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**AUSTRALIAN ANTI-DISCRIMINATION LAW,  
WORK, CARE AND FAMILY**

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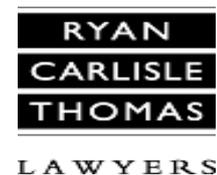


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# Australian Anti-Discrimination Law, Work, Care and Family

Anna Chapman\*

## I INTRODUCTION

From the mid 1970s Australian parliaments enacted legislation establishing statutory schemes to deal with grievances of discrimination in a range of contexts such as the commercial provision of goods and services, and accommodation. From the outset employment and work were a central concern of the schemes. Initially the statutes prohibited discrimination on the grounds of race, sex and marital status. Over time amendments were enacted to add discrimination against employees and workers related to pregnancy and responsibilities to care for others such as children, spouses, aged parents and relatives. Indeed, the enactment of new grounds and provisions in anti-discrimination legislation has been a main policy initiative of successive Commonwealth, State and Territory parliaments in response to growing calls for governments to respond to tensions between labour market engagement and care responsibilities.

The anti-discrimination provisions on care and family responsibilities have been the subject of much critical examination and commentary. Scholarship has revealed limitations and problems in the architecture of the schemes.<sup>1</sup> Narrow and overly legalistic interpretations by tribunals and courts have also been examined.<sup>2</sup> In addition, limitations in the processes of conciliation and enforcement through tribunal and court hearings have been highlighted.<sup>3</sup> This working paper provides a close examination of the specifics of work, care and family across Commonwealth, State and Territory anti-discrimination law. It explores the provisions of anti-discrimination legislation and case decisions relating to pregnancy, care and family responsibilities, for their understandings of work, gender, race, sexual orientation and relationship. The scope of the paper lies in the development of the different schemes over time.

For a number of reasons it is timely to review the passage of developments in anti-discrimination law regarding work and care. The Commonwealth

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<sup>1</sup> See, eg, Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Book, 2010); Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Chris Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006); Belinda Smith, 'Not the Baby and the Bathwater - Regulatory Reform for Equality Laws to Address Work-Family Conflict', (2006) 28(4) *Sydney Law Review* 689-732; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

<sup>2</sup> See, eg, Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31; Fiona Knowles, 'Misdirection for Indirect Discrimination' (2004) 17 *AJLL* 185; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *MULR* 325.

<sup>3</sup> See, eg, Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010); Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18 *Griffith Law Review* 778; Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525.

government is currently engaged in a process of reviewing Commonwealth anti-discrimination legislation with the aim of consolidation into one statute.<sup>4</sup> A close engagement with the progress of anti-discrimination legislation regarding work and care may usefully inform that review. In addition, new provisions enacted with the *Fair Work Act 2009* (Cth) (*'FW Act'*) provide protections for employees against 'adverse action', including discrimination, across all aspects of employment, including hiring, promotion, training and dismissal.<sup>5</sup> The *FW Act* provisions are linked to, and potentially draw on, anti-discrimination law in complex, and as yet unexplored, ways.<sup>6</sup> These intersections render it highly pertinent (and timely) to study anti-discrimination law for its understandings of discrimination, care and family, as these may inform interpretations of the new *FW Act* provisions.<sup>7</sup> A final reason for exploring developments in anti-discrimination law as it relates to work and care lies in the emergence in recent times, and notably in Victoria, of a new type of discrimination in the form of an unreasonable failure by an employer to accommodate an employee's care responsibilities.<sup>8</sup> In order to fully understand the potential of this new type of obligation on employers, and how it presents a departure from the past, a close reading of developments to date is called for.

The working paper is structured around two overarching themes that reflect how anti-discrimination law constitutes its understandings of work, care and family. The first (explored in Part III) reveals how this set of legal rules produces its concepts of work and the normative worker of the public sphere as separate to care and family responsibilities, which largely remain positioned in the private sphere. This is seen in how the legislation defines its domain through a liberal public/private dualism, how the comparative methodology of direct discrimination produces a worker separated from care and family, and how the dominant understanding of equality that underlies the legislation offers women and others with care responsibilities at most only that which the normative

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<sup>4</sup> Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011.

<sup>5</sup> *Fair Work Act 2009* (Cth) s 342, s 351.

<sup>6</sup> For example, the *FW Act* defines one form of prohibited 'adverse action' as where an employer 'discriminates between' the employee and other employees (s 342(1)). In addition, the *FW Act* provides an exception to 'adverse action' where the action is 'not unlawful under' applicable anti-discrimination law including the *SDA* and State and Territory anti-discrimination law (s 351(2), (3)). The grounds in the *FW Act*, including 'family or carer's responsibilities', are not defined in the Act. Nor is the concept of discrimination. See further Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) *Adelaide Law Review* (forthcoming); Simon Rice and Cameron Roles, "'It's a Discrimination Law Julia, But Not as We Know It": Part 3-1 of the Fair Work Act' (2010) 21 *The Economic and Labour Relations Review* 13; Carol Andrades, *Intersections Between 'General Protections' Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries* (Working Paper No 47, Centre for Employment and Labour Relations Law, 2009).

<sup>7</sup> Decisions reflect the complexity of the intersections between the statutory schemes. See for example, *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011); *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011); *D H Gibson Pty Limited* [2011] FWA 911 (10 February 2011); *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) (special leave to appeal to the High Court has been granted: Transcript of Proceedings, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011)).

<sup>8</sup> *Equal Opportunity Act 2010* (Vic) (*'EOA (Vic)'*) s 17, s 19, s 22, s 32 (first inserted into the *Equal Opportunity Act 1995* (Vic) (*'EOA 1995 (Vic)'*) by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)). See further, Chapman, above n 6; Anna Chapman, 'Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)' (2008) 21 *AJLL* 200; Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21 *AJLL* 116.

worker has. The second theme (Part IV) examines the ways in which gender, race, sexual orientation and family are constituted in the legal rules, and reveals how the attributes and legislative schemes are reductionist of diversity in care practices. They position much care outside the concern of anti-discrimination law, locating it firmly in the realm of the private. Together these dimensions reveal fundamental ways in which Australian anti-discrimination law falls short of offering a mechanism to bring about a deeper resolution between work and care.

In order to make sense of the discussion of the specifics of work, care and family, Part II of the working paper provides an overview of developments in anti-discrimination schemes across Australia, focusing on the grounds or attributes and the meaning of discrimination.

## II OVERVIEW OF THE STATUTORY SCHEMES

The ground of 'sex' was enacted into State anti-discrimination legislation in the 1970s, and at the Commonwealth level in 1984.<sup>9</sup> Since then all parliaments have incrementally enacted provisions into their anti-discrimination statutes to provide redress in relation to discrimination against employees and other workers that is related to their pregnancy, and responsibilities to care for others such as children.

The Commonwealth has been slow and hesitant in this regard. In 1992 the Commonwealth *SDA* was amended to add provisions relating to 'family responsibilities'.<sup>10</sup> As enacted though these rules were very limited, as they only prohibited conduct that comprised dismissal from employment, and only discrimination in the form of less favourable treatment (that is, direct discrimination).<sup>11</sup> Some three years later in 1995 provisions relating to 'potential pregnancy' were added to the Act (which already contained 'pregnancy' from enactment).<sup>12</sup> The relevant Minister described the objective of this amendment as being to provide 'clear and unambiguous' protection for women who are treated in a discriminatory manner on account of their potential to become pregnant and bear a child.<sup>13</sup> In 2003 breastfeeding was addressed through the addition of a direction in the statute that '[t]o avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women', and so is protected as sex discrimination.<sup>14</sup>

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<sup>9</sup> *Sex Discrimination Act 1975* (SA); *Equal Opportunity Act 1977* (Vic); *Anti-Discrimination Act 1977* (NSW) ('*ADA* (NSW)'). The Commonwealth *Sex Discrimination Act 1984* (Cth) ('*SDA*') was enacted in 1984.

<sup>10</sup> The Bill was prompted by Australia's ratification in 1990 of *ILO Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*.

<sup>11</sup> *SDA* s 4A, s 7A, s 14(3A) (inserted by the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth)).

<sup>12</sup> *SDA* s 7, and definition of 'potential pregnancy' in s 4B (inserted by the *Sex Discrimination Amendment Act 1995* (Cth)). Prior to this amendment in 1995, there was an exemption for reasonable behaviour in relation to direct discrimination on the attribute of pregnancy. This 1995 Act repealed it.

<sup>13</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2459 (Mr Michael Hugh Lavarch, Attorney-General).

<sup>14</sup> *SDA* s 5(1A) (inserted by the *Sex Discrimination Amendment (Pregnancy and Work) Act 2003* (Cth)).

The very limited scope of the *SDA* regarding care responsibilities remained unaddressed until 2011, when a number of important amendments were enacted. These implemented some of the recommendations of a 2008 Senate Inquiry.<sup>15</sup> '[B]reastfeeding' was made a separate ground and claim of discrimination, distinct from sex discrimination. In addition, the 'family responsibilities' provisions were extended beyond dismissal to apply in relation to all aspects of employment, including hiring and promotion. Notably, although the original 2010 Bill contemplated prohibiting indirect as well as direct discrimination on the ground of 'family responsibilities', the provisions in the Bill on indirect discrimination did not survive debate in Parliament and as enacted the legislation retained the prohibition on direct discrimination alone.<sup>16</sup>

Similar to developments at the Commonwealth level, a relatively early concern of all State and Territory parliaments was to prohibit discrimination related to 'pregnancy' (which in several statutes has been extended to identify 'potential pregnancy' as well).<sup>17</sup> More recently, all State and Territory anti-discrimination statutes have been amended to cover discrimination on the ground of 'breastfeeding'.<sup>18</sup> Like the Commonwealth *SDA*, three State anti-discrimination statutes have an attribute identified as 'family responsibilities',<sup>19</sup> and four have attributes that relate to 'carer' responsibilities or status.<sup>20</sup> All State and Territory

<sup>15</sup> Senate Standing Committee on Legal and Constitutional Affairs, 'The Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality' (2008). See further, Dominique Allen, 'Improving the Effectiveness of the Sex Discrimination Act: Recommendations from the 2008 Senate Inquiry' (2009) 22 *AJLL* 100.

<sup>16</sup> *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) (which took effect in June 2011). The Act also extended the reach of the *SDA* to male complainants, and made amendments to the sexual harassment provisions.

<sup>17</sup> *EOA 1995* (Vic) s 6(h) 'pregnancy' (enacted with the *EOA 1995* (Vic) in 1995); *Anti-Discrimination Act 1991* (Qld) ('*ADA* (Qld)') s 7(1)(c) 'pregnancy' (enacted with the *ADA* (Qld) in 1991); *Equal Opportunity Act 1984* (SA) ('*EOA* (SA)') s 85T(1)(c) 'pregnancy' (enacted with the *EOA* (SA) in 1984); *Equal Opportunity Act 1984* (WA) ('*EOA* (WA)') s 10 'pregnancy' (enacted with the *EOA* (WA) in 1984); *Anti-Discrimination Act 1998* (Tas) ('*ADA* (Tas)') s 16(g) 'pregnancy' (enacted with the *Sex Discrimination Act 1994* (Tas)); *Discrimination Act 1991* (ACT) ('*DA* (ACT)') s 7(1)(f) 'pregnancy' (enacted with the *DA* (ACT) in 1991); *Anti-Discrimination Act 1992* (NT) ('*ADA* (NT)') s 19(1)(f) 'pregnancy' (enacted with the *ADA* (NT) in 1992). Note also the *ADA* (NSW) s 24(1B) which provides that the 'fact that a woman is or may become pregnant is a characteristic that appertains generally to women' and so is protected as sex discrimination (inserted by the *Anti-Discrimination (Amendment) Act 1994* (NSW)). The *EOA* (SA), *ADA* (Tas), *ADA* (NT) and *DA* (ACT) define their attributes of 'pregnancy' to include either child-bearing capacity or potential pregnancy: *EOA* (SA) s 85T(4); *ADA* (Tas) s 3; *ADA* (NT) s 4(1); *DA* (ACT) Dictionary (see also s 5A on the meaning of potential pregnancy).

<sup>18</sup> *EOA 1995* (Vic) s 6(ab) 'breastfeeding' (inserted by the *Equal Opportunity (Breastfeeding) Act 2000* (Vic)); *ADA* (Qld) s 7(1)(e) 'breastfeeding' (enacted with the *ADA* (Qld) in 1991); *EOA* (WA) s 10A 'breast feeding' (inserted by the *Equal Opportunity Amendment Act 2010* (WA)); *ADA* (Tas) s 16(h) 'breastfeeding' (inserted into the *Sex Discrimination Act 1994* (Tas) by the *Sex Discrimination Amendment Act 1998* (Tas)); *ADA* (NT) s 19(1)(h) 'breastfeeding' (enacted with the *ADA* (NT) in 1992); *DA* (ACT) s 7(1)(g) 'breastfeeding' (inserted by the *Discrimination Amendment Act 1999* (ACT)). See also *EOA* (SA) s 85T(5) which identifies breastfeeding as part of the attribute of 'association with a child' (inserted with the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA)), and also *ADA* (NSW) s 24(1C) which provides that 'the fact that a woman is breastfeeding or may breastfeed is a characteristic that appertains generally to women' and so is protected as sex discrimination (inserted by the *Anti-Discrimination Amendment (Breastfeeding) Act 2007* (NSW)).

<sup>19</sup> *ADA* (Qld) s 7(1)(o) 'family responsibilities' (inserted by the *Discrimination Law Amendment Act 2002* (Qld)); *EOA* (WA) s 35A 'family responsibility or family status' (inserted by the *Equal Opportunity Amendment Act 1992* (WA)); *ADA* (Tas) s 16(j) 'family responsibilities' (enacted with the *ADA* (Tas) in 1998).

<sup>20</sup> *EOA* (Vic) s 6(i) 'parental status or status as a carer' (the identification of the status as a 'carer' was first enacted with the enactment of the *EOA 1995* (Vic)); *ADA* (NSW) s 49S 'responsibilities as a carer' (inserted by the *Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000* (NSW)); *EOA* (SA) s 85T(1)(e)

statutes, apart from the New South Wales and Western Australian legislation, contain separate attributes and provisions that relate to the status of being a 'parent'.<sup>21</sup>

All Australian anti-discrimination statutes extend beyond the specific attributes identified in the legislation, to cover also characteristics that appertain generally to people with an attribute, and characteristics that are generally imputed to people with a particular attribute.<sup>22</sup> For example, pregnancy and the potential to become pregnant has long been recognised as a characteristic that applies generally to women, and as such discrimination on the ground of potential pregnancy is recognised as a form of sex discrimination.<sup>23</sup> This characteristic extension mechanism has played an important role in the past of filling gaps in coverage before separate grounds relating to, for example, potential pregnancy and breastfeeding were enacted.<sup>24</sup>

Anti-discrimination statutes have identified two main forms of discrimination – generally known as direct discrimination and indirect discrimination. The older form of direct discrimination, which is still found in most statutes, is articulated around the idea of less favourable treatment on the basis of an attribute. Specifically, it is required that it be established that the respondent treated (or proposes to treat) the complainant 'less favourably than' the respondent treated (or would treat) a person without that attribute. The circumstances of the complainant and the comparator person without the attribute must be the same or not materially different, and the treatment of the complainant must be by reason of the attribute.<sup>25</sup> This test is generally seen as requiring a comparison between the way the complainant was treated by the respondent, and the way a similarly situated (real or hypothetical) person not of the complainant's attribute

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'caring responsibilities' (inserted with the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA)); *DA* (ACT) s 7(1)(e) 'status as a parent or carer' (enacted with the *DA* (ACT) in 1991).

<sup>21</sup> *EOA* (Vic) s 6(i) 'parental status or status as a carer' (protection for the status of being a parent was contained in the *Equal Opportunity Act 1984* (Vic)); *ADA* (Qld) s 7(1)(d) 'parental status' (enacted with the *ADA* (Qld) in 1991); *ADA* (Tas) s 16(i) 'parental status' (enacted with the *Sex Discrimination Act 1994* (Tas)); *ADA* (NT) s 19(1)(g) 'parenthood' (enacted with the *ADA* (NT) in 1992); *DA* (ACT) s 7(1)(e) 'status as a parent or carer' (enacted with the *DA* (ACT) in 1991). Note also the *EOA* (SA) s 85T(1)(d) identifies the attribute of 'association with a child' (inserted with the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA)). The *SDA* does not have a ground of parental status.

