Not The Baby And The Bathwater: Regulatory Reform For Equality Laws To Address Work-Family Conflict

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Abstract

The issue of work-family balance is clearly on the corporate agenda, with a plethora of corporate initiatives being promoted as family-friendly across Australia. But what regulatory mechanisms — public or private — are in place to prompt, facilitate and universalise such corporate initiatives to integrate more fully those employees who undertake both paid work and unpaid, domestic caring responsibilities? And, just as importantly, what accountability mechanisms are available to ensure that such initiatives achieve this goal, and is more than simply a public relations exercise?

Given the gender dimension of work-family conflict, our federal sex equality laws — the *Sex Discrimination Act* 1984 (Cth) and the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) — have proven to be of some use in prompting greater family-friendliness in Australian workplaces. However, the regulatory tools offered by these laws are not up to the task. In this article, I draw on new regulatory scholarship to explain the weaknesses of our current equality laws, and then to propose a new regulatory model that holds promise for better prompting, facilitating and rendering accountable corporate initiatives to establish sustainable, family-friendly work environments.

1. Introduction

Why, after more than 20 years of sex discrimination and affirmative action legislation, do we still have such high rates of gendered segregation both within organisations and across industries? Why do we continue to have a gender gap in work remuneration? Why are so few men taking on more active family roles now that most women are sharing the household breadwinning?

Part of the answer lies in gender norms — cultural rules about what women and men should do in respect of paid work and unpaid family care work. These norms are embedded in workplace practices and cultures. Despite the substantial increases in women's workforce participation, the 'ideal worker' norm — long hours, availability for overtime and work travel, unbroken tenure — continues to

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reflect a traditional male role of breadwinner, unencumbered by the often unpredictable and time consuming demands of family caring responsibilities. In this way much work-family conflict reflects gender discrimination in the workplace — the constitution and re-constitution of an ideal (and to some extent outdated) worker.[1] Many men do not (or do not wish to) fit this traditional role, and most women, who are participating in increasing numbers in the paid workforce, do not fit this role as they continue to undertake the bulk of household labour. The conflict arises out of practices and cultures reflecting and reinforcing assumptions about traditional gender roles and competencies, the prioritisation of paid work over unpaid caring labour, and work and family occupying separate spheres.

Workplace management scholars, among others, are revealing that these assumptions, and the practices and cultures they support, are not good for society or for business.[2] They limit the participation and development of workers who undertake both paid work and unpaid caring labour, restrict men's participation in caring activities, and, just as importantly, undermine workplace productivity.[3] For these reasons, work-family conflict, like the miners' canary, reveals workplace practices that are not only inequitable but also ineffective. Such practices often 'are so embedded and routine that no one thinks to question them — they are just the way things get done.'[4]

To address work-family conflict, and the gender inequity it reflects, many organisations have introduced so-called 'family-friendly' initiatives for their employees.[5] These include the provision of parental and other family leave, the option of working part-time or job-sharing, support for or access to dependant care services, and flexible work hours and locations. Such initiatives demonstrate that work-family conflict is no longer seen as purely a private or individual concern, but a crucial issue for organisations seeking to compete for employees and customers in global markets.

While such family-friendly employer initiatives are welcome, they have prompted a number of criticisms and concerns.[6] Access to such benefits is patchy, their quality or effect may be unclear, and many benefits labelled as 'family-friendly' are emerging against the backdrop of a decline in the more fundamental of family-friendly work conditions: a liveable wage, reasonable hours, employment security and a voice for workers.[7] Others have argued that introducing family-friendly 'benefits' will not achieve real change and instead 'companies *must* include — explicitly, imaginatively, and effectively — the

1 Examples of the extensive scholarship on how work-family conflict reflects an unencumbered ideal worker include: Rhona Rapoport, Bailyn Lotte, Joyce K Fletcher & Bettye H Pruitt, *Beyond Work: Family Balance, Advancing Gender Equity and Workplace Performance* (2002); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

2 See, for example Rapoport et al, above n1.

3 Ibid.

4 Ibid.

5 See Part 2B 'Corporate Responses to Work-Family Conflict', below.

6 See Part 2B 'Corporate Responses to Work-Family Conflict', below.

private needs of employees when reengineering their work'[8] if they are to gain benefits in both equity and efficiency.

