

Work-and-Care Initiatives: Flaws in the Australian Regulatory Framework

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ABSTRACT

The Australian labour law system was founded at the turn of the twentieth century upon a set of gendered breadwinner assumptions regarding work and care. Those gendered assumptions were formally displaced in Australia from the 1970s onwards, with a raft of legal entitlements developed over the subsequent forty or so years. Yet it is clear that many workplaces in Australia do not accommodate, and, indeed, are even hostile to, pregnant women, mothers, and other workers with substantial care responsibilities. This article reveals four themes of the Australian regulatory framework that together explain the inadequacies of the current work-and-care schemes in Australia.

I. INTRODUCTION

The Australian labour law system was founded at the turn of the twentieth century upon a work-and-care dynamic that constructed the activities of work and care as existing in wholly separate and gendered spheres of life. Work was an activity of male breadwinner husbands, while care was the sole domain of the workers' wives, who were housewives not engaged in the labour market.¹ Those gendered breadwinner assumptions of law were formally displaced in Australia from the 1970s onwards, with a raft of legal entitlements developed over the subsequent forty or so years. These included maternity leave and then non-gender specific parental leave, discrimination protections on grounds including sex, pregnancy, and family or care responsibilities, and the right to request an alteration in working arrangements in order to accommodate care responsibilities.

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¹ See e.g. *Ex Parte HV McKay* (1907), 2 CAR 1; Anna Chapman, "Work/Family, Australian Labour Law, and the Normative Worker" in Joanne Conaghan & Kerry Rittich, eds, *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005) 79 at 82-5.

More recently, from the early 2000s onwards, the heterosexed character of the legal entitlements has been challenged through the legal recognition of same-sex relationships.

Yet it is clear that many workplaces in Australia do not accommodate, and, indeed, are even hostile to, pregnant women, mothers, and other workers with substantial care responsibilities. A national review conducted by the Australian Human Rights Commission over 2013 and 2014 found that discrimination related to pregnancy, parental leave, and returning to work following parental leave was “pervasive” in Australian workplaces. The review notes that one in two mothers (49 percent) reported being treated unfairly or being disadvantaged in their workplace at some point.² Nearly a fifth (18 percent) reported job loss “during pregnancy, when they requested or took parental leave or when they returned to work.”³ Men also experience discrimination, with over a quarter (27 percent) of fathers (and partners of mothers who recently have given birth) reporting discrimination when requesting or taking parental leave or when they returned to work.⁴

The reasons underlying the ineffectiveness of the Australian regulatory framework regarding work and care are various and interrelated. Four themes emerge from this framework, which together explain the inadequacies of the work-and-care schemes. First, in their coverage, the various schemes favour full-time, longer-term continuous employment, which leaves out many women, and especially mothers, who are more likely to hold part-time and casual jobs. Second, the judicial interpretation of key legislative concepts has further narrowed the application of the schemes. Third, enforcement procedures are weak and sometimes non-existent. Finally, the failure of the legal framework to recognize and respond to the full diversity of families places some workers and their families outside of the protection of the law. Together, these four themes exemplify the shortcomings in the Australian attempt to substantively dislodge the breadwinner-homemaker framework.

The structure of this article is as follows. The main anti-discrimination law and labour law initiatives developed in Australia since the 1970s are outlined to provide the necessary background, and, following that, the four themes suggested above are drawn out.

² Australian Human Rights Commission (AHRC), *Supporting Working Parents: Pregnancy and Return to Work, National Review: Report* (Sydney: Australian Human Rights Commission, 2014) at 8 [AHRC, *Supporting Working Parents*]. The meaning of “mother” in these data is explained, but it does not appear to include lesbian co-parents (at 24).

³ *Ibid* at 27.

⁴ *Ibid* at 48-9. The employees surveyed were those who claimed the Dad and Partner Payment (DAPP), discussed below.

II. LAW REFORM: 1970 TO THE PRESENT

For the first half of the twentieth century, the Australian labour law system consciously and explicitly discriminated against women workers. For example, until 1966, the federal public sector deemed women to have “retired” upon marriage.⁵ Moreover, until the early 1970s, women workers were legally entitled to only a proportion of the male wage rate—which was initially 54 percent from 1912 onwards, then 75 percent from 1950 onwards—on the assumption that women workers financially supported themselves alone, while male workers financially supported a wife and children.⁶ These two sets of rules, which excluded married women from employment in the public sector and set wages based on gender, starkly illustrate the explicitly discriminatory basis of Australian labour law in the early twentieth century.⁷ In the modern era, law reform projects have focused on leave regimes to allow time off work for caregiving, redress for discrimination, and a “right-to-request” mechanism that allows workers to request a change to work arrangements to accommodate care responsibilities. These are outlined in turn.

A. Leave

The Australian labour law system recognizes two forms of leave regarding care responsibilities: leave following the birth or adoption of a child and, more recently, leave in relation to other caring responsibilities, such as the care of children in other contexts and the care of partners, frail or elderly parents, or other relatives. This latter leave is now known as personal/carer’s leave.

⁵ *Commonwealth Public Service Act 1922* (Cth), s 49, repealed by *Public Service Act 1966 (No 2)* (Cth), s 4.

⁶ *Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others* (1912), 6 CAR 61 at 71; *Federated Clothing Trades v JA Archer* (1919), 13 CAR 647 at 691; *Basic Wage Inquiry 1949-50* (1950), 68 CAR 698; *National Wage Case 1974* (1974), 157 CAR 293.

⁷ In 1994, a mechanism was enacted to enable wage differentials in which gender was a factor to be challenged. The current provisions are found in the *Fair Work Act 2009* (Cth), Parts 2-7 [*FW Act*]. In this article, the *FW Act* is referred to as the labour law statute. Of course, this does not mean that equal pay for women workers has been won, as ongoing legal claims for equal pay attest. See e.g. the test case brought by several trade unions in relation to childcare workers and early childhood educators that is currently before the Fair Work Commission. See “Equal Remuneration Case 2013-14,” online: <<https://www.fwc.gov.au/cases-decisions-and-orders/major-cases/equal-remuneration-case-2013-14>>. The national gender pay gap has been calculated to be 16.2 percent for full-time employees. Workplace Gender Equality Agency, “Equal Pay Day: 8 September 2016,” Media Release (7 September 2016), online: Medianet <<http://www.medianet.com.au/releases/110344/>>.

Leave Following Birth or Adoption: Parental Leave

In the 1970s, feminist groups successfully pushed for establishing maternity leave schemes. A scheme commenced initially in the federal public sector, and then the trade union movement pursued a test case in the private sector.⁸ In the private sector, women who gave birth were legally entitled to take up to fifty-two weeks of unpaid absence from work and then return to their former position or, where that no longer existed, an equivalent position.⁹ In 1985, the leave was expanded to adoption, and, in 1990, maternity leave became parental leave when the right to be absent from work was extended to spouses and male de facto spouses.¹⁰ In 2005, a right to request an extension of this unpaid leave for a further fifty-two weeks was added, for a maximum leave of two years. An employer was only entitled to reject the request for an extension on “reasonable” grounds.¹¹ In 2009, unpaid parental leave was extended to same-sex couples.¹²

The basic entitlements of unpaid parental leave in the private sector remain in place today—a right to take an unpaid absence from work following birth or adoption of up to fifty-two weeks, with a right to request an extension for an additional period of up to fifty-two weeks and a right to return to the pre-parental leave position or, where that position no longer exists, “an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.”¹³ The leave can be shared between an employee couple, with a maximum of eight weeks to be taken at the same time by the members of the couple.¹⁴ Prior to 2013, the maximum concurrent leave was three weeks.¹⁵

The minimum private sector entitlements relate to unpaid leave only. Although some collective agreements (and, less likely, industrial awards and

⁸ In the federal public sector, twelve weeks of paid leave was provided, followed by a further forty weeks of unpaid leave. *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). This remains the standard of paid leave in the federal public sector. The standard for paid leave in state public sectors is now fourteen weeks. See e.g. Victorian Public Service Graduate Recruitment and Development Scheme, *Victorian Public Service Agreement 2006* (2006), s 1, part 6, clause 46.8.2, online: <<https://graduates.vic.gov.au/uploads/pdf/VPSAgreement2006.pdf>>.

⁹ *Maternity Leave Test Case* (1979), 218 CAR 120. Note that the trade union movement did not seek any component of paid leave in this test case.

