

# Managing Work and Family in the 'Shadow' of Anti-discrimination Law

*Sara Charlesworth*

*There is now increasing attention paid to a developing 'work and family' case law in the Australian industrial and anti-discrimination jurisdictions. However, very few grievances are ever pursued to a formal tribunal or court hearing. Drawing on complaints lodged with the Victorian Equal Opportunity Commission under the Equal Opportunity Act 1995 (Vic), this chapter considers the ways in which discrimination against workers with family responsibilities is manifested and understood in the workplace. The context of these complaints, including workplace understandings of what constitutes discrimination against workers with family responsibilities and the gendered organisational structures and cultures in which such understandings are negotiated, is also explored. The article concludes that prospects for more effective protection of workers with family responsibilities are limited unless the organisation of work around the unencumbered 'ideal worker' can be comprehensively challenged.*

## Introduction

The reconciliation of work and family life is a growing concern in most OECD countries. Many workers, particularly women, trying to juggle parenthood, unpaid work in the household and paid work, are complaining about a 'time squeeze' or 'care crunch'. While much of the Australian policy debate has focused on the role of 'family-friendly' benefits in alleviating the tensions between work and family (see Charlesworth et al, 2002), the anti-discrimination legal framework also plays an important role in protecting individual workers with family responsibilities and in providing a context within which conflict around work and family is negotiated in the workplace.

This chapter focuses on the types of workplace disputes that arise for many parents and carers, overwhelmingly women, as they try to balance their caring and paid work responsibilities. I am particularly interested in how these disputes play out in the 'shadow' of anti-discrimination law that proscribes discrimination against workers with family responsibilities. We get a partial glimpse of such disputes from

the growing work/family case law in Australia (for recent analyses of this case law, see Bourke, 2004; Gaze, 2005). But court and tribunal determinations remain relatively infrequent and represent only a very small fraction of complaints lodged under anti-discrimination legislation. It has been estimated that only around 5 per cent of complaints lodged under anti-discrimination legislation are referred to a tribunal or court, with many of these settling before hearing (Hunter and Leonard, 1995: 1). Moreover, the adversarial legal process and formalism involved in tribunal and court hearings, and the limits of written decisions, work to reify the issues in dispute and strip away much of the gendered social and workplace context in which complaints of discrimination arise (see Thornton 1999; Gaze 1997) and indeed much of the sheer complexity and contradictions of workplace disputes arising from or focused on work and family imbalance.

To get a more contextualised and a somewhat richer sense of the workplace clash between family and paid work responsibilities, as well as of workplace understandings of discrimination against workers with family responsibilities, I draw on current research analysing formal complaints lodged with the Victorian Equal Opportunity Commission (EOCV) under the *Equal Opportunity Act 1995* (Vic) (EOA).<sup>1</sup> Drawing on this empirical research also provides an opportunity to respond, at least in part, to Anna Chapman's call for scholarship around work/family conflict to be supplemented by a focus on labour law regulation on the intersection of market work and family life (Chapman, 2004). This article attempts to tease out how labour market regulation around 'work/family' discrimination operates outside court and tribunal determinations, by focusing on the ways discrimination against workers with family responsibilities is manifested and understood in work/family complaints. My analysis emphasises the workplace context. It is concerned less with any deficiencies of the actual legislative provisions than with understandings of what constitutes work/family discrimination reflected in the private ordering that occurs in the 'shadows' of both anti-discrimination law and workplace norms.

The first part of the article provides a brief overview of the anti-discrimination legal framework relevant to workers with family responsibilities (for a more detailed analysis of this framework, see Lee Adams' chapter in this volume) and the persistence of the 'ideal worker' norm, despite the substantial erosion of the traditional male

breadwinner/female homemaker model. In the following sections of the article, I use data from 'work/family' complaints lodged with the EOCV to highlight the ways in which discrimination against workers with family responsibilities is manifested and understood in the workplace. I argue that the gendered social and workplace contexts in which such understandings are negotiated can work to blind employers, and indeed employees, to *family-hostile* work organisation underpinned by the norm of the 'ideal worker'. As a consequence, work/family complaints can become focused on the individual worker rather than systemic discrimination or disadvantage – employee complainants concentrated on a 'reasonable accommodation' of their individual 'special' needs and employer respondents on the 'lack of fit' of an individual worker with a seemingly fixed organisation of work. Further, the focus on parental and carer status can work to hide the gendered underpinning of 'workers with family responsibilities'. The final part of the article canvasses the need to challenge the organisation of work around the unencumbered ideal worker.

## The Anti-Discrimination Framework and the Work/Family Context

Legislation prohibiting discrimination in employment was first enacted in Australia more than 30 years ago. When sex discrimination provisions were introduced in State and federal jurisdictions,<sup>2</sup> women's lack of equality of access to the labour market, and to the wages and conditions enjoyed by men within employment, meant employment was recognised as an important site of discrimination. Such legislation makes both direct and indirect discrimination unlawful. Direct discrimination is where an employee is treated less favourably than another employee would be because of their status or characteristics, such as sex or marital status. Indirect discrimination is where apparently neutral conditions or requirements are applied in the workplace, that have the effect of disadvantaging a person who is a member of a group, such as women or married women. In general terms, these anti-discrimination provisions establish a limited framework within which individual employees have the right to lodge a complaint in certain circumstances.<sup>3</sup> Most anti-discrimination jurisdictions have prohibited discrimination on the grounds of sex and pregnancy since their inception, and protection is generally provided in

respect of the circumstances in which employment is offered, the terms and conditions afforded to employees and the dismissal of employees. Before the enactment of specific provisions, complaints that raised issues of work/family discrimination were typically lodged on the grounds of sex or pregnancy.

In 1991, Australia ratified ILO Convention 156, commonly referred to as the Workers with Family Responsibilities Convention. It is worth recalling the full title of the convention, the Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, which links equal employment opportunity for men and women workers to the equal treatment of those with and without family responsibilities. Article 1 of the Convention makes its policy aims quite clear: to both proscribe discrimination against workers with family responsibilities, and to enable such workers to engage in employment with minimum conflict between their 'market work' and 'family work' (Williams, 2000: 2-3). It states:

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

Following ratification of ILO 156, most anti-discrimination jurisdictions moved directly to protect workers with family responsibilities. Today State jurisdictions, with the exception of South Australia, prohibit discrimination on the grounds of parental status, carer's status, carers' responsibilities or family responsibilities.<sup>4</sup> Despite art 1 of ILO 156, the *Sex Discrimination Act 1984* (Cth) (SDA) was amended only to prohibit direct discrimination on the ground of family responsibilities in respect of dismissal from employment. While some protection for individual workers is currently provided in the *Workplace Relations Act 1996* (Cth) in respect of unlawful termination on the grounds of family responsibilities, anti-discrimination law provides the main legal arena in which work/family disputes have been pursued in Australia (Murray, 2005: 74) and is the focus of the analysis in this chapter.

These explicit proscriptions of discrimination against workers with family responsibilities have seen an overall increase in complaints

lodged on these and related grounds, such as pregnancy, with the federal and State human rights bodies that administer anti-discrimination laws.<sup>5</sup> For example in 2003-04, 14 formal complaints were lodged with the federal Human Rights and Equal Opportunity Commission (HREOC) under the SDA claiming dismissal on the grounds of family responsibilities, with a further 177 complaints lodged on the grounds of pregnancy, together some 30 per cent of all complaints lodged under the SDA (HREOC, 2004).<sup>6</sup> In 2003-04, 286 complaints on the grounds of pregnancy and parental and carer status in the area of employment were lodged with the Victorian Equal Opportunity Commission under the *Equal Opportunity Act 1995* (Vic) (EOA). These included 132 complaints on the grounds of parental status, 104 complaints on the grounds of pregnancy and 50 complaints on the grounds of carer status (EOCV, 2004: 36).<sup>7</sup>

## Understandings of Discrimination and the Ideal Worker

Discrimination is an extremely pliable concept (Thornton, 1990: 1-8). At its broadest, discrimination is generally understood as unfair treatment. Discrimination in employment, for example, may denote unfair treatment in that an irrelevant consideration or characteristic has been taken into account in decision-making (as provided for in the ILO Convention 111: Discrimination (Employment and Occupation) 1958). The concept of discrimination incorporates both a more individualised understanding in which discrimination occurs due to the personal prejudices or beliefs of individuals, and a more structural understanding that sees discrimination as an institutionalised phenomenon that occurs due to a web of systemic, social practices (Guest, 1999: 5). Indirect discrimination provisions that focus on the discriminatory effects of apparently neutral rules or practices open up the possibility of a more structural understanding of discrimination. However, most Australian direct and indirect discrimination provisions set up a comparator understanding of discrimination.<sup>8</sup> That is, a comparison is made between the treatment of a complainant, for example with carer responsibilities, and the treatment of others without that status. The complainant must prove they were treated less favourably than the individual or group comparator is or would be.

So how is discrimination understood in the workplace? What constitutes unfair or less favourable treatment at a particular place or point of time is contingent on social and workplace norms that intersect with, but are not necessarily captured by, anti-discrimination law. Such legislation sets parameters around what needs to be established in cases of direct and indirect discrimination and also, particularly in larger organisations, informs the development of equal employment opportunity (EEO) and anti-discrimination policies and training (see Thornthwaite, 1994). However, the 'normative order' or 'private ordering' (Astor and Chinkin, 1992: 69) provided in the workplace through anti-discrimination provisions in respect of protection of workers against discriminatory treatment, and/or redress for that treatment, works in contradictory ways, often leading to a narrowing or reframing by employers and managers of what constitutes discrimination (Charlesworth, 2003: 229).

