

Paid domestic work: A private matter or a public policy issue?

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**INSTITUTE OF POLICY STUDIES
WORKING PAPER 09/02**

March 2009



INSTITUTE OF POLICY STUDIES
WORKING PAPER
09/02

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MONTH/YEAR

March 2009

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Abstract

In industrialised countries most of the goods and services traditionally undertaken in the home are now largely sourced outside the household. The main exceptions are childcare, food preparation and washing and cleaning, which can be unpaid work or can be undertaken on a paid basis: this is paid domestic work. The ILO estimates that there are over 100 million domestic workers globally. These workers are often the most disadvantaged and vulnerable and, in many countries, are migrants, sometimes working illegally and sometimes part of guest worker schemes. Most domestic workers internationally are women. In New Zealand, domestic work was once an important source of paid employment for women with shortages of workers met by migration from the British Isles. While it had almost disappeared as a paid occupation post World War II, a number of reasons suggest a likely increase in the number of paid domestic workers in the near future, probably met, again, by migration. Nevertheless, little is known about New Zealand domestic workers, and paid domestic work fits uncomfortably with labour law, principally because the workplace is the private home. This has meant that overall, paid domestic work has, in a variety of ways, been a private matter in New Zealand. However, we suggest that it is time that paid domestic work is viewed as a public policy issue, particularly in relation to labour law and migration policy development.

Keywords: paid domestic work, low skill migration, labour law

Acknowledgments

We would like to acknowledge the Emerging Issues Fund and the Foundation for Research, Science and Technology in supporting this research in New Zealand and the Portuguese Fundação para a Ciência e a Tecnologia for its funding of the 'Domestic work and domestic workers: interdisciplinary and comparative perspectives' project. We would also like to thank Robert Didham of Statistics New Zealand for his advice on the availability and quality of data on domestic workers. In addition, we acknowledge the advice on domestic worker migration data given by Juthika Badkar of the Department of Labour. A workshop/seminar on paid domestic work was held in mid August 2008. This attracted academics, union officials, employers and policy makers and we are grateful for their participation in this discussion. In addition, we are grateful for the comments on this paper by Richard Whatman and Sally Keeling. However, the opinions expressed in this working paper are ours as are any remaining errors.

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Introduction

Historically, most households grew their own food, made their clothes, fashioned tools and cared for dependents, both young and old. However, changes in technology, the demise of the extended family, along with a general trend towards specialisation of work, mean that in industrialised countries most of these goods and services are now largely sourced outside the household. This includes much of the care of older relatives. Yet, three areas of work have stayed to a relatively high degree within the household. These are childcare, food preparation and washing and cleaning.

Care of dependents in the home, cooking and cleaning can be unpaid work or can be undertaken on a paid basis: this is paid domestic work. Despite the myth of New Zealand being a 'classless' egalitarian society, such work was at one stage a large source of paid employment for women. In the 1896 census there were 17,791 domestic workers, the third largest occupation in that census.¹ In the same year an attempt to legislate for such workers to have a half-day off each week was defeated (Coney, 1993). The number of paid domestic workers rose to 19,189 in 1901 but fell again to 17,955 in 1921. However, numbers surged during the Depression with an estimated 29,262 in this area of employment in 1936 (Coney, 1993). Despite a reluctance to perform it, domestic service was the single largest employment category for women from the 1880s to the 1930s. Due to the demand for domestic workers, such work was important in creating early female migration flows to New Zealand (Hastings, 2006).²

In New Zealand domestic work declined rapidly around the time of the Second World War. In fact, in the period immediately post World War II, domestic work as a paid employment sector almost disappeared when technical innovations such as washing machines and vacuum cleaners appeared and women returned to the home to undertake such work. However, paid domestic work now appears to be on the rise again. While the possibility of a worldwide recession may curb some current demand for domestic labour, there are drivers in place that suggest that the

¹ Despite being a large sector of employment for women at this time, for a variety of reasons there were few Maori women who worked as domestic servants (Coney, 1993).

² For example, Marianne Allen Manchester (later Tasker) was one of a group of single women brought out from Britain on assisted passage by the Hawke's Bay provincial government in 1870 and she went on to play an important role in trying to establish a domestic workers union in 1899 (Pike). Hers was an early attempt to make domestic work 'decent work', to use the modern International Labour Organization terminology. Manchester wanted the union to have the powers under the *Industrial Conciliation and Arbitration Act 1884* which would have provided domestic workers with redress rights under the Conciliation Board or the Arbitration Board. The 'union' was primarily focused on achieving better conditions and fixed hours – a call for a 68 hour week with a weekly half holiday from 2pm on Thursday, work to cease at 2pm on Sunday and eight holidays a year. Another union was formed by Kate Evans in 1898, who took a less militant approach, seeking instead to improve the working conditions of domestic servants through moral persuasion of employers, and by the establishment of a clubroom and a benefit fund for domestic servants. However, over time both unions faded away. Manchester made a further attempt to establish a union in 1906 that was ultimately unsuccessful. While her efforts generated lots of lively debate and even provoked the creation of a Committee of Employers of Domestic Employees, re-registration problems in 1907 scuttled the campaign. The Registrar of Industrial Unions' ground for cancellation was that domestics were not 'workers' because "domestic servants were kept for comfort and convenience" (New Zealand History Online, 2008).

incidence of domestic work in countries such as New Zealand is likely to continue to rise in the long term. Reasons for the recent and possible future increase include:

- De-institutionalisation, primarily since the late 1980s, of some forms of care, including psychiatric and disability care, has meant more people with care needs are living in home-like settings.
- There has been an increase in the employment outside the home of women with dependent children and/or elderly parents. This has not been matched by an equal increase in the amount of domestic work that men undertake. This means someone else has to care for the young or the elderly and undertake other domestic work. In particular, there has been an increase in the number of women in managerial and professional type occupations most of whom, if partnered, have their partner working in similar high-income occupations. These couples tend to be income rich, but time poor (Callister, 2005).
- Low fertility and ageing in high-income countries will greatly increase the demand for aged care workers. Alongside policies to promote 'ageing in place' this will require many of these care workers to undertake work in the home. A number of Australian studies are predicting large increases in the number of age care workers and point to migration as the key way of supplying such workers (e.g. Hugo, 2007, 2008).
- Over the longer term there has been an increase in income differences between the better off and the poorer members of society potentially allowing domestic work to be contracted out. For example, Ministry of Social Development research shows that while there has been a small recent decrease in household income inequality, overall between 1988 and 2007 household incomes have become less equal (Ministry of Social Development, 2008).
- There may have been a change of attitudes towards contracting out domestic work, perhaps partly prompted by more migrants to New Zealand coming from countries where domestic work is common. Australian research indicates that while resources are important in determining whether domestic work can be outsourced, attitudes are an important factor when making decisions to hire domestic workers (Baxter, Hewitt and Western, 2009).

The rise in domestic work means that historically relevant issues such as legal status and employment rights, as well how to source such workers, are ripe for renewed debate.

In most countries, domestic work is a significant area of employment and is of increasing importance. In fact, the International Labour Organization (ILO) has suggested that a conservative estimate is that there are over 100 million domestic workers globally (ILO, 2008). Equally, the ILO has highlighted that these workers are often the most disadvantaged and vulnerable in society; domestic work is often the site of forced labour, child labour, abusive employment relationships, and unfair working conditions (see e.g. ILO, 2007 and 2008).

In many countries, those employed in this area are migrants, sometimes working illegally or, at times, as part of guest worker schemes. Further, most domestic workers internationally are women. The movement across borders of primarily women to undertake domestic work has led to a dramatic worldwide increase in female migration, particularly from parts of Asia, South America, Africa and Eastern Europe. The movement across borders also has an ethnic dimension.

It is often 'white' women (and men) employing 'non-white' women (Baxter, Hewitt and Western, 2009).

