

USING THE LAW TO SUPPORT WORK/LIFE ISSUES: THE AUSTRALIAN EXPERIENCE*

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ABSTRACT

The article analyzes the legal and policy environment in Australia that attempts to promote work/family balance through the use of flexible work practices. In particular, the article analyzes and describes the introduction of laws to protect employees with caring responsibilities, and the types of complaints that have arisen. By considering the role of law in remedying individual grievances and promoting organizational change, the article offers insights into opportunities and challenges for American legal reform.

INTRODUCTION

Academics, legislators, consumer advocates, and others often tout legal reform as a means of redressing workplace discrimination suffered by employees using (or attempting to use) flexible work practices to achieve work/family balance. Advocates argue that building a compliance framework will perform an educative function by raising awareness regarding the importance of work/family issues for employees, as well as providing a justiciable remedy. In part, these arguments rely on the historically important role fulfilled by the law in redressing other forms of discrimination, e.g., based on disability, race or sex. In relation to flexible work practices, however, key issues to introducing legal reforms include the construction of the laws and their ambit, the possible types of cases to be litigated, and the outcomes for individual complainants and other employees.

Recent legal developments in Australia offer an insight into the use of law to promote flexible work practices. Legislators at the federal level and in all Australian states except one have enacted explicit legislation supporting employees with caring responsibilities. New South Wales ("N.S.W.") recently introduced the most advanced legislation, which other Australian jurisdictions accept as a model of best practice.¹ Such broad legislation provides a more egalitarian means of protecting and providing for families than sex discrimination legislation, which also exists in every Australian jurisdiction, the United Kingdom, and the USA. Sex discrimination laws only protect employees who have been discriminated against on the basis of their access or proposed access to flexible work practices

1. See generally SARA CHARLESWORTH ET. AL., RMIT UNIVERSITY, CENTRE FOR APPLIED SOCIAL RESEARCH, *BALANCING WORK AND FAMILY RESPONSIBILITIES: POLICY IMPLEMENTATION OPTIONS* (2002) (discussing policies, programs, and regulations implemented throughout Australia that should be adopted in Victoria and other Australian jurisdictions), available at <http://www.rmit.edu.au/browse;ID=3k5nkp1c0dgk> (last visited March 13, 2004).

where the individual can show that the behavior amounts to direct or indirect sex discrimination.² In contrast, the New South Wales carers' responsibilities legislation explicitly protects employees with caring responsibilities, is accessible by men *and* women, covers all forms of caring responsibilities (i.e. beyond child-care) and is primarily targeted at reforming working time arrangements and working conditions through flexible work practices.³

The aim of this paper is to provide an analysis of the legal and policy framework supporting the implementation of flexible work practices in Australia, and the practical outcomes. Section I of this paper provides a statistical profile of Australia's workforce participation and patterns (Part A) and general information about Australia's anti-discrimination legislative framework (Part B). Section II of the paper provides details of the specific legislation prohibiting discrimination on the grounds of caring responsibilities, including objectives of the legislation (Part A), and schema of the legislation (Part B). Section III describes the carers' responsibilities legislation in practice, including decided cases (Part A) on working part-time/job-sharing (sub-section 1), working from home (sub-section 2), long hours and varying work hours (sub-section 3), access to leave provisions (sub-section 4), and defining the limits of the legislation (sub-section 5). Section B details the nature of complaints and conciliated cases under the Carers' Responsibilities legislation, which are those that did not go to hearing. Section III draws conclusions. As Australia and the United States have similar legislative frameworks and judicial processes in relation to discrimination, an understanding of the Australian experience may help an American audience to envisage a system of legislative support for flexible work practices and the possible outcomes.

I. BACKGROUND

In order to contextualize the Australian legislative support for flexible work practices, and in particular the purpose of the legislation, this section provides broad statistical data on Australian workforce participation and patterns. In addition, this section provides an overview of the schema of discrimination laws. The following section will then identify the key elements of the recent

2. See Sex Discrimination Act, 1984 (Austl.).

3. See Anti-Discrimination Act, 1977, 4B (N.S.W.) (enacting state legislation to protect employees from discrimination on the basis of their caring responsibilities), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204 (last visited March 20, 2004).

amendments to the *Anti-Discrimination Act, 1977* (N.S.W.)⁴ that protect employees with caring responsibilities.

A. *Statistical Profile*

As in the United States, progressing gender equity has been a key concern for public policy and private institutions for decades. The depth of women's penetration into the formal labor market has been of primary interest. While women's participation has steadily increased over time, there remains a gender gap in both the United States and Australia. As of 2001, the rate of participation for women aged fifteen to sixty-four in Australia was 63.9% (compared to 70.8% in the United States in 2000) and the rate of participation of men aged fifteen to sixty-four was 82.1% (compared to 83.9% in the United States in 2000).⁵ In Australia, this level of participation by women accounts for 43.9% of the total labor force.⁶

A secondary concern has been the pattern of women's attachment to the labor market, and in particular the mode of work (e.g., full-time, part-time or casual), areas of work (i.e. occupational segregation), periods of participation (i.e. entry, re-entry and exit), and levels of work (i.e. vertical segregation). First, in terms of the mode of work, the data demonstrates that women dominate the part-time worker category, i.e. those employees who work fewer than thirty-five hours per week.⁷ Second, in terms of the areas of work, Australian society remains significantly occupationally segregated in that women dominate sales and personal service industries.⁸ Third, in terms of the periods of participation, women's participation levels have historically dropped during child-bearing years, however recent data has demonstrated that more women with young children are

4. *Id.* (enacting legislation to protect care givers from direct and indirect discrimination), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/ (last visited March 20, 2004).

5. See AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, INTERNATIONAL COMPARISONS – WORK 218 (2002), available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/549f30e9815d261eca256bcd00827318!OpenDocument>. (last visited March 28, 2004).

6. AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, WORK – NATIONAL SUMMARY TABLES 124 (2002) [hereinafter AUSTL. BUREAU OF STATISTICS 2002], available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/2CA0A66D07B8E4F0CA256BCD008272FF?Open> (last visited March 28, 2004).

7. See *id.* (recognizing that while part-time workers comprise 26.7% of the total number of workers employed, women comprise 71.9% of the group).

8. AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 1998, WORK – PAID WORK: TRENDS IN WOMEN'S EMPLOYMENT (1998), available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/24C5A8A259305D5BCA2569AD000402D2?OpenDocument> (last visited March 28, 2004).

returning to the workforce while their children are young.⁹ Finally, in terms of vertical segregation, although women are well represented in managerial and professional specialty positions (43%), a 2003 Census of the top 200 Australian companies found that women are grossly under-represented in executive and board directorship positions.¹⁰

Each of these factors relating to women's participation in the labor market and the patterns of women's attachment has focused attention on the family-friendliness of Australian workplaces, particularly for women with dependent children. Hence, concern about gender equity has been the initial and primary driver of the work/family agenda in Australia.¹¹ More recently, however, the agenda has broadened to include men and a wider range of caring responsibilities as a result of attention to our aging population¹², the increased participation of older workers in the labor market (particularly women),¹³ the changing pattern of work hours,¹⁴ and

9. See AUSTL. BUREAU OF STATISTICS 2002, *supra* note 6 (relaying that in 1991, 44.5% of women with children aged 0-4 years were in the labor force and that by 2001, 49.8% of women with children aged 0-4 years were in the labor force).

10. Equal Opportunity for Women in the Workplace Agency, 2003 CENSUS OF WOMEN BOARD DIRECTORS & WOMEN EXECUTIVE MANAGERS (2002) (finding that women only compose 8.4% of Board Directorships and 8.8% of Executive Management positions), available at http://www.eowa.gov.au/Events/Australian_Women_In_Leadership_Census/2003_Australian_Women_In_Leadership_Census/Not_Embargoed_EOWA_Census_Media_Kit_2003.pdf (last visited March 28, 2004). In comparison, Catalyst reports that in 2003, 13.6% of board seats were held by women in Fortune 500 companies in the U.S. and, in 2002, 15.7% of corporate officer positions were held by women in the U.S. Fortune 500. *Id.*

11. See, e.g., Rohan Squirchuk & Juliet Bourke, *From Equal Employment Opportunity to Family-Friendly Policies and Beyond: Gender Equity in Australia*, in ORGANIZATIONAL CHANGE & GENDER EQUITY: INTERNATIONAL PERSPECTIVES ON FATHERS AND MOTHERS AT THE WORKPLACE 117 (Linda L. Hass, et al. eds., 2000) (evaluating Australia's efforts to achieve gender equity in the workplace through family-friendly initiatives); see also CHARLESWORTH, *supra* note 1 (examining the Australian government's role in promoting work/family balance).

12. AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, INTERNATIONAL COMPARISONS—POPULATION (2002) (illustrating that, in concert with the United States, Australia has an aging population), available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/0425c705eb6f3fb2ca256bcd00827315!OpenDocument> (last visited Apr. 1, 2004). At present 16% of the Australian and American populations comprise citizens aged sixty years and over. *Id.* The United Nations predicts that the median age in Australia and America will be approximately thirty-six for both nations in 2005, 39.6 and 38.6 in 2020, and 41.9 and 40.7 in 2050, respectively. *Id.* The UN also predicts that the proportion of citizens aged sixty-five and over will increase from 12% in 2005 in Australia and America to approximately 22% in 2050. *Id.*

13. AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, WORK – PAID WORK: LONGER WORKING HOURS (2003) (reporting that in 2001 48.1% of women aged 55-59 and 21.5% of women aged 60-64 participated in the labor market in comparison with 35.7% of women aged 55-59 and 15.9% of women aged 60-64 in 1991), available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/2ca0a66d07b8e4f0ca256bcd008272ff!OpenDocument> (last visited Apr. 1, 2004).

men's changing expectations about their active participation in family life.¹⁵

The broader agenda has stimulated and been informed by the collection of statistical data on employment and caring responsibilities, which has then been disaggregated by gender,¹⁶ as well as qualitative data on workers' experiences of balancing work and family responsibilities. With respect to the statistical data, a national study conducted in 1998 found that carers of people with a disability and the elderly represented 13% of people employed full-time and 16% of people employed part-time.¹⁷ In a 2000 study of a broader range of carers, conducted in New South Wales, the Australian Bureau of Statistics found that 42% of persons aged eighteen years and over provided care to another adult or child, 53% of all carers had children and provided care for their children only, and that a significantly higher proportion of females (46%) than males (37%) provided care.¹⁸ The study defined a "carer" broadly as any person in New South Wales aged eighteen years or over, who in the last six months had a child under fifteen years of age, as well as anyone who cared for someone else including any other child under fifteen years of age, an elderly person, and any person with a short or long term sickness, injury or condition.¹⁹

14. See *id.* (reporting on the trends of longer and more intense working hours in Australia); see also AUSTRALIAN BUREAU OF STATISTICS, MEASURING WELLBEING (2001) (stating changes in working hours patterns), available at [http://www.abs.gov.au/ausstats/free.nsf/Lookup/D609B8E54F0EDCA8CA256AE30004282D/\\$File/41600%5F2001.pdf](http://www.abs.gov.au/ausstats/free.nsf/Lookup/D609B8E54F0EDCA8CA256AE30004282D/$File/41600%5F2001.pdf) (last visited Apr. 1, 2004).

15. See GRAEME RUSSELL et al., FITTING FATHERS INTO FAMILIES (DEPT. OF FAMILY AND COMMUNITY SERVICES, CANBERRA) (Jan. 1999) (finding that the roles of fathers in Australia are stereotypically gendered because fathers have insufficient time for family and need a stronger employer support network), available at [http://www.facs.gov.au/internet/facsinternet.nsf/v1A/families/\\$file/fitting_fathers_executive.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/v1A/families/$file/fitting_fathers_executive.pdf) (last visited Apr. 14, 2004).

16. See AUSTRALIAN BUREAU OF STATISTICS, CARING IN THE COMMUNITY, AUSTRALIA (1998) (reporting gender, age, and education levels of carers in Australia), available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E243871471015E4BCA256943007F0603> (last visited Jan. 29, 2004). At present, the Australian Bureau of Statistics has only collected this data in one Australian state, namely New South Wales.

17. *Id.*

18. AUSTRALIAN BUREAU OF STATISTICS, MANAGING CARING RESPONSIBILITIES AND PAID EMPLOYMENT, NEW SOUTH WALES (2001) [hereinafter MANAGING CARE], available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1C7DF016EE44A08ACA256A57005DBA3> (last visited Apr. 3, 2004).

19. *Id.* (finding that of the 42% who provided care during the six months of the study, 84% provided care on a continual basis).

The 2000 study of New South Wales carers also found that half of all carers surveyed were employees in paid employment.²⁰ Of these, 40% used some form of flexible working arrangement in the last 6 months to care for another person.²¹ Further, the study found that females were more likely to use flexible work arrangements (48%) than males (33%), although this varied by sector (public and private), with 47% of females in the private using a work arrangement to care for another person compared to 28% of males.²²

The qualitative experience of workers with family responsibilities has been examined in a range of national and industry based studies. In 1999 the Australian Council of Trade Unions surveyed seven thousand employees across a range of industries and found that only 44% of respondents were happy with their work and family balance.²³ Moreover, the trend towards dissatisfaction appears to be increasing over time. The 1995 Australian Workplace Industrial Relations Survey conducted with employers and employees across 2001 workplaces found that job satisfaction had declined over time, particularly amongst full-time workers.²⁴ A 2001 national study conducted by the Office of the Employment Advocate (OEA) found that a significant proportion of employees (41%) reported that balancing their personal and professional lives had become more difficult over the last two years because, primarily, their workplace was less accommodating (46%).²⁵ Of those employees who found that work

20. *Id.*

21. *Id.* (defining a flexible working arrangement to include the choices of flexi-time, scheduled day off, working from home, or part-time work).

22. *Id.*; see also WORK+LIFE Strategies, Statistics Requested by a N.S.W. Government Dep't on the N.S.W. Health Care Sector (2001) (unpublished data, on file with the author) (finding, across three different workplaces in the health care sector, that between 45 and 63% of staff had caring responsibilities - the majority of which (21-30%) related to caring for a school age child, and secondly (9-23%) a family member who is frail).

23. See GRAEME RUSSELL & LYNDY BOWMAN, DEPARTMENT OF FAMILY AND COMMUNITY SERVICE, CANBERRA, WORK AND FAMILY: CURRENT THINKING, RESEARCH AND PRACTICE 9 (2000) (citing a report completed by the Australian Council of Trade Union, Employment Security and Working Hours: A National Survey of Current Workplace Issues), available at [http://pandora.nla.gov.au/parchive/2000/Z2000-Aug-7/www.facs.gov.au/internet/facsinternet.nsf/b919d06b2c7d99e3ca256807001393b2/17b77b50cd8dbb42ca2568e0001e1869/\\$FILE/work_family.pdf](http://pandora.nla.gov.au/parchive/2000/Z2000-Aug-7/www.facs.gov.au/internet/facsinternet.nsf/b919d06b2c7d99e3ca256807001393b2/17b77b50cd8dbb42ca2568e0001e1869/$FILE/work_family.pdf) (last visited Apr. 4, 2004).

