests” (Article 23(4)). In addition, under various international treaties, New Zealand has accepted further obligations to implement and respect trade union rights. New Zealand is a founder member of the International Labour Organisation (“ILO”), since 1919, and has ratified 61 international labour Conventions including ILO Convention No. 98 on the Right to Organise and Collective Bargaining (1949). New Zealand has not ratified Convention No. 87 on Freedom of Association (1948), however, obligations to uphold freedom of association arise in respect of New Zealand’s membership of the ILO.

In 1978, New Zealand ratified both the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”). The ICESCR obliges State parties to ensure the right to form and join trade unions of their own choice, including at national and international level. It further states that trade unions have the right to function freely and to take strike action (Article 8). The ICCPR stipulates that, “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” (Article 22). Although New Zealand ratified both of these instruments, it did so with reservations to these specific Articles, which remain in place.

Concerning the three other main elements of the ILO’s ‘core’ human rights framework (each of which is supported by two ‘fundamental’ conventions) New Zealand has ratified 5 of the 6

relevant instruments. It has ratified both of the relevant instruments on forced labour, and both of the relevant instruments on equality and discrimination. It has also ratified Convention No. 183 on the Worst Forms of Child Labour. It has not, however, ratified ILO Convention 138 on Minimum Age. There is also a reservation on the United Nations Convention the Rights of the Child (UNCROC) relating to the age at which children in New Zealand are permitted to be in employment.

With respect to the rights of indigenous and tribal peoples, New Zealand historically ratified four ILO instruments, however, all four were abrogated by decision of the 2018 International Labour Conference and are thus no longer in force. The modern ILO framework now emphatically rests on ILO Convention No. 169 on Indigenous and Tribal Peoples, which New Zealand has not ratified.

(4) Previous UPR cycle

Within the previous UPR cycle:

Concerning **freedom of association**, the New Zealand Council of Trade Unions called for New Zealand to lift its reservations on Article 22 of ICCPR and article 8 of ICESCR and seek ILO's assistance in ratifying ILO Convention No. 87 on Freedom of Association. The Human Rights Foundation of Aotearoa New Zealand similarly called for the ratification of Convention 87. The summary of treaty body reports presented to that cycle also noted that New Zealand had been encouraged to 'consider withdrawing its reservation to ... article 8 of ICESCR ... and all other reservations to ICCPR'.

Several countries raised various concerns around law and practice concerning the protection of **children's rights and the lack of a minimum age for work**. On children's rights generally, Australia called on New Zealand to 'continue its efforts to protect the rights of the child and reduce child poverty and violence'. The NZCTU argued for the assistance of the ILO to be sought with a view to beginning 'a process for the ratification of ILO Convention No. 138, Minimum Age Convention'. The Equal Justice Project also recommended enactment of a minimum age of employment for children, 'thereby allowing ratification of ILO Convention No. 138'. The summary of treaty body reports similarly noted that New Zealand had been encouraged to consider ratification of Convention No. 138.

New Zealand was also urged to take steps to improve the situation of **indigenous peoples**. Nicaragua, Norway and Ecuador specifically called on New Zealand to ratify ILO Convention No. 169. At the mid-term review of the UPR, the NZCTU also expressed the view that New Zealand should ratify Convention No. 169. Edmund Rice International similarly urged New Zealand to ratify ILO Convention No. 169. The summary of treaty body reports also noted that New Zealand had been encouraged to consider ratification of ILO Convention No. 169. Under the review process New Zealand responded that it 'will not ratify conventions or apply international standards that are inconsistent with New Zealand's unique legal, constitutional, and Treaty of Waitangi arrangements'.

Eight countries called for action to protect **migrant workers** and urged New Zealand to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The NZCTU reported 'increasing numbers of reports of the abuse of migrant workers in New Zealand and evidence that migrant exploitation is growing' and called for the ratification of ICRMW. The Human Rights Foundation of Aotearoa New Zealand called for the ratification of ICRMW. New Zealand responded that it was 'not considering ratifying the ICRMW'.

Overall, the New Zealand Government responded to the previous review by acknowledging that the UPR process had been a useful tool 'to take stock of remaining on-going challenges'. The Government reflected that New Zealand had a human rights record to be proud of, but must continue to do more. Submitting organisations broadly share this analysis, but call for urgent steps to bring New Zealand within key international law frameworks.