This type of gendered migration has led to a new literature about a growing 'global care chain'. In their study of domestic labour, Ehrenreich and Hochschild (2002), suggest that today global trade includes a less tangible form of exchange, that of 'care'. This is a series of personal links across national boundaries between people based on paid or unpaid work of caring. In earlier writings, Hochschild (1983) discusses the "commercialisation of human feelings" suggesting that workers, mainly women, are required to sell their "emotional labour". Outsourcing the care of children or other dependents has the potential to be more problematic than outsourcing other domestic work (England and Folbre, 2003). Such care giving can involve 'love' or at least close bonds (Folbre, 2001). This is in contrast with other jobs often held by migrants, such as fruit picking or labouring on building sites, which do not involve such relationships. All this type of literature has drawn attention to the increasing interconnectedness of families, economies and societies between less developed and more developed countries including, in more recent times, discussion concerning migration and the wellbeing of those in the sending countries. On the positive side of the discussions of wellbeing and migration there are flows of remittances back to families and communities, but on the negative side issues such as 'care deficits' in the families of the migrants are raised (for example, see Parreñas, 2001).

Some of the 'exchange of care' literature also touches on issues of inequality within countries and with that the complex issue of how to support the achievement by women of equality with men. Research shows that men still hold a disproportionate number of the more powerful positions in New Zealand society, including within universities (McGregor, 2008). One way of supporting more women to move into these jobs is by reducing their unpaid work. While the growth of early childhood services is one type of support, having nannies, housecleaners and cooks can offer a higher level of support to these women. Such support means that if these women are partnered, their partners also do not need to undertake the totality of such unpaid work in a household and can pursue high-income careers. But such a system, while supporting horizontal equality, relies on within-country vertical income inequality.

At another extreme, the Swedish model has, at its heart, both horizontal and vertical equality. In Sweden, government policies such as universal entitlements to paid parental leave, along with an aim to provide universal, high-quality subsidised childcare, have assisted in parents achieving a very different work-life balance to that of many other countries. But this has obviously been at considerable cost to the wider taxpaying community, particularly given that those workers undertaking jobs such as childcare are relatively well paid. Critics of the system also point to the extreme levels of gender-based, occupational segregation with women still undertaking most of the paid caring work. In addition, the more equal income distribution in Sweden, along with the dominant notion that "each person should take care of her/his own dirt" has, in the past, made it harder for middle-class families to privately employ domestic labour even if they wanted to (Nyberg, 2000: 12). Historically, strict migration policies have also restricted the number of migrants who might be employed as domestic workers, forcing Swedes to think more about ways of dividing work in the home.

The 'exchange of care' literature also includes a debate regarding the possible limits of 'professionalisation' of household work. For example, Radin (1996) and Arrow (1997) discuss issues such as the commercialisation of sex through prostitution. Aside from ethical, moral and emotional issues there may be other factors that limit professionalisation of unpaid work.

Ironmonger (1996) argues that a main reason why unpaid household production still continues is that the final products are superior in terms of quality, time and location of delivery of output. Weiss (1997) also notes that unpaid household production continues because of lowering costs of search (for goods and services), transaction costs and monitoring of the production and quality of goods and services. Yet, transforming the unpaid work in the home to paid work in the home avoids some of the limits of professionalisation (for example the location of the output).

In early 2008, paid domestic work has been the subject of unprecedented international attention in a number of international settings. On 19 March 2008, the ILO's Governing Body took the decision 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 the employers' and workers' groups. This decision marked 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 coming years. Equally, a project on International Labour Mobility in the Asia Pacific Region, undertaken by the Pacific Economic Cooperation Council in early 2008, identified the 'feminisation' of migration in the region being closely linked to large flows of domestic workers in the area. This project identified both opportunities and problems for both the sending countries and those bringing in domestic workers (Hugo et al, 2008). In addition, the 2008 edition of the OECD International Migration Outlook has major sections on low skill and temporary migration that touch on domestic work.

In New Zealand, the local supply of potential domestic workers is likely to be shrinking. This is due to two main factors. One is the overall upskilling of the New Zealand population, but particularly of women. As women gain higher educational qualifications they are likely to find low paid domestic work less attractive. In addition, like many other areas of the workforce, the current caregiver workforce is likely to be ageing with fewer local young people moving into this area of work. It is almost inevitable that immigration will be increasingly used to meet the forecast increase in demand for domestic labour. While the potential source countries for such migrants include traditional domestic migrant sending Asian countries such as the Philippines, New Zealand has a source much closer that could supply significant numbers of domestic workers, that of Melanesia. Currently there are no migration outlets for other than high skill workers from Melanesia.

This paper sets out why it is time for policy makers to focus on domestic work. In doing so it draws on a workshop held by the Institute of Policy Studies in August 2008. This workshop is part of a wider project on low skill migration. First, the paper endeavours to define domestic work in relation to the variety of employment arrangements for undertaking such work in New Zealand. The paper then sets out what official data can tell us about domestic work. Next, we consider some aspects of employment law in relation to domestic work, including exploring the implications of the private nature of the workplace. This is followed by a short discussion of the challenges faced by regulators in designing 'responsive regulation' this area of the economy. Given that migration to supply domestic workers seems inevitable, we conclude with an exploration of potential migration models for New Zealand. While we are aware of the need to consider issues related to both the sending and the host country, in this paper we focus primarily on the host country. In undertaking this research, while we attempt to undertake an objective analysis of domestic work arrangements in New Zealand, we have an over-riding interest in exploring ways of ensuring that domestic work is decent work.

Conceptual issues

Definition of domestic is an obvious preliminary starting point. In this paper we are focussing on work that is primarily carried out within a household. There is domestic type work that is carried out outside of the household. This includes gardening and lawn mowing services. In some situations it could include chauffers and security guards. Other work, such as house maintenance, could also be considered, in some contexts, to be domestic work. It is recognised that there are some gender implications of the choice of what to focus on as inside work has traditionally been seen as women's work while outside work has been men's work.³

At an international level, the discussion of domestic workers tends to define the scope of the topic as including both cleaners and carers, in the same delimitation of the topic as was given at the beginning of this article. Domestic workers are, in this definition, all those employed in paid work inside other people's homes, undertaking tasks broadly encompassed by 'the three c's': cooking, cleaning and caring.⁴ Many of the world's domestic workers are employed in a variety of tasks, including care of children, the disabled and the elderly, as well as cleaning and cooking. It is a trite fact that internationally many of the domestic workers in the most invidious situations (including child labourers and those in forced labour situations) will be required to do the entirety of the household chores as well as to care for any children or adults needing care.

Nevertheless, a definition that includes these three elements is not self-evident either internationally or at a national level. In New Zealand, most obviously, the tasks tend to be separated out, so that 'cleaning' and 'nannying' are distinct.⁵ That is, most often a cleaner will have distinct tasks from a nanny; this distinction may be reflected in qualifications, pay and conditions of work.

In the international context, this distinction is also evident: the ILO's International Standard Classification of Occupations differentiates between personal service workers (covering housekeeping supervisors, cooking, childcare workers and elder-care) and domestic helpers and cleaners (covering the cleaning aspects of the job).⁶ In other words, the international classification of occupations categorises the domestic worker role by task, dividing up the various elements of the role in much the same way that they are often divided in New Zealand in practice. In doing so, it categorises women who do those tasks in private homes as conceptually the same as those doing such tasks in hotels, hospitals or restaurants, not considering the private nature of the home to affect integrally the nature of the work. This point will be addressed in subsequent sections of the paper.

³ While the jobs within the household are generally seen as women's work, whether paid or unpaid, some specialist paid domestic work has been traditionally male. An example is the occupation of butler.

⁴ There is some cross-over with the concept of three 'd' work – 'dangerous, dirty and dull' – that is undertaken by lower skilled workers and often migrants.

⁵ In contrast to the tasks currently tending to being separated, historically in New Zealand domestic workers were 'generals', that is the sole servant in a house doing a variety of tasks. Coney (1993) notes that the English style of a large dwelling with many specialist servants was rare in New Zealand around the 1900s. She notes that in 1901, of the 15,400 dwellings employing servants, 13,500 had only one worker. She goes on to note at p 224 that '[t]here was perpetual complaint from generals about their isolation and lack of social life'.

