CONVENTION 182

NEW ZEALAND

Article 22 of the Constitution of the ILO

Report for the period 1 July 2007 to 31 May 2009
made by the Government of New Zealand
on the

WORST FORMS OF CHILD LABOUR CONVENTION, 1999 (No. 182)

Please give a list of the laws and regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of these texts, to the International Labour Organisation with this report.

Please give any available information concerning the extent to which these laws and regulations have been enacted or modified to permit of, or as a result of, ratification.

Over the report period, the following legislative amendments have been made:

Crimes (Substituted Section 59) Amendment Act 2007

This Act removed the legal justification for the use of reasonable force on a child for the purpose of correction. The Act states that parents may justifiably use force if it is reasonable in the circumstances and for purposes such as preventing a child from engaging in offensive or disruptive behaviour, or in performing the normal daily tasks that are incidental to good care and parenting. The intention of the Act is to make better provision for children to live in a safe and secure environment free from violence.

The Sentencing (Offences against Children) Amendment Act introduces a new section 9A to the Sentencing Act 2002, listing factors that must be taken into account when sentencing for offending involving violence or neglect of a child under 14 years of age.

Education (National Standards) Amendment Act 2008

From 16 December 2008 this Act introduced increased penalties for non-enrolment and non-attendance and gave the Secretary for Education the discretion to prosecute for non-attendance.

- This Act amended the following sections of the Education Act 1989:
- Section 24(1) - to increase the maximum financial penalty for non-enrolment of compulsory school aged young people from $1,000 to $3,000.
- Section 29(2) - to increase the financial penalty for irregular attendance from:

Copies of these Acts can be obtained at:

1 http://www.legislation.govt.nz

a) $150 to $300 for a first offence;  
b) $400 to $3,000 for a second or subsequent offense.

- Section 31(7) - to give the Secretary for Education (or any person appointed by the Secretary for Education) the discretion to take prosecutions for non-attendance.

II Please indicate in detail for each of the following Articles of the Convention the provisions of the abovementioned laws and regulations, etc. or other measures, which give effect to each Article. In addition, please give any information specifically requested on the different Articles.

If in your country ratification of the Convention gives the force of national law to its terms, please indicate by virtue of what constitutional provisions the ratification has had this effect. Please also specify what action has been taken to make effective those provisions of the Convention which require a national authority to take certain specific measures.

If the Committee of Experts on the Application of Conventions and Recommendations or the Conference Committee or the Conference Committee on the Application of Conventions and Recommendations has requested additional information or has made an observation on the measures adopted to apply the Convention, please supply the information asked for or indicate the action taken by your Government to settle the points in question.

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Please provide a general overview of the measures taken to apply this Article.

General comment

Child labour in New Zealand at present is mainly regulated by a combination of education and health and safety legislation. Children under the age of 16 are required to attend school and therefore cannot be employed during school hours or when it would interfere with their attendance at school. There are also restrictions on hiring children under the age of 15 to do certain work such as logging, construction and manufacturing - or any other work that is likely to cause harm. There is no minimum wage currently for employees under the age of 16.

AWARENESS RAISING & EDUCATION

Significant focus has gone into developing information to raise young people’s awareness of workplace health and safety and their rights in workplace. This has been linked with other campaigns such as the “Grim Harvest” alert about seasonal fatalities, the focus on Pacific people’s safety, and engagement with schools. This work is ongoing.

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3 For more information about the ‘Grim Harvest’ campaign please visit http://www.dol.govt.nz/itsnojoke/index.asp
Children’s employment work programme

Work is currently underway to ensure that young people experience fair and productive work in safe and healthy workplaces. This work includes raising young people’s awareness of their rights, improving their ability to enforce their rights, reviewing health and safety regulations relating to young people, and monitoring young people’s participation in employment.

Drug education programme

In 2003, the Ministry of Youth Development undertook a review called “Effective Drug Education for Young People” and found 16 best practice principles that can help schools provide drug education that is effective in improving young people’s drug-related knowledge, skills and promoting a safe attitude.

The New Zealand Police have designed two drug education programmes for Years 5-6 and Years 7-8. The programmes prepare young people to make responsible choices and decisions about the use of drugs and give them the skills to implement these.

Education programme relating to preventing child prostitution

Education and vocational training are seen as among the best strategies to prevent young girls from entering the sex industry.

PREVENTION

National Plan of Action against the Commercial Sexual Exploitation of Children

There has been no change to this since our last report.

National Plan of Action to Prevent Trafficking in Persons

New Zealand has not had any cases of people trafficking. Nevertheless, New Zealand is conscious that it remains at risk of becoming a destination country for victims of trafficking and has developed a whole-of-government Plan of Action to Prevent People Trafficking (Plan of Action) in anticipation of a case being identified in the future. This Plan of Action will be considered by Cabinet for release in mid 2009. The Department of Labour leads the work to develop and implement the Plan of Action and will forward a copy to the International Labour Organisation once it has been adopted and published.

The Plan of Action provides an overarching framework for New Zealand’s anti-trafficking strategies and sets out short, medium and long term goals and responsibilities. It provides for a consistent and coordinated response to people trafficking and implementation of measures in the Trafficking Protocol.

Implementing the Plan of Action will mainstream people trafficking prevention and assistance for victims of trafficking into existing Government initiatives and programmes. As the Plan of Action is a whole-of-government strategy, each agency will be responsible for implementing the action items they have committed to in the Plan. Overall monitoring and reporting will be undertaken by the Department of Labour with assistance from the Inter-agency Working Group on People Trafficking. The Inter-agency Working Group is chaired by the Department of Labour and has membership from the Ministries of Foreign Affairs and Trade, Justice, Health, Women's Affairs, the New Zealand Police, New Zealand Customs Service and the Department of Prime Minister and Cabinet.
Increased Monitoring and Awareness of School-Aged Young People

The introduction of an electronic enrolment database (ENROL)\(^4\) within the education sector has improved New Zealand’s ability to identify young people who are, and are not attending school. Schools and the Ministry of Education are using ENROL to improve the real-time tracking of young people’s enrolment status, particularly when shifting between schools. This has greatly reduced the amount of time some young people are out of school.

Information on enrolments is a key tool in protecting young people of compulsory school attendance age (6 to 16 years old) from inappropriate employment, and ensuring young people are able to receive the school-based education that they are entitled to until the age of 19.

Although young people are legally required to attend secondary schooling to the age of 16, some young people do leave school prior to this. By improving the retention in schooling to at least 16 years through more effective monitoring, tracking and achievement data, the education sector aims to reduce the number of young people vulnerable to exploitation under 16 years old, and limit the proportion of 16 and 17 year olds who have experienced extensive periods of time outside of formal education.

