Department of Employment and Workplace Relations
Questions on Notice: *Minimum Age Convention, 1973 (C138)*
JSCOT Hearing 6 February 2023

1. **According to the NIA, Australia intends to exclude from the minimum age light work provisions, certain occupations on the basis they are already legislated in the states and territories, are commonly carried out by young people, or are considered acceptable ways for children to develop a work ethic and earn pocket money.**

   The ILO Committee of Experts on the Application of Conventions and Recommendations* has specifically acknowledged legislation may be a basis for exemptions under article 4, subject to certain conditions.

   a) **Is there a conflict between the rationale provided by Australia and the rationale considered acceptable by the ILO for an article 4 exemption?**

There is no conflict in the rationale provided by Australia and the rationale considered acceptable by the ILO for article 4 exemptions.

In 2019 the Department received advice from the ILO on Australia's compliance with the Convention under Article 4. The ILO office indicated that legislation of all jurisdictions appeared to meet conditions required by the Convention concerning the conditions under which light work may be undertaken and recognised the specific issue of Australian practice allowing children under 13 to work in some instances. The ILO office suggested Australia utilise exemptions under Article 4.

It is important to note that the flexibility provision in Article 4 represents common forms of flexibility provisions that are drafted into ILO Conventions to enable member States to ratify the Conventions when national circumstances would otherwise posed obstacles to compliance.

Reliance on the flexibility provision in Article 4 does not bring into question the Government's commitment to the abolition of child labour.

In reviewing jurisprudence from the Committee of Experts, there are many instances where the Committee of Experts has noted that categories of employment are excluded from relevant labour laws and the member State has failed to declare these under Article 4. The Committee of Experts has called on that country to either declare them excluded under Article 4 or consider themselves non-compliant with the Convention. Therefore, we consider that declaring these categories of employment excluded from the outset would satisfy the Committee of Experts.

Despite the reliance on the Article 4 exemptions, employers of children will need to remain compliant with existing law and practice that protects children from performing hazardous work, including compulsory schooling and work health and safety (WHS) requirements.

   b) **Which countries have indicated Article 4 exemptions in their Article 22 reports?**

   *** International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports relating to Convention No. 138 and Recommendation No. 146 concerning Minimum Age*, 1981, see specifically pages 24-25, 31, 164-164.**

Article 22 reports by other countries are not publicly available and we do not have access to them.

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However, we are aware that there are a number of member states that have similarly relied on Article 4 of the Convention to exclude categories of employment from the application of the Convention including Japan, Iceland, Philippines, Bahamas, Sri Lanka and Egypt. The most common categories are family undertakings, domestic work, and work on family ships/fishing vessels.

Does legislation at the state and territory level satisfy the requirement that if hazardous work is undertaken from the age of 16, the health, safety and morals of young persons are to be fully protected?

Yes. Article 3(3) provides that, notwithstanding Article 3(1), a state may authorise work *as from 16 years of age* on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity (emphasis added).

Australia's sophisticated WHS framework operates to ensure that the work Article 3(1) contemplates is only conducted where the health and safety of a child of any age is fully protected and where they have received appropriate training and instruction.

In addition to work health and safety requirements, and general child employment or protection laws, each state and territory has industry or activity specific laws that operate to prohibit children under certain ages engaging in types of employment. The details of restrictions vary in each state and territory, but it is common to see age prohibitions in areas of work such as work in casinos and work in the adult entertainment industry.

a) If so, what are the requirements in each jurisdiction?

WHS in Australia is legislated and regulated separately by each of Australia's state, territory and Commonwealth jurisdictions. WHS laws are largely harmonised across jurisdictions through a set of uniform laws (the model WHS laws). These model WHS laws are developed and administered by an independent statutory body, Safe Work Australia (SWA), through a tripartite process involving all jurisdictions as well as employer and worker representatives. All of Australia's jurisdictions other than Victoria have adopted the model WHS laws, and Victoria maintains similar duties and responsibilities in its laws.

Under the model WHS laws, a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, that the health and safety of all workers and other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. The primary duty requires PCBUs to proactively manage risks by eliminating health and safety risks so far as is reasonably practicable, and if it is not reasonably practicable to eliminate the risks, by minimising those risks so far as is reasonably practicable. The duty to ensure health and safety is an ongoing duty and requires a structured, systematic risk management approach to WHS.

What is 'reasonably practicable' under WHS laws is determined objectively. This means that a duty-holder must meet the standard of behaviour expected of a reasonable person in the duty-holder's position and who is required to comply with the same duty. The reasonably practicable standard employers are objectively required to meet will increase both where workers are young, and where risks are high.