How workers come to understand what is happening to them as 'discrimination' and make a formal complaint is a complex process of 'naming, blaming, claiming' (Felstiner et al, 1980-81)<sup>9</sup> that occurs within a broader workplace, policy and societal context. To 'name' discrimination you have to be able to 'see' it. There are many reasons why people may not 'see' discrimination in the denial of employment benefits such as reduced hours, or in vulnerability to dismissal or retrenchment associated with pregnancy and maternity leave (Hunter, 2005: 8). Individuals may perceive certain treatment as unfair, but not as treatment on the basis of their sex and/or family responsibilities. Working in a female-dominated workplace or where most of the employees have carer responsibilities makes it difficult for women to construct their experience as less favourable treatment. On the other hand, while less favourable treatment may be more obvious to women working in male dominated workplaces, it may be a threat to their attempts to 'fit in', or to carefully constructed identities as somehow 'gender-neutral' workers, to acknowledge it to themselves.<sup>10</sup> A popular understanding of discrimination as the intentional act of person or group of persons against other individuals, can also blind workers to the institutionalised nature of discrimination. Conversely, where the lack of access to certain benefits, such as family-friendly working time arrangements, is not seen a result of such individual prejudice, it is often accepted as 'just the way things are' (Hunter, 2005: 9). That is, it is difficult to attribute blame for any detriment experienced when the

imposition of conditions and requirements is seen to emanate from the fixed organisation of work, such as around rostered hours or shifts.

Even where discrimination is perceived, actually making a complaint is a risky business. Many employees will decide to put up with the women-hostile or family-hostile environment in which they work to maintain a career or even just to remain employed. They may feel as individuals they are strong enough to manage any gendered treatment, they may have concerns about job security and ongoing employment, and/or they may fear reprisal (Charlesworth, 2001: 149-56). Those who do complain of discrimination have typically reached a point where the workplace disadvantages or detriment they experienced in trying to balance their work and family responsibilities are sufficient enough to threaten or preclude their ongoing employment (Conaghan, 2004: 181). But such complaints do not occur in a vacuum. They are located in a specific workplace context and in the broader context of social and labour market change – and the adequacy of the response of government and Australian enterprises to those changes.

As in most OECD countries, Australia has seen profound changes in both within families and in the workforce. The most significant of these changes is the substantial erosion of the traditional model of the male breadwinner and female homemaker. The decline of the male breadwinner model is underpinned by a steady growth in women's participation in paid work, including those with young children.<sup>11</sup> Consequently, we have seen a rise in the proportion of dual earner couple families with dependent children (Charlesworth et al, 2002: 22) and also of sole parent families, where sole parents, overwhelmingly mothers, are engaged in paid work (Pocock, 2003: 73). At the same time, increased pressures on businesses to be globally competitive have led to new patterns in the form and hours of work, and to substantial deregulation of the labour market (Charlesworth et al, 2002: 1). Part-time work, particularly for women, has increased dramatically in Australia,<sup>12</sup> particularly in feminised service industry sectors, and full-time work is less likely to be continuous and more likely to be associated with longer hours (Campbell, 2002). However, despite the increased participation of women in the paid workforce, the unequal division of labour in the household has proved resistant to change and women still shoulder the main burden of unpaid 'family work' (Baxter et al, 2003: 2; Craig, 2003).

There has also been little change in labour market policies and in workplaces, which continue to be based on the presumption of an ‘ideal worker’ with few domestic responsibilities, full-time work and little or no time off to care for family. While no longer representative, the norm of the ‘ideal worker’, as Joan Williams calls him (Williams, 2000: 3) or the ‘unencumbered citizen’ as Sandra Berns calls him (Berns, 2002: 5) is a powerful one. This ideal worker, who is available to work long hours and schedule any outside commitments around work, is dependent on a domestic norm, that is, a full-time carer engaged in family work of housework and childcare, whose unpaid work subsidises the paid work of the ideal worker (Conaghan, 2002: 72). Given the gendered transformation of work and the erosion of the standard employment relationship, the ideal worker is in fact increasingly less representative. However, it **[who is ‘it?’]** has a **powerful resonance as a market work imaginary and norm [not sure of sense?]** and, as Joan Williams notes, while the ideal worker norm does not define all jobs today, it defines the good jobs (2000: 1). In various guises, and in most workplaces, the ideal worker is assumed in the way in which work is organised, in the scheduling of hours, the design of jobs, the allocation of tasks and responsibilities, in the ways in which commitment and performance are recognised, and in the increasingly time-unbounded character of many jobs (see Rubery et al, 2005).

It is in the context of both the profound social and workplace changes and the important norm of the ideal worker that negotiations around work and family take place in the workplace. Such negotiations also take place in a national context in which there is an absence of coherent policy, a fact that serves to exacerbate the tensions and difficulties experienced as men and women juggle work and family. Australia lags behind other OECD countries in developing policies to help people manage their life cycle transitions without losing their attachment to the paid work force. For example, Australia is one of only two OECD countries without a national scheme of paid maternity leave, and there are significant gaps, especially for casual workers, in access to carers’ and parental leave. Relying predominantly on the voluntary efforts of employers has worsened the balance of work and family for many employees in Australia. There is also evidence of *family-hostile* rather than *family-friendly* developments in Australia’s increasingly deregulated labour market, such as longer hours,



intensification, degraded part-time work and casualisation (Charlesworth et al, 2002: 54).

This context shapes both perceptions of discrimination and the pursuit of discrimination claims within and outside the workplace. To get a sense of how understandings of work/family discrimination currently play out such claims, in the following sections I draw on a set of work/family discrimination complaints lodged with the EOCV in 2004.

### Complaints of Work/Family discrimination under the Equal Opportunity Act 1995

The *Equal Opportunity Act 1995* (Vic) (EOA) prohibits sexual harassment and discrimination on the basis of certain attributes such as sex, race and impairment in a number of areas including employment,<sup>13</sup> education, the provision of goods and services and accommodation. In respect of family responsibilities, the EOA explicitly proscribes discrimination on the grounds of breastfeeding, pregnancy, parental status and status as a carer.<sup>14</sup>

The Equal Opportunity Commission Victoria (EOCV) is the body that handles both inquiries about, and complaints of, discrimination under the Act. In 2003-04 there were 865 inquiries about discrimination on the grounds of breastfeeding, pregnancy, parental status and status as a carer.<sup>15</sup> In the same period there were 286 formal complaints in the area of employment on these grounds,<sup>16</sup> a ratio of one formal complaint for every three inquiries.<sup>17</sup> Once a formal complaint is lodged, the EOCV complaint-handling process has two main phases – investigation and conciliation. In simple terms the process is as follows. An investigator gathers information deemed to be relevant to the complaint and reports to the Commission,<sup>18</sup> which may refer the matter to conciliation or decline the complaint, or some parts of the complaint. If referred to conciliation, a conciliator then attempts to facilitate the complainant and respondent reaching an agreement to resolve the complaint. Where there is no resolution or where a complaint has been declined by the Commission, the complainant may request that the complaint be referred to the Victorian Civil and Administrative Tribunal (VCAT).<sup>19</sup> Investigation and conciliation are confidential and ‘private’, as are in most instances the specific outcomes

of the complaint-handling process,<sup>20</sup> apart from the annual publication of annual aggregate statistics. Consequently, as in most anti-discrimination jurisdictions, relatively little is known outside the human rights bodies about the complainants who lodge complaints, the employers and the workplaces about which they make complaints or the substance of those complaints.<sup>21</sup>

As part of a larger research project,<sup>22</sup> data was gathered from complaint files held by the EOCV where complaints had been lodged with the EOCV on the grounds of breastfeeding, gender identity, lawful sexual activity, marital status, parental status, status as a carer, pregnancy, sex, sexual harassment and sexual orientation in the area of employment.<sup>23</sup> The data collection included all complaints that met the above criteria lodged with the EOCV between 1 January and 31 March 2004. Each complaint file contains written communications between the EOCV and the complainant and respondent and their representatives, if any, including the statement of complaint and the respondent responses to this complaint. In addition files include notes of telephone conversations between the EOCV and the parties and witnesses, if any, internal communication between relevant members of the EOCV, including an investigator report to the Commission, records of Commission decisions to refer or decline a complaint, and any referrals to VCAT requested by the parties. Quantitative data was gathered on the demographic and employment characteristics of complainants and respondents, where these were able to be identified; the claims and responses of the parties; the complaint-handling process; and on complaint outcomes. In addition, direct transcripts were made of statements of complainant and respondent employer responses to those claims.

The file analysis indicates that, between 1 January and 31 March 2004, a total of 84 complainants had lodged sex and/or gender discrimination complaints in the area of employment with the EOCV. Of these complainants, 26 claimed 'work/family' discrimination; that is they made complaints of discrimination in employment on the grounds of status as a carer, parental status and/or pregnancy.<sup>24</sup> As shown in Table 1, complainants frequently raised more than one ground of discrimination, with a total of 55 complaints made, 28 of which were on work/family grounds.<sup>25</sup> In addition five complainants also claimed discrimination on the grounds of sex, which as highlighted below was integral to those work/family complaints.

Despite the availability of carer status as an attribute under the EOA, all of the complaints, bar one, were concerned with motherhood or in six cases with fatherhood status. The only complaint made on the grounds of carer status related to caring responsibilities for the complainant's mother. This reflects not only the conflation of work/family with motherhood/parenthood but also underscores the invisibility of discrimination on the grounds of other caring responsibilities. There is now increasing evidence of the pressures on workers with dependent care responsibilities for other than dependent children (see Campbell and Charlesworth, 2004: 26-31, 34-8). However, even in NSW where specific caring responsibilities anti-discrimination provisions have been enacted in recognition of the existence of diverse caring relationships (Bourke, 2004: 31), a significant majority of complaints made under that legislation have involved a parent's responsibility to care for a child, rather than other caring responsibilities (Bourke, 2004: 66).