¹⁰ *Adoption Leave Test Case* (1985), 298 CAR 321; *Parental Leave Test Case* (1990), 36 IR 1; *Parental Leave Case (No 2)* (1990), 39 IR 344.

¹¹ *Parental Leave Test Case 2005* (2005), 143 IR 245.

¹² As enacted with the *FW Act*, *supra* note 7.

¹³ *Ibid*, s 84.

¹⁴ *Ibid*, s 72(5).

¹⁵ *Fair Work Amendment Act 2013* (Cth), Schedule 1, s 13 [FWAA].

organizational policies) contain rights to paid leave relating to birth or adoption, the spread of paid leave schemes through these mechanisms has been slow and is highly uneven. In 2010, less than half of working mothers across Australia could access paid parental leave, and large groups of women, especially casual workers and those in small and medium private sector businesses, were far less likely to have any coverage by a paid scheme.¹⁶ Where it exists, the most common provision in collective agreements for paid parental leave for the main carer was for fourteen weeks.¹⁷ Provisions in collective agreements for paid leave for secondary carers are very poor, with one week being the most common duration in 2009.¹⁸

Given these uneven and paltry provisions for paid parental leave, the federal Labor government bowed to pressure in 2010 and enacted a new statute establishing a modest payment scheme for workers on leave to care for babies and adopted children.¹⁹ The scheme provides a government-funded payment for employees and other workers who are the primary carers of a baby or adopted child.²⁰ Up to eighteen weeks of payment is available, at the rate of the weekly national minimum wage.²¹ This

¹⁶ Bill Martin et al, *PPL Evaluation: Final Report* (Brisbane: Institute for Social Science Research, University of Queensland, 2014) at 2. It is unclear whether the concept of “working mothers” used in the report covers lesbian co-parents.

¹⁷ Note that eleven collective agreements—all in the higher education sector—provided for twenty-six weeks of paid leave for mothers (during 2009). Marian Baird et al, “Paid Maternity and Paternity Leave and the Emergence of ‘Equality Bargaining’ in Australia: An Analysis of Enterprise Agreements, 2003-2007” (2009) 35:4 *Australian Bulletin of Labour* 671 at 682. The article uses the categories of “maternity leave” and “paternity leave,” which are still in common use in collective agreements. It is not possible from the article to ascertain the precise coverage of the two types of paid leave, including specifically the coverage of same-sex relationships.

¹⁸ *Ibid.*

¹⁹ *Paid Parental Leave Act 2010* (Cth) [*PPL Act*]. Despite the title of the Act, it does not give a right of absence as such. A worker must source their right to be absent from work to another legal right, most typically the right of unpaid parental leave in the *FW Act*.

²⁰ The scheme envisages that, in most cases, employers, rather than the government, will administer the payment to employees as part of normal payroll procedures. This administrative role has been strongly resisted by employers. Notably, the *Fairer Paid Parental Leave Bill 2016* (discussed further below) removes employers from this administrative role, unless they choose to opt in.

²¹ *PPL Act*, *supra* note 19, Parts 2-3. To be eligible for a payment under the government scheme, the claimant’s individual adjusted taxable income must be AUS \$150,000 per annum or less, and that person must have worked an average of around one day per week for at least ten of the thirteen months leading up to birth or adoption. Parental leave pay can be accessed anytime from the date of birth until the baby’s first birthday, but it needs to be taken in one continuous block. The current national minimum weekly wage in Australia for employees is AUS \$694.90 (1 July 2017 to 30 June 2018). For women who worked only a day or so a week in a low paid position, the weekly parental leave payment

government-funded scheme is additional to any employer-provided arrangement, and workers may access both, at the same time or, more usually, in sequential periods.

In 2012, the Labor government extended the scheme to provide an additional payment, specifically for fathers and partners of the birth mother, comprising up to two weeks at the weekly minimum wage.²² This Dad and Partner Payment (DAPP) cannot be taken while the father or other partner is receiving any form of paid leave.²³ Workers can take DAPP at the same time as another person receives parental leave payment under the 2010 government scheme or paid parental leave under an employer-provided arrangement or is otherwise the main carer of the baby or adopted child.²⁴

Personal/Carer's Leave

A leave entitlement for carers outside the circumstances of birth or adoption was first recognized through a series of test cases pursued by trade unions in the mid-1990s.²⁵ The basic entitlement continues today, although now it is known as personal/carers' leave. The legislation provides employees with ten days of paid leave per year of service, where this amount accumulates over the course of the year and from year to year. The leave may be taken where the worker is not fit for work because of their own illness or injury or for the purpose of providing care or support to a member of their "immediate family" or household who is ill, injured, or faces an unexpected emergency.²⁶

is above a replacement wage. See further Erin McCarthy, Elise Jenkin & Andrew Stewart, *Parental Leave: A User-Friendly Guide* (Pymont: Thomson Reuters, 2012).

²² Similar work and income tests exist. See note 21 above and accompanying text.

²³ Though DAPP may follow sequentially a period of paid leave.

²⁴ In 2016, the government introduced the *Fairer Paid Parental Leave Bill 2016*, which, if enacted, would have reduced access both to DAPP and to the 2010 government scheme. The bill provided, among other things, that where workers have employer-provided paid parental leave that is more favourable to them than the modest 2010 government scheme, they would not be entitled to any payment under the 2010 scheme. The government said that the bill would end the current practice of "double-dipping" by employees. The government, however, was not able to gain support for the passage of the bill and withdrew it in May 2017. "Coalition Abandons Legislation to Outlaw 'Double Dipping'," *Workplace Express* (18 May 2017), online: <https://www.workplaceexpress.com.au/nl06_news_selected.php?R=2&act=2&stream=15-5&selkey=55653&hlc=2&hlw=>>.

²⁵ *Family Leave Test Case—November 1994* (1994), 57 IR 121; *Personal/Carer's Leave Test Case—Stage 2—March 1996* (1996), 66 IR 138.

²⁶ *FW Act*, *supra* note 7, s 97. Prior to the enactment of the 2009 *FW Act*, the concept of "immediate family" explicitly excluded same-sex couples.

B. Discrimination Laws

From the 1970s onwards, anti-discrimination legislation was enacted at both state and then federal levels. This legislation provides a right to seek redress in relation to discrimination on a range of grounds including sex, pregnancy, breastfeeding, responsibilities to care for others, and sexuality or sexual orientation.²⁷ Most statutes characterize direct discrimination as treating the claimant “less favourably” than the employer treats, or would treat, a man or a person who is not pregnant or does not have care responsibilities in circumstances that are the same or are not materially different. They characterize indirect discrimination in terms of the existence of a practice or requirement that disadvantages a group identified with a protected attribute, where the practice or requirement is not reasonable in the circumstances.²⁸ Intention, or a discriminatory motive on the part of the employer, is not required for either direct or indirect discrimination.²⁹

Some state anti-discrimination statutes move beyond the concepts of direct and indirect discrimination to recognize a third type of discrimination claim—namely, failing to reasonably accommodate on the ground of care responsibilities.³⁰ Moreover, the Victorian anti-discrimination statute imposes an additional positive duty on both public and private sector employers by requiring employers who have a duty not to engage in discrimination, sexual harassment, or victimization to “take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimization as far as possible.”³¹

²⁷ See e.g. *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic) (which dates back to a 1977 Act) [Vic EOA]; *Equal Opportunity Act 1984* (SA) (which dates back to a 1975 Act); *Sex Discrimination Act 1984* (Cth) [SDA].

²⁸ See eg, *SDA*, *supra* note 27, ss 5(1) (direct discrimination), 5(2), 7B (indirect discrimination). Some statutes have attempted to move away from a comparator approach of less favourable treatment in direct discrimination by using the concept of “unfavourably.” See e.g. *Vic EOA*, *supra* note 27, s 8(1). Direct and indirect discrimination have been interpreted to be mutually exclusive. *Waters v Public Transport Corporation* (1991), 173 CLR 349 at 393; *Bropho v Western Australia*, [2007] FCA 519 at para 289. There is no general provision shifting the burden of proof to respondents, although a shifted burden of proof arises in some schemes in relation to establishing reasonableness under indirect discrimination. See e.g. *SDA*, *supra* note 27, s 7C. Discrimination legislation also prohibits sexual harassment, victimization, and some other forms of harassment and vilification as well.

²⁹ See e.g. *Vic EOA*, *supra* note 27, s 10.