This duty of care extends to, among other things, the provision of any information, training, instruction or supervision that is necessary to protect all workers, including young workers, from risks to their health and safety. It is a criminal offence not to comply with the duty of care.

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Even though Victoria has not adopted the model laws, in all salient respects the Victorian OHS Act provides identical duties. The primary duty in s19 of the model WHS laws is broadly 'to ensure, so far as is reasonably practicable, health and safety…'. Although Victoria has not adopted the model laws, s20 of the *Occupational Health and Safety Act 2004 (Vic)* provides an equivalent duty to 'ensure, so far as is reasonably practicable, health and safety'.

2. **Given Australia is planning to exclude certain work from the light work provisions of the Convention—that is allowing children under 13 to undertake certain limited forms of work—what are the limitations placed on children between 5 and 13 who work across the jurisdictions?**

Children between the ages of 5 and 13 will remain subject to existing Australian law and practice which provides an overall framework of protections for young people engaging in work under article 4 exemptions.

These include:

- Compulsory education legislation in each state and territory generally prohibits children of compulsory school age from working during school hours or at times that would render them unfit to attend school or receive such instruction.
- WHS legislation places a duty of care on persons conducting a business or undertaking to maintain a safe and healthy workplace for their workers, including young workers. This includes ensuring the young workers undertake appropriate tasks having regard to their age and inexperience and receive appropriate levels of supervision and training to ensure the work is done without risk to health and safety.
- Depending on the jurisdiction, state and territory child employment and welfare legislation regulate the working conditions of children, including the times they can work, the number of hours they may work per week and ensuring that they perform work that is appropriate for their level of physical or emotional development.
- Sector specific legislation places additional limitations and conditions on children working in certain industries or engaging in certain work activities.
- The Fair Work Act and modern awards set the legislated minimum employment entitlements available to young employees.

In addition to regulatory measures aimed at protecting the health, safety and welfare of young workers, states and territory jurisdictions also have various guidance materials dealing with young workers in the workplace, such as the range of considerations that need to be taken into account when employing and allocating work to young workers.

Safe Work Australia has developed a number of model Codes of Practice as part of the harmonisation of work, health and safety laws across Australia. These Codes provide practical guidance to duty holders on how to meet their obligations and some outline specific requirements for considering the vulnerability of young workers.

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3. **According to the NIA, the states and territories have advised their laws comply with the Convention, and that no further legislative change would be required. However:**
   - **some states and territories do not have a specified minimum age of 15, or any specified minimum age (article 2)**
   - **the NIA acknowledges some state and territory laws do not comply with the minimum age requirement for hazardous work—they do not prohibit it, they merely restrict it (article 3)**
   - **Australia intends to use exemption provisions in article 4 for existing state and territory legislation that does not comply with the light work requirements (article 7).**

   What is the basis of the assessment that all jurisdictions in Australia will be in compliance with articles 2, 3 and 7 of the Convention when it is ratified?

Article 2

The ILO has confirmed it is not necessary to explicitly state a minimum age in our legislation, and that the Article can be given effect through the strict enforcement of compulsory schooling requirements, along with regulation of children's participation in work and a strong welfare system.

Australia will specify 15 years as the minimum age for admission to employment or work in any occupation in a declaration appended to our ratification, subject to articles 4 to 8 of the Convention.

This is the youngest age at which a child ceases to be of compulsory school age (which varies between the ages of 15 and 17 depending on each state and territory jurisdiction). Generally, state and territory legislation requires children to participate in schooling (or an approved equivalent) to Year 10, and then participate in full-time schooling, approved training or employment, or a combination of these activities until the age of 17.

Article 3

Ratification of Convention 138 is proceeding on the basis that Australia achieves broad overall compliance with the convention on the basis that Australia's overall system of domestic law and practice provides a robust framework which limits, in most fundamental respects, any possibility that children are engaging in work prohibited by Article 3.

The Department notes that in some states and territories, the child employment legislation alone does not preclude persons under the age of 16 years from engaging in hazardous work. The law and practice assessment for Convention 138 identified that some state and territory child employment and protection legislation, when considered in isolation, do not explicitly rule out the possibility of a person under 16 years of age being engaged in Article 3 work.