*Who were the complainants?*

Nineteen women and seven men made work/family complaints, the majority of complaints on the grounds of parental status (15 complaints) and pregnancy (12 complaints). Only one male complainant raised a claim of carer status discrimination. Available data on almost half the complainants (eight women and five men) indicated they ranged in age from 20-24 years to 40-49 years. The complainants came from a range of industries and worked in a variety of occupations. Seven of the female complaints came from the retail industry, including clothing and food retail. Four complainants (three women and one man) came from the property and business services industry, including computer services, project management and real estate or property management. Another four complaints came from the manufacturing industry (one woman and four men) including paper and food manufacturing. Six of the complainants, all women, worked in intermediate clerical sales and service occupations including as salespersons, receptionists, while another four female complainants worked in elementary clerical sales and service occupations including as sales and shop assistants. Three complainants, all men, worked in intermediate production jobs including as machine operators or drivers, while another three male complainants worked in labouring occupations.

Grounds of Complaint	Complainants		
	Female	Male	Total
Pregnancy	9	0	9
Pregnancy & Sex & Impairment	1	0	1
Parental Status	4	1	5
Parental Status & Pregnancy	2	0	2
Parental Status & Impairment	0	2	2
Parental Status & Industrial Activity & Victimisation	0	1	1
Parental Status & Sex	1	0	1
Parental Status & Marital Status & Impairment	0	1	1
Parental Status & Sexual Harassment & Age & Race	0	1	1
Parental Status & Sex & Sexual Harassment & Age	1	0	1
Parental Status & Marital Status & Sex & Discriminatory Information Request	1	0	1
Carer Status & Marital Status & Sex & Sexual Harassment & Gender Identity & Age & Impairment & Industrial Activity & Physical Features & Victimisation	0	1	1
Total	19	7	26

**Table 1: Complainants lodging 'Work & Family' Discrimination Complaints with EOCV: January–March 2004**

While the majority of complainants were or had been employed in full-time permanent positions (nine women and five men), nine complainants (eight women and one man) worked on a part-time basis. Of these, six complainants (five women and one man) worked on a casual basis. One female complainant had worked as a seasonal worker and another as an 'own account' worker. The majority of complainants (15 women and four men) had left their employment at the time they made their complaint with the EOCV. Six complainants (three men and three women) were employed by the employer they made a complaint about. While five female complaints had been employed for less than one year at the time they left their job and/or lodged a complaint with the EOCV, 10 complainants (six women and four men) had worked for

three years or more for the respondent employer. One female complainant lodged a complaint against a potential employer.

The complainants and the workplaces they complain about present a far greater diversity than reflected in the case law.<sup>26</sup> For example, while almost of the respondents in reported work/family case law cases are large public or private sector organisations,<sup>27</sup> many of the respondents in the EOCV complaints were small and medium sized employers.<sup>28</sup> The EOCV complainants not only include men raising issues of work/family conflict, they also reflect a far greater range of occupations and employment status than typically found in the work/family case law; the representation of casual workers in particular highlighting the precarious workplace contexts in which work/family conflict may arise.

*What work/family discrimination did the complainants claim?*

The treatment complained of in the EOCV complaints is broadly similar to complaints lodged under the caring responsibilities provisions of the *Anti-Discrimination Act 1997* (NSW). These complaints include employees being unable to negotiate flexible work arrangements to fit in with childcare arrangements, changes in shifts and parents needing to work part time or take leave in order to care for a child with a disability (see Bourke, 2004: 66).

Seventeen, two thirds, of the 26 complainants claimed they had been dismissed or had resigned either as a result of work/family discrimination or, in the case where multiple grounds of complaint were claimed, that work/family discrimination had been a contributory factor in their dismissal or resignation. The main substance of six complainants' claim was that they had been terminated from their employment. Eleven complainants also claimed discriminatory treatment in the terms and conditions of their employment that culminated in their dismissal or resignation. Another seven complainants complained about discriminatory treatment in the general terms and conditions of their employment, four of these in relation to treatment before or after they took maternity leave,<sup>29</sup> which went in the main to access to family-friendly working time arrangements as discussed further below. One complainant alleged that she was not selected for an advertised position because of assumptions made about her childcare responsibilities and another

complainant claimed that she had been offered a promotion that did not transpire after she advised she was pregnant.

**Table 2: Treatment Complained of by Complainants lodging ‘Work & Family’ Discrimination Complaints**

Treatment complained of	MAIN WORK/FAMILY GROUNDS OF COMPLAINT <sup>30</sup>			
	Parental Status	Pregnancy	Carer Status	Total
General terms & conditions of employment	2		1	3
– leading to dismissal/resignation	6			6
Terms & conditions of employment before/after leave	1	3		4
– leading to dismissal/resignation	1	4		5
Promotion/job selection	1	1		2
Termination /constructive dismissal	3	3		6
Total	14	11	1	26

The high incidence of dismissal or ‘forced resignation’ in the EOCV work/family complaints raises a number of issues. First, it suggests that, in such circumstances, discrimination may become more visible, at least to complainants. An acceptance of family-hostile work practices as ‘the way things are’ is more difficult to cling to when you find yourself unemployed, and this may provide some impetus to make a complaint. Secondly, the high rate of dismissal/resignation provides an illustration of the failure of ‘individual bargaining’ in the workplace around work and family. It underscores the power differential in such bargaining; where an employee may ask for some ‘accommodation’ and where an employer may simply refuse, with little consideration of the request or possible alternatives.<sup>31</sup> The hazards of negotiating work/family balance are exacerbated by part-time and casual status, as illustrated below. Thirdly, the high incidence of job loss, with redress

being pursued in an anti-discrimination jurisdiction highlights the inadequacy of current protections against unfair dismissal, with limits placed on access by contract workers, casual employees or by those with less than the requisite length of service.

*Complainant understandings of work/family discrimination*

There were three main categories of work/family discrimination claimed by complainants. The first category includes treatment that flowed directly from the status of the complainant as a mother or potential mother. For example, three complainants claimed they were dismissed when, or shortly after, they announced their pregnancy. Two of these complainants had just commenced employment, one on a full-time basis and one on a casual basis. The other was a seasonal worker who said she was forced to resign more than two months before her baby was due. Another complainant who claimed discrimination on the ground of parental status stated she was not given any further employment after she returned from maternity leave. Apart from issues of termination/forced retirement there were also complaints about other detriments that flowed from the pregnancy or motherhood of the complainant. One of the more common claims was that hours of work had been reduced. Three complainants were made casual, two after they advised they were pregnant and one after she returned from maternity leave. In each case their hours of work were reduced after return from maternity leave. Another complainant who had been working in a regular part-time casual arrangement had her hours of work reduced, ultimately to zero hours, after she advised she was pregnant. Claims of such direct discrimination on 'motherhood grounds' (Charlesworth, 1999: 15) remain surprisingly frequent, as evidenced by the findings of the HREOC Pregnancy Inquiry (HREOC, 1999) and in data gathered as part of the HREOC proposal for a national paid maternity leave scheme (HREOC, 2002).

A second category of work/family discrimination concerns situations where both predictable and unpredictable pressures (Campbell and Charlesworth, 2004: 38-40) from a complainant's family responsibilities make it difficult to remain working on a full-time basis or to meet certain working time schedules. Much of the case law highlights the difficulty women have in securing reduced hours or a schedule of hours after maternity leave that would make it possible to combine both their

work and family responsibilities.<sup>32</sup> The incompatibility of working hours, scheduling or rostering arrangements was also an issue for a number of EOCV complainants who claimed parental status discrimination, including a number of male complainants. One, who had worked more than five years for his employer, was working on night shift when his young son moved in with him. He asked to change to day shift so he could care for his son. He claimed the company refused to allow this transfer and also that it required him to work overtime, which he was unable to do. As a consequence he resigned from his job. Another male complainant, who had been employed for more than three years on a casual basis, claimed he was disciplined when he took three days absence to care for his children. His claim that he had had to do so when his former partner's casual work required her to attend work highlights the reach of work/family conflict beyond the confines of a single workplace, as well as the family-hostile ramifications of unpredictable casual employment.

A third category of complaint is where changes in the location of work and/or the organisation of work or management make the caring responsibilities of employees much more difficult to manage. In some instances previously negotiated family-friendly working time arrangements may be terminated. In one case where an employer had changed location, the complainant who had a small child faced considerable additional travel time. To accommodate her, the employer agreed she could undertake her work over four rather than five days a week. Two years later after a company merger, she was required to attend work five days a week. She was unable to comply and resigned. In another case, a male complainant was a carer for his disabled son. He was able to manage these caring responsibilities with full-time work as he had negotiated earlier start and finish times and had access to a car space. This enabled him to care for his son after he arrived home from school. His employer then moved to a new location where a car space was not available and required him to work the standard starting and finishing times. The complainant resigned after trying unsuccessfully to maintain his earlier working time arrangements. A third case illustrates the unpredictability of what constitutes organisational requirements and the 'grace and favour' nature of many negotiated family-friendly arrangements that may be ceased at employer or managerial discretion. A complainant, who had been employed on a full-time basis for more than one year, believed she had



negotiated part-time work after her return from maternity leave. However before she went on leave her manager changed his mind and said she would be required to work full time. She agreed on the basis she could work one day a week from home. However, while on maternity leave she was told that her old job was redundant and she would have to accept a new position full time on site five days a week.