A growing body of regulatory scholarship offers hope for those advocating better workplace practices in order to change the ideal worker norm. This scholarship reflects at least two developments. The first is a growth in the number and variety of regulatory tools and models employed by the state and supra-national bodies in the pursuit of publicly articulated goals, such as occupational health and safety, environmental management, competition and consumer protection.[9] The second is one of perspective — increasingly, legal scholars are looking beyond formal legal rules and enforcement mechanisms and adopting interdisciplinary approaches in order better to describe and analyse the regulation of public problems and advocate more effective regulatory solutions.[10] A regulatory approach arguably provides a more powerful and sophisticated lens for identifying how formal law and workplace norms do (or could) interact.

Around the world law is being used to provide worker rights designed to challenge the ideal worker norm, and facilitate the integration of workers who have family responsibilities.[11] These include rights to parental and other family leave, part-time work, and reasonable weekly hours. Australia's industrial laws have played a significant role in securing family-friendly work conditions, especially through the award test case mechanism in the Australian Industrial Relations Commission (AIRC).

However, with the 'Work Choices' legislation's transformation of the Australian industrial relations landscape,[12] we have seen the Federal Government

7 As Strachan and Burgess point out, a broad categorisation of family-friendly arrangements would include 'income security' and 'employment security', because employment that provides insufficient income to support a family will 'put pressure on family living standards and family structures' and 'insecure employment reduces the opportunity for planning and financial commitment, and may often be associated with benefit exclusion': Glenda Strachan & John Burgess, 'The "Family Friendly" Workplace: Origins, Meaning and Application at Australian Workplaces' (1998) 19 *Int J Manpower* 250 at 251.

8 Lotte Bailyn, *Breaking the Mold: Women, Men, and Time in the New Corporate World* (1993) at xii. See also Rapoport et al, above n1.

9 For example, Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) at ch 1.

10 See, for example Ayres & Braithwaite, above n9; Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (1993); Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Colum L Rev* 458; Michael C Dorf & Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Colum L Rev* 267; Hugh Collins, Paul Davies & Roger Rideout (eds), *Legal Regulation of the Employment Relation* (2000); Chris Arup, 'Labour law as Regulation: Promise and Pitfalls' (2001) 14 *AJLL* 229; Parker, *Open Corporation,* above n9; John Braithwaite, Nicola Lacey, Christine Parker & Colin Scott (eds), *Regulating Law* (2004); Susan Sturm 'The Architecture of Inclusion: Advancing Workplace Equity in Higher Education' (2006) 29 *Harvard Journal of Law and Gender* 247.

11 See Part 2C 'Legal Interventions', below.

12 The *Workplace Relations (Work Choices) Act* 2005 (Cth) amended the *Workplace Relations Act* 1996 (Cth) (WRA). These amendments, which came into effect in March 2006, constitute a very substantial overhaul of Australian industrial relations.

turn away from regulations developed reflexively through the AIRC.[13] Five entitlements have been legislated for directly,[14] representing a significant break from the past. In respect of most entitlements, including family-friendly ones, the government has chosen instead to rely upon market and social forces to deliver outcomes within a prescriptive but decentralised regulatory framework, and with a limited safety net.[15] With these changes, those advocating for better worker conditions might need to look beyond traditional labour laws for additional ways in which the law could be used to foster and support the development of workplace practices.

One regulatory approach that holds out some promise — in terms of effectiveness and possible appeal to this government — is a responsive and 'soft touch' approach that prompts, fosters and renders accountable the self-regulatory initiatives of corporations. In respect of work-family conflict or family-responsibilities discrimination, the regulatory goal could be framed as fostering and harnessing corporate resources to develop workplace practices that better support worker-carers.[16]

Corporations are increasingly 'self-regulating' with respect to both legal and social obligations. These relate to the health and safety of workers, environmental management and protection, the provision of terms and conditions that meet labour standards, equality and diversity, and even human rights.[17] In response to these obligations, corporations have established formal policies and compliance programs,[18] such as occupational health and safety plans and codes of conduct.[19] Many family-friendly initiatives reflect this corporate responsiveness to social, economic and legal norms. Such initiatives have the potential to disrupt the assumption that work and family constitute separate spheres and should be occupied by different genders.