However, Australia's overall system of domestic law and practice provides a robust framework which limits, in most fundamental respects, any possibility that children are engaging in work prohibited by Article 3. This framework includes:

- State and territory WHS laws impose a principles-based duty of care on businesses requiring them to ensure health and safety at their workplace based objectively on what a reasonable business in their circumstances would do. The standard that businesses are required to meet will increase both where workers are young, and where risks are high, effectively restricting the ability of an employer, in practice, to allow children to perform the type of work which Article 3 contemplates.

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- State and territory WHS Regulations provide additional age limitations and conditions for certain types of work and hazards, including to prohibit people aged under 18 from engaging in types of high-risk through the 'high risk work' licensing scheme.
- Activities that require a high-risk work licence include scaffolding work, dogging and rigging work, crane and hoist operation, forklift operation, reach stacker operation and pressure equipment operation.
- State and territory compulsory education requirements generally require children to remain in school or approved education until they turn at least 15 (the age at which children generally complete Year 10), and in most cases until they turn 17 years and generally prohibit children of compulsory school age from working during school hours.
- Child employment and protection legislation in state and territory jurisdictions contain a range of protections for children including provisions that prohibit children from performing hazardous work and regulate the working conditions of children, such as the times they can work, the number of hours they may work per week and ensuring that they perform work that is appropriate for their level of physical or emotional development.
- Sector specific legislation places additional limitations and conditions on children working in certain industries or engaging in certain work activities.

Article 7

The Convention does not explicitly define 'light work'.

Under Article 7, the concept of 'light work' directly relates to:

- conditions under which work is performed (its duration, arduous nature, conditions adapted to the age of the young person, protection of health and safety etc.); and
- the schooling of the young person (attendance and capacity to benefit from the instruction received).

Victoria and the ACT definitions of light work are consistent with Article 7.

The other jurisdictions instead define the type of work that compulsory school aged children are prohibited from undertaking, such as work that risks the child's health and wellbeing. Therefore, the only remaining type of work left for these children to perform would be considered 'light work'.

This also reflects compulsory education legislation that prohibits compulsory school age children from working during school hours or at times which would render them unfit to attend school or receive such instruction.

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Question:

CHAIR: Yes. I think the fact is that we have structures in place that make child labour, the harmful engagement and improper engagement of children in labour, unlawful. And we know that it occurs. It must occur to a small degree at least. So you're saying that, to the extent that we're aware of the problem, we consider whether our measures—because we have a law that says, 'This shall not occur.' It's a separate question as to whether you've got the frameworks in place to make sure that it isn't occurring, or, where it does occur, there are legal consequences. You mentioned the Fair Work Commission. I assume that, because most of the legislation is state based legislation, there must be state based bodies that are responsible for looking at this and responding wherever there seems to be some evidence of child labour. I'm just interested in **how that's monitored**, **whether it's ever aggregated on a national basis** and we can therefore say, from year to year, **incidences of child labour are staying level, at a very small level or low level, or they're increasing slightly or decreasing, anything like that**.

Mr Manning: I think the statistics Ms Wettinger is outlining are formal employment, if you like, so legal employment, where children are working in a way that would be consistent with the convention. I'm not aware of there being an **amalgamation of all of the numbers of contraventions of the various laws** that would be relevant in this space. We will take it on notice and inquire into that, but I don't think that there is.

Answer:

The number of contraventions of all relevant child labour laws in Australia are not aggregated on a national basis. Where reported instances of illegal child labour are monitored, data is maintained by the jurisdiction responsible for the application of the relevant legislation.

At a national level, the Australian Federal Police maintain statistics on illegal child labour that meets the legislative definition of offences contained within Division 270 & 271 of the *Criminal Code Act 1995*. Since 2018, the number of reports of forced labour involving persons under the age of 18 has remained very low. Of the eight offences reported since 2018, no offence was identified in five reports, and the resulting three reports remain under investigation.

Collection of this data differs amongst states and territories. Where jurisdictions collect their own data on cases of child employment breaches, numbers have remained consistent for the last five years. For example:

- In Western Australia, the number of cases of child employment breaches investigated by Department of Mines, Industry Regulation and Safety has remained consistent since 2018. In this time period there were no prosecutions but there 1-2 minor breaches per year found that were resolved by the employer signing a compliance declaration acknowledging awareness of their obligations.
- In Queensland, there has been no increase in non-compliance issues being reported to the Office of Industrial Relations in the last 5 years. In 2022, eight complaints were received by the Office of Industrial Relations concerning child employment matters. These complaints all involve non-compliance issues including school aged children working without adult supervision, failure to provide parental consent forms and working in excess of the hours prescribed by the Act and Regulations. All matters were resolved by voluntary compliance.