All 26 complainants complained of discrimination on at least one of the three work/family grounds available under the EOA. However in their accounts of what had occurred, it became clear that in several instances there were detriments they had experienced that they did not see as 'discrimination'. In two complaints the substance of the claims of discrimination was that the complainant's hours of work had been reduced after they returned to work from maternity leave. In one case a woman was transferred from permanent to casual status after she advised she was pregnant. She stated that, while she did not want this, she understood that this was a 'commonsense approach' from the company's perspective as this meant that her doctor's appointments would be on her own and not the company's time. In the other case, a young woman was advised that she would be employed on a casual basis when she returned from maternity leave. While noting in her statement of complaint that she was unhappy about the forced conversion to casual status, she stated that she believed her manager had 'the best intentions' in thinking it would be better for her to work casually. In both cases the unwilling conversion from permanent to casual status did not form part of the formal complaint, but was provided as background context to it – a context that not only gets stripped away in formal hearings, but also in the complaint-handling process.

Nevertheless what the complaints do illuminate is the complexity, intersectionality and indeed messiness of work/family conflict, not visible in the case law where the issue is pared down to a single issue and in many instances an agreed set of facts. Beth Gaze has observed that the gendered working of the law, which demands that a claim of discrimination focus on *either* sex discrimination *or* parental/carer status discrimination, does not recognise that a working mother is an 'intersectional parent' whose experience is as a *female* parent (Gaze, 2005: 94). In the EOCV complaint-handling process too, many claims of discrimination were reframed and refocused in a way that reflected an 'additive' approach to grounds of discrimination. However, in several

complaints, we get a glimpse of the intersectionality of sex and work/family discrimination. In one case a complainant claimed discrimination on the grounds of pregnancy, sex and impairment. She was a single woman and alleged that the workplace attitude to her changed when she said she was pregnant. She was excluded from some meetings on the basis she was about to go on leave. At the time she accepted this. While she was on leave, other colleagues got a pay rise. She pursued the pay rise when she returned from leave and was told she would have to do additional tasks to get the increase, which she did but was not awarded a pay increase. Her complaint also involved allegations of bullying by another colleague, including because she had taken maternity leave, and the rejection of her request for part-time work after she had been seriously ill for a number of months. Shortly after, she was advised she would have to take a pay cut because of business downturn. She refused and her employment was terminated.

*Employer responses to claims of work/family discrimination*

After a formal statement of complaint is lodged with the EOCV that identifies one or more grounds of complaint under the EOA, the respondent named by the complainant is contacted by an investigator assigned to handle the complaint. In most cases where discrimination in employment is alleged, the employer organisation is named as respondent. In some cases, particularly those involving claims of sexual harassment, other respondents may also be identified. In six of the 26 work/family complaints more than one respondent was named. They included both senior and supervisory managers and, in one instance, co-workers. Typically a letter is sent from the EOCV to any named respondent, outlining the claims of the complainant and the legislative provisions the complainant alleges have been breached. Respondents are then required to make a formal written response to the complaint. The data in Table 3 has been drawn from the first responses to the allegations of work/family discrimination made by or on behalf of the employer or employing organisation.

One of the assumptions that underpins the anti-discrimination complaint-handling process is that the majority of complaints can be successfully resolved, with any respondent who has discriminated seeing the error of his or her ways once this has been politely pointed out (Thornton, 1990: 146). As has been documented in other studies of

discrimination complaints lodged with Australian human rights bodies, it is relatively rare for respondents to either recognise the treatment complained of as discrimination and/or to immediately offer redress (Hunter and Leonard, 1995: 15; Chapman and Mason, 1999: 548). In only one of 26 EOCV cases did the respondent recognise the harm claimed by the complainant and offer some remedy. The complainant had claimed that while on maternity leave she was advised by her manager that she would be unable to return to work in her old position in a part-time basis, but must instead work in a new role on a full-time basis. On receipt of the formal complaint from the EOCV, another manager immediately moved to settle the complaint by offering the complainant her old position back on a part-time basis. The fact the dispute had escalated to a complaint to the EOCV was attributed by the company to a 'communication breakdown' between the complainant and her manager. In another three cases, while the respondent employer/manager disputed the treatment claimed was discrimination, some redress or reconsideration was offered in response to the formal statement of complaint. In one of these cases, where the complainant had been dismissed for being late to work because of childcare responsibilities, the respondent employer provided a 'statement of regret' requested by the complainant, who had not sought reinstatement.

While other studies of discrimination complaints suggest that a common response from respondents is to deny the facts,<sup>33</sup> this only occurred in two instances. One case involved a 'constellation' complaint where the complainant alleged sexual harassment based on her status as a young single mother that ultimately led to the termination of her employment. The response from the employer was that the facts of the alleged sexual harassment were a complete fabrication and that she had resigned her job, rather than being dismissed. The other complaint was made by a seasonal employee who claimed she was dismissed before she was due to go on maternity leave. The response from the employer was that she had not been dismissed, but had commenced her confinement and that she would be eligible to return to work the following season in a suitable role as a seasonal employee. The EOCV investigator, however, noted that the complainant's superannuation details indicated her employment with the respondent had ceased. This complaint also highlights the grey area of employment status for those who work on seasonal or casual basis.

**Table 3: Main Respondent Employer Responses to  
'Work & Family' Discrimination Complainants**

Main employer responses	WORK/FAMILY GROUNDS OF COMPLAINT <sup>34</sup>			
	Parental Status	Pregnancy	Carer Status	Total
Deny facts	1	1		2
Dispute interpretation of the facts		1		1
– operational/business requirements	7			7
– locate blame elsewhere eg poor performance	1	4		5
Substantive legal argument	2	1		3
Dispute interpretation/ substantial legal argument		1	1	2
– operational business requirements		1		1
Dispute interpretation/offer redress/reconsideration	3	1		4
Recognise wrong/redress		1		1
Total	14	11	1	26

In six cases respondents put forward a substantive legal argument as to why the EOCV should decline the complaints as frivolous, vexatious, misconceived or lacking in substance (as provided for under s 108 of the EOA). In one case this was because the complaint had taken action in relation to her dismissal in the Australian Industrial Relations Commission. In another case the respondent claimed that the complainant was a casual contract worker and not an employee and the EOCV had no jurisdiction to entertain the complaint, despite the fact that s 4(1) of the EOA provides for a broad understanding of employment that expressly includes contract workers. Interestingly, in one case it was asserted that the treatment claimed could not be considered discrimination because what the complainant was seeking was 'more favourable treatment'. While such a claim reflects a qualified reading of the relevant legislative provisions,<sup>35</sup> it is entirely consistent with a retreat from a more substantive understanding of equality in public and political discourse to a strictly equal treatment model (Charlesworth, 1999: 22-4), and a construction of any accommodation of work/family responsibilities as an unfair advantage. The claim of 'more

favourable treatment' accorded those with family responsibilities is also echoed by a complainant who stated she had been denied leave to attend a doctor's appointment, while a co-worker with children was able to access leave to attend a family function. She claimed her *non-parental* status was the basis of the less favourable treatment she had received. The argument of more favourable or special treatment rests on an assumption, as Beth Gaze notes, that what is sought represents an advantage over others rather than treatment which aims to improve equality by taking account of the person's different situation and consequent need for different treatment (2002: 347).

As can be seen in Table 3, the most frequent employer response (in 23 of the 26 work/family complaints) was to dispute the interpretation of the facts alleged by the complainant. That is, it was not the events or detriments outlined that were challenged, but their interpretation as unlawful discrimination. In many of these responses the presence of anti-discrimination and/or EEO policies is assumed to have an *inoculation effect*, which somehow operates to make an organisation *immune* to claims of discrimination (Charlesworth, 2003: 227-8). A claim of discrimination is perceived as an affront to policies designed to prevent it. This provides the organisational impetus to define the alleged discrimination away and argue that the behaviour, or detriment complained of, falls outside the parameters of that policy.<sup>36</sup> The invocation of employer anti-discrimination policies can be used both to validate employer actions and to ward off the threat of any vicarious liability of the organisation (under s 102 of EOA).

Many respondents reframed the facts claimed and the rationale for any detrimental treatment as either the poor performance of the complainant (in five complaints) and/or the operational or business requirements of the organisation (in a total of eight complaints, including in one that also involved a substantial legal argument). Both sorts of responses work to deflect any broader organisational responsibility for discrimination. The echo of both worker deficit and operational requirements is illustrated in a complaint where the employer response was that 'permanent part-time work was replaced with casual employment both as a result of economic factors and poor performance by the complainant in her duties, not on the basis of her pregnancy'. In one case, it was the complainant's comparative inadequacy as a prospective employee (although her status as prospective or actual employee was one of the matters in dispute) that

was claimed to be the basis of not hiring her. The respondent employer stated the decision not to hire her was not based on her pregnancy but that there was a better suited and experienced applicant for the job. The respondent went on to say 'as the position entails heavy lifting there are occupational health and safety issues involved but this did not affect the eventual decision to hire another person' suggesting that the fact of the complainant's pregnancy provided an important context if not a ground for her treatment.

Business or operational requirements were the rationale offered by respondents for the any [which word?] detriment experienced by complainants in eight cases. In several instances this involved changes to previous arrangements requested by the complaint to accommodate his or her family responsibilities. In one case outlined above an employee was required to attend the workplace five days a week after a period of being allowed to work four days rather than five to accommodate her parental responsibilities when the company changed locations. The employer response was that every effort had been made to support the complainant to balance her work and family commitments. However, while the company recognised the need to maintain flexibility in the workplace, it was claimed the previous arrangements had impacted on the workload of other employees and as a consequence she was now required to attend the workplace five days per week.