(5) Freedom of association

New Zealand, for decades, had a historically different approach to trade union rights from the freedom of association model in the international human rights system. Its opposition to the international model was made clear right from the outset – from the drafting stages of the Universal Declaration of Human Rights. New Zealand believed that its 1930s-era compulsory trade union system would be incompatible with the post-war liberal 'freedom of association' model under the international human rights framework. New Zealand believed that its model was stronger, and held this position consistently, for decades, on a matter of clear principle.

But times change. We note that the reservations were specifically worded to apply to 'existing legislative measures' in 1978. And we recall that New Zealand's compulsory union membership system ended nearly thirty years ago. Within the ILO, freedom of association has also changed – it has been elevated to the position of 'fundamental' right or 'core' labour standard. For these reasons New Zealand's once principled stance in relation to this instrument can no longer be sustained on any consistent or progressive grounds. Non-ratification of ILO Convention No. 87 for a country with a historically strong record on workers' rights has simply become an embarrassing anachronism.

The NZCTU has called on the government to provide a full assessment of any barriers to ratification of the Convention and to provide a plan for overcoming these barriers and moving towards ratification. New Zealand is one of only 33 states, and only 3 OECD members, who have not ratified the Convention. The non-ratification of the Convention by the New Zealand government sends the wrong message about New Zealand's commitment to freedom of association and the protection of that right.

Despite international obligations to promote freedom of association and collective bargaining, the New Zealand government has made regressive policy moves since the last periodic report. Following a protracted parliamentary process and widespread public opposition, the National Government passed the Employment Relations Amendment Act 2014 ('the Amendment Act') through its final stages in late October and early November 2014. The Amendment Act breaches New Zealand's obligations to promote freedom of association and collective bargaining in a number of ways which are identified in the next section.

(6) Legislative undermining of collective bargaining and fettering the right to strike

The Employment Relations Amendment Act 2014 breached Convention 98 Right to Organise and Collective Bargaining in a number of ways:

- Removal of the duty to conclude a collective agreement;
- A sixty-day period where parties cannot reinstate bargaining without agreement creates undue delay in negotiations and restricts strike action for a 100-day period (because industrial action cannot be commenced for 40 days after bargaining is initiated);
- Effective removal of the right to strike in support of multi-employer bargaining; and
- Unnecessary obstacles to and disproportionate deductions for taking strike action are a breach of the right to strike.

Taken as a whole, the Act was regressive and failed to promote collective bargaining. The changes were condemned by the ITUC and New Zealand's Human Rights Commission. The Human Rights Commission noted that in light of the fact that New Zealand's labour market is one of the most deregulated in the developed world "it is difficult to understand the justification for deregulating the New Zealand labour market even further, while at the same time breaching international obligations to protect employee's rights.

Removal of duty to conclude a collective agreement and applications to conclude bargaining

The Amendment Act fundamentally changed the orientation of collective bargaining. Before the passing of the Amendment Act, s 34 of the Employment Relations Act 2000 and associated case law provided that, despite a genuine belief by the employer that a stalemate had emerged on the issue of remuneration, they could not unilaterally declare the bargaining at an end while "circuit-breaking" options remained to the parties (such as facilitation under sections 50A-50I of the Employment Relations Act 2000).

The 2014 Amendment Act provided for unilateral termination of bargaining, with potential serious negative consequences for unions and their members engaged in bargaining.

New sections 50K – 50KA in the Act provided that if a party wishes to have bargaining declared over, then they may apply to the Authority for a declaration that bargaining has concluded under a process introduced by the Amendment Act. If the Authority agrees that bargaining is not progressing, they must make a declaration that bargaining is over. This commences a sixty-day period where the greater obligations of good faith in collective bargaining come to an end along with any existing collective agreement. Because industrial action may only be taken while bargaining continues and forty days after the initiation of bargaining, termination of bargaining effectively creates a 100 day ban on industrial action in support of a collective agreement.

These changes are fundamentally against New Zealand's commitments to promote collective bargaining. They also mean that the parties spend a lot more time anticipating, preparing for and appearing in legal challenges than actually bargaining.

Pay rates in collective agreements

New Zealand has recently experienced employers arguing that collective agreements do not need to contain wage rates. Unions had to seek recourse to legal action to enforce the ability to have pay rates in collective agreements, as evidenced by the Employment Court case of *First Union Inc v Jacks Hardware and Timber Limited* and the Employment Relations Authority case of *New Zealand Public Service Association Te Pukenga Here Tikanga Mahi v Lieutenant General Tim Keeling – Chief of New Zealand Defence Force*.

In the *First Union* case, the Employment Court determined that the employer's choice to refuse to bargain matters of pay and insistence that all remuneration should be set unilaterally with individual employees and not collectively, amounted to an opposition in principle to bargain wages and it was not a genuine reason to not conclude the collective agreement.