24. ALISON MOREHEAD ET AL., DEPARTMENT OF INDUSTRIAL RELATIONS AND SMALL BUSINESS, CHANGES AT WORK: THE 1995 AUSTRALIAN WORKPLACE INDUSTRIAL RELATIONS SURVEY 288 (Addison, Wesley, Longman 1997) (surveying workplaces with twenty or more employees).

25. PAUL GOLLAN, OFFICE OF THE EMPLOYMENT ADVOCATE SYDNEY, AWA EMPLOYEE ATTITUDE SURVEY 35 (2001) (stipulating that the survey included one thousand randomly selected wage and salary earners), available at http://www.oea.gov.au/docs/AWAEmployeeSurveyReport_18-09-01.pdf (last visited Apr. 4, 2004). There was

became easier over the past two years (approximately 17%), most attributed the reason to their workplace being more accommodating (60%) rather than a change in family circumstances (32%).²⁶ The OEA also found that employees in more highly skilled occupations and positions reported greater difficulty in balancing work and life than less skilled occupations.²⁷ Hence, the workplace plays a critical role in assisting or inhibiting employee's work/life balance.

Such data has fueled a campaign by disparate groups including government agencies, non-government organizations, discrimination agencies, and law reform bodies for greater public recognition of, and the provision of assistance to carers so they may more easily balance their work and family responsibilities.²⁸ This campaign catalyzed in a push for legislative reform to supplement existing workplace benefits,²⁹ and practices.³⁰ In particular, there has been pressure to provide employees with firmer entitlements to flexible work practices, such as part-time work, tele-working, condensed hours and control over what time the work day begins and ends.³¹ This pressure

no significant gender difference with regards to responding to these work/life balancing questions. *Id.*

26. *See id.* at 35-36.

27. *See id.* at 36 (finding that 52% of managers/administrators, 49% of professionals, technicians, or associate professionals, 26% of laborers, 33% of elementary sales or service technicians and 36% of intermediate sales or service technicians reported difficulty in balancing their personal and professional lives).

28. The author would like to recognize the Federal Work and Family Unit, the N.S.W. Department of Industrial Relations, Carers N.S.W., and the N.S.W. Anti-Discrimination Board and the N.S.W. Law Reform Commission for their roles as respective disparate groups that seek greater work/life balance.

29. *See* HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, SEX DISCRIMINATION UNIT, A TIME TO VALUE: PROPOSAL FOR A NATIONAL PAID MATERNITY LEAVE SCHEME 126-29, 214-17 (2002) (recommending that the Federal Government introduce a national maternity leave scheme to be funded by the Government), *available at* http://www.hreoc.gov.au/sex_discrimination/pml2/Atimetovalue.pdf (last visited Apr. 4, 2004). Groups also campaigned for flexible work practices to supplement existing benefits such as unpaid maternity and paternity leave, using personal sick leave to care for sick dependents and subsidized child-care payments. *Id.* at 39-40. The Federal Government has yet to respond to the recommendation by the Sex Discrimination Commissioner.

30. *See* Department Of Workplace Relations And Small Business, Work And Family Unit, WORK AND FAMILY STATE OF PLAY (1998) [hereinafter Work and Family Unit] (reporting that 67% of certified agreements and 79% of Australian Workplace Agreements, two types of industrial instruments, included one or more family friendly measures, with flexible working hours being the most common). The study neither evaluated whether the measures in fact were accessed by employees to balance their work and family responsibilities nor their adequacy. *Id.*

31. *See* Press Release, Australian Council of Trade Unions ("ACTU"), Test Case Bid for Working Parents (June 24, 2003), *available at* http://www.actu.asn.au/public/news/1056413522_1092.html (last visited Apr. 4, 2004). The peak union has recently initiated a test case to secure a right to (i) part-time work for women returning to work from maternity leave; (ii) request flexible working hours; (iii) purchase additional leave; and (iv) extend the statutory period of unpaid leave from

resulted in the introduction of discrimination legislation, particularly in New South Wales (“N.S.W.”) to protect workers with caring responsibilities.

B. Legislative framework

Federal and all seven State jurisdictions have enacted legislation to specifically prohibit discrimination and promote equality in designated areas of public life, including employment.³² Legislators incorporated additional prohibitions against discrimination into industrial legislation and a broad range of tangential legislation that includes laws relating to privacy, occupational health and safety, and workers compensation.

In relation to protecting employees with carers’ responsibilities, following Australia’s ratification of the *International Labor Organisation Workers with Family Responsibilities Convention (ILO 156)*,³³ the Federal Government amended the 1984 *Sex Discrimination Act* to include a prohibition against discrimination in employment on the basis of an employee’s *family* responsibilities.³⁴ While the *Sex Discrimination Act* applies to the majority of Australian workplaces, the family responsibility provisions have a limited practical ambit. First, the amended legislation only covers *direct* discrimination.³⁵ Second, the legislation only operates in relation to *dismissals*.³⁶ Third, whether *men and women*, versus only women, are protected from discrimination is questionable.³⁷ Some of these gaps

twelve to twenty-four months. *Id.* The test case has been set down for hearing before the Australian Industrial Relations Commission in August 2004. *Id.*

32. See Sex Discrimination Act, 1984 (Austl.); Anti-Discrimination Act, 1991 (Queensl.); Anti-Discrimination Act, 1977 (N.S.W.); Equal Opportunity Act, 1995 (Vict.); Equal Opportunity Act, 1984 (S. Austl.); Equal Opportunity Act, 1984 (W. Austl.); Anti-Discrimination Act, 1998 (Tas.); Anti-Discrimination Act, 1993 (N. Terr.).

33. International Labor Organization (ILO) Convention, June 23, 1981, 1991 Austl. T. S. 7 (recognizing the difficulty workers have sustaining a personal and professional life and paying particular concern to the equal opportunities and treatment between men and women who have families), available at <http://www.austlii.edu.au/au/other/dfat/treaties/1991/7.html> (last visited Apr. 4, 2004).

34. See Sex Discrimination Act, 1984, §7A (Austl.) (prohibiting less favorable treatment of a person with family responsibilities than without, if that treatment is by reason of employee’s family responsibilities).

35. See *id.* §§ 5, 7A (prohibiting only less favorable treatment of a person with family responsibilities than without, if that treatment is by reason of an employee’s family responsibilities, and not the disparate impact of such treatment).

36. See *id.* § 14(3A) (prohibiting discrimination based on employee’s caring responsibilities only in dismissal cases).

37. The SDA’s constitutional validity relies upon the United Nations’ *Convention on the Elimination of All Forms of Discrimination Against Women*. U.N.

can be filled in by relying upon the general prohibition against indirect discrimination on the basis of sex because women primarily are responsible for providing care or seek flexible work practices.³⁸ The gaps can also be filled by reliance upon State laws.

Each State in Australia also introduced legislation to promote equality and prohibit discrimination.³⁹ Each piece of legislation covers multiple grounds of discrimination (including sex, race and disability discrimination) and multiple areas (including employment). While there is a great deal of intentional similarity between the State laws, and between State and Federal laws, the coverage and schema demonstrate small variations. Each State's discrimination laws (except those of South Australia) explicitly prohibit discrimination on the basis of caring responsibilities, which is variously described as "parental status", "carer status", "family responsibilities" or "carers' responsibilities."⁴⁰

In 2001, New South Wales, the most populous state in Australia, introduced the most recent and broad ranging "carers' responsibilities" legislation. This legislation, which amended the 1977 *Anti-Discrimination Act*, adopts a unique model of discrimination and places significant obligations on organizations to eliminate discrimination against employees on the basis of their caring responsibilities.⁴¹ As the N.S.W. Carers' Responsibilities ("N.S.W. C.R.") legislation has been accepted as a model of best practice by other jurisdictions,⁴² the following section of this paper will describe its objectives and legislative features in particular.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (requiring all signatory states to eliminate all forms of discrimination against women in public and political life), available at <http://www.un.org/womenwatch/daw/cedaw/econvention.htm> (last visited Apr. 14, 2003).

38. See MANAGING CARE, *supra* note 18 at 6 (reporting from the 2000 study that females (32%) were more likely to use part-time work than males (4%)).

39. See AUSTRALIAN GOVERNMENT WEBSITE (providing links to the seven states of Australia: N.S.W., N. Terr., Queensl., S. Austl., Tas., Vict., and W. Austl.), available at <http://www.gov.au> (last visited Apr. 4, 2004).

40. See Anti-Discrimination Act, 1977, (N.S.W.); Anti-Discrimination Act, 1994, (N. Territory); Anti-Discrimination Act, 1998, (Tas.); Equal Opportunity Act, 1995, (Vict.); Equal Opportunity Act, 1984, (W. Austl.) (defining discrimination legislation in states with some differences).

41. Anti-Discrimination Act, 1977, (N.S.W.) (amended 2001).

42. See CHARLESWORTH, *supra* note 1.

II. PROHIBITION AGAINST DISCRIMINATION ON THE GROUNDS OF CARING RESPONSIBILITIES IN NEW SOUTH WALES

This section will identify the specific objectives of the N.S.W. Carer's Responsibilities legislation as well as the legislative model. It will illustrate that the aim of the legislation was to fulfill multiple policy objectives, including the stimulation of workplace modifications to accommodate employees with caring responsibilities.

A. *Objectives of the Legislation*

As noted above, the primary objective of the work/family agenda has been gender equity and this is espoused in the aims of the N.S.W. carers' responsibilities legislation. A second objective of the legislation was to support the privatization of care and to acknowledge the diversity of caring relationships. A third objective was the promotion of flexible work practices. While these policy objectives are evident from the debate surrounding the introduction of the legislation, the objectives are also implicit in the legislative form. The legislative model also reflects a frustration with the limited capacity of existing models of anti-discrimination regulations to produce substantive gender equality and a desire to encourage employers to proactively engage in implementing flexible work practices.

In relation to gender equity, a key goal of the legislation was to facilitate and maximize the employment of women with children by enabling women to continue in employment through the implementation and utilization of flexible work practices as well as by encouraging more men to take up their share of caring responsibilities and, thus, reduce the burden on women.⁴³ Upon introducing the legislation into the N.S.W. Parliament, then N.S.W. Attorney General, the Honorable Jeff Shaw QC, MP stated:

While protection of those with family responsibilities will largely benefit women—since women usually play the primary role in caring for children, the elderly and people with disabilities—this amendment is not simply an extension of the concept of sex discrimination, as it will protect both men and women who undertake such care.⁴⁴

43. See NEW SOUTH WALES LAW REFORM COMMISSION, REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (1999) (suggesting that "While the Commission accepts that protection of those with family responsibilities will largely benefit women, the availability of such protection may itself help to break down the traditional division of responsibility on male/female lines."), available at <http://www.agd.nsw.gov.au/lrc.nsf/pages/r92chp5> (last visited Apr. 4, 2004).

44. Anti-Discrimination Amendment (Carers' Responsibilities) Bill, N.S.W.

The design of the N.S.W.C.R. legislation also reflects the aim of gender equity by granting the provision of rights to the *employee* rather than to the dependants to be provided with care. While the legislative design is not surprising, and mirrors the focus of other international jurisdictions,⁴⁵ interestingly enough, other interests, like those of children, did not feature at all in the Parliamentary debates surrounding the introduction of the N.S.W.C.R. legislation.⁴⁶

In relation to the privatization of care and the diversity of caring relationships, the N.S.W.C.R. legislation acknowledges that there is now a greater onus on families to provide care for their aged and/or disabled relatives than in prior time periods. This onus is aggravated by "Australia's ageing population, increasing rates of disability, and a shift in emphasis from institutional to community-based care."⁴⁷ During the Parliamentary Debate on the Carers' Responsibilities legislation, these issues were adverted to by the Honorable Dr. A. Chesterfield-Evans of the Australian Democrats:

Clearly, if carers are not able to carry out their caring role, this puts an immense extra burden on society as a whole. In a sense, they have privatized the welfare function because of their love for the persons they care for. . . [T]o replace the role of the carer would be immensely expensive.⁴⁸

The selection of the word "caring" in the title of the legislation, the legislative definition of caring relationships, and the arguments raised during the Parliamentary debate, all convey that the N.S.W. legislature

Legislative Council Hansard, 2000, 5019 (N.S.W.) (statement of Hon. J. W. Shaw, Attorney General and Minister for Industrial Relations), available at <http://www.parliament.nsw.gov.au/Prod/Parliament/HansArt.nsf/0/ca256d11000bd3aaca2568ee001a2c12?OpenDocument>. (last visited Apr. 4, 2004).

45. See FED. MINISTRY OF ECON. AND LAB., LAB. L. (2002) (describing a law passed on January 1, 2001 by the Federal German Government to strengthen an employee's right to work part-time), available at http://www.bmwa.bund.de/Redaktion/Inhalte/Downloads/Homepage_2Fdownload_2Fenglish_2FLabour_2520Law_2FLabour_2520Law1.pdf,propert=pdf.pdf (last visited Apr. 4, 2004).

46. See June H. Zeitlan, *Preface* to ORGANIZATIONAL CHANGE & GENDER EQUITY: INTERNATIONAL PERSPECTIVES ON FATHERS AND MOTHERS AT THE WORKPLACE, at ix-xii (Linda L. Haas et al. eds., Sage Publ'g 2000) (stating that the distinction between Australia, the United Kingdom, and the United States on one hand and Sweden on the other is the concentration on gender equity as a driver of work and family policy, rather than gender equity in tandem with a commitment to children).

47. AGEING & DISABILITY DEPARTMENT, N.S.W. GOVERNMENT CARERS STATEMENT 3-4 (1999) (recognizing shifts in demographics of population and value of community care), available at <http://www.dadhc.nsw.gov.au/NR/rdonlyres/AD83F531-ED4F-4ECF-8E3A-36FCE980DA04/428/CarersStatement.pdf> (last visited Apr. 4, 2004).

48. See Anti-Discrimination Amendment (Carers' Responsibilities) Bill, N.S.W. Legislative Council Hansard, 2000, 5761 (N.S.W.) (statement of Hon. Dr. A. Chesterfield-Evans, Member, Australian Democrats).

recognized the existence of diverse caring relationships.⁴⁹ In terms of the definition, the N.S.W.C.R. legislation provides broad protection to employees who have responsibilities to “care for or support” children or immediate family members, irrespective of whether the relationship is formed by marriage or a de-facto relationship.⁵⁰ While the legislature eventually approved these categories of carers, some parliamentarians argued that the group was too broad and others argued that it was too narrow.⁵¹

Interestingly, while parliamentary debate centered on the breadth of caring *relationships* covered by the N.S.W. legislation, the first case heard by the N.S.W. Administrative Decisions Tribunal (“ADT”), Equal Opportunity Division focused on the nature of caring *responsibilities*.⁵² The N.S.W. legislation does not define the nature of “care or support” provided by a carer, and this issue has not been controversial in other Australian jurisdictions. Tribunals have readily accepted that a parent has a responsibility to care for a pre-school aged child on days when childcare is unavailable,⁵³ to pick up a child from school when after-school care is unavailable,⁵⁴ or when the childcare center closes.⁵⁵ In *Gardiner*, however, the question of

49. See Anti-Discrimination Act (Carers’ Responsibilities), 2000, (N.S.W.) (including the term “de facto relationships” in the legislation, which is more inclusive than the term spouse or family, which stereotypically refers to a nuclear group of two parents and children).