³⁰ *Ibid*, ss 17, 19, 22, 32; *Anti-Discrimination Act 1992* (NT), ss 24, 58. In relation to New South Wales, see *Tleyji v TravelSpirit Group Pty Ltd*, [2005] NSWADT 294 at para 105 [Tleyji]; *Reddy v International Cargo Express*, [2004] NSWADT 218 at para 84. Reasonable accommodation in relation to disability is also legally required. See e.g. *Disability Discrimination Act 1992* (Cth), s 5.

³¹ *Vic EOA*, *supra* note 27, s 15.

C. Adverse Action Prohibitions

In 2009, prohibitions against “adverse action” were added to the labour law statute. These provide redress to workers who are treated adversely by their employer, including in a discriminatory manner, based on attributes including sex, family or carer’s responsibilities, pregnancy, and sexual orientation.³² These labour law protections overlap with, and sit alongside, the existing anti-discrimination law framework discussed under the previous subheading, and a claimant may bring a claim under either an anti-discrimination statute or the labour law scheme (but not both).³³ In addition to providing protection against discriminatory conduct, the labour law statute also provides redress for workers who are treated detrimentally because they have exercised their workplace right to, for example, parental leave or personal/carer’s leave or because they have inquired into their employment entitlements with their employer or with the labour inspectorate or have requested a change in their work arrangements in order to accommodate care responsibilities.³⁴

D. The Right-to-Request Scheme

In addition to protection against “adverse action,” a right-to-request scheme was enacted into the labour law statute in 2009.³⁵ This mechanism enables employees to request a change in their working arrangements to accommodate various responsibilities and circumstances.³⁶ Initially, these responsibilities were limited to the care of preschool-aged children and children (under the age of eighteen) with a disability. In 2013, the provisions were extended to apply to the care of children and other family members as well as, potentially, a broad range of other people, in addition to requesting a change in working arrangements by an employee aged fifty-five years and over and for the purpose of dealing with family violence.³⁷ The concept of working arrangements has wide meaning and includes altering the number and spread of working hours, the days of work, and altering the work

³² *FW Act*, *supra* note 7, ss 342(1), 351.

³³ The statutory provisions dealing with choice of jurisdiction are complex. See e.g. *FW Act*, *supra* note 7, ss 721-3; *SDA*, *supra* note 27, ss 10(3), 11(3); see further Neil Rees et al, *Australian Anti-Discrimination Law*, 2nd ed (Sydney: Federation Press, 2014) at 12.12.

³⁴ *FW Act*, *supra* note 7, s 340.

³⁵ The antecedent of this statutory scheme is found in a 2005 test case. *Parental Leave Test Case* (2005), 143 IR 245.

³⁶ *FW Act*, *supra* note 7, s 65.

³⁷ *FWAA*, *supra* note 15, s 17.

location. An employer is only entitled to reject a request to alter working arrangements on “reasonable business grounds.”³⁸

E. Gender Equality Reporting

Since 1986, both universities and larger private sector employers have been required to disclose to an agency certain information related to gender equality.³⁹ The current federal act, the 2012 *Workplace Gender Equality Act* requires that private sector employers with 100 or more workers and universities report annually to an agency on how the organization is performing against a set of “gender equality indicators.”⁴⁰ These indicators include the gender composition of the organization’s workforce (including its governing body); the extent to which men and women receive equal remuneration; the availability and utility of measures, including flexible work arrangements, which are designed to support workers with care responsibilities; and consultation with employees about gender equality in the organization.⁴¹ The public reports from organizations are published on the agency’s website.⁴² Organizations with 500 or more workers must additionally have policies or strategies in place to support improvements in at least one of these equality indicators.⁴³

III. INADEQUACIES WITH AUSTRALIAN LEGAL REGULATION

The different initiatives discussed above are all beset with various inadequacies. These exist both in the substantive rules and procedural requirements. They arise due to the language of legislative provisions and their interpretation by courts and tribunals. This section draws out four key failings, discussing each in turn. First, there are strict eligibility rules and employer exemptions, which narrow the coverage. Second, narrow

³⁸ *FW Act*, *supra* note 7, s 65(5); see also s 5A for a partial articulation of the meaning of “reasonable business grounds.”

³⁹ The first Act was the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth).

⁴⁰ The Workplace Gender Equality Agency has a range of functions, including to advise and assist employers (of all sizes) to promote gender equality, to develop benchmarks and to issue guidelines, and to undertake research on gender equality. *Workplace Gender Equality Act 2012* (Cth), s 10 [WGEA].

⁴¹ *Ibid*, s 3.

⁴² Provision is made for the non-publication of personal information, including information relating to remuneration. *Ibid*, ss 13, 14, 14A.

⁴³ *Ibid*, s 19; *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth). Similar requirements to develop equality programs exist in the federal and state public sectors, although they extend beyond gender to race, ethnicity, and disability. See e.g. *Public Service Act 1999* (Cth), s 18; *Government Sector Employment Act 2013* (NSW), s 63.

judicial interpretations constrict the statutory rights still further. Third, there are procedural constraints on claims and limited enforcement of successful claims. Fourth, the law demonstrates insufficient sensitivity to intersectionality and non-heterosexual relationships. These themes suggest that the system's inadequacies disadvantage women workers and workers with care responsibilities more generally.

A. Substantive Reach

The reach of the Australian work-and-care legal initiatives is deficient due to strict eligibility rules regarding the types of work arrangements and issues covered. Regarding eligible work arrangements, several of the legal mechanisms discussed above assume a worker who is employed on a full-time and longer-term continuing basis. This assumption reveals the legacy of the breadwinner worker. It ignores the growth in Australia of part-time, casual, and contract engagement and the feminization of these non-standard work arrangements. Both unpaid parental leave and the right-to-request mechanism can only be used by workers who are employees at common law and have completed twelve months of continuous service with their employer before taking parental leave or requesting to alter their working arrangements.⁴⁴

Casual employees who have been with their employer for more than twelve months are only covered by both sets of rights where they have worked during that time on a "regular and systematic basis" and have "a reasonable expectation of continuing employment by the employer on a regular and systematic basis."⁴⁵ In relation to personal/carer's leave, all casual employees are disqualified from eligibility.⁴⁶ These rules mean that many women workers are ineligible for unpaid parental leave, the right-to-request mechanism, and personal/carer's leave.⁴⁷ In Australia, casual

⁴⁴ *FW Act*, *supra* note 7, ss 67, 65(5). On the meaning of "continuous service," see *ibid*, s 22. Unpaid parental leave is not recognized as "service" for this purpose.

⁴⁵ *Ibid*, ss 12 (definition of "long-term casual employee"), 65(2)(b), 67(2).

⁴⁶ *Ibid*, s 95. Independent contractors are also excluded by these entitlements. Neither casual workers nor independent contractors are entitled to paid annual leave.

⁴⁷ It is thought that around 9 percent of the workforce are independent contractors rather than employees, and casual employees account for around 20 percent of all employees in Australia. Productivity Commission, *Workplace Relations Framework: The Inquiry in Context*, Issues Paper No 1 (Canberra: Productivity Commission, 2015) 9. On casualization and gender, see Katy Richmond, "The Workforce Participation of Married Women in Australia" in Donald E Edgar, ed, *Social Change in Australia: Readings in Sociology* (Melbourne: Cheshire, 1974) 269, Table 1; Rosemary Hunter, "The Legal Production of Precarious Work" in Judy Fudge & Rosemary J Owens, eds, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Portland, OR: Hart Publishing, 2006) 283.

employees receive a 25 percent wage loading (or premium) to recognize the leave entitlements they forgo.⁴⁸ Nonetheless, it is questionable whether these key work-and-care initiatives should be traded off in the way they currently are in return for a higher hourly or weekly wage rate. While such a trade-off might find favour with workers without care responsibilities, it is unlikely to be favourable among casual workers with care responsibilities.

There is a further key way in which the reach of the Australian work-and-care initiatives is curtailed. The anti-discrimination statutes and labour law statute contain exemptions that substantively reduce the protections offered. The language of the anti-discrimination statutes suggests that a discrimination claim cannot be used to challenge employer conduct that complies with, or is authorized by, another law (such as the health and safety law and the labour law).⁴⁹ This hierarchy of legislation means that claimants have not been able to use anti-discrimination law to challenge the products of the labour law system, such as redundancy provisions and allowances provided under industrial awards, provisions for leave, and consultation provisions contained in collective agreements. Although the content of labour law instruments ought now to be non-discriminatory,⁵⁰ there is reason to suspect that discriminatory clauses may continue to slip through tribunal vetting processes.⁵¹ Such matters cannot be challenged under anti-discrimination law.