To acknowledge the need for corporate self-management is not to argue for market or voluntary regulation over government regulation. In this article I draw upon regulatory scholarship that rejects the dichotomisation of regulation and deregulation and instead adopts a pragmatic view of: the power that corporations wield, the need for corporations to internalise public policy goals and the limitations of traditional command and control regulation to achieve this

13 For an excellent regulatory analysis of the Work Choices changes see Sean Cooney, John Howe & Jill Murray, 'Time and Money under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29 *UNSWLJ* 215.

14 The Australian Fair Pay and Conditions Standard provides minimum legislative work conditions in respect of pay, hours, annual leave, parental leave and personal or carer's leave.

15 Cooney et al, above n13.

16 I thank K Lee Adams for promoting the useful term, 'worker-carer'. See K Lee Adams, 'Indirect Discrimination and the Worker-Carer: It's Just Not Working' in Jill Murray (ed), *Work, Family and the Law* (2005) at 18–44.

17 See for example, David Kinley & Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (forthcoming 2006).

18 Parker, *Open Corporation*, above n9.

19 Jill Murray, *Corporate Social Responsibility: An Overview of Principles and Practices: Working Paper No. 34* (2004) at 5.

internalisation and, consequentially, change behaviour.[20] Regulatory scholars have examined state regulation that, in effect, 'meta-regulates' corporations as self-regulatory actors — acknowledging, encouraging or even requiring the development of internal compliance systems to achieve public policy goals. In this picture the state might set the general goals and play some role in facilitating and enforcing their achievement, but would also promote and rely upon the regulated actors to self-identify problems and develop solutions in conjunction with stakeholders.

As I explore in this paper, the Australian federal gender equality laws — the *Sex Discrimination Act* 1984 (Cth)[21] (hereafter *SDA*) and the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth)[22] (hereafter *EOWW Act*) — have played some part in prompting corporations to 'self regulate' for equality and family-friendliness. Companies with recognised best-practice equal employment opportunity (EEO) policies report that development of those provisions was, at least in part, prompted by such legal obligations.[23] Further, studies show that it is not unusual for organisations to respond to complaints under anti-discrimination laws with agreements to develop better internal policies.[24]

Nonetheless, the regulatory models embodied in Australia's current equality laws have significant limitations. The *SDA* prohibits discrimination and provides victims with a corresponding right to seek compensation for breach. Such rights have been used to challenge biased or family un-friendly work practices, such as requirements to work full-time or inflexible hours, and without carers, or parental leave.[25] In administering the *SDA*, the Human Rights and Equal Opportunity Commission (HREOC) has used the 'soft' tools of education and persuasion to engage public attention and prompt corporate responsiveness by highlighting and transforming both the moral and the business case for equality. In turn, the statement of public policy encapsulated in the prohibition on discrimination, the

20 See Part 3 'Regulatory Scholarship', below.

21 This is supplemented by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) which establishes the Human Rights and Equal Opportunity Commission (HREOC) as the statutory agency responsible for administering federal anti-discrimination legislation, and the processes for resolving claims made under the four federal substantive anti-discrimination Acts.

22 Previously called the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986, the Act is outlined in Part 4 'Current Equality Regulation', below.

23 Sara Charlesworth, Philippa Hall & Belinda Probert, *Drivers and Contexts of Equal Employment Opportunity and Diversity Action in Australian Organisations* (2005) <http://search.informit.com.au.ezproxy.library.usyd.edu.au/documentSummary;dn=974546755684015;res=E-LIBRARY> (23 June 2006) at 19.

24 Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *ADRJ* 280.

