DISCRIMINATION, WORK AND FAMILY: 
RECENT REGULATORY RESPONSES 
TO PROMOTE EQUALITY

Shannon Fentiman

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Discrimination, Work and Family: Recent Regulatory Responses to Promote Equality

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I. INTRODUCTION

To date, state and federal anti-discrimination legislation has been largely unsuccessful at challenging the gender norms and cultural inequalities that exist in Australian workplaces. There remains a significant reduction in labour force participation of women aged between 25 and 44 years, of which the main drivers are caring for children and other caring and household responsibilities. This policy and legislative failure is why Australia has one of the lowest labour force participation rates for women in these age ranges compared with other OECD countries.

Family caring responsibilities are the most common non-work commitments that compete with work demands. Unable to challenge the notions of the ‘ideal’ worker or the ‘Harvester family’, many women and men with family and caring responsibilities are still struggling to achieve equality at work despite the issue of work-life balance being on the public policy agenda for many years.

Some advances in helping workers balance their paid work and family responsibilities have been achieved, the recent introduction of paid parental leave being a very significant one. Yet, over the past 20 or so years, governments have been noticeably reluctant to act, especially in contrast to many countries in the European Union. The OECD noted in 2002 that there is only a ‘low penetration’ of family-friendly work practices in Australia.

As a result, anti-discrimination legislation has been one of the only avenues for workers with family responsibilities to pursue flexible working conditions. Yet, even here the courts have consistently interpreted anti-discrimination legislation narrowly, viewing the statutes through a

5 In 1996, HREOC released Stretching Flexibility; Enterprise Bargaining, Women Workers and Changes to Working Hours which examined the impact on women workers of demands to work increasingly flexible hours. Since then there have been a number of discussion papers, reports and inquiries into work-life balance and family friendly workplaces by HREOC including: Striking the Balance: Women, Men, Work and family (2005); It’s About Time Final Paper (2007) and Gender equality: What matters to Australian women and men (2008).
prism of formal equality. The Courts have failed to recognise that the aim of the legislation is to bring about social change. Consequently, there a number of technical barriers for complainants in both direct and indirect discrimination claims. In effect, whilst the laws have been effective in their remedial goal of compensating victims and resolving complaints they have failed in their stated purpose of eliminating inequality.

Recently, Governments at both a state and federal level have recognised the limitations of the current regulatory approach and have introduced a number of new mechanisms through both anti-discrimination legislation and workplace laws. This paper will focus primarily on recent developments in Victoria and in the Federal Government’s *Fair Work Act 2009* (Cth) and examine how these recent changes might bring about substantive equality for working families by improving flexibility at work and imposing positive duties on employers to alleviate inequality.

This paper will discuss the two ‘right to request’ models in Victoria and in the National Employment Standards at a federal level, the new positive duties on employers in the new *Equal Opportunity Act 2010* (Vic) and the new general discrimination provisions contained in the *Fair Work Act*. Up until now, there has been no positive duty on employers to eliminate discriminatory customs and practices. Whilst innovative, the lack of enforcement mechanisms for these new rights and duties may mean that the regulation is unlikely to better promote substantive equality in Australia.

To assess these new mechanisms this paper will examine recent legislative developments in equality in the UK. The UK, with influence from the policies of the European Union, introduced a statutory right to request flexible work provision in 2003 and drawing on their experience this paper will consider how effective the Australian models might be. The UK have also had positive duties on public authorities in relation to eliminating discrimination and promoting equality and these have been substantially strengthened and expanded in the new *Equality Act 2010* (UK).

## II. Equality in Australia

### A. Concepts of Equality: Formal v Substantive

Australia has a number of relevant international legal obligations in relation to equality at work. These obligations are legislated for in federal and state based anti-discrimination statues which prohibit particular discriminatory behaviour in areas of public life, including at work. Most Australian anti-discrimination laws expressly outline that the aims of the legislation are to eliminate, as far as possible, discrimination against persons on grounds covered by the laws and to promote recognition and acceptance within the community of the principle of equality.

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8 See UN *Declaration of Human Rights*, 1948, esp Arts 2,4,7,22 and 23; ICESCR [1976] ATS 5, esp Arts 6-7; ICERD [1975] ATS 40, esp Arts 1,2,and 5(e); CEDAW [1983] ATS 9, esp Arts 1 and 11.
9 See for example *Sex Discrimination Act 1984* (Cth), s3(d).
According to Owens & Riley, “the concept of equality is critical to understanding the possibilities and limitations of the operation of statutory provisions proscribing discrimination at work.” Yet, equality is a highly contested concept. In discrimination jurisprudence it is common to find two predominant concepts of equality: formal and substantive equality. It is a useful and well-recognised dichotomy through which to analyse Australia’s legislative regime aimed at protecting equality.

1. **Formal Equality**

Formal equality is also often referred to as rule equality, or equal treatment; people are to be treated exactly the same in all circumstances. As Aristotle put it, ‘likes should be treated alike’. Thornton contends that formal equality is inherent with the Anglo-Australian legal culture and is fundamental to the notion of the rule of law. Whilst formal equality is a simple concept, it has obvious difficulties. Treating everyone equally, assumes that everyone is the same, and that they are starting from a position of equality within society. As a concept, it fails to take into account structural barriers faced by women, people with disabilities and other minorities.

Owens & Riley maintain that “formal equality is ill equipped to deal with systemic or structural inequality... is apt to ignore underlying assumptions and therefore to fail to identity the way in which social structures and actions may actually create inequality.”

This concept of equality is clearly problematic when applied to discrimination on the grounds of family responsibilities. Treating workers with family responsibilities the same as workers without family responsibilities only reinforces the already existing disadvantage these workers face. Formal equality may involve equal treatment, but rarely results in equal outcomes.

2. **Substantive Equality**

Substantive equality, or equality of results, is more concerned with the outcomes of the way people are treated, and therefore, by necessity, recognises and accommodates differences. This approach ‘interrogates the assumptions’ about the existing ‘level-playing field’ that is often inherent in a formal approach to equality. This approach recognises that often special affirmative measures may be required to overcome structural disadvantage and past inequality.

Substantive equality is also consistent with international human rights law, upon which Australian anti-discrimination legislation is based. Article 26 of the International Covenant on Civil and Political Rights places a positive obligation on State parties to take steps to protect against discrimination. The Human Rights Committee has stated that the principle of...