⁶ See <http://www.ilo.org/public/english/bureau/stat/isco/index.htm> and Hoffmann "International Statistical Comparisons of Occupational and Social Structures: Problems, Possibilities and the Role of ISCO-08" available at <http://www.ilo.org/public/english/bureau/stat/isco/press1.htm> (last accessed 14 January 2009)

Relating to the New Zealand context, Table 1 sets out how food preparation, cleaning, childcare and eldercare can be undertaken. It shows how some activities can be undertaken as unpaid work in the home, as paid work in the home or for some paid work outside of the home.

Table 1: Ways of undertaking domestic work

		Cooking	Cleaning	Childcare	Eldercare
In-home	Unpaid work	Household members	Household members	Household members	Household members
	Contractors	e.g. caterers, 'meals on wheels'	e.g. "Mr Green"	nanny agency	Agency care
	Individual employee	cook	cleaner	nanny	caregiver
Out of home		e.g. restaurants, pre-prepared foods in supermarkets	e.g. commercial drycleaner	e.g. ECE, school	Retirement homes

As always, such a depiction simplifies complex relationships. For example, a person working for a contractor such as "Mr Green" may be a self employed franchise holder or they may be an employee of the franchise holder. Some domestic workers may only work for one agency (such as an eldercare agency) but for many clients. Other agency workers might work for just one client. Some workers might work at times as direct employees of the client while at other times work through an agency. In addition, some employers of domestic workers may operate in the private sector and be funded directly by the client (or perhaps the family of the client), while others might work for a government agency (for example a District Health Board) and the service would be paid for by the taxpayer. Alternatively, they may be working for a private 'care' company that is a multinational operation. Working for a major employer, particularly a government agency, can involve an aspect of regulation and control that may not exist in private arrangements.

Further adding to the complexity, as already noted some workers may only work as a cleaner or as a nanny, whereas others may undertake a variety of tasks. For example, most nannies in New Zealand would probably undertake some light housekeeping in addition to pure care work. It is also likely that, with the gradual increase in the number of elderly and disabled in homes, due to both the aging of the population and policy directions that increase care in the community, that cleaners may be required to do some basic care work in addition to their other tasks. This could range from a companion role to cooking to assisting with dressing. Additionally, it is difficult to easily distinguish cleaning tasks from caring tasks in many cases. In fact, there are suggestions that in the health care industry, there are moves towards requiring a multi-tasking worker, who will do both the domestic cleaning and caring for the elderly or disabled in the home. Again, the aging of the population combined with general policy directions is likely to mean that the call for such care increases and becomes more important in a practical sense.

Not directly shown in table 1 is the relative vulnerability of either worker or client in these relationships. Both the worker and the client can be vulnerable to exploitation in a domestic work setting (Table 2). A major contributor to this vulnerability is the private nature of the workplace, a point we will return in the paper.

Table 2: Potential vulnerability of client and worker in some examples of domestic work

		Vulnerability of client	
		Low	High
Vulnerability of worker	Low	Mr Green Franchise holder cleaning houses	Unionised care worker employed by DHB looking after a disabled older person
	High	Illegal migrant house cleaning	Illegal migrant looking after a disabled older person

The models shown in both tables also give no idea of whether domestic work is a short term job or a long term ‘career’. Anecdotal information suggests that in New Zealand it may be students or mothers with young children might do some of this sort of work (cleaning or caring) part-time, and only for a limited period of their lives. For most workers, mobility out of domestic work is important. But for some clients, such as children, mobility may bring with it instability of caregivers. In contrast, evidence from overseas suggests that some domestic jobs can be long term with limited mobility.

Finally, when discussing domestic work it is often described as low skilled, or sometimes even unskilled, work. 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 (Hyman, 1994). 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 (Chaloff, 2008). For example, lower skilled jobs can often be filled by higher educated immigrants, at least in the early period of when they migrate as migrants may face employment barriers such as language skills or qualification recognition.

What we currently know about domestic work and its arrangements in New Zealand

There are various ways that household work could be measured. One is to ask the households themselves if they employ people do undertake this work. In 2005, as part of a wider Australian longitudinal survey, respondents were asked if they regularly paid someone to do any household jobs such as cleaning, ironing and cooking. Overall, 10.2% of households regularly paid someone to help with the housework, with this more common in high-income households. Overall, 18% of households in the highest quintile of equivalised income paid someone to help with the housework, compared to 9.0% of households in the lowest income quintile. Help with the housework was most common in lone person households and couple households either with no children or children under the age of 15 (Headey and Warren, 2007). These patterns are likely to be similar to New Zealand.

The other way to measure such work is to ask the employees themselves. The 2006 census shows there were 342 domestic housekeepers, 1,143 domestic cleaners and 2,702 nannies.⁷ This is almost certain to represent a significant undercount of domestic workers, particularly in relation to elder care. Problems with census data include: ‘under the table’ work that is not recorded; cleaners who work for contractors may not be recorded as working in homes or may do a mix of domestic and commercial cleaning; the census definition of ‘child carers’ means those who provide ‘care and supervision for children in residential homes and non-residential childcare centres’ which does not give any information on where these workers work; there is a similar issue in relation to caregivers of older people; people who work in domestic occupations as a secondary job will not be recorded; and people who multi-task have to place themselves in only one category (e.g. nannies who cook, clean and undertake childcare). Other figures put the number of home based care workers between 18,000 – 20,000 (Burns, 2007). While not a direct measure of aged care related domestic workers, the then Minister of Health noted that as of June 2008 while approximately 28,000 older people were living in aged residential care services, another 60,000 older New Zealanders received home support services (Cunliffe, 2008).

Given that the census data is likely to be an undercount, a detailed analysis of these data is probably unhelpful. But what these data show is that most of the domestic housekeepers (67%), domestic cleaners (74%) and nannies (84%) were born in New Zealand. Few were born in Asia, a traditional source of such labour in many other countries. However, it is possible that those people working ‘under the table’ in these occupations are more likely to be immigrants, perhaps working illegally. The census data indicate that cleaners are much more likely than nannies to have no formal qualifications. Overall, just under half of nannies had a formal tertiary qualification, and only 16% had no formal qualifications. This suggests that generally this is not a low skill occupation in New Zealand, a conclusion that is not surprising. This reflects the overall childcare model in New Zealand. Looking after children is not generally viewed as care but instead is seen as ‘early childhood education and care’. In institutional and some home settings such as Barnadoes home care, education and care is highly regulated and this regulation has included requirements for suitably trained employees.

Department of Labour migration data are also unhelpful. Work applications approved by NZSCO Occupations in the period 2003-2008 showed 1,700 Caretakers and Cleaners, 815 Early Childhood Teaching Professionals, 257 Child Care Workers, 1,703 Housekeepers and 3,960 Personal Care Workers. These are small flows compared with 722,329 total approvals over this period. Even if some of these migrants were planning to be domestic workers there are other problems with migration data. These include: people may not stay long in the job they came to undertake; some people on non-work permits will be working illegally; and flows undercount the number of migrants workers who have entered New Zealand under other categories (e.g. family reunification, refugees, Pacific access categories, etc), and who subsequently work in the domestic work sector.

Overall, the official data sources provide little insight into the extent of domestic work in New Zealand and, given the nature of the work, such official sources, even if improved, are not likely be ideal.

⁷ It is difficult to make comparisons with census data in the 1980s as different classification systems were used. However, in the category ‘Housekeeper (Private service)’ in the 1986 census there were 387 people recorded. Of these 98% were female and 16% were born overseas. At this time the three most important countries of birth outside of New Zealand were England, Australia and the Netherlands.

Availability of low skilled workers in New Zealand

Internationally, the low skilled and migrants tend to be over-represented amongst domestic workers. But New Zealand has relatively few low skilled workers in general, as well as low skilled migrants in particular. In 2006, overall only 15% of all women aged 20-49 in New Zealand had no formal qualification. And despite New Zealand having a relatively high proportion of its population born overseas (Bromell, 2008), relatively few poorly educated women are migrants. In 2006, only 9% of New Zealand resident women born overseas had no formal qualification. The OECD shows that migration to many OECD countries has included many low-educated workers (Charloff, 2008).⁸ For example, the OECD data indicate that in Southern Europe low-educated persons represent a third or more of all immigrants. They point out that in most European countries and in the United States, employers rely increasingly on immigrants for low-skilled work. For example, around 2000, over 40% of low-educated workers in the age 25-34 in the US were foreign born. In this OECD study of low skilled migration, three countries stand out. These are Canada, New Zealand and Australia, with New Zealand the strongest outlier. In recent years in these countries immigration policy has focussed on higher skilled workers. One result is there are relatively more foreign-born workers in the older low-educated labour force than in the younger labour force. This pattern is reversed in most other OECD countries.