50. Anti-Discrimination Act, 1977, § 49S (N.S.W.) (indicating that children can include grand-children, immediate family members can include a spouse, a parent, or a step-parent, a grand-parent, or sibling, and marriages can be a subsequent marriage while relationships can be hetero or homosexual in nature).

51. Compare Anti-Discrimination Amendment (Carers’ Responsibilities) Bill, N.S.W. Legislative Council Hansard, 2000, 5489 (N.S.W.) (statement of Rev. the Hon. F. J. Nile, Member, Christian Democratic Party) (opposing inclusion of homosexual relationships in the definition of a “spousal” relationship), *with id.* at 6243 (statement of Ms. Clover Moore, Independent Member for Bligh) (arguing that term carers’ should include a broad spectrum of relationships so as to include extended family members or couples living separately).

52. See *Gardiner v. New South Wales WorkCover Authority* (2003) 184 NSWADT ¶ 2 (examining reasonableness of employer relocating employee to different office location when she cares for two young children and finding that the relocation was not discriminatory), *available at* 2003 WL 21877233. This finding was recently upheld on appeal. *Gardiner v. New South Wales WorkCover Authority* (2004) 1 NSWADTAP, *available at* 2004 WL 213980.

53. See *Mayer v. A.N.S.T.O.* (2003) 209 FMCA ¶ 14 (holding that an employer discriminated against an employee by imposing full-time work conditions after the employee returned from maternity leave but could not find full-time childcare), *available at* 2003 WL 21876726.

54. See *Song v. Ainsworth Game Tech. Pty Ltd.* (2002) 31 FMCA ¶¶ 14, 72 (ruling that an employer discriminated against the complainant when she sought to leave work for twenty minutes each afternoon to pick up her child from school at 3:00 p.m. and leave him at friend’s house before returning to work, because no afternoon school care was provided on-site).

55. See *Laz v. Downer Group Ltd.* (2000) 1390 FCA ¶¶ 3-7 (discussing an

whether the complainant had “caring responsibilities” was a threshold issue. The complainant did not argue that she had a responsibility to care for her school-aged children before school *in the absence* of institutional care, but rather that her maternal obligations were ever-present and included “meeting the physical, emotional and psychological needs of her children” by preparing them for school in a relaxed environment.⁵⁶ The N.S.W. Tribunal accepted the complainant’s argument and commented that “[t]he phrase is a general one and should be given a broad interpretation in keeping with the human rights purpose of the provision.”⁵⁷ Moreover, the Tribunal held that a broad definition of “caring responsibilities” would give effect to Parliament’s intention to eliminate discrimination on the ground of carers’ responsibilities.⁵⁸

Finally, the legislation was aimed at promoting workplace changes to accommodate employees’ caring responsibilities, namely flexible work practices (such as part-time work, condensed hours and working from home).⁵⁹ This linkage was identified as a likely outcome by employer and employee groups during the consultation phase,⁶⁰ however it is not made explicit on the face of the legislation, nor was it referred to in the N.S.W. Law Reform Commission’s 1999 discussion about the proposed legislation.⁶¹ Further, the connection was not identified by the then N.S.W. Attorney General during the

employee’s contractual work responsibilities as well as her responsibilities to pick up her son from childcare by 6:30 p.m., the time the center closed, twice a week because her husband was not available on those nights).

56. *Gardiner*, (2003) 184 NSWADT ¶ 36 (noting that the complainant’s description of psychological needs and a relaxed environment included making her children’s lunch and attending to their uniform and daily school needs).

57. *Id.* ¶ 39.

58. *Id.* ¶ 35.

59. See Anti-Discrimination Act (Carers’ Responsibilities) Bill, 2000, § 49V (N.S.W.) (stating that it is unlawful for an employer to discriminate against an employee or a potential employee based on that person’s role as a carer); see also Workplace Relations Act, 1996, No. 104 Amend. 2003 (stating that part-time employees are entitled to employment benefits on a pro-rata basis (e.g. annual leave and superannuation), as well as government funded medical benefits).

60. See JULIET BOURKE, CORPORATE WOMEN, CHILDREN, CAREERS AND WORKPLACE CULTURE: THE INTEGRATION OF FLEXIBLE WORK PRACTICES INTO THE LEGAL AND FINANCE PROFESSIONS 1-3 (Industrial Relations Research Centre, The University of New South Wales 2000) [hereinafter CORPORATE WOMEN] (discussing the linkage between gender equity, discrimination legislation and flexible work practices). Also, as a Senior Legal Policy Officer, the author was responsible for conducting the consultation between the N.S.W. Attorney General’s Department and peak employer and employee groups in 1998 and 1999 on the Anti-Discrimination Amendment (Carers’ Responsibilities) Bill.

61. See New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act, 1977* (N.S.W.), REPORT, 92 NSWLRC 298, 297-308 (1999) (reporting on scope and operation of *Anti-Discrimination Act 1977*).

Parliamentary debate on the carers' responsibilities legislation. Only one Parliamentarian from a minor party ("the Greens") commented on possible outcomes of the legislation being job-sharing and reduced hours working.⁶² It is unclear whether the then N.S.W. Attorney General's omission was by design or default. It is noted however, that there was little effective pressure to identify the practical impact of the legislation, and the then N.S.W. Attorney General positioned the legislation at a philosophical level: "[Let] me emphasize that what we are supporting today is like supporting motherhood. It is a self evidently correct proposition to say that people should not be discriminated against in their employment because, for example, they have to care for a sick child."⁶³

B. Schema of the Legislation

In conformity with the general scheme of discrimination legislation across Australia, and well accepted principles of discrimination jurisprudence, the carers' responsibilities legislation covers direct and indirect forms of discrimination.⁶⁴ The most innovative aspect of the legislation is its adoption of the "disability" model of discrimination, namely its use of concepts such as reasonable accommodation and unjustifiable hardship.⁶⁵ Another critical aspect of the legislation, given the connections between industrial and anti-discrimination laws in New South Wales, is its capacity to produce systemic and proactive changes by employers, and to generate positive reactions to individual requests for flexibility. This section will describe the legislative schema in detail and the following section will describe the legislation in operation, e.g., the types of complaints which have been received by the N.S.W. Anti-Discrimination Board (which administers the legislation), as well as the decided cases in Australian jurisdictions with similar legislation to the N.S.W. carers' responsibilities legislation.

62. See Anti-Discrimination Amendment (Carers' Responsibilities) Bill, N.S.W. Legislative Council Hansard, 2000, 5489 (N.S.W) (statement of Hon. I. Cohen, N.S.W. Parliament).

63. See *id.* at 5761 (statement of Hon. J.W. Shaw, Attorney General and Minister for Industrial Relations) (comparing employment discrimination against mothers with that against carers).

64. See *id.* § 49V (stating that an employer cannot deny an employee opportunities to a promotion or subject the "employee to any other detriment" based on their status as a care giver).

65. See *id.* § 49S (including broad definition of people who need care); see also *id.* § 49U (determining unjustifiable hardship by considering benefit or detriment suffered by those involved, person's responsibilities as carer, and financial situations of involved parties).

The concepts of direct and indirect discrimination are pivotal to all Australian discrimination laws, and there is significant overlap between the statutory definitions in federal and state legislation. The terms direct and indirect discrimination have a technical meaning which is designed to redress unfavorable treatment on the basis of an attribute (e.g. race or sex), whether the treatment arose out of unfair conduct or the unfair outcome of an apparently fair requirement on a particular group (i.e. disparate impact). The carers' responsibilities legislation prohibits employers from directly or indirectly discriminating against employees (including salaried workers, contractors, partnerships and job applicants) on the basis of their caring responsibilities.⁶⁶

In essence *direct* discrimination⁶⁷ occurs when a person is treated less favorably than another person⁶⁸ in similar circumstances because of a characteristic.⁶⁹ For example, it would be directly discriminatory for an employer to decline to employ a woman with children because of a stereotypical view that women with family responsibilities are adverse to traveling;⁷⁰ or to ask a potential employee questions about her family responsibilities during a job interview; or to dismiss an employee on the basis that he had requested leave to care for a sick relative.⁷¹

66. See *id.* § 49W (defining discrimination against commission agents); see also §49X (defining discrimination against contract workers); *id.* § 49Y (stating firm with six or more partners cannot discriminate against a person based on carer role); *id.* § 49Z (prohibiting discrimination by government councilors); *id.* §49ZA (stating industrial organization cannot discriminate against one who is not a member of that organization based on that person's role as a carer); *id.* § 49ZB (prohibiting all qualifying bodies from discriminating based on carer role); *id.* § 49ZC (stating employment agencies cannot discriminate based on person's carer responsibilities).

67. See *id.* § 49T(1)(a) (Austl.) (describing direct discrimination as treating individual's with caring responsibilities less favorably than other persons who do not have the same caring responsibilities).

68. Direct discrimination can be found by comparing an employee with either a real person or a hypothetical person in similar circumstances.

69. See Anti-Discrimination Act, 1977, § 49T(2) (stating that the characteristics of the complainant may be actual or implied).

70. See, e.g., *Dickie v. Newman* [No. H86] (1998) 11 QADT 3 (holding that an employer had directly discriminated against a prospective employee, on the basis of her parental status, when assessing her employment application). Ms. Dickie applied for a marketing position with a livestock company, knowing that the position involved overseas and interstate travel. *Id.* at 2. Mr. Newman posted back Ms. Dickie's application to her with a highlighted and underlined note on the envelope which read: "*FROM: HALLMARK RACING. Question 1. HOW CAN YOU TRAVEL INTERSTATE & OVERSEAS WITH A CHILD & HUSBAND? Answer 1. YOU CAN'T!*" *Id.* Ms. Dickie was awarded \$6,000 in damages. *Id.* at 2-3.

71. See, e.g., *Johnston v. Kew Aged Care* [No. 32293] (1998) 1476/98 MPrint Q9544, 4 (holding that an employer had unlawfully dismissed an employee on the basis of her family responsibilities when the employer terminated the employee, a personal carer and cook, after she had failed to attend work on two occasions in

The prohibition against *indirect discrimination* is often conceived as targeting conditions or requirements which appear to be facially neutral, but which have a discriminatory impact on a particular group and are unreasonable. In regard to carers' responsibilities, the key elements of indirect discrimination are:

1. the complainant has been required to comply with a requirement or condition;
2. the complainant cannot comply with the requirement or condition because of his/her responsibilities as a carer;
3. a substantially higher proportion of people who do not have such responsibilities comply or are able to comply with the requirement or condition; and
4. the requirement is not reasonable having regard to the circumstances of the case.⁷²

For many complainants the main issue will be one of indirect discrimination, namely whether a facially neutral condition which has a disparate impact on employees with caring responsibilities (e.g. that all employees attend 8 a.m. meetings, attend training on a weekend, or work full-time to qualify for a managerial position) is reasonable in the circumstances. In this regard the employer is required to accommodate an employee's request, e.g., for flexibility, unless such an accommodation would be unreasonable in the circumstances.

The requirement for an employer to meet reasonable requests for accommodation of an employee's caring responsibilities is emphasized in relation to decisions about who should be offered employment and who should be dismissed. Section 49V(4) provides two defenses to a complaint of discrimination: first, where an employee is unable to carry out the inherent (or essential) requirements of the job; and second, where, in order to carry out the requirements of the job, the employee requires an accommodation which would impose an "unjustifiable hardship" on the employer.⁷³ As to what constitutes an unjustifiable hardship, section 49U provides that

- all relevant circumstances are to be taken into account, including:
- (a) the nature of the benefit or detriment likely to accrue to or be suffered by any person concerned; and

order to be with her daughter who had been hospitalized with a diabetes relation illness).

72. See Anti-Discrimination Act, 1977, § 49T(1)(b) (requiring that the complainant prove that the conduct complained of is "not reasonable").

73. See *id.* § 49V(4) (explaining an employer's possible valid responses to a discrimination complaint).

- (b) the effect of the relevant responsibilities as a carer of a person concerned; and
- (c) the financial circumstances of and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.⁷⁴

The defense of inherent requirements may be enlivened where for example, an applicant wishes to work between the hours of 9 a.m. to 5 p.m., when the employer (who, for example, operates a bakery) requires an employee to be available from 3 a.m. to 11 a.m.⁷⁵ The defense of unjustifiable hardship may be enlivened where, for example, an employer terminates a machine operator who seeks to work from home to care for his sick spouse because the cost of establishing the large machinery at home would be prohibitive.⁷⁶ These defenses have yet to be tested by litigation in relation to carers' responsibilities, though they have contributed to a healthy body of case law in relation to disability discrimination which operates under the same model.⁷⁷

Finally, mention should be made of the potential for the carers' responsibilities legislation to produce systemic and proactive changes by employers. The *Anti-Discrimination Act, 1977* (N.S.W.) provides for individual and representative complaints about discrimination on the basis of an employee's caring responsibilities, enabling resolution of individual complaints while permitting voluntary systemic changes.⁷⁸ However, taken in conjunction with industrial legislation

74. See *id.* § 49U (defining unjustifiable hardship as it pertains to employers).

75. See *id.* § 49T(1)(b) (providing that indirect discrimination occurs when one is required "to comply with a requirement or condition with which a substantially higher proportion of persons who do not have such responsibilities comply or are able to comply").

76. See *id.* (providing that indirect discrimination also exists where a requirement or condition is imposed "with which the aggrieved person does not or is not able to comply").

77. See, e.g., *Moxon v. Westbus Pty Ltd* [No. 001098] (2002) 24 NSWADTAP ¶ 4 (dismissing appeal from [No. 999027] (2000) 12 NSWADTAP ¶¶ 20-22) (dismissing the appeal on the basis that although the defendants had indirectly discriminated against the plaintiff by not providing wheelchair accessible buses, it succeeded in its defense that creating such buses would place an unjustifiable hardship on defendants in the form of financial difficulties, seating capacity, timing and safety of fitting hoists or lifts, along with other problems in retrofitting existing buses and dealing with road impediments); *Maxwell v. Commissioner of Corrective Services* [Nos. 991021, 991022] (2000) 22 NSWADT ¶¶ 107-14 (discussing elements of the "inherent requirements" defense and the case law that defines it). The court determined that a "full and proper" assessment of the position for which plaintiff was applying must be made as to its inherent requirements and the plaintiff must be assessed for the position. *Id.* ¶ 192.