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11 Cf Nicholas Smith, who argues that the distinction is elusive, confusing and unhelpful, ‘A Critique of Recent Approaches to Discrimination Law’ [2007] New Zealand Law Review 499, 506.
14 R Owens & J Riley, above n 10, 349.
15 Ibid.
substantive equality may require parties to take affirmative action in order to diminish or eliminate conditions which perpetuate discrimination.\textsuperscript{18}

In a substantive approach to equality, there can often be issues of identifying which differences are relevant and should be recognised. Often, different treatment can be referred to as ‘special treatment’ or ‘special measures’ and this may at times further entrench the differences it tries to overcome.

In the context of work and family, it is clear that the substantive equality will be more helpful in achieving equality for women at work. A notion of substantive equality can challenge the norms of treating women the same as men in the workforce; a workforce designed for the Harvester family. As Smith notes, "substantive equality would mean de-gendering work and care, enabling and facilitating the participation of [men and women] in both productive and reproductive work."\textsuperscript{19}

\textit{B. The Regulatory Framework: Anti-Discrimination Legislation}

As Smith and Riley point out, all of the anti-discrimination laws in Australia are framed in a similar way in that the primary means of addressing discrimination is to provide a tort-like right for individual victims to seek redress.\textsuperscript{20} Whilst all federal and state anti-discrimination statutes outline an objective to promote acceptance and recognition of the principle of equality, with the exception of the new \textit{Equal Opportunity Act 2010 (Vic)}, no further guidance is provided by parliament about the concept of equality that is to be promoted and there are no proactive provisions.

The anti-discrimination laws in Australia prohibit both direct and indirect discrimination. Direct discrimination is mostly defined in terms of different and less favourable treatment.\textsuperscript{21} Owens & Riley argue that this means the legislation defaults to a position of formal equality.\textsuperscript{22} They state:

\[ \text{T}he \ normative \ understanding \ of \ equality \ as \ sameness \ is \ asserted \ in \ all \ the \ discrimination \ statutes \ by \ their \ description \ of \ other \ differences \ in \ treatments \ as \ \textit{exceptions} \ or \ \textit{exemptions}, \ or \ sometimes, \ positive \ discrimination \ or \ special \ measures.\textsuperscript{23} \]

The formulation of direct discrimination does focus is on whether or not someone has been treated differently, or unequally, which does appear to promote formal equality. However, indirect discrimination prohibits requirements or conditions that disproportionately affect

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\begin{thebibliography}{99}
\item[21] See for example \textit{Sex Discrimination Act 1985} (Cth) s5(1).
\item[22] R Owens & J Riley, above n 10, 354.
\item[23] Ibid.
\end{thebibliography}
\end{flushleft}
certain groups, unless the requirement is reasonable. These provisions appear to promote substantive equality, by looking to the outcomes of facially neutral conditions.

Both direct and indirect discrimination provisions in the statutes have been interpreted narrowly by the Courts. As Gaze notes, "Australian judges have generally approached interpretation of anti-discrimination statutes as being similar in kind to other statutes...the subject matter has not been seen as a basis for any different approach to interpretation." The High Court, when it has examined the purpose of anti-discrimination laws, has unambiguously stated that the laws are remedial in nature and should receive a beneficial construction. Yet the Court has consistently adopted a narrow and conservative approach to interpretation, especially in recent times. In the recent High Court decision in Purvis v New South Wales, several High Court judges considered the purpose of the Disability Discrimination Act 1992 (Cth) and observed:

Different comparisons may have to be drawn according to whether the purpose is limited to ensuring that persons situated similarly are treated alike, or the purposes is wider than that. In particular, if the purpose of the legislation is to ensure equality of treatment, the focus of the inquiry will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other way, for example, economic, social and cultural equality.

And they continued to examine the concept of 'substantive equality':

Substantive equality directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that 'in order to treat some persons equally we must treat them differently.'

Significantly, the judges concluded that the principle purpose of the Disability Discrimination Act 1992 (Cth) was 'equality of treatment' as the Act did not, unlike more recent disability discrimination legislation in the US and the UK, provide for positive obligations on persons to treat disabled people differently from others or make 'reasonable adjustments' to accommodate them.

The decision in Purvis clearly affirms that direct discrimination actions are confined to formal equality. Those wanting to achieve substantive equality under anti-discrimination legislation may need to turn to indirect discrimination provisions. But as Smith notes, indirect discrimination is an action that is significantly more difficult to identify and prove and although it appears that substantive equality is addressed by the legislation (it is concerned with

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24 See for example Sex Discrimination Act 1985 (Cth) ss5(2), 7B.
28 Ibid, 154.
29 Ibid, 154-5.
30 Ibid.
outcomes), the courts have also interpreted these provisions very narrowly from a ‘formal equality’ viewpoint.

It is through indirect discrimination law provisions for example, that women returning to work from maternity leave have established a right to be taken seriously by their employers when they seek part time work to accommodate conflicting work and family commitments.31 However recent case law indicates that it can be very difficult to change entrenched practices and the understandings on which they rest.32

Indirect discrimination involves imposing a requirement, condition or practice can be complied with by a higher proportion of people without the attribute or personal characteristic. The test of proportionality which is found in most formulations of indirect discrimination in the statutes suggests the use of statistical research to prove difference in the impact of the requirement condition or practice and can involve quite complex calculations.33 It can be one of the technical barriers complainants face in bringing an indirect discrimination claim.

Under both state and federal statutes a person does not discriminate against another person indirectly if the condition, requirement or practice imposed is reasonable in the circumstances. This proviso is one of the major barriers to effectively eliminating discrimination of men and women with family responsibilities in the workforce.

The case of Schou has attracted much analysis and criticism and illustrates the ineffectiveness of the current anti-discrimination legislation to promote equality. Ms Schou, a Hansard sub editor, who had a child with a serious long-term illness and had requested to work from home one day a week. The original tribunal decision found that the requirement or condition imposed was that Ms Schou attend the office every work day (the attendance requirement).34 Ms Schou could not comply with it due to family responsibilities, and a higher proportion of those who were not parents or carers could comply.35 The tribunal also held that on all the factors of the case, the attendance requirement was not reasonable given the relative low cost of alternatives (installing a modem in Ms Schou’s house) and the devastating consequence of Ms Schou failing to comply with the requirement (she would lose her job). The State launched two appeals. On appeal to the Victorian Court of Appeal, the complaint was dismissed entirely on the basis that the attendance requirement was reasonable.