The relatively low number of low skilled migrants, particularly in the younger age groups can be seen by again examining 2006 census data. In the broad 20-49 age group, 28% of New Zealand women were born overseas. Amongst those women with doctorates, 57% were born overseas and for those with a bachelor's degree it was 35%. But when women with no formal qualifications are considered, only 17% were born overseas. This suggests there is currently only a relatively small pool of low skilled immigrant women in New Zealand who could be a source of domestic labour.

Employment and other legal issues in relation to domestic workers in New Zealand

Attention began being paid to the difficulties of domestic work for the ILO in the early 2000s. For example, the 2000 global report on freedom of association and collective bargaining noted the difficulties for trade unions in involving domestic workers (ILO, 2000: para 76) and in 2002, the difficulties in obtaining data on domestic workers were mentioned in the Conference report on decent work and the informal economy (ILO, 2002). More focussed attention was paid to domestic workers in a 2004 report on migrant workers, where women domestic workers were identified as one of the most vulnerable groups of migrant workers (ILO, 2004a), and in the 2005 global report on forced labour, which highlighted the domestic labour sector's high vulnerability to forced labour through the existence of such practices as debt bondage and the 'highly personalized relationship between the workers and employer' (ILO, 2005: para 237).⁹ The 2004 global report on freedom of association noted that the fact that the work occurs in the private sphere is often used as a justification for the lack of legal regulation for domestic workers (ILO, 2004c). The main issues identified by the ILO in relation to the 2007 proposal to consider a convention in this area were working hours, wages, workload and rest periods, social security, physical and sexual abuse, abuse by recruitment agencies and contractual conditions, and the

⁸ In the OECD study on low skilled immigration, low skilled is defined as those holding less than upper secondary school qualifications.

⁹ See also paras 36 and 151.

difficulties in exercising their right to form trade unions. All these factors will need to be considered in the national level context of policy formation (ILO, 2007).

As discussed above, domestic work in early New Zealand was not seen as a desirable occupation (Coney, 1993 and Pike, 2007). As a result, domestic workers had little negotiating power, and continued to be excluded from legislative protection. In 1907, the Registrar of Industrial Unions' difficulty in categorising domestic work as legally protected¹⁰ – or protectable – work resonates in New Zealand labour law. The Employment Relations Act 2000 (ERA) sought to stop the use of independent contractor arrangements to circumvent the basic protections afforded under employment legislation (Rossiter and McMorran, 2003).¹¹ Regardless of that, it is likely that in some cases domestic workers will fall into the grey area of arrangements with homeowners that are informal, unwritten and unable to be monitored in the usual ways and consequently 'outside' the usual protections of the law. Other domestic workers employed by agencies and health boards may enjoy a more regularized employment relationship for reasons which will be discussed below, but may still suffer from many side effects of the under-regularized nature of the sector as a whole.

The vulnerability of particular workers has at times in New Zealand's employment law history been directly addressed through legislation. One such example is the "homeworker" definition in the Employment Relations Act 2000. A homeworker, according to section 5 of that Act:¹²

- (a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
- (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

Workers falling within this definition are deemed to be covered by the provisions of the law (ERA, s 6). By being explicitly covered by the Act, homeworkers could avoid disputes regarding the classification of the relationship, bypassing the vexed question of whether they were working under a contract of service, in which case they would be covered by the law, or were working under a contract for service, in which case they would not be covered by the Act.¹³ The inclusion of this specific definition of homeworkers clarified the application of legislation relating to minimum entitlements (Rossiter and McMorran, 2003: 15-16). Its origin can be found in the recognition of the vulnerability of this largely female group of workers and attempts to ensure that they were protected by the law regardless of their ambiguous workplace, which made them an otherwise difficult fit with classical labour law (Department of Labour, 1985: 87). As this

¹⁰ He ultimately cancelled the registration of a putative domestic workers' union established the year before, on the ground that these women were not 'workers' because "domestic servants were kept for comfort and convenience" (see Coney, 1993)

¹¹ Also see Roth (2001: 479-481) and Timmins (2000 – 2003).

¹² A definition was first enacted in the Labour Relations Act 1987. The ILO has a somewhat similar definition in its Home Work Convention, 1996 (No. 177): there, a homeworker is defined as someone working from their own home or other premises *of their own choice* other than the workplace of the employer, for remuneration, and whose work results in a product or services as specified by the employer, but excludes those with the necessary autonomy and economic independence to be considered as an independent worker.

¹³ On contracts for service as distinguished from contracts of service, see generally *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695 (CA) and *NZ Couriers Ltd v Curtin* [1992] 3 NZLR 562 (CA).

article argues, the grey area into which paid domestic workers can fall in New Zealand potentially calls for similar policy attention.

The homeworker definition also pertains in some cases to particular domestic workers. Clearly, the definition of homeworker originally intended to encompass workers such as machinists working from their own home in the textile industry.¹⁴ While the definition of homeworkers in the ERA does not appear, on a common usage approach, to cover paid domestic workers employed in other people's homes, the sort of work that is included in the definition of homework has been extended significantly since it was first enacted.¹⁵

Cashman v Central Regional Health Authority [1997] 1 NZLR 7 (CA) concerned professional homecare workers who were hired by a health organisation as independent contractors to provide relief care and home support for elderly and disabled people living in their own homes. The Court of Appeal found that these workers fell within the definition of "homeworkers" as they were indeed "engaged in the course of some other person's trade or business to do non-tradesman's work in a dwelling (*not necessarily their own*)" (p 14, emphasis added). In this case, the "other person's trade or business" was that of the health organisation, the formal employer of the care workers, and not the individuals enjoying the care. Further, the Court held that "an engagement, employment or contract is within the definition if it is expressly or impliedly a term that the place where the work will be done is to be a dwelling house" (p 29). Accordingly:

Such an interpretation will include people like the appellants, but would not extend to those like artists, journalists or designers who choose to work from home but in respect of whose place of work the other party to the engagement is indifferent, and in respect of whom no term can be implied about where the work is to be done.

(p 27)

While this statement undoubtedly drew upon the initial policy reasons for the inclusion of the definition in the Act,¹⁶ to conclude that the definition includes careworkers working in private homes is a significant extension of its intended scope and shows how labour law can be adapted to the needs of new labour arrangements and the growth (or re-growth) of certain industries. The result is that workers akin to those in *Cashman* will be considered to be homeworkers for the purposes of the Act, as the Court of Appeal unambiguously held the definition to extend that far.

¹⁴ This category covered workers in an employment relationship but also those in vendor/purchaser relationship.

¹⁵ The distinction between domestic work and home work is explicitly expressed by one UK-based NGO: "Homebased work ranges from traditional crafts such as weaving or embroidery; processing natural products like making rope or shelling cashew nuts to industrial work, such as making leather shoes, garments or trimming rubber and plastic parts. ... Homebased work is not domestic work - cleaning or childcare done in other people's homes; or unpaid household work - cleaning, cooking, childcare done by most women for their family." See HomeWorkers Worldwide at <http://www.homeworkersww.org.uk/about-us/what-is-homework> (last accessed 19 November 2008).

¹⁶ The green paper leading to the inclusion of the homeworker definition saw the key reasons as being: to provide protection for a vulnerable group of mainly women workers; to avoid disputes regarding the classification of the relationship i.e. whether there was a contract of or for service; and to clarify the application of legislation relating to minimum wages, holidays, ACC etc. Homeworkers were described as those "...who, for a range of reasons, are prevented from or restricted in undertaking... regular work in a factory, commercial premises or customarily designated place of work, and who are employed by a firm or intermediary agent to carry out work in their own homes" Department of Labour, 1985: 87. This has since also included "teleworkers": those employed from their own home to perform computer based tasks. See also Roth (2001).