However, in the recent case of *New Zealand Public Service Association* case, the Authority also confirmed that unions are entitled to have a discussion about how wages are to be agreed, but noted that this did not mean that a scale will ultimately be included in a resulting collective employment agreement.

In order to address the issues raised by these cases, the Labour-led Government, elected in 2017, proposes to introduce legislation to require pay rates to be included in collective agreement. The NZCTU is consulting with the Government regarding these provisions.

Opt out of multi-employer collective agreement negotiations

Sections 44A, 44B and 44C of the Employment Relations Act 2000 (inserted by the 2014 amendment Act) permit employers presented with a notice initiating collective bargaining including both them and other employers to write to all parties within 10 days discontinuing their participation in the bargaining. No reason for doing so is necessary.

The effect of these sections is to allow an employer who receives a notice initiating bargaining for a multi-employer collective agreement ('MECA') to opt out of the bargaining by writing to the other parties to the collective agreement within 10 days of receiving notice of initiation of bargaining. A valid opt out notice will bring bargaining to an end for that employer and the union(s) or employer may reinstate bargaining.

As the Department of Labour identified in their initial regulatory impact statement this provision is clearly in breach of Conventions C87 and C98. Allowing employers to opt out of MECA coverage denies workers the opportunity to bring bargaining leverage (including industrial action) to bear on the question of employer coverage.

The restriction on strike action in support of multi-employer bargaining was one of the grounds criticised by the Committee of Freedom of Association ('the CFA') in the previous case brought by the New Zealand Council of Trade Unions ('the NZCTU') against the New Zealand Government.

In the Department of Labour's initial 'Regulatory Impact Statement: Improving how collective bargaining operates' at [42] and [43] the Department noted:

This proposal will likely be seen by unions as being inconsistent with the statutory objective of the Act to promote collective bargaining and International Labour Organisation (ILO) Convention 98 on the Right to Organise and Collective Bargaining, which New Zealand has ratified. While ILO Convention 98 does not contain any express prohibition on employers opting out of multi-employer

contain any express prohibition on employers opting out of multi-employer bargaining, unions may argue the proposal undermines the Convention's intent to encourage collective bargaining. It is therefore possible that New Zealand would face some form of examination in the ILO initiated by unions under the supervisory mechanisms for compliance with International Labour Conventions.].

In their submission on the Bill, the Human Rights Commission was rightly critical of the failure of the Minister and officials to engage with the question of whether the changes did in fact breach the Conventions (rather than the risk that unions might take action):

The 2012 Cabinet paper advises Cabinet that unions may initiate action in the ILO and this process could be fairly public, lengthy and resource intensive. The point being made is not whether the proposed changes are compliant with international obligations, as required in the Cabinet manual, but rather the risks associated with unions raising non-compliance at an international level. The Regulatory Impact Statement prepared by the then Department of Labour takes the same approach. The duty imposed on the Minister (and presumably if they are in agreement the view of officials advising the Minister) is to advise the Cabinet of the Minister's view of New Zealand's compliance with its international obligations. The paper, in order to comply with the Cabinet Manual should state whether the view of the Minister is that the proposals comply or do not comply with international obligations. The Minister may point out that others might disagree with his assessment but he must make the assessment. That assessment has not been made in the Cabinet Paper.

Disproportionate pay deductions for partial strikes

The Amendment Act adds a new framework permitting employers to make pay deductions for partial strike (at ss 95A-95H). Two particular aspects of this framework are objectionable from a freedom of association perspective. First, the definition of strike goes far beyond the traditional definition of 'withdrawal of labour' and second, deductions for partial strike action may be disproportionate to the action taken through the levy of a flat 10 percent deduction.

Film Production Workers

The Employment Relations Act 2000 was amended in 2010 so that workers engaged in film production work are considered to be independent contractors rather than employees, unless they have a written employment agreement that provides they are employees. This amendment effectively removed all film and television workers from a direct employment relationship. The NZCTU identifies that, as a result there are questions concerning their right to bargain collectively, as several employers have argued that the negotiation of standard terms is prohibited by the Commerce Act, 1986 on price-fixing grounds.

Conclusion

With the election of the Labour-led Coalition Government in late 2017, the Government has introduced legislation to the New Zealand Parliament to overturn the majority of the retrogressive measures with respect to the right to collectively bargain and some of the measures with respect to the right to strike. Additionally the New Zealand Government has established a tripartite working group to overturn the restrictions on the right to collectively bargaining for film production workers. As at the date of reporting, those processes are underway.