One of the reasons that the court held the attendance requirement was reasonable was that any alternative proposal (such as installing a modem and allowing Ms Schou to work from home) must be considered in the hypothetical situation where all of the Hansard sub editors worked from home.36 It was stated that the good manager may make exceptions to the general rule, but failure to do so could not form the basis of an indirect discrimination claim.37 If this was the

33 Section 11(1)(b) Anti Discrimination Act 1991 (Qld).
34 Schou v Victoria (Department of Victorian Parliamentary Debates) [2000] EOC 93-100.
35 Ibid, [74].
36 Ibid, [27].
37 Ibid, [33].
case, any individual who sought a ‘special allowance or privilege’ to the general rule could complain of indirect discrimination.38

The decision by the Court of Appeal effectively means that an individual can only access flexible working arrangements if all their co-workers have access as well. This is consistent with notions of ‘equal treatment’ and formal equality. As Gaze asserts, if their co-workers are not facing the same constraints of parental/family responsibility then this test operates directly contrary to the objects and language of the statute.39 It is difficult to see why an adjustment sought by one employee should only be assessed as reasonable if it would be reasonable for all employees to seek it, even though many will never in fact want it and are not in the circumstances to seek the adjustment.40

This reasoning rests on the assertion that what is sought is an advantage over others rather than treatment which aims to improve equality by taking account of the person’s different situation and consequent need for different treatment. What this inevitably means for women seeking redress through indirect discriminations provisions is that equality will equal sameness - formal as opposed to substantive equality.

Cases involving indirect discrimination against women on gender grounds raise a fundamental challenge to tradition and practices which have reserved the best jobs for the male ‘ideal workers’ in a way that appears natural and inevitable.41 It is hard to escape the suspicion that the court is uneasy with the potential for indirect discrimination to disturb existing practices never before questioned and embrace substantive equality.42

The difficulties faced by Ms Schou in bringing her indirect discrimination have thankfully now been removed by legislative change in Victoria which requires an employer not to unreasonably refuse a request to accommodate a worker with family responsibilities (discussed below). Nevertheless, it is indicative of the approach of the judiciary to the interpretation of anti-discrimination legislation, that is, that is that the legislation protects only formal equality, and therefore as long as employees with family responsibilities are treated the same as other employees, the employer has not discriminated against them.

III. RECENT LEGISLATIVE RESPONSES

In response to this failure of anti-discrimination legislation to foster the social change anticipated, many states and territories have made recent amendments to their anti-discrimination statutes, and the Commonwealth has initiated a number of reviews of federal anti-discrimination statutes.43 This paper focuses on recent regulatory reforms in Victoria and

38 Ibid, [39].
39 Gaze, above n 25, 347.
40 Ibid.
41 Ibid.
42 Gaze, above n 25, 346.
43 Inquiry into the effectiveness of the Sex Discrimination Act 1984, Senate Standing Committee on Legal and Constitutional Affairs.
in the Commonwealth’s *Fair Work Act* because they are the most unique to the current regulatory regime.

**A. Victoria**


Victoria is leading the way in relation to developments in anti-discrimination legislation amongst the states. Over the past five years there have been a number of amendments to the legislation, many of them aimed at trying to achieve equality for workers with care responsibilities at work.

In the 2006 state election campaign, the Victorian Labor Party committed to implementing the right to request flexible work in anti-discrimination legislation.44 This was in response to the Howard Government’s WorkChoices legislation which took away the benefits of the *Family Provisions Test Case* for many employees.45 This kind of ‘right to request’ regulation, as it is termed in the UK and Europe, was one of the central claims from the Australian Council of Trade Unions (ACTU) in the *Family Provisions Test Case*. Charlesworth and Campbell summarise the ACTU claim:

> Drawing on the experience of the RTR legislation in the United Kingdom, one of the main ACTU claims was for an employee to be able to request a chance in hours to enable to the employee to provide care, with an obligation on the employer to consider requests seriously. The change requested related not only to the number of hours worked but also the times at which work is performed.46

In 2008, amendments were passed to the *Equal Opportunity Act 1995* (Vic), providing that employers are not to unreasonably refuse to accommodate the responsibilities that an employer has as a parent or carer.47 Such a refusal constitutes discrimination.48 The coverage is wide, as it extends to potential employees, employees and independent contractors. There is also no restriction on the kinds of requests that can be made, eg location of work, hours of work and breaks and how work is to be performed etc. These provisions were carried over into the new *Equal Opportunity Act 2010* (Vic) which comes into effect in August 2011.49

The terms ‘parent’ and ‘carer’ are defined in the Act ‘parent’ is defined to include ‘step-parent’; ‘adoptive parent’; ‘foster parent’ and ‘guardian’ and ‘carer’ is defined to mean ‘a person on

44 ALP (ALPV), *Safer Fairer Workplaces*, Melbourne, 2006 p 11 in Charlesworth; p 123
45 *Parental Leave Test Case 2005* (2005) 143 IR 245 (*Family Provisions Test Case*). These test cases are run by application from the ACTU to vary the standard award conditions under the legislation.
47 See sections 13A, in relation to job applicants, s14A in relation to employees, s15A in relation to contractors, and also 31A which relates to firms. In the new *Equal Opportunity Act 2010* (Vic) ("Equal Opportunity Act"), which comes into force in August 2011, these sections are maintained in sections 17, 18 and 19. The model is similar to that which the Human Rights and Equal Opportunity Commission (HREOC) recommended in its *It’s About Time: Women, Men, Work and Family – Final Paper* (2007). For more information see B Smith, above n 3.
48 Ibid.
whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis’.\footnote{Ibid.}

The definitions of ‘parent’ and ‘carer’ were not amended in the new \textit{Equality Act 2010}. As Chapman notes:

\begin{quote}
These definitions are the existing formulas for parent and carer, dating back to 1995 and earlier... the definition of ‘parent’ is inclusive only relatively narrowly drawn around legal statuses of parenthood, and does not reflect diverse contemporary social practices of parenting, for example, in same sex relationships and extended family, kinship and friendship networks. The concept of ‘carer’, defined exhaustively, is also quite narrowly drawn.\footnote{A Chapman, ‘Care Responsibilities and Discrimination in Victoria: The Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic)’ (2008) 21 \textit{Australian Journal of Labour Law} 200, 202.}
\end{quote}

Whilst there is clearly some work to be done around expanding these definitions, this is still, by comparison to the federal right to request model, and indeed the UK model discussed later in this paper, very wide application in that it applies to all parents, regardless of the age of their children and it applies to carers. It also extends the provisions to potential employees and independent contractors. This will enable employees to seek flexibility around their care or family responsibilities before commencing employment. The provisions also provide for a very broad range of issues that can form part of the accommodation including the organisation of work.

