The Case of the Disappearing Department of Labour: Whither Goes State Protection for Vulnerable Workers?

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Introduction

- One way in which countries can be judged as to their level of sophistication over human rights is the way in which labour is treated and afforded state protection.
- OHS legislation and OHS enforcement agency can be seen as a barometer of the country's human rights status and as precursor for fundamental and wide-spread reforms in employment policy and law.
- New Zealand is also a good case study as it has a long tradition for introducing radical social, economic, and employment policies – social, economic and political laboratory.

Introduction (cont)

- We will attempt to demonstrate that if the slow erosion and demise of a significant state agency, such as the Department of Labour, can occur in NZ, then it can occur in other similar jurisdictions.
- We will draw on NZ's 2 major inquiries:
  - the 2000 Ministerial Inquiry into Tranz Rail OHS; and
  - the 2011-12 Royal Commission of Inquiry into the Pike River Coal Mine Tragedy in which 29 miners were killed in 2010
- But our stories are not only about the dismantling of the DoL but also the dismantling of the firm and its duty of care and the need for state control

Why State Involvement?

- The fact that we still have to defend and justify the necessity for state protection is indicative of the pervasiveness of neo-liberalism.
- Walters et al (2011:61) note in *Regulating Workplace Risks*:
- "…it is inescapable that in recent decades governmental appetite for regulation has waned considerably in most countries, in parallel with the rise of the varying degrees of non-liberal economic strategies. OHS regulation has been strongly affected by the non-regulatory or deregulatory orientations of national and international governance in two main ways. **First,** existing regulatory frameworks have been modified in various ways to allow more freedom to capital. **Second,** resources for inspection have been reduced in one way or another in most countries. These developments present further challenges to the means with which regulatory inspectorates are able to inspect…".

Theoretical Underpinnings

- There are of course perennial debates regarding:
  - the role of the public sector vs the role of the private sector (public interest theory),
  - the relationship between the state and business in OHS (capture theory), and
- While these debates have been robust, they have, in the main, been ideologically driven and theoretically based.

Public Interest Theory

- As part of the wider application of public interest theory and the ability of governments to protect vulnerable workers, there have been a number of studies focusing on various vulnerable groups
- Sargeant and Tucker's (2009) model has been constructed to include micro-, macro- and meso-level factors that bring together political, economic, and institutional influences on the risks faced by migrant workers.
- Sargeant and Tucker's (2009) model is useful as:
  - It provides a comparative framework in order to better understand the regulatory influences of different jurisdictions with regard to at-risk migrant workers in different countries. T
  - It provides a link between OHS in the public interest & the capture of OHS regulatory processes by powerful interest groups.

NZ's OHS Legislation

- NZ has a long history of introducing robust OHS legislation but it was frequently as a result of major fatalities often among miners.
- Traces of the minimum standards embedded in NZ's early *Factories Act 1891* can still be found in the *Health and Safety in Employment Act 1992*.
- However, these two Acts could not be more different, starting with the powers of the OSH inspector
- The powers of the OSH inspector under the previous *Factories and Commercial Premises Act 1981* covered a much wider range of employment activities compared with the present *Health and Safety in Employment Act.1992*
  - eg OSH inspectors were able to inspect wages and time records of all employees (section 15).

NZ's OHS Legislation (cont)

- Under the current *HSE Ac*t, OSH inspector no longer had unrestricted access to all commercial premises. Instead their duties under the current Act, section 30, are restricted:
  - "(a) to help employers, employees, and other persons to improve safety at places of work, and the safety of people at work, by providing information and education; and
  - (b) to ascertain whether or not this Act has been, **is being, or is likely to be complied with**; and
  - (c) to take all reasonable steps to ensure that this Act is being complied with; and
  - (d) all other functions conferred on inspectors by this Act or any other enactment".

NZ's OHS Legislation (cont)

- Two main features outlined in the Robens' Report were seen by New Zealand and other Commonwealth governments as essential to effective administration of, and long-term compliance with, OHS legislation:
  - A single Act covering all workers, administered by a single unified inspectorate; and
  - The creation of a joint, self-regulatory/OHSM approach where the responsibility for health and safety is placed firmly back into the workplace.
    - The participation of employees is formalised via the mechanism of representation on workplace health and safety committees.

NZ's OHS Legislation (cont)

- The NZ HSE Act, 1992 deviated from the Robens model in that it ***did not*** stipulate the participation of employees in their health and safety because the *Employment Contract Act* ***failed*** to recognise trade unions as the legitimate representative of the workers or countenance worker participation.
- The *EC Act 1991* reversed conditions and wages for most workers in NZ, such as the withdrawal of penal rates, the dismantling of industry-specific safety provisions, and the erosion of limits on hours of work, etc.

