



Low skill temporary migration in New Zealand: Labour market and human rights law as a framework for managing future migration

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Abstract

International labour mobility has been on the rise in recent decades. In many countries including New Zealand, there has been a significant shift from permanent migration to temporary migration in order to meet labour demands in critical sectors. While many of those on the move are highly skilled, globally there is demand for particular types of low skill workers. However, almost all low skill workers who are legal migrants are temporary migrants and the main avenue for regulating the movement of low skill workers internationally has been guest worker schemes or temporary migrant worker programmes (TMWP). There are divergent opinions amongst policy makers and researchers on the merits of circular migration. Some see only negatives impacts for migrant workers: including dependency and exploitation, social exclusion, and irreversible social impacts on their families left behind. Others believe that the current iteration of guest worker schemes can complement both labour demand and development (through remittances, skill transfer and experience). This paper focuses on the host country, that is New Zealand's perspective, and specifically on the human rights and labour law issues that will be relevant for any future expansion of low skill migration to New Zealand. In particular the focus is on low skill caring and related work rather than work in areas such as construction, manufacturing or primary sector industries.

New Zealand's Recognised Seasonal Employer Scheme for seasonal horticultural work, was successfully trialled as a new model of temporary migration. However extending work schemes to activities primarily servicing the needs of people and for work that is generally not seasonal, requires close examination. Temporary migrant workers are particularly vulnerable to abuse and exploitation and their isolation in rural areas or private homes, leaves them detached from the normal checks and balances covering the permanent workforce. Policy design in this area is a balancing exercise and will necessitate some trade off of rights such as family reunification and freedom of movement. However this paper uncovers a gap, notwithstanding the existence of a comprehensive international legal framework on migrant rights, between rhetoric and enforcement of rights in the comparative countries selected for their relevance to New Zealand. Unfortunately a middle ground appears difficult to identify with the reality being that the tap will be turned off when this option becomes too expensive. Ignoring or tolerating irregular migration is not the answer either.

New Zealand can learn from the experiences of other countries but none of the models canvassed in this paper are ultimately preferred. Instead it becomes apparent that the success of Recognised Seasonal Employer Scheme has no further congruence with TMWP for the domestic and care sector. Work involving people, as opposed to products, is not only most problematic from a human rights and labour law perspective, but is also unlikely to fulfil the 'triple win' rationale for the resurrection of the current host of TMWP. Care work for example, necessitates the building of longer term relationships (and understanding of cultural norms of care) and therefore a policy that limits the amount of time a worker is allowed to remain in the country is unlikely to achieve the necessary results. Even if New Zealand favoured migrants from sending states who were actively involved in the training, welfare and protection of their temporary migrating citizens - training, oversight and enforcement in the host country are not straightforward. This paper concludes that the difficult and often more controversial decision to accept that some permanent low skill migration (and the accompanying protections afforded to those migrants) is appropriate and will have to be made. Policy needs to be developed not just from a migrants rights standpoint, but to address demand (which will of course not disappear), continuity of care for the elderly, and similar rights and protections of the clients.

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CONTENTS

I	Introduction	4
II	International framework	5
	<i>Universal rights</i>	
	<i>Migrants rights specifically</i>	
	<i>General Agreement in Trade in Services (GATS)</i>	
	<i>A sliding scale of rights</i>	
III	“Resurrecting” guest worker schemes	12
IV	Low skill labour demand and temporary migrant workers	16
	<i>New Zealand</i>	16
	<i>The demand for temporary labour</i>	18
	<i>Domestic work</i>	19
	The international position	
	Coverage in national employment legislation	
	Best Practice? Canada’s Live-in Caregivers programme	
	United Kingdom – relying on EU labour	
	The workplace as the private home	
	Positive regularisation	
	<i>Care workers for the elderly</i>	28
	<i>Agricultural/horticultural workers</i>	30
	United State of America	
	Canada	
	Learning from others – New Zealand and Australia	
V	Enforcement of rights	35
VI	Conclusion - Issues for policy development in New Zealand	38
VII	Bibliography	40

I INTRODUCTION

The demand for migrant labour is clear. The world's workers are ageing as a result of declining fertility and increasing life expectancy. In addition, the labour forces of most developed countries have been affected by the declining participation of men (due to longer education in the younger age groups and better pensions for older age groups) but rising participation of women. In the short term the labour forces of most industrialised countries are either growing slowly (Australia, Canada and the USA), are stable (most EU countries) or are shrinking (Germany and Japan) (Hugo and Young 2008). However, in the longer term (2020-2030) most are projected to decline. A similar trend is seen in Asia with some countries' labour forces starting to decline in the period 2010-2020 and most by 2020-2030. As such, migration has been posited as part of the solution to essential labour shortages resulting from ageing populations in need of care, the increasing number of women entering the workforce and the national workforce perceiving "low skill" jobs as undesirable for increasingly skilled local workers. Importing labour is generally perceived in terms of employer demand, with migration policies effectively regulating a tap that can be turned on or off according to the requirements of the national labour markets. While those with money to invest or recognized skills are regarded as acceptable (in terms of residency and possibly citizenship) those who are deemed "unskilled" or "low skill" are only admitted temporarily, even though the work is economically essential or socially important. Placements vary in length depending on the nature of the work but are based on the premise that the work will be rotational or circular. Settlement is either prohibited or strongly discouraged in most cases.¹

While guest worker programmes were prevalent post WWII, they fell out of favour as the wider social and economic costs increasingly outweighed the benefits. Today's temporary migrant worker programmes (TMWP) are seen as way of addressing the economic needs of both sending and receiving countries and of the migrants as well - in effect creating a "triple win" situation to the advantage of the host, the sending country and the migrant themselves (Ruhs 2005: 1). While an international framework has developed over the last half century to protect non-citizens, there remains a disjunction between those prescribed rights and the realities that temporary migrant workers must face. In fact, the entire concept of "temporary" labour migration is problematic from a migrant rights perspective, to the extent that enforcement of the temporariness of migrants' stay may involve infringing their human rights and dignity (such as labour licensing arrangements that bind migrants to a single employer in a manner tantamount to enslavement). There are divergent opinions amongst policy makers and researchers on the merits of circular migration.

(Callister et al. 2009)

In exploring the current and potential human rights and labour law issues for temporary low skill migration to New Zealand, the broad spectrum of relevant overseas countries and their responsibilities as receiving countries are revealed. The recent iterations of TMWP in the sectors of agriculture/horticulture and domestic work, including a special focus on home care giving for the elderly, is timely for New Zealand. Many industrialised receiving countries are becoming increasingly reliant on temporary migrant labour, a trend that is expected to continue for the foreseeable future. Ultimately given that the work migrant workers typically perform is the "three-D jobs": *dirty*, *degrading* and *dangerous* (Taran and Geronimi 2002: 3), this paper argues that the temporary migrants have rights under a reasonably comprehensive international framework but that the special host state oversight required to enforce these protections may ultimately prove too costly.

¹ This paper is part of a series of three working papers around the issues of low skill migration. The two others comprise an investigation of domestic work (Paul Callister, Lisa Tortell and Jessie Williams, 2009) ; and one on caregivers for the elderly (Juthika Badkar, Paul Callister & Robert Didham, 2009) . All projects were undertaken as part of the Emerging Issues Programme Low-skill Migration project. Further information can be found on the IPS website: www.ips.ac.nz

The comparative country examples used in this paper have been selected for their relevance to New Zealand: Canada, United State of America (USA), Germany, United Kingdom (UK), Spain, Italy, Australia and Singapore. These mainly liberal democratic states either have had a long history of experience with migrant worker schemes or are new countries of immigration. The USA is included to illustrate that despite publicly promoting the protection of human rights and core labour standards at the international level, it has failed to protect migrant workers in this regard (Linares 2006).²

This paper begins with an overview of the international framework, and a brief history of some of the major post WWII TMWP in Europe and the USA. In Part IV the theoretical rationale behind the resurrection of TWMP today is explored. Next, the demand factor in relation to the impact this has on migrants' rights is addressed before the paper turns to a substantial overview of the three case studies identified above, before addressing the enforcement of rights in order to avoid empty rhetoric. Finally the policy positions that this uncovers for any future expansion of TWMP in New Zealand are summarised.

II INTERNATIONAL FRAMEWORK

Formal citizenship, some argue, is the starting point for any discussion of labour migration, where settlement and family reunification are an option (Papademetriou 2005). Joseph Carens argues that anyone who is de facto a long-term member of the society in question should enjoy the full set of citizenship rights. In other words, the rights should attach to the fact of living in a society, rather than to a person's formal legal status as a citizen (Carens 2008). Traditionally rights of citizenship belong in the first place to those who are full-fledged citizens, their rights being accompanied by extensive legal and/or moral obligations, such as paying taxes, voting, sitting on juries, helping to maintain public order, and so forth. The justification for extending these rights to certain categories of immigrants who do not yet hold formal citizenship status is that they are citizens in the making. They are people whose intention is to stay long term in the country and to contribute fully to it, which will normally involve applying for citizenship at some point after being allowed to enter, depending on the prevailing rules for admission. That being so, there seems to be no unfairness to existing citizens in extending many citizenship rights to these immigrants (health care, schooling, and other social benefits) as a kind of advance payment against what they will later contribute.

This simplistic picture does not reflect the situation of the increasing number of temporary migrant workers (highly skilled as well as low skill) or the undocumented whose entitlements cause much disagreement in the literature. David Miller (2008: 196) argues that "their position is better understood in contractual terms: what rights they get should depend on what agreements they have made (or are in place) before they enter... equally, they are under no obligation to contribute to the society they work in, other than by complying with its laws and rules of social behaviour". Since the 1990s, citizenship has gone through a 'reevaluation' process, and not all immigration is seen as desirable - certainly not the broader significant Pacific immigration to New Zealand seen in the 1960s and 1970s - and accordingly, those who are non-citizens are encountering situations where they are ineligible for certain provision of

² A far bleaker picture could be painted, for example, in reference to the plight of domestic workers in Ethiopia or in the Middle East, but this has little bearing on the New Zealand's governance system or indeed on policy planning for the potential use of temporary migrant workers. The EU is also not discussed here in any detail as immigrants, who are not EU citizens, are by definition excluded from the reach of EC law and while freedom of movement is a crucial aspect to ensure against vulnerability, the EU's regional free movement is not relevant to the island state of New Zealand.

their host state (Jacobson 1997).³ The tie between belonging and rights is no longer clear, instead a professional and economic contributions criteria is applied, along with considerations over the costs of immigration. Therefore much of the debate on the rights of migrants has focused on the legalistic aspects revolving round the existing international law framework for the protection of migrants (Cholewinski 1997; Aleinikoff & Chetail 2003; Satterthwaite 2005).

The international framework cannot be found in a single document, but is derived from accepted customary law and a variety of binding global and regional instruments (EU arrangements for example), non-binding agreements and policy understandings reached by states at the global and regional level. The core is constituted by human rights instruments adopted by the United Nations (UN) General Assembly and those relating to migrant workers adopted by the International Labour Organization (ILO). While there is much work to do in this area, a large array of international standards already exists to provide parameters for the regulation of international migration in such a way as to contribute towards strengthening the rule of law.

Universal rights

International human rights law is grounded upon the premise that all persons, by virtue of humanity, have fundamental rights. These rights are contained in the: United Nations Declaration of Human Rights 1948 (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and UN Convention on the Rights of the Child (UNCROC) among others. These earlier conventions cover individual rights, state responsibility and interstate relations, and while they do not address migrants specifically; they apply to migrant workers and their families just as they do to everyone else.

Human rights are universal, indivisible and inalienable. The UDHR underscores that all people are entitled to respect for their human rights, regardless of their place of residence, status in a country, or state of productive employment. Once a non-national is within the territory of a state, the state must respect and ensure their human rights of “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art 2 and ICCPR art 2(1)). The Human Rights Committee (2004) has emphasised that “the enjoyment of Covenant rights is not limited to citizens of state parties but must also be available to all individuals, regardless of nationality or statelessness... who may find themselves in the territory or subject to the jurisdiction of the State Party”. In extending equal protection of law to all persons, including women, migrants and aliens, article 26 of the ICCPR is vital. All the countries in this paper, with the exception of Singapore and the USA, have ratified the convention and given effect to its rights, therefore legislation within each of these states must be applied to all without discrimination.⁴

³ For example in 1996 changes to welfare legislation in the USA made most noncitizens ineligible for welfare benefits, supplementary security income and food stamps. This reevaluation has also prompted states to sanction dual nationality, a change from the notion of singular loyalty. Jacobson argues that while citizenship has not disappeared as a concept, it has been reframed in terms of utilities and the protections it can provide – a contract in effect.

⁴ As the Human Rights Committee has explained, article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on State Parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principles of non-discrimination [are] not limited to those rights which are provided for in the Covenant.” See Human Rights Committee, ‘General Comment 31, the Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, (New York

Exceptions may be made to universality only in certain circumstances (Committee on the Elimination of Racial Discrimination 1993b: 146). The ICCPR for example contains a narrow exception to equal rights of non-citizens in relation to political rights that are explicitly guaranteed to citizens, such as the right to vote and freedom of movement (arts 12(1) and 25). The Committee on the Elimination of Racial Discrimination (1993a) has said that states can distinguish between citizens and non-citizens but only where this does not have the effect of limiting non-citizens' enjoyment of rights enshrined in other instruments.

Migrants rights specifically

The ILO's vision on formation after WWI is "based on the premise that universal, lasting peace can be established only if it is based upon decent treatment of working people".⁵ The ILO attempted to plug any gaps in the earlier UN conventions through conventions No 97 on Migration for Employment and No 143 on Migrant Workers (Supplementary Provisions). The former was adopted in 1949 and provides the foundations for equal treatment between nationals and *regular* or legal migrants across the continuum of migration: from entry to return. It has been ratified by 48 countries, including New Zealand, Germany, France and the United Kingdom. The principle of equal treatment of migrant workers with national workers is firm in respect of working conditions, trade union membership and the enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the Convention. Further, details for contract conditions, participation of migrants in job training or promotion, and provisions for family reunification are clearly set out. The convention does not however afford protection to *irregular* migrant workers – those without legal status in a transit or host country owing to illegal entry or the expiry of their visa (International Labour Organization 2008b). This group can also include those who violate the terms of their visa i.e. visitors or students working as domestic workers.