<sup>22</sup> *SDA* s 5(1)(b)(c), s 7(1)(b),(c); *EOA* (Vic) s 7(2)(b), (c); *ADA* (NSW) s 24(1A); *ADA* (Qld) s 8; *EOA* (SA) s 29(6)(c); *EOA* (WA) s 35A(1); *ADA* (Tas) s 14(2); *ADA* (NT) s 20(2); *DA* (ACT) s 7(2). In 1994 and 2007 the *ADA* (NSW) was successively amended to provide explicitly that the fact that a woman is or may become pregnant, or breastfeeding or may breastfeed, are characteristics that appertain generally to women and can form the basis of a sex discrimination claim: *ADA* (NSW) s 24(1B), (1C). From 2003 the *SDA* has provided that 'breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women', and so is protected as sex discrimination: *SDA* s 5(1A). Note that some statutes also cover past attributes: *EOA* (Vic) s 7(2)(a); *ADA* (NSW) s 49S(2); *ADA* (Qld) s 8(d); *DA* (ACT) s 7(2)(d).

<sup>23</sup> *Bear v Norwood Private Nursing Home* (1984) EOC 92-019 at p 75,475-75,476; *Marshall v Marshall White & Co Pty Ltd* (1990) EOC 92-304 at p 78,072; *Human Rights & Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 p 328 per Lockhart J.

<sup>24</sup> Notably Western Australia has only very recently enacted provisions relating to breastfeeding: *EOA* (WA) s 10A 'breast feeding' (inserted by the *Equal Opportunity Amendment Act 2010* (WA)).

<sup>25</sup> *SDA* s 5(1); *ADA* (NSW) s 24(1); *ADA* (Qld) s 10; *EOA* (SA) s 29(2)(a), s 6(3); *EOA* (WA) s 8(1); *ADA* (Tas) s 14(2); *ADA* (NT) s 20(2). The *ADA* (NT) also provides that discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity': s 20(1). The Victorian and ACT statutes provide a test in simpler language of treating another person 'unfavourably because' that person has an attribute: *EOA* (Vic) s 8(1); *DA* (ACT) s 8(1).

was (or would be thought to be) treated by the respondent.<sup>26</sup> Put simply, in a complaint of sex discrimination brought by a woman, the comparator employee will be a similarly situated male employee.<sup>27</sup> In a complaint of pregnancy discrimination, the comparator will be a person whose employment circumstances are similar to the complainant, and who is not pregnant.<sup>28</sup>

The second main understanding of discrimination recognized in anti-discrimination legislation is indirect discrimination. The older form of indirect discrimination requires that the employer has imposed a requirement or practice with which the complainant could not, or did not, comply. That requirement or practice must be one which a higher, or substantially higher, proportion of persons who do not have the complainant's attribute comply or are able to comply, and its imposition must be not reasonable in all the circumstances.<sup>29</sup> More recently some statutes, including the *SDA*, have provided a more open-textured understanding of indirect discrimination, requiring instead the imposition of a requirement or practice that has, or is likely to have, the effect of disadvantaging persons with the attribute. The requirement or practice must not be reasonable.<sup>30</sup> As discussed below tribunals and courts have been prepared to find that a requirement to work full-time following return from an extended period of leave (such as parental leave) will disadvantage women relative to men, or will be a requirement with which a substantially higher proportion of men than women can comply.<sup>31</sup>

In addition to prohibiting conduct that amounts to direct and indirect discrimination, two (and perhaps three) anti-discrimination statutes – the Victorian Act, the Northern Territory Act (and arguably the New South Wales statute) - move beyond conventional understandings of discrimination to impose an obligation on employers to provide a level of accommodation for an employee's care responsibilities.<sup>32</sup> Some jurisdictions have also been expanded

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<sup>26</sup> Note that many early cases where an employee claimed to have been dismissed due to being pregnant did not explicitly articulate the comparative methodology, or the need for a comparator, focusing instead more on whether the causal link was established between the attribute and the dismissal. The reasoning in these cases was simpler and less technical. See, eg, *Cook v Lancet Pty Ltd* (1989) EOC 92-257; *Mullins v National Association for Training the Disabled in Office Work* (1990) EOC 92-318; *Marshall v Marshall White & Co Pty Ltd* (1990) EOC 92-304; *Larsen v RSPCA – Northern Division (Tasmania)* (1991) EOC 92-356; *Smith v Frankl* (1991) EOC 92-362. In 2008 a Senate inquiry recommended that the comparator requirement under the *SDA* be removed, in favour of the adoption of the *DA* (ACT) approach: Senate Standing Committee on Legal and Constitutional Affairs, *The Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) recommendation 5.

<sup>27</sup> See, eg, *CM and S v Australian Telecommunications* [1992] HREOCA 10 (23 June 1992); *Ho v Regulator Australia Pty Ltd* [2004] FMCA 62 [151]; *Poniatowska v Hickinbotham* [2009] FCA 680 (23 June 2009) [310].

<sup>28</sup> See, eg, *Erbs v Overseas Corporation* [1986] HREOCA 2 (2 December 1986); *Edwards v TT Line Tasmania Pty Ltd* [1997] HREOCA 49 (25 August 1997); *Parker v North Queensland Animal Refuge Inc* [1998] QADT 4 (16 March 1998) p 18.

<sup>29</sup> *ADA* (NSW) s 24(1)(b), s 49T(1)(b); *ADA* (Qld) s 11; *EOA* (SA) s 85T(4)(b); *EOA* (WA) s 35A(2). Note that the *ADA* (NT) does not contain an obvious indirect discrimination rule, but does provide that discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity': s 20(1)(a).

<sup>30</sup> *SDA* s 5(2), s 7(2), s 7B, s 7C; *EOA* (Vic) s 9(1); *DA* (ACT) s 8(1)(b), (2); *ADA* (Tas) s 15.

<sup>31</sup> See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998) para 6.17.10 (a claim of indirect discrimination on the ground of sex under the *SDA*); *Bogle v Metropolitan Health Service Board* (2000) EOC 93-069 [189], [192] (a claim of indirect discrimination on the grounds of sex and family responsibilities under the *EOA* (WA)).

<sup>32</sup> *EOA* (Vic) s 17, s 19, s 22, s 32 (first inserted into the *EOA 1995* (Vic) by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) (see Chapman, above n 8)); *ADA* (NT) s 24 (which applies in relation

to explicitly countenance human rights considerations. The Australian Capital Territory and Victoria each have separate legislation that builds in human rights concepts and concerns into the interpretation of their anti-discrimination legislation. They provide that the jurisdiction's statute book (including the anti-discrimination statute) must be interpreted, so far as is possible to do so, in a way that is compatible with the human rights recognized in the Territory or State human rights statute.<sup>33</sup>

These State and Territory provisions, together with the Commonwealth *SDA*, do not provide even coverage across Australia regarding discrimination related to pregnancy, and responsibilities to care for others. The statutes differ in the range and wording of attributes protected, the statutory meaning of the concept of discrimination that is prohibited, and in the role of positive obligations and human rights considerations. In addition, and importantly, they also differ in the span of potentially relevant exemptions and exceptions that take effect to excuse conduct that would be otherwise unlawful under the relevant statute.<sup>34</sup> For these reasons the scope of protection across Australia in relation to pregnancy and caring responsibilities varies from State to State and Territory. Nonetheless, close examination of the different schemes reveals a number of themes embedded within them regarding the particular vision of work, care and family of anti-discrimination law. These themes are explored in Part III and Part IV of the working paper.

### **III SEPARATING WORK AND THE WORKER FROM CARE AND FAMILY**

#### ***A The Public Sphere of Work and the Private Realm of Care and the Family***

In the second half of the 20<sup>th</sup> Century a body of scholarship emerged exploring the linguistic basis of law in the Western liberal tradition as lying in binary oppositions of meaning, such as objective/subjective, rational/emotional, and public/private. The scholarship shows how law represents itself as concerned only with the public realms of life, such as the labour market, and not the private

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to all attributes in the Act). This appears to be the likely effect of the *ADA* (NSW) provisions in s 49V(4) and s 49U, although this has not been tested in case decisions. In addition, in the context of indirect discrimination claims and the reasonableness component, the New South Wales tribunal has required employers to at least consider and sometimes to make reasonable efforts to accommodate an employee's request to alter her working arrangements: *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84].

<sup>33</sup> *Human Rights Act 2004* (ACT) s 30, dictionary definition of 'Territory law'; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32, s 3(1) definition of 'statutory provision'. Cases have not explored the impact of these provisions in shaping interpretations of the pregnancy and care responsibility provisions.

<sup>34</sup> Some exemptions relate specifically to the pregnancy, and carer responsibility type attributes (see, eg, the 'unjustifiable hardship' exemptions in *ADA* (NSW) s 49V(4); *ADA* (Tas) s 28), whilst others apply more broadly to the range of attributes covered under the different statutes. These latter include, for example, action of an employer that was taken under statutory authority (such as an employer's action that was authorised under occupational health and safety legislation, or industrial legislation): *SDA* s 40; *EOA* (Vic) s 75; *ADA* (NSW) s 54; *ADA* (Qld) s 106 (see also s 108); *EOA* (WA) s 69, s 35N; *ADA* (Tas) s 24; *ADA* (NT) s 53; *DA* (ACT) s 30. There are also exemptions that relate to the activities of religious institutions that conform to the teachings of the religion: *SDA* s 37(d), s 38; *EOA* (Vic) ss 82-84; *ADA* (NSW) s 56; *ADA* (Qld) s 109; *EOA* (SA) s 50; *EOA* (WA) s 72, s 73; *ADA* (Tas) s 27(1)(a), s 51, s 52; *ADA* (NT) s 51; *DA* (ACT) s 32, s 33.

spheres of care and family, which in liberal legal philosophy are left untouched by legal regulation.<sup>35</sup>

All Australian anti-discrimination statutes reflect this liberal tradition in the ways in which they delineate their domains. A main mechanism through which this occurs is in the articulation of the definitions of 'employment' and 'work', for application in the substantive prohibitions on discrimination.<sup>36</sup> The definitions typically define 'employment' or 'work' in terms of employment (in the common law sense of engagement under a contract of employment),<sup>37</sup> engagement under a 'contract for services',<sup>38</sup> and several include work remunerated by commission,<sup>39</sup> work as a Commonwealth, State or Territory 'employee',<sup>40</sup> and work under a statutory appointment.<sup>41</sup> Some definitions refer to work under a vocational placement or an apprenticeship program.<sup>42</sup> A number of jurisdictions extend beyond remunerated 'employment' and 'work' to apply in relation to unpaid or volunteer work.<sup>43</sup> For example, under the South Australian statute 'unpaid work' relates to work for an 'organisation' who becomes the unpaid worker's 'employer' under the Act, whilst the Tasmanian statutory provisions refer to 'employment' as including 'employment or occupation in any capacity, with or without remuneration'.<sup>44</sup>

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<sup>35</sup> See, eg, Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997); Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448; Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) chap 1; Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835.

<sup>36</sup> *SDA* s 4(1) definition of 'employment', Part II Div 1; *EOA* (Vic) s 4(1) definition of 'employment', Part 4 Div 1, Div 2; *ADA* (NSW) s 4(1) definition of 'employment', Part 3 Div 2; *ADA* (Qld) Dictionary definition of 'work', Chap 2 Part 4 Div 2; *EOA* (SA) s 5(1) definition of 'employment', Part III Div II; *EOA* (WA) s 4(1) definition of 'employment', Part II Div 2; *ADA* (Tas) s 3 definition of 'employment', s 22(1)(a); *ADA* (NT) s 4(1) definition of 'work', Part 4 Div 3; *DA* (ACT) Dictionary definition of 'employment', Part 3 Div 1.

<sup>37</sup> *EOA* (Vic) s 4(1)(a) definition of 'employment'; *ADA* (Qld) Dictionary definition of 'work' para (a); *ADA* (Tas) s 3(a), (h) definition of 'employment'; *ADA* (NT) s 4(1) definition of 'work' para (a).

<sup>38</sup> *SDA* s 4(1) definition of 'employment'; *EOA* (Vic) s 4(1) definition of 'employment' para (c); *ADA* (NSW) s 4(1) definition of 'employment'; *ADA* (Qld) Dictionary definition of 'work' para (b); *EOA* (WA) s 4(1) definition of 'employment' para (b); *ADA* (Tas) s 3 definition of 'employment' para (g); *ADA* (NT) s 4(1) definition of 'work' para (b); *DA* (ACT) Dictionary definition of 'employment' para (a). A distinction is drawn in the common law between contracts of employment, and other forms of contracts to perform work, such as contracts for services. See generally, Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> edn, 2011) 155-160. That anti-discrimination law applies to all forms of contracts to perform work recognized at common law stands in stark contrast to the *FW Act* which generally speaking, continues to apply only to the narrower band of contracts of employment: see for example *FW Act* s 15.

<sup>39</sup> *EOA* (Vic) s 4(1) definition of 'employment' para (d); *ADA* (Qld) Dictionary definition of 'work' para (c); *ADA* (Tas) s 3 definition of 'employment' para (e); *ADA* (NT) s 4(1) definition of 'work' para (c).

<sup>40</sup> *SDA* s 4(1) definition of 'employment' para (c); *EOA* (WA) s 4(1) definition of 'employment' para (c); *DA* (ACT) Dictionary definition of 'employment' para (b).

<sup>41</sup> *EOA* (Vic) s 4(1) definition of 'employment' para (b); *ADA* (Qld) Dictionary definition of 'work' para (d); *ADA* (NT) s 4(1) definition of 'work' para (d).

<sup>42</sup> *ADA* (Qld) Dictionary definition of 'work' paras (ea), (h); *ADA* (Tas) s 3 definition of 'employment' para (i); *ADA* (NT) s 4(1) definition of 'work' para (f). Whilst most jurisdictions contain at least a three point articulation of the meaning of 'employment' or 'work', two statutes – the *ADA* (NSW) and the *EOA* (SA) – contain very short definitions of 'employment'.

<sup>43</sup> *ADA* (Qld) Dictionary definition of 'work' para (f); *EOA* (SA) s 5(1) definition of 'employment'; *ADA* (Tas) s 3 definition of 'employment' para (a); *DA* (ACT) Dictionary definition of 'employment' para (c). The *EOA* (Vic) explicitly provides that the sexual harassment provisions in the Act extend in relation to work on a voluntary or unpaid basis: s 4(1) definition of 'employment'.

<sup>44</sup> *EOA* (SA) s 5(1) definitions of 'employment', 'employee', 'employer' and 'unpaid worker'; *ADA* (Tas) s 3 definition of 'employment'.

The terminology and concepts used in each formula of ‘employment’ and ‘work’ contain a strong flavour of public exchanges, and those that mimic the labour market. They use standard employment law and market language, even in the jurisdictions that cover unpaid work. Arrangements for voluntary work are not generally seen as giving rise to common law contracts, as mostly the requisite intention to create legal relations will be absent, and likely the contractual requirement of consideration as well.<sup>45</sup> In those jurisdictions that include unpaid work in their coverage, it seems unlikely therefore that a common law contract would be required in order to trigger coverage by the statute. In the remaining jurisdictions though, it is unclear whether the definitions would require that the work be performed under a contract enforceable at common law.<sup>46</sup> The few cases that have examined in a substantive manner the definitions of ‘employment’ or ‘work’ in anti-discrimination law have not explored these matters fully. The most authoritative statement relevant to this question comes from a NSW Court of Appeal decision which examined the question of whether police officers were ‘employees’ for the purposes of the New South Wales anti-discrimination statute. In this decision Spigelman CJ expressed the view that:

nothing in the scope and purpose of the [New South Wales] Act suggests that ... [the concept of employee] should be limited to persons subject to contracts of employment, even with the specific statutory extension to include work under a contract for services. Insofar as persons do "work" in a context closely analogous to "employment", the purpose of the legislation would be better served by extending the protection of the Act to such a relationship. There must be some element of regularity and permanence in the relationship, and also an element of direction and control of work, for it to fall within an extended sense of the word "employment". But where such context exists, the Court should be slow to hold that the Act has no application.<sup>47</sup>

His Honour is drawing on a labour market understanding of employment as having some level of ‘regularity and permanence’, with work being performed under the ‘direction and control’ of the putative employer.<sup>48</sup> Some tribunal decisions likewise reflect labour market understandings of work and employment, in circumstances where factually there probably was a common law contract in existence.<sup>49</sup> Other tribunal decisions though, to do with prison labour and volunteering in a religious organization, arguably reflect neither a strong commercial understanding of employment, nor probably the existence of

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<sup>45</sup> Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696 at 703-709.