25 For a summary and analysis of these cases see Belinda Smith & Joellen Riley, 'Family-friendly Work Practices and the Law' (2004) 26 *Syd LR* 395; Adams, above n16. Similarly, in the United States, anti-discrimination laws have been used to challenge family responsibilities discrimination: Williams, *Unbending Gender* above n1; Joan Williams & Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job' (2003) 26 *Harv Women's LJ* 77. For analysis of UK law see Joanne Conaghan, 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on *London Underground Ltd v Edwards*' in Collins et al, above n10 at 161.

success and publicity of a limited number of claims and HREOC's education and outreach services have arguably achieved *some* normative change concerning the need for gender equality and, specifically, the need for family-friendly workplace practices.

However, the effect of the *SDA*'s prohibition on discrimination on gender norms is significantly limited by the prohibition's proscriptive and general nature, the individual and civil nature of enforcement, the narrow range of sanctions and the limited role the State has played in building incentives and enhancing employers' capacity to address inequality.[26] There is little in the existing models of regulation to ensure that equality even makes it onto the corporate agenda, that responses are genuine and effective, that information about corporate initiatives is developed and shared to create norms of better practice, or that such information can be used to create pressure on laggards and encourage leaders.

Similarly, while the *EOWW Act*, the 'affirmative action' Act, may have played some role in getting gender inequality onto corporate agendas and prompting organisational responses, its regulatory model is deficient in ensuring that such responses are widespread, genuine, integrated with other business objectives, and sustainable. The regulatory agency has very little power to enter into regulatory conversations with corporations about their equality efforts, and there are no reporting requirements of disclosure sufficient for the agency, employees or other interested parties to identify leaders, laggards or even a benchmark for equality practices.

The new regulatory scholarship suggests these models could be developed into much more potent forces for change. Accepting that socially-responsible action by corporations — in respect of their employees, customers and other stakeholders — depends upon corporate self-management, in this article I explore how our current equality laws could be developed so as to promote genuine and effective family-friendliness or worker-carer integration. My proposal covers changes to both substantive rules and agency roles that could be combined to create greater incentives and opportunities for regulated actors and stakeholders to give content to the general rules of non-discrimination and equality. Central to these proposals is an expanded regulatory role for HREOC that better enables it to promote organisational commitment to equality and worker-carer integration, to foster the innovative development and diffusion of the skills and knowledge needed for self-regulation, and to institutionalise self-regulation through meta-evaluation and triple-loop learning.

I undertake this analysis of current and proposed equality laws in five parts. In the next part I explore how work-family conflict can be understood using equality analysis, the nature and scope of corporate responses to equality and work-family conflict and the way in which law is being used in other jurisdictions to address this problem. In Part 3 I outline key ideas from recent 'pragmatic' regulatory scholarship, drawing particularly on the work of John Braithwaite, Christine Parker and 'new governance' scholars in the United States. These ideas provide a

26 See Part 4B 'Analysis of Current Equality Laws', below.

framework for my analysis in Part 4 of the way our current equality laws regulate workplace gender equality and for outlining, in Part 5, a reform proposal for more effective equality laws. In the final part I note some limitations and future research directions presented by this proposal.

2. *Work-Family Conflict, Corporate Responses, and Law*

A. Work-Family Conflict and Gender Equality

The 'new economy' has been characterised as 'a breakdown in the psychological contract'[27] and a rise in contingent work.[28] One aspect of this new economy is the increase in women's workforce participation. This trend in women's participation — common to OECD countries — shows an increase from 29 per cent in 1954, to 47 per cent in 1980, 57 per cent in 1990 and 55.9 per cent in 2003.[29] Significantly, there has been an increase in the workforce participation of mothers of dependent children.[30] While women, and particularly mothers, have significantly increased their workforce participation, men's rate of participation has declined only slightly to 71.6 per cent in 2003, and the decline has been most noticeable in the early retirement age group.[31] This means that an increasing proportion of all Australians are participating in paid work, including those with young children.

Under the traditional gendered division of labour, women were responsible for the unpaid domestic and caring work of reproducing citizens and caring for other dependants. Despite women's entry into the workforce, while some of the work has been outsourced, most of it continues to be done in the home by women.[32]

Work-family conflict is often a conflict of time, or rather, time norms. Domestic and caring work takes time; often a lot of time, often with unpredictable demands. Paid employment also takes time. But, as importantly, time has become a primary means of valuing workers — the ideal worker is one who is able to work long hours, uninterrupted by external demands, short leaves or career breaks.[33] This is no longer the dominant form of worker, but there is evidence that it is still

27 Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (2004) at 3.