Management of non-enrolled students has been supported by ENROL (particularly in the notification of non-enrolment cases), recent changes to the Education Act 1989 that support stronger penalties, and Government commitments to assisting schools to get tough on truancy.

**PROHIBITION & ENFORCEMENT**

**Crimes Act 1961 and Amendments**

**Prostitution Reform Act**

The 2003 Prostitution Reform Act (PRA) decriminalised prostitution and created a certification regime for brothel operators. The Act prohibits the use in prostitution of persons less than 18 years of age and gives prostitutes the same workplace protections as other industries. The law also eliminates the defence (by clients, brothel operators, and those facilitating commercial sexual services, for example) of claiming ignorance that a person engaged in commercial sexual activity was under age 18. The act extends culpability to any person who receives financial gain from such activity involving an underage person.

**Examples of measures taken under PRA**

In January 2008, the New Zealand Police carried out an operation which resulted in the arrest of 25 people. Two people were charged with being a client of a person under 18 years, and one for sexual connection with a person under 16 years.

In another case, approximately 16 young people were removed from the streets and either returned to their parents or placed in the care of Child Youth and Family Services

\(^4\) For more information on ENROL:

(CYFS). However, Police reported being unable to remove some young people because they were aged 17.

**Immigration Bill 132-2 (2007)**

Clause 49 provides that the Minister of Immigration or an Immigration Officer can decline a minor’s visa application if either is not satisfied that a parent or guardian consents to it. This provision is based on section 35(2) of the 1987 Act. It is not intended to discriminate against minors or hinder genuine asylum seekers, but to protect children and young people against exploitation by third parties, in order to fulfil New Zealand’s obligations under The Hague Convention on Civil Aspects of International Child Abduction, and the United Nations Convention on the Rights of the Child.

**Education Act 1989 and Amendments**

The Education Act 1989 plays an important role in ensuring all young people under 16 are protected from the pressures of employment during school hours. Attendance at school is monitored and parental failure to ensure their child is enrolled and attends compulsory schooling is an offence. There are also offence provisions relating to the employment of school aged children that affect both parents and employers.

Government commitments to getting tough on truancy have resulted in recent changes to the Education Act 1989 that:

- increase the maximum financial penalties (for non-enrolment, non-attendance, and repeat offences); and
- gave the Secretary for Education the discretion to prosecute for non-attendance.

**Minimum Employment Code**

The New Zealand Government, by amending the Minimum Wage Act 1983, has addressed the issue that a lower minimum wage for 16 and 17 year olds compared to those aged 18 and over is prima facie discrimination under s19 of the Bill of Rights Act 1991. There is no longer a minimum wage for youth on the grounds of age as of 1 April 2008. The minimum wage for employees aged 16 years and over rose to $12.50 an hour before tax on 1 April 2009, except for new entrants and employees subject to the minimum training wage.

From 1 April 2009, the training wage increased to $10.00 an hour before tax. The training wage applies to people doing recognised industry training involving at least 60 credits a year. The new entrants minimum wage is $10.00 an hour before tax. The new entrants minimum wage applies to some 16 and 17 year old workers.

There is no statutory minimum wage for employees who are under 16 years of age.

**HUMAN RIGHTS**

**Action Plan for Human Rights**

The Human Rights Commission released an Action Plan for Human Rights in March 2005, which has a strong focus on children’s rights and incorporates labour rights. In 2007, the Government agreed to consider implementing the Plan’s priorities for action, work with the Commission by providing responses to requests for information and identify current work being conducted that meets the Plan’s objectives. The Commission is currently
conducting a mid-term review of the Plan with input from Government departments and civil society. The Government continues to improve the realisation of human rights in New Zealand through a range of policies and legislation. Steady progress on a number of proposed actions has also been made by regional and local government, the community and the volunteer sector.

Article 2

For the purposes of this Convention, the term child shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term the worst forms of child labour comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Please indicate, for each of the clauses (a) to (d) the measures taken to secure the prohibition and elimination of the worst forms of child labour with regard to all persons (girls and boys) under the age of 18.

Further to the information provided in our last report, New Zealand would like to add the following in relation to clauses (b) and (d).

Clause (b) - The Department of Internal Affairs has recently successfully completed a trial of its website filtering programme aimed at blocking New Zealanders’ access to at least 7000 known websites containing images of child sexual abuse. If fully implemented internet service providers will be invited to join this voluntary programme which will complement the Department’s enforcement activity. Please also refer to Article 1 for further comments pertinent to clause (b).

Clause (d) - In New Zealand every employee has the same basic rights under the Health and Safety in Employment Act. There are additional protections for employees under 15 years of age. This includes trainees and those gaining work experience. An employer must take all practicable steps to ensure that no employee under 15 works in any area in the workplace at any time while

• goods are being prepared or manufactured for trade or sale;

• construction work is being performed;

• logging or tree-felling is being performed; or
• any work is being performed in that area that is likely to cause harm to the health and safety of a person under 15 years old.

These restrictions have been developed to implement special protections to child labour:
• no-one under 15 can drive or ride on a tractor, implement or mobile plant;
• no-one under 15 can operate machinery;
• no-one under 15 can lift heavy loads or do any other work that is likely to harm them; and
• no-one under 16 can work after 10.00 pm or before 6.00 am.

In mid June 2008, New Zealand Cabinet approved amendments to the Health and Safety in Employment Regulations to place duties on principals, similar to those applicable to employers, which restricts young people under 15 years who are working as independent contractors, from working in hazardous workplaces or doing hazardous works. Business New Zealand and New Zealand Council of Trade Unions were consulted and broadly supported the change.

Article 4

1. The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999.

2. The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist.

3. The list of the types of work determined under paragraph 1 of this Article shall be periodically examined and revised as necessary, in consultation with the organizations of employers and workers concerned.

Please indicate the types of work determined in accordance with paragraph 1. Please communicate the relevant text.

We refer you to clause 54 of the Health and Safety in Employment Regulation 1995, which is as follows:

Employment of young persons

(1) Subject to subclause (2) of this regulation, every employer shall take all practicable steps to ensure that no employee under the age of 15 years works in any area at a place of work under the control of that employer:

(a) at any time when goods are being prepared or manufactured for trade or sale in that areal;

(b) at any time when any construction work is being carried out in that area;
(c) at any time when any logging operation or tree-felling operation is being carried out in that area; or

(d) at any time when any work is being carried out in that area that is likely to cause harm to the health and safety of a person under the age of 15 years.

Please indicate the measures taken to identify where the types of work so determined exist, and communicate the results.

There are age restrictions on hazardous work (below age 15) and night work (below age 16) in the Health and safety in Employment Regulations 1995.