A second type of key exception in both anti-discrimination statutes and the labour law system relates to religious organizations, such as religious schools and hospitals and religious institutions providing services such as emergency housing and drug and alcohol counselling.⁵² With the contraction of the state under neo-liberalism, religious bodies provide an increasing share of services previously offered by the state, and they engage a growing percentage of the workforce. These religious exceptions exonerate from liability people and institutions where the behaviour that is challenged is based on the genuine religious beliefs of

⁴⁸ *Annual Wage Review 2015-2016*, [2016] FWCFB 3500 at para 614.

⁴⁹ See e.g. *SDA*, *supra* note 27, s 40; *Vic EOA*, *supra* note 27, s 75.

⁵⁰ *FW Act*, *supra* note 7, ss 153, 194(a), 195. It is unclear though whether these provisions prohibit indirect as well as direct discrimination. See *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*, [2012] FCA 480 at paras 54-7 [DAEA].

⁵¹ The complexity involved is evident in, e.g., *University of Melbourne*, [2014] FWCA 1133; *DAEA*, *supra* note 50 at paras 54-8.

⁵² See e.g. *SDA*, *supra* note 27, ss 37, 38; *Vic EOA*, *supra*, note 27, ss 81-4; *FW Act*, *supra* note 7, ss 153(2), 195(2)(b), 351(2)(c). The *Vic EOA*, *supra* note 27, s 84, contains a broader exception in relation to a person's genuine religious belief, which arises in any work (or other) context.

the discriminator. They operate to reduce the reach of the legislation in religious contexts and, most likely, additionally discourage claimants from pursuing claims. For example, in relation to work-and-care issues, there are anecdotal accounts of Catholic schools dismissing unmarried women teachers who are pregnant.⁵³

While the exclusion from liability of conduct that accords with other laws and the conduct of religious bodies is conscious and chosen by Parliament, the language of the personal/carer's leave provisions in the labour law statute appears unintentionally narrow. Personal/carer's leave is available where "the employee is not fit for work because of a personal illness, or personal injury, affecting the employee," a formula that originates in award provisions for sick leave at least from the 1940s.⁵⁴ It is unclear whether this language, which remains today in the labour law statute, authorizes an absence from work to attend prenatal appointments or reproductive health appointments such as *in vitro* fertilization treatment.⁵⁵ For other issues, such as breaks at work for the purposes of breastfeeding or expressing, it is clear that no relevant minimum legal entitlement exists.⁵⁶ Clauses on these matters might appear in some collective agreements, although no research indicates their prevalence, but it is clear there is no national minimum legal standard in relation to them.

B. Judicial Interpretations of Substantive Rules

In addition to narrow legislative drafting, a significant shortcoming in the Australian work-and-care landscape is the conservative and narrow interpretations, against the interests of claimants, given to the legislation in key decisions. Although Australia does not have a national bill of rights, judges and adjudicators are nonetheless directed to interpret legislation in a way that best achieves the purpose or object of the statute under consideration.⁵⁷ The case law on anti-discrimination law and "adverse action" prohibitions is marked by senior courts narrowly interpreting key concepts in the statute in question.⁵⁸ Although the objects of a scheme may

⁵³ See e.g. Melissa Fyfe, "Teacher Scorned for 'Chosen Lifestyle'," *The Age* (4 October 2009).

⁵⁴ See e.g. *Australasian Meat Industry Employees Union v Metropolitan and Export Abattoirs Board* (1943), 51 CAR 677 at 685.

⁵⁵ AHRC, *Supporting Working Parents*, *supra* note 2 at 124.

⁵⁶ *Ibid.*

⁵⁷ *Acts Interpretation Act 1901* (Cth), s 15AA [AIA]. Some states though have state equivalences of rights that shape the interpretation of that state's legislation. See e.g. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32.

⁵⁸ Beth Gaze, "Context and Interpretation in Anti-Discrimination Law" (2002) 26 *Melbourne UL Rev* 325; Anna Chapman, "Judicial Method and the Interpretation of Industrial Discrimination" (2015) 28 *Austl J Lab L* 1.

be open to debate, it is nonetheless difficult to defend dominant judicial approaches as furthering the purposes of anti-discrimination law or the “adverse action” provisions in the labour law statute.

Three decisions serve to illustrate court and tribunal conservatism. These decisions narrow the substantive protections afforded to workers by the relevant statute, and they likely have a strong chilling effect on potential claims. The first decision concerns the meaning of direct discrimination in anti-discrimination statutes. As noted earlier in this article, most anti-discrimination statutes formulate the test of direct discrimination as involving an employer who treats the claimant “less favourably” than an employee without that attribute in circumstances that are the same or are not materially different. In *Hickie v Hunt & Hunt*, the claimant was a female partner in a law firm who returned from five months of parental leave on an agreed part-time basis to find that she had virtually no files or ongoing work.⁵⁹ She claimed that the law firm’s failure to maintain her practice amounted to direct discrimination on the ground of sex under the federal 1984 *Sex Discrimination Act*. Marea Hickie was unsuccessful in this claim because the tribunal considered that a hypothetical male partner who took extended leave of around five months and then returned to work on a part-time basis would not have been treated any better by the law firm than the claimant was. On this reasoning, Hickie had not been treated less favourably than this hypothetical comparator.

In 2003, Australia’s highest court approved a similar methodology regarding direct discrimination, albeit in the context of disability and education. *Purvis v New South Wales* involved a school student, Daniel, with an acquired brain injury who had been excluded from school because of his violent and anti-social behaviour.⁶⁰ This behaviour was a manifestation of his disability. The court held that there was no contravention of anti-discrimination law regarding direct discrimination on the ground of disability because another student who did not have a disability, but who behaved in the same violent manner as Daniel had, would also have been excluded from the school. For that reason, Daniel had not been treated “less favourably” than a comparator who was in the same (or similar) circumstances as himself.⁶¹

⁵⁹ *Hickie v Hunt & Hunt*, [1998] HREOCA 8. The claimant, however, did succeed on a claim of indirect sex discrimination in relation to the failure to maintain her practice and other matters.

⁶⁰ *Purvis v New South Wales* (2003), 217 CLR 92 [*Purvis*].

⁶¹ Note that at the time when *Purvis* was decided, the *Disability Discrimination Act 1992* (Cth), under which it was litigated, contained neither an “unjustifiable hardship” exception of relevance to Daniel’s situation nor a characteristic extension provision.

The tribunal's approach in *Hickie*, and most authoritatively in *Purvis*, to understanding direct discrimination in terms of a comparator with the same behaviour and circumstances as the claimant, although without the specific attribute itself, renders irrelevant the real-life connection between the claimant's situation and the protected attribute. The reason why *Hickie* took five months' leave and returned to work part-time rather than full-time was because she was a woman who had given birth and was now the carer of a baby. Similarly, Daniel was not merely a difficult teenager; his anti-social and violent behaviour was a manifestation of his disability. The *Hickie* and *Purvis* approach to drawing the comparator has been replicated throughout anti-discrimination law.⁶² It can lead to highly artificial hypothesizing that lacks credibility and works against the interests of claimants, who have the burden of proof in establishing their claim of discrimination. It is hard to imagine a credible male comparator to *Hickie* because male partners in law firms are far less likely to take five months of leave and then return to work on a part-time basis.

Adverse action protections in labour law have been interpreted similarly in ways that disadvantage claimants. *Construction Forestry Mining and Energy Union v Endeavour Coal*, a 2015 "adverse action" claim under the labour law statute provides a good illustration.⁶³ This claim involved a maintenance fitter employed in a mine who was moved against his wishes from a weekend roster to a less well remunerated weekday roster. This followed a series of authorized absences from work by the worker under various forms of personal/carer's leave—for his own

Both these matters were addressed in the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Schedule 2, which enacted an "unjustifiable hardship" exemption for educational providers in relation to existing students and amended the definition of "disability" in s 4 to make it clear that a disability "includes behaviour that is a symptom or manifestation of the disability." Had these provisions existed at the time of *Purvis*, most likely the comparator methodology would have been applied differently, yet the educational authority would have likely been ultimately successful.

⁶² See e.g. *Mayer v ANSTO*, [2003] FMCA 209; *Commonwealth of Australia v Evans*, [2004] FCA 654; *Sterling (Commerce) Pty Ltd v Illif*, [2008] FCA 702; *Lipman v Commissioner of Police*, [2015] NSWCATAD 250. See further Anna Chapman, "Australian Anti-Discrimination Law, Work, Care and Family," Centre for Employment and Labour Relations Working Paper No 51 (2012) at 19-21; Belinda Smith & Joellen Riley, "Family-Friendly Work Practices and the Law" (2004) 26 Sydney L Rev 395.