The homeworker definition does not however cover all three of the types of employment relationships visible in New Zealand.¹⁷ The scope of the Court's extension is limited, as the subclause "in the course of that other person's trade or business" means that the statute clearly only encompasses those employees who work in someone's home for a third party: a business supplying domestic services or an agency or health board. In other words, the definition differentiates between these types of domestic workers and those working for the homeowner in a direct contractual relationship. Careworkers or cleaners in a direct work relationship with a homeowner will not be considered homeworkers within the Employment Relations Act and will not necessarily, accordingly, receive the same protections and benefits guaranteed to those working in private homes but with an employment relationship with an intermediary company or agency. As such, working for an agency may provide greater protection for domestic workers than entering into assorted private arrangements – a rather surprising conclusion given the general concern with rights of agency workers in the European Union context.¹⁸ Whether these rights are known however, is another matter. In any event, this highlights that domestic workers are only directly or specifically covered in the general New Zealand labour law by association.

This is not to contend that New Zealand employment law does not apply to domestic workers employed by home owners (the employer) directly, or that New Zealand's labour law is poor. The Employment Relations Act 2000 tried to limit the employment relationships that can truly be classified as contracts for service, rather than contracts of service, by requiring the courts to consider the true nature of the relationship (s 6(2) and (3)).¹⁹ The result is that domestic workers employed directly by households, on a regular and continual basis, should be treated as employees and so entitled to the same protections as all other New Zealand employees, not to mention those falling within the homeworker definition. The relevant employment legislation that will apply includes the Holidays Act 2003 and the Minimum Wage Act 1983, as well as the various provisions of the Employment Relations Act in relation to trade union rights and rights on termination of employment (see ERA, parts 4 and 9). In this way, New Zealand legislation complies with current minimum ILO standards, as well as exceeding the situation in many other developed countries. The enforcement mechanisms are generally robust, and formal complaint mechanisms are available where the minimum conditions are not met. In fact, while New Zealand does not have a specific act pertaining to domestic workers as is the case in South Africa and other countries, in theory most individual domestic employees (see table 1 above) are general employees just as they are under Canada's Employment Standards Act 2000.

¹⁷ That is: (1) employees of cleaning, nannying and private nursing agencies, some of whom will be working for homeowners who are in contractual arrangements with those agencies, and others who will be working in individual homes under employment contracts between the agencies and District Health Boards; (2) direct employees of District Health Boards looking after the elderly and disabled in their own homes; and (3) direct employees of homeowners working in their employers' private home.

¹⁸ A proposed EU Directive on Agency Workers aims to ensure that agency workers in Europe enjoy the same basic working conditions as 'employees'. The UK has recently reached a tripartite agreement with employers and trade unions whereby agency workers will be entitled to the same rights as employees in relation to pay and working conditions after 12 weeks in the same job: see <http://news.bbc.co.uk/2/hi/business/7410127.stm>. See also Trades Union Congress (2007).

¹⁹ See *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 and *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) at para 78: "We start by observing that the approach dictated by s 6 [of the ERA] is plainly not the same as that taken by Cooke P and Hardie Boys J in TNT. On the other hand, both the wording of s 6 and its Parliamentary history suggest that what was intended was more in the nature of a nudge rather than radical change in this area of the law." See also LexisNexis (2002; 115-136); Hill (2004); Roth (2001).

The private nature of the workplace

As already discussed, the unique characteristic of domestic work that separates it from other occupations is the fact that the workplace for domestic workers is the private home. The fact that the workplace for domestic workers is the home means that in some circumstances, legal exceptions apply so that domestic workers are not covered by all the general protections enjoyed by other employees. The Health and Safety in Employment Act 1992 (HSEA), for example, imposes a duty on employers to “take all practicable steps to ensure the safety of employees while at work” (s 6). The definition of “employee” in the Act, however, does not apply to workers engaged by the occupier of a home to do “residential work” in relation to that home – that is, pursuant to s 2(1):

Residential work, in relation to the occupier of a home, means—

a) Domestic work done or to be done in the home; or

b) Work done or to be done in respect of the home,—

by a person employed or engaged by the occupier solely to do work of one or both of those kinds in relation to the home

To illustrate, cleaners employed by the *occupier* of a house will not be covered by this Act. The focus is on whether the employer is the occupier of the home at which the work is being done, thus reflecting the same pattern as that evident above in relation to the definition of homeworker – workers in direct contractual relationships with the occupiers of the homes within which they work are differentiated from other workers who have a contractual relationship with an intermediary company or health board.

In *Burt (Health & Safety Inspector) v Punt Paint & Waterblasting Ltd* [1996] DCR 155, the meaning of “residential work” was considered. Two young children suffered lead poisoning after playing in lead-contaminated sand residue after the defendant had sandblasted their family home. The court rejected the defendant’s argument that the employee was performing “residential work” and therefore exempt from duties under the act, despite a contractual arrangement that the house owner would clean up after the sandblasting. It was argued for the principal (employer) of the defendant that the defendant could not be an employee for the purposes of the Act because he was employed to do “residential work” and therefore the Act had no application. The Court held that it is not the place or type of work which is relevant but whether the employer or principal is the occupier of the home in relation to which the work is being done. In this case it was accepted that the relationship between the occupier of the house and the defendant was that of principal and contractor. The Court noted that the occupier had no duties under the Act to the defendant or its employees, and that was the sole effect of the work being “residential work”. The character of the work did not relieve the defendant of its duties under the Act in relation to the actions or inactions of its employees.

This case suggests that the exemption in the statute will be read narrowly. The end result is that householders will not have duties under the Act, while companies employing and providing cleaners or carers will. In terms of its application, the statute focuses on the nature of the employer; a distinction between cleaner and tradesperson, or a contract for service and contract of service, is not relevant (Department of Labour, 2003: para 1.4):

Householders who hire people either as contractors or as employees - solely to work on or in their home - do not have any responsibilities under the Act. For example, if you employ

a cleaner for your home, you do not have the duties of an employer under the Act. Similarly, if you hire a plumber to fix a blocked drain in your house, you will not be liable as a principal under the Act.

Not surprisingly, access to “dwellinghouses” by unions, health and safety inspectors, and labour inspectors is also problematic. The guidelines produced by the Occupational Health and Safety Service at the Department of Labour, do recognise that domestic work can potentially involve hazardous activities, or the experience of difficult behaviours (Occupational Health and Safety 2002: 8, 39). Health care workers, for example, who are “providing care in a client’s home face hazards similar to those experienced in hospitals and other institutional health care settings. However the home-based work environment is likely to be less controllable, visible, standardised and predictable” (Ibid: 8). However the Employment Relations Act allows labour inspectors to access workplaces “at any reasonable hour” (s 229) except where the workplace is a private home (s 230). Likewise the Health and Safety in Employment Act 1992 limits the rights of health and safety inspectors to visit workplaces that are, or are within, homes. As a general rule a home is not considered to be a place of work (HSEA, s 31(2)(a)). In those cases, inspectors can only enter the workplace with the consent of the occupier or an entry warrant from the court (HSEA, s 31 and ERA, s 230). The implications of the lack of inspection could potentially be far-reaching, as some domestic workers are rendered virtually invisible and therefore more vulnerable than other parts of the workforce.

This results in confusion. To recap, a home could be deemed a work place in the context of “homeworkers” but not necessarily so in direct relationships between occupiers and domestic workers because of the “residential work” exception. The exclusion of residential work is intended to cover householders who employ a person to work in respect of the home – painters, tillers, decorators etc – from liability as an employer. The rationale for exclusion included concerns about enforceability and also about the practicability of householders exercising the type of controls required by the Act. Interestingly, this rationale does appear to cover domestic work done or to be done in respect of the home. The original Health and Safety in Employment Bill did not intend to exclude liability in respect of persons employed within the home but not actually working on the home (Department of Labour 1992: 10). The definition as enacted, however, might have been intended to cover casual cleaners and childminders, although even here the logic for the exclusion remains dubious.