<sup>46</sup> A similar point was made in relation to the SDA by the Human Rights and Equal Opportunity Commission before a 2008 Senate inquiry: Senate Standing Committee on Legal and Constitutional Affairs, *The Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) p 28.

<sup>47</sup> *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232 at [88] per Spigelman CJ.

<sup>48</sup> On the legal meaning of employment, and in particular the difference between employment under a contract of employment and engagement under a contract for services, see Owens, Riley and Murray, above n 38, 155-160.

<sup>49</sup> See, eg, *Koppleman, Gill v Steven Moore* [2000] TASADT 1 (18 December 2000) (complainant was paid a small amount of remuneration by the respondent’s finance company, comprising a percentage of each application for a personal loan that she prepared on instruction from the respondent); *Chandra v Brisbane City Council* [2002] QADT 1 (24 January 2002) (complainant operated two canteens pursuant to a lease with the respondent).

a contract at common law, yet both situations were found to be within the scope of the 'work' provisions in the Queensland statute.<sup>50</sup>

Although the definitions of 'employment' and 'work' in all the statutes are inclusive only, and the cases have not to date provided a clear demarcation of these concepts, it nonetheless seems very unlikely that arrangements that parents (whether they are a couple or not) make with each other in relation to the care of their children would amount to 'employment' or 'work' for these purposes. Nor are other ordinary forms of (unremunerated) care arrangements made between family, friends and the members of kinship groups, for example, likely to come within the statutory definitions of 'employment' and 'work'. This is to say that anti-discrimination legislation – and probably most relevantly sex discrimination – positions itself as having no application in relation to the arrangements made for the performance of such care work within families, intimate relationships and social and cultural settings. These sorts of agreements, especially where the relationship is subsisting, have often been found to be unenforceable in common law contract, even where they involve substantial amounts of money, the general understanding being that parties in these contexts lack an intention to attract legal obligations to their promises.<sup>51</sup>

Unsurprisingly, cases under the various anti-discrimination statutes have not explored the question of the applicability of the 'employment' and 'work' provisions to unremunerated care arrangements made between family, friends and others.<sup>52</sup> That these arrangements are seen as private matters beyond the reach of anti-discrimination law is supported by the exclusions from coverage that are contained in most statutes for all types of work performed for commercial reward that takes place in the employer's own home (or under some statutes any person's home), or more narrowly where it involves the care of children in their home.<sup>53</sup> This is a raw drawing of a line excluding the built entity

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<sup>50</sup> *NC v Queensland Corrective Services Commission* [1997] QADT 22 (30 September, 1997) (complainant prisoners were denied eligibility to work in the prison kitchen, for which prisoners received a small amount of remuneration); *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 (12 December 2008) (a non-Catholic volunteer President of a Catholic lay organization was told to resign). Both these cases are in a jurisdiction that covers unpaid work. Note that the accepted view is that prisoners do not work under a contract at common law, as the element of intention to create a contract is lacking: *Ireland v Johnson* [2009] WAIRC 00123; *Midas Conway v GSL Custodian Services Pty Ltd* [2005] AIRC 792. It is unclear whether the volunteer President of the Catholic lay organization would have been engaged pursuant to a common law contract: *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308; *Morris and Morris v Anglican Community Services* [2000] SAIRC 6; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

<sup>51</sup> The classic cases are *Balfour v Balfour* [1919] 2 KB 571 and *Cohen v Cohen* (1929) 42 CLR 91 (both involving allowances promised by husbands to their wives). See more recently, for example, *Williamson v Suncorp Metway Insurance Ltd* [2008] QSC 244. See further, Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (LawBook/Thomson Reuters, 2009) [5.25]-[5.50]; Mary Keyes and Kylie Burns, 'Contract and the Family: Whither Intention' [2002] *MULR* 30.

<sup>52</sup> There has however been a decision relating to a party for lesbians in which it was affirmed that, in enacting the *EOA* (SA), 'the legislature did not intend to reach into every aspect of life': *O'Keefe v Sappho's Party Inc* [2009] SAEOT 50 (24 April 2009) at [23] per Barrett J. The fundamental question was: 'Was she [the complainant] discriminated against in the public sphere where the Act protects her from discrimination or was she discriminated against in the private sphere where the Act did not protect her?' *O'Keefe v Sappho's Party Inc* [2009] SAEOT 50 (24 April 2009) at [35] per Barrett J (italics removed). The question was addressed by weighing up the public aspects of the party in question against the private aspects of it, finding by majority that the party was a private event and so outside the scope of the prohibition on discrimination in the provision of goods and services under the *EOA* (SA).

<sup>53</sup> *SDA* s 14(2); *EOA* (Vic) s 24; *ADA* (Qld) s 26, s 27; *EOA* (WA) s 33; *ADA* (Tas) s 27(1)(c); *DA* (ACT) s 24, s 25. See also *EOA* (SA) s 34(1); *O'Keefe v Sappho's Party Inc* [2009] SAEOT 50 (24 April 2009) at [8]. Note that

of the home, thereby constituting the commercial activities that occur within homes, such as domestic cleaning, child care, and gardening work, performed by non-family members under legally enforceable contracts for reward, as outside the scope of the legislation's concern.<sup>54</sup> These exemptions reflect both the malleability of liberalism's public/private divide, and also the strength of the ideology surrounding the home and domestic sphere as being outside law's realm. They suggest strongly that care and domestic arrangements between family members, people in intimate relationships, and friends, which are not commercially remunerated, are far beyond the reach of anti-discrimination law.

In these drawings of a public/private, anti-discrimination law operates to separate work in the public sphere from care and family in the private sphere, even typically where that care work is performed under a commercial arrangement. Law's realm is constructed to lie in a particular understanding of 'employment', 'work', and the public, countenancing family and care arrangements in that public realm, but only to a closely defined degree, and always purporting not to regulate or touch family and care outside those carefully articulated parameters. The very process of permitting some legitimate space for care and family commitments in anti-discrimination law's public realm itself generates the separation between the public realm of work and the rest of family and care which remain firmly positioned in the private. In this way work is separated from care, and the fiction of care, the home and family as being beyond, or prior to, law is maintained. As scholarship has shown, a legal policy of non-intervention in the private does not leave that sphere unregulated, or untouched, by law. Rather, law does regulate private matters, albeit that it does so indirectly through creating a space, and giving its imprimatur to, the influence of informal mechanisms of social power.<sup>55</sup>

An illustration of these ideas is provided in the 1993 decision of *Speering v Ministry of Education*.<sup>56</sup> Ms Speering was a teacher of almost 20 years standing, employed by the Western Australian Ministry of Education. Initially she was engaged full-time and after a two year probationary period achieved permanent

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some of these exclusions relate only to the prohibition on discrimination, and not the prohibition on sexual harassment: *Hickmott v Shaw and Bionic Products* [1995] HREOCA 18 (26 July 1995). Other exemptions similarly reflect a public/private approach. Although anti-discrimination legislation applies generally to partners and potential partners in their relationship with the partnership, most statutes only operate in relation to partnerships of 5 or 6 or more people, reflecting a view that small partnerships are more properly situated in the private realm of life than the regulated public sphere: *SDA* s 17; *EOA* (Vic) s 31; *ADA* (NSW) s 49Y; *ADA* (Qld) s 16, s 17, s18; *EOA* (WA) s 35E. Note that three statutes apply to all partnerships regardless of size: *EOA* (SA) s 85Y; *ADA* (Tas) s 22(1)(a), s 3 definition of 'employment'; *DA* (ACT) s 14. It is unclear whether the *ADA* (NT) covers a partnership under its definition of 'work': *ADA* (NT) s 28(b), s 31, s 4 definition of 'work'.

<sup>54</sup> One context of these exemptions is the increase in Australian households contracting out domestic work such as cleaning, garden maintenance, clothes washing and ironing: Australian Bureau of Statistics, *4102.0 - Australian Social Trends, March 2009* (2009). At the international level the International Labour Organisation has become increasingly concerned with the general exclusion of domestic workers from employment protections. The issue of domestic work discussed at the June 2010 conference: International Labour Office, *Decent Work for Domestic Workers, Report IV(1), Fourth Item on the Agenda, International Labour Conference, 99th Session, 2010* (2010).

<sup>55</sup> See, eg, Boyd, above n 35; Thornton, *Public and Private*, above n 35; Thornton, 'The Public/Private Dichotomy', above n 35; O'Donovan, above n 35, chap 1; Olsen, above n 35.

<sup>56</sup> *Speering v Ministry of Education* (unreported, Equal Opportunity Tribunal of Western Australia, Deputy President O'Brien, Members Buick and Harris, 14 May 1993) ('*Speering*').

status. After taking 12 months maternity leave in 1979, her options were to return to work full-time, or resign. She chose to resign her full-time position and take up part-time work with the Ministry. Being part-time meant that she was automatically classified as a 'temporary teacher', and this had many disadvantages attached to it, including that Speering wouldn't always know whether she would be employed in the next school year. In addition, as a temporary teacher she wasn't entitled to maternity leave, and so on the birth of her second child she resigned. In the following year she started back again with the Ministry, filling a few different positions including relief teaching, and with time settling on a part-time position again. This continued to mean that she was classified as a temporary teacher.

In 1990 the Ministry introduced a policy under which employees could convert from temporary status to permanent employment, but the policy required, amongst other things, that applicants work at least one year full time (as a probation period).<sup>57</sup> Speering challenged this requirement to work full-time for a year, on the basis that it constituted indirect discrimination on the attribute of her sex, or alternatively on the attribute of a characteristic that appertained generally to women (that they have children and have the main responsibility for caring for them). Speering's evidence was that she was not able to work full-time because at 1990 she 'still had very many family responsibilities and a very busy husband'.<sup>58</sup> The WA tribunal determined that Speering had established her complaint, commenting that 'in none of the material tendered to the [t]ribunal nor indeed in the oral evidence was there any cogent or logical explanation as to why there was the requirement [in the Ministry policy] to serve the probationary period full-time.'<sup>59</sup>

This decision is interesting as it records that Speering's husband, an operations manager, gave evidence that:

his job would have suffered had he assisted his wife in the day to day responsibilities of looking after the children. He said that [it]... would have been seen by the management in his company that he was not committed enough to his job. He was working about sixty hours a week and if he had to take time off this would not have been seen in a good light by management.<sup>60</sup>

The decision records further that Speering testified that her husband 'was in a very responsible job and worked a lot on the weekends and very long hours',<sup>61</sup> and that by the time of the birth of their second child his work commitments 'were becoming increasingly more demanding.'<sup>62</sup>

The definition of indirect discrimination required amongst other things that Speering establish that she was not able to comply with the Ministry's condition

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<sup>57</sup> The decision notes that in 1992 the policy was altered to permit the probationary period of 12 months to be served part-time: *Speering* p 1, p 8, p 10, p 24.

<sup>58</sup> *Speering* p 7.

<sup>59</sup> *Speering* p 13. Ms Speering was awarded \$4,000 in compensation for the loss of opportunities in her employment and for the stress she experienced.

<sup>60</sup> *Speering* p 5.

<sup>61</sup> *Speering* p 3.

<sup>62</sup> *Speering* p 3. See similarly at p 4.

to work full-time for a year. The tribunal was at pains to point out that it was not its role to comment on the domestic arrangements between Speering and her husband; presumably on the view that this would be an inappropriate incursion into the private realm of the Speering family life. On the question of whether Speering could work full-time for a year, the decision records:

In this case it is not to the point to say that the Complainant chose to have children, chose not to put them in care, chose to work part-time. The fact is that her lifestyle as it concerned the upbringing of her children is in keeping with that of women with children generally. It is generally the man who continues with his job and the woman who stops working or makes a career change either in occupation or in hours of work. It is not the role of the Tribunal to comment whether in the context of our society this is a desirable state of affairs – it is the status quo, generally speaking.<sup>63</sup>

This decision can be seen as illustrating both the way in which anti-discrimination law has separated work from care, as well as shaping indirectly the arrangements between Speering and her husband. The decision quarantines his job as an operations manager from care responsibilities for his children, leaving him free to pursue his labour market aspirations unencumbered by care concerns. This strongly separates his work from (his) care responsibilities. The decision shapes the private sphere of arrangements between Speering and her husband, as the statutory scheme validated (and entrenched perhaps in their relationship) his role as the primary wage earner who apparently performs no day to day care, and her role as the primary (if not sole) carer and secondary wage earner. The decision confirms and facilitates the practice of women scaling down their level of engagement in the labour force – typically to part-time status and often to precarious conditions and insecurity – so that the private sphere of care can be given more of their time. This doesn't bring work and care closer for Speering and other women in her position, let alone merge them; rather it merely assists in and allows for an enlargement in her circle of care responsibilities, and a concomitant shrinking of her sphere of labour market work, with all the attendant precariousness that often entails.

Speering is not an unusual case, factually in terms of her history of precarious work following motherhood, and in the approach of the decision-maker not to comment on her domestic arrangements with her partner. What is notable though about the case, and the reason for its use here, is that it is unusual for evidence to be given about the demanding job of the other parent, and that person's unavailability to undertake domestic and care work. In subsequent cases brought by women claiming indirect discrimination in relation to a requirement to work full-time following parental leave, or a requirement to be deployable to different locations of the employer, a mother's argument that she cannot comply with such requirements due to care responsibilities is generally not explored in the hearing, and is accepted by the decision-maker at face value.<sup>64</sup> As discussed further below, courts and tribunals have been largely

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<sup>63</sup> *Speering* p 22.

<sup>64</sup> See, eg, *Tleyji v TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [76]; *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [45]; *Mayer v ANSTO* [2003] FMCA 209 (6 August 2003) [69]-[74]; *Kelly v TPG Internet Services Pty Ltd* [2003] FMCA 584 (15 December 2003) [58]-[83]; *State of Victoria v Schou* [2001] 3 VR 655; *State of Victoria v Schou* [2004] 8 VR 120; *Amery v State of New South Wales* [2001] NSWADT 37 (12 March 2001) [47]-[49]; *State of New South Wales v Amery*

prepared to accept women's greater role in daily care giving for children, through the mechanism of judicial notice. Complainants' partners (who presumably must exist in at least some cases, and perhaps in the majority of cases where women are seeking to work part-time following parental leave) have, since Speering, slipped further out of the picture. They are rarely mentioned now, and the separation of their work from their care responsibilities has become even less visible than was the case with Speering's husband.

An example of the greater invisibility of partners and (private) domestic arrangements in more recent times is provided in the 2003 decision of *Gardiner v New South Wales WorkCover Authority*,<sup>65</sup> in which a mother sought to challenge a direction to her regarding her work location that would involve her in considerably more commuting time, and so less time to spend with her children. The decision records that:

The extent of the discriminatory effect on Ms Gardiner is that she will probably not be able to see her children in the mornings and the evenings on the days she travels to Gosford and she will have less time overall with her children because of the extra travelling time. On the basis of working five days per fortnight in Gosford, this would amount to at least 10 hours less per fortnight when the travelling time from Maroubra to the City is deducted. Ms Gardiner did not say that there would be no-one available to care for the children during the time that she was absent, or that she would have to employ someone to do so.<sup>66</sup>

It is interesting that Gardiner did not assert that she needed to be present to supervise her young children (aged 6 and 8), otherwise they would be without adult supervision. Nor did she assert that she was the one who conveyed them to school each day, as the decision records that she took them to school 'on occasion' only.<sup>67</sup> The NSW tribunal decision records that the complainant:

...described [her] ... responsibilities as including the need to be available to prepare [the children] ... for school in a relaxed environment knowing that they have a proper lunch, news for the day, their reading book and their hair done properly. She also said that her responsibilities included meeting the physical, emotional and psychological needs of her children. When giving evidence before the [tribunal], the applicant said that her role as a mother is much broader than tasks that can be outsourced and that she needs to ensure that her children have everything they need. She said that their physical and emotional needs are changing form [sic] day to day and that her children are a 24-hour a day responsibility.<sup>68</sup>

In reading the decision one is left with the impression that Gardiner's partner may well have been present in the home at least in the mornings (and perhaps was the person who usually drove the children to school?). This is not stated though, and if he or she exists they are invisible in the decision. That person's

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(2003) 129 IR 300 [38]-[40]; *Amery v New South Wales* [2004] NSWCA 404 [89]-[90], [132]-[135] per Beazley JA (Cripps AJA agreeing), [175]-[177] per Hodgson JA dissenting; *New South Wales v Amery* (2006) 230 CLR 174 [105]-[106], [115], [146]; [160]-[161] per Kirby J dissenting; *Hickie v Hunt & Hunt* [1998] HREOCA 8 (8 March 1998) paras 6.17.1-6.17.13.