⁶³ *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd*, [2015] FCAFC 76, leave to appeal to the High Court of Australia was rejected on 11 December 2015; see further Beth Gaze, Anna Chapman & Adriana Orifici, 'Evaluating the Adverse Action Provisions of the Fair Work Act: Equality Thwarted?' in John Howe, Anna Chapman & Ingrid Landau, eds, *The Evolving Project of Labour Law* (Sydney: Federation Press, 2017) 88.

sickness and also in order to care for his partner, who was unwell, and their three preschool-aged children. The worker claimed that his employer had subjected him to “adverse action” in the form of the change in roster because he had exercised his workplace right to take personal/carer’s leave or because of his family or carer’s responsibilities. His claim, like that of the claimants in *Hickie* and *Purvis*, was unsuccessful. The court accepted that the employer’s sole reason for moving the worker to the weekday shift was “his poor attendance” record and not because he had taken his legal entitlements to personal/carer’s leave. The real-life connection between taking personal/carer’s leave, which by its nature is unpredictable, and the worker’s attendance record, was not seen as relevant by the court. The employer’s decision-maker gave evidence that he did not care why the worker was absent, only that the worker was absent. This evidence was accepted by the court, and this meant that the employer had not contravened the “adverse action” prohibition in the statute because the change in roster did not occur because the worker had exercised his workplace right to personal/carer’s leave. The precedential value of both *Purvis* and *Endeavour Coal* is significant and effectively reduces the scope of the substantive protections, as well as discourages claimants from pursuing claims, a matter that is explored next.

C. Procedure

No or Partial Enforcement Frameworks

Some work-and-care provisions have no legal framework of enforcement at all. Although the labour law statute provides that employers are only entitled to reject a request for an alteration in working arrangements, or for an extension on the first twelve months of unpaid parental leave, for “reasonable business grounds,” the legislation provides no ability to challenge the merits of an employer’s rejection of each of these types of requests.⁶⁴ It was a deliberate policy choice of Parliament that these two mechanisms provide a right to ask, but not a right to receive, reasonable accommodation of the worker’s care responsibilities.

Although it appears that employers in Australia frequently grant requests by workers for accommodation of their care responsibilities, case study research reveals that a lack of fit frequently arises between the

⁶⁴ *FW Act*, *supra* note 7, ss 44(2), 739(2), 740(2). For an analysis of the parts of the right to request scheme that are legally enforceable, such as the requirement on the employer to provide in writing “details of the reasons” for a rejection of the request and what might be drawn from such provisions, see Anna Chapman, “Is the Right to Request Enforceable?” (2013) 26 *Austl J Lab L* 118.

agreed new arrangement, on the one hand, and expectations regarding workload and job design, on the other.⁶⁵ For example, a mother returning from parental leave may come back to work with reduced hours but with the same volume of tasks and no reduction in the expectations of line managers.⁶⁶ This suggests a lack of fit exists between the right-to-request mechanism (and anti-discrimination law's obligation of reasonable accommodation) and other aspects of labour law such as contractual arrangements and management practices. This is partly a problem in the enforcement of the agreed arrangement and partly related to how the agreed arrangement sits within broader dynamics of the work relationship.

A similar lack of effective enforcement affects the federal 2012 *Workplace Gender Equality Act*. Larger organizations must have policies and strategies in place or at least be working towards the development of such policies and strategies.⁶⁷ Sanctions on employers for failing to comply with these obligations are limited. Employers may be named in Parliament as violating the Act, and they may be ineligible for federal government contracts, grants, or financial assistance.⁶⁸ In relation to the latter violations, however, it has been pointed out that "it is unclear how often this actually happens in practice."⁶⁹ In addition, the positive duty on employers to "take reasonable and proportionate measures" imposed by the 2010 *Equal Opportunity Amendment Act* is not enforceable by claimants.⁷⁰ As originally enacted, the Victorian Equal Opportunity and Human Rights Commission was given power to conduct public inquiries into possible breaches of this positive duty and to issue compliance notices

⁶⁵ Bernadette O'Neill, Fair Work Commission, *General Manager's Report into the Operation of the Provisions of the National Employment Standards Relating to Requests for Flexible Working Arrangements and Extensions of Unpaid Parental Leave under s. 653 of the Fair Work Act 2009 (Cth): 2012-2015* (Melbourne: Fair Work Commission, 2015); Rae Cooper & Mariam Baird, "Bringing the 'Right to Request' Flexible Working Arrangements to Life: From Policies to Practices" (2015) 37:5 *Employee Relations* 568 at 579.

⁶⁶ Cooper and Baird, *supra* note 65 at 577-8. This problem is also noted in Natalie Skinner, Barbara Pocock & Claire Hutchinson, *A Qualitative Study of the Circumstances and Outcomes of the National Employment Standards Right to Request Provisions: A Report to Fair Work Australia* (Adelaide: Centre for Work and Life, 2015) at 4.

⁶⁷ *WGEA*, *supra* note 40, ss 19B, 19C.

⁶⁸ *Ibid*, s 19D, note in s 18.

⁶⁹ Andrew Stewart, *Stewart's Guide to Employment Law*, 6th ed (Sydney: Federation Press, 2018) 8. Even though this formal enforcement framework is weak, some scholars have found cause to be optimistic in the potential of the legislative scheme to generate a market for gender equality performance, enabling employees and others to demand better performance by organizations regarding gender equality. Belinda Smith & Monica Hayes, "Using Data to Drive Gender Equality in Employment: More Power to the People?" (2015) 28 *Austl J Lab L* 191.

⁷⁰ *Equal Opportunity Amendment Act 2011* (Vic).

and enforceable undertakings where breaches were found. Regrettably, those enforcement procedures were weakened in 2011 following a change of government. The commission now has power to conduct an investigation into a matter and, upon conclusion of that investigation, may take any action it sees fit, including a report to Parliament.⁷¹ In fact, however, the commission has never conducted an investigation into a possible breach of a positive duty. Reduced funding to the commission also means that it is unlikely to do so in the future.

Procedural Road Blocks to Enforcement

Anti-discrimination law is based on a model of enforcement by individual claimants; there is no public enforcement body for anti-discrimination law.⁷² The “adverse action” provisions in the labour law statute also provide a claim-based model of enforcement, although the Fair Work Ombudsman plays an important role as the public inspectorate to ensure compliance with the labour law statute. The role that the ombudsman can play, however, is limited by its resources. Claimants must choose at the outset between the legal claims that they may pursue. The Australian system generally requires that only one legal claim be lodged in relation to the same behaviour.⁷³ Weighing the advantages and disadvantages of different avenues of redress is complex, and it appears that many claimants do not have the benefit of legal advice at this stage or at all. While parties generally bear their own legal costs in “adverse action” litigation,⁷⁴ the losing party in the federal anti-discrimination system will usually be ordered to pay the legal costs of the successful party.⁷⁵ This approach to

⁷¹ Vic EOA, *supra* note 27, ss 15(4), 139-43.

⁷² Discrimination agencies may play a role as *amicus curiae* in litigation (as “friend of the court”) where this would be in the public interest, but reductions in funding effectively curtail this potential. Rees et al, *supra* note 33 at 12.13.9.

⁷³ E.g., in relation to a work-and-care issue, the choice might be between a claim under the SDA, *supra* note 27; a claim under a state discrimination statute such as the Victorian *Equal Opportunity Act*; an adverse action claim under the labour law statute; or an application for an order to stop bullying under Part 6-4B of the *FW Act*, *supra* note 7. See e.g. *Bashour v Australia & New Zealand Banking Group Ltd final (Human Rights)*, [2015] VCAT 308.

⁷⁴ *FW Act*, *supra* note 7, s 570; see further Stewart, *supra* note 69 at 9.4.