28 Rosemary Owens, 'Decent Work for the Contingent Workforce in the New Economy' (2002) 15 *AJLL* 209; Ian Watson, John Buchanan, Iain Campbell & Chris Briggs, *Fragmented Futures: New Challenges in Working Life* (2003).

29 Watson et al, above n28 at 136; Australian Bureau of Statistics, 'Labour Force Participation in Australia', *Australian Labour Market Statistics,* Cat no 6105.0 (2006) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/featurearticlesbyTopic/30CB19068CCDE510CA256F81007761A9?OpenDocument> (23 June 2006).

30 Watson et al, above n28 at 136-138.

31 Watson et al, above n28 at 136; Australian Bureau of Statistics, 'Labour Force Participation in Australia', above n29.

32 Michael Bittman & Jocelyn Pixley, *The Double Life of the Family* (1997) at 101–102; Sex Discrimination Unit HREOC, *Striking the Balance: Women, Men, Work and Family: Discussion Paper 2005* (2005) at 26 citing Australian Bureau of Statistics 'How Australians Use Their Time' (1997) Cat No 4153.0 at 33 on how women spend 5 hours per day in unpaid work, whereas men spend 2.73.

the ideal in that the 'good jobs' — those with high pay, high security, good benefits and career potential — go to those who can work full time, long term, as and where the firm requires.[34] Those with other commitments can participate in paid work, and there are certainly jobs available for them. In fact, Australia has a very high proportion of workers engaged in part-time employment, and this is the predominant form of employment for women with children.[35] But these jobs are often precarious or contingent — casual (so, low security and benefits), low pay and with little or no career structure.[36] Accordingly, while there is a range of working time options, the rewards of alternative options reflect the norm of an unencumbered worker.

In summary, those who traditionally did home work are now also doing paid work, resulting in work-family conflict or collision.[37] Efforts to combine work and care responsibilities often lead to:

- stress[38] and reduced personal time for worker-carers,
- spillover from work to home and home to work,[39]
- long working hours as worker-carers perform the double load,
- possibly reduced quality of care,
- possibly reduced rates of reproduction, commonly referred to as 'fertility',[40] and
- coping strategies by carers, such as taking part-time and casual work, or working below qualifications and skills, that have long-term economic and social implications for both the carers and their dependents because of the precarious conditions of such work.

While women are no longer restricted to the private sphere, there is still a pervasive norm that this sphere is their responsibility. Thus, work and family debates are often focused on the need to reduce the conflict between the demands of work and family care *for women* and accommodating *women* so that they are better able to combine these dual responsibilities. Policy and workplace initiatives are also often framed as facilitating *women's* choice. But, when debates are framed in this way, women's disproportionate responsibility for domestic work goes unquestioned.

33 For a more detailed analysis of the way in which time norms structure the 'ideal' worker, see Belinda Smith, 'Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change' (2002) 11 *Colum J Gender & L* 271 at Part II.

34 Williams, *Unbending Gender*, above n1.

35 Watson et al, above n28 at 144.

36 Owens, 'Decent Work' above n28; Helen Glezer & Ilene Wolcott, 'Conflicting Commitments: Working Mothers and Fathers in Australia', in Linda L Haas, Philip Hwang & Graeme Russell (eds), *Organisational Change and Gender Equity: International Perspectives on Fathers and Mothers at the Workplace* (2000) at 44.

37 Barbara Pocock, *The Work/Life Collision: What Work is Doing to Australians and What to Do About It* (2003); Barry J Fallon, 'The Balance Between Home Work and Paid Responsibilities: Personal Problem or Corporate Concern?' (1997) 32 *Australian Psychology* 1.