78. See *Anti-Discrimination Act, 1977* § 88 (N.S.W.) (providing that a complaint of discrimination can be lodged by an individual or a representative body on behalf of a named person or persons).

which governs terms and conditions of work across workplaces, the Act has the capacity to create *mandatory* systemic changes supportive of carers.⁷⁹ This capacity arises because of the connections between industrial and discrimination legislation, particularly in N.S.W.⁸⁰ Likewise the *Industrial Relations Act, 1996* (N.S.W.) has as one of its objectives the prevention and elimination of discrimination,⁸¹ and it enables the President of the Anti-Discrimination Board (“ADB”) to intervene in relation to matters of discrimination,⁸² and also compels the Commission to take into account the principles of the ADA when exercising its functions.⁸³

In practice, the connection between industrial and discrimination arenas has led to a review of discriminatory awards, the establishment of a standard anti-discrimination clause to be included in all N.S.W. awards and agreements, and an additional avenue of redress for employees who have been dismissed on the basis of their caring responsibilities.⁸⁴ Moreover, there is now a heightened sensitivity by members of the N.S.W. Industrial Relations Commission (“IRC”) to the potential for carers’ responsibilities discrimination in disputes, and an appreciation for discrimination jurisprudence.⁸⁵ For example

79. See Press Release by the former President of the Anti-Discrimination Board, *Women at Work: Solitary Redress and Systemic Unfairness* (May 17, 1998) (addressing the new opportunities created by the New South Wales Industrial Relations Act 1996 that allows the Industrial Relations Commission to focus on systemic discrimination in the area of employment through mandatory compliance with the New South Wales Anti Discrimination Act), available at <http://www.lawlink.nsw.gov.au/adb.nsf/pages/media14> (last visited Jan. 29, 2004). The Industrial Relations Commission is essentially being given the opportunity to focus on issues with which the New South Wales Anti Discrimination Board has not been able to deal due to the Anti Discrimination Act’s emphasis on individual complaints. *Id.*

80. See *id.* (noting that the New South Wales Industrial Relations Commission must be satisfied that industrial instruments comply with the New South Wales Anti-Discrimination Act 1977 and take into account discrimination in industrial matters).

81. See *Industrial Relations Act, 1996*, § 3 (N.S.W.); see also *Workplace Relations Act, 1996*, § 3 (Austl.), (finding a similar provision in the *Workplace Relations Act*, namely: “The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by: . . . (i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers and (j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. . .”).

82. See *Industrial Relations Act, 1996*, § 167.

83. See *id.* § 169.

84. See *id.* § 19; see also *Principles for Review of Awards* [No. IRC 3786] (1998) 661 NSWIRC (Austl.).

85. The President of the IRC, the Hon. Mr. Justice Wright commissioned a presentation on the carers’ responsibilities legislation to the Judges of the IRC at the 2001 IRC Annual Conference. Juliet Bourke, *Flexible workplace practices and*

in *Amery & Ors v. New South Wales*, the N.S.W. Anti-Discrimination Tribunal found that an award which paid teachers a higher top rate of pay if they were permanent employees (rather than casuals) discriminated on the basis of sex because women were more likely to work as teachers on a casual basis to accommodate their caring responsibilities.⁸⁶ When the matter was later heard by the N.S.W. Industrial Relations Commission, on an interim application to stay proceedings to vary the award, the IRC confirmed its preparedness to interpret the non-discrimination principles broadly and beneficially, and indicated that it held the expertise of the ADT on discrimination in high regard: "Although the Commission is not bound by it, the decision of the ADT has highlighted the potential existence of unlawful discrimination in an award of this Commission."⁸⁷

Similarly, the case law which has arisen in discrimination jurisdictions across Australia and in the Federal industrial arena, demonstrates a general willingness to interpret carers' responsibilities legislation broadly and beneficially.⁸⁸ As tribunals and courts in state and federal jurisdictions are highly sensitized to, and influenced by, each other's decisions, there is considerable uniformity between judgments as to how discrimination laws should be interpreted.⁸⁹ This approach has pushed the boundaries on acceptable workplace practices in relation to part-time work/job-sharing at senior levels, working from home, and varying work hours, although cases may not have arisen on the same issue in each jurisdiction.

III. CARERS' RESPONSIBILITIES IN PRACTICE: RECENT AUSTRALIAN LEGAL CASES ON FLEXIBLE WORK PRACTICES

The N.S.W. Carers' Responsibilities legislation is administered by the N.S.W. Anti-Discrimination Board, which is empowered to investigate and conciliate a complaint.⁹⁰ If the complaint is not

Women in the Workforce. Carers' Responsibilities and Anti-Discrimination: An opportunity and a challenge.

86. See *Amery & Ors v. New South Wales* (2001) NSWADT 37, available at 2001 WL 278717 (NSWADT March 12, 2001). *Amery* is currently on appeal.

87. See *Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* [No. IRC 4347] (2002) 144 NSWIRC ¶ 51.

88. See discussion *infra* Section III.A (noting cases that have interpreted carers' responsibilities legislation broadly and beneficially).

89. See Maggie Smyth, Industrial Relations and Anti-Discrimination, Address to the Industrial Relations Society of NSW Annual Convention (May 16, 2003) (noting case law and administrative decisions that have helped influence the interpretation of discrimination laws), available at http://www.lawlink.nsw.gov.au/adb.nsf/pages/speech1_2003#ada (last visited Apr. 7, 2004).

90. See Anti-Discrimination Act, 1977, § 119 (Austl.) (detailing the functions and powers of the Anti-Discrimination Board to investigate and resolve complaints).

resolved by the Board, the complainant may litigate the matter through a separate specialist Tribunal, namely the Administrative Decisions Tribunal, Equal Opportunity Division.⁹¹ A similar process exists in all Australian states and federally.⁹² There has been only one litigated case under the N.S.W. carers' legislation (which commenced on 1 March 2001); however, at least 140 complaints have been dealt with by the ADB.⁹³ This section will identify trends in cases which have arisen under similar discrimination and industrial legislation across Australia, as well as the nature and outcomes of the complaints in N.S.W.⁹⁴

A. *Decided Cases*

At present the cases decided under carers' responsibilities discrimination legislation in Australia cover the following broad areas of flexible work practices: working part-time or on a job-share basis (particularly at a senior level); working from home; and varying working hours. The discrimination and industrial cases identified below represent the key decided cases in relation to caring responsibilities. These cases demonstrate three noteworthy trends, namely (i) the substantial increase in the number of cases adjudicated over the past 5 years, and (ii) the almost exclusive use of the legislation by female complainants (iii) with child-care responsibilities. The latter two trends are also evident in the complaints which have been received by the N.S.W. Anti-Discrimination Board in relation to carers' responsibilities legislation.⁹⁵

1. *Working Part-time/Job-share*

The statistical profile of Australia identified in Section I.A above demonstrated that Australia has a high level of part-time work;

91. See *id.* at § 118 (stating that one may go to the Administrative Decisions Tribunal to appeal decisions or orders made by the Tribunal); see also Anti-Discrimination Board, *What Can I Do If I'm Treated Unfairly or Harassed Because of My Carers' Responsibilities?* (detailing steps to take if one is discriminated against on the basis of carers' responsibilities, including the option, if one's complaints are not conciliated, to appeal the Board's decision to the Administrative Decisions Tribunal, Equal Opportunity Division), available at <http://www.lawlink.nsw.gov.au/adb.nsf/pages/carersharass2> (last visited Apr. 7, 2004).

92. With the exception of the Northern Territory which provides for a Hearing Commissioner.

93. Telephone interview with Ms Jill Moir, Manager, Complaints and Resolution Branch, ADB (February 21, 2003).

94. See discussion *infra* Section III.A.

95. See discussion *infra* Section III.B.

however, considerable concern has been expressed about the limited availability of such work to staff in managerial/senior positions.⁹⁶ This issue has arisen for adjudication in two key discrimination decisions: (1) the 1998 landmark federal case of *Hickie v. Hunt and Hunt Solicitors*,⁹⁷ and (2) the 1999 case of *Bogle v. Metropolitan Health Service Board*.⁹⁸

In *Hickie*, the Human Rights and Equal Opportunity Commission considered the gendered impact of a requirement that legal partners, or those aspiring to be partners, work full-time.⁹⁹ The case was brought under the *Sex Discrimination Act 1984* (Cth) and, for technical reasons, the case was argued as one of indirect sex discrimination, arising from family responsibilities rather than under the family responsibilities provisions.¹⁰⁰ Hence the issue before the Commission was whether it was reasonable for the employer (Hunt and Hunt Solicitors) to require a female partner with family responsibilities to work on a full-time basis.¹⁰¹ Notwithstanding these technical issues, *Hickie* has been seen as a touchstone for cases which have followed relating to caring responsibilities discrimination per se.¹⁰²

96. See CORPORATE WOMEN, *supra* note 60, at 2 (finding that women who request flexible work arrangements often find themselves with “marginal” work assignments or experience “career stagnation, or retrenchment”).

97. [No. H96/185] (1998) HREOCA 8 ¶ 4.5.4, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HREOCA/1998/8.html?query=%22hickie%22+and+%22hunt%22> (last visited Apr. 7, 2004).

98. See (2000) 93-069 EOC 74,200; see also *Escobar v. Rainbow Printing Pty. Ltd.*, 2002 WL 1501204 (FMCA July 5, 2001) (concerning family responsibilities discrimination under the SDA). The Court found that a refusal to allow Escobar to return to work on a part-time basis following maternity leave, and her subsequent dismissal, amounted to indirect discrimination on the basis of her family responsibilities. *Id.* ¶ 37.

99. See *Hickie*, (1998) 8 HREOCA ¶ 4.5.26.

100. See *id.* The family responsibilities provisions (§ 7A) of the SDA apply to “employees”, and the provisions relating to partners (§ 17) cover sex discrimination but do not cover a prohibition against discrimination on the basis of family responsibilities. Hence *Hickie*, as a partner of a law firm, was compelled to argue her case as one of indirect sex discrimination (§ 5). *Id.*

101. See *id.* ¶ 4.5.29 (finding that full-time employment is a requirement with which a greater proportion of men could comply). As such, requiring an employee to be employed full-time to make partner amounts to indirect discrimination. *Id.* at ¶ 8.15.5.

102. See Susan Halliday, former Sex Discrimination Commissioner, *Pregnancy Discrimination: Hickie v Hunt*, Address at the Employment Law Conference, Sydney (June 23, 1998) (stating that *Hickie v. Hunt & Hunt Solicitors* demonstrated the way in which employees can be indirectly discriminated against and the expectation that employers should be aware of the need for employees to return to work after maternity leave on a part-time basis or risk liability for indirect discrimination), available at http://www.hreoc.gov.au/speeches/sex_discrim/pregnancy_discrimination.html (last visited Apr. 7, 2004).

The evidence demonstrated that until Ms. Marea Hickie started working part-time to accommodate her family responsibilities, she was viewed as an excellent employee and a valuable member of the legal staff.¹⁰³ Her work and her results (in terms of income generated) were considered to be of high quality, and her promotion was rapid: from new graduate in 1988, to Associate in 1991, to contract partner in 1995.¹⁰⁴ When appointed as a contract partner for twelve months, the employer endorsed *Hickie's* plan to take three months maternity leave and then to return to work on a part-time basis until the expiration of her contract, i.e. for six-and-a-half months.¹⁰⁵

Hickie fully expected her employment to continue after the expiration of the contractual period, however difficulties arose in the implementation of Hickie's planned course of action, and three months before the end of the contractual period, she was advised that her contract would not be renewed.¹⁰⁶ Hickie's Counsel, noting that the same senior partner who had recommended her appointment as partner also recommended that her contract not be renewed, asked, "what changed?"¹⁰⁷ The Commission observed that the answer was complex, and that to a degree, fault lay both with Hickie¹⁰⁸ and Hunt and Hunt Solicitors.¹⁰⁹ Nevertheless, overall the Commission considered that the salient change was Hunt and Hunt's attitude towards Hickie's employment on a part-time basis.¹¹⁰

103. See *Hickie*, (1998) 8 HREOCA ¶ 3.1.2 (noting that Hickie received superior performance appraisals, regular raises, and was approached about partnership before becoming a part-time employee).

104. See *id.* ¶ 1.6. The Commission also noted that in 1994 Hickie's salary was increased by \$15,000 (which was 'well above' the other professional staff), and the Commission found that it was an indicia of "her perceived value to the firm at that time." *Id.* ¶ 3.1.2.

105. See *id.* ¶ 4.2.2 (noting that the terms of Hickie's maternity leave agreement were not disputed).

106. See *id.* ¶ 8.3.2 (reporting that the partnership made no motion for renewal of Hickie's contract based on an appraisal that she did not fulfill her partnership duties).

107. See *id.* ¶ 10.1.2.

108. See *id.* ¶ 10.1.4 (finding that Hickie needed to "have guidance to develop an effective management style" and had a tendency to be "overcritical and demanding"). The Commission also found that Hickie should have apologized for not showing up to the partners' retreat. *Id.* ¶ 10.1.8.

109. See *id.* ¶ 4.5.13 (finding that while "Hickie may have been inept in dealing with staff, Hunt and Hunt were aware of this when she was made a partner, and yet they did little if anything to counsel or train her in this apart from occasional admonitions from Mr. Forbes Smith," and that was "little evidence that any steps were taken to assist Ms Hickie to integrate into her new team." *Id.* ¶ 6.7.7.

110. See *id.* ¶ 10.2(c) (finding that the imposition of working full-time to maintain her practice was an act of indirect discrimination).

The Commission found that on three occasions Hunt and Hunt indirectly discriminated against Hickie on the basis of her family responsibilities: first, by removing the whole of Hickie's plaintiff practice while she was on maternity leave; second, by deciding not to renew Hickie's contract; and third, by pressuring Hickie to "resume full-time work in order to maintain her position."¹¹¹ The latter was manifested by the senior partner's comment during Hickie's performance appraisal:

[A]t this point in time she is unable to say whether she will return to full-time employment. I see this as a major hurdle, especially if she is not part of the team. I do not believe that you can run a practice and service clients 3 days a week.¹¹²

The Commission found that on each of these occasions, Hunt and Hunt imposed a requirement (namely the return to full-time work) with which a substantially higher proportion of men could comply, but with which Hickie could not comply given her family responsibilities, and which was not reasonable in the circumstances.

The Commission observed that "it is predominantly women who seek the opportunity for part-time work . . . in order to meet family responsibilities," and commented that "the question of reasonableness of the requirement (that Hickie work full-time to maintain her position) has to be considered in light of the nature and extent of the disadvantage."¹¹³ The Commission concluded that: "The imposition of a condition or requirement or practice that a partner work full-time would inevitably disadvantage women practitioners, especially those who are, or those who are aspiring to be partners. To regard this as a reasonable requirement would perpetuate and institutionalize indirect discrimination against women lawyers."¹¹⁴ The Commission awarded Ms. Hickie AUS \$95,000 in damages.¹¹⁵

The importance of the *Hickie* decision is not only that the complainant won her claim of indirect sex discrimination on the basis of her family responsibilities, but also that the Federal Human Rights and Equal Opportunity Commission rejected the argument that full-time work is *necessarily* a reasonable requirement of seniority.¹¹⁶

111. See *id.* ¶ 10.2 (reporting the findings of the Commission).

112. *Id.* ¶ 6.14.

113. See *id.* ¶ 4.5.4.

114. *Id.* ¶ 6.17.12.

115. See *id.* ¶ 12.ii (assessing damages for lost salary, future loss of salary and injury to reputation, feelings, humiliation and distress). This represents a substantial award in the context of Australian discrimination claims.