In the context of child labour, the ILO has listed the hazards associated with domestic work as including “long and tiring working days, the use of toxic chemicals, being obliged to carry heavy loads and handle dangerous items, such as knives, axes and hot pans, insufficient or inadequate food and accommodation, and humiliating or degrading treatment, including physical and verbal violence, and sexual abuse”.²⁰ With these possibilities, inspection by health and safety inspectors could potentially contribute greatly to the improvement in the working conditions of domestic workers.

Theoretically, many of these matters could be addressed through union oversight. In the domestic workers context, however, the role of trade unions is very limited, not simply due to the difficulties with inspection. Internationally, the consensus is that the trade union rights of

²⁰ These hazards make domestic work one of the worst kinds of child labour: see *Domestic Labour Global facts and figures in brief* at <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm> (last accessed on 20 January 2009).

domestic workers are practically difficult to enforce given that domestic workers will usually work on their own out of public sight. As such, union coverage is typically low, at least in relation to domestic workers employed in direct relationships with the occupiers of the home, or those employed through agencies (ILO, 2000 and 2004c). In New Zealand, union membership is likely to be more commonplace among domestic workers employed by health boards as care workers working in private homes. Further, unions' rights to enter workplaces, not to just to inspect, but under the Employment Relations Act generally, does not extend to dwellinghouses (s 19).

The Employment Relations Act and its associated statutes refer to the workplace and the relationship of the employer to that workplace as owner or occupier, thus indirectly limiting the rights of workers who work in private homes, rather than specifying explicitly domestic work. This pattern is also evident in the exceptions in relation to domestic workers in the Human Rights Act 1993 prohibition against discrimination in employment. Prima facie, applicants for employment in New Zealand are protected against discrimination on various grounds in the process of advertising, interviewing and selecting candidates for particular jobs (HRA s 22; Huscroft and Rishworth, 1995). The Act lists 13 prohibited grounds of discrimination but then allows for exemptions in relation to certain grounds of discrimination in certain circumstances.²¹ There are blanket exceptions allowing discrimination on any grounds in contexts such as national security (s 25) and work carried out outside New Zealand (s 26). In other cases, one or another of the grounds of discrimination will not be prohibited in relation to particular jobs such as religious ministers (s 28), political party appointments (s 31) and sexual violence counsellors (s 27(4)).

Further certain grounds of discrimination have been exempted in particular situations: where there is a "genuine occupational qualification"(s 27(1));²² in relation to "domestic employment in a private household" (s 27(2)); for reasons of "privacy" (s 27(3));²³ and "where, as a term or condition of employment, a position ordinarily obliges or qualifies the holder of that position to live in premises provided by the employer"(s 27(5)).²⁴ The reasons for the legislative sanction on discrimination in relation to paid domestic work in a private household are difficult to make out as there have been few test cases but seems to be associated with the same "privacy" and "authenticity" considerations as the other three grounds.²⁵ However the areas in which such

²¹ The prohibited grounds of discrimination are listed in s 21(1) and the exceptions are in ss 24-35.

²² Examples of such a position would include that of a wet nurse, actress, model, and escort. This would not however be a defence to perpetuating sexist and potentially demeaning stereotyped characterisations. An employer is under an obligation to take into consideration the individual applicant's or employee's ability to do the job, regardless of stereotyped assumptions about the latter's sex.

²³ S 27(3) Section 15(3)(a) Human Rights Commission Act 1977 mention two examples of such positions: that of attendant in a public lavatory; and that of a person responsible for the fitting of clothes to customers or others. A wide variety of situations have perhaps developed over thirty years, such as strip searching, and some clinical and medical roles.

²⁴ This subsection appears to share a common philosophical, if not moral, justification with subs (3). The present subsection adds marital status to sex as a ground of lawful discrimination. The matters that may be proved to make out the exception, while numerous, may become elusive to most employers given the objective test recognised by the subsection.

²⁵ Title of s 27. Authenticity is not defined in the Act, however its predecessor, s 15(3)(a) Human Rights Commission Act 1977, listed some examples (theatrical performances, posing for artists, or being a model for the display of clothes) of employment or positions in which, "for reasons of authenticity", a person's sex would be a "genuine occupational qualification" (GOQ).

employees can be discriminated against during employment,²⁶ including pre-employment and advertising, are wider than the other three cases: not just on the grounds of sex (including pregnancy and childbirth) but also on the grounds of religious or ethical belief, disability, age, political opinion, and sexual orientation.²⁷ Discrimination on the grounds of race, colour, national or ethnic origins, employment status, family status and marital status is prohibited in relation to domestic employment.

Complaints to the Human Rights Commission (HRC) on matters of discrimination in private households have been extremely rare and the onus of proof falls on the defendant (s 92F(2)). In one case, it was ruled that a private rest home could not be considered a private household (HRC, 1993). In another case an employment agency had refused to hire someone on the basis of his sex when recruiting casual staff to provide services to the elderly, including 24 hour nursing care, shopping, transport, gardening, cooking, housework and odd jobs (HRC, 1994). The opinion of the HRC was that gardening and odd jobs such as chopping wood did not come within the exception, as that is what the complainant had thought he could contribute. Instead the term referred to housework done within the four walls of the home. The opinion continued that: “it was extremely doubtful s27(2) even applied to babysitting and child-minding which, arguably, was not domestic work”. However this was not elaborated upon as the work in the complaint concerned that occurring outside the house. The HRC’s own guidelines however contradict this and further add to the confusion (HRC, 2008: 9):

“Can I advertise for a young person to be a nanny in my house?”

Yes, where the job is one of domestic employment in a private household, the Act permits different treatment based on age, disability, political opinion, religious or ethical belief, sex or sexual orientation. It does not permit different treatment based on marital status, colour, race, ethnic or national origins, employment status or family status.”

This explanation suggests that the reasons behind this exemption are associated with the fact that the employment occurs within the home, rather than anything associated particularly with the nature of the tasks undertaken. In other words, this exemption is perhaps the legal embodiment of the maxim that “one’s home is one’s castle”. That does not, however, provide a complete explanation, and is confused further by the prohibited grounds of discrimination that are not exempted.²⁸ It is difficult to discern a logical distinction between those grounds and the grounds upon which discrimination is allowable.²⁹

A current example of such discrimination is the proposed change in the rules for home-based childcare disallowing nannies under the age of 20 to work in home-based services. This was to come into effect on 1 December 2008, but has currently been put on hold by the new government as part of the review of the early childhood education sector (The Dominion Post, 2008 and

²⁶ Employment under the act has a board definition; it includes advertisement, pre-employment questions and interviews, conditions of employment, training opportunities, promotion and transfer, fringe benefits, termination and retirement.

²⁷ GOQ is on sex and age only; "privacy" on sex and "living on the premises" sex, marital status

²⁸ Domestic workers are protected against discrimination in their employment on the grounds of their marital status, colour, race, ethnic or national origins, employment status and family status.

²⁹ It is interesting to note that the seemingly illogical statutory arrangements in relation to discrimination law and domestic work extends beyond New Zealand: the prohibition against discrimination in employment and sexual harassment in the workplace in US Title VII (42 USC § 2000e (2005)) applies only to employers employing over 15 employees; obviously, in practice, this means that most often the employers of domestic workers are not subject to those prohibitions.

Tolley, 2008).

Domestic workers are also mentioned in a number of financial statutes. The Income Tax Act 2007 defines a ‘private domestic worker’ in s YA1 as:

“a person employed by any other person if—

- a) the employer is the occupier, or 1 of the occupiers, of a dwellinghouse or other premises used exclusively for residential purposes; and
- b) the employment is for the performance of work in or about the dwellinghouse or premises or the garden or grounds belonging to the dwellinghouse or premises; and
- c) the employment is not for a business carried on by the employer or an occupation or calling of the employer; and
- d) the employment is not regular full-time employment”

Once again, it is clear that this will not apply to all domestic workers, but merely those who work in irregular or part-time employment (under 30 hours a week on average for each employer); full time domestic workers will enjoy the same tax regime as other employees where tax deductions are the responsibility of the employer. In addition, arrangements cannot be made under a contract for service simply to dodge such responsibilities. The Inland Revenue Department (IRD) will closely examine the terms of any contract to determine whether workers are self-employed or employees. This situation might arise for example, where a full time housekeeper and a house owner enter into a contract for service so that the housekeeper, as an “independent contractor”, is responsible for his or her own tax (IRD, 1995: 12). On the other hand, those workers who fall within the definition will not have their tax withheld by their employer but are obliged to pay the tax directly, including making deductions for student loans, ACC (KiwiSaver Act 2006, s 14) and child support, and must maintain certain information. Private domestic workers may also choose to fund their own KiwiSaver contributions (Injury Prevention, Rehabilitation and Compensation Act 2001, s 13 and 168A).