Convention 143 was adopted 26 years later at a time when concern about *irregular* migration, including smuggling and trafficking, was growing. It is therefore broader in scope, but has only been ratified by 23 countries. Part 1 sets out the requirements for respecting the rights of all migrants including those with irregular status, while providing measures to end clandestine trafficking and to penalise employers of irregular migrants. The equal protection of irregular migrant workers and their families in the areas of remuneration, social security and other benefits is provided for on an equal basis with regular migrants (art 9(1)). Part II concerns regular migrants and their right to equal treatment with national workers, including some liberal provisions such as the right of migrant workers to free choice of employment after a prescribed period of two years or after the first work contract if less than two years (art 14(a)).

Although there are some provisions in convention 97 that specify more far-reaching rights for migrants and members of their families who have been admitted on a permanent basis, in all other respects temporarily as well as permanently admitted migrants enjoy the same rights under ILO auspices.⁶ With

United Nations, 2004). It is noted however, that the USA's reservations make the ICCPR's virtually redundant at the domestic level.

⁵ See ILO mission statement at: http://www.ilo.org/global/About_the_ILO/lang--en/index.htm

⁶ The approach taken by the ILO has been to exclude certain categories specifically from the protection of one or other instrument. For example, members of the liberal professions and artistes who are given permission to enter for an (undefined) short duration are excluded from both no 97 and no 143 (art 11(2)(b) in both); and persons coming specifically for purposes of training or education from Part 11 of 143 (art 11(2)(d)) as migrant workers, although they are covered by other ILO conventions as workers when they take up an employment relationship. There are also some

very few exceptions, ILO instruments are of general application: *they cover all workers irrespective of citizenship*.⁷ Today many migrants are irregular but the lack of legal status or recognition makes them particularly vulnerable to abuse, exploitation and denial of their most basic human rights. As Patrick Taran argues, being characterised as “illegals” compounds this further, as it infers that they have no legal rights (2000a: 87).⁸

Then in 1990, the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) based on the concepts and language drawn from the two earlier ILO conventions. As the title suggests, this convention deals with the working situation of migrants, entitling them to the same pay, hours, safety considerations, and other workplace conditions that nationals enjoy. This comprehensive document regulates most aspects of international migration and its entry into force on 1 July 2003 was celebrated as a major milestone in the effort to provide human rights protections to migrant workers worldwide. Currently it has been ratified by 41 countries, who are mainly labour supplying states.⁹ Its equal protection provisions are especially strong, since it makes it clear that all migrant workers – regular and irregular, male and female – must be treated equally before the law.¹⁰ Part III lists the human rights of all migrants such as freedom from servitude and freedom of association. In an attempt to discourage irregular migration, Part IV makes provision for additional rights for migrants who are documented such as access to education; vocational guidance; housing; social and health services; liberty of movement in the state; cultural rights; equality of treatment with nationals in respect of protection against dismissal and access to unemployment benefits; the right to vote, be elected and participate in the public affairs of the state of origin; and the right to have a family. Thus the UN’s approach is that all migrant workers, even temporarily admitted ones, should enjoy not only the human rights spelt out in Part III but also the additional rights in Part IV except as otherwise provided for in Part V (see art 57). For example, seasonal workers are entitled to the rights provided for in Part IV that can “be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year” (art 59).

exceptions for project tied migrants – those with special qualifications who go to a country to carry out specific short-term technical assignments (143 art 11(2)(e)).

⁷ With the exception of Article 8 of Convention No. 97 and to some extent Part II of Convention No. 143, the instruments do not make a distinction between permanent or non-permanent migrants. The provisions in these instruments do not depend on reciprocity and also cover refugees and displaced persons in so far as they are workers employed outside their home country. The only exceptions from their scope of application are seamen, frontier workers, and artistes and members of the liberal professions who have entered the country on a short term basis. Convention No. 143 also excludes trainees and employees admitted temporarily to carry out specific duties or assignments from the coverage provided by the general provisions of Part II.

⁸ The ruling of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants in 2003 is a reiteration of international acceptance of this position: upholding that the migratory status of a person cannot constitute a justification for depriving them of the employment and exercise of their rights, including those related to work. See Inter-American Court of Human Rights ‘Juridical condition and rights of the undocumented migrants’ Advisory Opinion OC-18/03, 17 September 2003 In France, the Code du Travail (Labour Code) states that all migrant workers, specifically including those in irregular status, are entitled to wages in conformity with law applying to national workers (art L341).

⁹ <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 11 April 2009). This categorisation is a broad generalisation, for it is noted that many countries are both sending and receiving countries. New Zealand receives migrants but also sends both high and low skill migrants going to Australia. The Philippines, and increasingly Mexico and Morocco, are not just labour providers, but also receivers, as well as significant transit countries. However the list of countries that have ratified the MWC does not include any of the world’s industrialised democracies.

¹⁰ Article 18 provides that migrant workers “shall have the right to equality with nationals of the state concerned before the courts and tribunals.” Article 24 affirms that “every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.”

There has been considerable controversy over the promotion, ratification and implementation of the ILO conventions and the MWC highlighting the tension between a human rights approach to social protection and the increasingly deregulated globalised use of labour. Although there has been relatively widespread ratification of convention 97, there has been less ratification of convention 143 and the MWC. New Zealand has only ratified the first which is also true of many of the receiving countries used as case studies in this paper. None of the major countries of destination have ratified the MWC. While this convention does not actually create new rights, it explicitly extends to migrant those rights set forth in other UN documents and ILO instruments (Weissbrodt 2007: 226). In a few instances however, certain provisions and perhaps the perception that these limit state sovereignty could explain the lack of signatories (Piper and Iredale 2003; Taran 2000a).

In an attempt to produce some consensus, the ILO Declaration on Fundamental Rights and Principles at Work was approved by tripartite delegations from all 176 member countries in 1998. This establishes that all member states, even when they have not ratified certain ILO conventions, are obligated to respect and promote basic rights and principles at work arising from membership in the organization. They must promote “decent work” including: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the elimination of discrimination in the workplace; and the abolition of child labour. These principles are of course already incorporated into the eight core ILO conventions which express in more detail and in a formal legal structure the scope and content of these fundamental principles and rights.¹¹ While these instruments do not specify migrant workers, they are applicable to all, without distinction of nationality and in many cases regardless of migration status. The declaration does however make specific reference to groups with special needs, including migrant workers.¹²

Despite these efforts, there are a number of shortcomings and omissions in the framework that are not addressed in any of the instruments. These have been identified as: the feminization of migrant labour, including the overrepresentation of women migrant workers in vulnerable jobs; the increasingly short term nature of migration which causes precariousness; and the growth of irregular migration, the need to facilitate legal labour migration and to protect migrant workers (Cholewinski 2008).

General Agreement in Trade in Services (GATS)

The World Trade Organization (WTO) has been identified as a possible solution to the shortcomings of the existing framework and has also developed an important set of international provisions governing migration. The “temporary movement of natural persons” - known as Mode 4 - forms part of negotiations under the GATS and applies to people who cross a border temporarily for the purpose of supplying services. GATS does not define “temporary” but WTO members have agreed to periods

¹¹ The following conventions are all ratified by between 140 and 173 countries: The Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), 4 and the Right to Organise and Collective Bargaining Convention 1949 (No. 98), The Forced Labour Convention, 1930 (No. 29), 9 and the Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), 13 and the Worst Forms of Child Labour Convention, 1999 (No. 182). The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Equal Remuneration Convention, 1951 (No. 100)

¹² The ILO’s multilateral framework on labour migration includes the Plan of Action for Migrant Workers decided by resolution of the International Labour Conference in 2004. The ILO’s Decent Work Agenda and the Global Employment Agenda define the framework towards achieving employment creation. ILO standards for the promotion of employment include the Employment Policy Convention, 1964 (No. 122), the Employment Policy Recommendation, 1964 (No. 122) and the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169). They explicitly mention migrant workers.

ranging from a few weeks to three to five years (Dommen 2005). It is not an instrument designed to enable people to cross borders in search of employment but rather, it aims to create a multilateral framework for the predictable provision of skills and expertise in the service sectors. The legal status of the workers is tied to the contract employer or contract bound, so they must remain employed to maintain their legal status.

The inclusion of Mode 4 was the result of developing countries' demands during the Uruguay round. However the focus of Mode 4 discussions has been on skilled workers (accountants, doctors, nurses, and teachers) although the low skill workforce is not excluded. Industrialised countries have sought to protect local labour markets and tightly control migration flows, and as such Mode 4 discussions have been difficult (Dommen 2005). Its scope and impact has been limited by the fact that few WTO members have made commitments in this area and where they have, have placed more limitations on them than on other modes. Even fewer are proposing to expand them in the future negotiations. States are not able to enter bilateral arrangements through GATS because access to particular markets is supposed to apply to all WTO members on a non-discriminatory basis, depriving the host market of the flexibility to choose workers.

This is not to say that Mode 4 cannot protect the human rights of migrants. It could be an important tool as many countries (particular host countries) are members of the WTO framework and collectively the GATS framework could be used to reduce illegal migration and the human rights violations that accompany it. There is a strong argument, offered by the World Bank recently in relation to the Pacific, that seasonal labour migration programmes that target the unskilled have the potential to make a material difference to the wellbeing of significant numbers of workers, their families, and communities. Importantly, as Bob Warner points out, even if negotiations were broadened to liberalise the movement of unskilled workers from developing countries, solely relying on trade negotiations is too narrow a context for addressing temporary low skill migration (2009: 171 - 90). Using GATS for dispute resolution for example would be problematic for sending countries, not least those in the Pacific, where membership of the WTO poses significant institutional challenges (although technical assistance and resources are available).

Mode 4 does not address migration's human dimension. It considers movement of labour essentially in terms of numbers and with reference to purely local situations, as countries limit their Mode 4 commitments to their own economic needs and political priorities. Moreover members are not required to protect labour migrants from violations of basic human rights or to make international commitments in this respect, for there is no reference in GATS to international human rights or labour rights obligations (Howse and Mutua 2000). Absent direct incorporation into the WTO framework, the status of non-WTO human rights commitments is effectively unenforceable in WTO law (Broude 2007: 28). Thus, a labour providing WTO member would not be able to complain against another member for failing to protect the basic rights of service providing labour-migrants as these are outside of economic effect (Panizzon 2005).¹³ This stands in stark contrast to international intellectual property rights protection where WTO members may complain against lax protection of intellectual property rights of

¹³ Except in the case of jus cogens violations that are binding on all States, irrespective of whether a State has directly consented to be bound by it or not and include: the right to life and the prohibition of genocide; the prohibition of slavery or slave trade, murder and causing disappearance of individuals; the prohibition of torture and other inhuman or degrading treatment or punishment; the prohibition of prolonged arbitrary detention; the prohibition of systematic racial discrimination (e.g. apartheid); and the prohibition of consistent patterns of gross violations of internationally recognized human rights; and the prohibition of retroactive penal measures.

their nationals.¹⁴ In sum, as a trade body, the WTO is not the appropriate forum for setting social or labour standards and protecting workers around the world.

A sliding scale of rights

Notwithstanding the international framework including the UN treaty monitoring bodies, clearly stating that migrant workers are entitled with very few exceptions to the same human rights protections as nationals, many vulnerable migrants remain without protection. The plight of migrant workers in terms of their human and labour rights and limited access to legal remedies is exacerbated often by their non-citizen and/or unauthorised status. This reflects the gulf between *rhetoric* and *reality* in guaranteeing those rights to all persons. The problems of rights implementation and enforcement relate actually to all persons not just migrants. As discussed in this paper however, there are difficulties that all migrants experience which are often exacerbated because of specific vulnerabilities linked to their immigration status.

While the UDHR recognises the right of every person to leave any country, including their own and the right of every person to return to that home country, there is no corresponding right to enter or stay or work in another country because no state has surrendered that right under any international treaty. The issue here, is whether one accepts that states have the right to control entry (and by extension, removal) of non-citizens, but also have the right to set differential terms of access to labour markets for citizens and non-citizens after they have entered the territory. States requiring certain things of legally resident work visa holders is perfectly acceptable; however such differentiation does fly in the face of rights and freedoms that were the subject of long historical struggle. Freedom of labour in particular is felt to be a defining feature of modern democracies (Steinfeld 2001).

It is evident that a sliding scale of rights exists based on immigration status (Arthurs 2005). In general, foreigners admitted for permanent residence are granted the same rights as citizens, with the exception of some political rights. This is the case in New Zealand where permanent residents essentially have the same rights as citizens including the right to vote, access to social welfare and health services. However few countries grant migrants permanent settlement at the time of first admission. Mostly, migrants enter under temporary categories that do not grant equal rights. The right to participate in public affairs, to vote and hold office, to have access to public services and to enter one's own country, are rights directly tied to the status of the citizenship in a democratic state. As Margaret Satterthwaite observes: "the special nature of these rights makes their limited applicability to citizens acceptable" (2005: 17). In addition, temporary migrant workers are often constrained to specific jobs or employers, and may not be allowed to be accompanied or joined by their immediate relatives.¹⁵

The skilled overall enjoy a greater range of benefits and choices to do with unequal access to the permanent residency status and the opportunity to settle (as in the USA, Canada, Australia and New Zealand in particular) which is largely denied to the lesser skilled. As Nicole Piper explains, "what we can increasingly observe globally is a tendency toward 'bifurcation' between skilled and less skilled

¹⁴ See Article 41 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994; The Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125) and the request for consultations in China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights – Request for Consultations by the United States, WTO Doc. WT/DS362/1 (Apr. 16, 2007).

¹⁵ This subset never includes the most fundamental rights (the non-derogable rights), even in the context of a public emergency which "threatens the life of the national and the existence of which is officially proclaimed" (ICCPR, art 4) where states may derogate from a limited set of obligations.

migration in the case of migration between countries, with the skilled typically being offered ‘better deals’ with regard to entitlements and rights”(2008: 15). With temporary skilled migrants, there is such competition in solid economic times for these migrants that states have to offer them bundles of rights comparable to the ones enjoyed by citizens and residents in order to have much hope of inducing them to come. In New Zealand, as job losses occur in a time of economic uncertainty, politicians have been calling for migrants to be laid off first, even those who moved here on the promise of the work to residence visa to fill jobs on the skill shortages list, seemingly with two year contracts (Tan 2009).