116. See *id.* ¶ 8.15.5 (finding that a requirement to work full-time to maintain a position of partner at the firm was unreasonable as it disadvantaged or could likely

Hickie generated high profile and sustained media interest across Australia, and thus played an important role in moving work/family issues onto the corporate agenda and raising awareness among potential complainants. Certainly there were a dearth of cases on family responsibilities discrimination before *Hickie*, and a burgeoning number thereafter, such as the 1999 West Australian case described below.¹¹⁷

Bogle v. Metropolitan Health Service Board squarely raised the issue of family responsibilities discrimination in relation to a denied request to work on a part-time/job-share basis in a senior position.¹¹⁸ The case was brought under the *Equal Opportunity Act 1984* (W. Austl.), namely the prohibition against indirect discrimination on the ground of family responsibilities or family status.¹¹⁹ Ms. Bogle held a supervisory position as a Dental Clinic Charge Nurse and, after taking maternity/adoption leave, she sought to return to that position on a part-time job-share basis.¹²⁰ The hospital rejected Ms. Bogle's proposal and informed her that she would either have to work full-time to maintain the Charge Nurse position, or regress to a substantially lower level if she wanted to work part-time.¹²¹ The issue before the West Australian Equal Opportunity Tribunal was one of indirect family responsibilities discrimination, and in particular whether it was reasonable to require a person in a supervisory position to work full-time.¹²² The hospital argued that the position of Charge Nurse could not be job-shared for the following reasons:

1. the need for continuity in the daily management of the clinic;
2. duplication in the training of staff;
3. the possibility of conflict over accountability for daily routines;
4. differing standards of staff performance management;

disadvantage female partners).

117. See Susan Halliday, *Pregnancy Discrimination: Hickie v Hunt*, Address at the Employment Law Conference, Sydney (June 23, 1998) (citing the sparse number of cases, such as *Speering v. Ministry of Education* and *Nicholls v. Ministry of Education*, that dealt with family responsibility discrimination before *Hickie* and discussing implication of *Hickie*), available at http://www.hreoc.gov.au/speeches/sex_discrim/pregnancy_discrimination.html (last visited Apr. 7, 2004) .

118. *Bogle*, (2000) 93-069 EOC 74,200.

119. Bogle also argued indirect sex discrimination, as well as discrimination on the basis of marital status, and was successful on those grounds, as well as on the ground of family responsibilities. *Id.* at 74,203.

120. *Id.* at 74, 202.

121. *Id.* at 5.

122. *Id.* at 74,204, 74,223 (questioning whether the hospital's policy that a supervisory position be performed on a full-time basis involved discrimination in employment against a mother only able to work part-time because of family responsibilities).

5. differing leadership styles;
6. differing standards of service to patients;
7. additional management burdens for the Head of the Unit;
8. doubling of staff costs;
9. repetition of confidential staff information;
10. the possibility of conflict over leave times.¹²³

In relation to the reasonableness of Ms. Bogle's request in light of the Hospital's ten point argument, the Tribunal observed that the likelihood of these issues occurring was very remote, and further, that if they did arise it was unlikely to be *because* the position was shared.¹²⁴ The Tribunal also suggested that potential conflicts over daily routines and management could be dealt with through the use of existing diary or planning practices.¹²⁵ The Tribunal agreed, however, that there may be some increase in staff costs in relation to training because of the need to send both position holders to the same course.¹²⁶ Nevertheless, the Tribunal found that the costs would be marginal and outweighed by the additional benefits of job-sharing, namely "increased flexibility, retention of qualified and experienced staff, probably lower rates of absenteeism and sick leave (to mention a few)."¹²⁷

In summary, the Tribunal described the employer's response to Bogle's job-share request as being a "'knee jerk' reaction based on no more than an awareness that it had always been a full-time position and an intuitive feeling that it would not work."¹²⁸ The Tribunal also observed that "one of the most marked features of Dental Services' opposition to the idea of job-sharing the Charge Nurse position is the extent to which, upon examination, it was shown to be based not on any objective analysis, but on entrenched historical belief systems and attitudes or 'intuition.'"¹²⁹

The Tribunal held that the requirement that the Charge Nurse position only be performed on a full-time basis was not reasonable in the circumstances, and thus constituted indirect discrimination on the grounds of family responsibilities.¹³⁰ The employer was ordered to temporarily assign Ms. Bogle a job-share position for a set period of

123. *Id.* at 74,218.

124. *Id.* at 74,220.

125. *Id.* at 74,219-20.

126. *Id.* at 74,220.

127. *Id.*

128. *Id.* at 74,226.

129. *Id.* at 74,222.

130. *Id.* at 74, 225-26.

twelve months, and was required to pay AUS \$12,600 in compensation.¹³¹

Bogle is important on a number of levels, first because it compelled an employer to justify an outright refusal to permit flexible work practices in a supervisory/senior position; and second because it was a positive case promoting work flexibility (namely increased productivity) rather than just an entitlements-based case.

2. Working from Home

At present one in five (1.8 million) employed persons work some hours at home, and almost one million of those workers could be classified as home workers (that is, those who solely or primarily work at home, or who have an arrangement with their employer to work from home).¹³² While only 4% of home workers identify providing care for family members as their motivation for working at home (as compared to 48% who indicated that their motivation was to operate a personal or family business such as a farm), it is significant that women and men working from home are more likely to have children than women and men working in other locations.¹³³ This data suggests that while caring responsibilities may not be the main reason why workers elect to work from home, it is an additional factor. The question remains whether there is an unmet need for tele-working arrangements to facilitate caring responsibilities. While this has not been the subject of research by the Australian Bureau of Statistics, it has been raised in discrimination complaints.

The issue of tele-working in discrimination law cases amounts to a question of whether it is reasonable to require employees to work on-site, and correspondingly whether it is unreasonable to deny access to tele-working to enable employees to accommodate their caring responsibilities. This issue has been carefully considered in the case of *Schou v. State of Victoria*.¹³⁴ Schou's complaint has followed a tortured path, being decided in 2000 at first instance by the Victorian Civil and Administrative Tribunal,¹³⁵ taken on appeal to the Supreme

131. *Id.* at 74, 229.

132. See AUSTL. BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, PAID WORK: WORKING FROM HOME (2002), available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/81F583639480D4D0CA256BCD00827304?Open> (last visited Jan 29, 2004).

133. See *id.*

134. (2002) 375 VCAT 7-8 (determining whether failure to install a modem in the plaintiff's home to allow her to work from home to care for her young children two days per week was reasonable).

135. *Schou v. State of Victoria* (2001) 321 VSC (Unreported, Harper, J., Aug. 31, 2001).

Court in 2001,¹³⁶ and reheard by the Victorian Civil and Administrative Tribunal in 2002.¹³⁷ This history has provided a rich forum for the airing of latent arguments against the feasibility of teleworking, as well as the establishment of important jurisprudence about choice, the relevance of flexible work practices policies, and the issue of inconvenience.

Ms. Schou was employed in the Department of Victoria Parliamentary Debates from 1979 to 1996.¹³⁸ She had a young family and her youngest child suffered from asthma, bouts of chest infections, and separation anxiety related, in part, to his illness.¹³⁹ Ms. Schou and her supervisors agreed in August 1996 that a modem line between her home and Parliament House and a fax machine should be installed to enable her to continue full-time work as a sub-editor by allowing her to work at home on Thursdays and Fridays.¹⁴⁰ This arrangement was designed to assist Schou in balancing her responsibilities as a parent and as a carer.¹⁴¹

In November 1996, Ms Schou resigned from her position.¹⁴² At that time the modem and fax machine had still not been installed in her home and she found herself unable to continue work and care for her children.¹⁴³ Ms. Schou lodged a complaint under the *Equal Opportunity Act 1995* (Vict.) of indirect discrimination on the ground of possessing the attribute of parental status or status of carer.¹⁴⁴

a. Decision at first instance in VCAT

The case was heard at first instance in the Victorian Civil and Administrative Tribunal, Anti-Discrimination List ("VCAT"). In relation to the threshold elements of indirect discrimination the Tribunal found that the employer's insistence that Ms. Schou attend

136. *State of Victoria v. Schou*, No. 6377, 2002 WL 110404 (VSC Oct. 10, 2001).

137. *Schou*, (2002) 375 VCAT 7-8 (examining whether the initial tribunal failed to frame the question of reasonableness correctly).

138. *See id.* at 1.

139. *See id.* at 2.

140. *See id.* (agreeing that installation of a modem line was the "best solution" to Ms. Schou's problem of balancing her home life with her home life with her employment).

141. *See id.* (stating that the agreement would enable Ms. Schou to continue working full-time while caring for her sick son).

142. *See id.* at 1.

143. *See id.* at 2.

144. *See id.* (specifying that parental and or carer status qualify as relevant attributes for which one can be discriminated against under the Act).

work full-time on-site at Parliament House on sitting days was the imposition of a requirement or condition.¹⁴⁵ It found that, as a parent and/or carer, Ms. Schou did not and could not comply with the requirement or condition and that a higher proportion of people who are not parents or carers could comply with it.¹⁴⁶ The main issue was whether the on-site requirement or condition was reasonable in all the circumstances.¹⁴⁷

The Tribunal ultimately found that the requirement or condition was *not* reasonable having had regard to the following issues:

1. if Ms Schou failed to comply with the requirement she would risk losing her job;
2. the installation of a modem would have allowed Ms Schou to satisfy her full-time work requirement by working part-time at home and part-time at Parliament House;
3. the cost was modest - between two thousand and two and a half thousand dollars; and
4. the financial circumstances of the Department were such that it could easily afford to remove the condition.¹⁴⁸

The Tribunal concluded that the delay in installing the modem and fax amounted to a refusal to implement the agreement made between Ms. Schou and her supervisors, and that her resignation from the Department was a direct consequence of this failure.¹⁴⁹

With respect to the question of reasonableness, the employer argued before the Tribunal that it is relevant that Ms. Schou chose to have the attribute of parent or carer, i.e. that she chose to be the primary carer of her children.¹⁵⁰ VCAT strongly rejected this argument and stated that an employer cannot escape the liability under the legislation by constructing an argument such as:

you chose to be a parent or carer, you chose a certain marital status and so you must live with the unreasonable or uncomfortable consequences of your choice in that I can treat you less favourably on account of an attribute you chose to have than I will treat another who has chosen not to have that attribute in the same or

145. *See id.* at 7 (finding that a modem could have been reasonably installed in Ms. Schou's home at a modest cost to her employer, thus making her employer's condition that Ms. Schou work full-time on-site at Parliament House unreasonable).

146. *See id.*

147. *See id.* at 28.

148. *Id.* at 29-30.

149. *See id.* at 7 (finding that the denial of Ms Schou's proposal to work part-time at home made her choose between her career and obligations as a parent).

150. *Id.* at 5 (identifying Ms. Schou's decision to be a carer as the result of a position forced upon her by her employer).

similar circumstances and your choice to have that attribute can be a substantial reason for my treatment of you. I will not remove an unreasonable requirement or condition with which you cannot comply on account of an attribute you chose to have and by that means, I will prevent you from being in my employ, attending my school, benefiting from my goods and services. . . .¹⁵¹

The Tribunal stated that it was precisely those types of behavior that the legislation was enacted to prevent,¹⁵² and it awarded Schou over AUS \$160,000.¹⁵³

b. On appeal to the Supreme Court

The employer, the State of Victoria, appealed to the Supreme Court on a point of law, arguing that the Tribunal had not considered *all* relevant matters when it found that the “attendance” condition unreasonable, including the impact of Schou’s flexibility on other employees and the organization in general.¹⁵⁴ The Supreme Court agreed with the employer that the Tribunal should have considered a broader range of evidence before making its decision and remitted the case back to the Tribunal for a further hearing.¹⁵⁵ While not finally determining the question of whether the attendance requirement was reasonable, the Court strongly indicated that it *was* reasonable.¹⁵⁶ Significantly, the Court, albeit a single judge, aired arguments against flexibility which demonstrated: (i) a formal equality frame of reference to interpreting discrimination law, and (ii) the acceptance of commonly held assumptions about the practical barriers to implementing flexible work practices.

The Court’s theoretical frame of reference appeared to be that equality of treatment (i.e. treating all employees the same) is the focus of discrimination law rather than equality of outcome. Instead of viewing flexible work practices as a means of bringing employees with caring responsibilities up to a level playing field with employees

151. *Id.* at 31.

152. *See* Schou v. State of Victoria (2002) 1453 VCAT.

153. *See id.* (awarding Schou \$161,307.40 for lost income, benefits, and opportunities, but not for emotional distress). This is the highest award to date for a claim of discrimination in employment on the basis of caring responsibilities.

154. *See* State of Victoria v. Schou (Unreported, V.S.C., Harper J., 31 August 2001) (copy on file with author).

155. *See id.* at 9-11 (asserting that determining the reasonableness of the attendance policy required examination of the modem proposal, relevant business factors implicated in the Department’s conduct, and potential repercussions of accommodating Schou).

156. *See id.* at 2 (describing the attendance policy as unexceptional and even necessary given the complexities of the position).

without caring responsibilities, the Court opined that such practices are more akin to a “favor” or special treatment. The Court stated that “the Act forbids discrimination. It does not compel the bestowing of special advantage.”¹⁵⁷ This line of reasoning is at odds with much jurisprudence and commentary, both in Australia and overseas.¹⁵⁸

The Court’s frame of reference was also manifested in its acceptance of a number of assumptions about the difficulties associated with implementing flexible work practices.¹⁵⁹ The arguments can be conceptualized as relating to (i) social engineering; (ii) the business case; (iii) floodgates; (iv) line-of-sight supervision; (v) trust; and (vi) industrial disputes.

Social engineering. The Court suggested that while it is important to recognize women’s difficulties in balancing work and family, and to take positive steps to promote equality between the sexes, Parliament “did not intend” discrimination law to be the vehicle to achieve that end.¹⁶⁰ It is noteworthy that when the *Carers’ Responsibilities* legislation was introduced in N.S.W., the then-Attorney General explicitly stated this was the aim of Bill.¹⁶¹

No business case. The Court suggested that Ms. Schou’s request for flexibility “on any view brought no benefit to the Department.”¹⁶² It is also noteworthy that cost/benefit analyses reveal considerable financial benefit in retaining and enhancing the productivity of valued employees through the application of flexible work practices, as was recognized in *Bogle*.¹⁶³

Floodgates. The Court expressed a fear that granting one request for flexibility would open the floodgates for employers and questioned when the requests for flexibility would end (from both

157. *Id.* at 7; see also Equal Opportunity Act, 1995 at I.3 (identifying the objectives of the Act as eradicating discrimination and promoting equal opportunity).

158. See, e.g., Anti Discrimination Act, 1977, § 122C (N.S.W.) (listing objectives as endorsing equal opportunities for women, racial minorities, and the disabled); Equal Opportunity for Women in the Workplace Act, 1999 (Austl.) (mandating that organizations with more than one hundred employees establish programs for women’s advancement).

159. See *State of Victoria v. Schou* (2001) 321 VSC, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/2001/321.html>.

160. See *id.* (noting that “civilized communit[ies]” not only prohibit discrimination but also institute positive measures to eradicate barriers to equal participation).

161. See FED. MINISTRY OF ECON. AND LAB., *supra* note 45.

162. *Schou* (2001) 321 VSC ¶ 6.

163. *Bogle v. Metropolitan Health Svcs. Bd.* (2000) 93-069 WAEOC.EOC; see also Hill, E. J., Hawkins, A. J., Ferris, M., and Weizman, M., “Finding an extra day a week: The positive influence of perceived job flexibility on work and family life balance” (2001) (50)(1) *Family Relations* 49-58.

current employees and job applicants), and where is it appropriate for the employer to draw the boundaries.¹⁶⁴ The Court asked rhetorically, “How many modems would the Department be required to install for how many carers?”¹⁶⁵ (There was no evidence of an impact analysis to determine accurately current and projected needs for flexibility).