In appears that if a request for accommodation is refused, the onus is on the employee to show the refusal was unreasonable.\footnote{Ibid, 206-207. See also \textit{Richold v Vic} [2010] VCAT 433 (14 April 2010).} This is important as it notoriously difficult for employees to prove, since it is the employer, rather than the employee, that is equipped with specific knowledge of their own employment practices and their effect on employees and business requirements. Margaret Thornton refers to this as ‘the monopoly of knowledge’.\footnote{Thornton, above n 13, 180.} However in practice, employers will be required to adduce evidence in response to a claim of unreasonable refusal to accommodate, so in a way, the employer must prove they have not unreasonably refused the request.

In determining whether or not the refusal to accommodate was unreasonable the Act provides that all relevant facts and circumstances must be considered and lists a number of factors that should be taken into account including, amongst others, the consequences for the employer of making such accommodation and the consequences for the employee if such accommodation is not made.\footnote{Sara Charlesworth and Iain Campbell above n 46, 128.} Where an employee believes they have been unreasonably refused accommodation, they can make a complaint to the Victorian Equal Opportunity and Human Rights Commission\footnote{\textit{Equal Opportunity Act 1995 s104.}} but they don’t have to prove direct or indirect discrimination.\footnote{See Chapman, above n 52, 201.}
Significantly, this presents a shift away from the traditional role of anti-discrimination legislation in Australia which protects formal equality, towards the promotion of substantive equality. These provisions introduced a positive duty on employers to accommodate differences in the workplace. As Smith notes:

Rather than requiring all workers to be treated the same regardless of their circumstances, the duty requires employers to reasonably accommodate the specific needs of workers with family responsibilities in order to promote substantive equality ... The proposal acknowledges that equality will not be achieved by simply treating workers with family responsibilities as if they do not have family responsibilities.\(^{59}\)

Right to request legislation is often referred to as ‘soft’ regulation\(^{60}\); it aims to try and drive cultural change by providing structured guidance for employers about the right thing to do, or as one Victorian MP described it, ‘codified common sense’.\(^{61}\) In order for this kind of regulation to succeed in promoting substantive equality and challenge the culture of Australian workplaces, it will be necessary for employees to have a high degree of knowledge about their procedural rights, and for there to be enough support and materials for employers to follow a fair procedure in approaching their decision to accommodate worker’s responsibilities.

2. Equal Opportunity Act 2010

In August 2007, the Deputy Premier and the Attorney General of Victoria announced a review of the Equal Opportunity Act 1995 (Vic) to provide a broad policy framework for reform. An independent review was conducted by Julian Gardner, and the final report was handed down in June 2008. In the foreword to the report, Gardner states:

The review recommends that the Act take a more positive approach. The goal of progressively achieving substantive equality and the recognition of the link between discrimination and disadvantage should be included. This will help to create cultural change and provide a basis for the Commission’s work in education and research.\(^{62}\)

Following the report, in April 2010, the Victorian Government passed the new Equal Opportunity Act to come into effect in August 2011.\(^{63}\) The objectives of the Act are to encourage the identification and elimination of discrimination, sexual harassment and victimisation and their causes, and to promote and facilitate the progressive realisation of equality.\(^{64}\)

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59 B Smith, above n 3, 129.


62 Department of Justice (Vic), An Equality Act for Fairer Victoria, Melbourne, 2008 (“Gardner Report”) (emphasis added). Recommendation 7 of the report stated that the objectives of the Act should recognise the need to progressively achieve substantive equality, as far as is reasonably practicable.

63 Equal Opportunity Act 2010 (Vic).

64 Ibid, Section 3.
(a) Removing Technical Barriers to Equality

The Act removes some of the technical problems with discrimination and has amended the definitions of both direct and indirect discrimination. In his second reading speech, Rob Hulls, the then Attorney General, said that the bill clarifies the meaning of discrimination so that it is easier to understand for both duty-holders and complainants, and so that a complaint will no longer fail on unnecessary technicalities. 65

As discussed above, since the High Court’s decision in Purvis, one of the difficult problems for complainants to overcome with direct discrimination complaints is to correctly identify a ‘comparator’. The new definition in the Equal Opportunity Act 2010, removes the comparator requirement. The complainant is required to prove that they were treated less favourably because of an attribute. Removing this technical legal problem goes some way towards making it easier for complainants to succeed in their claims. However, as Allen notes, there is still a technical hurdle for complainants in that they still bear the onus of proof in establishing that the less favourable treatment was because of the attribute. 66

The definition of indirect discrimination has also been simplified and amended to overcome some of the barriers for complainants. The Equal Opportunity Act 2010 provides that indirect discrimination occurs if a person imposes a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with an attribute and the requirement or condition is not reasonable. 67 The definition removes the requirement that a complainant show that a substantially higher proportion of people without the attribute can comply with the requirement, condition or practice.

Significantly, the Act also changes the onus of proof in relation to demonstrating that the requirement of condition is reasonable to the person who imposed or proposes to impose it. 68 As discussed above, this is important as often this knowledge is solely within the knowledge of the employer.

Even acknowledging these important amendments, which do remove barriers for workers facing discrimination, anti-discrimination laws still lack the ability to promote substantive equality given their focus on remedying individual instances of discrimination and not challenging systemic discrimination and cultural change in workplaces. One of the trends in the UK to try and achieve the realisation of equality has been through more proactive regulatory mechanisms.

(b) Positive Duties on Employers

One of the most significant measures in the Equal Opportunity Act 2010 that promotes substantive equality is the introduction of positive duties on duty holders, to take reasonable

65 Hulls, Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 786.
67 See s9.
68 See s9(2).
and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.\textsuperscript{69} In his second reading speech then Attorney General Rob Hulls stated:

In practice, the duty will mean that organisations will need to think proactively about their compliance obligations, rather than wait for a complaint to trigger a response. In other words, prevention is better than cure and many organisations already recognise this as a matter of best practice. It may involve organisations identifying potential areas of non-compliance, developing a strategy for meeting and maintaining compliance, for example through training, or clear policies, and having a process for reviewing and improving compliance where appropriate.\textsuperscript{70}

Positive duties shift the burden from individual complainants to institutions. However, as Allen notes, the duty holder is not required to do anything specific to comply, and the enforcement structure is also weak.\textsuperscript{71} Individuals cannot bring a complaint against a duty holder for breach of the duty, and the only consequence may be the threat of an investigation or public inquiry by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).\textsuperscript{72} Section 139 of the \textit{Equal Opportunity Act 2010} outlines that after conducting an investigation may take any action it thinks fit including:

- facilitate compliance with the Act by providing educational materials and compliance advice
- accept a formal written undertaking to comply with the Act
- issue a compliance notice setting out the action required to remedy the breach.\textsuperscript{73}

A person may have the issuing of a compliance notice, and its terms, reviewed at the Victorian Civil and Administrative Tribunal (VCAT).\textsuperscript{74} The Commission may take action at VCAT to enforce a breach of an undertaking or compliance notice.\textsuperscript{75} VCAT may make an order requiring compliance with the undertaking or compliance notice.\textsuperscript{76} Breach of this order would constitute contempt of court.