38 Fallon, above n37.

39 Pocock, *Work/Life Collision*, above n37; Daniel Petre, *Father Time: Making Time for your Children* (1998).

40 Watson et al, above n28 at 146.

Women are able to 'choose' how to combine home and paid work, but have little real option to not do the domestic work. Fudge argues: 'The problem is that so long as men can choose not to do domestic labour, women will have no choice but to do it.'[41]

Work-family debates are often framed as being about women's choices. In this story, women can, for instance, 'choose' to comply with the long-hours norm, by either outsourcing their domestic and caring responsibilities, or by not having children. Alternatively, they can 'choose' to remain in their traditional role of stay-at-home carer and housewife, underutilising their qualifications and facing economic and social risks. Or, they can 'choose' to do what most women do in Australia — undertake the bulk of domestic and caring work and accept the jobs that conflict least with these responsibilities.[42] As discussed, such jobs are characteristically contingent — part time, casual, low skilled and low paid.[43] The nature of this employment leaves worker-carers in need of support by a partner or the state, neither of which can be guaranteed or guaranteed to keep them out of poverty. This is a picture of women being 'free' to choose from very limited options.

Men do not often figure in the debates about work and family because men are even more constrained, although not necessarily more disadvantaged. Men have fewer choices or, rather, are not expected or even permitted to choose how to combine care-giving roles with paid work. Just as the cultural construction of women as care-giver has prevailed, the breadwinning role still dominates notions of masculinity.[44] While surveyed men increasingly express preferences for greater involvement with their children and shorter work hours,[45] those men who do choose this often face the same limited options available to women, and even some degree of punishment or disapproval for breaching the masculine norm.

On average, men's hours of work have increased. While some men now work part-time, these are often those who are in full-time study, early retirement or underemployed.[46] Importantly, Australia is an OECD outlier in the proportion of men who are working very long hours.[47] These long hours have significant implications for health and for male involvement in children's lives as well as impacting on working time norms, dragging up expectations of all work hours

41 Judy Fudge, 'A New Gender Contract? Work/Life Balance and Working-Time Flexibility' in Joanne Conaghan & Kerry Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (2005) at 261–287.

42 Studies show that women are much more likely than men to adapt their workforce participation around their caring responsibilities, while for men 'caring responsibilities do not intrude on their patterns of participation like they do for women': Watson et al, above n28 at 142–43; Glezer & Wolcott, 'Conflicting Commitments' above n36 at 45–47.

43 Watson et al, above n28 at 142–43.

44 Petre, above n39.

45 James T Bond, Ellen Galinsky & Jennifer Swanberg, *The 1997 National Study of the Changing Workforce* (1997) at 74.

46 Watson et al, above n28.

47 Over 20 per cent of employed men in Australia and the US work more than fifty hours per week: Jerry A Jacobs & Kathleen Gerson, 'Who Are the Overworked Americans?' (1998) 56 *Rev Soc Econ* 442, 449.

beyond what is compatible with non-work commitments. The norm of long hours is biased against those who undertake domestic and caring labour. As a society we need to question whether discouraging such reproductive labour is desirable or sustainable, and it certainly warrants attention while we maintain a restrictive immigration policy and lament decreasing fertility rates. Nancy Folbre notes the unsustainability of a system that does not acknowledge and share the costs of care — for Folbre, allowing corporations to externalise the costs of reproduction is akin to allowing them to exploit 'a natural resource without replenishing it.'[48]

The problem of work-family conflict reflects the limits of formal equality and the struggle for substantive equality. After centuries of exclusion — by law and ideology — women have now been permitted and even encouraged to enter the work force, but workplaces have retained as the ideal worker model the traditionally unencumbered male worker.[49] Williams and Segal sum this up: '[I]f employers define the ideal worker as someone who takes no time off for childbearing or childrearing, then the workplace is designed around a worker with the body and societal role of a man, which constitutes gender discrimination.'[50]

A commitment to substantive equality provides one rationale for challenging the current working-time norms and allocation of paid and unpaid work. Substantive equality would mean de-gendering work and care, enabling and facilitating the participation of all citizens in both productive and reproductive work, not merely those who are prepared to bear (or unable to avoid) the costs. It would mean recognising the biological differences between women and men, and removing the bias toward male biology in the workplace which sees the taking of leave for child birth as an exception or deviation from the norm.