Line-of-sight supervision: The Court suggested that only an on-site manager could provide appropriate staff supervision. The Court stated “It may be that such liaison [with staff] is less satisfactory, or less than satisfactory, when that communication is not face to face.”¹⁶⁶

The trust issue. The Court implied that working off-site is tantamount to not working, or not working to capacity, likening working from home with granting a leave of absence which, the Court stated, “meant a significant increase in the already very considerable workload of those who remained.”¹⁶⁷

Industrial fears. The Court was less explicit about this barrier, but implied that management support for flexibility may prejudice “the maintenance of good industrial relations” thus leading to industrial unrest.¹⁶⁸

Having decided that VCAT had not considered *all* relevant matters when determining whether the “attendance” condition was reasonable and the impact of Schou’s flexible schedule on other employees and the organization in general, the Court upheld the appeal and remitted *Schou* back to VCAT for rehearing.¹⁶⁹

c. Rehearing in VCAT

After *Schou* was remitted to VCAT, it was reheard by a Tribunal which consisted of a different judge than the initial *Schou* Tribunal. The issue for the VCAT’s determination was whether it was “reasonable” for the employer to impose an obligation on all sub-

164. See *Schou* (2001) 321 VSC ¶ 10 (speculating that Department’s accommodation of Schou could easily lead to demands that would overburden the Department).

165. See *id.* (articulating the difficulties inherent in a case-by-case analysis of reasonableness under particularized circumstances).

166. See *id.* ¶ 8 (enunciating the intricacies of parliamentary reporting, which requires collaboration with editors, reporters, and parliament officials).

167. See *id.* (reasoning that the Department’s refusal to grant leave during Parliamentary terms demonstrated the necessity of reporters’ physical presence).

168. See *id.* ¶ 10 (emphasizing the Department’s responsibility to analyze the impact of Schou’s request on the agency’s ability to maintain industrial harmony, ie to inhibit strike action).

169. See *Schou v. Victoria* (2002) 375 VCAT.

editors that they attend work on-site on a full-time basis.¹⁷⁰ Two key matters taken into account by the Tribunal were the alternatives to working on-site (i.e. working from home part-time) and the employer's formal employment agreement which promoted flexible work practices.¹⁷¹

The complainant argued that Schou's request was *practical and achievable*.¹⁷² In response, the employer produced a list of reasons why working from home would prove *impossible*.¹⁷³ The Tribunal agreed that relevant factors in determining the "reasonableness" of the request included the impact of the arrangement on her colleagues, the proportion of sub-editors permitted to work from home (25%), the duration of the agreement, and some level of prior approval.¹⁷⁴ The Tribunal then undertook a detailed investigation of the complaint's duties, and her modem proposal. The Tribunal noted that the complainant's work was stressful and demanding, involved long hours and necessitated constant communication with supervisors and staff.¹⁷⁵ The Tribunal considered the employer's arguments against the modem proposal, including the potential burden placed on other sub-editors, security of information, possible equipment failures, access to external resources and the necessity for liaison with staff. The Tribunal dismissed each of the employer's arguments as "remote or mildly inconvenient difficulties that, with the good will which existed amongst sub-editors and between sub-editors and others could be accommodated."¹⁷⁶ Importantly, the Tribunal placed considerable weight on the existence of the employers' flexible work practices policy which advocated the use of flexible work practices to assist employees to balance their work and caring

170. *Id.* ¶ 9.

171. *Id.*

172. *See id.* ¶¶ 4, 8-9 (emphasizing the limited nature of Schou's proposal to work at home two days per week for a specified time period where one of the days Parliament did not sit).

173. *See id.* ¶ 12-14 (asserting the necessity of direct, frequent communication between reporters, editors, and parliamentary officials; the confidentiality and accessibility of parliamentary material and recordings; and the difficulty of solving technological problems).

174. *Id.* ¶ 9 (stating that the issue cannot be analyzed solely from the applicant's perspective, the interests of the sub-editors must be taken into account).

175. *Id.* ¶¶ 12-13 (explaining that while the complainant's job was stressful and did require frequent communication with colleagues, Parliament does not sit continuously).

176. *See id.* ¶¶ 15, 21-22 (articulating Schou's proficiency as a reporter, head reporters' acquiescence with Schou's request, the agency's failure to assert challenges during previous litigation, the acknowledged ability to communicate technologically, and the stability of the technological system).

responsibilities.¹⁷⁷ The Tribunal viewed the employers' policy as a workplace benefit which should not have been unreasonably withheld. In effect, the Tribunal used the existence of the policy as a starting point on the question of reasonableness, as the employer (by generating the policy) had implicitly promoted flexible work practices as reasonable and acceptable.¹⁷⁸ This reasoning has significant implications for Employers of Choice who are at pains to develop state-of-the-art policies to attract and retain talented employees, and yet demonstrate a gap between the rhetoric and reality.

In summary, while the Supreme Court decision positioned flexible work practices as marginal work practices and a source of aggravation, the two VCAT decisions demonstrated a more progressive perspective, a realistic understanding of workplace relations, and a willingness to scrutinize an employers' argument against flexibility to determine whether implementing the working from home arrangement was reasonable and practicable.¹⁷⁹

3. *Long hours/Varying work hours*

The lengthening of the work week has been of growing concern to Australian employees, and is a significant source of work-life conflict. A recent report from the Organisation for Economic Co-operation and Development (OECD) found that "in Australia 25.5% of full-time workers worked more than 49 hours a week in 2000, up from 20.4% a decade earlier."¹⁸⁰ Moreover amongst certain professional occupations, such as lawyers and doctors, the average working week is even longer. A 1998 research project conducted on the legal profession in New South Wales found that salaried partners, associates, and employees work an average of over sixty hours per week, and equity partners work over eighty hours per week.¹⁸¹ Similarly a 1998 research project conducted on the medical profession found that 68% of junior doctors worked for more than fifty hours per week.¹⁸²

177. See *id.* ¶¶ 10, 24 (observing that the employment contract provisions regarding "flexible and progressive work practices" entitled employees to presume the availability of such measures).

178. See *id.* (stating that the employer's policy promotes flexibility in the workplace and employees are reasonable in their expectations that alternative work schedules will be approved).

179. *Shou* is currently on appeal to the Supreme Court of Victoria.

180. See AUSTRALIAN BUREAU OF STATISTICS, LABOR MARKET STATISTICS, Cat No. 6016, at <http://www.abs.gov.au/Ausstats> (last visited Apr. 7, 2004).

181. LAW SOCIETY OF N.S.W., FAMILY RESPONSIBILITIES STUDY 20 (1998) (on file with author).

182. AUSTRALIAN MEDICAL ASSOCIATION, STUDY FINDINGS: SYSTEMS OF WORK FOR JUNIOR DOCTORS IN

Dissatisfaction with long hours is manifested in conflict with work and family responsibilities. Fifty-five percent of women respondents in the Australian Living Standards Survey conducted in 1991-1992 reported that "working hours interfered with time for children."¹⁸³ The correlation between long hours and work/family conflict is further evidenced by research demonstrating that individuals who work long hours in high level positions evidence the greatest frustration with achieving a balance between work and family life.¹⁸⁴

Concern about long work hours, the ability to vary hours, and family responsibilities has been demonstrated by the lodging of claims in the industrial arena, and reliance upon discrimination law in industrial cases. For example, in 2001/2002 the Australian Council of Trade Unions ("ACTU") agitated for a reduction in working hours via the insertion of a "reasonable hours of work clause" in awards.¹⁸⁵ The ACTU adduced an impressive body of evidence relating to the impact of long work hours on employees' capacity to manage their family responsibilities.¹⁸⁶ While the Australian Industrial Relations Commission rejected the reasonable hours clause, it accepted a "reasonable overtime" standard award, which provides employees with the right to refuse to work overtime where it would result in unreasonable hours having regard to the employee's family responsibilities.¹⁸⁷

PUBLIC HOSPITALS: AN OVERVIEW OF SEVEN CASE STUDIES (1998), *available at* [http://www.ama.com.au/web.nsf/doc/SHED-5G2UR2/\\$file/wplacel0_ve_systems%20of%20work.pdf](http://www.ama.com.au/web.nsf/doc/SHED-5G2UR2/$file/wplacel0_ve_systems%20of%20work.pdf).

183. See Helen Glezer & Ilene Wolcott, *Parents' Preferences for Balancing Work and Family Responsibilities*, 16 WORK & FAM. 4 (1998), in OECD, BABIES AND BOSSES: RECONCILING WORK AND FAMILY LIFE: AUSTRALIA, DENMARK, & THE NETHERLANDS 188 (2002).

184. See Helen Glezer & Ilene Wolcott, *Conflicting Commitments: Working Mothers and Fathers in Australia*, in ORGANIZATIONAL CHANGE & GENDER INEQUITY 48-49 (Linda L. Haas et al. eds., 2000), (explaining that 26% of Australian employees felt that the balance between work and family had deteriorated).

185. See AUSTL. COUNCIL OF TRADE UNIONS, THE REASONABLE HOURS TEST CASE (2002) (noting that the percentage of Australians working more than forty nine hours per week ranks among the highest of any developed nation, and recounting the detrimental health consequences of such overwork), *available at* <http://www.actu.asn.au/public/papers/reashoursback/> (last visited Apr. 7, 2004) .

186. See AUSTL. COUNCIL OF TRADE UNIONS, UNREASONABLE HOURS AND WHAT THEY DO TO US, in FIFTY FAMILIES REPORT (explaining that such workers enjoy little quality time with children and spouses and miss important family celebrations, with detrimental impacts on the workers and their families), *available at* <http://www.actu.asn.au/public/papers/fiftyfamilies/index-Chapter-2.html> (last visited Apr. 7, 2004) .

187. See AUSTL. INDUS. RELATIONS COMM'N, REASONABLE HOURS TEST CASE, *supra* note 185 (permitting inclusion of clause requiring "reasonable overtime" which gives employers the right to require that an employee work reasonable amounts of overtime at overtime rates). It also gives employees the right to refuse overtime for personal reasons. *Id.*

Individual complainants have also had success in the industrial arena when arguing that long/unpredictable or fixed hours have caused discrimination on the basis of family responsibilities. In this regard, two key cases have been *Laz v Downer* in 2000, and *Community and Public Sector Union v. CSL* in 2002.¹⁸⁸

In *Laz v. Downer Group*, the Federal Court of Australia heard a complaint by Ms. Laz under the provisions of the *Workplace Relations Act 1996* (Cth) which prohibits termination of employment on the basis of an employee's family responsibilities.¹⁸⁹ In essence, the case came down to a conflict between Mr. Gillies (the Managing Director) who wanted Laz (his personal assistant) to be available after-hours when he demanded it, and Laz's need to have predictability over the end of her work day so that she could meet her family responsibilities.¹⁹⁰

The facts were that Laz needed to collect her son from child-care by 6:30 p.m. two days each week, and although she did not object to working late, she did object to being given insufficient notice to make alternative child-care arrangements.¹⁹¹ The Court had no difficulty finding that Laz's dismissal was directly related to Gillies' fundamental concern about Laz's availability "to work as and when required into the early evening to meet demands which might arise on any given day. . . . Mr. Gillies was not prepared to accept that it was necessary for the applicant to receive some notice that she would be required to work beyond 6:00 p.m. on a day on which she had to pick up and care for her son because her husband was lecturing."¹⁹²

The issue that was more vexing for the Court was whether the requirement to work after-hours *without notice* was in fact an inherent requirement of the job and therefore enabling the lawful

188. See *Laz v. Downer Group Ltd.* (2000) 1390 FCA ¶ 34 (finding that Laz's inability to work beyond the stated terms of her contract did not justify the termination); see also *Community and Public Sector Union v. CSL Ltd.* (2002) C2002/2562 AIRC ¶ 96 (holding that employers had to make reasonable accommodations for the parental and familial duties of their employees), available at <http://www.airc.gov.au/alldocuments/PR921278.htm>; see also *Song v Ainsworth Game Technology Pty Ltd* (2002) 31 FMCA (holding that an employer had unlawfully transferred the employee from a full-time position to a part-time position, which amounted to a dismissal, rather than permitting her to leave work for a fifteen minute period every afternoon to collect her son from pre-school at 3 p.m. and take him to an after-school carer).

189. See *Laz* (2000) 1390 FCA ¶ 1.

190. See *id.* ¶¶ 3-13 (detailing the controversy over work hours that arose between Laz and her supervisor, Gillies).

191. See *id.* ¶ 11 (noting the caveats Laz placed on her availability to work after her contracted hours).

192. See *id.* ¶ 14.

termination of Laz.¹⁹³ In this regard the Court considered the employment contract, which contained clauses as to Laz's working hours, namely that Laz was required to work 8:30-5:30 p.m. Monday through Friday.¹⁹⁴ Although the contract stipulated that it might be necessary for Laz to "work outside these hours," it emphasized that "while the Company will endeavor to keep such additional work to a minimum, it is expected that you will make yourself available for such requirements."¹⁹⁵ The contract implied that after-hours work was to be the exception rather than the rule, but clearly Gillies thought that long hours were the normal state of affairs.

Regard to the contract could only take the Court so far because the contract was silent on the issue of *notice*.¹⁹⁶ In this regard, the Court accepted the evidence of Laz that at the outset of her employment she had made known to the recruitment agency and to Gillies her need for notice.¹⁹⁷ Laz's appointment indicated an acceptance of that limitation.¹⁹⁸ More importantly, the Court rejected the employer's mere assertion that the work had to be performed after hours without notice when there was no evidence to show that:

1. there was work which was significant in either quantity or quality that had to be completed by Laz after 5:30 p.m.;
2. the work was not completed by Laz on the days she did not stay back late;
3. the failure to complete the work was a matter of substance for Gillies or the Company generally, and
4. notice could not have been given.¹⁹⁹

The Court concluded that Laz's failure to work after-hours without notice was a source of *irritation* to Gillies, but that it was not an inherent requirement of her position.²⁰⁰ Consequently the Court ordered that Laz be reinstated to her position (or an equivalent position on no less favorable terms).²⁰¹ The Court has also intimated

193. See *id.* ¶¶ 31-34 (determining, at some length, that Gillies' request that Laz work after-hours was not inherent in the position).

194. See *id.* ¶ 3.

195. *Id.* ¶ 32.

196. See *id.* ¶ 33 (explaining that while Laz was concerned with the issue of notice, the contract did not specifically speak to the issue).

197. See *id.* ¶ 13 (considering evidence that applicant, from the beginning of her employment, would leave work between 5:30 and 6:00 p.m.).

198. *Id.* ¶ 34.

199. *Id.* (rejecting the arguments made by the defense).

200. *Id.*

201. See *id.* ¶ 39 (ordering Laz's reinstatement to the same or similar position as she occupied before being terminated).

that Laz should be compensated for her lost wages (sixteen months x AUS \$60,000 annually) and ordered the employer to pay her legal costs.²⁰² The Court decided not to award a further penalty against the Company on the basis that Gillies' actions were not malicious or undertaken in contempt of the law, but that he was not "sufficiently sensitive" to Laz's circumstances "and the difficulties (more often confronting women) associated with working and rearing young children."²⁰³ Obviously however, insensitivity and a lack of discriminatory intention did not save him from the Court's finding that he had acted unlawfully in dismissing Ms. Laz.