In this or other employer responses few details were provided as to the nature of the operational requirements or of any consideration of other alternatives that could potentially meet the needs of both the respondent employer and the complainant. The choices that are made by employers and managers day in and day out about the organisation of work are not represented as such and remain hidden behind assertions of seemingly immutable operational or organisational requirements. For example, the refusal to allow a complainant to move onto day shift and not undertake overtime so he could care for his son who had come to live with him was justified on the basis that there were no suitable positions available on the day shift and further that that the requirement to perform reasonable overtime was reasonable.<sup>37</sup> In another case, despite reported cases that would indicate that employer refusal to allow part-time work in senior or supervisory positions needs to be accompanied by serious consideration of the request (see, for example, *Bogle v Metropolitan Health Service Board*,

2000), the respondent asserted that part-time employment was 'not appropriate for the coordinator role, which is a full-time role supporting the management team and managing two administrators'. As a consequence, it was argued that the request to attend the workplace on a full-time basis was 'a reasonable management and operational requirement'.

In other cases any *discriminatory effects* of the pursuit of commercial interests or decisions made to change the way work had been organised were simply discounted. This is reflected in a case where the complainant had asserted that a proposed shift change made it difficult for him to care for his child. The employer response was that 'the shift change is necessary to bring this production line in line with the rest of the plant'; and further 'it has been explained to employees and they were given ample to time to arrange their affairs'. Such a response underpins an understanding of any accommodation of work/family responsibilities as entirely contingent on management discretion as to the way in which work should be organised. What is fundamentally at issue in this and in many of the other work/family discrimination complaints is both the right of employers to organise the workplace as they see fit, and an acceptance of the ways in which work is organised as somehow fixed and unalterable. This is accompanied by a consequent denial of responsibility for any collateral detriment to employees in the pursuit of business interests. That is, employer-initiated change or flexibility is privileged in a way in which employee-initiated flexibility is not.

Now the view that employers should have the right to operate the workplace as they see fit and that this right is not or should not be substantially effected by the operation of anti-discrimination law is not the view of some respondent employers. Peter Anderson, the Director of Workplace Policy for the Australian Chamber of Commerce and Industry, provides a telling view of anti-discrimination law. Stating that employers accept the general principle of equal opportunity that underpins discrimination law, he goes on to say:

Discrimination law must, however, necessarily be qualified. It should represent a balance of interests, and it operates most efficiently when it is targeted at specific conduct rather than imposing far reaching or unspecified duties. The specific needs of smaller and medium sized businesses need to be taken into account in framing and implementing the law. In particular, employers lose confidence in discrimination law if

it goes beyond the boundaries of common sense or is unbalanced in content or enforcement (Anderson, 2004: 906).

The contingent status of anti-discrimination law and the primacy of business needs were reflected even in those responses lodged by lawyers on behalf of respondents. While respondents were much more likely to obtain legal representation than complainants,<sup>38</sup> there was little reference to the substance of the relevant provisions and no reference at all to any of the relevant work/family case law where such representation was obtained.<sup>39</sup> Discourses about business or operational requirements and managerial discretion to determine just what these requirements **[were?]** were far stronger. Such discourses are reflected not only in employer arguments in reported work/family decisions, but also in some of the more recent determinations in work/family case law. The view of the primacy of business interests and the rigidity and neutrality of work organisation as 'commonsense' has been recently echoed in the Victorian Court of Appeal decision in *Victoria v Schou* (2004) where the court found that it was 'plain beyond argument' that it was reasonable to require Ms Schou to be present at her workplace rather than telecommute (at [24]).

Despite the growing community and political awareness of the issues of work/family balance, there is little evidence in many of the employer and management responses to claims of work/family discrimination that any serious consideration has been given to accommodating employee needs for some flexibility to balance work and family. Assumptions that the assertion of employer prerogative and/or the immutability of work organisation are a sufficient response to such claims both reflect and shape understandings of what is *unlawful* work/family discrimination in the workplace. Such understandings not only determine the nature of the environment that employees work in but also responses to any claim of discriminations. These responses in turn will determine, at least to some extent, the discourse used in the further negotiation of that claim (see Edelman et al, 1993: 504), and may provide a rationale for complaints to be declined by human rights bodies before they are referred to conciliation.

#### *Workplace understandings of work/family discrimination*

So what do these disparate discourses and counter discourses around work/family discrimination tell us? At a broad level the EOCV



complaints provide an illustration of the contingent access many workers have to family-friendly benefits across a wide range of Australian workplaces. They also point to the existence and practical effect of family-hostile work conditions, such as casual employment and inflexible working time arrangements, and the failure of the current regulatory regime to ameliorate such conditions. The claims of both direct and indirect discrimination on the basis of pregnancy, parental and carer **[responsibilities?]** provide direct evidence of workplace conflict around work/family and allow us to glimpse a more systemic family-hostile and women-hostile work organisation underpinned by the norm of the 'ideal worker', that is not always visible to individual complainants or respondents.

Labour market and employment level data suggest that work/family imbalance and conflict are common, particularly for women with dependent children (Campbell and Charlesworth, 2004). However, most of the EOCV complainants focused on their individual experience of work/family discrimination. They varied as to the extent to which they complained of an overt act of discrimination, such as dismissal because they were pregnant, or about the lack of accommodation by their employer of their parental status, such as in access to part-time work and compatible shift rosters. Even in claims of indirect discrimination, where the focus is on the discriminatory effect of apparently neutral rules or conditions, a workplace understanding of discrimination as something that occurs between or to individuals means complainants rarely see it as an organisational or a social problem. This exacerbated by the individual complaint-handling requirements of the EOA that, like other Australian anti-discrimination jurisdictions, require that complainants specify any detriment that has occurred to them *as individuals*. Thus work/family complaints become focused on the individual worker and in many cases on the lack of a 'reasonable accommodation' of their individual 'special' needs rather than on any systemic discrimination or disadvantage.

Indeed both employers and employees represented in these complaints appear to accept that the best employees can hope for is some temporary accommodation of these special needs. For most respondents the family responsibilities of workers are seen as outside the employer's realm of responsibility. Any requests for accommodation or for flexible working time arrangements to help employees manage paid and unpaid work responsibilities are seen as emanating from

individuals' 'choices' to take on both family work and market work. Operational requirements are not, however, viewed as similarly freely chosen or as a by-product of managerial decision-making and discretion. Work organisation and task allocation appear to be naturalised and employees can 'choose' to fit in or not. Even where employers may have been provided some accommodation of employee needs, such accommodation cannot be taken for granted. As we have seen, previously negotiated family-friendly arrangements can be altered with little consideration of any impact on employees. The needs of the organisation are paramount. As a consequence, workers with family responsibilities who cannot fit in with a seemingly fixed organisation of work – that can only be adjusted to meet operational requirements – become constructed as the problem, with a shift in focus from 'family-hostile' work organisation to the deficits of individual workers. In this way organisational and managerial norms compete with legal norms around discrimination in the workplace and indeed in the complaint process.

The EOCV complaints highlight the way in which the legal proscription of certain discrimination on certain work/family grounds provides broad parameters for workplace negotiations and disputes around work and family. As Beth Gaze has pointed out, 'legislation can create a space and a vocabulary for understanding discrimination', including on the basis of family responsibilities (Gaze, 2004). The process of making a statement of complaint for many complainants was a process of framing and reframing their grievances using the vocabulary of the legislation on which they sought to rely. In doing so, however, the detail, messiness and intersectionality of the experiences of work/family imbalance may be put to one side. Further, the use of such grounds as parental and carer status can work to hide the gendered take up of primary caring responsibilities, overwhelmingly by women. In this way the sex discrimination that is integral to discrimination against mothers is rendered invisible. Men may also fall foul of the ideal worker norm. However, the men represented in the EOCV complaints remain atypical, not only in seeking accommodation of their family responsibilities, but also in pursuing a claim of discrimination when this accommodation was refused (Bittman et al, 2004: 177-80).

## Conclusion

Most Australian anti-discrimination jurisdictions have introduced provisions to directly protect workers with family responsibilities. Such legislation goes beyond what is currently available in many countries, including the United States and the United Kingdom where those wishing to pursue claims of discrimination on the grounds of their caring responsibilities have had to rely in the main on indirect sex discrimination provisions (Conaghan, 2004; Williams and Cooper, 2004). Like family-friendly policies, legislation directly proscribing discrimination against those with caring responsibilities acknowledges that market work and family work are intertwined and as such has the potential to challenge a conception of the workplace as 'a discrete and bounded sphere of social and economic activity in which its participants are fully and exclusively engaged' (Conaghan, 2002: 56).

So has the radical potential of explicitly proscribing discrimination on the grounds of family responsibilities been realised in Australia? In her analysis of the origins and impact of the NSW carer's responsibilities legislation, and Australian work/family case law more generally, Juliet Bourke argues that that 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 (2004: 67). This has been undeniably important, at least in the State jurisdictions that proscribe both direct and indirect discrimination on work/family grounds. The extension of anti-discrimination provisions to parents, carers and workers with family responsibilities also effectively opens up a mechanism for men to claim work/family discrimination as reflected in six of the EOCV complaints discussed in this chapter. Bourke claims that the Australian work/family case law has 'challenged the boundaries imposed by employers on workplace flexibility and found employers wanting' (2004: 61).<sup>40</sup> However, what the analysis of the EOCV complaints and the responses to those complaints arguably demonstrate is just how resilient the boundaries imposed by employers on workplace flexibility are, particularly when they are tackled on an individual basis, and just how vigilantly those boundaries are policed lest it be suggested that employers have any responsibility for the unpaid family work on which the supply and demand for market work depends.