<sup>65</sup> *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184 (11 August 2003) ('Gardiner'); [2004] NSWADTAP 1 (4 February 2004).

<sup>66</sup> *Gardiner* at [67].

<sup>67</sup> *Gardiner* at [24].

<sup>68</sup> *Gardiner* at [36].

presence in the home when the children are there seems to underlie Gardiner's argument (accepted by the NSW tribunal) that attending to her children's emotional needs and spending time with them comes within the NSW concept of 'responsibilities as a carer'.<sup>69</sup> The reason being that if she were the only adult present in the house in the mornings, and was the person who drove them to school, this would be a more certain argument to bring her situation within the attribute of 'responsibilities as a carer' than the argument she put before the tribunal (albeit ultimately successfully on that issue). The point here is that Gardiner's partner and his or her role in providing care to the children is completely hidden within the private sphere of the home, with the tribunal presenting the view that the legislation has nothing to say about those arrangements. In contrast to Speering, Gardiner was not ultimately successful in her complaint of indirect discrimination, as it was determined that she was not able to show that the employer's requirement regarding work location was not reasonable in all the circumstances, with part of that consideration being the discriminatory impact that the direction had on Gardiner herself.<sup>70</sup> That finding itself may have led to a rearrangement within Gardiner's household, with her partner taking a greater role in preparing the children for school each day; this is of course unknown.

### ***B Producing the Unencumbered Benchmark Worker***<sup>71</sup>

In 1990 Margaret Thornton wrote about a 'benchmark' figure of Australian anti-discrimination law, whom she described at that time as 'likely to be a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy'.<sup>72</sup> In her book Thornton showed how the benchmark worker is produced through the comparative methodology of direct discrimination. Through the process of comparison, across the different attributes, the comparator benchmark worker emerges as normative in the labour market. This is because their experiences provide the yardstick against which the treatment of the complainant is measured, and direct discrimination is defined. In other words, they provide the neutral point from which direct discrimination is identifiable.<sup>73</sup>

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<sup>69</sup> *Gardiner* at [39].

<sup>70</sup> *Gardiner* at [70]. This finding was upheld on appeal: [2004] NSWADTAP1 (4 February 2004).

<sup>71</sup> The concept of the 'unencumbered' worker is sourced from, and used throughout, Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Aldershot, 2002). The term first appears in the preface (at vi).

<sup>72</sup> Thornton, *The Liberal Promise*, above n 1, 1. Sandra Fredman describes in the UK context a benchmark figure who is 'white, male, Christian, able-bodied and heterosexual': Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 9.

<sup>73</sup> In one form the legal concept of indirect discrimination also contains a comparative methodology, and arguably also works to produce a normative worker, although perhaps less obviously so. Indirect discrimination connotes a situation where an employer has imposed a formal or informal requirement or practice that takes effect in the workplace to substantially disadvantage workers or employees identified with an attribute, in circumstances where the imposition of that requirement is not, in all the circumstances, reasonable: see, eg, *SDA* s 5(2), s 7(2), s 7B, s 7C; *EOA* (Vic) s 9; *ADA* (NSW) s 49T(1)(b); *ADA* (Qld) s 11; *EOA* (SA) s 85T(4)(b); *EOA* (WA) s 35A(2); *ADA* (Tas) s 15; *DA* (ACT) s 8(1)(b), (2), (3). Note that the *ADA* (NT) does not contain an obvious indirect discrimination rule, but does provide that discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity': s 20(1)(a).

Most of the attributes relating to responsibilities around caring and family have been enacted into the different statutes since Thornton published her work in 1990, and this may account for the silence around care and family in her description of the 'benchmark' figure. The comparisons that have resulted since the early 1990s under the different attributes of care and family responsibilities and tests of direct discrimination have produced a further dimension in the benchmark worker, that of being both separate to, and unmarked by, the particularities of care and family. In this way anti-discrimination law itself contributes to the continuation of a normative worker without substantial care or family responsibilities. For example, the direct discrimination provisions on the attribute of pregnancy produce a benchmark figure who is not pregnant, and the New South Wales scheme generates a normative worker without 'responsibilities as a carer'. Sandra Berns has identified a benchmark worker of the Australian labour market and social policy as an 'unencumbered worker',<sup>74</sup> and this is an apt descriptor to use in identifying this dimension of the benchmark worker produced by the range of family and carer type attributes in Australian anti-discrimination law.

The legislative definition of direct discrimination in most statutes requires that the comparison be between the complainant and a person not of the complainant's attribute who is in 'the same or similar circumstances' to the complainant.<sup>75</sup> This requirement of equivalence in circumstances has come to be interpreted by tribunals and courts as requiring a methodology that ascribes all significant aspects of the complainant's situation, except the actual attribute itself, to the comparator.<sup>76</sup> This theme in interpretation appears prominently in decisions involving women complainants who challenge the conduct accorded to them upon their return from a period of maternity leave.

In the 1998 decision of *Hickie v Hunt & Hunt* the complainant had been on maternity leave for five months. She was a contract partner in a law firm, and during her absence her junior solicitors left the firm, and most of her files were transferred to other partners.<sup>77</sup> She intended to return to work on a part-time basis. She argued, amongst other things, that the firm's failure to maintain her practice whilst she was on leave, (so that she came back from maternity leave with virtually no files or work in progress), amounted to direct discrimination on the ground of sex. Commissioner Evatt indicated that the circumstances called for the construction of a hypothetical comparator, being a male partner who was on leave for a similar amount of time, whose staff had left, and who was

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<sup>74</sup> Berns, above n 71. Berns uses this term throughout her text, with it first appearing in the preface (at vi). Other scholars have developed similar concepts, such as the 'ideal worker': Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* (Oxford University Press, 1999).

<sup>75</sup> *SDA* s 5(1); *ADA* (NSW) s 24(1); *ADA* (Qld) s 10; *EOA* (SA) s 29(2)(a), s 6(3); *EOA* (WA) s 8(1); *ADA* (Tas) s 14(2); *ADA* (NT) s 20(2). Early views that factors such as pregnancy and potential pregnancy meant that women and men would not be 'in the same or similar circumstances' were quickly rejected: see, eg, *Mount Isa Mines Ltd v Marks* (1992) 35 FCR 96 at 103, rejected on appeal *HREOC v Mount Isa Mines* (1993) 46 FCR 301 at p 327 per Lockhart J, p 307-8 per Black CJ.

<sup>76</sup> This approach to drawing the comparator in anti-discrimination law is broadly in line with the High Court decision (on the ground of disability in the area of education) in *Purvis v State of New South Wales* (2003) 217 CLR 92. This High Court decision has been heavily criticized as undermining the objectives of anti-discrimination law. See, eg, Belinda Smith, 'From *Wardley* to *Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *AJLL* 3.

<sup>77</sup> *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998).

intending to return to work on a part-time basis. As there was little evidence from which an inference could be drawn that the law firm would have taken steps to maintain his practice during his absence, by for example engaging a locum, the complainant's argument of direct discrimination was unsuccessful.<sup>78</sup>

Subsequent decision-makers have taken a similar approach to Commissioner Evatt, formulating a hypothetical comparator as a person characterized by all the relevant factual circumstances of the complainant, except the actual attribute itself. For example, in *Thomson v Orica Australia Pty Ltd*, the complainant was demoted when she returned from 12 months maternity leave.<sup>79</sup> In her claim of direct discrimination on the attribute of pregnancy, the Federal Court identified the hypothetical comparator to be a (non-pregnant) employee of similar seniority and experience as the complainant who, with the employer's consent, took 12 months leave, and who wanted to return and had a right to return to work on the same basis as the complainant.<sup>80</sup> In this case the court assumed that the posited comparator would not have been treated in a way that contravened the employer's own policy to return him or her to the same or similar position, (noting that '[t]here was no evidence that it would do so')<sup>81</sup> and on this basis the court determined that the complainant had been treated less favourably.<sup>82</sup>

Other cases where women have faced a downgrading of their terms and conditions upon their return to work following parental leave have been decided in favour of complainants, on an analogous drawing of the hypothetical comparator.<sup>83</sup> In some of these decisions adjudicators have noted that the comparator would have a legal right to return to the same or a similar position

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<sup>78</sup> *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998) paras 4.5.19 – 4.5.21, 4.5.25. The complainant did however succeed on a claim of indirect discrimination in relation to the failure to maintain her practice, and other matters. Ms Hickie was awarded \$95,000 by way of compensation.

<sup>79</sup> *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002) ('*Thomson v Orica*').

<sup>80</sup> *Thomson v Orica* at [121]-[122].

<sup>81</sup> *Thomson v Orica* at [138].

<sup>82</sup> *Thomson v Orica* at [138]. Ms Thomson also succeeded on her claim of direct sex discrimination: [150]. The matter was stood over for hearing on the question of compensation, although ultimately it appears the case was settled prior to that hearing taking place.

<sup>83</sup> See, eg, *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 (3 October 2003) [82]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209 (6 August 2003) [58]; *Correy v St Joseph's Hospital Ltd* [2007] NSWADT 104 [94], [99]; *Du Bois-Hammond v Raging Thunder Pty Ltd and Others* [2004] QADT 27 (26 August 2004) [140]-[142]; *Ilian v ABC* [2006] FMCA 1500 (17 October 2006) [184]-[185]; *Edwards v Hillier & Educang Limited t/a Forest Lake College* [2006] QADT [87]; *Heikkinen v Edith Cowan University* [2007] WASAT 321 (31 December 2007) [126]-[127] (notably the complainant was unsuccessful on a factual basis); *Sheaves v AAPT Limited* [2006] FMCA 1380 (7 November 2006) [71], [77] (notably the complainant was unsuccessful on a factual basis). The *Thomson v Orica* methodology of drawing the comparator has been applied in other factual contexts involving pregnancy and care issues: *Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3 (20 January 2006) [97]; *Dare v Hurley* [2005] FMCA 844 (12 August 2005) [104]; *Ho v Regulator Australia Pty Ltd* [2004] FMCA 62 (12 May 2004) [155]; *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 [97]-[98]. See also *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003) [104]-[105], [108], on appeal *Commonwealth v Evans* [2004] FCA 654 where Branson J determined that 'it is not illegitimate for an employer, all other things being equal and provided indirect discrimination is avoided, to favour for re-employment an employee who takes limited leave over an employee who regularly takes a lot of leave, albeit that it is leave to which he or she is entitled': [71]. Such employer conduct may now be prohibited by the 'adverse action' prohibitions in the *FW Act* s 342, s 351. Branson J sought to distinguish *Thomson v Orica* on the basis that in that case the employer's family leave policy mandated non-discriminatory treatment of people who took the leave there in question, whereas the National Crime Authority certified agreement in this case did not guarantee equal treatment of staff who took their lawful entitlements to carer's leave: [71].

equivalent to the complainant's statutory entitlement of unpaid parental leave<sup>84</sup> (and not merely, as was found in *Thomson v Orica Australia Pty Ltd*, a right under the employer's policy which might or might not form a contract term).<sup>85</sup>

In other parental leave situations, adjudicators have engaged in a similar methodology as Commissioner Evatt in *Hickie v Hunt & Hunt*, with the complainant being unsuccessful as, like Hickie, she was not able to show that her employer would have treated the comparator better than it treated her. In short, in these cases the employer has argued successfully that it would not have followed its own policy, or a legal obligation, to return the comparator to the same or a similar position.<sup>86</sup> In one decision the Federal Court described the employer's submission that it would similarly treat the comparator as poorly as it treated the complainant 'a remarkable admission of bad corporate responsibility', although not directly discriminatory within the meaning of the statute.<sup>87</sup> This Federal Court conclusion evidences the limitations of the formal equality approach of direct discrimination, discussed under the next heading in this working paper.

In the 1998 decision of *Hickie v Hunt & Hunt* the hypothetical comparator was not drawn as a male contract partner who continued to work full-time and had not taken extended leave (as he had not given birth to a baby). Drawing the comparator in that simple manner would have made the complainant's task of establishing direct discrimination more achievable than that task became, and remains, under the standard approach developed by Commissioner Evatt, and adopted subsequently. The standard methodology has led to wholly unrealistic and rather tortured exercises of hypothesising, necessary because rarely will there be a real comparator in these types of cases. This is because real comparators, such as an actual male contract partner in a law firm, simply do not have the same leave patterns and forms of work engagement as complainants who are mothers to babies and infants (such as Hickie). As will be discussed below, adjudicators have been prepared to take judicial notice of women's child care responsibilities, and have found, without the need for much in the way of evidence, that a requirement to work full-time presents a barrier for mothers of babies and infants. There is a disjuncture between this willing (and perhaps appropriate) recognition of the employment manifestations of being a new mother, and the way that hypothetical (male or non-pregnant) comparators are articulated in direct discrimination. The standard methodology of drawing the comparator distorts the very real connection between the attributes of pregnancy, motherhood, care and family responsibilities, and the employment manifestations of them in terms of taking an extended period of leave. It potentially renders invisible mothers' difference from the benchmark norm, a difference that arises through the experience of giving birth.<sup>88</sup>

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<sup>84</sup> See, eg, *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 (3 October 2003) [81]; *Correy v St Joseph's Hospital Ltd* [2007] NSWADT 104 [94], [99].

<sup>85</sup> *Thomson v Orica* [144]-[146].

<sup>86</sup> See, eg, *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960 (3 December 2007) [119]-[135] (affirmed on appeal in *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702 (21 May 2008) [42]-[45]); *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [45]-[46].

<sup>87</sup> *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702 (21 May 2008) [46].

<sup>88</sup> A similar argument is made in Belinda Smith and Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Sydney Law Review* 1 at 22.

### ***C The Normativity of Formal Equality***

In many ways anti-discrimination law is aimed at generating an ideal of formal equality, where equality would mean that the complainant and the comparator were treated the same.<sup>89</sup> This is reflected in the comparative methodology of the standard formulation of direct discrimination, requiring in a complaint of sex discrimination an examination of whether a woman complainant was treated 'less favourably than' a male comparator. That men and women be treated the same, or consistently, by their employer regardless of their sex, is the objective that this test of direct discrimination in the employment context seeks to generate. This formal conception of sex equality has no minimum standard as such, beyond a principle of uniformity.

An understanding of formal equality as underlying anti-discrimination law is also revealed in exemptions and exceptions to the prohibition on discrimination. Several statutory schemes provide that granting a woman a 'right' or 'privilege' (as the rules identify it), in connection with pregnancy or childbirth does not constitute unlawful sex discrimination.<sup>90</sup> If not for the existence of this exemption, an employer providing, for example, paid maternity leave would be engaged in less favourable treatment of men on the attribute of sex. As Regina Graycar and Jenny Morgan rhetorically ask, 'if women workers were considered "normal", [would, for example] ... pregnancy leave really [be] "special treatment"?'<sup>91</sup> In addition to these pregnancy and childbirth specific exemptions to sex discrimination, most statutes separately provide a broader exemption for 'special measures' that further equality.<sup>92</sup> As with the pregnancy specific exemptions, special measures reflect the underlying precept that providing assistance and accommodation to women would, in the absence of the exemption, constitute less favourable treatment and so direct discrimination against men.<sup>93</sup>

A formal approach to the meaning of equality produces two interrelated limitations. First, and as discussed under the previous heading, some employers have been able to place their conduct outside the prohibition on discrimination by arguing successfully that they would have treated a comparator in the same inflexible manner as they treated the complainant, and therefore discrimination

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<sup>89</sup> On the contested meaning of equality, see, eg, Rosemary Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Hart Publishing, 2008); Owens, Riley and Murray, above n 38, 396-402; Reg Graycar and Jenny Morgan, 'Thinking About Equality' (2004) 10 *University of NSW Law Journal* 5; Fredman, above n 72, chap 1; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> edn, 2002) chap 3.

<sup>90</sup> *SDA* s 31; *EOA* (Vic) s 88(3)(a); *ADA* (NSW) 35; *EOA* (WA) s 28; *ADA* (NT) s 54; *DA* (ACT) s 37.