As of 1 April 2009 changes to the Health and Safety in Employment Regulations came into force. These new regulations restrict young contract workers under the age of 15 from working in high-hazard workplaces such as construction, logging and manufacturing sites, and from doing work that is likely to cause injury such as working with machinery, driving heavy vehicles and lifting heavy loads. They also restrict young contract workers under the age of 16 from working at night – between 10pm and 6am – unless the work is done in accordance with an approved code of practice.

Please indicate how the list of the types of work determined under paragraph 1 of this Article has been periodically examined. Please provide any revise list.

During the report period, New Zealand has analysed young people’s work patterns, where they are sustaining work-related harms, and reviewed literature on what age young people generally mature physically and psychologically, to better understand age as a risk factor. Types of work are likely to harm the health, safety or morals of children are defined in legislation such as the Prostitution Reforms Act, the Crimes Act 1961 and Amendments, the Sale of Liquor Act 1989 and the Health and Safety in Employment Regulation 1995.

Please indicate the consultations which have been held with the employers’ and workers’ organisations in accordance with the provisions of this Article.

Business New Zealand, and the New Zealand Council of Trade Unions.

Article 5

Each Member shall, after consultation with employers’ and workers’ organisations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.

Please indicate the mechanisms established or designated, and provide information on their functioning, including any extract of reports or documents. Please also indicate the consultations which have been held with the employers’ and workers’ organisations in accordance with the provisions of this Article.

As submitted in the 2003 report, the Child Labour Officials Advisory Committee (CLOAC) was formed following consultation with Business New Zealand and the New Zealand Council of Trade Unions. It undertook activities to raise public awareness about Convention 182.

In 2007, the Children’s Employment Work Programme Advisory Group took its place as an interagency monitoring and coordination role. However, this group has fallen into abeyance as this role has been superseded by the processes put in place to monitor and

**Article 6**

1. Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour.

2. Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers’ and workers’ organisations, taking into consideration the views of other concerned groups as appropriate.

Please indicate the programmes of action and provide information on their implementation.

Please indicate the consultations which have been held with the employers’ and workers’ organisations in accordance with the provisions of this Article, Please also indicate the extent to which the views of other concerned groups have been taken into consideration.

There has been no change since the last report on this Convention.

**Article 7**

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.

2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

   (a) prevent the engagement of children in the worst forms of child labour;

   (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

   (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

   (d) identify and reach out to children at special risk; and

   (e) take account of the special situation of girls.

3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

Please indicate the measures taken in accordance with paragraph 1, including the provisions of penal or other sanctions and their actual application.
Please indicate the measures taken with regard to each of the clauses (a) to (e) of paragraph 2. If any of the measures are time-bound, please specify the time frame.

Free Basic Education and where possible Vocational Training

The New Zealand education system supports free education to all New Zealand residents between the compulsory school attendance ages of 6 and 16 years old. Students engaged in education are entitled to continue with a free school-based education to age 19 years.

The Government has committed to the introduction of a Youth Guarantee which will enable 16 and 17 year olds to access a range of free training opportunities offered by providers beyond school.

In relation to clauses (a), (b), (d) and (e), New Zealand continues to provide a range of education programmes to protect children from the engagement of the worst form of child labour. Please refer to the discussion under Article 1 for further information.

In accordance with clause (b) and for information on how government agencies collaborate to fund and provide community responses to prostitution by young people, please refer to article 3 (b) of New Zealand’s 2007 Article 22 Report on Convention 182.

Please indicate the authority or authorities designated in accordance with paragraph 3 responsible for the implementation of the provisions giving effect to this convention, and by what methods such implementation is supervised.

New Zealand’s existing policy and legislative framework continues to provide effective protection to children regarding their education and employment. The Education Act 1989 ensures compulsory school attendance (between age 6 and 16) and places restrictions on employment during school hours or employment that affects school work. The Health and Safety in Employment Act 1992 (and relevant regulations) also provides protection for young people by age.

Article 8

Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.

Please indicate any steps taken in accordance with the provision of this Article.

In 2007/08, the New Zealand International Aid and Development Agency (NZAID’s) overall budget for multilateral development assistance is approximately $72.9 million. NZAID spent almost 33% of its programme budget on multilateral agencies, either through core-funding, bilateral programmes or regional programmes.

New Zealand attended the International Conference on Child Labour and Exploitation in August 2008 and fully supports the initiative to evaluate progress made in eradicating the worst forms of child labour, and to explore the challenges still remaining.

New Zealand’s overseas development assistance supports international efforts to eliminate child labour and to achieve education for all children. The overall goal of New Zealand’s development assistance, managed by the Government agency NZAID, is
sustainable economic development. NZAID’s mission statement as of 8 May 2009 is to "support sustainable development in developing countries, in order to reduce poverty and to contribute to a more secure, equitable and prosperous world"\(^5\).

NZAID works closely with partner countries to make sure they have the resources and technical support needed to improve access to quality education. For example, NZAID has assisted the Solomon Islands Government to rebuild the basic education system by providing textbooks and classroom materials, improving infrastructure, and assisting with up-skilling teachers.

The New Zealand Government continues to support regional initiatives that focus on children’s education, health and rights, including prevention of child trafficking and support for children affected by HIV/AIDS.

**III. Please state whether courts of law or other tribunals have given decisions involving questions of principle relating to the application of the Convention. If so, please supply the text of these decisions.**

Films, Videos and Publications Classification Act 1993

The District Court Judge assessed the objectionable material in a case as “The material covered comprised videos complete and incomplete and still images, disgusting, degrading, abusive and life-threateningly dangerous for the children abused in those images”. (This case is attached as Annex A)

**IV. Please give a general appreciation of the manner in which the Convention is applied in your country. Please indicate any practical difficulties encountered in the application of the Convention, or any factors which may have prevented or delayed action against the worst forms of child labour. If your country has received any assistance or advice under ILO technical cooperation projects, such as the International Programme on the Elimination of Child Labour (IPEC). Please indicate the measures taken accordingly.**

The main practical difficulty in the application of Convention 182 in New Zealand is the clandestine nature of the worst forms of child labour.

**V. In so far as the information in question has not already been supplied in connection with other questions in this form – please supply copies of extracts from official documents including section reports, studies and inquiries, and, where such statistics exist, information on the nature, extent and trends of the worst forms of child labour, the number of children covered by the measure given effect to the Convention, the number and nature of infringements reported, penal sanctions applied, etc. To the extent possible, all information provided should be disaggregated by sex.**

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Films, Videos and Publication Classification Act 1993

Charges brought for offences related to the possession and/or distribution of child sexual abuse images from 1/1/2003 to 31/12/2008

<table>
<thead>
<tr>
<th>Prison</th>
<th>Community work</th>
<th>Supervision</th>
<th>Fine</th>
<th>Home detention</th>
<th>Discharged</th>
<th>Acquitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>57</td>
<td>38</td>
<td>50</td>
<td>47</td>
<td>9</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Note: These figures relate to Department of Internal Affairs prosecutions only. All the offenders are male. Charges can also be laid by the Police and the Customs Service. “Supervision” generally forms part of a sentence and is not itself a separate sentence.