(7) Child labour

New Zealand principally cites its lack of a domestic statutory minimum age restriction for employment as the reason for its failure to ratify ILO Convention No. 138. This is, of course, utterly insufficient as an explanation. Convention No. 138 is now one of the ILO's 'fundamental' conventions, and New Zealand can and should ratify the convention; like more than 90 percent of other ILO States have done. While several other non-ratifying States are very small or have high levels of poverty and under-development, New Zealand is one of only a very small number of wealthy, industrialised countries not to have ratified the Convention. Its failure to do so is shameful and should be addressed at the earliest opportunity.

(8) Indigenous and tribal peoples

From 1936 – 1955 New Zealand ratified four ILO instruments concerning indigenous peoples. These instruments established an outdated framework, which was abolished by decision of the International Labour Conference in June 2018. Since New Zealand has not yet ratified the ILO's Convention No. 169, the country is now entirely outside of the ILO framework on indigenous peoples' rights. This position is difficult to equate with modern New Zealand's political culture, in which a series of generally positively received actions have been implemented to address historic injustices and to improve opportunities for indigenous peoples. These laudable developments ought to be matched by ratification of Convention No. 169, as a matter of urgency.

Māori, the indigenous people of New Zealand, are significantly represented in the trade union movement. The NZCTU recognises Te Tiriti o Waitangi (The Treaty of Waitangi, signed between Māori leaders and the British Crown in 1840) as the founding document of New Zealand and formally acknowledges this through the structure of Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (NZCTU), representing approximately 60,000 Māori workers.

In its 2017 submission to the 93rd session of the Committee on the Elimination of Racial Discrimination, the NZCTU raised a number of issues of concern to Māori workers, including disparities in health and safety at work and pay equity. The NZCTU raised concerns that Māori education and health workers employed by Māori and iwi (tribal) organisations receive unequal pay for work of equal value as a result of discriminatory government funding arrangements. In its concluding observations, the Committee stated it was 'concerned by reports that qualified Maori nurses receive significantly lower pay' and requested the New Zealand Government to provide 'additional information on programmes undertaken to ensure effective implementation of the principle of equal opportunity and treatment in employment, without distinction as to race, colour, descent or national or ethnic origin'. The Committee also encouraged the New Zealand Government to consider ratifying ILO Convention 169.

(9) Migrant workers

We note that New Zealand has ratified ILO Convention No. 97 (Migration for Employment Convention (Revised)). We urge the government to take steps to ratify also its counterpart Convention No. 143 (Migrant workers (Supplementary provisions)). And we call on the Government to ratify the ICRMW.

In the concluding observations of the 93rd session of the Committee on the Elimination of Racial Discrimination, the Committee stated:

...the Committee is concerned by reports that migrant workers risk being subjected to labour discrimination and exploitation, including through receipt of salaries below the minimum wage. The Committee is also concerned about the exploitation of international students.

The Committee recommended that the New Zealand Government 'take appropriate and effective measures to ensure equal opportunity and equal treatment for migrants in employment' and 'consider ratifying the [ICRMW]'

The NZCTU has reported continued concerns with exploitation of migrant workers. The New Zealand Government has signalled its support for action to eliminate labour exploitation, including by increasing resources and staffing for the Labour Inspectorate. However, further action is needed, including reviewing immigration policies and regulations to remove barriers for migrant workers reporting abuses of their rights.

(10) The Maintenance of a Punitive Social Welfare System

Although New Zealand has universal social security coverage for all residents and children, subject to qualifying criteria, New Zealand currently does not guarantee the human right to social security. By way of example, the New Zealand Government applies a sanctions regime to benefits with the effect of removing the right to social security from some persons, including children.

In 2012-2013, the National Government significantly reformed New Zealand's social security system and introduced sanctions for non-compliance with new punitive requirements to access welfare. The Social Security Act 1964 contains this sanctions regime for non-

compliance with 'reciprocal obligations'. Under the Act, the Chief Executive of the Department of Social Development, through its social security service agency, Work and Income New Zealand (WINZ), can reduce, suspend, or cancel the benefit payable to the beneficiary.

Sanctions can be imposed for failures related to work readiness, relationship status and, worryingly, for failure by a sole parent to inform WINZ of the name of the other parent of their child, which disproportionately affects single mothers.