<sup>91</sup> Graycar and Morgan, above n 89, 34.

<sup>92</sup> See, eg, *SDA* s 7D; *EOA* (Vic) s 12; *ADA* (Qld) s 104, s 105; *EOA* (SA) s 47 (relating to sex and marital status only); *EOA* (WA) s 31 (limited to sex, marital status, and pregnancy), s 35K (in relation to family responsibilities or family status); *ADA* (Tas) s 25, s 26; *DA* (ACT) s 27; *ADA* (NT) s 57.

<sup>93</sup> See, eg, *Proudfoot v ACT Board of Health* [1992] HREOCA 6 (17 March 1992) (women's health service); *Kennedy v Top End Women's Legal Service* [2004] NTADComm 2 (4 June 2004) (appeal dismissed: *Kennedy v Anti-Discrimination Commission of the NT* [2006] NTCA 9 (3 October 2006)) (women's legal service). See also *Jacomb v Australian Municipal Administrative Clerical and Services Union* [2004] FCA 1250 (24 September 2004) in which the complainant unsuccessfully challenged the trade union's rules that provided for 50% of positions in the branch executive to be held by women.

within the meaning of the legislation did not occur.<sup>94</sup> Secondly, a vision of formal equality produces, at best, access to the normative worker's terms and conditions of engagement; it does not provide a mechanism for the generation of new forms of leave or work arrangements appropriate for the complainant. This means that existing (normative) patterns of leave and work engagement that have as their subject the 'unencumbered' worker remain unchallengeable and potentially unchanged by legal pressure from anti-discrimination law. This second limitation can be seen in a number of cases where women workers have in effect sought to alter their work arrangements to better accommodate their pregnancy, carer or family responsibilities.<sup>95</sup> For example, a pregnant attendant in an animal shelter unsuccessfully claimed direct discrimination on the attribute of pregnancy under the Queensland statute on the basis that her employer refused to alter her responsibilities so that she no longer worked in the cattery.<sup>96</sup> She sought this change following medical advice that she should avoid contact with cats, as toxoplasmosis infection is carried in the faeces of cats and can be dangerous to pregnant women. In the decision the tribunal concluded: 'Here, the discrimination is not direct because the job required all persons who worked at the refuge to work with cats. That is, all refuge workers were to be treated the same whether they were pregnant or not.'<sup>97</sup> The complainant had resigned, and in the result the employer was not required to make any accommodation for her, or other pregnant women (now and into the future).<sup>98</sup> In this workplace the non-pregnant worker was further entrenched as normative.

The attribute of sex, and several other attributes such as race and sexual orientation, are framed in most of the statutes in a symmetrical manner in the sense for example that men can complain of sex discrimination, Anglo-

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<sup>94</sup> See, eg, *Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960 (3 December 2007) [119]-[135] (affirmed on appeal in *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702 (21 May 2008) [42]-[45]); *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [45]-[46]. *State of Victoria v Schou* [2004] VSCA 71 (30 April 2004) is also an example of this.

<sup>95</sup> See, eg, *Foran v Bloom* [2007] QADT 31 (5 December 2007) [32] (on the claim relating to attendance at seminars); *Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004); *Parker v North Queensland Animal Refuge Inc* [1998] QADT 4 (16 March 1998); *State of Victoria v Schou* [2004] VSCA 71 (30 April 2004).

<sup>96</sup> *Parker v North Queensland Animal Refuge Inc* [1998] QADT 4 (16 March 1998). For contrary reasoning on the direct discrimination claim, see the earlier case of *Larsen v RSPCA* [1991] HREOCA 3 (25 March 1991).

<sup>97</sup> *Parker v North Queensland Animal Refuge Inc* [1998] QADT 4 (16 March 1998) p 18. The complainant also unsuccessfully claimed indirect discrimination on the attribute of pregnancy. The tribunal determined that it was 'impossible' to re-organise the complainant's work so that she did not come into contact with cats or cat faeces (p 19) and for this reason the employer's requirement to work with cats was reasonable in all the circumstances: p 20. In its defence the employer relied on s 108 of the *ADA* (Qld) which provides that '[a] person may do an act that is reasonably necessary to protect the health and safety of people at a place of work.' The tribunal expressed the view that had it been necessary to make a finding under s 108, that section would have exonerated the employer: p 20.

<sup>98</sup> Some early claims brought by pregnant employees reveal a tribunal understanding that pregnant workers may not be able to perform their work satisfactorily on account of their pregnancy, and that dismissal for this reason would not amount to be discrimination within the meaning of the relevant anti-discrimination statute. The tribunals adopted a formal equality approach to understanding the scope of the legislation, in assuming that the complainant ought to be able to perform her job, as presently constructed, or in the same way as everyone else performs that same role. In short, the cases do not countenance the need for employers to consider reviewing and adjusting the job requirements of the pregnant worker so that she can stay employed. See *Bear v Norwood Private Nursing Home* (1984) EOC 92-109 at p 75,477; *Robson v Geoffrey Button (Sales) Pty Limited* (1984) EOC 92-125 at p 76,269.

Australians are entitled to pursue a complaint of race discrimination, and people who identify as heterosexual can complain of discrimination on the ground of their sexual orientation.<sup>99</sup> The legislative provisions regarding pregnancy, breastfeeding, care and family responsibilities are not drafted in a symmetrical manner, and provide protection only to people who are pregnant, are breastfeeding, and have care or family responsibilities.<sup>100</sup> These attributes cannot be used by, for example, non-pregnant people to complain of discrimination in missing out on benefits offered to pregnant employees, and people without family responsibilities to complain that they were discriminated against on the ground of their lack of family responsibilities. In this way these targeted attributes are more directed towards a substantive conception of equality, rather than a formal understanding of equality. This aspect of the legislative schemes does not however detract from the main point illustrated above in the Queensland animal shelter decision – that a formal equality understanding of consistency of treatment underlies the comparative approach of direct discrimination, and this is so even in relation to targeted attributes such as pregnancy.

In Victoria the standard concept of indirect discrimination has also been interpreted as being based on a formal understanding of equality. Indirect discrimination generally connotes a situation where an employer has imposed a requirement or practice that takes effect in the workplace to substantially disadvantage workers or employees identified with an attribute, in circumstances where the imposition of the requirement is not reasonable.<sup>101</sup> The case of *State of Victoria v Schou*, in the Victorian Supreme Court and Court of Appeal, provides a good illustration of both a formal equality approach being taken in understanding the 1995 Victorian Act, and the limits of that approach.<sup>102</sup> Ms Schou was a sub-editor of Victorian Parliamentary Hansard, with 18 years of service. She sought permission to work from home some days of the week when parliament was sitting, in order to be close to her youngest child who was experiencing medical conditions. Those issues were expected to

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<sup>99</sup> See, eg, *SDA* s 5; *Racial Discrimination Act 1975* (Cth) ('*RDA*') s 9(1); *EOA* (Vic) s 4(1) definitions of 'race', 'sexual orientation'; *ADA* (NSW) s 4(1) definition of 'race', s 23; *ADA* (Qld) dictionary definitions of 'race', 'sexuality'; *EOA* (SA) s 29(2), s 5(1) definitions of 'race', 'sexuality'; *EOA* (WA) s 4(1) definitions of 'race' and 'sexual orientation', s 8(1); *ADA* (Tas) s 3 definition of 'race', 'sexual orientation', s 16(e); *DA* (ACT) s 7(1)(a), dictionary definitions of 'race', 'sexuality'; *ADA* (NT) s 19(1)(b), s 4(1) dictionary definition of 'race', 'sexuality'. The exception is that complainants are only able to complain of 'homosexuality' discrimination under the 'homosexuality' provisions in the *ADA* (NSW) Part 4C.

<sup>100</sup> See eg, *SDA* s 4A, s 4B, s 7, s 7A; *EOA* (Vic) s 4(1) definition of 'carer'; *ADA* (NSW) s 49S; *ADA* (Qld) dictionary definition of 'family responsibilities'; *EOA* (SA) s 5(3), s 85T(4); *EOA* (WA) s 10, s 4(1) definition of 'family responsibility or family status'; *ADA* (Tas) s 3 definition of 'family responsibilities', s 16(g), (h); *DA* (ACT) s 7(1)(f), (g), dictionary definition of 'carer'; *ADA* (NT) s 19(1)(f), (h).

<sup>101</sup> See, eg, *SDA* s 5(2), s 7(2), s 7B, s 7C; *EOA* (Vic) s 9; *ADA* (NSW) s 49T(1)(b); *ADA* (Qld) s 11; *EOA* (SA) s 85T(4)(b); *EOA* (WA) s 35A(2); *ADA* (Tas) s 15; *DA* (ACT) s 8(1)(b), (2), (3). Note that the *ADA* (NT) does not contain an obvious indirect discrimination rule, but does provide that discrimination includes 'any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity': s 20(1)(a).

<sup>102</sup> *State of Victoria v Schou* [2001] 3 VR 655; *State of Victoria v Schou* [2004] 8 VR 120. Note that the indirect discrimination formula has been redrafted with the 2010 *EOA* (Vic). For commentary and critique on this litigation, see Carolyn Sutherland, 'Applying Victoria v Schou: The Approach of VCAT and the Federal Magistrates Court' (2007) 29 *Australian Bar Review* 45; Knowles, above n 2; K Lee Adams, 'A Step Backwards in Job Protection for Carers' (2002) 15 *AJLL* 93; Gaze, above n 2; Therese MacDermott and Rosemary Owens, 'Equality and Flexibility for Workers with Family Responsibilities: A Troubled Union?' (2000) 13 *AJLL* 278.

improve within a year or two, as indeed they did. The claim involved a number of different arguments; the main one being that her employer's requirement that she work full-time on site was indirectly discriminatory on the attribute of 'parental status or status as a carer'. The tribunal (twice) found in favour of Schou, determining as a matter of fact that the requirement for her to work full-time on site was not reasonable, as it was feasible for her to work at home on the days she requested.<sup>103</sup> In contrast, the Supreme Court and the Court of Appeal found against Schou, and ultimately dismissed her complaint.

Justice Harper of the Supreme Court determined that the meaning of indirect discrimination in the 1995 Victorian Act only prohibited the imposition by the employer of a 'detriment' on the employee, whereas in contrast in her request to work at home, Schou 'sought a favour' from her employer.<sup>104</sup> Justice Harper determined that this latter is not prohibited by the Act. In addition, Harper J indicated that the question of reasonableness for the test of indirect discrimination ought to be assessed on the basis of all sub-editors wishing to work from home, as Schou did.<sup>105</sup> In the Court of Appeal Phillips JA in the majority also appeared to indicate that it was appropriate to consider the question of reasonableness in light of all sub-editors wanting to work from home in the way that Schou did,<sup>106</sup> and described Schou's claim in similar terms as seeking a 'special allowance of privilege'.<sup>107</sup> These judgements speak to a strong formal equality approach to understanding the legislation's objectives and scope, in effect that the statute was not designed to assist someone such as Ms Schou who sought something extra from her employer, over and above what other employees received. It seems that the judges viewed Schou as being treated the same as all other employees who were also required to work on site all work days, and such a situation could not constitute discrimination within the meaning of the Victorian Act.

The question of the reach of anti-discrimination law in terms of the concepts of seeking a benefit or challenging the imposition of a 'detriment', initiated by Harper J in *State of Victoria v Schou*, has emerged also in the last few years in the Federal Magistrates Court in cases under the Commonwealth *SDA* where women have sought to return from maternity leave to part-time work, rather than resume the full time position they held prior to going on leave. In *Kelly v TPG Internet Pty Ltd*, Raphael FM expressed the view that anti-discrimination law (and specifically there the *SDA*) can only be used to challenge a 'detriment' that is imposed on the complainant relative to an existing situation, and that it cannot be used to challenge the refusal of a 'benefit' (meaning something additional to the existing situation such as a change from full time to part time work upon

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<sup>103</sup> *Schou v State of Victoria* (2000) EOC 93-000, 93-101; *Schou v State of Victoria* (2002) EOC 93-217.

<sup>104</sup> *State of Victoria v Schou* [2001] 3 VR 655 [24], [19]. See also [13] where Harper J repeated the 'warning' of Brennan J in his dissenting judgment in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 372 that '[a]nti-discrimination legislation cannot carry a traffic it was not designed to bear.'

<sup>105</sup> *State of Victoria v Schou* [2001] 3 VR 655 [19], [41].

<sup>106</sup> *State of Victoria v Schou* [2004] 8 VR 120 [27].

<sup>107</sup> *State of Victoria v Schou* [2004] 8 VR 120 [39]. Buchanan J similarly expressed the view that the *EOA* 1995 (Vic) could not be used by an employee to request a change in arrangements to meet their needs: [48]

return from maternity leave).<sup>108</sup> Much criticism has been leveled at this view, including the message sent to employers that if they consistently refuse flexibility to all employees, this will not infringe the formal equality precept of discrimination, whereas an employer who allows some employees to move to part time work, but does that inconsistently, is at greater risk of being liable for discrimination.<sup>109</sup> The concern is that this may discourage employers from implementing any flexibility at all.

Part of the test for indirect discrimination requires an assessment of whether the impugned requirement was, in all the circumstances, reasonable. In considering reasonableness in this context, the New South Wales tribunal has required employers to at least consider and to make reasonable efforts to accommodate an employee's request to alter her working arrangements.<sup>110</sup> Provisions in the New South Wales Act that use the concepts of 'inherent requirements' and 'unjustifiable hardship' may also take effect to impose an obligation on employers to accommodate, although this has not been tested in cases.<sup>111</sup> The Northern Territory statute and the Victorian Act have enacted explicit obligations on employers to provide a level of adjustment for pregnant workers and workers with care responsibilities. From its enactment in 1992 the Northern Territory *Anti-Discrimination Act* has provided that the unreasonable failure to accommodate a 'special need' is a separate form of prohibited conduct.<sup>112</sup> In 2008 the Victorian Act was altered to enact a third form of discrimination – the unreasonable failure to accommodate a request from a parent or carer to alter work arrangements.<sup>113</sup> The amending legislation inserted into the Victorian statute examples of ways that work arrangements might be suitably altered, and these clearly speak to adjustments and accommodation by employers. For example, an employer may be able to accommodate an employee's responsibilities by allowing the employee to occasionally work from home.<sup>114</sup> These accommodation provisions, and the interpretations of the New South

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<sup>108</sup> *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 (15 December 2003) [78]-[82]. Note that Raphael FM finds support for his interpretation of the SDA in Harper J in *State of Victoria v Schou* [2001] 3 VR 655 [79]. Contra *Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004) [124], [126], [129].

<sup>109</sup> *Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004) [124]. See also K Lee Adams, 'Indirect Discrimination and the Worker-Carer: It's Just Not Working' (2005) 23 *Law in Context* 18; Beth Gaze, 'Quality Part-time Work: Can Law Provide a Framework?' (2005) 15 *Labour & Industry* 89 at 99-100; Sarah Rey, 'New Limits of Flexible Work Practices' (2004) 10 *Employment Law Bulletin* 20; The Hon John von Doussa QC and Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act' (2004) 10 *University of NSW Law Journal* 43.

<sup>110</sup> See, eg, *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [105] where the tribunal stated that it did not require that it be satisfied that 'no stone had been left unturned by a respondent in their evaluation of alternatives.' 'Reasonable efforts however need to be shown'. See also *Reddy v International Cargo Express* [2004] NSWADT 218 (30 September 2004) [84] where the NSW tribunal identified as a 'failure' the employer's lack of serious consideration or effort to accommodate the complainant's request to return to work following maternity leave on a part-time basis.

<sup>111</sup> *ADA* (NSW) s 49V(4), s 49U. These provisions apply in relation to the attribute of 'responsibilities as a carer'. They are similar to provisions that exist in relation to disability discrimination.

<sup>112</sup> *ADA* (NT) s 4 definition of 'prohibited conduct', s 24, s 58. These provisions apply in relation to all attributes. It was found that this provision had been contravened when a shop proprietor failed to accommodate the pregnant complainant's need to not lift and carry boxes weighing up to 20 kilos: *Windler v McDermott* [1996] NTADComm 1 (13 June 1996).

<sup>113</sup> *EOA* (Vic) s 17, s 19, s 22, s 32 (inserted into the *EOA 1995* (Vic) by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)). These provisions apply only in relation to the attribute of 'parental status or status as a carer'. See Chapman, above n 8.

<sup>114</sup> *EOA* (Vic) s 17(1) example.