Is it possible then for anti-discrimination law to challenge the organisation of work around the unencumbered ideal worker? Two limitations of anti-discrimination legislation in this regard are its remedial nature (Murray, 2005: 82) and the individualised complaint process, both of which constrain any systemic change. A more critical impediment, however, is the requirement that a comparison be made between the complainant's situation and that of a benchmark figure; that is, someone without parental or carer responsibilities or who is not pregnant. As Anna Chapman argues, it is in this way that anti-discrimination law itself reinforces the unencumbered worker as normative (Chapman, 2004). The practical day-to-day operation of legal prohibitions against discrimination in employment also occurs in a workplace context, where legal norms of non-discrimination compete with sometimes contradictory organisational norms around performance, efficiency, risk and the ways gender is done [**correct? sense?**]. The prohibition of discrimination does influence what happens in the workplace and the way in which certain behaviour or practices are perceived to be discriminatory or not. At the same time, however, such understandings are mediated by managerial and workplace norms and the internalisation of legal values occurs on the organisation's terms (Edelman and Suchman, 1999). Thus employee requests for the workplace accommodation of their family responsibilities may be rejected on the basis of perceived costs and disruption to the flow of work, a market-based argument that may be seen as entirely consistent with the 'reasonableness' test of indirect discrimination provisions (see Lee Adams, this volume).

Nor do workplaces operate in a vacuum. Dominant political, social and economic understandings of gender equality, government employment and industrial relations policy, and neo-liberal discourses of the market, also contribute to the workplace understandings of work/family discrimination and to the framing of claims of discrimination and responses to those claims. While the issue of work/family conflict or imbalance has been a significant one in the media and in political and community debate in Australia, the parameters of that debate have been set by the primacy of enterprise-defined operational requirements, the deregulation of the labour market and the rise of managerial discretion (see Bray and Waring, 2005). On the one hand, it is argued that any provision of family-friendly benefits or any accommodation of individual workers with

family responsibilities should be conditional on the operational requirements of individual employers (Howard, 2003: 5-6) and, on the other hand, that the provision of some small additional collective rights for workers with family responsibilities would force employers to discriminate against women.<sup>41</sup> The muddled discourses around what constitutes 'discrimination' more generally can work to construct family-friendly benefits as more favourable treatment and also to hide the extent to which direct and indirect discrimination against women (and workers with caring responsibilities in general) is institutionalised, legitimised and entrenched (WEL, 2004: 9). In a deregulated labour market where basic employee rights are being steadily eroded, this creates the space for the dominance of managerial discretion not only in deciding if and on what basis employee requests for flexibility are to be accommodated, but also in shaping what might constitute work/family discrimination.

Given the limitations of work/family anti-discrimination legislation, how then can workers with family responsibilities be enabled, as is the aspiration in art 1 of the Workers with Family Responsibilities Convention, to engage in employment without being subject to discrimination and with minimal conflict between their employment and family responsibilities? Clearly effective change in the way in which market work is organised cannot occur without changes in the gendered division of labour in family work (Gaze, 2004). But likewise the workplace shapes the gender regime within families and households and it remains important not to lose sight of the way in which market work structures how, on what basis and by whom unpaid family work is undertaken. As such the workplace remains a central site of change and is very much intertwined with the way family responsibilities are manifested and understood in the workplace context.

If we are to enable workers with family responsibilities to engage in employment without being subject to disadvantage and minimise conflict between market work and family work, we need to challenge the persistence of the 'ideal worker' as the template around which work is organised and regulated. As Kerry Rittich argues, given the historically gendered division of labour in family work, 'part of what labour market equity for women requires is not simply formal means of non-discrimination, but access to labour markets under terms and conditions that do not disadvantage those who undertake unpaid work'

(2002: 132). Change in **[word(s) missing?]** needs to occur in three main areas. First, we need seriously to challenge the organisation of work and the design of jobs; not only for workers with family responsibilities but for workers generally. Secondly, we need to secure decent minimum standards, which better balance the needs of employees against those of the employer, particularly in relation to the quantum and scheduling of working hours (Rubery et al, 2005: 26). As Jill Murray aptly puts it: ‘When push comes to legal shove, without statutory intervention or the creation of legally binding award entitlements of a positive nature, little real change can be achieved for those who combine work and care’ (Murray, 2005: 83).

Thirdly, we need a mechanism to allow employees to ‘normalise’ their requirements for a family-friendly workplace and to require employers to consider the needs of ‘non-ideal workers’ (Gaze, 2005: 106). One such mechanism is a ‘right to request’, which in limited form has been provided for in the recent AIRC *Family Provisions Test Case* (2005).<sup>42</sup> This decision provides, among other things, for a right for an employee returning from parental leave to request part-time work up until their child is of school age with a duty on employers to not unreasonably refuse the employee’s request. This provision is based on similar UK legislation which provides employees (with a child under six years or a disabled child under 18 years) with the right to request a change to the hours, times and location of their work to meet their caring responsibilities. There is a corresponding duty on employers to consider these requests seriously, only being able to refuse a request on set business grounds.<sup>43</sup> Such legislation still reinforces the concept of an individual accommodation of individual needs and does not necessarily challenge the ideal worker norm around which work is organised. However, there is some evidence of the relatively powerful effect of this relatively weak and contingent right on employer practice ‘by providing a little more elbow power’ in negotiations with line managers and employees (Hegewisch, 2004: 10). It is precisely this ‘elbow power’ and room for negotiation that many of the EOCV complainants were seeking.

## Notes

1. The Equal Opportunity Commission of Victoria (EOCV) complaint data was collected as part of a larger research project conducted as part of an Australian Research Council (ARC) Post Doctoral fellowship (DP0449672).

I am grateful to both the ARC and the EOCV for making this research possible. The views expressed in the article are my own.

2. South Australia and Victoria were the first Australian jurisdictions to proscribe sex discrimination in employment in the *Sex Discrimination Act 1975* (SA) and the *Equal Opportunity Act 1977* (Vic). Currently, the federal legislation prohibiting sex discrimination in employment is the *Sex Discrimination Act 1984* (Cth) (SDA). At the State level, sex discrimination in employment is proscribed in the *Anti-Discrimination Act 1977* (NSW), the *Equal Opportunity Act 1984* (SA), the *Equal Opportunity Act 1984* (WA), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1991* (Qld), the *Anti-Discrimination Act 1992* (NT), the *Equal Opportunity Act 1995* (Vic) and the *Anti-Discrimination Act 1998* (Tas).
3. For comprehensive critiques of the limitations of Australian anti-discrimination law, see Thornton, 1999; Hunter, 1992; ALRC, 1995; Gaze, 2002.
4. See *Anti-Discrimination Act 1977* (NSW) s 49S; *Anti-Discrimination Act 1998* (Tas) s 16; *Equal Opportunity Act 1995* (Vic) s 6; *Equal Opportunity Act 1984* (WA) Part IIA; *Anti-Discrimination Act 1994* (NT) s 19.
5. However, there has been a recent decrease in complaints lodged with human rights bodies more generally, including on work/family grounds. The NSW Anti-Discrimination Board attributes the drop in complaints partly to a new method of counting complaints and the loss of some resources and staffing (ADB, 2004: 11-12). The EOCV lists a number of possible reasons for a decrease in complaints, including better informal dispute resolution, concern about fear of retribution, not wanting to make a fuss; and because the outcomes are not worth the effort to formally lodge a complaint (EOCV, 2004: 34).
6. In 1997-98 there were 15 complaints on grounds of family responsibilities and only 61 on the grounds of pregnancy under the SDA (HREOC, 1998: 28). HREOC provides no breakdown on the area of complaint for complaints on the grounds of pregnancy. However its 2003-04 data show that 87 per cent of all complaints received under the SDA are in the area of employment (HREOC, 2004). The increased awareness of work/family discrimination, particularly around pregnancy, can also be linked to the HREOC Inquiry into Pregnancy and Work (HREOC, 1999).
7. Note a complainant may lodge more than one complaint. The differing grounds or attributes raised by complainants clearly reflect the legislation under which they are trying to fit. For example, in the study outlined in this article complaints of discrimination on the grounds of parental status included post maternity leave issues. Under the SDA such complaints are typically lodged on the grounds of sex and/or pregnancy.
8. With the exception of the *Racial Discrimination Act 1975* (Cth).
9. This analysis focuses on the transformations whereby an individual's experience is perceived as injurious (naming); becomes a grievance where another person or entity is held responsible for the perceived injury (blaming), and the grievance is voiced to the person or entity believed to be responsible and a remedy sought (claiming). When a claim is rejected or resisted, even partly, it becomes a dispute (Felstiner et al, 1980-81).
10. In a recent Australian study in the male-dominated IT sector, Rosemary Hunter uses focus group interviews with women IT professionals from a range of private and public sector workplaces to highlight the phenomenon