Prosecutions under HSE act 1992 and HSE Regulation 1995 where a young person was injured in employment

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Year</th>
<th>Offence section</th>
<th>Description of Accident</th>
<th>Plea</th>
<th>Decision</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bay Pallets Ltd</td>
<td>2008</td>
<td>6 of HSE &amp; 51(a) of Regulation</td>
<td>14 year old suffered partial amputation of 3 fingers on a snip saw</td>
<td>Guilty</td>
<td>Convicted</td>
<td>$14,000 (fine) $18,000 (reparation)</td>
</tr>
<tr>
<td>Street Smart Ltd</td>
<td>2008</td>
<td>6</td>
<td>12 year old fell from a truck and was killed</td>
<td>Guilty</td>
<td>Convicted</td>
<td>$55,000 (fine) $60,000 (reparation)</td>
</tr>
<tr>
<td>Yarrows Ltd</td>
<td>2007</td>
<td>6</td>
<td>17 year old had his fingers and wrist crushed by the pastry machine</td>
<td>Guilty</td>
<td>Convicted</td>
<td>$45,000 (fine) $17,146 (reparation)</td>
</tr>
</tbody>
</table>

Prostitution Reform Act 2003
As at 31 January 2009 a total of 120 charges have been laid under sections 20 - 22 of the Prostitution Reform Act 2003 (PRA). Table 1 provides data on the number of charges bought under the PRA by charge status and offence. Table 2 provides data on the number of disposed charges brought under the PRA by outcome and offence.

### Table 1: Number of charges brought under the Prostitution Reform Act 2003, by charge status and offence, 27 June 2003 to 31 January 2009

<table>
<thead>
<tr>
<th>Offence</th>
<th>Active</th>
<th>Disposed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex worker fails to adopt safer sex practices (section 9)</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Induce/compel persons to provide sexual services (section 16)</td>
<td>-</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Assist &lt;18 to provide sex services (section 20)</td>
<td>6</td>
<td>29</td>
<td>35</td>
</tr>
<tr>
<td>Receive earnings from person under 18 years (section 21)</td>
<td>4</td>
<td>24</td>
<td>28</td>
</tr>
<tr>
<td>Contract for sex with U18 (section 22)</td>
<td>6</td>
<td>36</td>
<td>42</td>
</tr>
<tr>
<td>Operator did not hold certificate (section 34)</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>21</td>
<td>99</td>
<td>120</td>
</tr>
</tbody>
</table>

**Notes**

1. Source: Ministry of Justice.
2. Figures are provisional and may change, for example, due to appeals. Data are correct as at 26 February 2009.
3. Table presents charge-based data i.e. number of criminal charges laid in courts.
4. Date when charge was laid or finalised has been used to determine year.
5. PRA offences consist of offence codes '2971' to '2983'.
6. Active charges are those charges not yet disposed by the courts.
Table 2: Number of disposed charges brought under the Prostitution Reform Act 2003, by outcome and offence, 27 June 2003 to 31 January 2009

<table>
<thead>
<tr>
<th>Offence code</th>
<th>Convicted</th>
<th>Acquitted</th>
<th>Dismissed</th>
<th>Discharged</th>
<th>Withdrawn</th>
<th>Other not proved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex worker fails to adopt safer sex practices (section 9)</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Induce/compel persons to provide sexual services (section 16)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Assist &lt;18 to provide sex services (section 20)</td>
<td>16</td>
<td>1</td>
<td>4</td>
<td>-</td>
<td>8</td>
<td>-</td>
</tr>
<tr>
<td>Receive earnings from person under 18 years (section 21)</td>
<td>7</td>
<td>-</td>
<td>4</td>
<td>2</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Contract for sex with U18 (section 22)</td>
<td>20</td>
<td>-</td>
<td>3</td>
<td>1</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Operator did not hold certificate (section 34)</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>45</strong></td>
<td><strong>1</strong></td>
<td><strong>11</strong></td>
<td><strong>6</strong></td>
<td><strong>27</strong></td>
<td><strong>9</strong></td>
</tr>
</tbody>
</table>
Custodial Sentences Imposed Under Sections 20-22 of the Prostitution Reform Act, by Case, 27 June 2003 to 4 November 2008

<table>
<thead>
<tr>
<th>Case</th>
<th>Offence(s)</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antolick v R, Christchurch HC, (20 May 2004)</td>
<td>Section 22 (also 3 charges under s149A of Crimes Act)</td>
<td>2 years (Reduced on appeal from 3 years, because the majority of the charges were laid under the Crimes Act with a maximum penalty of 5 years)</td>
</tr>
<tr>
<td>Panckhurst J</td>
<td>R v Gillanders, Christchurch DC, (3 March 2005)</td>
<td>Section 20 Section 21 21 months</td>
</tr>
<tr>
<td>Judge Erber</td>
<td>R v Barnett, Christchurch DC, (19 July 2006)</td>
<td>Section 22 Section 22 (attempted) 3 months (A further 1 year was imposed for offences relating to child pornography)</td>
</tr>
<tr>
<td>Judge Abbot</td>
<td>R v Booten Christchurch DC, (18 March 2008)</td>
<td>Section 22 x 3 Section 21 x 3 Section 20 x 4 2 years and 3 months imprisonment (Appealed sentence – Appeal dismissed)</td>
</tr>
</tbody>
</table>

VI. Please indicate the representative organisations of employers and workers to which copies of the present report have been communicated in accordance with article 23, paragraph 2, of the Constitution of the International Labour Organisation. If copies of the report have not been communicated to representative organisations of employer and / or workers, or if they have been communicated to bodies other than such organisations, please supply information on any particular circumstances existing in your country which explain the procedure followed.

Copies of this report have been forwarded to:
VII. **Please indicate whether you have received from the organisations of employers or workers concerned any observations, either of a general kind or in connection with the present or the previous report, regarding the practical application of the provisions of the Convention or the application of the legislation or other measures implementing the Convention. If so, please communicate the observations received, together with any comments that you consider useful.**
Responses to comments made by the Committee of Experts on the Application of Conventions and Recommendations, submitted in 2008

The Committee notes the Government’s report. It also notes the comments of the New Zealand Council of Trade Unions (NZCTU) received with the Government’s report. It requests the Government to provide information on the following points.