⁷⁵ See e.g. *Fetherston v Peninsula Health (No 2)*, [2004] FCA 594; *Chen v Monash University (No 2)*, [2016] FCAFC 93. The discretion to order costs arises from the *Federal Court of Australia Act 1976* (Cth), s 43; the *Federal Circuit of Australia Act 1999* (Cth), s 79. In contrast, in most state anti-discrimination systems, costs will only be ordered against an unsuccessful party if they are seen to have acted unreasonably in bringing the claim or in the conduct of the litigation. See e.g. *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109.

costs in the federal anti-discrimination system has been shown to inhibit the enforcement of federal anti-discrimination law.⁷⁶

There are many self-represented claimants in both the anti-discrimination law system and the “adverse action” system. Those claimants, as with all claimants, must manage their way through a number of procedural road blocks to lodge their claim, proceed to conciliation conducted by a commission, and, if not settled, eventually have their claim heard on its merits by a tribunal or court.⁷⁷ Proceedings can be slow, reflecting the inadequate levels of funding of commissions, tribunals, and courts.⁷⁸ Procedural mechanisms operate in practice to deny claimants access to justice, especially self-represented claimants without access to legal advice. Two procedural matters stand out. These are examined in turn.

The first procedural matter concerns limitation periods; a claimant who brings an “adverse action” claim under the labour law statute for dismissal from employment has a maximum of twenty-one days from the date of dismissal to lodge their application. Extensions of time to the twenty-one-day period are possible but only in “exceptional circumstances.”⁷⁹ Unsurprisingly, there are many applications for extensions of time, and, indeed, it appears that there may be more

⁷⁶ Beth Gaze & Rosemary Hunter, “Access to Justice for Discrimination Complainants: Courts and Legal Representation” (2009) 32(3) UNSWLJ 699.

⁷⁷ The conciliation processes are confidential, and little public information is available about them and their outcomes. It is known though that in the range of 70-80 percent of claims in anti-discrimination law as well as the adverse action protections (at least in relation to dismissal) do not proceed to a hearing on the merits. AHRC, *2015-2016 Complaint Statistics* (Sydney: AHRC, 2016) [AHRC, *2015-2016 Complaint Statistics*]; Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *2015-2016 Annual Report* (Carlton: VEOHRC, 2016) at 18; Fair Work Commission, *Annual Report 2015-2016* (Melbourne: Fair Work Commission, 2016) at 51 [Fair Work Commission, *Annual Report 2015-2016*].

⁷⁸ The AHRC records that “just under half of all complaints [in the 2015-16 financial year] were finalised within 3 months (47%), 82% were finalised within 6 months, 94% within 9 months and 98% within 12 months.” AHRC, *2015-2016 Complaint Statistics*, *supra* note 77. In 2015-16, 80 per cent of claims under Vic EOA, *supra* note 27, were finalized within six months. VEOHRC, *supra* note 77 at 18. In contrast, the Fair Work Commission records that 90 per cent of adverse action disputes involving dismissal were finalized within 103 days (approximately 3.5 months): Fair Work Commission, *Annual Report 2015-2016*, *supra* note 77 at 50. Following finalization of a complaint by all of these bodies, where the matter is not settled, the claimant may then lodge a claim in a court or tribunal for a hearing on its merits.

⁷⁹ *FW Act*, *supra* note 7, ss 366(1)-366(2). In determining whether “exceptional circumstances” exist, the tribunal is directed to consider: the reason for the delay; any action taken by the applicant to dispute the dismissal; prejudice to the employer; the merits of the application; and fairness as between the applicant and other persons in a like position (s 366(2)).

applications for extensions of time than there are hearings of “adverse action” claims on their merits. The tribunal hearing these applications for extensions of time interprets the phrase “exceptional circumstances” very narrowly. As a result, very few extensions of time are granted to claimants, who must then either commence another legal action (if there is still time left) or abandon their grievance altogether.

A 2016 case illustrates the narrow interpretive approach of the tribunal.⁸⁰ The claimant, who was self-represented, had lodged her application within the twenty-one-day time period, but tribunal staff could not open the attachments to her emailed application because they were formatted using word processing software not approved under the tribunal’s rules. The tribunal quickly alerted the applicant to the problem with formatting, provided her with a copy of the relevant rule, and told her that because of the formatting error her application had not been lodged. She was able to convert the attachments to an acceptable format and email the documents to the tribunal the following day, twenty-four hours outside the twenty-one-day time limit. She explained to the tribunal that the delay in converting the files and emailing them to the tribunal arose because she lived in a remote location, with limited phone coverage and Internet access. She gave evidence that she had experienced difficulty in obtaining legal advice over the telephone from a community legal centre due to the poor phone reception where she lived.

The tribunal concluded that there were no “exceptional circumstances” to justify an extension of time, especially as the tribunal construed the merits of her claim as weak and because she did not take action to contest the dismissal with her employer, other than by lodging the application for “adverse action.” The claim itself appeared to be relatively complex, involving a labour hire agency arrangement in which the claimant alleged that her employer reneged on an earlier agreement to allow her to work from home two days per week. The commissioner hearing the extension of time application commented (negatively) that the application did not contain an outline of legal argument regarding the “adverse action” claim or witness statements.⁸¹ Despite this lack of legal argument and evidence, the commissioner was prepared to conclude that the legal claim itself was “weak.” As a result, the claimant’s application

⁸⁰ *Davie v North Queensland Primary Health Network*, [2016] FWC 8979.

⁸¹ *Ibid* at 35.

for an extension of time was dismissed, and this ended her ability to pursue an adverse action claim.⁸²

A second procedural matter involves summary dismissal. Claims under anti-discrimination and labour law statutes are heard by federal courts and state tribunals that operate under variously worded provisions that enable the court or the tribunal to dismiss an application (at any time) where it can be shown by the respondent (employer) that the application is, for example, “frivolous,” “vexatious,” “an abuse of process,” or has “no reasonable prospect of success.”⁸³ It has become commonplace for employers to launch strongly fought summary dismissal applications in the period before the hearing into the application. These interim applications by employers have become a regular part of both the anti-discrimination system and the labour law system and clearly benefit employers over claimants. Although the summary dismissal provisions might have been drafted with the objective of reducing the time and costs overall of the system, as one judge has commented:

[I]t is often the case ... that an application for summary dismissal achieves precisely the opposite: [that is, it creates] increased costs and further delay. In this matter, for example, the [merits] could readily have been finally determined in the same amount of time and with the same amount of effort as this application [for summary dismissal].⁸⁴

These two mechanisms—short and strict time limits for “adverse action” claims and summary dismissal applications—operate in the context of chronic underfunding for community legal centres, which are the obvious source of legal advice and assistance for claimants.⁸⁵ A brief perusal of the case law on procedural matters reveals that many self-represented claimants

⁸² It is highly unlikely that she would now be successful in an unfair dismissal claim, as that too has a twenty-one-day time period, with extensions of time in “exceptional circumstances” only. *FW Act*, *supra* note 7, ss 394(2)-394(3).

⁸³ The rules on summary dismissal of a claim are contained in the *Federal Court of Australia Act 1976* (Cth), s 31A; Federal Court Rules 2011 (Cth), rule 26.01; Federal Circuit Court of Australia Act 1999 (Cth), s 17A; Federal Circuit Court Rules 2001 (Cth), rule 13.10. For similar state legislation, see e.g. Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 75(1).

⁸⁴ *Sun v EP2 Management Pty Ltd*, [2016] FCCA 1381 at 10.

⁸⁵ Amanda Alford & James Farrell, “Community Legal Centres Face Funding Crisis” (2016) 41:1 *Alternative Law Journal* 2.

are struggling as they attempt to navigate their way through the systems.⁸⁶ Although trade unions have been, and remain, less present in the enforcement of anti-discrimination law, they are active participants in enforcement in the labour law system, especially in relation to issues of freedom of association.⁸⁷ Yet there is a limit to their ability to fill the void left by a reduction in public funding of community legal centres.

D. Failure to Recognize Diversity

There are two main ways in which Australian work-and-care initiatives assimilate diverse family forms to a uniform model. The first relates to intersectionality and the second to the coverage of diverse family-and-care relationships.

Intersectionality

Kimberlé Crenshaw, writing in the American context, has shown how a legal framework that prohibits discrimination on a list of specific attributes such as race and sex, which she called the “single-axis framework,” effectively marginalizes the claims of those who experience multiple, intersecting discriminatory forces.⁸⁸ The result is a distortion in the way that intersectional experiences of discrimination are conceptualized, analyzed, and remedied by the law. Australian anti-discrimination legislation, as well as the “adverse action” protections in the labour law statute, is characterized by a “single-axis framework,” and this feature may render it difficult for some claimants to articulate their grievances in a way that is cognizable under the relevant legislative scheme, while remaining authentic to their experiences.⁸⁹ Difficulties might exist for claimants

⁸⁶ See e.g. *Wong v Dong Lai Sun Massage Pty Ltd*, [2016] FCCA 18; *Sultana v Thomastown Child Care Centre Inc*, [2016] FWC 422; *Noronha-Barrett v Australian National University*, [2015] FWC 5879.