There are two ways of viewing these specific obligations on private domestic workers. On the one hand they accord with the pattern that, arguably, domestic workers currently employed by companies and agencies in New Zealand enjoy more employment law rights than those employed directly by the homeowners of the houses in which they work: that is, it is the nature of the employer which is considered important rather than the nature of the employee in these private arrangements. In other words, it mirrors the way in which employment law is not uniform in its treatment of domestic workers, unconsciously carving the sector up for different treatment. In the employment law context, there are exceptions on the basis of the employer’s identity, both in relation to the occupier of the home workplace and whether or not the employer is a company or the homeowner directly.

On the other hand, by being categorized in this way those employed on a part-time or irregular basis have an incentive to be brought into the system, as opposed to accepting ambiguous arrangements because of worries about paying secondary tax or because a prospective employer will not undertake PAYE obligations. Employers cannot circumvent the law by setting up independent contract arrangements and as employees, albeit employees who pay their own tax, the protections of the Employment Relations Act will apply. This optimistic argument, however, is not a sufficient reason to continue with this confused mix of approaches; a whole government approach must be preferable.

A continuum of possible arrangements

Knowledge of the law is an issue. In some overseas jurisdictions, targeted domestic worker legislation has been mooted due to research showing that issues of race, culture, language and gender mean that their mainly female (and largely immigrant) workers less likely to know their rights, and most likely to be unfairly treated by their employers.

The reality for domestic workers in New Zealand may differ significantly from the letter of the law. Aside from those in genuine contract for service arrangements, all domestic workers are employees under the Employment Relations Act. Arguably however, there is a large gap between the letter of the law and the protection of domestic workers in practice in New Zealand as elsewhere (Aubert, 1969: 116 - 126). It is possible that some paid domestic work could be organised as independent contracting or contracts for service because this is 'easier' for the householder and virtually undetectable by the usual checks in the system, such as inspectors and unions, because of the seclusion of the workplace. This is despite the categorisation of such work as a contract for services appearing to be contrary to the Employment Relations Act in many instances. If this is true, then many are in a truly unstable employment situation particularly if migrant workers are added to the mix.

This certainly seems to be the case in relation to the one group of domestic workers whose employment conditions have been in the spotlight in recent years – publicly funded homecare workers in the homes of people with a disability or the elderly.³⁰ Although public funds are intended to cover costs such as holiday pay, travel time and costs, training, supervision and insurance, there appear to be serious shortfalls in the working conditions of these workers (Health Workforce Advisory Committee, 2006; TVNZ, 2008; Burns, 2005; Lazonby, 2007; NACEW, 2006). There are suggestions, for example, that the only homecare workers to receive travel costs and holiday pay are those employed by ACC. In other words, 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 New Zealand legislative protections than domestic workers 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: these domestic workers often suffer from lower wages and less advantageous working conditions than other workers.³¹ Their visibility however means they are more easily championed by unions, individuals and political parties.³² Possibly, this attention is part of a gradual realisation that domestic workers are an invaluable part of the care of the ageing population in New Zealand.

³⁰ Note that their services are funded through the Accident Compensation Commission and the Ministry of Health to District Health Boards, or directly to non-government organisations that contract for the homecare service provision.

³¹ Providers are in competition with each other. The funds available are intrinsically connected to the client, and must theoretically cover all business costs including paying wages, holiday pay, travel time and costs, paying for attendance and delivery of training, employing supervisors, equipment, uniforms and supplies, insurance, any building rental and, in the case of private companies, making a profit. Homecare workers are caught in this funder/provider split. The same pattern exists in the UK, where the Trades Union Congress has summarised a number of reports that suggest that the privatization of care work, so that patients are cared for in their homes by workers employed by agencies, rather than directly employed by public bodies, is a cheaper option because of the lack of employment rights passed onto the workers. That is, these workers will receive lower pay, fewer benefits and less job security than workers working directly for health boards.

³² Union coverage by the Food and Service Workers Union and the Nurses Union, and have been championed by others, including the New Zealand Council of Trade Unions and Rural Women New Zealand, who campaigned in 2005 for the government to reimburse the travel costs of homecare workers. The National Party made the plight of homecare workers an election issue in 2005 and they are an integral part of the Green Party health policy.

Research conducted by the NACEW in 2005/2006 highlighted that government contracting was one area where there may be the potential for the government as funder to influence improvements in the quality of work for women currently in precarious working situations or low paid work in the homecare, residential and cleaning sectors. Homecare workers however, are poorly paid, feel undervalued, and as such the sector suffers from retention and turnover problems. The private part of this arrangement – which necessitates profit – means that issues of fair pay and employment conditions, meeting legal requirements around provisions such as sick leave and holiday pay and covering all costs associated with the performance of the job are sometimes lacking. There is little scope for wage increases. The typical wage of these ‘unskilled’ workers in 2006 was \$10.50- \$11.50 per hour and there is massive staff-turnover, some sources putting it as high as 50% per annum (New Zealand Nurses Organisation, 2005). A recent *Close Up* investigation put the pay rates of care workers, mainly focused on those working in rest homes, at around \$12 - \$14, in line with recent changes to the minimum wage (TVNZ, 2008). David Cunliffe’s \$13 million injection to ‘reform’ the Aged Care Sector in mid-October included DHBs being *asked* “to pass this through to the workforce” (Cunliffe, 2008). The *Close Up* report also estimated that only 10,000 of a possible 50,000 people employed in this area were in touch with unions. The largely non-unionised nature of the workforce makes data concerning such workers difficult to obtain.

The Health Workforce Advisory Committee (2006) identified that training is a major issue with homecare workers: when undertaking training is at the expense of the homecare worker, there is no incentive to up-skill if that training will not lead to a higher wage. High turnover and retention problems were also noted, and the report stated that this in turn impacts on the client’s right to choose from whom they receive service. Cee Payne from the Nurses Union reiterated that low pay, lack of training and supervision, and emotional and physical stress from workloads, meant that there was a desperate need for an overhaul. A focus on minimum requirements and the needs of staff was, in her view, overdue.

There is however some ambiguity and lack of uniformity in relation to the legal responses to domestic work. Domestic workers in New Zealand are prima facie covered by employment law protections, but with some notable and potentially far-reaching exceptions in relation to discrimination, labour inspection and income tax collection. The coverage and exceptions are patchy, with domestic workers excluded from some protections when they are employed directly by homeowners, but not when their employment relationship is with an intermediary company. While the nature of the job may not differ, the way in which the law treats domestic workers can vary significantly. As this workforce grows, it is possible that different categories of domestic workers will continue to be treated differently by the law, without the reasons for this distinction being examined fully.

The New Zealand system has perhaps not needed to specifically address private arrangements as it has not been part of our culture to have domestic workers in the home, particularly live in. Due to this and also our geographic isolation with regards to migrants coming here to fill these jobs, we simply have not conceived of the expansion of private arrangements. However New Zealand will need to respond, after all, to the aforementioned adoption of a new ILO convention on domestic workers.

Responsive regulation?

Baldwin and Black (2007:1) argue that '[a]n important test of a regulatory theory is whether it offers assistance in addressing the challenges that regulators face in practice'. Building on a growing literature which identifies potential gaps between legislation and desired outcomes, Baldwin and Black discuss the concept of 'really responsive regulation'. For lawmakers to be successful with their regulations they need to be able to (p. 25):

- Detect undesirable or non-compliant behaviour
- Develop tools and strategies for responding to that behaviour
- Enforce those tools and strategies on the ground
- Assess their success or failure and modify them accordingly

As already noted, given the nature and location of the work, monitoring domestic work is difficult. While there might be legislation in place, actually detecting non-compliance, as well as enforcing compliance, can be extremely difficult. Equally, due to the lack of information on domestic work, assessing whether laws are working, and if they are not determining effective ways to modify them, is challenging.