Article 3, clause (d), of the Convention and Article 4, paragraph 1. 1. Hazardous work. The Committee notes the Government’s information that it intends to review the HSE Regulations in order to prohibit hazardous work for employees aged under 16 years (raising the prohibition from 15 years). The Committee hopes that the HSE Regulations will soon be reviewed in order to ensure conformity with Article 3, clause (d), of the Convention, read in conjunction with Paragraph 4 of Worst Forms of Child Labour Recommendation, 1999 (No. 190), and requests the Government to provide information on any developments in this regard.

Answer: The New Zealand Government has decided not to deal with this issue by way of regulatory change at this point, and the Department of Labour is looking at non-regulatory options to ensure the protection of young people under the age of 16 from hazardous work through developing practice guidelines and information.

2. Self-employed children. The Committee had previously noted that the HSE Regulations, which contain provisions for the employment of children in hazardous occupations, only apply to a “place of work under the control of that employer” (section 54). It had also noted the Government’s information that the Minors Contracts Act of 1969 provides protection for minors (persons under the age of 18) entering a contract for service (self-employment). The Committee had requested the Government to provide information on any steps taken or envisaged to prohibit self-employed children from performing hazardous work.

Answer: The age restrictions on hazardous and night work in the Health and Safety in Employment Regulations 1995 have, from 1 April 2009, been extended to cover self-employed children working as independent contractors: regulations 58A-58F of the Health and Safety in Amendment Regulations 2008. The change helps ensure that young people doing contract work have similar protections to young people working as employees. The changes do not affect home occupiers engaging young people for domestic or gardening work in their own homes, and there is a special exemption allowing young contract workers 13 and over to use tractors for agricultural work provided they are fully trained or being trained.

The Committee notes the Government’s information that the Department of Labour will review the HSE Regulations in order to extend such Regulations to children working as independent contractors as well as self-employed children under 16 years of age. The Committee hopes the HSE Regulations will be soon reviewed in order to cover young self-employed persons. It requests the Government to provide information on any development in this regard.

Article 5. Monitoring mechanisms.

The Committee notes the NZCTU’s statement that it sees the Department of Labour’s intention of investigating hazardous work practices of young persons between 16 and 18 years of age as a positive if overdue action. In this regard, the NZCTU recommends that
input be sought from experts in child and youth development in order to assess the physical and psychological limits of young persons in relation to the work. The Committee notes the Government's statement in reply to the NZCTU's comments that it will take into account the NZCTU's recommendation.

The Committee requests the Government to provide information on the follow-up to these measures envisaged by the Department of Labour and results achieved.

**Answer:** In March to May 2008, the Department of Labour put out various communications to reinforce the application of the HSE Regulations under a "Know Your Rights" theme. These included using some innovative techniques to attract young people's attention, namely preparing a fact sheet using a comic/graphic style, and running a radio song competition aimed at young Pacific and Maori young people to promote health and safety at work. We also revitalised fact sheets for employers and young people on youth minimum rights, and these have been translated into Maori and Pacific languages. The Department has also leveraged our Seasonal Fatalities campaigns (which ran in 2007-08 and 2008-09) to highlight information about young workers.

The Department is continuing to investigate workplace practices relating to persons between 16 and 18 years of age engaged in hazardous work. This forms part of our review of the age threshold. This work also includes reviewing literature containing experts’ views on children’s development, and their physical and psychological limits in relation to work.

The Committee requests the Government to provide information on the activities of the Children’s Employment Work Programme Advisory Group regarding children involved in the worst forms of child labour, and results achieved.

**Answer:** New Zealand has made progress on the Children’s Employment Work Programme. Highlights are:

- Raising awareness of regulations and rights – with campaigns, networking with youth publications, and innovative ways of engaging young people;
- Progress on the reviews of the health and safety regulatory ban on hazardous work by employees under 15 and whether to raise the age threshold to age 16 (please refer to reply under Article 3); and
- The release of the first of the regular Youth Labour Market outcomes reports for monitoring children’s participation in work.

The Government is in the process of developing an on-line toolkit on children’s employment rights and a framework for evaluating the toolkit’s effectiveness. This work is targeted at further improving awareness and enforcing existing children’s employment rights, and at the same time gathering additional information on the matter to inform future policy development. The approach is intended to engage key players such as schools, unions, employers, child advocates and Department of Labour operational staff. The evaluation will provide a focal point for external advocacy, coordination across stakeholders and information collection. Resulting information and stakeholder engagement should provide a good base, in future, from which to assess the need for any policy or legislative developments to improve the protection of children in employment, including from the worst forms of child labour.

However, while the work programme has continued the Advisory Group has fallen into abeyance. This is largely because the interagency monitoring and coordination role that
the Advisory Group was intended to carry out is being managed by the processes put in place to monitor and report on the United Nations Convention on the Rights of the Child (UNCROC). The New Zealand Ministry of Youth Development prepares the New Zealand reports to the UNCROC committee in consultation with all government agencies and a standing advisory group which meets 2-3 times a year. This interagency monitoring and reporting process covers many of the same issues covered by Convention 182.

**3. Prostitution Law Review Committee.** The Committee had noted that the Prostitution Law Review Committee (PLR Committee) is responsible for assessing the impact of the Prostitution Reform Act (PRA) on the number of persons working as sex workers in the country, and on any prescribed matters relating to sex workers or prostitution. The Committee requests the Government to provide information on the results of this research.

For the results of the Christchurch School of Medicine’s research please refer to our response to the Committee of Experts’ comment in relation to Article 7, on page 20.

The PRA also established a statutory Prostitution Law Review Committee in 2003, to review the act over a 5 year period. The 11-member Committee consisted of representatives from local government, the police, the public health industry, business, academia, nongovernmental organizations (NGOs), and the sex industry. In May 2008 the Prostitution Law Review Committee published its review of the PRA. In relation to young people the Committee recommended a collaborative approach between Police, the Ministry of Social Development, the Ministry for Youth Development and relevant NGOs should be taken to assist at risk young people and the Ministry for Youth Development and the Ministry of Social Development should deliver increased funding to community-based organisations working with at risk youth.

The full text of the report can be accessed through:

**Article 6. Programmes of action to eliminate the worst forms of child labour.**

*National Plan of Action Against the Commercial Sexual Exploitation of Children. The Committee had previously noted that a National Plan of Action against the Commercial Sexual Exploitation of Children (NPA against CSEC) had been approved in 2001, focusing on child prostitution, child pornography, child sex tourism and child trafficking for sexual purposes. Noting that some of these activities from the five year stocktake are still ongoing, the Committee requests the Government to continue providing information on the implementation of these activities, and results achieved.*

The Plan of Action to Prevent Trafficking in Persons provides an overarching framework for New Zealand’s anti-trafficking strategies and sets out short, medium and long term goals and responsibilities. Training has been undertaken by enforcement agencies, including the Department of Labour, the New Zealand Police and the New Zealand Customs to identify trafficking activities.