- of the *denial of discrimination*, and argues that it is part of the process of 'active identity formation and projection' (Hunter, 2005).
11. The employment rate for women aged 15-64 has increased from 45 per cent in 1980 to 62 per cent in 2003. Women with dependent children have also increased their participation in the paid workforce from very low levels. In 1985, the employment rate for this group was 46 per cent, which rose to 60 per cent in 2003. Women with dependent children made up around 32 per cent of all working age women in 2003 (Campbell and Charlesworth, 2004: 5, 7).
  12. In 2003, OECD figures show that 41.4 per cent of Australian women engaged in paid employment worked on a part-time basis (cited in Campbell and Charlesworth, 2004: 8). For mothers with dependent children, part-time work is a way of combining paid work and family responsibilities. In 2003, 35.5 per cent of mothers with dependent children worked part time, with only 25.7 per cent working on a full-time basis (Campbell and Charlesworth, 2004: 8).
  13. 'Employment' under the EOA is broadly defined and includes under s 4(1) also engagement under a contract for services; and work that is remunerated wholly or partly on commission. However, the EOA also provides that some employers may discriminate in determining who should be offered employment, including in the provision of domestic or personal services in a private home (s 16) in the employment of relatives in a family business (s 20), and where the employer employs no more than the equivalent of five people on a full-time basis (s 21).
  14. EOA s 6. In s 4(1) 'parent' is defined as including step-parent, adoptive parent, foster parent and guardian with 'parental status' meaning the status of being a parent or not being a parent; 'carer' means a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis
  15. Total inquiries included 15 on the grounds of breastfeeding, 81 on the grounds of carer status, 399 on the grounds of parental status and 370 on the grounds of pregnancy (EOCV 2004: 35).
  16. Complainants may make a complaint on more than one ground or attribute under the EOA. In the area of employment there were no formal breastfeeding complaints, 50 carer status complaints, 132 parental status complaints and 104 pregnancy complaints (EOCV 2004: 36).
  17. This ratio of inquiries to complaints in this area is much higher than that for inquiries and complaints received by the NSW Anti-Discrimination Board under the carers' responsibilities provisions of the NSW *Anti-Discrimination Act 1977*, and may reflect different coding practices. In 2003-04 there were 535 complaints on the grounds of carer responsibilities, with 43 formal complaints received in the area of employment (ADB 2004: 12), a ratio of less than one out of every 10 inquiries. Complaints lodged on the grounds of sex under the NSW legislation include discrimination on the grounds of pregnancy.
  18. The Commission is constituted by five members appointed by the Governor in Council on the nomination of the relevant Minister and includes a chief conciliator (EOA s 163).
  19. In 2003-04, a total of 15 complaints on the grounds of pregnancy (8 complaints) and parental and carer status (7 complaints) in the area of



- employment were referred to VCAT (unpublished data provided via email to author by VCAT, 1 August 2005). While no breakdown is provided as to the outcome of complaints on these grounds, aggregate data indicates that 70 per cent of all anti-discrimination complaints referred to VCAT finalise before or at mediation (VCAT, 2004: 16).
20. Section 192 of the EOA provides that any member or staff member of the Commission can only divulge any information obtained in the course of performing functions or duties of the Commission if it is necessary to perform those functions or duties. There has been much criticism of the secrecy surrounding the conciliation process under anti-discrimination law, which arguably goes far beyond that required under the legislation. See Hunter and Leonard, 1995: 25-6; Thornton 1990: 151.
  21. Although HREOC now publishes an online conciliation register detailing the outcomes of conciliated and finalised complaints under the relevant federal anti-discrimination legislation: see <[http://www.hreoc.gov.au/complaints\\_information/register/index.html](http://www.hreoc.gov.au/complaints_information/register/index.html)>.
  22. Australian Research Council Discovery Grant DP0449672 (2004-06). The larger project is concerned with the ways in which women's workplace disadvantage is recognised and understood within the workplace. The collection of data from EOCV complaint files is part of the first phase of this research.
  23. Under a confidentiality agreement with the EOCV, and following approval from the respective Human Ethics Committees of the Victorian Department of Justice and RMIT University, complaint files were made available for analysis at the EOCV premises in late 2004.
  24. None of the other complainants who claimed discrimination on other grounds, including on the grounds of sex, raised what could be understood as work/family discrimination. This may reflect the broader coverage of the Victorian legislation compared to the SDA, where the limited grounds of family responsibilities mean that complainants who do not use the ground of pregnancy may rely on the grounds of sex. See, for example, the HREOC Conciliation Register for complaints conciliated and finalised under the SDA in the period 1 January to 30 June 2004, where two of the 30 conciliated work/family complaints were on the grounds of sex discrimination alone. <[http://www.hreoc.gov.au/complaints\\_information/register/sda/pdf/sda\\_jan04\\_june04.pdf](http://www.hreoc.gov.au/complaints_information/register/sda/pdf/sda_jan04_june04.pdf)>.
  25. This is fewer complaints than might be expected based on annual EOCV data. Over 2003/2004, a total of 286 complaints were made on work/family grounds (EOCV, 2004: 36).
  26. Or indeed in earlier studies of anti-discrimination complaints. For example, in the Hunter and Leonard study of sex discrimination complaints, the occupation of complainants were concentrated in white collar and professional jobs and the industries in which they worked were concentrated in public administration and defence and the wholesale/retail industry (1995: 3, 6)
  27. For example, *Victoria v Schou* (2004), *Evans v National Crime Authority* (2003), *Howe v Qantas Airways Ltd* (2004), *Kelly v TPG Internet Pty Ltd* (2003).
  28. Where it could be ascertained, data was also collected on the number of employees in the respondent organisation. This was able to be determined for 18 respondents. The data indicates that, of these, a third (six) employed

- less than 20 employees, one respondent employed between 20 to 50 employees and three respondents between 100 to 200 employees.
29. In this chapter the term 'maternity leave' does not necessarily reflect any statutory entitlement to unpaid or paid leave or the provision of any enterprise-based paid leave. It refers simply to the period of time complainants took off before the birth of their child and when they returned to work.
  30. Two complainants made complaints on the grounds of both parental status and pregnancy. One has been coded as a complaint on the grounds of pregnancy as while the treatment complained of had post-pregnancy consequences, the treatment was said to occur while she was pregnant. The other complaint has been coded as on the grounds of parental status because the treatment complained of occurred post childbirth.
  31. Such experiences provide a challenge to a recent claim by a spokesman for the federal Minister for Workplace Relations, Kevin Andrews, who claimed that women returning to work from maternity leave in some fields were in a strong bargaining position. 'You can talk to employers and bargain and say these are the conditions and hours I would like' (Adele Horin 'Its time to share the load, but the formula does not add up', *Sydney Morning Herald* 23 June 2005).
  32. For example, *Hickie v Hunt and Hunt* (1998), *Bogle v Metropolitan Health Service Board* (2000), *Escobar v Rainbow Printing Ltd (No 2)* (2002) and *Mayer v ANSTO* (2003).
  33. For example, Hunter and Leonard (1995: 15) found that in more than half of the complaints studied the respondent denied the facts asserted by the complainant. However, this difference may reflect the inclusion of sexual harassment claims in that study.
  34. Ibid. [to what does this refer?]
  35. While not as comprehensive as the 'special measures' provision in s 7D of the SDA, which provides that a person may take special measures for the purpose of achieving substantive equality between, for example, men and women, the EOA also provides in s 82(1) that 'anything done in relation to the provision to people with a particular attribute or special services, benefits or facilities that are designed to meet the special needs of those people or to prevent or reduce a disadvantage suffered by those people in relation to their education accommodation, training or welfare'.
  36. In public determinations too, assumptions have been made that if a respondent has equal opportunity or affirmative action policies, it may be less likely to have acted in a discriminatory way, such as in *O'Grady v Challenge Bank Limited* (1994).
  37. Interestingly this response was sent in on the respondent employer's behalf by the relevant national employer association. While what constitutes 'reasonable overtime' is rarely specified in awards, this assertion would not appear to be supported by the test case standard established by the AIRC in the *Reasonable Hours Test Case* (2002). This provided that an employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard, among other things, to the employee's personal circumstances, including any family responsibilities.
  38. Only four of the 26 complainants were legally represented when they lodged their complaint compared to 10 respondents who had legal

- representation when they responded to the statement of complaint. Another three respondents were represented by relevant employer associations.
39. In their study of the outcomes of conciliation in sex discrimination cases Hunter and Leonard also observed that the majority of arguments raised by respondents related to the facts of the case rather than to the application of the law (1995: 16).
  40. Beth Gaze takes a less sanguine view of Australian work/family case law, particularly that around access to part-time work, highlighting the legal complexity and unpredictability of work/family litigation (2005: 102).
  41. For example, in its response to the ACTU claim in the *Family Provisions Test Case* (2005) before the AIRC, the federal government argued that employers may refuse to employ women if current entitlements to work and family benefits were extended (Australian Government, 2004: 90). A similar argument was also raised in the 2002 Australian maternity leave debate where it was asserted by government ministers that the provision for paid maternity leave would 'discriminate' against 'stay-at-home mums'.
  42. It is unclear what, if any, practical impact this decision will have in the current climate. The radical industrial relations legislative changes currently proposed by the federal government may well supersede the effect of this decision and its implementation as part of the (unpaid) parental leave provision in the *Workplace Relations Act 1996*.
  43. The Blair government is currently undertaking widespread consultation with a view to extending this right to request to employees with older children and other caring responsibilities (DTI, 2005: 70-5).

## References

- Anderson, P (2004) 'The Sex Discrimination Act: An employer perspective – twenty years on' 27(3) *University of New South Wales Law Journal* 905.
- ADB (Anti-Discrimination Board) (2004) *Annual Report 2003-2004* <[http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2003\\_2004](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2003_2004)>.
- Astor, H and C Chinkin (1992) *Dispute Resolution in Australia* Sydney: Butterworths.
- Australian Government (2004) *Family Provisions Case 2004: Final Submission* 19 November, <[http://www.airc.gov.au/familyprovisions/comm/FinalComm\\_Subn.pdf](http://www.airc.gov.au/familyprovisions/comm/FinalComm_Subn.pdf)>.
- ALRC (Australian Law Reform Commission) (1994) *Equality Before the Law: Justice for Women Report* No 69 Parts I & II, Commonwealth of Australia.
- Baxter, J, B Hewitt and M Western (2003) *Post-Familial Families and the Domestic Division of Labour: A View from Australia* HILDA Survey Working Paper, School of Science, University of Queensland.
- Berns, S (2002) *Women Going Backwards: Law and change in a family unfriendly society* Aldershot: Ashgate.
- Bittman, M, S Hoffman and D Thompson (2004) *Men's uptake of family friendly employment provisions* Policy Research Paper 22, Department of Family and Community Services. Canberra: Commonwealth of Australia.