The larger the package of rights due to temporary workers, the more costly bringing these workers in will be to employers and to the state, potentially restricting legal admission. Martin Ruhs and Bridget Anderson (2006) argue, there is a fundamental trade off between rights and numbers. Daniel Bell has tested this argument with the cases of Singapore and Hong Kong who admit huge numbers of temporary foreign domestic workers (Bell and Piper 2005). The workers are almost all women and mainly from the Philippines, have no opportunity for permanent residence, let alone citizenship. It is not unusual for workers to have been there for fifteen years. In both places, these workers face very difficult working conditions (Carens 2008). However the idea that source countries can expand overseas employment of their nationals by agreeing to reductions in their rights is morally unacceptable, and violates international norms (Wickramasekara 2008). All migrant workers have basic rights as human beings and workers which in theory cannot be traded off (Global Forum on Migration and Development 2008; International Labour Organisation 2006; Wickramasekara 2008). As the Jorge Bustamante, the Special Rapporteur on the human rights of migrants, has highlighted this view corresponds with the trend he has observed of “viewing migrants as commodities, rather than as persons with rights and duties afforded to them through the international human rights framework”(2008: para 27).

Nevertheless, the problem with visas being constantly renewed is that a stronger claim to remain ensues, and perhaps ought at some point to be converted into a right of permanent residence. The EU has recently issued a directive that non-EU citizens who are legally and continuously present for five years in an EU state should be given permanent residence status but this does not include those in seasonal schemes (see European Council Directive 2003/109/EC).¹⁶ Regularisation programmes in various countries (including France most recently in 1998; Spain in 1985; Italy most recently in 2002; and Canada most recently in 2005) where long term irregular migrants have been given residency has strengthened this claim. However states’ immigration policies are still primarily focused on incentivising migrants to return home and the presence of family members is seen as one of the major factors in turning temporary migrants into permanent ones (Carens 2008; Martin 2003a).

III “Resurrecting” guest worker schemes

Political context usually shapes the development of international law and migrant worker standards are no different. ILO Convention 97 was prompted by interest in facilitating the movement of surplus labour from Europe to other parts of the world after WWII, but the reality was ‘failure’ in that the system ceased to be rotational. These early guest worker schemes had limitations. In several countries, official recruitment systems had broken down by the 1960s, allowing unregulated entry and increased

¹⁶ Continuously does not mean that people must not have left the country – see art 5(3): “Periods of absence from the territory of the Member State concerned shall not interrupt the period referred to in paragraph 1 and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1.”

family unification. The programmes ballooned and lasted longer than anticipated, leading to the aphorism that there is nothing more permanent than temporary workers (Dustman 2001).

Germany's Gastarbeiter programme (1955-1973) was based on a high level of state involvement and attempted to ensure rotation by recruiting workers for a limited period, restricting their rights, and minimising family reunification (Ruhs 2002). Migrants were expected to accept relatively poor wages and conditions, make little demand on social infrastructure, and not get involved in labour struggles (Castles 1986). Germany, like other Western European states, was trying to *import labour but not people*.

In the USA experience, the Bracero programme (1942 – 1964) which had helped ease growers' fears of an impending labour shortage during WWII by issuing temporary work visas to Mexican nationals who were willing to work in agriculture, ultimately came under fire. On the one hand, religious, welfare, and liberal organisations viewed the programme as “slave labour”, a social and moral “outrage”, and a “disgrace” to American democracy and the Christian religion (Hawley 1966). In 1959, the Secretary of Labour, James Mitchell, requested an assessment of admissions - 4.6 million in all (Martin 2003b: 46-47). The assessment report led to the growing perception that bracero admissions led to short-term economic gains and long-term economic, political, and social costs. President John F Kennedy became convinced that braceros were “adversely affecting the wages, working conditions, and employment opportunities of our own agricultural workers...the workers most seriously affected are those from underprivileged groups which are already at the bottom of our economic scale” (Martin 1996: 66). Ironically, by the time the programme ended, admissions had shrunk due to a step up in wage enforcement, housing and related regulations, combined with labour saving technological advances (Martin 2007: 11).

In Europe, by contrast, TMWP were peaking in admission as they were unilaterally ended in 1973-74 (M. Miller and Martin 1982). There, governments had become increasingly concerned by unemployment and the increase of irregular migration and the focus shifted to bringing migration flows under control. As Max Frisch famously wrote: “We asked for workers, but we got people”.¹⁷ The locus of employment is one of the key differences between the Europe and American early experience of these programmes: non-farm manufacturing, construction and mining in Europe, as opposed to agriculture in the USA. As Philip Martin further compares: “the Mexicans who filled the seasonal USA jobs were expected to return to Mexico every year, migrants in Europe filled year-round jobs and earned right to unify their families and settle with renewals of work and residence permits” (Martin 2007: 11).

Much of the current policy pertaining to TMWP and indeed the enjoyment of rights, is clouded by this previous experiences. When countries cancelled these programmes they officially blamed the oil crisis (Kindleberger 1967). Castles (2006) argues that more fundamental factors were behind the decision including the fact that many industries were becoming dependent on migrant labour and the rotation principle was breaking down. As this happened, migrant families were growing and requiring family housing, schools, medical care and social facilities. Migrant workers joined trade unions and participated in the wave of labour militancy in the early 1970s. All this contributed to the perception that migrant labour was no longer a low-cost option and at the same time its social and cultural consequences were becoming more evident: instead of temporary guests, many migrant workers were

¹⁷ Originally “It [Switzerland] has called for workers, and has been given human beings.” Originally published as Tagebuch 1966-1971, Suhrkamp (1972). Sketchbook 1966-1971, p. 8, trans. by Geoffrey Skelton (1971), Methuen (1974). In the 1980s and 1990s this phrase become an often-quoted adage in the Central European debate about guest workers.)

becoming long-term disadvantaged residents. As Piotr Plewa (2007: 15) explains; “the 1973-1974 oil shocks were to guest worker opponents what Mitchell’s report was to *bracero* critics: a new context in which state policymakers could be convinced to curb temporary foreign worker admissions without offending employers”.

The end of recruitment did not mean that all migrants left. Some did, but others stayed, family reunification sped up and settlement and ethnic minority formation became obvious. Aside from integration explanations, economic incentives and the fact that the recession was much worse in Turkey and North Africa than in Europe, there were a number of rights related reasons that they stayed. Despite worsening employment prospects, these migrant workers had been partially integrated into welfare systems of the receiving countries and were therefore entitled to unemployment benefits, education and social services. In the case of Germany, the extension of unemployment benefits was a major reason why so many of the laid-off Gastarbeiter remained in Germany (Ruhs 2003: 15). Governments could not simply expel legally resident foreigners and the courts protected their rights to secure residence status and to live with their families. A coalition of pro-immigrant forces championed these workers and influenced politics through their links with social-democratic and liberal parties – including trade unions, churches and civil rights organisations. Some argue that the inherent contradictions of the guest worker system based on the inferiority and the separation of the foreigner, has led to today’s ethnically and religiously diverse but socially divided European societies (Castles 2006; Schierup et al. 2006). Many of these migrant workers were Muslim and they faced numerous difficulties in integrating. France deported thousands of Muslims in the 1970s for “disturbing the public order” when they tried to organise politically (C. M. Warner and Wenner 2006).

As migration increased again in the 1990s, policy makers managed it by *adjusting rights*, in effect rolling back social and economic rights. This can be seen in the number of asylum seekers countries take and the strict conditionality on applications, in contrast to the number European governments took in the post WWII period.¹⁸ In the USA, the cost of providing welfare and social assistance to legal and unauthorised migrants was debated in the mid 1990s and while the government did not go as far as California’s Proposition 197, which would have created a state-funded screening mechanism to ensure that unauthorised foreigners did not obtain state-funding services including public school education, they did restrict access to social assistance.¹⁹

Regardless of the failure of the earlier guest worker schemes, the literature is surprisingly clear on the potential benefits to be gained and many countries have introduced or re-introduced TMWP. Not least to provide legal channels for what has been illegal migration and working (Millbank 2006). For receiving countries, there will be a steady supply of a much needed workforce in both skilled and unskilled occupations that is responsive to the country’s political and socioeconomic climate. Since return is presupposed, the sending countries can benefit from the inflow of remittances and skills upon the migrants’ return. The migrants are also thought to gain much. Migration represents a potential livelihood strategy and an expansion of these schemes would not only increase the opportunities for more out-migration in the developing world but would also reduce the risks and vulnerabilities faced by migrant workers as illegal flows are expected to be diverted to what would then be more accessible legal channels (Black 2004; Pritchett 2002).

¹⁸ Germany for example put liberal asylum provisions into their post WWII constitution but a backlash in the 1990s, that included attacks on foreigners, saw numbers reduced and it became harder to apply.

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act 1996. Some of these benefits were later restored Shawn Fremstad, 'Immigrants and Welfare Reauthorization', (Washington: Center on Budget and Policy Priorities, 2002)..

Far from disputing the adverse consequences of such programmes in the past, current proponents of temporary worker schemes arguing that past mistakes can be avoided by adopting “innovative policy designs” or, as the Global Commission on International Migration puts it; “carefully designed temporary migration programmes” (2005: 16; International Development Committee 2004). Indeed, instead of revisiting the arguments for and against temporary workers schemes, most current policy prefers to move ahead, take its “existence as given” and rather ponder the “points of leverage in a scheme’s design that could enhance the benefits” for everyone (Barber et al. 2005: 4-5).

Some international migrant experts disagree and argue that only less democratic states, which deny rights to foreign workers, restrict access to legal system and make draconian use of deportation, can have “successful” schemes (Castles 2006; Martin 2004).²⁰ On the other hand “triple – win” TMWP are unlikely to succeed *ultimately* in democracies because of the existence of strong legal systems and international human rights instruments. Even temporary migrants gain welfare entitlements and acquire civil and political rights and it is very hard for democratic countries to force former guest workers to leave. Others argue that this helps explain why some democratic labour-importing states – like Japan and the USA – have not made much use of guest worker systems but have instead tacitly tolerated undocumented migration (Martin 2004).

The very notion of TMWP in liberal states is problematic because the nature of the restrictions associated with these schemes may not be compatible with a liberal democratic framework. In some countries, such as the UK and the USA, the government or the employer takes part of the workers’ income and returns it with interest if the workers leave at the end of the contract period (Schiff 2004). Otherwise the income is forfeited. UK trade unions criticise mandatory saving schemes for migrants from the Baltics because they constituted a breach of basic human rights as well as a loophole to circumvent minimum-wage legislation (salaries are deposited in their home bank accounts and legislation only applies domestically) (Black 2004). In Canada, seasonal migrant workers are subject to a host of wage deductions. In the case of Caribbean workers, the Compulsory Saving Schemes takes 25% of their gross pay and remits it to their respective government who then retains five to eight per cent. The rest is then plays in the worker’s account. This kind of initiative is seen as paternalistic, should be optional and the delays reported in receiving the money hugely criticised (North-South Institute 2006).

Where temporary work schemes do appear to work (in that migrants return home), government have adopted and enforced stiff punishments for overstaying such as fines, imprisonment, and even physical punishment.²¹ In Singapore overstaying guest workers face not only the confiscation of a bond but mandatory caning and up to six months imprisonment for illegal entry. Similar laws exist in Malaysia, and also in Japan and the UK - but without the caning provisions (Chalamwong 2004: 27). Some programmes put the onus on employers to ensure that workers return. Greece and Israel require

²⁰ Although whether these countries can prevent settlement in the long run is unclear given that the trend appears to be towards labour market dependency on migrants and increased family reunification in some Asian countries. Permanently suppressing worker rights may also be impossible as the strikes and demonstrations by migrant workers in Dubai in early 2006 shows.

²¹ Apart from punishments, governments have adopted rules that severely restrict the rights of temporary workers. In the United Arab Emirates (UAE) for example severe restrictions on family reunification for emigrant workers earning below 3,000 dirhams a month prohibits nearly 75 percent of Indian emigrants from bringing their wives and children resulting in “serious social and psychological problems among young male migrants.” Moreover, UAE’s labour policy generally segregates migrant workers from the host society. Almost 70 percent of contract workers are reportedly housed in worker camps located away from the city and are transported on a daily basis by the employers to their work sites. See K. C. Zachariah, B. A. Prakash, and S. Irudaya Rajan, 'The Impact of Immigration Policy on Indian Contract Migrants: The Case of the United Arab Emirates', *International Migration*, 41/4 (2003), 161-72 at 168.

employers to post a bond that is forfeited if the worker fails to leave at the end of the contract (Epstein et al. 1999). Potentially this could encourage employers to offer better conditions and wages so that the workers are less tempted to switch to illegal employment. Although as Maurice Schiff (2004: 3) points out, employers have no means of enforcing the policy. Instead the consequence of employer bonds may be that employers place heavier restrictions on the personal freedoms of migrant workers so that they do not abscond, as has been observed in Singapore (International Labour Organisation 2004).

At a practical level, Martin Ruhs (2005) views TMWP as a better alternative to illegal immigration or permanent immigration programmes. He emphasises that “current permanent labor immigration programs benefit a few skilled migrant workers, but leave much larger numbers of low skilled workers in low income countries excluded from the global labor market,” a status quo that is unlikely to change anytime soon given the political reality in receiving countries (Ruhs 2005: 23). Micheal Collyer (2004: 5-6) acknowledges the problem implicit in treating migrants as no more than mobile labour: “enforced isolation from social and family ties in the country of origin would raise human rights issues”. However, he contends that: “temporary labour migration schemes appear to offer the best possibility for compromise between the interests of the governments and societies of origin and destination.” Thus, every temporary worker scheme will involve at least some trade-off between economic gains and human rights.

Some labour sending countries have also tried to correct the imbalance by establishing institutional mechanisms to protect their citizens who work overseas temporarily. Of these, the Philippines has the most developed system with the advancement of the rights, welfare, and interests of overseas Filipinos being a major part of the country’s foreign policy in recent years (Tullao 2008). Specific initiatives include licensing and regulation of recruitment companies, bilateral agreements with host states, monitoring of employment quality, insurance protection and reintegration programmes. However, while the workers are physically in the host states, they are often outside of the reach of such protections, particularly when working in private homes, on the sea or in rural areas.