By way of example, s117 of the Act outlines sanctions that may be imposed for failure to participate in a work readiness test including for a first failure, 50 percent until the person re-complies. Thereafter, if the person has not re-complied within 4 weeks, the benefit is cut by a further 50 percent making a 100 percent reduction until the person re-complies. For a second failure, the benefit can be suspended and for a third failure, cancellation of the person's benefit.

Section 70A of the current Act (and sections 176 – 178 of the 2017 National Government proposed Rewrite Bill) impose sanctions on sole parents (mothers in 97.7 percent of cases) who fail to identify who is in law the other parent (fathers in 97.7 percent of cases) of their child. As at May 2016, the rate of the sanction was \$22 per week, per child for the first 13 weeks, then rising to \$28 per week. As at the end of March 2016 there were 13,616 parents and 17,087 children in New Zealand subject to the sanction, amounting to 17.7 percent of the working age sole parents who are receiving Job Seeker or Sole Parent Support from WINZ.

The sanctions amount to 6.7 percent of the current Sole Parent Support benefit net rate for the first 13 weeks, and 8.6 percent after the sanction has been in place for more than 13 weeks. 97.7 percent of those whose benefits are sanctioned are women and (52.8 percent) of those affected are Māori. As the sanction is cumulative, there are a considerable number of sole parents who are sanctioned for more than one child – 2,768 nationwide as at the end of March 2016, accounting to \$44 or more per week. This adds to their poverty and means more children going without basic essential needs. The New Zealand Government has confirmed in its response that as at June 2017 there were 57,217 people receiving sole parent support, with sanctions applied to 3,414 of those people. Exemptions from this sanction can be obtained, but are often out of reach of beneficiaries, such as obtaining a statement for a legal representative that the child is at risk of violence or the child was conceived as a result of incest or sexual violence. Furthermore, the proposed sections 176 and 178 contained in the Rewrite Bill move the rates of these sanctions out of legislation and into regulations made under section 397(1)(h) by Order in Council, further limiting administrative protections and potential judicial oversight.

There is no official information or monitoring of the effects of these sanctions, or any evidence of behavioural change. In their work, *Penal Welfare: What it Does, and Why We Should Change It*, Hodgetts et al. outline New Zealand's shift from a universal welfare system based on citizenship rights to one that is increasingly targeted and punitive, with the main priority to restrict access to benefits and entitlements. Non-compliance with mutual obligations results in sanctions, such as reduction and /or removal of entitlements, fines and in some cases banishment from the system. Child Poverty Action Group (CPAG), a major anti-poverty advocacy organisation in New Zealand with a particular focus on the plight of impoverished children in New Zealand, in their 2017 report, *Further fraying of the welfare safety net*, refer to a continual dismantlement of key aspects of the welfare 'safety net' regardless of the party in power, constituting a deliberate, methodical, continued and systematic reduction of social welfare and income support in New Zealand. The NZCTU supports the announcement of the newly elected Labour Government (2017) to remove excessive sanctions but has been disappointed with the limited actions taken to achieve this outcome to date.

Migrants on temporary visas or permits are ineligible for social security benefits. This includes temporary migrant workers and their families.

(11) Recommendations

The submitting organisations call on New Zealand to:

International treaties and agencies

- ratify, as a matter of urgency, ILO Conventions No.87 (Freedom of Association and Protection of the Right to Organise, 1948) and No. 138 (Minimum Age Convention, 1973)
- withdraw the Reservations in respect of Article 8 of the ICCPR and Article 22 of the ICESCR
- ratify the optional protocol to ICESCR
- ratify the ICRMW, and the Indigenous and Tribal Peoples Convention, 1989 (No. 169)

Domestic human rights reforms

- continue its programs of reforms to overturn the legislative undermining of freedom of association and the right to strike
- amend the right to freedom of association in the New Zealand Bill of Rights Act 1990 to expressly include the right to collectively bargain and the right to strike in conformity with the law
- include the right to decent work (including the right to gain one's living by work which is freely chosen or accepted) in the New Zealand Bill of Rights Act 1990
- include the right to just and favourable conditions of work (as expressed in art 7 of ICESCR) in the New Zealand Bill of Rights Act 1990
- include other economic, social and cultural rights in the New Zealand Bill of Rights Act 1990
- review the role of the courts, and Parliament, in ensuring rights-consistent legislation
- remove excessive sanctions from the social welfare system
- ensure effective implementation of the principle of equal opportunity and treatment in employment, including for Māori workers
- review immigration policies and regulations to remove barriers to migrant workers seeking assistance and remedies for labour exploitation and other rights abuses

Consultation

- to plan and implement the above reforms in full consultation with the New Zealand Council of Trade Unions