- Bourke, J (2004) 'Using the Law to Support Work/Life Issues: The Australian Experience' *American University Journal of Gender, Social Policy and the Law* 12.
- Bray, M and P Waring (2005) 'The rise of managerial prerogative under the Howard government' Paper for the *IR Changes Report Card* forum, Law School, University of Sydney, 21 June.
- Campbell, I (2002) 'Extended Working Hours in Australia' 13(1) *Labour and Industry* 91.
- Campbell, I and S Charlesworth (2004) *Background Report: Key Work and Family Trends in Australia* Melbourne: Centre for Applied Social Research, RMIT University.
- Chapman, A (2004) 'Work-family Conflict and Australian Labour Law' paper presented at the *2004 Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) Conference*, Noosa Lakes Resort, Noosa, <[http://www.griffith.edu.au/school/gbs/irl/airaanz2004/Papers/Chapman\\_044.pdf](http://www.griffith.edu.au/school/gbs/irl/airaanz2004/Papers/Chapman_044.pdf)>.
- Chapman, A and G Mason (1999) 'Women, Sexual preference and Discrimination Law: A Case Study of the NSW Jurisdiction' 21 *Sydney Law Review* 525.
- Charlesworth, S (1999) 'Working Mums: The Construction of Women Workers in the Banking Industry' *Journal of Interdisciplinary Gender Studies* 4(2) 12-28
- Charlesworth, S (2001) *In the Shadows of the Law: Sex Discrimination in the Australian Banking Industry* Doctoral thesis. Melbourne: School of Law & Legal Studies, La Trobe University.
- Charlesworth, S (2003) 'Paying the Price: The Cost of the EEO in the Australian Banking Industry' *Gender – From Cost to Benefits: Refereed Proceedings from the 6th Interdisciplinary and International Symposium on Gender Research*, University of Kiel, Westdeutscher Verlag.
- Charlesworth, S, I Campbell, B Probert with J Allan and L Morgan (2002) *Balancing work and family responsibilities: Policy Implementation Options* A report for the Victorian Departments of Premier and Cabinet & Innovation, Industry and Regional Development, Melbourne, Centre for Applied Social Research, RMIT University.
- Conaghan, J (2004) 'Women, Work and Family: A British Revolution?' in J Conaghan, R Fisch and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative practices and Possibilities* Oxford: Oxford University Press.
- Conaghan, J (2002) 'The family-friendly workplace in labour law discourse: Some reflections on *London Underground Ltd v Edwards*' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* The Netherlands: Kluwer Law International.
- Craig, L (2003) 'How do they find the time? A time-diary analysis of how working parents preserve their time with children' Paper for the Australian Social Policy Conference 'Social Inclusion' 9-11 July, University of New South Wales, Sydney.
- DTI (Department of Trade and Industry) (2005) *Work and Families: Choice and Flexibility* A Consultation Document February 2005, <[http://www.dti.gov.uk/er/choice\\_flexibility\\_consultation.pdf](http://www.dti.gov.uk/er/choice_flexibility_consultation.pdf)>.

- Edelman, L, J Lande and H Erlanger (1993) 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace' 27(3) *Law & Society Review* 496.
- Edelman, L and M Suchman (1999) 'When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law' 33(4) *Law & Society Review* 941.
- EOCV (2004) *Annual Report 2003/2004* Melbourne: Equal Opportunity Commission of Victoria.
- Felstiner, W, R Abel A Sarat (1980-81) 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' 15 *Law & Society Review* 631.
- Gaze, B (1997) 'Some Aspects of Equality Rights: Theory and Practice' in B Galligan and C Sampford (eds), *Rethinking Human Rights* Sydney: Federation Press.
- Gaze, B (2002) 'Context and Interpretation in Anti-Discrimination Law' 26 *Melbourne University Law Review* 325.
- Gaze, B (2004) 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionments and Alternatives' *Women, Work and Equity Forum* University of Sydney, 1 August, <[http://www.hreoc.gov.au/sex\\_discrimination/index.html](http://www.hreoc.gov.au/sex_discrimination/index.html)>.
- Gaze, B (2005) 'Quality Part-time Work: Can law provide a framework?' 15(3) *Labour and Industry* 89.
- Guest, K (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984* Research Paper No 16, Department of the Parliamentary Library, Information and Research Services.
- Hegewisch, A (2004) 'Individual Working Time Rights in Germany and the UK: How a little law can go a long way' Paper presented at *Working Time for Working Families: Europe and the United States Conference*, American University WCL, 7-9 June, Washington, DC. <<http://www.wcl.american.edu/gender/worklifelaw/publications/Hegewisch%20How%20a%20little%20law%20can%20go%20a%20long%20way.pdf>>.
- Howard, J (2003) 'Giving Australian Families Choice' *Options* No 17, August, <[http://www.sa.liberal.org.au/pyne/\\_pdf/Options\\_work\\_and\\_family.PDF](http://www.sa.liberal.org.au/pyne/_pdf/Options_work_and_family.PDF)>, 4-7.
- HREOC (Human Rights and Equal Opportunity Commission) (1998) *Annual Report 1997/1998* Sydney: HREOC.
- HREOC (1999) *Pregnant and Productive: It's a right not a privilege to work while pregnant*. Report of the National Inquiry into Pregnancy and Work Sydney: HREOC.
- HREOC (2002) *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* Sydney: HREOC.
- HREOC (2004) *Annual Report 2003/2004* <<http://www.hreoc.gov.au/annrep04/chap4.html>>.
- Hunter, R (1992) *Indirect Discrimination in the Workplace* Sydney: Federation Press.
- Hunter, R (2005) 'Perceptions of discrimination in IT organisations' Paper presented at the *Women, Work & IT: Contemporary perspectives on the reproduction of gender inequality in employment* Conference, University of Queensland, Brisbane, 23-24 June.
- Hunter, R and A Leonard (1995) *The Outcomes of Conciliation in Sex Discrimination Cases* Working Paper No 8, Centre for Employment and Labour Relations Law, Faculty of Law, The University of Melbourne.

- Murray, J (2005) 'Work and Care: New Legal Mechanisms for Adaptation' 15(3) *Labour and Industry* 67.
- Pocock, B (2003) *The Work/ Life Collision: What work is doing to Australians and what to do about it* Sydney: Federation Press.
- Rittich, K (2004) 'Feminization and Contingency: Regulating the Stakes of Work for Women' in J Conaghan, R Fisch and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative practices and Possibilities* Oxford: Oxford University Press.
- Rubery, J, K Ward and D Grimshaw (2005) 'The Changing Employment Relationship and the Implications for Quality Part-time Work' 15(3) *Labour and Industry* 7.
- Thornton, M (1990) *The Liberal Promise: Anti-Discrimination Legislation in Australia* Melbourne: Oxford University Press.
- Thornton, M (1999) 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the "New Corporatism"' 23 *Melbourne University Law Review* 749.
- Thornthwaite, L (1994) 'Ever-Widening Ripples: The Impact of Specialist Industrial Tribunals on Management Practice' 36 *Journal of Industrial Relations* 285.
- VCAT (Victorian Civil and Administrative Tribunal) (2004) *Your Voice in Dispute Resolution: 2003-04 Annual Report*, <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual\\_report\\_2003-2004/\\$file/complete\\_2003-2004\\_annual\\_report.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_2003-2004/$file/complete_2003-2004_annual_report.pdf)>.
- Williams, J (2000) *Unbending Gender: Why Work and Family Conflict and What to Do About It* New York, Oxford University Press.
- Williams, J and H Cooper (2004) 'The Public Policy of Motherhood' 60(4) *Journal of Social Issues* 849.
- WEL (Women's Electoral Lobby) (2004) *Australian Industrial Relations Commission Test Case: Final Submission*, November 2004 <[http://www.airc.gov.au/familyprovisions/other/WEL\\_Final\\_Nov04.pdf](http://www.airc.gov.au/familyprovisions/other/WEL_Final_Nov04.pdf)>.

## Cases

- Bogle v Metropolitan Health Service Board (2000) EOC ¶93-069
- Escobar v Rainbow Printing Ltd (No 2) [2002] FMCA 122
- Evans v National Crime Authority [2003] FMCA 375
- Hickie v Hunt and Hunt [1998] HREOCA 8
- Howe v Qantas Airways Ltd [2004] FMCA 242
- Kelly v TPG Internet Pty Ltd [2003] FMCA 584
- Mayer v ANSTO [2003] FMCA 209
- Reasonable Hours Test Case, AIRC, 2002, Print PR072002
- O'Grady v Challenge Bank Limited (unreported, HREOC, O'Connor K, 5 January 1994)
- Victoria v Schou (2004) 8 VR 120
- Victoria v Schou (2004) EOC ¶93-328 [same as previous one?]

## Legislation and Conventions

- Anti-Discrimination Act 1991 (Qld)

MANAGING WORK AND FAMILY AND ANTI-DISCRIMINATION LAW

Anti-Discrimination Act 1992 (NT)  
Anti-Discrimination Act 1998 (Tas)  
Anti-Discrimination Act 1997 (NSW)  
Discrimination Act 1991 (ACT)  
Equal Opportunity Act 1977 (Vic)  
Equal Opportunity Act 1984 (SA)  
Equal Opportunity Act 1984 (WA)  
Equal Opportunity Act 1995 (Vic)  
ILO Convention 111: Discrimination (Employment and Occupation) 1958  
ILO Convention 156: Workers with Family Responsibilities  
Sex Discrimination Act 1975 (SA)  
Sex Discrimination Act 1984 (Cth)  
Workplace Relations Act 1996 (Cth)