⁸⁷ See e.g. *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010), 193 IR 251; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*, [2016] FCA 987; *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union*, [2016] FCAFC 99.

⁸⁸ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies” (1989) U Chicago Legal F 139 at 139; see also Nicola Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 CJWL 25.

⁸⁹ Under most anti-discrimination statutes, claimants must establish that at least one attribute covered by the Act—be it sex, race, sexuality, parental status, or care or family responsibilities—was one of the reasons for the conduct. See e.g. *SDA*, *supra* note 27, s 8. Other discrimination statutes impose the more onerous standard requiring that at least one attribute was “a substantial reason” for the conduct. See e.g. *Vic EOA*, *supra* note 27, s 8(2)(b). The adverse action provisions require only that the prohibited reason be

where all dimensions of the intersectional discrimination are represented by protected attributes; it is even more difficult where non-protected factors are also present, such as economic disadvantage and homelessness. A claimant might feel that her experience has been misrepresented through the need to adopt the categories and concepts of the legislation. For example, Indigenous scholar Hannah McGlade has explained that “[w]hen an Aboriginal woman experiences discrimination, she experiences discrimination because she is an Aboriginal woman, not just ‘Aboriginal’ or ‘woman’ or ‘Aboriginal’ plus ‘woman’.”⁹⁰

The decision of the Equal Opportunities Division of the New South Wales Administrative Decisions Tribunal in *Tleyji v TravelSpirit Group Pty Ltd* illustrates how the intersectional character of the claimant’s experience may have been obscured by the single-axis framework in a way that undermined the veracity of her case.⁹¹ The claimant brought her claim under three attributes in the New South Wales anti-discrimination statute: responsibilities as a carer, sex, and race. The allegations of discrimination concerned several matters, including her employer’s refusal to allow her to return from parental leave on a part-time basis and the hostile work environment that she says she experienced upon her return from parental leave.⁹² The tribunal dealt with the claim relating to carer responsibilities and sex together, finding that there was insufficient evidence to establish that such a hostile work environment existed. The claim of race discrimination was examined separately.⁹³ The allegation of race discrimination arose in relation to the claimant speaking in Arabic when she took personal phone calls at her desk, at least some of which were from her family. She was told by her supervisor that she was only to take calls in Arabic upstairs in the staff room, which was out of ear shot of others in the small, open-concept office space.⁹⁴

one of the reasons for the conduct, although this has been interpreted to require that the prohibited reason be a “substantial and operative” factor. *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012), 290 ALR 647 at 103; see also *FW Act*, *supra* note 7, s 360.

⁹⁰ Hannah McGlade, “Reviewing Racism: HREOC and the Racial Discrimination Act 1975 (Cth)” (1997) 4:4 Indigenous Law Bulletin 12.

⁹¹ *Tleyji*, *supra* note 30.

⁹² *Ibid* at para 18.

⁹³ The claim of discrimination on the attributes of carer’s responsibilities and sex were dealt with in *ibid* at paras 5-113, and the race discrimination complaint was dealt with in paras 114-37.

⁹⁴ *Tleyji* relied on the characteristic extension mechanism to argue that speaking Arabic is a characteristic that concerns generally her race as being Lebanese. *Ibid* at paras 114, 128.

The strong evidence of racial tension in the workplace was ignored in the tribunal's decision that her claim regarding the hostile work environment upon her return from parental leave lacked factual substance. While the tribunal accepted that Tleyji believed that she returned to a work environment in which her colleagues were "cold, unhelpful and unfriendly" and that the atmosphere had been "better" before she went on leave, she could not point to particular instance of this changed environment to the satisfaction of the tribunal.⁹⁵ In contrast, in the tribunal's analysis of the race claim, it did identify the existence of an "explosive environment." This environment comprised deterioration in the relationship between Tleyji and her supervisor, conflict over her request for part-time work, and other issues, such as Tleyji's attendance record and the suggestion that she may have been making too many personal phone calls.⁹⁶ Notably, the tribunal did not draw on this material as possible contextual evidence of racial tension in the workplace. Rather, it discussed this material under the heading of "causation" in examining whether the less favourable treatment of the claimant was causally related to her race.⁹⁷ This is interesting as the evidence of causation on the race claim was compelling. Tleyji was permitted to make and take phone calls in English from her desk, as were others in the workplace; the supervisor's directive related only to her speaking in Arabic from her desk.⁹⁸

Ultimately, Tleyji succeeded both on her claim of indirect discrimination related to carer responsibilities when she was denied her request to return to work on a part-time basis and on her claim of direct discrimination related to race. Reading the decision leaves a very clear impression that all of the conduct cited by Tleyji was interrelated and that examining the sex and carer claim and events in isolation from the race claim and identified event obscured the claimant's experience as relating to all three attributes at the same time. For example, the hostility that the claimant says she experienced when she returned from parental leave, which she notably identified as related to her responsibilities as a carer, seemed consistent with the racial tension in the workplace. In addition, at least some of the phone calls that Tleyji made in Arabic were to her family members, and as a mother returning to work after parental leave, it seems credible to suggest that some of these may have related to the care of her baby.⁹⁹ In

⁹⁵ *Ibid* at paras 20-1.

⁹⁶ *Ibid* at para 133; see also para 134.

⁹⁷ *Ibid* at para 131.

⁹⁸ *Ibid* at paras 124-5.

⁹⁹ The content of the phone calls is not apparent from the decision.

these various ways, Tleyji's experience of intersectional discrimination appears to have been lost by the single-axis framework of the legislation.

Diversity and Reach

Many anti-discrimination law and labour law mechanisms regarding care responsibilities were explicitly framed during the twentieth century to provide entitlements only in relation to care provided in the context of a heterosexual couple relationship. For example, a worker only qualified for unpaid parental leave where the person who gave birth was their "spouse" or "de facto spouse." Until December 2017, when the federal parliament enacted legislation to recognize same-sex marriage, same-sex partners could not be "spouses" of each other.¹⁰⁰ A "de facto spouse" was defined in the legal entitlements to mean "a person of the opposite sex to the employee who lives with the employee in a marriage-like relationship, although not legally married to the employee."¹⁰¹ Due to the explicit requirement that the partners be of "the opposite sex" to each other, same-sex partners could not be de facto spouses.

From 2000 onwards, statutory definitions of "de facto" began to be rewritten for the purpose of recognizing same-sex relationships. The states acted in this respect earlier than the federal parliament, with New South Wales recognizing same-sex relationships in its anti-discrimination definition of "de facto" in 2000.¹⁰² The federal Parliament only moved to recognize same-sex couples as de factos in anti-discrimination law in 2008 and in labour law a year later in 2009.¹⁰³ Both anti-discrimination law and labour law now recognize unmarried people in same-sex relationships who can in fact prove the existence of a relationship within the meaning of the legislative definition. Two themes reveal how the recognition of relationships in discrimination law and labour law operate to exclude family-and-care relationships that do not conform to the norms of law and, as will be explored, have a differentially exclusionary impact on lesbian, gay, bisexual, and transgender (LGBT) workers, their families, and care networks. These relate to the two-adult marriage-like couple, and the primary caregiver model.

¹⁰⁰ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

¹⁰¹ See e.g. *Industrial Relations Reform Act 1993* (Cth), Part VIA Div 5, Sch 14; see similarly *Workplace Relations Act 1996* (Cth), s 263. Both statutes are no longer in effect.

¹⁰² E.g., New South Wales provided recognition to same-sex relationships in its anti-discrimination statute from 2000: *Anti-Discrimination Amendment (Carer's Responsibilities) Act 2000* (NSW).

¹⁰³ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth); *FW Act*, *supra* note 7.

Two-Adult Marriage-Like Couple

Some legal entitlements delineate the legal rule's concept of care broadly and do not limit it to any particular family context.¹⁰⁴ On the other hand, other labour law entitlements that recognize care assume the two-adult couple as the normative care relationship, which is understood in terms of marriage-like indicators such as living together, pooled finances, and public recognition of the relationship. Although this definition of couple now includes same-sex couples, it remains a conventional two-adult couple marked by marriage-like factors.