The Department of Internal Affairs has recently successfully completed a trial of its website filtering programme aimed at blocking New Zealanders’ access to at least 7,000 known websites containing images of child sexual abuse.

**Article 7, paragraph 2. Effective and time-bound measures. Clause (b). Direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration.** The Committee had previously noted the Department of Child, Youth and Family Services (CYF) funded service providers to
work with children and young people who may be living or working on the streets. The Committee requests the Government to continue providing information on the measures taken in order to assist for the removal of children from the commercial sexual exploitation and for their rehabilitation and social integration. It requests the Government to provide information on the number of children under the age of 18 years who have been withdrawn from commercial sexual exploitation and rehabilitated pursuant to the implementation of the NPA against CSEC.

In 2007 the Christchurch School of Medicine conducted a survey and found that under age prostitutes made up 1.3% of the total number of sex workers surveyed. The Prostitution Reform Act Review Committee does not consider the Act has increased underage involvement in prostitution. The Committee believes the passage of the Prostitution Reform Act has raised awareness of the problem of underage prostitution, and that this is a positive consequence.

**Article 8. International cooperation and assistance. Child sex tourism.**

Parts IV and V of the report form. Application of the Convention in practice. Following its previous comments, the Committee notes the Government’s information that there have been 25 prosecutions under the Films Act since it was amended in 2005. The Committee requests the Government to continue providing information on the nature, extent and trends of the worst forms of child labour, the number of children covered by the measures giving effect to the Convention and, in particular, the number and nature of infringements reported, investigations, prosecutions, convictions and penal sanctions applied.

Please refer to pages 12 – 15 of this Report.
Cooper v Department of Internal Affairs

Year: 2008

Date: 18 September 2008

Court: High Court, Wellington

Judge: Mallon J

File no: CRI-2008-485-86

Noted: 31 TCL 43/4

Case Summary - BriefCase

Criminal justice — Sentencing — Appropriateness

Criminal justice — Sentencing — Severity

Media law — Censorship — Classification — Objectionable

Legislation Cited

Statutes

Films, Videos, and Publications Classification Act 1993 s 131A

Cases Cited

Considered

Department of Internal Affairs v Wigzell 20/11/07, Clifford J, HC Wellington CRI-2007-485-110[Green]

R v Oliver [2003] 2 Cr App R (S) 15; Times, December 6, 2002; [2003] 1 Cr App R 28 (CACrimDiv)
Following information received from the German police, inspectors from the Department of Internal Affairs executed a search warrant at Mr Cooper's home. Examination of his computer pursuant to that search warrant disclosed objectionable material as defined in the Films, Videos, and Publications Classification Act 1993 ("the Act"). The material was of children (mainly boys) involved in various kinds of sexual activity, the most serious of which were images involving penetrative sexual activity between adults and children. In all Mr Cooper was found in possession of 5,000 images and 200 movies that were objectionable. There was a further 8 gigabytes of encrypted data that could not be viewed without a password which Mr Cooper said he could not remember and did not provide. Examination of Mr Cooper's computer indicated that Mr Cooper had been downloading objectionable material from at least 2003, that he was a member of chat groups relating to discussions about young boys and had file sharing software. This was two years after Mr Cooper had been fined on other convictions for possession of objectionable material.

Sixteen charges were brought against Mr Cooper under s 131A of the Act. Mr Cooper pleaded guilty to the charges. He was sentenced to two years four months' imprisonment. He appeals against this sentence on the grounds that the District Court Judge was in error in sentencing Mr Cooper on the basis that all of the encrypted data contained objectionable material, in treating Mr Cooper's failure to provide the password as an aggravating factor, in her assessment of the level of seriousness of the images and by treating the offending as comparable to that in Department of Internal Affairs v Wigzell HC WN CRI 2007-485-110 20 November 2007. He says that those errors led to a sentence that was manifestly excessive.

The encrypted data

The Department's estimate was that the encrypted data contained around 60,000 images. Mr Cooper submits that the Judge was in error to sentence him on the basis that he was in possession of 60,000 objectionable items as well as the 5,000 images and the 200 videos that were accepted as being objectionable. Mr Cooper submits that the content of the encrypted data was in dispute and had not been proven by the Department beyond reasonable doubt.

The Department submits that the Judge was entitled to take the 8 gigabytes of encrypted data into account. It submits that Mr Cooper faced 16 representative charges based on 5,000
images and 8 gigabytes of encrypted data as set out in the summary of facts that was before the Judge. It submits that it was for Mr Cooper to challenge the summary of facts by way of a disputed facts hearing. In the absence of such a challenge the Department submits that it was open to the Judge to infer that there were around 60,000 objectionable images in the encrypted data.

[5]

The 16 charges brought against Mr Cooper are described in the summary of facts as being:

a) Five charges relating to movies found in Mr Cooper's directory “ToSort”;

b) Five charges relating to 11 parts of movies that were being prepared to be joined into five individual movies in the “ToJoin” directory;

c) Four charges relating to parts of movies that had been downloaded from the internet via file sharing and which were held in the “Incomplete” folder (which held over 200 files); and

d) Two charges relating to two of the 120 images that Mr Cooper downloaded from a server in Germany.

[6]

The informations do not describe the 16 charges as being representative, but there is no dispute that they represented 5,000 images and 200 movies that were found on Mr Cooper's computer and that were objectionable.

[7]

The summary of facts before the Judge referred to the encrypted files as follows:

“Within the drives are a number of encrypted files. These are Steganos Security Encrypted files and are in excess of 1 Gigabyte and up to 2 gigabytes in size each. They are titled ‘Cutey’ (a similar term the defendant uses for a collection of boy pictures on a CD rom found in his possession) ’old’, and ‘new’. In addition there is an encrypted file titled ‘ToSort’ that is the same name as that found on another drive which contained the movies of children being sexually abused. In an additional drive was found three further encrypted files of up to 2 gigabytes in size each. The background of this drive also shows considerable evidence of images and movies of children being sexually abused. The defendant was asked about these encrypted files and he states that he has ‘honestly’ forgotten the password to them even though three of them were created two days prior to the search warrant.”

[8]

The Judge dealt with the number of images in this way:
The representation, which is covered by the informations, was taken from a sample which was accessible to the enforcement authority of up to 5000 images and 200 movies. In addition, they identify that there is up to 8 gigabytes of encrypted material.

... 

You do not recall your password. That, Mr Cooper, is such a fanciful excuse for a person who lives and works with computers that I put it aside as a desperate attempt to avoid the disclosure to others of material, which I accept you probably objectively in the light of day accept is objectionable. I consider your level of co-operation was minimal. This limits the effect of the guilty plea, in my view.