Clearly, if the Commission regularly investigates breaches, and there are resources devoted to this end, there will be an incentive for employers and other duty holders to comply voluntarily and it may be effective means of bringing about substantive equality. In this way, there is an opportunity to promote proactive compliance from employers without relying on a complaint being lodged. The Commission has also undertaken to develop educational material to assist people and organisations comply with the new duty.\textsuperscript{77} The educational functions of the Commission will be vital if the positive duties are to have any impact on driving cultural change in the workplace.

\textsuperscript{69} See Part 3, s15.
\textsuperscript{70} Hulls, above n 65.
\textsuperscript{71} D Allen, above n 66, 323.
\textsuperscript{72} \textit{Equal Opportunity Act 2010} ss15(3), (4).
\textsuperscript{73} Ibid, ss143-147.
\textsuperscript{74} Ibid, s146 (2)(e).
\textsuperscript{75} Ibid s147(2)(a).
\textsuperscript{76} Ibid s147(2)(b).
\textsuperscript{77} Ibid s156.
B. The Fair Work Act 2009 (Cth)

As Smith notes, “whilst anti-discrimination provisions first appeared in federal labour laws over 20 years ago, their use and presence in the industrial law realm has been muted.”\(^\text{78}\) However, following the election of the Rudd Labor Government in 2007 and the introduction of the Fair Work Act 2009 (Cth)\(^\text{79}\) there have been two significant developments in the industrial relations arena; ‘general protections’ provisions and a federal ‘right to request’ regime. Given the reach of federal workplace laws, which now apply to all constitutional corporations, these are significant regulatory reforms in Australia’s equality legislation.

1. General Protections

Section 351 of the Fair Work Act, located in Pt 3-1 (General Protections) provides:

**351 Discrimination**

An employer must not take adverse action against a person who is an employee, or prospective employee of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The Fair Work Act differs from previous workplace relations legislation in that it provides a general cause of action for discrimination, rather than just a remedy for dismissal because of a range of attributes. There is now effectively a choice for employees about which jurisdiction they pursue a discrimination claim.

To make out a contravention, it is sufficient if the prohibited reason for the adverse action is just one of the reasons that motivated the action in question.\(^\text{80}\)

‘Adverse action’ is defined in s 342(1) of the Act and includes dismissal, injury in employment, alteration of a person’s position to their prejudice, or discrimination and includes threatening to take such action.\(^\text{81}\) The term ‘discrimination’ is not defined. Smith argues that this could be significant as these new rights are not automatically subject to the limitations of anti-discrimination jurisprudence and leaves open the opportunity for courts and parties to develop more contemporary principles.\(^\text{82}\) The objectives of the legislation do make it clear that the laws are intended to take into account Australia’s international labour obligations which may assist in the interpretation of s 351.\(^\text{83}\)

There is considerable debate about whether or not s 351 is limited only to direct discrimination.\(^\text{84}\) Interestingly, the Fair Work Ombudsman (FWO) (an statutory body created...
under the *Fair Work Act*, to ensure compliance with the laws and investigate potential breaches), has released a Discrimination Policy which expressly states that in the exercise of its regulatory and investigatory functions, the FWO will interpret s 351 of the Act as prohibiting both direct and indirect discrimination. The policy further states:

The FWO places particular emphasis on addressing indirect, systemic and more insidious forms of unlawful discrimination. ‘Systemic discrimination’ refers to ‘patterns or practices of discrimination that are the result of interrelated policies, practices and attitudes that are entrenched in organisations or in broader society. These patterns and practices create or perpetuate disadvantage for certain groups.

This is very clearly a move towards promoting substantive equality in Australian legislation. The policy outlined above is concerned with the outcomes of entrenched practices on certain groups, not merely whether or not they are receiving ‘equal treatment’. Natalie James, former Chief Counsel of the FWO asserts that “the *Fair Work Act* represents a significant milestone in anti-discrimination protection”.

Another significant development in anti-discrimination regulation that s 351 gives rise to is a reverse onus of proof. The *Fair Work Act* provides that the employer must prove, to the civil standard, that the reasons for the action did not include a discriminatory reason. So once a contravention is alleged, the reason is presumed and the employer must establish that the conduct was not carried out unlawfully. It is recognised that the employer is usually best placed to lead evidence about the reasons for the adverse action as this is something solely within the knowledge of the employer.

In the recent case of *Barclay v The Board of Bendigo Regional Institute of TAFE* the Federal Court of Australia confirmed that because of the reverse onus, an employer will normally need to call evidence from the decision maker to elicit what motivated them to act to an employee’s detriment. The evidence can then be tested against established facts and the credibility of the decision maker will be assessed by the court. The reverse onus removes one of the technical barriers that employees face in bringing discrimination claims under state and federal anti-discrimination statutes.

One of the significant advantages of having a general discrimination provision in federal workplace laws is the resources that are dedicated to the monitoring and enforcement of federal workplace laws. Natalie James, former Chief Counsel, outlines that the FWO has the capacity to regulate responsively, which is a significant development in discrimination regulation.

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88 *Fair Work Act* s361.
89 See *General Motors Holden Pty Ltd v Bowling* (1976-1977) 12 ALR 605.
91 N James, above n 87, 9.
caution to Enforceable Undertakings or ultimately litigation. There is also an opportunity for the FWO to incorporate discrimination investigations into audit programs and educational services.92

Section 351 is also a civil remedy provision, which means that persons who contravene s 351 and unlawfully discriminate face the prospect of financial penalties.93 An Inspector can apply to Court for orders in relation to a contravention or proposed contravention of s351, which means that it is not necessary for an individual complainant to pursue a claim.94

The inclusions of a general discrimination provision in federal workplace laws sends a strong message to employers that discrimination is a workplace issue for which they have some responsibility to try and prevent. It is now a "mainstream, enforceable employment right."95 This will inevitably produce a more proactive response from Employers in eliminating discrimination and promoting substantive equality in their workplaces.