NZ's OHS Legislation (cont)

- The industry- and workplace-specific OHS hazards and remedies (which were contained under the previous award system) either vanished or were covered by broad generic performance standards and regulations (inline with an OHSM approach).
- There was also a major shift in the labour market from full-time, permanent employment to precarious employment, with an increase in part-time, temporary, casualised and so-called "self-employed" workers.

NZ's OHS Legislation (cont

- By 2000 NZ's OHS record had declined considerable & the newly elected Labour Coalition Government undertook reviews and amendments to the OHS legislation.
- Review of the OHS legislation and a Ministerial Inquiry into the OHS of Tranz Rail (once state owned) bought about changes:
  - One Act, one authority, covering all workers
  - Worker participation (committees & reps) for large- & medium-sized businesses
  - Stress & fatigue treated as significant hazards
  - The limitation period for taking a prosecution was extended
  - Crown monopoly over prosecution removed

The Evolution of the NZ Department of Labour

- Established in 1891 and modelled on the UK system, the Department of Labour was one of the primary means by which the government regulated not only employment relations but also the economy and social welfare.
- Post-war years saw a strengthened role for the Department in improving workplace conditions, administrating assisted immigration, and a renewed centrality of industrial relations policy.
- Minister of Labour held one of the most powerful portfolios in government (typically top ranking MP or Prime Minister – now near the bottom ranking!!)

The Devolution of the NZ Department of Labour

- However, by 1988 the Department of Labour underwent major restructuring, which continued in some form or another for over two decades until its disestablishment in 2012.
- Since the mid-1980s, successive governments have to a greater or lesser degree “rolled back the state”.
- The DoL was directed to focus exclusively on core labour market functions while taking a “side-line” position to most aspects of employment, including industrial disputes and frontline enforcement.

Number of OHS inspectors by number enterprises

	1988	1998	2008
No. of OHS inspectors	**317**	**168**	**130**
Size of Business Population	**247,143**	**471,100**	**470,050**

The Devolution of the NZ Department of Labour

- The reasons for the reduced coverage of inspectors are threefold.

1. There has been a systematic withholding of resources to the OHS inspectorate since the 1980s
2. In theory self-regulation requires fewer inspectors as the onus is on the employer (and to a lesser extent the employee) to ensure that they create a healthy and safe workplace.
3. There was a trade-off – employers involvement in setting standards and DoL would back off. BUT there is either a lack of willingness (or a lack of competency) on the part of employers to engage in OHS infrastructure
   - eg Minex OHS Mining reference group set up to develop performance standards and codes of practice but nothing or very little eventuated.

The Devolution of the NZ Department of Labour

- The 2008 election of the National Coalition Government finally demolished the long-established prominence of the position of employment relations and the Department of Labour
- The NZ Department of Labour was disestablished on the 1st July 2012 and merged into a supra agency that now includes the Ministries of Economic Development and Science and Innovation and the Department of Building and Housing and called the Ministry of Business, Innovation and Employment

Ministry of Business, Innovation and Employment (MoBIE),

- It is difficult to understand the rationale behind the composition of the new Ministry of Business, Innovation and Employment (MoBIE)
- Government press releases also reinforce the business focus of the Ministry, for example:
  - The establishment of a new ***business-facing*** department to take more effective leadership of NZ's microeconomic policy agenda and the development of practical decisions to achieve productivity improvement and competitive, internationally-focused businesses and industries…".

Whither Goes State Protection for Vulnerable Workers?

- The disestablishment of the Department of Labour also raises uncomfortable questions:

1. Is the demise of the Department of Labour indicative of its lack of political influence and patronage combined with the lack of influence of workers?
2. Given its new form, is MoBIE capable of protecting vulnerable workers?

- Both questions are difficult to answer

Way forward?

- There have been, however a number of initiatives that may address issues surrounding vulnerable workers:
  - Taskforce and advisory panel have been established to provide expert advice on vulnerable workers to the Minister of Labour.
  - NZ OHS inspectorate has been influenced by the US Department of Labor's Wage and Hour Division strategy of interrupting the flow of goods from manufacturers to retailers (see David Weil & Carlos Mallo, 2007)
  - Using the media in a coordinated way to publicize findings from research and to raise the industry and OHS inspectorate concerns

Conclusions

- There are perennial problems in NZ and elsewhere around weak enforcement & legislation.
- It is also evident is that, although the eventual disestablishment of the Department of Labour was swift, in reality its demise has been insidious.
- It may be possible that traditional regulatory agencies such as the US Dept of Labor's Wage and Hour Division (WHD) can reinvent themselves into a highly flexible unit with the ability to literately "put a spanner in the works".

THANK YOU