This case carries implications for courts and tribunals administering industrial or discrimination legislation which prohibits discrimination on the basis of caring responsibilities. A court or tribunal will be conscious of the discriminatory impact of long and unsociable work hours on employees with caring responsibilities—even if the employer is not. Moreover, a court or tribunal will be unlikely to accept at face value an employer's mere assertion that long and unsociable hours are an inherent or reasonable requirement of the position—that will be a matter for rigorous proof. This rigorous approach was evidenced in the case of *Community and Public Sector Union v. CSL*, decided by the Australian Industrial Relations Commission ("AIRC").

In *Community and Public Sector Union v. CSL*,²⁰⁴ the AIRC heard a claim under the *Workplace Relations Act*²⁰⁵ that an industrial dispute existed between the CPSU and CSL Limited on the basis of CSL's treatment of employees with parental responsibilities and its obligation to help employees balance their work and family responsibilities.²⁰⁶ Ms. Angelis was an accounts payable officer, and although Angelis originally commenced working with CSL on a full-time basis, she had reduced her weekly hours to three days a week, between 8 a.m. and 4 p.m., following the birth of her first child.²⁰⁷ Following the birth of her second child her son's commencement at school, Angelis sought to vary her hours to 7:30 a.m. to 3 p.m., to

202. See *id.* ¶¶ 41-43, 46 (addressing the Court's power to order lost wages or costs).

203. *Id.* ¶ 45.

204. (2002) C2002/2562 AIRC, available at <http://www.airc.gov.au/alldocuments/PR921278.htm>.

205. Workplace Relations Act, 1996 (Austl.).

206. See *Community and Public Sector Union* (2002) C2002/2562 AIRC ¶¶ 39-50 (summarizing the dispute between Angela Angelis and her employer, CSL).

207. See *id.*

enable her to collect her son from school.²⁰⁸ CSL denied Angelis' request to finish work at 3 p.m.²⁰⁹

The CPSU argued that it was unreasonable for CSL to refuse to reorganize work to accommodate Angelis' needs and that the refusal amounted to indirect discrimination based on parental status.²¹⁰ In determining the issue of reasonableness the Commission noted that there was no available after-school care, and that her husband was unable to pick up the child because of his own work commitments.²¹¹ The Commission also examined CSL's operational requirements in detail and the employer's assertion that Angelis was required to work beyond 3 p.m. to fulfill her banking and telephone duties.²¹²

On making its determination that Angelis' request was reasonable, the Commission observed that, as a starting point, "it is a reasonable expectation of employees that employers will give consideration to and where reasonably practicable, accede to requests to adjust working requirements to allow employees to attend to essential family requirements, I don't accept that it is incumbent upon employers to accede in all circumstances."²¹³ With regard to CSL, the Commission held that the reasons proffered by the employer as to why Angelis' request was unreasonable (e.g. because of the convenience in undertaking the weekly check run after 3 p.m.) were "post hoc rationalizations."²¹⁴ Moreover the Commission described the employer's insistence on a finishing time after 3 p.m. as "nothing more than sheer bloody-mindedness," and that such a requirement was not essential to Angelis' job.²¹⁵

The Commission ordered that the parties undertake a three month trial period during which Angelis would finish work at 3 p.m. on each of her three working days, and encouraged the parties to settle an on-going arrangement having regard to the business needs of CSL while

208. *See id.*

209. *See id.*

210. *Id.* ¶ 49 (asserting that permitting Angelis to leave at 3 p.m. would enable her to perform her parental duties and would not detrimentally impact CSL).

211. *See id.* ¶¶ 63-69 (contrasting Angelis' thorough investigation of appropriate childcare arrangements with CSL's tardy attempts). Mr. Angelis' start time was delayed to enable him to take his daughter to school because the school did not offer before-school care. *Id.* at ¶ 63.

212. *See id.* ¶¶ 70-93 (assessing and ultimately dismissing CSL's arguments that Angelis must work past 3 p.m. to perform her job duties).

213. *Id.* ¶ 48.

214. *Id.* ¶ 87.

215. *Id.* ¶ 88.

giving “reasonable accommodation” to Angelis’ parental responsibilities.²¹⁶

In summary, the Laz and CSL cases demonstrate the industrial jurisdiction’s willingness to examine the reasonableness of long and fixed hours of work in light of the discriminatory impact on workers with family responsibilities, and to resolve disputes pragmatically. The imposition of a trial period for the proposed flexibility (eg in CSL and Bogle) is a particularly innovative and practical development in Australian discrimination law.²¹⁷

4. Access to Leave Provisions

In Australia, employees’ working conditions (including leave entitlements) are governed by industrial statutes,²¹⁸ specific industrial instruments including awards, agreements and individual employment contracts.²¹⁹ In relation to award conditions, in 1995 the Australian Industrial Relations Commission determined that federal awards should be varied to enable employees to access their own paid sick leave entitlements to care for an ailing family member.²²⁰ A similar provision was introduced in 1996 in relation to N.S.W. Awards following a decision by the N.S.W. Industrial Relations Commission.²²¹ Further, some employers, notably in the government sector, also provide employees with additional and dedicated “carers’ leave,” which is not linked to sick leave entitlements, for a specified number of days per annum.²²² The aim of these various forms of “carers’ leave” is to assist employees to balance their work and family responsibilities.

216. *Id.* ¶ 96.

217. *See, e.g., id.* (requiring a trial period of the requested flexible hours).

218. *See, e.g.,* Workplace Relations Act, 1996 (Austl.); Industrial Relations Act, 1996 (N.S.W.).

219. Awards cover employees in a particular occupation or industry, while agreements cover groups or employees engaged by a specific employer or enterprise, or individual employees.

220. Personal/Carer’s Leave Test Case – Stage 2 (1995) 62 IR 48.

221. *See* State Personal/Carer’s Leave Test Case (1996) 68 IR 308 (defining family to include spouses, de-facto spouses, children, parents, grandparents, grandchildren, siblings, and same-sex partners).

222. *See, e.g.,* Public Sector Employment and Management (General) Regulation, 1996, part 6, Division 5 (N.S.W.) (providing full-time employees access to five days family and community leave per annum); Crown Employees (Public Service Conditions of Employment) Award, 2002, c.75 (N.S.W.) (delineating grounds for family and community service leave, which include the death or illness of a close family member and parent-teacher conferences).

In terms of the formal availability of carers' leave, a 1997 review of 2000 reports submitted by large organizations²²³ to the Affirmative Action Agency²²⁴ found that 72% of employers provided family/carer's leave and concluded that it is the most "widespread family-friendly provision."²²⁵ Similarly, a review of approximately 12,000 Federal Agreements certified between January 1, 1997 and December 31, 1998 found that family/carer's leave was the most common family-friendly provision (28%), as did a review of 1,056 (Federal) Australian Workplace Agreements²²⁶ approved up to December 31, 1998 which found that 66% included family/carers' leave.²²⁷

Notwithstanding the apparent widespread formal availability of carers' leave provisions in industrial awards and agreements, researchers have questioned whether there is a high and consistent level of *access* to flexible work practices—including carers' leave—by employees across and within workplaces.²²⁸ I have argued elsewhere that the culture of a particular workplace or industry plays a critical role in mediating the take-up (or avoidance) of flexible work practices by employees.²²⁹ The issue of a culture of disadvantage (including harassment) following access to carers' leave arose in the 2003 case of *Evans v. National Crime Authority*.²³⁰

Evans, an Intelligence Analyst with the National Crime Authority, complained that during the course of her one year of employment she had been discriminated against on the basis of her responsibilities as a single parent, contrary to the provisions of the Sex Discrimination Act, 1984 (Austl).²³¹ Evans was a single mother and, in accordance

223. Organizations with at least 100 employees.

224. The Affirmative Action Agency is now known as the Equal Opportunity for Women in the Workplace Agency.

225. See Work and Family Unit, *supra* note 30, at 22.

226. The Australian Workplace Agreements that were renewed covered 42,106 employees.

227. See Work and Family Unit, *supra* note 30, at 26, 30.

228. See, e.g., Matthew Gray & Jacqueline Tudball, *Access to Family-Friendly Work Practices: Differences Within and Between Australian Workplaces*, 61 FAM. MATTERS 39, 35 (2002) (reporting that carers do not enjoy enhanced access to flexible work arrangements); Gillian Whitehouse & Di Zeitlin, 'Family Friendly' Policies: *Distribution and Implementation in Australian Workplaces*, 10 ECON. AND LAB. RELATIONS REV. 221 (1999).

229. See generally CORPORATE WOMEN, *supra* note 60 (noting that professional advancement, particularly in traditionally male-dominated fields such as law and business, required full-time work and perpetual availability to work).

230. (2003) 375 FMCA.

231. Sex Discrimination Act, 1984 § 7A (Austl) (prohibiting employment discrimination based on family responsibilities); § 14(2) (prohibiting employment discrimination based on sex).

with her Federal Award, used her some of her substantial leave entitlements to care for her sick child. Evans complained that as a consequence of her leave usage she was harassed by management, transferred to another department and eventually forced to resign.²³²

The central issues for the Court were questions of fact as to whether the respondent employer had made disparaging remarks about Evans' leave taking and whether management's decisions about Evans' performance appraisal, transfer and termination were unlawfully influenced by Evans' family responsibilities, and in particular her use of carers' leave. It was not contested by the employer that Evans was entitled to take carers' leave under her contract, or that Evans did *not* take excessive leave and that she had supportive medical documentation. Rather, the employer appeared to argue that the taking of leave per se interfered with operational requirements and was therefore not acceptable.²³³

The Court accepted that Evans' manager was generally unhappy about "the concept of carer's leave" and this was manifested in his behavior towards staff who took leave.²³⁴ For example, shortly after Evans' child was hospitalized with pneumonia, Evans' manager advised her that he wanted "100% commitment to the job."²³⁵ The manager also badgered, harassed, and intimidated other employees about leave taking, including another employee who was a single mother and one of Evan's senior co-workers.²³⁶ Further, Evans' manager advised her that if he had known Evans was a single parent he would not have employed her.²³⁷ In essence, Evans worked in an environment which openly discouraged using contractual leave entitlements to accommodate caring responsibilities.

Evans was described by her senior co-worker as "competent" and "forthright."²³⁸ However, following Evans' manager's negative comments about Evans' leave-taking, Evans was given a low rating during her performance review.²³⁹ The Court readily accepted that

232. See *Evans* ¶¶ 10-21 (discussing Evans' conflicts with management regarding her leave taking, which resulted in her resignation).

233. See *id.* ¶ 10 (indicating that Evans' manager accused her of failing to perform her job duties full-time).

234. *Id.* ¶ 88.

235. *Id.* ¶ 56.

236. See *id.* ¶¶ 30-35, 37-43 (relating the manager's hostility towards employees who took carers' leave).

237. *Id.* ¶ 13.

238. *Id.* ¶ 37.

239. See *id.* at ¶ 41 (noting that Evans' senior co-worker considered the rating "too low" and was pleased with Evans' performance).

the rating was influenced by Evans' manager's negative views about Evan's leave taking. In addition the Court accepted that while Evans' manager did not *prohibit* Evans from taking carers' leave, he left her under the clear impression that leave taking would be viewed unfavorably. The Court stated that Evans' manager's remarks about 100% commitment "would have indicated to any reasonable person that he considered non-attendance for reasons of carers' leave to be damaging to that person's employment prospects with the organization."²⁴⁰

The Court agreed with the complainant that her contract would have been renewed but for her manager's adverse views about her leave taking. The Court found that Evans was directly discriminated against on the basis of her family responsibilities and the conduct included "harassment and pressure" about taking carers' leave as well as her transfer to another team and the failure to renew her contract.²⁴¹ The recognition that employees may be subjected to harassment on the basis of their caring responsibilities (and that this constitutes a form of discrimination) represents a new development in carers' responsibilities jurisprudence.

5. Defining the limits of Workplace Flexibility

Each of the cases detailed above have challenged the boundaries imposed by employers on workplace flexibility and found employers wanting. As a consequence, employers, particularly in the N.S.W. Government sector, have become increasingly sensitized to the importance of "reasonably" accommodating the needs of employees with caring responsibilities through the provision of flexible work practices.²⁴² A key concern for employers (and employees), however, has been to define what is required by "reasonably" accommodating requests for flexibility. This issue arose in the first case decided under the N.S.W. legislation, *Gardiner v. New South Wales WorkCover Authority*.²⁴³

240. *Id.* ¶ 89.

241. *Id.* ¶ 103.

242. See, e.g., N.S.W. PREMIER'S DEP'T., STRATEGIES FOR FLEXIBLE WORKPLACE ARRANGEMENTS (2000) (asserting that flexible work arrangements create a "diverse, skilled, and motivated workforce capable of delivering quality and efficient services to the wider community"), available at http://www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2000/attachments/sfwaa2000.htm (last visited Apr. 7, 2004). Central NSW government agencies developed similar policy documents which were disseminated widely throughout the NSW governmental sector.

243. (2003) 184 NSWADT.

Gardiner worked as a Team Manager for WorkCover of New South Wales, a government agency, and her responsibilities were to supervise thirty-two staff members, including line managers and staff, the majority of which were located in or near the Central Business District in Sydney.²⁴⁴ Ten years after Gardiner started work with WorkCover, the Head Office was moved from Sydney to Gosford (approximately 1.5 hours from Sydney). Gardiner, who reported directly to the senior management team, was also asked to move to the new Head Office.²⁴⁵

Gardiner informed WorkCover that the increased commute time involved in relocating would adversely impact upon her ability to prepare her children for school and to meet their after-school needs as she would arrive home between 5:30 and 10 p.m. or might have to stay overnight away from home. Gardiner argued that the requirement that she relocate her office was unreasonable and amounted to indirect discrimination on the basis of her carers' responsibilities.²⁴⁶

Senior Management at WorkCover responded to Gardiner's request for accommodation by reiterating the business need for her to be co-located with her supervisor at the Head Office, but offered flexibility of location and hours.²⁴⁷ In particular, WorkCover modified its requirement of full-time on-site attendance and directed Gardiner to attend her new office for five days every two weeks.²⁴⁸ Senior Management also offered Gardiner the possibility of starting work later to enable her to drop her children off at school.²⁴⁹

Gardiner argued that WorkCover's accommodations were not sufficient because attending the office on a regular, albeit reduced, basis still involved extra traveling time of ten to fifteen hours per two weeks for which she was not reimbursed.²⁵⁰ Further, Gardiner argued

244. See *id.* ¶¶ 13-16.

245. See *id.* ¶¶ 13-18 (presenting Gardiner's history with WorkCover and confusion regarding the relocation of her position).

246. See Anti-Discrimination Act, 1977, § 49V(2) (N.S.W.) (prohibiting employment discrimination based on carer's responsibilities). Gardiner had also argued that she had been discriminated against on the basis of her sex. *Id.* at § 25(2).

247. See *Gardiner* (2003) 184 NSWADT ¶¶ 20, 25 (recounting Gardiner's reluctance to move to the detrimental effect relocation would have on her ability to spend time with her children).

248. See *id.* ¶¶ 24-26 (maintaining that service delivery, work review, and oversight necessitated managers' presence in the Head Office, but addressing Gardiner's family responsibilities by limiting her required presence in Gosford).