Wales tribunal under indirect discrimination, clearly require more than merely formal equality from employers. They move towards a substantive understanding of equality, and in doing so shine a light on inadequacies of the dominant conception of equality that underlies anti-discrimination law as being merely that of consistency in treatment.<sup>115</sup>

#### IV THE PARTICULARITIES OF CARE AND FAMILY

##### *A The Gender of Care*

As discussed in Part II, the different anti-discrimination statutes extend beyond the specific attributes identified in the legislation, to characteristics that generally apply to people with the attribute, and characteristics that are generally imputed to people with that attribute.<sup>116</sup> This characteristic extension mechanism has played an important role in the past of filling gaps in legislative coverage. It continues to play a central role in many complaints today, performing the function of linking employment manifestations such as the taking of an extended period of parental leave, to attributes such as sex, pregnancy and parental status.<sup>117</sup> In 2005 the New South Wales tribunal used this mechanism, accepting a complainant's argument that having responsibilities as a carer is a characteristic that appertains generally to women or is a characteristic generally imputed to them, and so is protected as a form of sex discrimination.<sup>118</sup> In its decision the tribunal noted that '[n]o evidence has been led to support that proposition, however in our view this is a matter of common knowledge of which we may take judicial notice'.<sup>119</sup> Interestingly, this case involved the complainant's responsibilities to care for her aged parents and her sister who was recovering from a stroke, thereby expanding the characteristic extension principle beyond its more familiar territory of pregnancy and women's role in caring for babies and infants.

In claims of indirect discrimination on the ground of sex, complainants across several jurisdictions have argued frequently and successfully that judicial notice ought to be taken of mothers' greater role in caring for babies and infants. In these decisions courts and tribunals have been prepared to determine that a

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<sup>115</sup> Occupational health and safety legislation imposes an obligation on employers to take reasonable care for employee health and safety, and this may require positive accommodation and adjustment, and action of the employer taken under statutory occupational health and safety legislation is an exemption to the proscriptions on dismissal under anti-discrimination legislation: *SDA* s 40; *EOA* (Vic) s 86; *ADA* (NSW) s 54; *ADA* (Qld) s 106 (see also s 108); *EOA* (WA) s 69, s 35N; *ADA* (Tas) s 24; *ADA* (NT) s 53; *DA* (ACT) s 30. There has been very little discussion in anti-discrimination decisions, at least over the last 10 years, of the relationship between occupational health and safety obligations, anti-discrimination law, and pregnant women. For an earlier exploration, see *Mount Isa Mines Ltd v Marks* (1992) 35 FCR 96, on appeal *HREOC v Mount Isa Mines* (1993) 46 FCR 301.

<sup>116</sup> See n 22.

<sup>117</sup> Note that the taking of a period of maternity leave has been determined to be a characteristic that appertains generally to women who are pregnant, and protected as pregnancy discrimination: *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 [165]. The taking of up to 52 weeks unpaid parental leave has been found to be a characteristic of the attribute of 'parental status': *Du Bois-Hammond v Raging Thunder Pty Ltd and Others* [2004] QADT 27 (26 August 2004) [136].

<sup>118</sup> *Spencer v Greater Murray Area Health Service* [2005] NSWADT 138 (23 June 2005) [73].

<sup>119</sup> *Spencer v Greater Murray Area Health Service* [2005] NSWADT 138 (23 June 2005) [73].

requirement to work full-time following return from an extended period of leave (such as parental leave) will disadvantage women relative to men, or will be a requirement with which a substantially higher proportion of men than women can comply.<sup>120</sup> In *Hickie v Hunt & Hunt* Commissioner Evatt was prepared to ‘infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities.’<sup>121</sup> In the context of return to work following maternity leave, Driver FM has said ‘I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time,’<sup>122</sup> whilst the New South Wales tribunal has stated in relation to the attribute of ‘responsibilities as a carer’:

It is, we think, a truth universally acknowledged that people with responsibilities for the care of a infant child find it difficult to balance their responsibilities to care for their child and work, and within the Australian workforce a lesser proportion of those with such responsibilities are able to work full time than those who do not. That is a fact so well publicised in the mass media and so widely known that, in our view, it can be regarded for evidentiary purposes as a matter of common knowledge.<sup>123</sup>

This preparedness of courts and tribunals to take judicial notice of mothers’ caring responsibilities towards babies and infants has enabled women complainants under the Commonwealth *SDA* to sidestep the limitations of the ‘family responsibilities’ provisions, by using instead the sex discrimination provisions in conjunction with the characteristic extension mechanism.<sup>124</sup> Without this mechanism these complainants probably would not have succeeded in their cases. Undoubtedly women rather than men provide the vast bulk of care for babies and infants across Australia,<sup>125</sup> and women provide more care to

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<sup>120</sup> See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998) para 6.17.10 (a claim of indirect discrimination on the ground of sex under the *SDA*); *Bogle v Metropolitan Health Service Board* (2000) EOC 93-069 [189], [192] (a claim of indirect discrimination on the grounds of sex and family responsibilities under the *EOA* (WA)); *Kemp v Minister for Education & Anor* (1991) EOC 92-340 p 78,370-78,371 (a claim of indirect discrimination on the ground of sex under the *EOA* (WA)); *Howe v Qantas Airways* (2004) 188 FLR 1 [110]-[118] (in relation to the claim of indirect sex discrimination under the *SDA*); *Mayer v ANSTO* [2003] FMCA 209 (6 August 2003) [70] (in relation to the claim of indirect sex discrimination under the *SDA*); *Tleyji v The Travel Spirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [89] (in relation to the claim of indirect discrimination on the attribute of carer’s responsibilities in the *ADA* (NSW)); *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 [33] (a claim of direct sex discrimination under the *SDA*); *Edwards v Hillier & Educang Ltd t/as Forest Lake College* [2006] QADT 34 (11 August 2006) [95] (in relation to the claim of indirect discrimination under the *ADA* (Qld) on the attribute of parental status).

<sup>121</sup> *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998) para 6.17.10. In *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 (15 December 2003) [82] Raphael FM pointed out, correctly, that Commissioner Evatt did not rely solely on judicial notice. She also drew on the records of Hunt & Hunt showing it is predominantly women who work part-time at the firm.

<sup>122</sup> *Mayer v ANSTO* [2003] FMCA 209 (6 August 2003) [70].

<sup>123</sup> *Tleyji v The Travel Spirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [89]. The complainant was a woman returning to work after maternity leave.

<sup>124</sup> Until June 2011 the ‘family responsibilities’ attribute applied in relation to dismissal from employment only, and direct discrimination solely. The *SDA* was amended by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth), which extended the ‘family responsibilities’ provisions to all aspects of employment, from engagement through to dismissal, although continuing the limitation to direct discrimination alone.

<sup>125</sup> Australian Bureau of Statistics, *How Australians Use Their Time, 2006* (Cat 4153.0, 2008); Australian Bureau of Statistics, *Australian Social Trends, March 2009* (Cat 4102.0, 2009).

people with disabilities, the elderly and sick, generally than do men.<sup>126</sup> The risk however in the easy assumption of judicial notice around gender and care responsibilities lies in stereotyping and essentialising the categories of woman and man. This may take effect to further embed women as carers, and men as normative workers of the labour market without care responsibilities.<sup>127</sup> In addition, when adjudicators conflate carer with mother and woman, they render invisible the diverse ways and contexts in which women may care for a baby or infant without being that child's biological parent. This raises a plethora of issues, including race and sexual orientation, examined under the next heading in this working paper. A few anti-discrimination decisions note that the complainant is a sole parent,<sup>128</sup> reflecting an underlying normative understanding of women parents as partnered. These questions of diversity relating to couple relationships, and potentially the subjectivities of race and sexual orientation as well, may be obscured in the process of taking judicial notice of women's greater role in caring for babies and infants.

For men, the limits of the *SDA* provisions of 'family responsibilities' have until recent legislative amendments proven immovable, as men have not been able to rely on judicial notice of men's care responsibilities, or the characteristic appertaining mechanism. In addition, until recently male complainants have needed to be alive to the need to establish that they fell within a specified constitutional nexus provided in the Act in order to be covered by the 'family responsibilities' protections.<sup>129</sup> Although those sub-sections were likely to cover most male workers in Australia, they did not cover all men. These limitations were addressed by legislative amendment in 2011 so that the *SDA* now applies more broadly to male complainants.<sup>130</sup> The previous situation presented a hurdle for men that was not imposed on women.<sup>131</sup> The *SDA* applies generally to

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<sup>126</sup> Australian Bureau of Statistics, *Australian Social Trends, Sept 2009* (Cat 4102.0, 2009); Australian Bureau of Statistics, *Managing Caring Responsibilities and Paid Employment, New South Wales, Oct 2000* (Cat 4903.1, 2001); Australian Bureau of Statistics, *Managing Caring Responsibilities and Paid Employment, Queensland, Oct 2002* (Cat 4903.3, 2003).

<sup>127</sup> The idea of a normative worker without care responsibilities is derived from Berns, above n 71. Berns identified this normative or ideal worker as the 'unencumbered' worker. For earlier Australian work developing the idea of a normative worker of law, see Thornton, *The Liberal Promise*, above n 1. Other scholars have developed similar concepts, such as the 'ideal worker' of United States employment law: Williams, above n 74.

<sup>128</sup> See, eg, *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003) [2], not mentioned on appeal in *Commonwealth of Australia v Evans* [2004] FCA 654 (25 May 2004). Although it is noted (once) that the complainant is a single parent, it is unclear whether and how this matter shaped the submissions or the findings in this case brought under the attributes of sex and family responsibilities. See to similar effect, *Chacon v Rondo Building Services Pty Ltd* [2011] NSWADT 72 (6 April 2011) [141]; *Maxworthy v Shaw* [2010] FMCA 1014 (24 December 2010) [147]; *Stokes v Serco Sodexo Defence Services Pty Ltd* [2006] NSWADT 295 (10 October 2006); *Thompson v Big Bert Pty Ltd* [2007] FCA 1978 (14 December 2007).

<sup>129</sup> The relevant provisions (in previous s 9(5)-(9), s 9(11)-(20)) called on a mix of heads of power in the Australian Constitution, including the Commonwealth's own power to legislate in relation to its employees (s 52(ii)), the banking power (s 51 (xiii)), the trade and commerce power (s 51(i)), and the corporations power (s 51(xx)).

<sup>130</sup> The *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) extended the reach of the *SDA* for male workers by drawing on a more extensive list of international instruments under the external affairs head of power in the Australian Constitution (s 51(xx)).

<sup>131</sup> Few men have lodged complaints under the *SDA*. In 2010-2011 some 17% of complaints under the *SDA* (78 complaints) were lodged by men: Australian Human Rights Commission, *Annual Report 2010-2011*, 110 (Appendix 2, Table 19) (2011). In 2009-2010 19% of complaints under the *SDA* (101 complaints) were lodged by men: Australian Human Rights Commission, *Annual Report 2009-2010*, 81 (Table 19) (2010). These figures are not disaggregated into different attributes under the *SDA*. More men use State and

all women in the workforce, by virtue of the Act's reliance on the external affairs head of power in s 51(xxix) of the Australian Constitution through the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Of the few decisions involving men making claims in relation to work and care, two Tasmanian decisions highlight strongly the limited effectiveness of anti-discrimination legislation in supporting men's care responsibilities, and also the underlying inadequacy of provisions for male carers in industrial entitlements.<sup>132</sup> Both cases involved fathers who sought to access paid maternity leave in order to take an extended period of leave to be the primary care-giver for their baby.<sup>133</sup> Both fathers argued direct and indirect discrimination under the Tasmanian statute, on a range of attributes including sex, pregnancy, family responsibilities and parental status. Neither was successful, ultimately for the reason that two different exemptions in the Tasmanian statute exonerated the employers' conduct, even if that conduct was discriminatory within the meaning of the Act, which in each case was not decided. One of those exemptions excused conduct that was reasonably necessary to comply with a law of Tasmania,<sup>134</sup> and the other exemption permitted special measures (maternity leave being seen as a special measure for the benefit of female employees who were pregnant).<sup>135</sup> These decisions illustrate both the inadequacy of industrial entitlements supporting men as carers of babies, and the relative weakness of anti-discrimination law to challenge that.

The picture revealed here is of anti-discrimination law anticipating and supporting women in their care roles, and especially biological mothers in caring for babies. The mother-baby dynamic appears to be viewed as the natural care relationship, and its protection a central concern for anti-discrimination law. Adjudicators view the difficulties presented for mothers who are required to

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Territory anti-discrimination legislation, although the use of that law is also relatively limited. For example, in 2010-2011 men lodged 52 complaints compared to women's 86 complaints under the attribute of carer status, and men lodged 19 complaints compared to women's 51 complaints under the attribute of family responsibilities: Victorian Equal Opportunity & Human Rights Commission, *Annual Report 2010/11*, 47 (2011).

<sup>132</sup> *Anderson v Department of Justice and Industrial Relations* [2001] TASADT 3 (14 November 2001); *Cahill v State of Tasmania* [2004] TASADT 5 (28 June 2004).

<sup>133</sup> *Anderson v Department of Justice and Industrial Relations* [2001] TASADT 3 (14 November 2001). Anderson applied to use his 60 days of accumulated (paid) sick leave entitlements as maternity leave. In the result he took 5 months leave without pay: [4]. His complaint records that as his partner 'runs her own small business I have elected to be the primary child-carer': [1]. Tasmanian legislation (which was applicable to Anderson's employment) provided that the accumulated sick leave of State public sector employees could be taken as maternity leave: *Tasmanian State Service Regulations 1985* (Tas) reg 48. *Cahill v State of Tasmania* [2004] TASADT 5 (28 June 2004). Cahill applied for paid maternity leave of 12 weeks. In the result he moved from his full-time position to one working four days per week: [12].

<sup>134</sup> *ADA* (Tas) s 24. The relevant law, providing for maternity leave, was the *Tasmanian State Service Regulations 1985* (Tas) reg 48A, which was relevant to Anderson's employment as a State public sector employee: *Anderson v Department of Justice and Industrial Relations* [2001] TASADT 3 (14 November 2001).

<sup>135</sup> *ADA* (Tas) s 25; *Cahill v State of Tasmania* [2004] TASADT 5 (28 June 2004). The tribunal determined that the nature and purpose of the 12 weeks paid maternity leave was to accommodate the physiological effects of childbirth and pregnancy, and was not, in whole or part, for the purpose of caring for the baby: [58]. A similar exemption for special (or welfare) measures exists in most other jurisdictions: see, eg, *SDA* s 7D; *EOA* (Vic) s 12, s 88; *ADA* (Qld) s 104, s 105; *EOA* (SA) s 47 (relating to 'sex' and 'marital status' only); *EOA* (WA) s 31 (limited to 'sex', 'marital status', and 'pregnancy'), s 35K (in relation to 'family responsibilities or family status'); *ADA* (NT) s 57; *DA* (ACT) s 27.

return to work full time following maternity leave as ‘general knowledge’<sup>136</sup> and for some ‘a truth universally acknowledged’.<sup>137</sup> For men the picture is very different, with new fathers largely left unassisted in their attempts to take paid leave from work in order to care for a baby. This is due both to inadequacies in underlying minimum standards elsewhere, and also the ineffectiveness of anti-discrimination law to challenge the realm of industrial entitlements.<sup>138</sup> In short, for men, their attempts to escape the role of the normative worker are not supported by anti-discrimination law. In these ways, anti-discrimination law, and especially the *SDA*, reinforces women (and especially birth mothers) as carers first and workers second, at the same time as constituting men as workers and not substantial carers, thereby reinforcing gendered understandings of work and care. Through the mechanism of taking judicial notice, anti-discrimination law assumes homogeneity within the category of woman (and man), and is thereby potentially reductionist of diversity in terms of race and sexual orientation, amongst other particularities.

### ***B The Race and Sexual Orientation of Care***

All people experience events through the intersection of a number of identities, such as sex, race, sexual orientation, (dis)ability and socio-economic background. With separate anti-discrimination statutes at the Commonwealth level, and lists of disparate attributes at State and Territory level, the structure of anti-discrimination legislation may not permit an authentic representation of a complainant’s intersectional experience of discrimination and prejudice.<sup>139</sup> Whilst some forms of intersectional discrimination involving care (identifying for example the attributes of sex, pregnancy, parenthood and care or family responsibilities) arise commonly in cases brought by women under the various anti-discrimination statutes,<sup>140</sup> other intersections with care and family

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<sup>136</sup> *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998) para 6.17.10.