The Fair Work Act also introduced a new right for employees to request ‘a change in working arrangements’ to assist them in caring responsibilities.96 The provision is limited to those employees who have at least 12 months’ service, are employed in a permanent role (or are long-term casual) and have pre-school age children, or children under 18 with a disability.97 This ‘right to request’ is contained within the National Employment Standards (NES) which are the minimum entitlements that apply to all national system employees.98 Both Modern Awards and enterprise agreements must be consistent with the NES.

Changes in working conditions are not defined, but examples are provided for in the Act and include changes in hours of work, changes in patterns of work and changes in location of work.99

Employers can only refuse an employee’s request to a change in working arrangements if they have reasonable business grounds.100 The response to the request must be in writing and provided within 21 days.101 If the employer refuses the request, the written response must include the reasons for the refusal.102 ‘Reasonable business grounds’ are also not defined in the Act. The Best Practice Guide on the Right to Request Flexible Working Arrangements, published by the FWO outlines that reasonable business grounds can include

the effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service the inability to organise work among existing staff; and, the

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92 Ibid.
93 Fair Work Act, ss351, 539.
94 Ibid, s539(2).
95 Smith, above n 78, 219.
96 Fair Work Act, s65.
97 Ibid, s65(2).
99 Ibid, s62.
100 Ibid, s65(5).
101 Ibid, s65(4).
102 Ibid, s65(6).
inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.\textsuperscript{103}

The Federal RTR model, like the Victorian model, clearly draws on the \textit{Family Provisions Test Case} decision. However, its scope is more restricted than both the Victorian model and the \textit{Test Case} decision. The restriction of the right to only permanent and long term casuals is problematic. Casual employees must have been engaged on a regular and systemic basis for at least 12 months and who have a reasonable expectation of continuing engagement with the employer on a regular and systemic basis.\textsuperscript{104} As Charlesworth and Campbell point out, “this requirement will exclude many of the working parents of pre-school age children who are most likely to make requests.”\textsuperscript{105}

Compared to the Victorian right to request model, the group of employees caught by the provisions is limited. There is no general right for carers and there is no right for employees with school age children to request flexibility.

One of the other limitations of the federal RTR scheme is that it does not provide an enforcement mechanism and no procedure to challenge the decision of the employer where requests are unreasonably refused. The Act specifically provides that no order can be made against an employer in relation to a contravention or alleged contravention of s 65(5) (the requirement to only refuse a request if there are reasonable business grounds).\textsuperscript{106} Employees can bring an action against their employer on procedural grounds, for example if they fail to state the reasons for the refusal, or put the response in writing.\textsuperscript{107} There is only provision for dispute resolution on whether there has been a reasonable refusal if the employer consents through the employment contract or other written agreement.\textsuperscript{108}

As noted by Charlesworth and Campbell, right to request regulation does differ from other employment regulation in that it provides an individual rather than a collective right.\textsuperscript{109} The right is activated via an individual employee request, and the flexibility is peculiar to that individual employee’s employment contract, it is not a collective condition contained in the enterprise agreement or award. This really is a move away from formal equality and a move towards substantive equality.

Right to request regulation focuses on outcomes for parents or carers at work. However, the lack of enforcement mechanism for employees or monitoring, it may be problematic given that notions of formal equality are so strongly entrenched in Australia; many employers may think that any change to work for some employees and not others is unreasonable (this was approach


\textsuperscript{104} \textit{Fair Work Act}, s13(2).

\textsuperscript{105} S Charlesworth and I Campbell, above n 47, 122.

\textsuperscript{106} \textit{Fair Work Act}, s44(2).

\textsuperscript{107} Ibid, s44(1).

\textsuperscript{108} Ibid, ss739(2), 740(2).

\textsuperscript{109} S Charlesworth and I Campbell, above n 47, 121.
taken by the Courts in Schou). This is why the role of the FWO in providing guidance to employers will be critical.

Clearly for many workers in Victoria, utilising the provisions in the *Equal Opportunity Act 1995* will be better option in pursuing flexibility at work. Section 66 of the *Fair Work Act* states that State or Territory laws can validly provide employee entitlements in relation to flexible working arrangements. So whilst Victorian workers will have a choice about how to best pursue flexible working arrangements, workers in other states in Australia have no other regulation to turn to.

**IV. ARE THE NEW REGULATORY RESPONSES EFFECTIVE AT PROMOTING SUBSTANTIVE EQUALITY?**

Both the positive duties in the *Equal Opportunity Act 2010*, the inclusion of a general discrimination provision in the *Fair Work Act* and the right to request models at both the state and federal level have moved Australia forward in promoting substantive equality. Just how effective those regulatory measures will be in promoting substantive equality can, in part, be assessed by looking to the effects of similar regulatory reform in the UK.

**A. UK Right to Request**

The ‘right to request’ and ‘duty to consider’, flexible working conditions were introduced in 2003 with the introduction of the *Employment Act 2002* (UK). It provided the right to employees who had 26 weeks service and have parental responsibility for children under the age of 6 (or 18 if the child has a disability) with a right to request a change in where and when they work, including hours of work.\(^{110}\) The request must be seriously considered. In April 2006, the coverage was extended to employees caring for a dependent adult.\(^{111}\) A second extension (introduced in April 2009) broadened coverage further to parents of children under the age of 16.\(^{112}\)

According to Harriet Harman, the then Minister for Women and Equality:

> Children don’t stop needing their parents’ time when they reach their sixth birthday. We have already built a strong foundation of support for families through the right for parents with children under six to request flexible work. But, as any parent knows, older children going through the teenage years need just as much support and guidance. Families are the framework of our lives and matter not just to individuals but to our communities, the economy, and society as a whole. Mothers often tear their hair out trying to balance earning a living with bringing up their children and need more flexibility at work. And fathers want to be able to play a bigger part in bringing up their children.

It is clear that the regulation is aimed at improving work-life balance for those workers who have family responsibilities.

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\(^{110}\) *Employment Act 2002* (UK) s80F(1)(a).

\(^{111}\) See the *Work and Families Act 2006* (UK).