Through an exploration of current TMWP, this balance is explored. Are the temporary (and circular) migration programmes currently promoted by the likes of the Global Commission on International Migration (2005), the World Bank (2006), the Global Forum on Migration and Development (GFMD) (2007) and the ILO (2006: principle 5) living up to the hype of protecting migrants rights and are the kind of models New Zealand might potentially want to follow or expand?

IV Low skill labour demand and temporary migrant workers²²

New Zealand

New Zealand is an outlier in the OECD. A significant, and growing, proportion of its residents are born overseas (Globerman and Shapiro 2008). Due to New Zealand’s migration policies, most of these migrants have tertiary education qualifications. But also a very large proportion of New Zealand’s population, particularly those with post school qualifications, live overseas. Just under a fifth of New

²² The term unskilled has been criticised, particularly by feminist writers, on the basis that such jobs are actually skilled, but the skills used in them are undervalued by society. Alternative suggestions for such work include the term ‘essential work’. There is also some confusion at times between whether the definition of low skilled is based on the skills required for the job or according to the formal education levels of those generally working in the area. For example, lower skilled jobs are often filled by higher skilled immigrants, at least in the early period of when they migrate as migrants may face employment barriers such as language skills or qualification recognition.

Zealand's population was born overseas, while a similar proportion of the New Zealand born population, including Māori, does not live in New Zealand (Hamer 2007). At present, there are very few low skilled migrants in New Zealand. Unlike the situation in many OECD countries, due to New Zealand's migration policies currently low skill migrants are not replacing the reducing numbers of low skill locals. In relation to the OECD, New Zealand, along with Australia and Canada, stand out in terms of having a small proportion of low skill workers born overseas.

One reason that so many New Zealanders are born overseas is that historically New Zealand has attempted to meet short term demand for workers through migration, particularly since the 1970s when a range of temporary work schemes targeted recruitment from neighbouring countries in the Pacific (Bedford et al. 2007; Ramasamy et al. 2008).²³ New Zealand has however primarily focused permanent immigration policies on skilled trades and professional staff - nurses, teachers, accountants and trades people - who have the necessary points for immigration and residency requirements. As well as permanent migration, there is already an increasing trend towards temporary entry for the employment of skilled migrants with the discussion concerning temporary entry for low skill workers just beginning. Since 2000-2001, the number of temporary work applications approved has increased at an average of 18 per cent per year with jobs for dairy and beef farmers, field crop growers, bricklayers, drain layers and sheet metal workers, among others being placed on the immediate skill shortage list.²⁴ 12,000 more workers are estimated to be required for the dairy farm sector by 2012 alone (Human Rights Commission 2009: 59). The number of work permits for migrant workers from 13 low wage sectors has jumped tenfold in the past five years: 15,235 in 2008 from 1443 in 2003 (Collins 2008). In addition, the Pacific Islands Forum communiqué of October 2005 committed member countries to further examination of the idea of labour mobility. The first outcome of the forum was the agreement to establish the Recognised Seasonal Employers scheme in 2007. Similar schemes could operate in other areas of agriculture, as well as in the domestic sector, including the care of the elderly. New Zealand does not currently have other formal schemes but since 2004 there has been a rapid and growing reliance on migrant caregivers, most recently from the Philippines, but also from the Pacific.

In relation to the labour and human rights of migrant workers, New Zealand has shown strong support for human rights and has ratified all the core UN treaties but views the MWC as largely irrelevant (Piper and Iredale 2003). Many of the protections covered in that instrument are already in place through the New Zealand Bill of Rights Act 1990 (NZBORA), the other ILO conventions signed by New Zealand and citizenship provisions which enable migrants to become naturalised and full citizens reasonably easily. In addition, the NZBORA is seen as offering rights in the context as to what is reasonable, whereas the MWC is perceived as offering absolute rights. The main argument against ratification is that the convention's rights are already well covered by existing national laws including the Human Rights Act 1993, the Employment Relations Act 2000, the Health and Safety in Employment Act 1992, the Minimum Wage Act 1983 and the Holidays Act 2003. In addition, New Zealand's state accident insurance coverage, the Accident Compensation Corporation, covers everyone who suffers injury in an accident, including at work. Employment law enforcement mechanisms are generally robust, and there are formal complaint mechanisms available where minimum conditions are not met. That being said, the current Immigration Act review is looking at the issue of non-ratification and the possibility of strengthening the commitment to migrants' human rights.²⁵ New Zealand's human rights standards are comparatively strong and enforced by the courts legislative measures and

²³ For more background of New Zealand's low skilled migration, see (Badkar et al. 2009). For information on the Pacific Access Quota and the Samoan Quota Scheme, see the Immigration New Zealand website <http://www.immigration.govt.nz/migrant/stream/live/>

²⁴ The immediate skill shortage list is available here <http://www.immigration.govt.nz/NR/rdonlyres/89185A40-27D3-41F4-84BE-30129920411D/0/ImmediateSkillShortageList.pdf>

²⁵ See Immigration Act Review, section 3 http://www.dol.govt.nz/actreview/summary/summary-immigration-h1_04.asp

human rights institutions but also through policy and practice. Although as the Human Rights Commission has pointed out, there is still room for improvement at the community level where human rights need to be translated into everyday practice and monitored (Human Rights Commission 2008). Discrimination is a serious issue. A recent Human Rights survey showed that the Asian community is most likely to be discriminated against, although attitudes to them generally were improving (Human Rights Commission 2009: 20-30).

The demand for temporary labour

There are broadly four types of temporary migrant worker positions:

1. Undocumented workers, who contrary to the notion that they are all “illegal migrants”, have often entered the country legally on student visas, working holiday permits etc;
2. TMWP for truly seasonal jobs: where workers who abide by the terms of the seasonal work get priority to re-enter the following season; (H-2A program in USA, New Zealand’s Recognised Seasonal Employer scheme);
3. TMWP for permanent jobs: which appears to be the most common and are designed to rotate temporary workers through year round permanent jobs. Here, temporary migrant workers get one or multiple year work permits, but there are wide variations in employer and migrant rights to extend status and to adjust status; and
4. TMWP that have a probationary component: where migrants are extended more rights as there stay lengthens, akin to the historic guest worker schemes discussed above (Domestic Workers Visa UK; Canada’s Live in Caregivers, Spain’s agricultural workers scheme.).

While labour market needs are not the subject of this paper, the demand in many cases is not “seasonal” or “temporary” particularly the overwhelming pressure for caregivers in an aging developed world and for agricultural workers as evidenced by the huge numbers of undocumented workers in the USA (Castles 2006; O’Rourke 2006; Valiani 2009). In addition, the favouritism afforded to skilled workers ignores the crucial role unskilled workers play in many countries economies.

One could also argue that the circularity of the programmes negates the temporariness of the work, for many migrant workers return year after year to work under these programmes. Most importantly for this paper, framing the labour as short term can impact on the rights of migrants. As the Special Rapporteur on human rights of migrants, states: “Denial of demand is an important issues as it is one of the main factors that leads to irregular migration, a situation at the core of much of the abuse and numerous human rights violations suffered by migrants”(Bustamante 2005). There is no doubt that irregular migration is a protection problem, and the denial of demand can led at the extreme end to trafficking (United Nations 2006). Fear of detection may keep irregular migrant workers away from even legitimately available services. When large migrant populations are irregular, not only does this make governance difficult, it undermines the credibility of TMWP. It is also a problem of unfair competition, with advantages going to enterprises using workers in irregular status at cheap wages.

There is “tacit tolerance” of the presence of migrant workers in irregular status on the part of many governments during economic booms and to sustain large informal sectors of their economies, while officially they aim to be seen as “combating” or “fighting” irregular migration (RSA Migration Commission 2005; Wickramasekara 2008). Mamphela Ramphela has highlighted that “the world’s more prosperous states bear a significant degree of responsibility for the forces which have prompted

and sustained the movement of irregular migrants from one country and continent to another” (2004: 4). Unfortunately attempts to prevent or minimise irregular migration often entail intensified control measures and militarised borders, which do not address the demand issue either, and often result in criminalisation of irregular migration and gross violations of human rights (Wickramasekara 2008). The Bush administrations plan for 670 miles worth of additional fences to patrol Mexican border, passed by congress in 2005 is nearly completion and is highly controversial. There is no evidence to suggest that such initiatives work, quite the contrary as evidenced by the dramatic increase in the levels of undocumented migration to the USA. In any case, such plans miss the point that this is an issue of labour market regulation rather than border control. Relevant migrant worker programmes do seem to be the best option; “laws and regulations that go against the demand and supply will likely be ineffective in controlling the labour market. When there is legitimate need for workers, providing a legal avenue for their employment and ensuring their labour rights are protected produces the best results for all” (United Nations Secretary General 2006b: 76).

Domestic work

In most countries, domestic work is a significant area of employment and soliciting household services fills the old reliance on unpaid family labour, including in the newly industrialised countries of Asia and the Middle East (Cancedda 2001; Williams 2003). The ILO (2008a) conservatively estimates that there are over 100 million domestic workers globally, with approximately 31 million in the USA (Castro 2008: 3). Rosie Cox goes as far as to suggest that there are more domestic workers in the UK today than they were in Victorian times (Cox 2006: 3). Those, predominantly women, who migrate to work in the private households of the global north as domestics or domestic care workers comprise a large percentage of this migratory flow. Yet this sizable workforce remains largely hidden and invisible to society. Domestic work is characterised as domestic chores, performed by a person in another's private home for remuneration.²⁶ It relies to a large degree not only on internal national inequalities but also on global ones, not only in rich countries with relatively unequal social structures like the USA and the Arab oil kingdoms, but also in relatively egalitarian societies of north-western Europe (Moya 2007).

Domestic work is judged as intrinsically damaging for those who perform it (Phizacklea 1998; Kofman et al. 2000; Lutz 2002; Hess & Puckhaber 2004; Zimmerman et al 2006; Lister et al. 2007; Anderson 2007). Saskia Sassen's (2006) term 'servants of globalisation' depicts household domestic workers as the new disempowered class of workers in the service of global capitalism (Sassen 2006: 33). Equally, the ILO has highlighted that these workers are often the most disadvantaged and vulnerable in society; domestic work often being the site of forced labour, child labour, abusive employment relationships, and unfair working conditions (International Labour Organization 2007, 2008a). The levels of abuse and exploitation are well documented. From surveys and case studies, it is evident that domestic workers generally suffer from poor working conditions and their isolation makes some kind of organization which would allow them to improve their condition difficult (see Ramirez-Machado 2003). A number of studies has revealed appalling living and working conditions in Europe and in the USA (Agustin 2005; Anderson 2000; Connor 2001; Human Rights Watch 2001; Zarembka 2004) and illustrates the close connection between the invisibility of domestic work and slavery and trafficking, and prostitution (Bales 2004).²⁷

²⁶ See South Africa's Basic Conditions of Employment Act, s 1; Singapore's Employment Act 1968, s 2.

²⁷ There are obviously a whole raft of other international conventions that seek to protect people from slavery and trafficking

On 19 March 2008, the ILO's Governing Body decided to include the issue of standard setting for domestic work on the agenda of the 99th Session of the International Labour Conference in 2010, with the support of both employers' and workers' groups. This decision marks the start of a process expected to end with the adoption of a new ILO convention or recommendation, aiming to protect and enhance the rights of domestic workers around the world. For this reason, New Zealand's international obligations are likely to involve further attention being paid to the issue of the legal regulation of domestic workers in the near future.

The significance of household employment within a country's overall employment structure not surprisingly depends upon the existence of legal space to allow for its development. In some countries domestic work is a recognised occupational category (most notably in France, Italy and Spain) but not in others. In the UK for instance, the only visa regime that allowed private households directly to recruit domestic help from abroad is the au pair system (Anderson 2007: 250; Cox 2007).²⁸ The divergence in the way different countries treat domestic work means that international comparisons are problematic since no statistical significance in some countries might mean, as Lutz (2007: 189) points out, that the phenomenon is confined to the irregular market in a sort of "twilight zone". In such circumstances, migrant domestic workers will have entered as visitors, working holiday makers, volunteers, au pairs, family members or as in the case of the UK under a special immigration concession that allows wealthy employers to bring their domestic workers with them to the UK (Anderson 2001; Wittenburg 2008). However because they are not formally recognised as workers,²⁹ this leaves them extremely vulnerable to exploitation by their employers and others, not just because they might also be illegal.

Surprisingly, this lack of recognition is allowed under the current international framework. As reconfirmed by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in ruling that the objective of the Hours of Work (Commerce and Offices) Convention 1930 (No. 30) is: "to extend the hours of work standards prescribed by the Hours of Work (Industry) Convention, 1919 (No. 1) to all those persons not covered by Convention No. 1, with the exception of those employed in *agriculture*, maritime or inland navigation, fisheries and *domestic service*" (International Labor Office 2005). Similarly, article 2 of the Protection of Wages Convention, 1949 (No. 95) allows ratifying States to exclude certain categories of workers, including explicitly those employed in domestic service, from its scope of application.

The international position

The ILO's concern that specific attentions needs to be given to domestic workers is not a recent phenomenon. In 1965 the International Labour Conference called for normative action after recognition of the real demand for domestic workers and that the problems faced by them could be attributed to the

²⁸ The au pair scheme ceased operating in November 2008 and was replaced by the Youth Mobility Scheme, which allows those wanting to work as au pairs from Australia, New Zealand, Canada and Japan

²⁹ Norway: Working Environment Act, 1977 specifies: The Crown shall decide whether and to what extent this Act shall be applicable to work performed in the employee's home. The Crown may further decide that the rules of this Act shall apply, wholly or in part, to workers who carry out domestic work, care or nursing in the home or household of private employers, and may in this connection stipulate particular regulations for such employees. Japan: Labour Standards Law, 1995 stipulates: This Law applies to the enterprises and places of business listed in each of the items below; provided, however, that it does not apply to any enterprise or place of business employing only relatives living with the employer as family members nor to domestic employees.

specificity and nature of their occupation and to inadequate attention on key aspects of their situation in international law and national legislation (International Labour Conference 1965). Similarly the ILO's 1970 study clearly identified the main features of domestic labour, which are now familiar: most domestic workers are women, most of the time they are migrants, and they usually work in private households and have to live with their employer (International Labour Organisation 1970). Today the ILO holds that:

...domestic work remains one of the few sources of income and jobs for many young and older women with little, if any, education. But domestic work is often "invisible", undervalued and unprotected. It is carried out in homes, which are not considered to be workplaces, for private persons who are not considered to be employers, and by workers who are not considered to be employees. Regarded as an extension of women's traditional unpaid domestic duties and family responsibilities, it is given little monetary value. This explains why national law usually grants this category of workers different and inferior treatment to that afforded to other employees. Moreover, very often, the applicable law is not enforced (2007: para 423)

The development of international standards is meant to fill an important gap in the promotion of decent work for all (International Labour Organization 2008a: 13).