<sup>137</sup> *Tleyji v The Travel Spirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) [89].

<sup>138</sup> Underlying entitlements for men (as for women) were improved with the commencement of the new Commonwealth scheme of paid parental leave which applies in relation to births and adoptions after 1 January 2011: *Paid Parental Leave Act 2010* (Cth). See further, Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) *AJLL* 60.

<sup>139</sup> The statutes at the Commonwealth level are the *SDA*; *RDA*; *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Australian Human Rights Commission Act 1986* (Cth). Since the year 2000 complaints under multiple Commonwealth anti-discrimination statutes are able to be lodged and heard together (*Australian Human Rights Commission Act 1986* (Cth) s 46PO), and although this has improved the situation for complainants, difficulties still arise, as discussed in a number of submissions to a 2008 Senate inquiry: Senate Standing Committee on Legal and Constitutional Affairs, *The Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) pp 40-43. The issue of intersectionality is being examined at the federal level as part of the Commonwealth’s process of consolidating federal anti-discrimination statutes into one Act: Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, 5.3.

<sup>140</sup> See, eg, *Hickie v Hunt & Hunt* [1998] HREOCA 8 (9 March 1998); *Rispoli v Merck Sharpe & Dohme* [2003] FMCA 160 (3 October 2003); *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002); *Song v Ainsworth Game Technology Pty Limited* [2002] FMCA 31 (8 March 2002); *Sheaves v AAPT Limited* [2006] FMCA 1380 (7 November 2006). Complaints that are lodged in relation to work and care issues (at least under the EOA 1995 (Vic)) ‘frequently’ cited more than one attribute: Sara Charlesworth, ‘Managing Work and Family in the “Shadow” of Anti-Discrimination Law’ (2005) 23 *Law in Context* 88 at 97. On the intersections of gender and parenthood, see generally Gaze, above n 109, 94.

responsibility attributes – and notably those involving race and/or sexual orientation – appear to be dealt with less well.<sup>141</sup>

Kimberle Crenshaw, writing in the United States context, has shown how a framework of prohibiting discrimination on specific attributes such as race and sex - which she called the ‘single-axis framework’ of anti-discrimination law - takes effect to marginalise the claims of those who experience intersectional discrimination.<sup>142</sup> A ‘single-axis framework’ also underlies Australian anti-discrimination legislation and this feature may render it difficult for some complainants to articulate their grievances in a way that is cognisable to the relevant legislative scheme, and that remains authentic to them. Under most anti-discrimination statutes complainants must establish that at least one attribute identified under a relevant Act – be it sex, race, sexual orientation, parental status, or care or family responsibilities - was one of the reasons for the conduct.<sup>143</sup> Other State and Territory statutes impose the more onerous standard requiring that one (or more) of those attributes was ‘a substantial reason’ for the conduct.<sup>144</sup> This might present difficulties for complainants where all dimensions of the intersectional discrimination are represented by prescribed attributes; it is even more difficult where non-protected factors are also present, such as economic disadvantage and homelessness (and sexual orientation at the Commonwealth level).<sup>145</sup> A complainant might feel that her experience has been misrepresented through the need to adopt the categories and concepts of the legislation. For example, Hannah McGlade writes that ‘[w]hen an Aboriginal woman experiences discrimination, she experiences discrimination because she

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<sup>141</sup> Much scholarship has concluded that Australian anti-discrimination law may fail to deal adequately with intersectional discrimination where it relates to race and sexual orientation: see, eg, Andrew Thackrah, ‘From Neutral to Drive: Australian Anti-Discrimination Law and Identity’ (2008) 33 *Alternative Law Journal* 31; Jennifer Nielsen, ‘How Mainstream Law Makes Aboriginal Women “Disappear”’ (2004) 6 *Indigenous Law Bulletin* 23; Human Rights and Equal Opportunity Commission, *‘I Want Respect and Equality’: A Summary of Consultations with Civil Society on Racism in Australia* (2001); Hannah McGlade, ‘Reviewing Racism: HREOC and the Racial Discrimination Act 1975 (Cth)’ (1997) *Indigenous Law Bulletin* 29; Rosemary Hunter and Alice Leonard, ‘The Outcomes of Conciliation in Sex Discrimination Cases’ (Working Paper 8, The Centre for Employment and Labour Relations Law, University of Melbourne, 1995); Hilary Astor, ‘A Question of Identity: The Intersection of Race and Other Grounds of Discrimination’ chapter 11 in Human Rights and Equal Opportunity Commission, *Racial Discrimination Act 1975: A Review* (1995) 261; Anna Chapman, ‘Sexuality and Workplace Oppression’ (1995) 20 *MULR* 311 at 318-323; Australian Law Reform Commission, *Report No 69, Part 1, Equality Before the Law: Justice for Women* (1994) para 3.61-3.63.

<sup>142</sup> Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies’ (1989) *University of Chicago Legal Forum* 139 at 139. See also Nitya Duclos, ‘Disappearing Women: Racial Minority Women in Human Rights Cases’ (1993) 6 *Canadian Journal of Women and the Law* 25 which explored sex and race discrimination claims brought in Canada, finding that the tribunals failed to adequately take account of the intersectional character of discrimination experienced by racial minority women.

<sup>143</sup> *SDA* s 8; *RDA* s 18; *ADA* (NSW) s 4A; *EOA* (WA) s 5; *ADA* (Tas) s 14(3)(a); *ADA* (NT) s 20(3)(a); *DA* (ACT) s 4A(2).

<sup>144</sup> *EOA* (Vic) s 8(2)(b); *ADA* (Qld) s 10(4); *EOA* (SA) s 6(2). Most statutes require that the conduct complained of be ‘on the ground of’ the attribute identified: *SDA* s 5, s 6, s 7, s 7A, s 14; *ADA* (NSW) s 8, s 25, s 49V; *EOA* (SA) s 30; *EOA* (WA) s 11; *ADA* (Tas) s 16. Other anti-discrimination statutes require the conduct be ‘by reason of’ the attribute (*RDA* s 15), and others require that the conduct be ‘on the basis of’ an attribute: *EOA* (Vic) s 7(1); *ADA* (Qld) s 10.

<sup>145</sup> Although the *Australian Human Rights Commission Act 1986* (Cth) provides an attribute of ‘sexual preference’ (identified in the *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(ix)), it does not provide an ability to seek a binding order on that ground.

is an Aboriginal woman, not just “Aboriginal” or “woman” or “Aboriginal” plus “woman”.<sup>146</sup>

Searches of Australian decisions have not revealed any cases that raise the intersection of sexual orientation and the carer or family responsibilities attributes, and very few that deal with claims related to race and those grounds.<sup>147</sup> Of the few that raise race discrimination in the work context, some decisions clearly suggest that the intersectional character of the complainant’s experience may have been obscured, and in a way that undermined the veracity of the case.<sup>148</sup> The decision of *Tleyji v The TravelSpirit Group Pty Ltd* provides the strongest example of this.<sup>149</sup> Ms Tleyji brought her claim under three attributes in the New South Wales statute: responsibilities as a carer, sex and race. The allegations of discrimination related to carer responsibilities and sex, in relation to a number of matters, including her employer’s refusal to allow her to return from maternity leave on a part-time basis, and the hostile work environment that she says she experienced upon her return from maternity leave. The decision records Tleyji’s evidence as being that when she returned to work her colleagues were ‘a bit cold towards me, ... they were not what they were before I left to go on maternity leave.’<sup>150</sup> The New South Wales 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. Tleyji’s claim of race discrimination was examined completely separately to her claim relating to carer responsibilities and sex.<sup>151</sup> The allegation of race discrimination arose in relation to the complainant 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

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<sup>146</sup> Hannah McGlade, ‘Reviewing Racism: HREOC and the Racial Discrimination Act 1975 (Cth)’ (1997) *Indigenous Law Bulletin* 29. Provisions enacted into the *EOA* (SA) in 2009 that recognise Aboriginal and Torres Strait Islander caring responsibilities may better capture the experiences of an Aboriginal mother, for example. It remains to be seen how the new rule will reflect the gender dimension of caring: *EOA* (SA) s 5(3)(b).

<sup>147</sup> The initial stage of complaints under most statutes is conciliation. Most complaints across all the attributes do not proceed to a hearing on their merits. A search of databases reveals, for example, that less than 10 decisions dealing with the *SDA* were handed down by the Federal Magistrates Court in 2010, and in the same year less than 30 decisions were handed by the Victorian tribunal under all attributes in the *EOA* 1995 (Vic) (including applications seeking an exemption).

<sup>148</sup> *AO v Commonwealth Bank of Australia* [2007] NSWADT 135 (21 June 2007) (complaint on the attributes of race, disability and responsibilities as a carer; application for leave to proceed on the claim of race discrimination denied); *Horman v Distribution Group* [2001] FMCA 52 (19 December 2001) (complaint on the attributes of sex, pregnancy, racial hatred and sexual harassment); *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) (discussed below). In contrast, for earlier decisions dealing with intersectional complaints in the work context, that were not obviously fragmented, see *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 16 (20 July 1994) (sexual harassment and discrimination related to sex and race); *Fares v Box Hill College of TAFE* (1992) EOC 92-554 (discrimination related to sex and race). For a decision in the context of accommodation, brought on grounds of race and sex, that was fragmented, see *State Housing Commission (Homewest) v Homewest* [1998] WASCA 327 (7 December 1998), and discussed in Jennifer Nielsen, ‘How Mainstream Law Makes Aboriginal Women “Disappear”’ (2004) *Indigenous Law Bulletin* 28; Hannah McGlade and Jeannine Purdy, ‘From Theory to Practice, or What is a Homeless Yamatji Grandmother Anyway?’ (1998) 11 *Australian Feminist Law Journal* 137. All the decisions cited in this footnote involved women complainants.

<sup>149</sup> *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 (15 December 2005) (*Tleyji*).

<sup>150</sup> *Tleyji* at [18].

<sup>151</sup> The claim of discrimination on the attributes of carer’s responsibilities and sex were dealt with under a separate sub-heading in [5]-[113] and the race discrimination complaint was dealt with under a separate sub-heading in [114]-[137].

upstairs in the staff room, which was out of ear shot of others in the small open plan office space.<sup>152</sup>

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 maternity leave lacked factual substance. Whilst 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 maternity leave, she was not able to point to particular instances of this changed environment to the satisfaction of the tribunal.<sup>153</sup> In contrast, in the tribunal's analysis of the race claim, it did identify the 'explosive environment' that existed, comprising a 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.<sup>154</sup> Notably, the tribunal didn't draw on this material as possible contextual evidence of racial tension in the workplace. Rather, it discussed this material under the heading of 'causation', as part of its examination of whether the less favourable treatment of the complainant was causally related to her race.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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, took effect to obscure the complainant's experience as relating to all three attributes, at the same time. For example, the hostility that the complainant says she experienced when she returned from maternity leave, which notably she identified as related to her responsibilities as a carer, did not seem mutually exclusive of the racial tension in this 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 maternity leave it seems credible to suggest some of these would have related to the care of her baby.<sup>158</sup> In these various ways Tleyji's experience of intersectional discrimination was lost.

Australian anti-discrimination law tends to treat the different attributes it prescribes as mutually exclusive of each other, and this may lead to a distortion

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<sup>152</sup> Ms Tleyji relied on the characteristic extension mechanism to argue that speaking Arabic is a characteristic that appertains generally to her race as being Lebanese: *Tleyji* at [114], [128].

<sup>153</sup> *Tleyji* at [20]-[21].

<sup>154</sup> *Tleyji* at [133]. See also [134].

<sup>155</sup> *Tleyji* at [131].

<sup>156</sup> *Tleyji* at [124]-[125].

<sup>157</sup> Ms Tleyji was awarded \$5000 by way of compensation.

<sup>158</sup> The content of the phone calls is not apparent from the decision.

in the way that the intersectional experience of discrimination is legally thought about, analysed and remedied. This does not appear to have presented a problem in the many cases in relation to the intersections of sex, pregnancy, parenthood, and care or family responsibilities, where the women complainants do not identify their race or sexual orientation as relevant.

The complete absence of decisions dealing with sexual orientation and care or family responsibilities attributes is surprising, and suggests the erasure of those more complex claims in anti-discrimination law. The few decisions that do exist on race and care grounds provide cause for concern about the ability of the schemes to deal adequately with multidimensional discrimination involving racial prejudice. Together these matters suggest that anti-discrimination law has dealt better with the claims of discrimination related to care responsibilities brought by women of majority race and sexual orientation, than it has with the claims of those who experience intersectional discrimination.

### ***C The Cohabiting Couple of Care***

Leaving aside the grounds of pregnancy and breastfeeding, the attributes that relate to responsibility to care for others do not cover all circumstances where care is provided by one person to another. Each statute carefully defines its relevant concepts and relations of care, with a number of different approaches being apparent. These contain different levels of protection for care and family responsibilities, conveyed through messages about which relationships and family structures are cognisable and protected through anti-discrimination law.

The main model - found in most Australian anti-discrimination statutes - provides relatively narrow coverage for care responsibilities, restricting the relevant definitions of the attributes to care that occurs within defined family and couple settings. The Commonwealth *SDA*, and the anti-discrimination statutes of New South Wales, Queensland, South Australia and the Northern Territory are of this description. The Northern Territory statute provides the narrowest coverage of this category, in recognising only care that takes place as part of its 'parenthood' attribute; it does not contain any broader attribute relating to family or care responsibilities.<sup>159</sup>

Although the Commonwealth *SDA*, and the statutes of New South Wales, Queensland and South Australia use different terminology for their caring attribute, and sometimes have been worded in a way that suggests a drawing of the ground beyond a family context,<sup>160</sup> each care or family responsibilities concept is defined around responsibilities to care for, or support, a 'dependent child', or any other 'immediate family' member who 'is in need of care and

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<sup>159</sup> The *ADA* (NT) only prohibits discrimination on the attributes of 'pregnancy', 'parenthood' and 'breastfeeding': *ADA* (NT) s 19(1)(f), (g), (h). The concept of 'parent' is broadly defined to include 'a step-parent, adoptive parent, foster parent, guardian and a person who provides care, nurturing and support to a child': *ADA* (NT) s 4(1). The *ADA* (NT) also includes 'association' provisions, and on that basis may cover a carer for a person with an impairment, for example: *ADA* (NT) s 19(1)(j), (r).

<sup>160</sup> *SDA* s 4A 'family responsibilities'; *ADA* (NSW) s 49S 'responsibilities as a carer'; *ADA* (Qld) s 7(d) 'parental status' and s 7(o) 'family responsibilities'; *EOA* (SA) s 85T(1)(d) 'association with a child' and s 85T(1)(e) 'caring responsibilities'.

support'.<sup>161</sup> In several jurisdictions the 'dependent child' covered is defined broadly and inclusively, and identifies the idea that the child is wholly or substantially dependent on the employee, with the definitions listing for example adopted children, step children and ex-nuptial children.<sup>162</sup> The concept of 'immediate family member' is defined across the different statutes to include conventional understandings of family as a spouse or former spouse, adult children, parents, grandparents, grandchildren, and siblings of the employee.<sup>163</sup> Unmarried heterosexual de facto couples were recognised within the definition of 'immediate family' from the earliest days of these grounds. This has now been extended in all four jurisdictions to include same sex couples within the definitions now relevant to each Act – 'de facto partner', 'de facto relationship' (or 'domestic partner' under the South Australian Act).<sup>164</sup> New South Wales was the first jurisdiction to recognise same sex couple relationships in this way, having done so in 1999.<sup>165</sup> In 2002 recognition was effected in the Queensland Act,<sup>166</sup> and more recent recognition has occurred in the Commonwealth *SDA* (in 2008),<sup>167</sup> and in the South Australian Act in 2009.<sup>168</sup>

The definitions of 'de facto' or 'domestic' partners in all four statutes contain references to people living together as a 'couple', 'on a genuine domestic basis'.<sup>169</sup> All four, apart from the Commonwealth scheme, specify that the couple comprises two adults,<sup>170</sup> with the Queensland and South Australian legislation providing explicitly that the gender of the people in the couple relationship is not relevant.<sup>171</sup> Apart from the South Australian legislation, all statutes include

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<sup>161</sup> *SDA* s 4A; *ADA* (NSW) s 49S (refers broadly to 'any child or step-child of the person', and also includes responsibilities to an adult as a guardian); *ADA* (Qld) schedule dictionary definition of 'family responsibilities'; *EOA* (SA) s 5(3).