There remains a suspicion that your offending cannot be fully detected. While the defence has urged the Court not to take an adverse inference from the level of encryption and from your refusing the password I am satisfied that your excuse about that is so lacking merit that it is proper for the Court to take an adverse inference in relation to that matter.

The next question is the Court's starting point in terms of length of imprisonment. In Wigzell the features of the offending, as set out in the High Court mirror, the features of offending here in relation to previous history, use of images and the degrading nature of the images. The different features relate to the number or volume of images accepting the Crown's estimate that the encrypted files would have held 60,000 odd images, that still leaves you less than half the number of images which Wigzell had. But different again, and an aggravating feature from your perspective is the lack of co-operation, the extent of deception and the extent of the encryption.

Balancing all of those features together I am satisfied that a similar starting point to that adopted in the District Court in Wigzell is appropriate, that is a starting point of 3 years imprisonment.

It is apparent from these passages that the Judge proceeded on the basis that the scale of offending involved the 5,000 images, 200 movies and a further 60,000 images on the encrypted files.
In submissions made at the sentencing on Mr Cooper's behalf, it was said that there was no evidence to suggest that the encrypted material was actually objectionable. The issue of whether the encrypted material contained objectionable material had therefore been put in issue. If it was to be treated as aggravating, it was for the Department to prove the content beyond reasonable doubt. On the basis of the summary of facts I consider that there was insufficient evidence on which the Judge could be satisfied beyond reasonable doubt that there were 60,000 objectionable images. From the encryption, the similarity of file names and the failure to provide the password, at most an inference could be drawn that the encrypted files contained some objectionable material, but it could not be inferred without more that all the data was objectionable or what the level of seriousness of any such objectionable material was. In my view the Judge could sentence Mr Cooper only on the basis of the 5,000 images and 200 movies that were established as being objectionable.

**The failure to provide the password**

[11] The Judge was entitled to reject Mr Cooper's explanation that he could not remember his password given the level of organisation of the material on his computer, that Mr Cooper works with computers and that two of the files had been created just days prior to the search warrant. She was entitled to view that as a lack of co-operation and to sentence Mr Cooper on that basis. To be balanced against this was Mr Cooper's co-operation through taking no issue that the 16 charges were representative of the 5,000 images and 200 movies that were objectionable.

[12] To the extent that Mr Cooper did not co-operate in relation to the encrypted data, this was the absence of a mitigating factor rather than an aggravating factor. Paragraph [30] of the Judge's remarks gives the appearance of having treated Mr Cooper's lack of co-operation as an aggravating factor. However, reading her sentencing remarks as a whole, I consider that the Judge was simply drawing a distinction between Mr Cooper's lack of co-operation and Mr Wigzell's co-operation. Earlier in her remarks the Judge had listed the aggravating factors that she saw, and lack of co-operation was not included. The absence of co-operation was a relevant difference when comparing the sentence in Wigzell with a sentence for Mr Cooper because Mr Wigzell's co-operation was a mitigating factor in the sentence he received. I deal with the comparison with Wigzell at [23] to [27] below.

**Seriousness of the images**

[13] In sentencing for this kind of offending helpful guidance is provided by *R v Oliver & Ors* [2003] 1 CrApp R 28 (as discussed in *R v Zhu* [2007] NZCA 470 and Wigzell). In Oliver the two primary factors determining the relative seriousness of this kind of offending were identified as being the nature of the material and the extent of the offender's involvement with it. Guidance as to the first of those factors is provided by categorising the images into five levels of seriousness (Level 1 being the least serious and Level 5 the most). Mr Cooper submits that the Judge erred in her assessment of the categories into which the images and movies in this case were placed.

[14]
Prior to sentencing Mr Cooper’s counsel had the opportunity to view the objectionable material held on the Department’s file. A sample was viewed and, based on that, counsel submitted to the District Court Judge that 75—80% of the images were Level 1 or 2 and between 5—10% were Level 4 in terms of the Oliver categories. The Department did not contest this directly but submitted that the number of images in any particular category was just one of the relevant considerations on sentencing.

Counsel for the Department advises me that the District Court Judge had before her the same sample of images that was viewed by the defence. The Judge's assessment of that material was as follows:

"[4]  
The material covered comprised videos complete and incomplete and still images, disgusting, degrading, abusive and life-threateningly dangerous for the children abused in those images.  

[5]  
... The images covered, bearing in mind the levels classification extracted into the Wigzell case and the Zhu case cover erotic posing of children, sexual activity between children, penetrative and non-penetrative sexual abuse of children by adults. Primarily they depict boys; there are some girls.  

...  

[19]  
The scale of your offending is the next matter. As I read the summary of facts what was taken in the search was 200 partial films with many hundreds of images within those films of sexual activity with young boys. There were some 600 thumbnails produced in the sheaf of materials, which would alone have been classified individually as Level 1 or less but together create a picture which is more sinister.  

[20]  
There are in particular 3 images of bound and clad boys gagged, which is particularly disturbing viewed in the context of the material. In the context those rate at Level 5, in terms of my viewing of them. But out of context perhaps they are not individually at that level.  

[21]  
In the material on which you are charged there are 20 part movies, two images, each of them objectionable. All but three, in my view, are Level 2 and higher. The difficulty with the classification, of course, is that it is subjective. But I set that material out because the defence has made a great deal of the definition of the levels and the percentages of the material. The charged material appears to me as to some 70 or 80% to be Level 2 and higher, and as I have said there are those three very disturbing images against which you are not even charged. "
For Mr Cooper it is submitted that the Judge was in error in finding that 70 — 80% of the material was at Level 2 or higher, because the position was that 75 — 85% were at Level 2 or lower. I do not accept this submission. First, it appears that the Judge was referring to the material that was the subject of the charges (refer [5] above), rather than the material which these charges were said to represent. Secondly, on the information before me it is not apparent how many images were at Level 2. If most of the 75 — 85% said by the defence to be at Level 2 or lower were at Level 2, then what was submitted and what the Judge found may be entirely consistent. Thirdly, it was for the Judge to determine what level the material fell into. She viewed them and made her assessment of them. The material has not been put before me for re-assessment and there is no other basis on which I could interfere with the Judge's assessment on this.

Next it is submitted that the Judge was in error in referring to Level 1 images as being more sinister when viewed together and in concluding that the images of the boys who were gagged could be viewed as Level 5 when viewed “in context”. It is submitted that the classifications in Oliver assume that the images have been found in the context of other objectionable images. It is also submitted that images of the boys who were gagged are not capable of being classified as Level 5 because this would put these images in the same category as images of sexual torture or children being sexually involved with animals. It would also make them more serious than images of full penetrative sexual intercourse between an adult and a child (which is Level 4 in the Oliver categories).