Given its social and economic invisibility and the accompanying low social status, domestic work is often exploitative. Amongst other major problems encountered at the workplace, domestic workers face: long hours of work, heavy workloads, lack of privacy, low salaries, inadequate accommodation and food (live-in workers), job insecurity, absence of benefits normally granted to other categories of workers, and exposure to violence and abuse. In addition, given the particular vulnerability attached to their situation, two groups of domestic workers tend to be exposed to even harder conditions of work - migrant and child domestic workers. Domestic workers who are migrants are more prone to job related gender, race and class discrimination, physical and psychological abuse and financial exploitation than those working in more public areas.³⁰

The ILO framework however, currently provides for the exclusion of household work from the coverage of its instruments. An example given to the 300th Session of the Governing Body is the Maternity Protection Convention 2000 (No. 183), which is meant to apply to all employed women including those in atypical forms of dependent work. Yet ratifying States may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from the scope of this Convention limited categories of workers (art 2(1) and (2)). Likewise the Protection of Wages Convention 1949 (No. 95) allows ratifying States to exclude certain categories of worker, including explicitly those employed in domestic service, from its scope of application (art 2).

In this respect the CEACR noted in 2004 that the maternity protection of women engaged in *agriculture* or working at home or as *domestic workers* "continues to lag behind" (International Labour Organization 2008a: 14). Similar concerns have been expressed over the application of health and safety protections for domestic workers, the Termination of Employment Convention, 1982 (No. 158)

³⁰ Migrant nurses on the other hand have become more conspicuous care-givers as market demand has moved them from mainstream community hospitals. See N Constable, 'Filipina Workers in Hong Kong Homes: Household Rules and Relations', in B Ehrenreich and Ar Hochschild (eds.), *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (New York: Metropolitan Books, 2002), 115-41, Joy M Zarembka, 'America's Dirty Work: Migrant Maids and Modern-Day Slavery', in Barbara Ehrenreich and Arlie Russell Hochschild (eds.), *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* (New York: Henry Holt and Co, 2004).

and the Labour Inspection Convention, 1947 (No. 81). With regard to the latter, the CEACR noted in 2006 that “many national provisions authorizing workplace visits leave excluded from labour protection by inspectors the many people who are carrying out domestic work, or who are homeworkers, the majority of whom are women” (International Labour Organization 2006)

Coverage in national employment legislation

Some employers will treat their domestic workers well, but inadequate labour protections foster exploitation of domestic workers isolated behind the walls of private homes. There is continuum of coverage. Domestic workers often work in completely unregulated conditions and are not even recognised as employees under the legal definitions, or are expressly exempted from the labour laws protecting workers. In Singapore domestic workers are specifically excluded from protection under s 2 of the Employment Act 1968. The USA’s federal labour law takes the identical position: “the term employee... shall not include any individual employed as an agricultural worker, or in the domestic service of any family or person at his home...” (National Labour Relations Act 1935, s 2). The Supreme Court recently upheld the exemption of domestic service workers from minimum wage and overtime pay laws under the Fair Labor Standards Act.³¹ In these circumstance, the vulnerability of women migrant workers is seen in forced or coerced long work hours, often without breaks or leisure time (Anderson 2002: 107; Human Rights Watch 2001: 17).

In other countries, where regulation does apply, domestic workers are usually treated as a special category.³² This does not mean that specially tailored standards are enacted to take into account their particular conditions of work and employment relationship. On the contrary, they are instead afforded a lower protection than other categories of worker. Even when paid on time and according to the terms of the contract, domestic workers are often paid substandard wages which directly contravenes the principle of equality in the MWC (art 25). The Human Rights Watch reported in 2001 that migrant domestic workers interviewed in the USA received an average of \$2.14 per hour which was then less than half the minimum wage. Similarly even when regulations do apply to them, discriminatory rules exempting them from normal hour limits or setting long limits (as much as 12-16 hours in some places) may exist (Lim et al. 2004: 12). “Unscheduled availability at all times” is often expected, partly due to the gendered assumptions that still exist in some countries about women’s role in the home. Filipina live-in workers in Los Angeles and Rome have complained of the “absence of set parameters between their work and rest hours” (Parrenas 2001: 164).

CERD makes clear that the states’ obligations to end racial and xenophobic discrimination should be understood according to the substantive equality model: meaning that an individual’s rights are violated not only when, for example, laws formally treat one racial group, national origin, or gender differently from other groups, but also when any law, policy, or action has the practical effect of disadvantaging them.³³ The CEDAW Committee urged Sweden, as it has urged Germany (CEDAW Committee 2000),

³¹ *Long Island Care at Home, Ltd. v. Coke*, Case No. 06-593 (Decided June 11, 2007).

³² In Grenada for example, domestic workers have a 60 hour week where as others (like agricultural, construction and industrial workers) are restricted to 40 hours. In Belgium, domestic workers come under a special chapter in the labour laws. There is no regulation on the maximum hours of work, wages, or paid overtime. There is no guarantee for time off for sickness. The notice period before dismissal is very different. The rights and duties of employers and employees are very poorly defined. A household domestic worker working for less than 24 hours a week is not obliged to make provision for social security or pensions, and nor is her employer.

³³ While art 1(2) states that the Convention does not apply to distinction, exclusions, restriction or preference between citizens and non-citizens, the CERD Committee has made clear that this provision “must not be interpreted to detract in any way from the rights and freedoms [of aliens] recognized and enunciated in other instruments, especially the Universal

to “strengthen its efforts to combat xenophobia and racism.. [and] to be more proactive in its measures to prevent discrimination against immigrant, refugee and minority women, both within their communities and in society at large, to combat violence against them and to increase their awareness of the availability of social services and legal remedies” (CEDAW Committee 2001). Even in new countries of emigration like Italy, who has historically been a country that sent workers to the industrialised countries of Northern Europe, their contemporary immigration has not resulted in compassionate understanding. Instead increasing sentiments of nationalism and xenophobia to the 20,000 plus contract workers arriving from the Philippines each year and the large permanent immigrant group in Rome as a result of amnesty granted to undocumented migrants has been observed (Parrenas 2008). Spain too has experienced the growth of social tensions and passed the Foreign Persons Law in an effort to promote the social integration of immigrants and for the first time recognize their political and social rights. Ironically this enacted occurred at the same time as the February 2000 violent outbreak of racism in the town of El Ejido against Moroccan and Algerian migrant workers.³⁴

Most migrant workers face discrimination and xenophobia aimed at foreigners in host countries (International Labour Organisation 2004: 2-3), but those working in domestic service may find that they do not qualify for the kinds of protections against racial or ethnic *discrimination* that other workers receive. In the USA, for example, domestic workers are almost never covered by Title VII of the Civil Rights Act 1964 which only applies to employers with 15 or more employees. In Hong Kong and Singapore, migrant domestic workers are tested for pregnancy, sexual transmitted diseases and HIV/AIDS (Nicole Constable 1997; Cox 2006). Deportation is the outcome of pregnancy detection, for these workers are not allowed to have relations with local men.

Contracts are supposed to establish the legal rights and obligation of the parties involved and the legal bias they must refer to regarding the job description, type of employment, working days, hours of work, breaks, holidays, overtimes, wages, settlement of disputes etc. In this sector, a written contract is paramount but very few countries require this arrangement. Canada is one of the few. In 2002 the Immigration and Refugee Protection Regulations were introduced and require participants to have signed contracts that conform to provincial employment standards with their employer (s 112). Legislation in Hong Kong and South African is also positive in this regard. Domestic workers have the right to a minimum wage, overtime pay, a weekly day of rest, maternity leave, and paid annual leave. The freedom to form associations and trade unions gives these domestic workers greater awareness of their rights and an ability to negotiate between working conditions and avenues for reporting labour exploitation. In South Africa, the 2003 legislation covering domestic workers, along with gardeners, drivers, caregivers extended all labour rights to them and includes a mandatory wage increase of 8%. Employers must also register workers with the unemployment insurance fund and pay a monthly contribution.³⁵

Best Practice? Canada’s Live-in Caregivers programme

Declaration of Human Rights, the ICESCR and ICCPR. See Human Rights Committee, '27th Session - General Comment 15, the Position of Aliens under the Covenant', (New York: United Nations, 1986).

³⁴ For more on this see <http://www.eurofound.europa.eu/eiro/2000/04/feature/es0004184f.htm>

³⁵ See the South African Labour Law Guide http://www.labourguide.co.za/domestic_section.htm

Domestic workers have been imported for over a century in Canada. The latest iteration is the Live-In Caregiver Program (LCP) which was instituted in 1992. Under this, 1500 to 2000 foreigners per year who do not qualify under the normal requirements (or are far back in the queue) can come to Canada if they agree to work for two years as live in domestic caregivers. The design of the scheme is to address the needs of families who required in-home assistance caring for children, persons with disabilities or the elderly and allows those that participate in the programme to apply for permanent residency status and eventually citizenship after working under the auspices of the programme for 24 out of 36 months.³⁶ Applicants to the programme must have a high school education, speak one of Canada's official languages, possess relevant experience or certification from a special caregiver training course, and have a bona fide job offer from a Canadian employer.

In reality the vast majority are university educated and well over 90% are from the Philippines. They are required to live in the homes of the people for whom they work. They have the right to change employers after arrival, but they must continue to work as live-in caregivers. During this period, they do not have the right of family reunification. The protection of most of the normal labour legislation regarding minimum wages, overtime, holidays, vacations, and other working conditions are afforded to them with regulations limiting what they can be charged for room and board and what they must be provided in terms of living space and amenities. At the end of the two years, they are entitled to transfer their status to that of a normal permanent resident with rights of access to the general labour market and rights of family reunification (Immigration and Refugee Protection Regulations s 113). In effect, they are on probation and treated as temporary migrants for two years.

The fact that relatively few (estimated at 28% in 2005) of those admitted under this scheme continue to work as live-in caregivers after the two years are up, illustrates perfectly the exploitative or unfair element of these restrictive conditions (Valiani 2009: 11-12). Once they have other options, they make other choices. They live-in, at those wages, only because that is the sole labour market option in Canada open to them even though there is no shortage of Canadian caregivers who live in their own homes (Carens 2008: 433). On the other hand, the programmes' restrictions are limited and it provides an opportunity for a couple of thousand disadvantaged people a year to gain entry to Canada who would otherwise have no chance of admittance. In that sense, the scheme's defenders are right that it serves the interests of the workers who are employed within it.

The system has been reformed over the years as a result of the endeavours of Canadian NGOs as well as in response to public criticism and this has improved the lives of these women. Improvements include: shortening the mandatory service period from three years to two; eliminating the prior requirements that those in the programme take courses and save money before gaining permanent residence; enhancement of the financial terms; boosting protections against abuse by employers; and being able to change employers.

The problem with this programme is the live-in requirement that renders these workers vulnerable and yet this is clearly the one non-negotiable element since it is the fundamental rationale. This aspect clearly violates basic human rights of equality and can foster human rights abuses (Langevin 2007). Canada is currently one of eleven countries for which United Nations special rapporteur, Jorge Bustamante, has formally requested permission to visit in response to a flood of migrant worker complaints around rights violations - abusive working conditions, non-payment of wages, gender violence, and restrictions of the freedom of movement, to mention a few (Valiani 2007). CEDAW has urged Canada to reconsider the live-in component (CEDAW 2003). Most recently, Canada's own

³⁶ Canadian Immigration and Refugee Protection Act (2001, c.27), and the Canadian Immigration and Refugee Protection Regulations, P.C. 2002-997, Part 6, Div. 3.

Parliamentary Standing Committee on Citizenship and Immigration (2009) questioned aspects of the programme, particularly the live-in requirement, recommending that this be removed.

United Kingdom – relying on EU labour

The United Kingdom's special working visa classification for domestic workers has been fraught with problems. It is reserved for those who have already been employed by their sponsor at an overseas location for at least one year immediately preceding application.³⁷ The policy position of the British Government is that EU labour will meet future demand and therefore low-skilled migration from outside of the UK is to be phased out by 2010 (Home Office 2006). The domestic worker visa appears to be the exception to the rule and new protections were instituted in 2006 and remained with changes to the immigration system in 2008. Previously these migrant workers did not have a work permit in their own right and therefore were at the mercy of their employer. Now they can change employer if abused or exploited, access health care and bring with them their spouse and children as long as they can support them. Domestic workers who have remained in the UK for five years can apply for an indefinite leave to remain provided they have continuously met all the requirements of the domestic workers during the 5 years of their employment with the employer / employers.³⁸

However demand for household labour is another matter, as Brigit Anderson identifies, this:

... has for several years been satisfied by cobbling together a range of immigration statuses, as well as of course by illegal employment. Those working in domestic service may have the immigration status of spouses, asylum seekers, students, visitors, work permit holders and they may or may not be working within or in breach of the extremely complex regulations that govern each of these statuses (2007: 250).

Research conducted by NGOs Oxfam and Kalayaan (which means “freedom” in Tagalog, the national language of the Philippines) reveals a number of vulnerability indicators that are alarming. Of the majority of workers registered with Kalayaan in 2006: 43% of workers reported not being given their own bed, 41% were not given regular meals, 70% were given no time off, and 61% were not allowed out of the house without their employer's permission. They were paid as little as 50p an hour, were made to work up to 16 hours a day, and were on constant call to their employers (Kalayaan and Oxfam 2008). Similar figures were recorded by the Centre on Migration, Policy and Society (Jayaweera and Anderson 2008).