<sup>162</sup> *SDA* s 4A; *ADA* (NSW) s 49S provides similar broad coverage of children though not using the concept of 'dependent child'; *EOA* (SA) s 5(4). The *ADA* (Qld) does not define the term 'dependant child'.

<sup>163</sup> *SDA* s 4A; *ADA* (NSW) s 49S(1)(c); *ADA* (Qld) schedule dictionary; *EOA* (SA) s 5(4). Australian law does not recognize same sex marriages, whether performed in Australia or in a country that recognizes marriage between people of the same sex: *Marriage Act 1961* (Cth) s 5 definition of 'marriage', amended by the *Marriage Amendment Act 2004* (Cth). Confirming that 'spouse' under the *Public Service Act 1922* (Cth) does not include same sex relationships, see *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* (includes corrigendum dated 2 June 1998) [1998] FCA 138 (27 February 1998).

<sup>164</sup> *SDA* s 4 'de facto partner'; *ADA* (NSW) s 49S(3) 'spouse' includes 'de facto partner' which is in turn defined in the *Interpretation Act 1987* (NSW) s 21C; *ADA* (Qld) schedule dictionary definition of 'immediate family' includes 'spouse' which is in turn defined in the *Acts Interpretation Act 1954* (Qld) s 32DA(6) to include a 'de facto partner'; *EOA* (SA) s 5(4), s 5(1) definitions of 'domestic partner' and 'close personal relationship'.

<sup>165</sup> The *Property (Relationships) Legislation Amendment Act 1999* (NSW) amended the *Property (Relationships) Act 1984* (NSW) s 4(2) definition of 'de facto relationship'. This definition is used in the *ADA* (NSW) s 49S meaning of 'spouse' in the definition of 'immediate family member'.

<sup>166</sup> The *Discrimination Law Amendment Act 2002* (Qld) amended the *Acts Interpretation Act 1954* (Qld) by inserting as s 32DA a definition of 'de facto partner' (and note sub-sect (6)). This definition is used in the *ADA* (Qld) schedule dictionary meaning of 'immediate family' and 'family responsibilities'.

<sup>167</sup> The new *SDA* concept – 'de facto partner' – is contained in the *Acts Interpretation Act 1901* (Cth) s 22C(1)(c). See also s 22A and s 22B. The amendment to the *SDA* was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) schedule 2, and the amendment to the *Acts Interpretation Act 1901* (Cth) was made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) schedule 2.

<sup>168</sup> The amendment was made by the *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

<sup>169</sup> *Acts Interpretation Act 1901* (Cth) s 22C(1)(c); *Property (Relationships) Act 1984* (NSW) s 4; *Acts Interpretation Act 1954* (Qld) s 32DA(1); *EOA* (SA) s 5(1) definitions of 'domestic partner' and 'close personal relationship'.

<sup>170</sup> *Property (Relationships) Act 1984* (NSW) s 4; *Acts Interpretation Act 1954* (Qld) s 32DA(1); *EOA* (SA) s 5(1) definition of 'close personal relationship'.

<sup>171</sup> *Acts Interpretation Act 1954* (Qld) s 32DA(5); *EOA* (SA) s 5(1) definition of 'close personal relationship'.

statements to the effect that in determining whether a relationship falls within the statutory concept, all the circumstances of the relationship are to be taken into account, including any or all of a list of indicative factors. The lists in the statutes are substantively very similar, with the list in the Commonwealth *SDA* being:

- 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.<sup>172</sup>

The New South Wales and Queensland Acts add a further factor relating to the performance of household duties.<sup>173</sup> Although not containing a list of indicative factors, the South Australian statute does note that '[t]wo persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.'<sup>174</sup>

These provisions mean that discrimination related to care responsibilities is prohibited, but only where that caring occurs within carefully defined contexts, namely the care of children of the employee, and other members of the employee's 'immediate family' such as a spouse, a cohabiting couple partner, parents, grandparents and siblings of the employee. Although the provisions covering care of children are quite broadly drawn, and may extend beyond conventional understandings of nuclear family arrangements for raising children,<sup>175</sup> the remainder of 'immediate family' draws upon and reinforces a relatively conventional view of families and intimate relationships. Indeed the legislation itself signifies its narrow scope through the use of the appellation of 'immediate' to the category of family recognised. Until very recently two of these statutes only countenanced different sex couples as 'immediate family'; same sex relationships were not recognised at all. Although now all include same sex couple relationships as 'immediate family', they have done so in a way that reinforces the primacy of the cohabiting couple relationship (with most statutes leaving no doubt that means two adults). Couples are constituted as the normative care relation for these purposes, rather than, for example, broader

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<sup>172</sup> *Acts Interpretation Act 1901* (Cth) s 22C(2). The Commonwealth legislation is clear that none of these factors are determinative, and a temporary absence from living together, or where an illness or infirmity causes a separation in living arrangements, does not mean that a 'de facto' partnership does not exist: s 22C(3), (4). In addition, a de facto partnership can exist even where one person is married to someone else, or in a registered relationship with someone else: s 22C(5). See also *Property (Relationships) Act 1984* (NSW) s 4(2); *Acts Interpretation Act 1954* (Qld) s 32DA(2) (which also provides that '[t]wo persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence': s 32DA(3), (4)).

<sup>173</sup> *Property (Relationships) Act 1984* (NSW) s 4(2); *Acts Interpretation Act 1954* (Qld) s 32DA(2).

<sup>174</sup> *EOA* (SA) note to the definition of 'close personal relationship'. The *EOA* (SA) does additionally provide provisions recognizing Indigenous arrangements of care. These are discussed further below.

<sup>175</sup> This has not been explored in case decisions.

relations of care within kinship, social and friendship networks, between neighbours, and people in multiple intimate relationships.

The standard list of indicative factors draws on conventional understandings of couple relationships as sharing a residence, pooled finances, public reputation, etc. Those factors are said to have been drawn from a 1986 New South Wales case about property adjustment that determined whether a man and a woman were 'living ... together as husband and wife on a bona fide domestic basis although not married to each other'.<sup>176</sup> The current standard list of factors can be seen to reference and reinforce judicial understandings of the traditional hallmarks of marriage. In this way marriage provides the benchmark family relation against which the existence of a de facto relationship in anti-discrimination law is tested to assess similarity, whether different sex or same-sex. Indeed, apart from South Australia which uses the language of a 'domestic' partner, in the other statutes marriage still provides the reference point for the name of the 'de facto' category. Cases in anti-discrimination law have not explored the meaning of the 'de facto' definitions of 'immediate family', although the same definitions have been applied in other contexts such as property division regimes, intestacy laws and superannuation claims. In those areas a trend has been discerned towards more flexible and purposive approaches to judicial interpretation, with lesser reliance on the conventional traits of marriage.<sup>177</sup> Although that more flexible and contemporary understanding might also be expected to apply in relation to anti-discrimination statutes, the legislation itself makes clear the need for the presence of at least some key traditional markers of marriage - a cohabiting couple comprising two adults.

In contrast to this first model of recognising care and family responsibilities, a second approach provides relatively broad coverage of care responsibilities per se, and does not require that the care take place within any particular setting, other than it not be provided for commercial reward. Three statutes reflect this approach - the Victorian Act, the Australian Capital Territory statute and the Western Australian legislation. In Victoria and the Australian Capital Territory the attributes are worded similarly around the status of being a 'carer', where 'carer' is defined to mean a person upon whom another person is 'dependent' (or under the Victorian Act 'wholly or substantially dependent') for 'ongoing care' and assistance or attention, with the provision of care being otherwise than through an arrangement that is commercial, or substantially commercial.<sup>178</sup> Although both statutes pair the status of being a carer with that of being a parent, these are separate statuses, with the status of being a carer not confined to a parent's care for a child. In contrast to these statutes, the attribute in the Western Australian Act is worded as 'family responsibility or family status'.<sup>179</sup>

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<sup>176</sup> *D v McA* (1986) 11 Fam LR 214 at 227 per Powell J. The formula of 'living ... together as husband and wife on a bona fide domestic basis although not married to each other' was the definition of de facto relationship in the *De Facto Relationships Act 1984* (NSW), applicable in this case. See Jenni Millbank, 'The Role of "Functional Family" in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 1 at 10; Jenni Millbank, 'The Changing Meaning of "De Facto" Relationships' (2006) 12 *Current Family Law* 82 at 86.

<sup>177</sup> Millbank, 'The Changing Meaning', above n 176, 94.

<sup>178</sup> *EOA* (Vic) s 6(i), s 4(1) definition of 'carer'; *DA* (ACT) s 7(1)(e), dictionary definition of 'carer'.

<sup>179</sup> *EOA* (WA) s 35A.

Although worded narrowly, the Western Australian attribute is defined broadly to mean being a 'relative', and additionally very widely as a person 'having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment'.<sup>180</sup> This latter formula may provide the broadest coverage in the Australian anti-discrimination statutes. It does not appear to require ongoing care or a level of dependence, and in effect provides a very wide reading of 'family' to include everyone that an employee has some level of responsibility to care for.<sup>181</sup>

The Tasmanian legislation sits somewhere between these two models for recognising and protecting care responsibilities in anti-discrimination law. It combines the narrower approach of recognising care within a familial context, in addition to containing broader provisions around caring relationships per se. The relevant attributes are 'parental status' and 'family responsibilities'.<sup>182</sup> Similar to the first model of recognition, the concept of 'family responsibilities' is defined around responsibilities to a dependent child, and other 'immediate family member' (defined to include a 'partner').<sup>183</sup> The *Relationships Act 2003* (Tas) provides the definition of a 'partner' as someone who is in a 'personal relationship' with the employee, comprising either 'a significant relationship' or 'a caring relationship'.<sup>184</sup> '[S]ignificant relationships' are couple relationships of two adults,<sup>185</sup> whilst a 'caring relationship' is much more broadly drawn as a relationship 'between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care' (but not on a commercial basis).<sup>186</sup> This concept of 'caring relationship', like the Western Australian provision, is broadly drawn and may not require ongoing care or a level of dependence.<sup>187</sup> The *Relationships Act* contains inclusive lists of indicative factors for both types of relationships, with the lists being very similar to the standard list discussed above (in relation to the first model).<sup>188</sup> Notably, the list for a 'caring relationship' does not include the factor of whether a sexual relationship exists, and adds to the standard list the 'performance of household duties' and 'the level of personal care and domestic support' provided, emphasizing the character of that form of relationship.

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<sup>180</sup> *EOA* (WA) s 4(1) definition of 'family responsibility or family status'. 'Relative' is defined to mean 'a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person': s 4(1).

<sup>181</sup> This has not been explored in case decisions.

<sup>182</sup> *ADA* (Tas) s 16(i), (j). '[P]arental status' is defined as being the status of being a parent or childless, and 'parent' includes a step-parent, adoptive parent and foster parent: s 3.

<sup>183</sup> '[I]mmediate family member' is defined to include a spouse, parent, grandparent, grandchild or sibling of the employee and a 'partner' (within the meaning of the *Relationships Act 2003* (Tas)): *ADA* (Tas) s 3 definitions of 'immediate family member' and 'partner'.

<sup>184</sup> *Relationships Act 2003* (Tas) s 3 definition of 'partner', s 6.

<sup>185</sup> *Relationships Act 2003* (Tas) s 4.

<sup>186</sup> *Relationships Act 2003* (Tas) s 5(1), (2). The concept of 'related by family' is defined in s 7 quite narrowly to mean parents, children, ancestors and descendants.

<sup>187</sup> These matters have not been explored in case decisions, although cases under the New South Wales relationship recognition laws use the concept of 'personal care' which has been interpreted to mean requires 'assistance with mobility, personal hygiene and physical comfort': *Dridi v Fillmore* [2001] NSWCA 319 at [108], cited in Reg Graycar and Jenni Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 25 *Journal of Law & Policy* 1 at 29.

<sup>188</sup> *Relationships Act 2003* (Tas) s 4(3), s 5(5).

The Tasmanian Act is interesting in its attempt to move beyond the recognition of care in a familial context, to identify broader ‘caring relationships’. It remains to be seen how the ‘caring relationship’ concept will be interpreted, but with the list of indicative factors for identifying it largely harking back to the standard list developed from marriage concepts, marriage may continue to provide the point of reference for care recognition, even in this Tasmanian attempt to move outside that constraint.

Another State that has drafted its legislation in an attempt to step beyond the limited understanding of care and family contained in much anti-discrimination law is South Australia, which in 2009 amended its statute to provide in the definition of ‘caring responsibilities’ that:

an Aboriginal or Torres Strait Islander person also has caring responsibilities if the person has responsibilities to care for or support any person to whom that person is held to be related according to Aboriginal kinship rules or Torres Strait Islander kinship rules, as the case may require.<sup>189</sup>

This extended understanding of ‘caring responsibilities’ recognises and responds to the limited understandings of notably ‘dependent child’ and ‘immediate family’ in the South Australian statute. It highlights the racial foundations of the central concepts used elsewhere in the Australian statutes.

The broader recognition of care provided in the legislation of Victoria, the Australian Capital Territory, Western Australia and Tasmania potentially recognise care relations that arise, for example, within kinship networks, social and friendship groups, neighbours, and people in more than one intimate relationship.<sup>190</sup> South Australia explicitly includes the caring responsibilities of Aboriginal and Torres Strait Islander people within its 2009 definition of ‘caring responsibilities’. The existence of these recognitions of care responsibilities in a broad range of contexts underscores the limited scope and protection offered by the dominant model of recognising care responsibilities found elsewhere in Australian anti-discrimination law – that of ‘immediate family’ and the marriage-like cohabiting couple. This main model is built on broader relationship recognition schemes enacted by parliaments for use in a wide range of contexts such as property division regimes, intestacy laws and superannuation claims, and their appropriateness for use in recognising and protecting care responsibilities in proscriptions against discrimination must be questioned.

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<sup>189</sup> *EOA (SA)* s 5(3)(b) (emphasis removed). This provision was inserted into the *EOA (SA)* along with the provisions on ‘caring responsibilities’ by the *Equal Opportunity (Miscellaneous) Amendment Act 2009 (SA)*.

<sup>190</sup> These broader contexts have not been explored in case decisions.

## V CONCLUSION

This working paper has examined how anti-discrimination law in Australia understands its concepts of work, care and family in ways that undermine the objective of bringing about a better settlement between work and care. The discussion has revealed that anti-discrimination law is built on a very strong understanding of public/private, both in how it constructs its domain as lying in the public world of 'employment' and 'work', and in the ways it countenances and protects the appearance of care and family in the public realm of the labour market only in carefully delineated circumstances. This leaves much care in the unprotected realm of the private. Whilst presenting itself as having no concern with the private arrangements within families, it does shape those dynamics, as the *Speering* case illustrates. The working paper has also shown how the comparator aspect of direct discrimination produces a normative or benchmark worker of the labour market who is 'unencumbered' in the sense of being separate to, and unmarked by, the particularities of care responsibilities. This separates the normative worker from care and family. In addition, the working paper explores how the formal equality precept of the different schemes as interpreted by tribunals and courts provides at best only access to the normative worker's terms and conditions of engagement. It does not provide a mechanism for the generation of new forms of leave and working hour arrangements, for example, a matter highlighted in the exceptional duty to accommodate provisions in the Northern Territory and Victorian statutes.

The second main theme developed in the working paper examines more closely the particularities of care and family in terms of gender, race and sexual orientation. It revealed how mother care, especially of babies and infants, is constituted as perhaps the central care relation to be protected by anti-discrimination law. The care responsibilities of fathers, and people of minority race and sexual orientation, may be less well protected. There is reason to believe that intersectional experiences of discrimination and prejudice relating to care responsibilities may be distorted in the different schemes, leaving these outsider experiences without effective protection from discrimination in the public realm of the labour market. The dominant model through which care responsibilities are recognised reflect narrow understandings of family and relationships, perhaps acknowledged in parliaments' identification of the relevant category as 'immediate family'. Although all statutes now recognise same sex relationships, only those that comprise a marriage-like couple living together are likely to count for these purposes. The much broader drawing of the care responsibilities attributes in Victoria, the Australian Capital Territory, Western Australia, Tasmania, and in relation to Aboriginality in South Australia, highlights the limited character of the provisions in other Australian anti-discrimination statutes.

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