The provisions of the federal 1984 *Sex Discrimination Act* are of this description. The Act prohibits discrimination in the work context on the ground of "family responsibilities," which is then defined in a way that includes responsibilities to care for a partner in a "de facto relationship."¹⁰⁵ A "de facto relationship" means a relationship "as a couple living together on a genuine domestic basis."¹⁰⁶ In determining whether two people are a couple in this sense, the legislation provides that all relevant factors are to be taken into account, including any or all of the following matters:

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use, and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the reputation and public aspects of the relationship.¹⁰⁷

¹⁰⁴ E.g., the Victorian *Equal Opportunity Act* renders discrimination on the ground of "status as a carer" unlawful, where "carer" is defined to mean "a person on whom another person is wholly or substantially dependent for ongoing care and attention." Vic *EOA*, *supra* note 27, s 4. See similarly the right to request provisions in the *FW Act*, *supra* note 7, s 65(1A)(b); the ground of "family or carer's responsibilities" in the *FW Act*, *supra* note 7, s 351 which is undefined and so potentially broad.

¹⁰⁵ *SDA*, *supra* note 27, ss 4, 4A, 7A; *AIA*, *supra* note 57, ss 2D, 2F. This definition is also used in the provisions that prohibit discrimination on the ground of "marital or relationship status." *SDA*, *supra* note 27, s 6.

¹⁰⁶ *SDA*, *supra* note 27, s 2F(1)(c).

¹⁰⁷ *Ibid*, s 2F(2).

The legislation is clear that it is irrelevant whether the two people are of different sexes or the same sex.¹⁰⁸

Outside anti-discrimination law, other legal entitlements adopt a similar approach. The 2010 government-funded parental leave payment scheme under the *Paid Parental Leave Act 2010* establishes a system of payments to be made to a birth mother or her “partner.”¹⁰⁹ A “partner” is defined as “a member of a couple.” Attention is then directed to many factors that are similar to those listed in the *Sex Discrimination Act*.¹¹⁰ The labour law rules regarding both unpaid parental leave and personal/carer’s leave refer to a “de facto partner,” and while there is no specified list of factors to consider, the concept of de facto partner is defined as a person who “lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes).”¹¹¹

The concept of “a couple” connotes two adults. This two-adult model may not sit well with many care arrangements, including those of LGBT workers, their families, and care networks. It fails to account for diverse care relationships that exist outside two-adult couples, such as might exist in sole-parent families, polyamorous relationships, and care between close friends, extended community, and kinship networks.¹¹² The inclusive list of factors to consider specified in the *Sex Discrimination Act*, and elsewhere, originates in early divorce cases from the mid-1970s where judges were required to decide whether a marriage had broken down even though the husband and wife were still living under the same roof. These cases required judges to articulate the characteristics of marriage in order to determine whether those characteristics were still present or not between the two people.¹¹³ These origins reflect the indicia of the heterosexual ideal

¹⁰⁸ *Ibid*, s 2D. The legislation assumes that gender is binary. This approach sits awkwardly with people who identify as gender fluid.

¹⁰⁹ *PPL Act*, *supra* note 19, ss 12, 54(1)-(3).

¹¹⁰ *Social Security Act 1991* (Cth), s 4(3). Notably, although claims can be brought by other non-parent carers who are not partners to the birth mother, these are identified as “exceptional” claims and are only granted in “exceptional” circumstances where the couple cannot provide adequate care to the baby. In this way, the exceptional claims provisions further reinforce the normativity of the two-adult parent couple. See Anna Chapman, “The New National Scheme of Parental Leave Payment” (2011) 24 *Austl J Lab L* 60.

¹¹¹ *FW Act*, *supra* note 7, ss 12, 70(a)(i), 97(b). These provisions assume that gender is binary.

¹¹² Such relationships may be covered under other categories recognized in the legislation, but they may not be. Close attention to each particular circumstance is required. E.g., the personal/carer’s leave provisions in *FW Act* also cover other “immediate family” plus members of the employee’s “household.”

¹¹³ See e.g. *In the Marriage of Todd Case (No 2)* (1976), 9 ALR 401; *In the Marriage of Pavey* (1976), 1 Fam LR 11,358; see further Belinda Fehlberg & Juliet Behrens,

of marriage. They focus on domesticity, the existence of a sexual relationship, shared finances, raising children, and the public aspects of the relationship. While they are matters that may not align well with many contemporary heterosexual relationships, they are even less appropriate for LGBT people, where much diversity exists, for example, in relation to housing, financial arrangements, and the raising of children.¹¹⁴ The public nature of the relationship is particularly problematic for many LGBT workers who are closeted in their workplace about their relationships and families. For example, in 2015, 62 per cent of LGBT workers felt they were unable to disclose their sexuality or gender identity in their workplace, despite wanting to.¹¹⁵

Primary Carer Model

Legal initiatives relating to the care of babies and infants reveal a primary carer model. The labour law entitlement to unpaid parental leave is available to women who give birth, or to her spouse or de facto partner,¹¹⁶ with only one member of the couple being permitted to be on unpaid parental leave at one time, other than for eight weeks when both members of the employee couple may be on leave together.¹¹⁷ This reflects a vision of care by one carer only—the primary carer—other than for the eight weeks of concurrent leave. Under the 2010 government scheme of parental leave payment, only one person can be recognized as the child’s “primary carer” and in receipt of a parental leave payment at the one time.¹¹⁸ The concept of “primary carer” is defined to mean that “the child is in the person’s care in that period” and “the person meets the child’s physical

Australian Family Law: The Contemporary Context (Oxford University Press, 2008) at 4.4.1.3; Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context*, 2nd ed (Oxford University Press, 2015) at 91, n 95.

¹¹⁴ See e.g. Deborah Dempsey, *Same-Sex Parented Families in Australia*, CFCA Paper No 18 (Canberra: Australian Institute of Family Affairs, 2013); Kath Reid, “Dancing Our Own Steps: A Queer Families’ Project” (2008) 2 *International Journal of Narrative Therapy and Community Work* 61; Elizabeth Short et al, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review Prepared for The Australian Psychological Society* (Melbourne: Australian Psychological Society, 2007).

¹¹⁵ This research suggests also that it is unlikely that these workers will claim their legal entitlements relating to care responsibilities from their employer in the first instance and also unlikely that they will complain to a tribunal if those entitlements are not forthcoming from their employer. AHRC, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights, National Consultation Report* (Sydney: AHRC, 2015) 19.

¹¹⁶ *FW Act*, *supra* note 7, s 70(a)(i).

¹¹⁷ *Ibid*, s 72(5).

¹¹⁸ *PPL Act*, *supra* note 19, s 47(3).

needs more than anyone else in that period.”¹¹⁹ This envisages that one person is the sole or, at least, the main carer. This approach was softened slightly by the introduction of two weeks of DAPP in 2012, which permits the primary claimant (typically, the mother) and her partner to be carers of the child concurrently for the two weeks of DAPP.

A primary caregiver model may be a poor fit for many contemporary families and care relationships. It appears to be a particularly poor fit for lesbian relationships, where the care of babies and infants and household work is shared more evenly between the couple.¹²⁰ One worker in a lesbian relationship gave evidence to the Australian Human Rights Commission inquiry into supporting working parents:

Neither my partner nor I like that this system we live in [which] requires there to be a “primary” parent. We are both primary, we are equally important parents, we both need to spend quality time with our daughter, we both have interesting and rewarding careers, we both need to make money.¹²¹

IV. CONCLUSIONS

This discussion of the main anti-discrimination and labour law entitlements in Australia regarding work and care reveals four thematic limitations with them. The language of the legislation has combined with conservative judicial interpretations, procedural barriers, and insufficient sensitivity to diversity to render it ineffective in enabling workers to combine work with family obligations. These inadequacies exist in a neo-liberal context that is moving against the interests of women workers and workers with care responsibilities more generally. For example, increases in precarious work and the growing feminization of those forms of work receive little, if any, government attention. Commercial childcare has become less affordable as well as less available, making it harder for women to be engaged in the labour market.¹²² At the other end of the labour market, the working hours of full-time employees continue to

¹¹⁹ *Ibid*, s 47(1).

¹²⁰ Dempsey, *supra* note 114; Amaryll Perlesz et al, “Organising Work and Home in Same-Sex Parented Families: Findings from the Work Love Play Study” (2010) 31:4 Australian and New Zealand Journal of Family Therapy 374.

¹²¹ AHRC, *Supporting Working Parents*, *supra* note 2 at 89.

¹²² Roger Wilkins, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 15* (Melbourne: University of Melbourne, 2017) at 24-6.

increase, as does work intensification, making it harder both for full-time employees to manage care responsibilities and for those with care responsibilities to work full-time. All these forces converge to particularly disadvantage women and others with care responsibilities.