249. *Id.* ¶ 24.

250. *Id.*

that she should only be required to attend the Head Office on an ad-hoc basis for scheduled meetings.²⁵¹ Finally, Gardiner and WorkCover disagreed as to whether regular attendance at Head Office was an inherent requirement of Gardiner's job.²⁵²

As discussed, the Tribunal accepted that Gardiner had "responsibilities as a carer" within the meaning of the *Anti-Discrimination Act, 1977* (N.S.W.). However Gardiner was less successful on the issue of substance, i.e. persuading the Tribunal that WorkCover's actions were unreasonable. The Tribunal took into account the impact of the relocation on Gardiner's ability to meet her caring responsibilities, the respondent's arguments that it is more efficient to co-locate managers at one office, as well as the accommodation offered by WorkCover (i.e. a reduction of on-site time to five days per fourteen). The Tribunal held that "the opportunity for Gardiner to meet and interact with her staff, colleagues and supervisors at Gosford on a regular and predictable basis is a legitimate management requirement."²⁵³ Ultimately, the Tribunal held that the requirement that Gardiner be based in Gosford was reasonable in all the circumstances and did not constitute discrimination.²⁵⁴

This decision does not support a return to managements' cavalier attitude towards staff with caring responsibilities. Rather the Tribunal clearly endorsed WorkCover's flexible and sensitive approach to identifying and accommodating an employee's caring responsibilities when deciding to relocate. Critically, WorkCover offered realistic solutions to the problem of time and place—it changed core hours to accommodate a late start time and offered flexibility in location. Although these changes did not meet Gardiner's high expectations, they obviously persuaded the Tribunal. At a broader level the decision suggests that employers can meet their legislative requirements by developing creative, practical and flexible solutions for employees with caring responsibilities.²⁵⁵ Thus *Gardiner* provides pragmatic guidance on employer's obligations to reasonably accommodate the needs of employees with caring responsibilities, and demonstrates the

251. *Id.*

252. *Id.*

253. *Id.* ¶ 70.

254. *See id.*

255. An appeal was heard by the NSW Administrative Decisions Tribunal Appeal Panel on 17 November 2003. The Appeal Panel upheld the original decision. (2004) NSWADTAP 1.

limits of the legislative imperative to provide workplace flexibility to carers.

Taken as a whole, the decided cases detailed above regarding alternative work schedules at both junior and senior levels reveal the practical application of carers' responsibilities discrimination legislation in a diverse range of industries. They also demonstrate that courts and tribunals have broadly and beneficially interpreted the prohibition against carers' responsibilities discrimination and have been prepared to give employers' considerable push-back on the status quo.²⁵⁶ These interpretations have enabled employees to balance their work and family obligations. However, the cases also demonstrate a narrowness in terms of the complainants' profiles (namely women) and types of caring responsibilities (young children). This is not to say that complaints have not been made by men, and that a broader range of responsibilities have not been surfaced, but such cases have been less high profile, less numerous, and less likely to concern the on-going use of flexible work practices.²⁵⁷

256. One recent exception to this trend is *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 in which a Federal Magistrate dismissed one aspect of an employee's (Kelly's) complaint under the Sex Discrimination Act 1984 (Austl.), namely her complaint of family responsibilities discrimination. Kelly's request to work part-time following the birth of her child was rejected by her employer, and the Court agreed that the employer was under no obligation to provide part-time work to an employee with caring responsibilities, given that no other employee worked on a part time basis. The Court viewed granting Kelly's request as akin to providing a positive benefit, rather than leveling the playing field to allow a carer to continue to work. The decision reflects a narrow and formal equality approach to interpreting the carers' responsibilities legislation, and is inconsistent with the majority of Australian decisions in this area of jurisprudence.

257. See e.g., *Independent Education Union et al. v. Geelong Grammer School* (2000) 557 F.C.A. In April 2000, the Federal Court considered the case of the *Independent Education Union and Dr. Holden v Geelong Grammar*. The case was brought to the Court's attention as an interlocutory application against the impending dismissal of Holden, an English teacher. Although the Court's decision was narrow, whether Holden had been dismissed for a prohibited reason under the *Workplace Relations Act 1996 (Cth)*, the case is instructive because the facts concerned long and perhaps unreasonable work hours, questions of safety, and family responsibilities. Not long after Holden commenced duties, he became concerned about the lengthy hours he was required to work. He gave evidence to the Court that he worked on average 100 hours per week, and for weeks without a day off (as of March 3, he had worked thirty-four consecutive days). On some days Holden provided students with twenty-four hours continuous care. Holden commented that his working hours placed "an unreasonable strain on (his) physical and psychological health and (his) personal and family relationships," and he questioned his capacity to fulfill his obligation to care for students while fatigued. Holden's relationship with the school management deteriorated significantly in light of airing his concerns. The Court granted the applicant interim relief, but the case was not finally determined.; see also *National Union of Workers v. Wooldumpers Australia Pty Ltd* (1999) 90 IR 19 (in which a male employee unsuccessfully argued he should not be required to work any Saturday because of his need to look after his mentally ill brother and because of problems associated with his parents who were in their eighties). Two male employees

B. Complaints and Conciliated Cases

As noted above, the N.S.W. Anti-Discrimination Board administers the N.S.W. Carers' Responsibilities legislation and is obligated to receive, investigate and, where appropriate, conciliate complaints.²⁵⁸ If the matter is not resolved by the Board it may be referred to the N.S.W. ADT, Equal Opportunity Division for hearing.²⁵⁹ While a small number of carers' responsibilities complaints have been referred for hearing, at this stage the ADT has only decided one case under the N.S.W. Carers' Responsibilities legislation.²⁶⁰ A significant number of complaints, however, have been made to the Board, and the Board has monitored the profile of these complaints in terms of the gender of complainants, type of complaints, industry of the respondent and the size of the employer.²⁶¹

Since the commencement of the legislation in March 1, 2001 until February 21, 2003 the Anti-Discrimination Board has received 140 complaints of carers' responsibilities discrimination, of which 136 were within jurisdiction.²⁶² The Board expects that as awareness of the carers' responsibilities legislation increases, so will the number of complaints.²⁶³ At this stage the number of complaints received by the Board in relation to carers' responsibilities is consistent with the range of complaints received by other discrimination agencies.²⁶⁴

had more success in *Federated Municipal & Shire Council Employees Union, N.S.W. Division v. Hastings Shire Council* (2001) 95 NSWIR Comm. (holding that the employer had unlawfully refused leave to enable (i) the first employee to drive his wife to a doctor for a surgical procedure and (ii) the second employee to stay at home to care for his children whilst his wife was sick), available at <http://www.austlii.edu/au/cgibin/disp.pl/au/cases/nsw/NSWIRComm/2001/95.html?query=title+%28+%22federated+municipal%22+%29> (last visited Apr. 7, 2004).

258. See N.S.W. ANTI-DISCRIMINATION BD., 2001-2002 ANNUAL REPORT CH. 1 (2002) [hereinafter N.S.W. ANTI DISCRIMINATION BOARD REPORT] (describing the duties and function of the government agency), available at <http://www.lawlink.nsw.gov.au/adb.nsf/85b15a3388df13624a2565c6001633d9/d2547f399b106e44ca256ae8007d6d25?OpenDocument> (last visited Apr. 7, 2004).

259. See *id.* (stating that only a small portion of complaints need to be referred).

260. *Gardiner* (2003) 184 NSWADT.

261. See *id.* at Ch. 2 (logging the types of complaints and inquiries made to the agency).

262. Email from Ms Jill Moir, Manager Complaints and Resolution Branch, ADB, to the author (Feb. 24 2003) [hereinafter Moir Email] (on file with author).

263. See N.S.W. ANTI-DISCRIMINATION BOARD REPORT, *supra* note 258 at Ch. 1 (citing education programs and good publicity as factors that have raised awareness).

264. See EQUAL OPPORTUNITY COMM'N VICTORIA, 2001-2002 ANNUAL REPORT, HUMAN RIGHTS, EVERY BODY, EVERY DAY 28 (2002) (stating that Victoria, under the Equal Opportunity Act, 1995 (Vict.) 127 complaints of parental/career status discrimination in employment and other areas were received during the 2001-2002 period); COMM'R FOR EQUAL OPPORTUNITY FOR WESTERN AUSTRAL., 2001-2002 ANNUAL REPORT 15 (2002) (stating that in Western Australia, under the Equal Opportunity Act, 1884 (W. Austl.) twenty-nine complaints of family responsibilities/status

In terms of the profile of complainants, 77% of the complaints received by the Board since March 1, 2001 were lodged by women.²⁶⁵ In relation to the types of complaints received by the Board, relying upon an analysis of a smaller sample (sixty-seven complaints) taken during the period July 1, 2001 to June 30, 2002, 78.8% of which were lodged by women, the Board observed:

Although a wide variety of relationships are covered by the legislation, a significant majority of complaints received by the Board involved a parent's responsibility to care for a child, and the majority of these related to women being refused part-time work when returning from maternity leave. The remaining complaints about parental responsibilities were from men or women unable to negotiate flexible work arrangements to fit in with child-care arrangements, changes in shifts and parents needing to work part-time or take leave in order to care for a child with a disability. The remaining complaints involved people needing to time off work to care for a relative with a disability such as their spouse, parent or grandparent.²⁶⁶

In terms of industry and size of employer, the Board has observed that respondent companies represent a broad spectrum of industries and occupations, while small companies are over-represented as respondents (e.g., between ten and twenty employees).²⁶⁷ It should be noted that the carers' responsibilities legislation does not apply to very small employers (defined as those with fewer than six employees); hence there is no data on the level of discrimination experienced by staff in very small workplaces.²⁶⁸

discrimination in employment and other areas were received during the 2001-2002 period, three of which were lodged by men); ANTI-DISCRIMINATION COMM'N QUEENSLAND 2000-2001 ANNUAL REPORT 14 (2001) (stating that under the Anti-Discrimination Act, 1991 (Queensl.) twenty complaints of parental status discrimination were received during the 2000-2001 period, 16 of which related to the area of employment); ANTI-DISCRIMINATION COMM'N TASMANIA, 2000-2001 ANNUAL REPORT, CELEBRATING DIFFERENCE, EMBRACING EQUALITY APPENDIX 3 (2001) (stating that under the Anti-Discrimination Act, 1998 (Tas.) 20 complaints of family responsibility/parental status discrimination in employment and other areas were received during the 2000-2001 period); HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, 2001-2002 ANNUAL REPORT, CHAPTER 2, TABLE 22 (2002) (stating that federally, under the Sex Discrimination Act of 1984 (Cth), sixteen complaints of family responsibilities discrimination were received during the 2001-2002 period, reflecting the limited ambit of the legislation).

265. See Moir Email, *supra* note 262 (explaining that the Board records that thirty-one complaints were lodged by men, 105 were lodged by women, and four by "other").

266. N.S.W. ANTI-DISCRIMINATION BOARD REPORT, *supra* note 258 at Ch. 1.

267. Telephone interview with Ms. Jill Moir, Manager Complaints and Resolution Branch, ADB (Feb. 21 2003).

268. See Anti-Discrimination Act, 1977, § 49V(3)(b) (Austl.) (stating unlawful employment discrimination does not apply if the person employed by an employer

In summary, the data relating to the complaints of carers' responsibilities discrimination received by the Board indicate usage by men and women, for a broad range of caring responsibilities, albeit the main usage is by women with children.²⁶⁹ The data also suggest that the primary impact of the legislation relates to the use of flexible work practices, and in particular the availability of part-time work.²⁷⁰ Hence the profile of complaints, and the outcomes, broadly matches the decided cases above.

CONCLUSION

This article has highlighted the use of law, and in particular the prohibition against discrimination on the basis of caring responsibilities, as a tool to support work/life issues. A particular strength of the Australian discrimination legislation is its explicit focus on direct and indirect discrimination against employees who are carers', rather than a blurred focus through the indirect discrimination provisions of sex discrimination legislation. It has also been suggested that the New South Wales' carers' responsibilities discrimination legislation offers a model of best practice for other jurisdictions seeking an effective tool to stimulate flexible work practices. Particularly positive features of the model include the breadth of caring responsibilities (including homosexual relationships) covered in the legislation, the innovative legislative schema, and the connections with the broader industrial arena. These features provide men and women, with a broad range of caring responsibilities, an avenue for complaint, and the potential for individual and systemic solutions.

This article identifies a number of policy objectives of the carers' responsibilities legislation, namely the facilitation of gender equity, the provision of support for a broad range of caring relationships, and the promotion of flexible work practices. The types of complaints lodged with the N.S.W. Anti-Discrimination Board, and the decided cases in other jurisdictions, indicate a level of success. It has not been suggested that law in isolation provides an appropriate or effective methodology to create organizational and cultural change, and in particular to eliminate the structural and attitudinal remnants of the

does not exceed five).

269. See N.S.W. ANTI-DISCRIMINATION BD. REPORT, *supra* note 258 at Ch. 1 (providing that almost eighty percent of complainants are women).

270. See *id.* (stating that many complaints stem from an employer's refusal to provide part-time work after a woman returns from maternity leave).

male family breadwinner norm.²⁷¹ Nevertheless, the introduction of Australian discrimination legislation focusing on caring responsibilities provides employees and employers with a formal site for debate about work/family issues, raises individual and community awareness of the discriminatory impact of existing workplace structures on carers, and assists in the introduction and mainstreaming of flexible work practices.

Finally, there are opportunities for improvement in the design and administration of Australia's caring responsibilities legislation. In terms of the design of the legislation there are three suggested opportunities for improvement: first, the creation of uniformity between the Federal and State jurisdictions (in order to promote certainty, and eliminate gaps); second, the expansion of existing legislative schema to enhance protection for *all* employees (e.g. by removing the small employer exception under the N.S.W. carers' responsibilities legislation);²⁷² and third, the expansion of the definition of "caring responsibilities" to include employees who provide care for people who are not immediate family members, or people who do not live in the same household (e.g. those in homosexual relationships living apart). In terms of the administration of the legislation, there are two key suggested areas for improvement: an increase in the jurisdictional limit applicable to damages, and continued promotion of the existence and implications of the legislation.²⁷³

These opportunities for improvement are relatively minor, and more in nature of fine tuning. Overall, the legislation has proved to be a workable vehicle for the implementation of flexible work practices. This outcome has been achieved by an overwhelmingly progressive judiciary, which has pushed the boundaries of the existing carers' responsibilities legislation, and suggested pragmatic solutions (e.g. trialling flexible work practices), thereby giving effect to the legislation's beneficial intent, and assisting carers to achieve equality at work.

271. See, e.g., Beth Gaze, *Context and Interpretation in Anti-Discrimination Law*, 26 MELBOURNE UNIV. L. REV. 323 (2002) (offering a more considered discussion of the effectiveness of anti-discrimination law in terms of promoting social change).

272. See Anti-Discrimination Act, 1977, § 49V(3) (b) (explaining that the option of employee protection could be the expansion of the unjustifiable hardship defense to employment decisions beyond hiring and firing, thereby creating an onus on employers to justify decisions about discrimination on the basis of caring responsibilities in relation to, for example, training, promotion, and benefits).

273. See *id.* § 113 (stating that damages for complaints are limited to \$40,000).