\(^{112}\) See the *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009* (UK).
An employee is required to put the application in writing indicating the change request, when it is proposed the change should come into force and what they think the effect of the change will be for employer and how that might be dealt with. Once an application has been made, the employer must meet with the employee within 28 days to discuss the implications of the proposed changes, and then within 14 days notify the employee of their decision. If the employer is refusing the request, they are required to indicate the grounds for their decision. The grounds upon which a request can be refused are listed in the legislation and include costs, inability to re-organise work, or hire additional staff, it would have a detrimental impact on quality and/or performance and planned structural change.

In comparison to the UK regime, the federal right to request model is significantly weaker. The UK model applies to a larger group of workers as it includes parental responsibility for children up to the age of 16, it does not exclude casuals, and employees only need six months service as opposed to 12 months. The UK model also requires more of the employer once the request is made. The employer has a duty to meet with the employee and discuss their application for flexible work before deciding on whether or not the request should be accepted or refused. There is no such requirement in Australia. There are also clear grounds outlined in the legislation about what are acceptable grounds for refusing a request. In the federal RTR model, there are no specified ‘reasonable business grounds’ and this has been left to guidelines published by the FWO.

On the other hand, the Victorian model measures up well against the UK model. It has coverage for the widest range of employees, as it includes both parents and carers, and contains a lengthy list of considerations for the employer including the consequences of refusing the both parties. How effective are these new measures – will it overcome some of the problems of narrow judicial interpretation and focus on formal equality.

Like the federal model in Australia, the UK right to request regime does not have a substantive right of appeal or review. The rights of appeal are limited to procedural matters, rather than to an examination of whether the employer has unreasonably refused the request. If an employee believes that the request has not been taken seriously they can refer a claim to an employment tribunal and the tribunal must verify that the correct process was followed, the request was taken seriously and the denial falls within one of the permitted grounds. Even though both regimes only have a procedural appeal, Charlesworth and Campbell argue that the UK model in contrast with the Federal RTR model for is stark in terms of review:

The explicit rejection … of any ‘third party involvement’ where disputes arise about the implementation of this standard suggests that in practice, and employer would not have to demonstrate that they have either considered the request, seriously or otherwise, or advanced business reasons for the refusal of a request within the required time period.

113 Employment Act 2002 (UK), s80F(2).
114 Ibid, s80G.
115 S Charlesworth and I Campbell, above n 47, 127.
116 Ibid.
There is no process under the Federal model in Australia to challenge whether or not the employer took the request seriously. As long as the employer’s response is in writing, and there are reasons provided, there is no further avenue available to an employee.

Under the Victorian model, there is an enforcement mechanism, but there is only a right to lodge a complaint, after an employer refuses to accommodate the employee’s family responsibilities. This is one of the main draw-backs of a RTR model that is part of an anti-discrimination framework and “limits the practical effect of such regulation” as claimants might be forced to look for alternative employment, whilst the aim of the regulation is to provide for flexibilities around worker’s current employment. Enforcement in this instance is dependent upon a claim by an individual employee and claims in the anti-discrimination jurisdiction can be lengthy and complex.

Notwithstanding some of the limitations of the UK model, the legislation has been hailed a success and has made a significant contribution to the increased availability of flexibility for employees in the UK. Evidence suggests that notwithstanding the ‘soft’ nature of the regulation, the vast majority of requests are either fully or partly accepted by the employer following dialogue with the employee.

Around six million employees currently have the legislative right to request flexible working, but many more than that, over 14 million employees, including part time workers, actually work flexibly. Many employees report that “whilst the law remains an important ‘back stop’ for informing employer and employees of their rights and responsibilities, their preferred approach is more informal.” There is however, insufficient data to evaluate whether the ‘right to request’ legislation has achieved improved work-life balance and substantive equality for employees. Challenging cultural norms through this kind of regulation has been more difficult with men, as they are more likely to have their requests for flexibility refused. Flexibility also continues to be difficult in more senior levels of organisations.

The introduction of the UK right to request was also accompanied by a significant public education campaign, trade union input and consultation and financial incentives for businesses to develop flexible work policies and practices. Yet despite this, a substantial minority still continue to be unaware of the ‘right to request’ statute. This is a challenge for the Federal and Victorian models.

\[117\] Ibid.
\[120\] Hegewisch, above n 118, 45.
\[121\] Ibid, 48.
\[122\] Department of Trade and Industry, above n 19, 254.
\[123\] Ibid.
\[124\] S Charlesworth and I Campbell, above n 47, 133.
\[125\] A Hegewisch, above n 118, 46.
B. Positive Duties to Realise Equality in the UK

Unlike Australian jurisdictions, in the UK there have been positive duties imposed on public authorities to implement equality. As the Gardner review noted in Victoria, giving individuals the right to pursue legal redress for acts of discrimination is an important part of anti-discrimination and equality regulation, but on its own, it cannot adequately deal with issues of systemic discrimination and often results in formal equality. The UK has for many years had positive equality duties requiring public authorities to have proportionate regard to enumerated equality objectives, addressing inequality associated with race, then disability and finally gender.

In 2009, the UK introduced the Equality Act 2010 (UK) which has two main purposes, namely, "to harmonise discrimination law, and to strengthen the law to support progress on equality." The Act is consistent with the trend of equality regulation, away from an individual rights based model, towards positive obligations to address and prevent inequality.

Section 143(1) of the Act imposes a duty on public authorities to, in the exercise of its functions, have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

There are then a number of other provisions which outline what authorities need to have regard to when advancing equality of opportunity and fostering good relations, including specific steps to those ends. Some of those specific steps include meeting the needs of persons who share a relevant protected characteristic and encouraging them to participate in public life of other activity, tackling prejudice and promote understanding. This duty goes beyond what already existed in the various equality statutes and makes the duty more substantive.

The case law in response to these duties has also been extremely positive and courts have taken a very expansive role in overseeing the equality duties. Decisions in this area have emphasised the need for the equality duties to be considered in advance of decision making and that failing to follow the correct procedure is of very great substantial and not merely technical

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127 Race Relations Act 1976 (UK) s71; Disability Discrimination Act 2005 ss49A and Sex Discrimination Act 1975 s76A.
128 Equality Act 2010 (UK) ("Equality Act 2010")
130 Equality Act 2010 ss143 (1)(a), (b) and (c).
131 Ibid, s143(3).
132 Ibid, ss143(3) and (4).
importance. In the case of R (on the application of Kaur and Shah) v Ealing LBC Lord Justice Moses outlined the importance of the process:

Records contribute to transparency. They serve to demonstrate that a genuine assessment has been carried out at a formative stage. They further tend to have the beneficial effect of disciplining the policy maker to undertake the conscientious assessment of the future impact of his proposed policy, which Section 71 requires. But a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes. The impact assessment must be undertaken as a matter of substance and with rigor.