The workplace as the private home

The single biggest factor causing invisibility and room for abuse, is the home as the workplace. Freedom of movement and privacy violations were reported by Human Rights Watch in relation to the USA where over half the domestic workers interviewed had their passport confiscated by their employer,³⁹ and had phone calls monitored (Human Rights Watch 2001: 13,18). There is an obligation on authorities to punish those who confiscate or destroy identity papers, particularly in relation to domestic workers (Committee on the Elimination of Racial Discrimination 2003)

³⁷ British Immigration Act of 1971 [section] 3(2), Part 5, [section] 2, Sub. 159A(a)(i)

³⁸ See UK Border Agency website <http://www.ukba.homeoffice.gov.uk/workingintheuk/othercategories/domesticworkers/>

³⁹ Contravenes MWC, art 21.

The reality is that live-in workers are more vulnerable to abuse than day workers because living in their employers' homes isolates them from social networks that provide the means for getting help and escaping dangerous employment. Violence, including sexual abuse, through close proximity to – and often a carefully constructed dependence on – their employers, is a phenomenon that the ILO reported on in relation to Italy (D'Alconzo et al. 2002). It goes without saying that this contravenes the law.⁴⁰ In the UK, the Council of Europe reported in 2001 that Kalayaan (which at that stage it had taken care of over 4,000 domestic workers from 29 different countries) had found that 84% had suffered psychological duress, 54% had been locked up, 38% beaten and 10% sexually abused (Committee on Equal Opportunities for Women and Men 2001). The USA union Domestic Workers United and the non-profit research firm DataCenter (2006) surveyed New York domestic workers and found that almost half of all live-in domestic workers had been abused by their employers in the past year.⁴¹ In Hong Kong, the South Asian Migrant Centre and Coalition for Migrants' Rights found that 26% of a random sample of foreign domestic workers have been the victims of physical or verbal abuse, while 4.5% have suffered sexual abuse including rape (Asian Migrant Centre and Coalition for Migrants' Rights 2001: 11).

In addition, aspects of the way domestic work is regulated can increase this isolation, the room for abuse and hazardous nature of the work:

- Locking domestic workers in the home is often the result of the *onus being on the employer if the migrant worker overstays*. In the case of Singapore, a fee is charged of the employer to make sure this does not occur (Al-Najjar 2001: 10-11).
- In Spain, private homes are defined as 'exceptional contexts', which in practice means that worker's rights are subordinated to employer's rights applying to the *constitutional rights* of privacy and private family life over labour rights (Leon 2008).
- In the UK private households are exempt from the Race Relations Amendment Act and it is legal for a private householder to refuse to employ someone on the grounds of their colour, their nationality and their religion (Anderson 2007: 251). In New Zealand, the Human Rights Act 1993 has similar exemption provisions for employment selection (Callister et al. 2009).
- In the USA domestic workers are explicitly excluded from the federal Occupational Health and Safety Act 1970 because they are not "employed in a business of [their] which affects commerce" (s3(6)). As people working for a private home, not an income generating business, they fall outside of the act.⁴² In New Zealand, health and safety regulations are similarly different for domestic employers of home owners or occupiers then they are for business owners (Callister et al. 2009).
- Unionisation too is difficult. The USA's labour legislation prohibits domestic workers from organising and bargaining collectively because they are excluded from the definition of employee. However even if this was not the case, as Carolyn H. de Leon, the founded of Domestic Workers United, a former domestic worker herself, explains: "it's really hard to galvanize domestic workers,

⁴⁰ CEDAW provides clear protection against gender-based violence, including sexual assault and harassment: the treaty's definition of discrimination has been interpreted to include these abuses. Gender based violence includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Sexual harassment in the workplace is also a form of violence. See Cedaw Committee, 'Eleventh Session: General Recommendation 19, Violence against Women', (New York: United Nations, 1992).

⁴¹ Abuse included but was not limited to, feelings of discomfort, verbal abuses, sexual advances and physical abuse including being punched, beaten, raped or sexually assaulted.

⁴² All state based legislation on health and safety does not recognise domestic workers as beneficiaries of the rights. Different kinds of restrictions are pointed to "private residence" or "business or commerce".

because [they are]... dispersed in isolated homes and sometimes working 11, 12 hours a day” (Lee 2003).

Obviously applying health and safety laws and rights to organise in a private home creates unique challenges and conflicts with other rights, such as the right to privacy. And yet domestic workers are no less deserving of protections and comparable mechanisms need to be established. In fact, as part of the realisation of a long struggle for worker, such standards were passed in recognition that working people should have safe and healthy working conditions. However domestic workers are treated like independent contractors for the purposes of health and safety standards but without the control over how tasks are performed and what tools are used. Some local governments in the USA have taken proactive steps. In 2003 Domestic Workers United succeeded in getting a law passed in New York City requiring “domestic worker placement agencies to provide employers with a ‘code of conduct’ explaining labour laws” along with an outline of job responsibilities, social security requirements and wages before placement. Ignoring this is a finable offence. Some, but very few, have formed cooperatives to fulfil contracts and take responsibility for working conditions (Castro 2008). In New Zealand, the ‘homeworker’ category of employees under the Employment Relations Act, gives those working for a third party, arguably greater protection as the employer still has duties under all relevant legislation including the Occupational Health and Safety Act (Callister et al. 2009).

The impact of unionisation can be profound in attempting rectify imbalance in the system. In the USA the Domestic Workers United are pushing for a Domestic Workers Bill of Rights, with the support of the most important newspaper, the New York Times. In Spain, the Federazione Italiana Lavoratori Commercio Alberghi Mense e Servizi-Confederazione Generale Italiana, a union in the commerce, tourism and services sector, has negotiated a national collective agreement for privately employed domestic workers, the first being established in 1974 (Mathers 2006). Lobbying by Kalayaan in the UK resulted in migrant domestic workers being afforded the full protection of UK employer law.

Laws are not just required to protect domestic workers and to deter, but often to change societal practice and attitudes towards women. In Italy, despite domestic work being a special category, a new general national contract for domestic workers was introduced in 2001 and included an important new provision against the dismissal of pregnant workers without lawful cause (D’Alconzo et al. 2002: 29-30). The Canadian Government has integrated gender concerns into its national immigration programme with an analysis matrix testing all new policy for potential gender impacts (International Organization for Migration 2004: 277).

The real issue however for countries that have made positive steps in addressing the vulnerability of domestic workers, is *redress* and *enforcement*. In Taiwan and the UK for example, domestic workers can now change employers. Taiwan allows this where there is adequate evidence of employer’s wrongdoing (International Labour Organisation 2004: 40). While Taiwan maintains that thousands of workers are helped to change employers each year, there is no data available on prosecutions of employers for abuse of domestic worker. The UK Home Secretary’s response when asked how many prosecutions and convictions there have been in the last three years; and what steps the Crown Prosecution Service was taking to increase the rate of prosecution, was that: “the Crown Prosecution Service does not hold data on prosecutions and convictions for employers of migrant domestic workers for abuse of those employees. It has prosecuted 285 people in the last three years for employing people contrary to their immigration status, which is important because employees are of course more vulnerable if they are being employed unlawfully” (Hansard 2008).

Care workers for the elderly

Policy makers have identified a shortage of care workers in many industrialised countries, where population ageing is generating increasing demand for care, particularly for those wishing to age in place and when women (the traditional caregivers) have joined the labour force in record numbers and family size has decreased. The relationship between care and paid labour has become a pressing issue. Care for the elderly in their own homes is a specific form of domestic work and same issues concerning the nature of the workplace and indeed recognition of the labour as real work apply.⁴³ The interesting issue for the purposes of this paper is that there is very little known about the roles that migrant care workers play in a variety of care settings, not just the provision of home care, but care in residential and nursing homes.⁴⁴ Like domestic work generally, caregiving work is often invisible, marginalised and only noticed when it is not provided at expected levels and quality. Aside from Singapore and Canada, whose live-in caregiver programmes encompass the care of the elderly, other countries are using migrant labour but in far less regulated ways. Lack of regulation increases the risk factor as the following examples illustrate.⁴⁵

Italy is a country sitting towards the extreme end of the spectrum where the “migrant-minder” model is at the forefront.⁴⁶ Here predominantly female migrants (from Latin America, Eastern Europe and African nations) work in home-based elder care. The number of domestic and personal care workers is large, compared to countries of north and west Europe. Dawn Lyons argues that the migrant work force fills a supply gap at low cost and sustains an ideal – that the provision of care remains the domain of the family (2006: 220). As such, Italy is an example of an uneasy trend towards commodification on the one hand, but at the same time very traditional notions about care, which is seen as “effortless, or as love or nature and not real work” (Lyon 2006: 223). This characterisation effectively devalues the labour being performed – the employers find it difficult to recognise care as work and at the same time sustain the notion of family care. The result is that the very presence of the migrant worker in the home, in a space of overlapping spheres of life, confuses more formal contractual relations.

In such cases, the “employee” is incorporated into the family which conceals the labour relationship. This implies that the same person provides migrant women with all they need to legally reside and to “survive” in: a job, housing, food and protection. In addition, the family employer is frequently the only link these women have with Italian society, as the employer takes care of preparing documents required for regular status, and deals with all other bureaucratic procedures pertaining to social and civil rights (medical service card, enrolment at the Employment Office, etc.). This situation is unfortunate in that the women rely on the family-employer for handling all matters “outside”. If all roles played by the family (employer, housing, etc.) are regarded together, it becomes evident that this situation of profound dependence deprives migrant women of any power of negotiation and makes them dependent and extremely vulnerable to threats and pressure. Consequently, migrant women often accept unplanned over-time work and activities not implied in their duties; moreover, aware that in case of conflict with the family-employer, they would lose salary, shelter and all they have, they are unable

⁴³ While recognising of course, that caregiver and domestic work overlap, and that very often workers do both

⁴⁴ Except for a few exceptions, the literature on states and care regimes has not paid sufficient attention to the role of migrant care workers to the overall organisation of social care, though of course literature of migration and gender has.

⁴⁵ The Institute of Policy Studies is undertaking research on caregivers for the elderly, including in residential care, so this section of the paper focuses particularly on caregiving in a home setting.

⁴⁶ Italy, along with Greece, Spain and Portugal, are countries that are described as “uneven providers” and provide the lowest institutional or state-supported home based care. Italy has a low proportion of the elderly population in residential care and home based services are very limited.

to react against breaches of their rights and severe abuse, such as sexual harassment. So, aggression and other ill treatment are believed to be common (D'Alconzo et al. 2002: 12) .

Feminists have long fought for the recognition of women's unpaid labour in the home as work.⁴⁷ In relation to migrant women, their labour is arguably more strongly excluded from the category of work, not only on the basis of gendered relations, but in addition through the dimensions of migrancy and legality (Levitas 1998). By not recognising care as real work, issues of social justice are side stepped, and confronting the often dissonant reality of highly educated migrant women doing low-paid and low-status work for middle class families is avoided.

Demand for care and proper regulation can increase the perception of its value. Germany's care worker recruitment scheme was implemented in 2002 as a legal mechanism – similar to the former guest worker model – for hiring care workers for the elderly on a temporary basis (up to three years) from Eastern European countries. The demand for such workers has meant that they are less likely to be live in, instead working in two to five households per day, spread over five to seven days a week. Live out, part time domestic work for several employers enables them to negotiate better employment arrangements since they are less dependent on a single employer (Lutz 2008: 46).

In New Zealand, which currently has little experience with private domestic workers, both citizens and migrants care workers are visibly at risk. Caregivers in rest homes have hit the national headlines precisely for the health and safety issues already identified (Todd 2009). John Ryall says that the standard of care of elderly people is being put at risk through low pay, limited training and high caregiver turnover (Service and Food Worker Union 2007). The Institute of Policy Studies research on domestic work in New Zealand found that publicly funded homecare workers in the homes of people with a disability or the elderly often suffer from lower wages and less advantageous working conditions than other workers. Although this category of domestic workers (ie those with an employment contract with a health board or with a private agency that is contracted by the health board to provide in-home health care) is prima facie more covered by current New Zealand legislative protections than those domestic employees in a direct employment relationship with a homeowner (in terms of visibility and the application of health and safety legislation) the difference in law makes little or no difference in practice (Callister et al. 2009: 20).

With regards to migrants in New Zealand, Filipino nurses have been forced to living in 'slave labour conditions' in rest homes to pay off thousands of dollars in recruitment fees. This prompted the Counties Manukau District Health Board to signed a deal in early 2008 with the Philippines Government to bring nurses directly from the Philippines, thus cutting out the private agents (Collins 2008; New Zealand Herald 2008). Some private agents are even recruiting caregivers and nurses directly from the Pacific under the access quota for low wages, irregular hours and bonded work despite contracts that often guaranteed otherwise (New Zealand Herald 2008). Beverly Rayna, who chairs the Nursing Council and is the manager of a Christchurch rest home, says that Filipino registered nurses are being brought to New Zealand on student visas by private language schools who put them through an aged care education course. In her view, the students are outlaying a considerable amount of money and being exploited by the schools, for these nurses do not have the skill level she needs to fill vacancies.

⁴⁷ Lourdes Beneria, 'Conceptualizing the Labour Force: The Underestimation of Women's Economic Activities', *Journal of Development Studies*, 17 (1981), 10-28, Ruth Levitas, *The Inclusive Society? Social Exclusion and New Labour* (New York: Routledge, 1998), Marilyn Waring, *If Women Counted* (San Francisco: Harper and Row, 1988).

Agricultural/horticultural workers

Many developed countries also have seasonal worker programmes for agriculture. The jobs in this sector are also clearly demarcated by gender. Those that are very hard physically and involve a lot of lifting and carrying are generally carried out by men, whereas women predominate in areas such as fruit picking. Here perhaps, because of the periodic nature of the work, TMWP potentially work as they were intended. The demand is often episodic, particularly in the viticulture industry and therefore the workforce is temporary, but the skills acquired and the resources invested see workers return year to year. Despite being “out in the open”, this work can be isolated and the workers vulnerable. Canada and the USA have two of the more established schemes currently operating and these illustrate that despite built in protections and benefits, workers are prone to abuse by their employers. Moreover, unlike the situation in Spain, where once a foreign worker has participated in the programme for three years they are given preference to apply for a permit leading to permanent residence, there is no such avenue.

United State of America

In the USA, the H-2A programme authorises employers to bring temporary migrant workers into the country to perform temporary or seasonal agricultural work.⁴⁸ The Department of Labour oversees compliance with labour laws and requires certification as ostensibly applications from growers should only be made when there are genuine shortages of domestic labour. The programme has been criticised for being “notoriously unwieldy and underused” approving only about 75,000 jobs for foreign workers a year, in a labour force of about 2.5 million seasonal and migrant farm workers, well over half of them undocumented (New York Times 2008b).