I do not accept this submission. The Judge did not overstate the seriousness of the Level 1 images. She referred to them when discussing the scale of Mr Cooper's offending. Individual images classified as Level 1 in and of themselves will be comparatively less serious than a large number of Level 1 images in a collection of images falling within the higher levels. As to the three images of the bound and gagged boys they are not before me for reassessment. I am not able to say whether the Judge was wrong to view them as within Level 5. It is conceivable that she viewed them as a precursor to sexual torture. She said they were “particularly disturbing”. But she also added that “perhaps they are not individually at that level”. I take it from that remark that she did not proceed on the basis that they were Level 5 images.

**Manifestly excessive**

In addition to the above criticisms of the Judge's remarks, the overall submission is that the sentence was manifestly excessive. For Mr Cooper it is submitted that before mitigating factors, a sentence of between 12 and 24 months was appropriate and not the three years the Judge adopted. In support of this submission it is said that, applying the guidance in Oliver, a starting point of 6 to 12 months was indicated because Mr Cooper had a small amount of Level 4 and 5 material (the latter depending on how the three images discussed above are viewed).

The relevant portion of Oliver for the purposes of this submission is as follows:
"16.

... A custodial sentence of up to six months will generally be appropriate in a case where (a) the offender was in possession of a large amount of material at Level 2 or a small amount at Level 3; or (b) the offender has shown, distributed, or exchanged indecent material at Level 1 or 2 on a limited scale, without financial gain. A custodial sentence of between six and twelve months will generally be appropriate for (a) showing or distributing a large number of images at Level 2 or three; or (b) possessing a small number of images at Levels 4 or 5.

17.

In relation to more serious offences, a custodial sentence between twelve months and three years will generally be appropriate for (a) possessing a large quantity of material at Levels 4 or 5, even if there was no showing or distribution of it to others; or (b) showing or distributing a large number of images at Level 3; or (c) producing or trading in material at Levels 1 to 3."

[21]

I consider that the submission for Mr Cooper applies the Oliver categories too narrowly. Level 4 images are of a more serious kind than images falling into the lower levels, but that is just one relevant consideration. Possession of a small number of Level 4 images is less serious than possession of that small number of those same images together with possession of a large number of level 1, 2 and/or 3 images. Similarly, that is less serious than possessing all those same images and showing a high degree of interest and involvement in them through collating, sorting, storing and encrypting them.

[22]

None of the categories in Oliver refer to a large number of images at Level 2 or 3 together with a small number of images at Level 4 or 5, downloaded and stored over a period of time with a high level of organisation, a preparedness to manipulate the images and the use of file sharing software. All of these factors were present here. Taking these factors into account puts the offending in the 12 months to 3 years range mentioned in Oliver.

[23]

This was accepted by counsel for Mr Cooper at the hearing of this appeal by the submission that, before mitigating factors and taking into account the aggravating factor of Mr Cooper's previous conviction, a starting point of 12 to 24 months was appropriate. It is submitted that the three year starting point was too high when compared with Wigzell. It is said that Wigzell was more serious because Mr Wigzell was found with over 200,000 images (cf. the 5,000 here) which included a large amount of Levels 4 and 5 material and images depicting bestiality and sexual violence. A comparison is also made with Stevens v New Zealand Police HC WN CRI 2008-406-007 where Mr Stevens was sentenced to 15 months' imprisonment (which included a 3 month uplift for previous convictions) having pleaded guilty to 20 charges representing 34,000 images falling into Levels 1 to 4.

[24]

The Judge's comparison with Wigzell is set out above (refer [8]). She saw some similarities and some differences leading her to impose an end sentence of two years and four months in contrast with the sentence of two years' imprisonment imposed on Mr Wigzell.
In this case there were 5,000 images and 200 movies accepted as being objectionable. In terms of numbers alone, this made the offending less serious than *Wigzell* and more serious than *Stevens*. In terms of the nature of the material in this case, as in *Wigzell* and *Stevens*, there was material in Levels 1 to 4. However a difference, so far as it can be determined on the information set out in those decisions, appears to be that in *Wigzell* there was a large quantity of Levels 4 or 5, whereas here there was a smaller quantity. That difference may simply reflect that the overall collection in *Wigzell* was very large.

In terms of the degree of interest and involvement this case appears to be similar to *Wigzell* but probably less serious than *Stevens*. In *Stevens* the images were catalogued in alphabetical and subject order. In *Wigzell* the material was downloaded over a 15 month period, organised, classified and collated and Mr Wigzell used various search tools on the internet, shared files with others and was a member of 25 news groups specifically designated for the sharing of child sexual abuse imagery. In this case Mr Cooper had material from 2003 and he had collated, sorted and stored material and had encrypted some material. He was a member of a chat group. There was also evidence of the use of file sharing software.

Overall, because of sheer weight of numbers (including the number of Level 4 and 5 images), the offending in *Wigzell* was more serious than here. But the offending here was more serious than in *Stevens*.

Mr Wigzell's end sentence of two years was appealed by the Department because it was viewed by the Department as manifestly inadequate. While not finding that the sentence met that test, the High Court Judge was of the view that if he had been considering the matter *de novo* he would have imposed a higher sentence. He indicated that the sentence would have been a three year starting point, uplifted by three to six months for the aggravating factor of Mr Wigzell's previous conviction, before mitigating factors. In *Stevens* the starting point was two years' imprisonment uplifted by three months for previous convictions and before mitigating factors.

Taking an approach consistent with these two cases, in my view the appropriate starting point was two years and six months' imprisonment. To this a three month uplift was appropriate for Mr Cooper's previous conviction (reflecting a need for individual deterrence). The District Court Judge applied a discount of just under 25% for mitigating factors. This was largely for Mr Cooper's guilty plea because she placed little weight on Mr Cooper's attendance at the Wellstop programme and his use of medication to reduce his libido, viewing those efforts as poor and directed at achieving a lesser sentence rather than a genuine attempt at rehabilitation. The discount has not been challenged and in any event is only a little below Mr Wigzell's discount where the Judge took a favourable view of his rehabilitation efforts and his co-operation.
Applying just over a 25% discount to two years and nine months gives an end sentence of two years. In my view that sentence is appropriate by comparison with Stevens and Wigzell and the maximum of five years' imprisonment for this kind of offending. This was a relatively serious case of its kind, but it was not the most serious and there was the guilty plea.

[31]

Mr Cooper has not submitted that a sentence of home detention should be substituted. The District Court Judge's view was that this was inappropriate and I agree with that assessment.

**Result**

[32]

The appeal is allowed. The sentence of two years and four months' imprisonment is quashed. In its place is a concurrent sentence on each charge of two years' imprisonment.