The case law in the UK is obviously being interpreted broadly in accordance with the objects of the legislation. It is worth questioning whether if positive duties became more common in equality legislation in Australia, whether we would see Courts taking a more beneficial approach to statutory interpretation.

Importantly, there is also a new duty in Clause 1 of the Act, which states:

When making decisions of a strategic nature about how to exercise its functions to have due regard to the desirability of exercising them in a way that is designed to reduce the inequality of outcome which result from socio-economic disadvantage.

As Monaghan notes, “this provision is welcome especially in an Equality Bill, recognising as it does the close link between poverty and discrimination. The link between discrimination and disadvantage was discussed in the Gardner Report and it was recommended that the Act recognise the link between discrimination and disadvantage. The Gardner Report noted a 2007 report from VicHealth which stated that “discrimination affecting one generation can also compromise the social and economic prospects of future generations, contributing to intergenerational cycles of poverty and disadvantage”.

Clearly positive obligations on authorities to consider socio-economic inequalities are a positive regulatory step towards achieving substantive equality and it is currently lacking in Australia. Notwithstanding how encouraging the inclusion of this new duty is, it is important to note that it is more limited than the other positive duties in the Equality Act 2010. There is no indication of the content of the duty or the steps which authorities should take in order to comply with it. As Monaghan notes, even though the new duty is justiciable, the obligations may prove too easy to meet.

Obviously, the biggest limitation of the positive duties in the new Equality Act 2010 is that they only apply to public authorities, and not the private sector. There are no positive obligations on

133 Elias and R v (on the application of G) v Secretary of State for Justice [2005] EWHC 1435 (Admin).
135 Ibid per LJ Moses, [25].
136 Equality Act 2010 s1(1).
137 Monaghan, above n 129, 531.
138 Gardner Report, above n 62, 1.42.
139 Ibid.
140 Monaghan, above n 129, 531.
employers in the private sector. A report from the House of Commons Select Committee on Work and Pensions noted the Government’s stated intention not to extend the duty on the public sector to the private sector, but recommended that the Government keep that policy under review, as a duty on the private sector should be maintained as an option if a voluntary standard proves ineffective. In this sense, the positive duty contained in the Equal Opportunity Act 2010 is unique. In Victoria the duty applies to all employers, but individuals are not permitted to make a complaint. Only the VEOHRC can investigate or hold a public inquiry.

The language of the UK statute is also far less prescriptive that the Victorian duty and the UK duty duty on public authorities to ‘have regard to’ has been described as ‘disturbingly vague’. It has been left to the Courts to determine what proper process should be followed by the public authority. Yet, in Victoria it is still unknown what employer’s will have to demonstrate in order to show they have complied with the duty to take reasonable and proportionate measures to eliminate discrimination.

V. CONCLUSION

After 30 years of anti-discrimination legislation based upon the principles of international human rights law, substantive equality for families in the workplace is far from reality. Not only is Australia not meeting its international obligations in creating equality of opportunity between men and women with family responsibilities, but we are well behind our OECD counterparts in relation to the number of mums and single parents who participate in the workforce.

Clearly, the current regulatory system does not go far enough to transform our workplace culture. The notion of formal equality is so firmly entrenched in our legal system, that a more proactive regulatory approach is needed.

It is indeed positive that new regulation on equality has appeared in the industrial relations sphere; given the reach of the new Fair Work Act these provisions have the ability to provide greater flexibility for workers with family responsibilities and provide greater protection from discrimination at work. Yet, the right to request provisions in the National Employment Standards are extremely limited compared to the regulation in both Victoria and the UK. The UK experience demonstrates that right to request legislation can begin to shift attitudes in the workplace about equality and the acceptability of flexible work, but progress is slow.

Given the lack of enforcement and monitoring of the right to request provisions in the National Employment Standards, it will be difficult to measure what impact these ‘soft’ regulatory provisions are having– anecdotal evidence will be important. Similarly, case law has been slow


143 It is important to note here some commentators argue that ‘right to request’ flexible working conditions is not an answer to achieving substantive equality and that it has only really emerged as a result of poor social policy. Women have had to work part time as a solution to work and family pressures where there is practically no state provision of child care, and child care fees are particularly high. See S Himmelweilt, above n 119, 251-254.
to come through on the right to request model in Victoria, but given its broad application and enforcement provisions, it is clearly the stronger model. Clearly the relative success of the UK model has involved the strict process that Employers must follow after receiving a request, including sitting down and meeting with the employee about their request, and the resources devoted to education and monitoring. For either the Victorian or Federal model to have any change of challenging the dominant workplace culture, significant resources will be required in this regard. Financial incentives for businesses to develop flexible work policies have also been successful in the UK and should be adopted here.

Positive Duties in relation to promoting substantive equality is an innovative and important regulatory response and again has had some relative success in the UK. Positive duties in relation to eliminating discrimination and promoting equality are not unique to the UK; there are legislated positive duties in like jurisdictions such as South Africa,\textsuperscript{144} Canada,\textsuperscript{145} Northern Ireland,\textsuperscript{146} and the United States.\textsuperscript{147} And the positive duties in the \textit{Equal Opportunity Act 2010} are, I submit, considerably stronger than the UK duties; the duties are framed in a positive way, are more proscriptive, apply to the private as well as the public sphere and VEOHRC can monitor and enforce them.

Together, right to request regulation, a general discrimination provision in federal workplace laws and the positive duties in the \textit{Equal Opportunity Act 2010} do move Australia closer towards realising our international obligations in promoting substantive equality, but there is still a long way to go. In particular, it will be very instructive to monitor how effective the new positive duties on employers in Victoria will be in achieving substantive equality and whether or not the Federal Government and other States and Territories take a similar proactive approach. There certainly is great potential.

\textsuperscript{144} Employment Equity Act 1998 (Sth Af), s5; Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (Sth Af).

\textsuperscript{145} Employment Equity Act 1995 (Can).

\textsuperscript{146} Northern Ireland Act 1998 (UK) s75 and Schedule 9 (relating to public authorities), Fair Employment and Treatment (NI) Order 1998 (FETO; previously the Fair Employment Act 1976).

\textsuperscript{147} Executive Order 11246 of Sept. 24, 1965 – Equal employment opportunity (US).
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