The host of protections and benefits provided by the Immigration Reform and Control Act 1986, are impressive including: housing, round trip transportation, higher than federal minimum wage pay rates, and a guarantee of work for at least three quarters of the contract period (see Title III, Part A . However accusations of a bondage-like system where, by law, the workers cannot change employers, remedies for labour law violations are limited, and termination of employment subjects them not only to loss of jobs but to deportation paints a picture straight out of the John Steinbeck’s *The Grapes of Wrath* (Farm Labour Organizing Committee 2008a; Schmitt 2007). According to Mary Lee Hall (2002: 533), the coercive tactic of “blacklisting” where growers threaten to place workers’ names on a “no return” list which would mean the named would not be allowed to come back to the area and work for any of the growers in the particular growers’ association (in this case, North Carolina). There have been numerous documented abuses and court cases on pesticide safety violations (Hall 2002: 534); poor housing conditions (Early et al. 2006; Ward 2005); provision of dangerous transport (Holley 2001: 618); and violations of minimum wages and hours (Blanding 2002).⁴⁹

The two largest farm worker unions, the United Farm Workers (UFW) and the Farm Labor Organizing Committee (FLOC), have sought representation of H-2A agricultural workers as the only viable way to change the power imbalance inherent in the system. FLOC signed a first ever contract covering all the

⁴⁸ Sec. 101(a)(15)(H)(ii)(a) of the US Immigration and Nationality Act (INA). The Bracero program, which ended in 1964 was replaced by the H-2 program which allowed employers to hire foreign workers for both agricultural and non-agricultural jobs in locations with a shortage of domestic (national) workers. But by 1986 this programme was found to have similar problems as its predecessor. The Immigration Reform and Control act 1986 split these workers into temporary agricultural workers (H-2A) and temporary non-agricultural workers (H-2B).

⁴⁹ For up to date information on cases see the Farmerworker Justice website:

http://www.farmworkerjustice.org/Immigration_Labor/Litigation.htm

North Carolina Grower's Association workers in September 2004. Under FLOC's collective bargaining agreement, these workers have a grievance procedure to help enforce contract rights in a prompt fashion,⁵⁰ and they also have more job security because of the contract provisions for seniority in hiring and recall. FLOC has restored blacklisted employees to their jobs and uncovered and corrected a recruitment fee scam by recruiters. Most recently, they managed to get rid of recruitment fees altogether (Farm Labour Organizing Committee 2008a).

In 2005 a landmark settlement on behalf of approximately 170 Thai workers brought onto fruit orchards in Eastern Washington by the California based labour contractor Global Horizon was settled.⁵¹ Global Horizons agreed to pay the state of Washington a \$USA230,000 settlement and establish new protection for domestic and foreign workers after violated a number of state and federal laws and regulations: including failing to provide worker agreements; failing to include pay period information on an employee pay statement; withholding Washington State income tax; withholding federal taxes from H-2A employees who are not subject to federal taxes; housing employees in unapproved, unsafe, and unsanitary accommodations; underreporting the number of workers it intended to bring to Washington to work in 2005; failing to pay industrial insurance premiums for almost 75,000 employee hours; and the insurance premiums for almost 75,000 employee hours; and the issuance of four separate Washington Industrial Safety and Health Act (WISHA) safety citations (Schmitt 2007; Senate Committee on Labour 2006).

As a result of this contentious dispute hundreds of Thai H-2A workers in Washington and elsewhere in the country were covered by a first-ever contract with the United Farm Workers union. The contract provides for seniority provisions, wage payments, two percents above the enhanced minimum wage required under the programme, a grievance procedure for violations of contract or H-2A requirements, and bereavement and transportation pay for workers who must return home to deal with family emergencies (Guernsey 2007: 314-15). This was an important step in protecting rights of migrant workers. Thai workers are seen as exceptionally vulnerable as they are linguistically and culturally more isolated than Latin American workers who may have brethren in the communities in which they work (Schmitt 2007). In New Zealand a similar generalisation could be made between Pacific migrant workers and those from Asia and South America. In addition Thai workers incur much larger recruitment fee debt burdens than their Latin American counterparts, rendering them less able to protect themselves from abuse (Ward 2005).

The advocacy these unions provide however is not without its risks as efforts to protect migrants' rights threaten the livelihood of labour recruiters. In 2005, FLOC opened an office in Nuevo Leon to ensure union members in Mexico had an immediate resource for information about their recruitment, problems with visas, and arrangements for working in the USA. Santiago Rafael was found tied up, tortured and beaten to death in the FLOC office after trying to help H-2A guest workers going to the USA resolve grievances concerning abuses in recruiting systems and employment conditions and the case remains unresolved (Farm Labour Organizing Committee 2008b; Smith 2007).

Surprisingly, the North American Free Trade Agreement (NAFTA), as a source of international labour rights, does not establish common minimum standards under the North American Agreement on Labor Cooperation (NAALC). A complaints framework exists (arts 29 -39(4)(b)), in addition to the

⁵⁰ Including bereavement leave, injury compensation, no termination without just cause, freedom from retaliation for filing a grievance, medial leave with right to return, right to receive visitors, half day off for religious worship.

⁵¹ See *In Re Global Horizons, Inc.*, Office of Administrative Hearings (OAH) Docket Nos. 2005-LI-0056 and 2005-ES-001, Sept. 22, 2005

requirement that appropriate government action to provide labour protection is taken (art 3). In reality, workers are rarely remedied as despite an investigation, this is ultimately left to the countries' respective domestic policies (i.e the executive). The USA is "both judge and party" of NAALC related disputes, and just as historically USA domestic law has failed to adequately address the issues faced by migrant workers, under NAFTA there is no tangible advancement (Linares 2006; Polaski 2004).

This is not to say that changes have not been mooted to reform the system but efforts at comprehensive immigration reform have stalled. Among them, the bi-partisan federal bill AgJobs would have given undocumented farm workers a chance to legalise and the right to change jobs - a crucial means of discouraging abuse by employers. Its goal is to bolster workers' rights and build a more productive, stable work force. While not perfect, AgJobs was born from long negotiations among growers and workers' advocates. However the outgoing Bush administration passed last minute changes to the scheme which took effect in January 2009 relaxing the process growers use to prove they tried to obtain documented workers, reduced wages and government oversight (Department of Homeland Security 2008). The New York Times observed; "This new plan harks back to the shameful days of the Bracero program of the 1940s to the 60s, when Mexicans were recruited into brutal serfdom in the United States. Abuses within today's H-2A program are rampant; advocacy groups like Farmworker Justice routinely document examples of workers who, chained to their employers and unprotected by the government, submit to abusive conditions, wage theft and other exploitation"(New York Times 2008a). In March, new Labor Secretary Hilda L Solis announced that she proposes to suspend the Bush administration regulations (Greenhouse 2009).

While the unions will be increasingly looking to contracts to the end the worst abuse and, in the words of UFW president Arturo Rodriguez "make the guest worker program fair and just", many other immigrant rights advocates are sceptical of the programmes exploitative nature and poor conditions. Amanda Shanor, programme officer for the Robert F. Kennedy Center for Human Rights and a long-time farm workers' advocate states that: "the history of experiments with guest worker programs in this country is full of lessons. From the abuse of the Bracero years that the courts are still trying to clean up, to the slavery cases of today that occur disproportionately in guest worker setting, these programs create an imbalance of power between workers and employers in which workers lose the ability to speak out for better wages or working conditions" (Lydersen 2006).

Canada

Canada's Seasonal Agricultural Workers Program (CSAWP) has operated to bring temporary workers from the Caribbean since 1966, followed by Trinidad & Tabago, Barbados and Mexico in 1974, the Organization of Eastern Caribbean States in 1976 and Guatemala in 2003. The large majority (over 80%) of whom go to Ontario for up to eight months (average is four) working on fruit, vegetable and tobacco farms (Maclellan and Mares 2006; Martin 2007).

Farmers must provide the migrant workers with free housing (including meals or cooking facilities) and must guarantee them a minimum of 240 hours work over six weeks at or above prevailing minimum wage rates. Employers must take out workers compensation insurance to cover the migrants in the case of industrial accidents, and must pay the cost of the migrants' international airfare, which can be partially recouped. While working in Canada the migrants pay local taxes, are entitled to pension plan contributions, holiday pay compensation and are covered by Canada's universal health care system (International Labour Organisation 2006). There is no right of family unification or settlement in Canada permanently, even after many years of participation in the programme (Carens 2008).

The scheme has been the subject of extensive study and critique. In 2003, the North-South Institute examined the legal and regulatory framework as part of its comprehensive study and identified the scheme as a “model of best practice and migrant worker participation in the benefits of economic globalisation”. However gaps were found including in workers’ understanding of their rights and relevant Canadian and provincial laws and regulation; lack of understanding about deductions and benefit programmes to which they contributed; and health and safety concerns related to working and living conditions (North-South Institute 2006; Robinson et al. 2003). Alarm was raised over the amount of money being made off these workers who are paying for employment insurance benefits which their temporary status makes impossible to collect or they do not know they are eligible for like materiality or parental leave benefits for their children (outside of the country). This has been rectified somewhat through union assistance in filing claims. However it raises the point that any guest worker programme with this kind of taxation provision, whereby the welfare system of the host state benefits and the worker is unable to make claims, is exploitative. These workers are entitled to a range of social programs during their stay in Canada and, in some instances, after their return to their country of origin. The recent Parliamentary Standing Committee report highlighted issues of access, particularly when workers had left the country and in the case of unemployment insurance, the requirement that they be available for work in Canada (Report of the Committee on Citizenship and Immigration 2009: 41-44). It also made recommendations to address the problems of: knowledge gaps, remoteness of workers, workers who have since left the country, communication, and employers who frustrate the process.

A positive feature of the Canadian scheme is that it provides continuity. Growers can request the same workers back each year, which means that they retain the skills that workers have built up and do not need to invest constantly in retraining. This can also be a plus for the migrant workers as they become familiar with their employer, their work, the local community and each other. However again, this strength of the scheme can also be a weakness. Workers are essentially “bonded” to a particular employer for the duration of their stay in Canada, and the employer has an almost absolute power to send them home before their contracts expire, on the basis of “non-compliance, refusal to work, *or any other sufficient reason*” (United Food and Commercial Workers Union Canada 2002). Workers can thus be trapped in exploitative or abusive situations and have very little power to refuse unreasonable demands such as working excessive hours or in unsafe conditions. They are exempted from certain federal labour protections such as freedom to change job and overtime pay (International Labor Office 2006) and there is no provision in the scheme for wage increases. Studies of workers under this scheme have found that they are unlikely to complain because they want to be ‘named’ in order to return the following season (Downes 2007; Lozano 2003).

The United Food and Commercial Workers (UFCW) union says the exploitation of migrant workers under CSAWP is “Canada’s shameful little secret” (2002). There have been protests and strikes by migrant workers, cases of abuse and exploitation, examples of sub-standard or overcrowded accommodation, and industrial accidents due to insufficient training, inadequate safety equipment or overlong working hours (Basok 2003; Martin 2003a). In Ontario, where most migrants are employed, the Employment Standard’s Act relating to minimum hours of work, daily and weekly rest periods and statutory holidays and overtime pay does not cover farm workers. Health and safety legislation was finally extended to this dangerous occupation in 2006. Agricultural workers were not allowed to organise and bargain collectively under Ontario’s Agricultural Employees Protection Act and are not covered by workplace (North-South Institute 2006). In November 2008, UFCW won a landmark victory for agriculture workers in *Fraser v Ontario* (Attorney General) at the Ontario Court of Appeal when the ban on farm unions was struck down as a violation of the rights guaranteed in the Canadian

Charter of Rights and Freedoms.⁵² The court gave the government a year to bring farm workers under the Ontario Labour Relations Act, or draft new legislation respecting the rights of farm workers to unionise. This has been delayed by the April 2009 ruling of the Canadian Supreme Court, granted leave to the state government to appeal with a tentative date for the hearing set for December. The UFCW appears to be the best at representing workers and the impact of the ban being lifted could be profound.

The key difference here with the USA scheme is that unlike the government to business model there, here the scheme is government to government meaning that more resources are available for issues like worker representation and review processes. This is undoubtedly one of the identifiable strengths of the Canadian scheme: operating under umbrella of bilateral (government to government) agreements provides for an annual review. This means that problems and inadequacies in the scheme can be addressed, and contracts and regulations updated. The agreements also provide a formal mechanism (consular liaison officers) for workers to raise grievances through their diplomatic mission. However there is also a downside here: the consular liaison officers are seen to be too remote from the workers and to suffer from a conflict of interest (maintaining good relations with Canada and the smooth operation of the scheme versus taking up the fight on behalf of individual workers). Like the unions in the USA, the UFCW and the Agriculture Workers Alliance (who operates worker support centres) have taken matters into their own hands, signing a landmark cooperation agreement with the Mexican state of Michoacán in February 2009 to ensure that the human and labour rights of agricultural workers from that region are recognised and enforced while they work in Canada (United Food and Commercial Workers Union Canada 2009). This unique pact - the partnering of a state institution with a civil society organisation - is seen as necessary to ensure that the programme is fair.

The realities of competition and the impact this has on rights from an industry perspective needs to be noted however. In Canada for example, farmers are directly competing with their Mexican and USA counterparts, who operate under different agricultural policies. Low wages paid by Mexican farmers to their employees in particular creates an unequal playing field. New Zealand does not suffer from such issues but gaining advantage through cutting costs (and hiring irregular migrants) was one of the reasons prompting the implementation of the RSE scheme.

Learning from others regarding primary sector work – New Zealand and Australia

New Zealand and Australia were until very recently in a select group of developed nations without a TMWP for seasonal agricultural work (Macellan and Mares 2006; Pickering and Barnes 2005). In 2007 New Zealand's Recognised Seasonal Employer (RSE) scheme was launched to provide temporary workers for the horticulture and viticulture industry, following a trial scheme supported by the World Bank in the 2006-2007 harvesting season in Central Otago (Cunliffe 2006). Up to 5,000 workers from Pacific Forum countries (Samoa, Tonga, Kiribati, Tuvalu and Vanuatu, Papua New Guinea, Nauru, Palau, The Republic of Marshall Islands and the Solomon Islands – but not Fiji) are permitted to work in New Zealand for up to seven months in an 11-month period, with the opportunity to return the following year and no limit on the number of times a worker can be engaged.⁵³ There is also a transitional scheme where employers who are not able to meet the requirement of the RSE scheme, but are working towards it, are able to hire overseas workers already in the country (Department of Labour 2008; Klapdor 2008).