While not rejecting the legal framework as one tool in influencing behaviour, Baldwin and Black suggest that policy makers need to think laterally. For example, they need to fully understand the role of all participants in the industry and what might change their attitudes and behaviour. This might involve a mix of possible penalties and incentives but could also involve techniques such as education campaigns around best practice.

Looking ahead: The preferred migration model and possible sources of domestic workers

As discussed, there appears to be some growth in demand for paid domestic workers in New Zealand and this demand is likely to increase. It is likely to rise on account of an increased division between the richest and poorest in the country; changes in attitudes to employing domestic workers, in part perhaps influenced by the experience of New Zealanders living abroad and foreign born residents from different cultural contexts; an increased need corresponding to a reduced reliance on institutionalised care of the elderly, ill and disabled; and the growth in the number of families in which both partners work full-time outside the home. Many of the reasons for this growth in demand equally explain why migration will be needed to fill the demand – the aging of the population, combined with a highly skilled and educated workforce, and the changing societal and cultural context in New Zealand, means that there will be fewer New Zealanders available to undertake full-time paid domestic work. The possible future shortage of a wider low skill caregiver work group and the need to look to low skill migration to meet this demand has been highlighted in Australia (Hugo, 2007 & 2008). This research also indicates that Australia is likely to be competing for New Zealand for such labour and, in fact, New Zealanders themselves may migrate to Australia to undertake caregiving work.

There are a number of possible models of migration for domestic work. And the models can vary by the category of domestic workers, for example caregiver of older people versus cleaners.

Where borders are difficult to seal, for example into Europe and into North America from the South often through the Mexican border, illegal migration provides a pool of domestic workers.

But New Zealand can easily control its borders and so, in general, domestic workers will have come to New Zealand legally. They may have, however, come to New Zealand on a non-work permit and may be working illegally.

In terms of controlled migration flows, Singapore and Canada provide two diametrically opposite migration schemes. In Singapore large numbers of paid domestic workers are entitled to work in the country on temporary work permits linked to particular jobs. These workers are subject to very strict controls in relation to the nature of their job, salary and working conditions, which are less than could be expected for a citizen. It is not possible for a paid domestic worker to obtain any citizenship or residency rights in Singapore and, in fact, if regular health checks detect a pregnancy, then the worker will be immediately deported.

In comparison, in Canada live-in care-workers will obtain rights of residency for them and their immediate family after two years in the country. The numbers of work permits each year are severely limited, and only skilled care givers are eligible to apply, and there is some suggestion that as a result, there are increased numbers of illegal migrants working in unregulated working environments. The employment of such care givers is highly regulated, and they enjoy the same employment rights as citizens working in Canada.

Clearly, in New Zealand it is unlikely that most types of domestic worker will be entitled to enter the country through the main permanent migration streams which are oriented towards skilled migration (Hugo et al, 2008). However, some may be able to come in as temporary migrants through a labour market tested work permit if there are specific labour shortages in New Zealand and no New Zealand citizens or residents are available to undertake such work.

Alternatively guest worker schemes such as the Recognised Seasonal Employment scheme could be developed. For specific occupations, such as caregivers for older people, some recognised training could take place in the sending country before coming to New Zealand. Despite some teething problems, there is some evidence that in its first year of operation RSE scheme was successful at meeting both demand from NZ employers and providing much needed income and opportunities to migrants (Nadkarni, 2008). However, despite this superficial similarity, there is no further congruence. In particular, care work will require the building of longer term relationships than agricultural work does, and so a policy that limits the amount of time that a worker is entitled to be in the country to the extent of the RSE is unlikely to achieve the necessary results for domestic work. Further, as migrant domestic workers are likely to be live-in or, if not, will necessarily undertake intimate work, issues of rights and protections are writ large; the home is a work environment that is especially susceptible to abuses and vulnerability.

If relatively low skilled domestic workers were brought in as permanent migrants, a number of issues arise. First, many might quickly move to other jobs therefore not meeting the demand for domestic labour. One way around this is the Canadian scheme, which starts the workers as temporary migrants with the potential to become permanent. Another is that with low skilled permanent migration, alongside the Trans-Tasman agreement that allows a free flow of residents of both countries, Australia will be scrutinising New Zealand schemes to see the potential for unwanted 'back door' migration of low skilled workers.

A question also arises as to where New Zealand might source its migrant domestic workers from. The short answer is that there are many low income countries from where low skill domestic workers could come. This includes many of the traditional sources of such labour in Asia,

African and South America. But there may be reasons to look closer to home. In 2006 a World Bank report identified that many Pacific Island nations, but particularly Melanesian countries, had high population growth, low employment, low incomes, major difficulties in developing local industries, and few migration outlets (Luthria, 2006). Where labour mobility is possible, it is generally skewed in favour of skilled workers. This report suggested that greater labour mobility would expand the employment options available to Pacific Islanders. The study was influential in supporting the development of the New Zealand RSE scheme and a recently announced scheme for Australia. These islands are also a possible source for domestic workers, as well as wider care workers, and such migration would likely contribute to development of the Pacific.³³ These countries are also a possible future source of migrant workers for the wider caregiver workforce.

The source of migrant domestic workers will not only be influenced by government policy but could also be influenced by employment preferences of those employing such workers in the home. Given that employers may be able, in some circumstances, to discriminate on basis of nationality and/or ethnicity, then this might have some influence on which workers are sought after.

The issues that arise in relation to the supply of future domestic workers are those that concern the very nature of the type of migration response that would be desirable for New Zealand. Questions of the numbers of workers that should be entitled to enter the country, whether or not a requirement for qualifications should exist or any pre-accreditation process, and where those migrants will come from will be key to any determination. Equally, the question of whether those migrants will be eligible for citizenship rights after a period of residence in New Zealand, or whether they will receive temporary work permits limited to a particular employer for a limited period of time must be addressed. Finally, the question of how employment rights should be regulated for this sector of the workforce will require determining whether they should be treated in any way differently from other domestic workers, either recruited locally or already New Zealand citizens.

Conclusion

While the concept of domestic service was unappealing, and did not fit well with notions of egalitarianism and opportunity distinguishing colonial society from late Victorian Britain, such work was at one stage a large source of paid employment for New Zealand women. One of the key features of New Zealand colonial society was the 'import' of young women to work as domestic workers. The shortage of domestic workers was able to be met by migration from the British Isles, with women born in New Zealand at that time being unprepared to work as domestic workers. While domestic work as a paid occupation had almost disappeared in New Zealand in much of the period post World War II, as the result of confluence of a variety of reasons, but especially the ageing of the population, there is a suggestion that the number of paid domestic workers is likely to rise in the near future, and that the increased demand for domestic workers is likely to be met, again, by migration.

³³ There is on-going debate about the overall benefit of migration to both sending and host countries. In relation to the Pacific, Connell (2008) sets out the problems created for the Pacific by migration of skilled nurses and doctors. It is possible that the migration of lower skilled caregivers could create some skill shortages in the Pacific. In part, this depends on the level of support given to upskilling of the Pacific population within the Pacific and the overall supply of such workers.

Little is known about the numbers of domestic workers, the realities of their working lives or their employment arrangements. Paid domestic work currently has a somewhat uncomfortable fit with labour law because of the location of the workplace: the private home. Overall, in New Zealand paid domestic work has, in a variety of ways, been a private matter. However, we suggest that it is time that paid domestic work is viewed as a public policy issue, particularly in relation to labour law and migration policy development. The pressure to think more about domestic work comes from both within New Zealand and outside. As an external driver, the ILO is now taking action to produce an international labour standard covering domestic work and, given our international obligations, New Zealand will be required to engage with this process. Associated pressure at both the national and international level by the trade union movement, and an increasingly globalised and vocal social movement of domestic workers, is also likely to bring the topic more to the fore in New Zealand.

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