⁵² Fraser v. Ontario (Attorney General), 2008 ONCA 760

⁵³ Employees from Kiribati and Tuvalu can stay for up to nine months, in recognition of their higher travel costs.

Employers are accredited and have to meet a certain criteria relating to good work practices to access this labour pool including: the ability to pay workers the minimum wage for at least 30 hours a week and the provision of accommodation and pastoral care (which includes food, clothing, transport to and from work, banking access, translation support and opportunities for recreation and religious observance). In addition, employers must pay half the airfare and ensure return tickets are purchase at time of recruitment. As temporary visitors to New Zealand however, these workers need insurance for health care which most employers are helping to organise (Cosgrove 2008), although they are covered by law for injury compensation through ACC.

Due to the sector it services, the scheme has avoided the element of competition with local workers (which in turn can drive down wages) and careful regulation coupled with active enforcement has seen it escape accusations of exploitation and abuse that plague the much broader agricultural guest worker schemes of the USA and Canada. There has been some criticism of lack of engagement with unions including reported concern from unions over workers being sent home for alcohol related reasons (Macellan 2008). Generally however, assessment of the scheme is positive (Courtney 2008; Gibson et al. 2008; Nadkarni 2008) and complaints and disputes do appear to be investigated by the RSE unit within the Department of Labour, a unit which includes compliance staff and labour inspectors (Cosgrove 2008). Advocates have been quick to identify human rights beaches, as in the case of Joris de Bres (2008), responding to the an Ashburton farmer's banning of three Romanian farm workers from speaking their own language at work. In addition, changes to the scheme have been made as problems arise. For example, a October 2008 change to the tax rate for RSE workers of 18.4 cents in the dollar (which includes the ACC levy), down from 20.4%. This special tax rate means that workers do not have to worry about tax rebates or tax owing when they leave New Zealand. In September 2008, the then Immigration Minister also announced improvements to pre-departure orientation for RSE workers, changes to freedom of movement provisions and enhanced pastoral care planning (Cosgrove 2008).

Australia's scheme followed the New Zealand model and saw the first workers arrive in February 2009 and is already causing controversy because unemployment is forecasted to increase. Calls have been made for the pilot to be canned (Narushima 2009). Unions were always sceptical of the use of overseas labour and stressed that it must not be used to undercut wages and conditions for Australian workers (Macellan and Mares 2006). The fear of a two tier system being created, with different wages and conditions for Australian and overseas workers was partly prompted by their experience with the exploitation of some workers under the s457 visas for temporary *skilled* labour (Macellan 2008: 6).

V Enforcement

Rights as a concept conjures up the image of a legalistic approach focusing “on what the law says” by downplaying the dynamic aspects of the political processes at play (VeneKlasen et al. 2004). Rights are in fact more of a work in progress, for when they exist on paper the challenge lies in guaranteeing their implementation and institutional avenues for claiming them.

When rights are not recognised by governments, efforts to advance and expand rights not yet enshrined in law are highly important (Piper 2008; VeneKlasen et al. 2004). However there are gaps in the existing international institutional architecture, with no single agency having a comprehensive mandate on issues of international migration (Doyle 2002). The ILO has a clear mandate on labour migration and protection of migrant workers based on tripartite cooperation. The UN High Commissioner for Refugees deals with forced migrants (asylum seekers and refugees). The UN Office of the High

Commissioner for Human Rights looks after the human rights of migrants. The International Organisation for Migration (IOM), an intergovernmental body which is outside the UN system, has expanded its mandate, which nevertheless does not include protection. Other agencies such as the World Bank, the World Trade Organization and the UN Department for Economic and Social Affairs, also deal with specific aspects of migration only (Doyle 2002; Global Commission on International Migration 2005). A World Migration Organisation has been mooted for a long time, but as Kofi Annan, the former UN Secretary General observed, there is no “appetite” for such a body (United Nations Secretary General 2006a).

With none of the primary receiving countries or host countries having ratified the MWC, and few likely to do so in the near future (Piper and Iredale 2003; Taran 2000b), soft options remain, such as the 2006 ILO adopted *non binding* Multilateral Framework on Labour Migration which provides for a rights based approach to labour migration including the protection of migrant workers. Some held hope for the Global Forum on Migrant and Development, established outside the UN system as a state driven process, but it has achieved no concrete outcomes from its meetings in 2007 and 2008 (Wickramasekara 2008).

The countries focused upon in this paper, for the most part, accept the international human and labour standards for temporary migrant workers. The issue is enforcement and specific protections for these vulnerable workers. It is concerning that democratic host countries have a poor record of enforcing laws against employers who illegally employ migrant workers. In 2002, only 53 employers were fined for immigration violations in the USA, similarly from 1998 to 2002 only eight employers were convicted of violating the UK’s immigration act which is meant to prevent illegal employment (Ruhs 2005: 8). In the USA, government enforcement of basic labour protections decreased for all workers in recent decades. The number of wage and hour investigations in the Department of Labor declined by 14 percent between 1974 and 2004, and the number of completed compliance actions declined by 36 percent (Southern Poverty Law Center 2007). During this same period, the number of USA workers covered by the Fair Labor Standards Act *increased* by more than half from about 56.6million to about 87.7 million (Brennan Center for Justice 2005). The Brennan Center for Justice concluded in 2005 that “these two trends indicate a significant reduction in the government’s capacity to ensure that employers are complying with the most basic workplace laws”.

The number of temporary migrant workers does matter when thinking about the enforcement resources of the state and how oversight mechanisms might best operate. In most countries, far greater effort is given to tax law enforcement. As Philip Martin observes: “Most labor laws are self-enforcing, in the sense that the best way to ensure that employers pay at least the minimum wage is to have a labor market in which workers will not work for less. Workers have an incentive to report violation of minimum wage laws, since they will get more money” (Martin 2007). However law enforcement is a prerequisite for the effective protection of rights, but is not necessary a simple process when migrants are involved. The success of a temporary worker scheme critically depends on the host country’s willingness and capacity to strictly enforce the law against all parties who illegally circumvent the program - recruitment agents, employers and migrant workers. The fear is that unless there is an effective law enforcement system in place, employers and migrant workers may find few incentives to join the TMWP and may actually favour illegal employment arrangements instead.

There is obviously a difference between employers exploiting temporary migrant workers and state exploitation. However morally, and legally, the state should be protecting this vulnerable group. While the experience of the RSE has been mostly positive, designing programmes for other sectors would be far more difficult. In France, and Belgium for example, a service voucher system has been introduced

in an attempt to regularise private arrangements for domestic workers and the workers are provided by certified agencies (Renooy 2007). The following encompasses the enforcement issues, or the checks and balances, New Zealand would want to consider (including the cost) in any future expansion of low skill migrant work schemes:

- Implementing specific protections for those jobs that do not have a natural fit with current legislation, such as domestic work. In 2004 in Ireland, the Equality Act was passed to protect foreign domestic workers from exploitation, after anecdotal evidence emerged of growing exploitation by some employers. The Act provides domestic worker with similar protection against discrimination as other types of employees and under the Labour Relations Act 1990, an order was made in 2007 on a code of practice for protecting persons employed in other peoples homes.⁵⁴
- Certifying recruitment agencies is becoming increasingly common. The UK instituted the Gangmasters (Licensing) Act 2004 to regulate agencies that place vulnerable workers in agricultural work, shellfish collecting and associated packaging industries, mainly to make sure they adhere to labour standards.
- Dis-incentivising abuse of the system through appropriate penalties, particularly for illegal sale of visas and use of irregular migrants. Monitoring of the programmes should ideally include targeted inspections instead of waiting for complaints.
- Incentivising migrants to report violations, which will mean that the worker will have to be able to change jobs, as opposed to loosing their work permit. Work permits could be issued to the sector for example, not the individual employer which would necessitate collective recruitment within the sector. Alternatively migrant workers could be afforded freedom of movement after a short period of employment (which enables employer to recover recruitment costs).
- Independent dispute resolution to manage conflicts when they arise and information/advice lines. This means real institutions, not reliance on consular offices that are across the country.
- Providing the groups in the system – unions, migrant groups – with space (legal) and perhaps funding to support migrants, particularly those who are culturally isolated.
- Education or “know your rights” campaigns. In Ireland, while domestic workers, including migrants, have the same rights as other employees their vulnerability is expressly recognised. Education campaigns from the Irish Congress of Trade Unions have tried to educate all.⁵⁵
- Official information provided to migrants in their own language, a practice that New Zealand’s Department of Labour already follows.
- Reviewing programmes periodically and being responsive to problems as they arise.
- Centralised management of programmes to avoid deference of responsibility.
- Specific benefits targeted at return, that are actually delivered on return ie. saving schemes or contributions, paternity entitlements etc. Most of which should be optional in the beginning so as not paternalistic.
- Enforcement issues would be strengthened if New Zealand favoured countries who were themselves interested in protecting their workers. Culture issues and notions of health and safety for example could be introduced before departure.

⁵⁵ See http://www.ictu.ie/download/pdf/domestic_english.pdf

VI Conclusion – Issues for policy development in New Zealand

Many countries recognise the need to manage labour demands in critical sectors while overcoming the limitations of an immigration system which favours highly educated applicants but creates shortages of “low skilled” workers. The main avenue for regulating the movement of low skill workers has been TMWP, sometimes seen as guest worker schemes. Where TMWP have been used in the past they have been clouded in controversy, not least because of the denial of human rights and minimum labours standards. While arguably all migrants face difficulties in the labour market and this can increase vulnerability, many of the current arrangements continue to exploit and abuse one of the *most* vulnerable groups in society – temporary low skill migrant workers – in efforts to ensure that no permanency ensues.

As long as temporary migrant workers remain legally unequal to other workers and have few if any pathways to permanent residence, it is unlikely that their situation will improve markedly. As policy debates continue, analysts will continue to look for “best practices,” of which the Canadian model is constantly touted as an exemplar. This and other overseas experienced vividly illustrate that certain factors increase the precariousness of temporary migrant workers: when they are not covered by legislation; when they are tied to one employer; where the workers are isolated (either because they live in or are in rural areas without proper monitoring); where there is an unregulated recruitment industry; where demand is officially ignored and irregular migration tolerated so that it undermines regulated channels; and where just standards exist but there is no enforcement.

Recent adjustments to overseas programmes and New Zealand’s own RSE scheme are positive steps in correcting imbalances in the system. The economic benefit to the workers does necessitate some trade off of rights such as family reunification. Policy design in this area is a balancing exercise because the reality is that when this low cost option becomes too expensive, the tap will be turned off. On the other hand, to avoid the incompatibility of TMWP with the foundations of liberal democracy and the historical struggle for workers rights, the temporariness of the job needs to be evaluated where there is no probationary component that will benefit the worker in the long run in terms of residency.

New Zealand as an island state has more opportunity than most to design TMWP without irregular migrants flooding the market and its smallness, coupled with one level of government (as opposed to federalism) bodes well for managing migration. Despite some problems, overall evidence suggest that in its first year of operation the RSE scheme met both demand from NZ employers as well as providing much needed income and opportunities to migrants. Further expansion of TMWP in New Zealand’s agricultural sector has little international best practice to use in modelling and could result in wages and workplace conditions being driving down if used in areas which forced out the local labour force. The experience of the USA and Canada with this often dangerous and isolated work, shows that not only should it be adequately covered by labour law and health and safety standards from the outset, but these conditions must be able to be enforced to avoid the abuses inherent in these jurisdictions. Moreover, these often truly seasonal workers should not be contributing financially to the revenue of host countries when they cannot claim the benefits. Aside from the good fit of TMWP with seasonal labour demand, the fact that the work concerns products (as opposed to people) also adds to the suitability of these schemes. Competition with the local workforce or with neighbouring countries competing in the same market (ie. Mexico, USA and Canadian farmers) is less of an issue in New Zealand.

Designing TMWP for labour supply in the domestic arena and especially for home care of the elderly is more complicated precisely because the work concerns people (not products) and will often challenge cultural norms, even when demand is evident. It is in this sector that New Zealand needs to think about

competition for workers with Australia who has its own projected labour demand for such workers and poaching may occur. For legislation to bring those working in the private home with the ambit of existing human rights and labour law, the private home would need to be seen as a workplace. This would require legislative change to in turn change societal attitudes, since one's home is currently seen as one's castle. In addition, treatment of care workers in New Zealand necessitates a change in attitude, ostensibly through better regulation, to make these workers and their work, valued. However circular migration for permanent jobs is most problematic from a rights perspective (with the exception of irregular migration), as the demand and indeed need for entitlements that citizens enjoy grows stronger the longer these migrants stay and contribute to the host society. Arguably, the policy design for care of the elderly in particular would need to recognise that *some* foreign workers may apply to remain in the host country on a permanent basis and to bring their families, otherwise the investment in these workers, say in training (including in cultural norms of care) will not be beneficial for the receiving country and possibly be of little use in terms of skill development in the home state. Canada's recent parliamentary committee review also recommended that a pathway to permanent residency be created for all temporary foreign workers modelled on the opportunity currently available to live-in caregivers (Report of the Committee on Citizenship and Immigration 2009: 56). This bonded type of scheme where there are labour shortages is akin to New Zealand's current work to residence visa.

This paper has explored many examples of TMWP in operation today in an effort to highlight the complex issues encompassing any future expansion of such programmes in New Zealand. The evidence overwhelmingly supports the notion that democratic societies should not have TMWP where vulnerable workers are being traded as mere labour. Not only is this unconscionable when such countries have committed themselves to the international legal framework, in terms of the balancing act in policy design, exploitation and abuse of workers is not "efficient" for the receiving country in the long run. If competition with our neighbours and demand for continuity does not alter policy towards temporary migration, ultimately the check and balances in liberal democracies will be used to rectify poor regulation, perhaps in ways that were never intended. The issue is designing a fair, affordable and adequate labour supplying system, – a truly "triple win" policy - and then actively enforcing its incentives and protections.

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