Characterising attempts to remove workplace biases against women as moves to 'accommodate' their 'special' needs, some critics argue that such changes can only be considered if they are economically justifiable for the organisation.[51] This represents an acceptance of the status quo and idealisation of the male body as natural and neutral. It leaves those who have been marginalised by this with the burden of arguing for change, rather than recognising those who have benefited from it to-date being required to justify its retention.[52]

If we want our citizens to be cared for and we want gender equality, we need to reorient our institutions to better support people to undertake both paid work and caring responsibilities. This problem needs to be analysed and addressed from many angles, considering the role and responsibilities of all social actors. I have chosen to focus on the role of corporations as employers in this picture, and the role of state intermediaries, such as HREOC and EOWA, in promoting more family-friendly practices.

48 Nancy Folbre, *The Invisible Heart: Economics and Family Values* (2001) at 186.

49 Smith, 'Time Norms in the Workplace', above n33; Williams, *Unbending Gender*, above n1.

50 Williams & Segal, above n25 at 116.

51 See references in Williams & Segal, above n25.

52 See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) at 70–74.

B. Corporate Responses to Work-Family Conflict

There is evidence that work-family balance is already on the agenda at least in some leading corporations. While there is still much rhetoric about the care of children being a private issue and a matter of individual choice,[53] the emergence of 'family-friendly' benefits indicates that a number of organisations have assumed some commitment to addressing this problem.

There has been a plethora of these 'family-friendly' initiatives.[54] These include: flexible and reduced hours, paid family leave, location flexibility, predictable and social schedules for workers, and child and aged care directory services and provision. The 'business case' has featured prominently as the reason for such experimentation, with family-friendly policies being developed or at least presented as a means to compete for recruits, retain employees, boost morale and commitment and increase productivity by better utilising human resources. It is unsurprising that businesses have offered this rationale, given the business imperative of maximising profits and the wider legal imperative of protecting and growing shareholder investments.

It is also unsurprising that businesses have been able to justify such initiatives as economically sound, given the amount of research and advocacy revealing and promoting the business case for diversity and family friendliness.[55] Equality advocates have invested considerable effort in research that reveals the hidden costs of exclusion and family-*un*friendliness, allowing the up-front costs of changing practices to be considered more carefully against the possible gains.

However, the business case for change still depends by definition upon there being an economic imperative for providing family-friendly arrangements for workers and, just as importantly, it depends upon this imperative being known and actionable. Research into the costs of discrimination and the benefits of workplace diversity is usually generalised, and is often focused only on 'the top end of town'[56] — skilled workers who have high recruitment and replacement costs — rather than more 'fungible' workers. Information about these workers might be

53 K Lee Adams, 'The Problem of Voluntariness: Parents and the Anti-Discrimination Principle' (2003) 8 *Deakin LR* 91; Sara Charlesworth, 'Managing Work and Family in the "Shadow" of Anti-Discrimination Law' in Jill Murray (ed), *Work, Family and the Law* (2005) at 88–126, 104–106 (finding that employees and employees often do not recognise instances of work-family conflict as the result of structural discrimination but the result of individual choice that should not override any business imperative).

54 See Organisation for Economic Co-operation and Development (OECD), *Babies and Bosses—Reconciling Work and Family Life*, *Volume 1: Australia, Denmark and the Netherlands* (2002); Strachan & Burgess, above n7; Ilene Wolcott & Helen Glezer, *Work and Family Life: Achieving Integration* (1995). For a government summary of family-friendly provisions in Australian workplaces see Commonwealth Department of Family and Community Services & Commonwealth Department of Employment and Workplace Relations, *OECD Review of Family-friendly Policies: The Reconciliation of Work and Family Life: Australia's Background Report* (2002) at 46–50.

55 See, for example Rapoport et al, above n1; Williams & Segal, above n25. The Equal Opportunity for Women Agency and HREOC also promote the business case for equality, as discussed in Part 5Bii 'Enabling – Acquisition of Skills and Knowledge', below.

56 Williams & Segal, above n25.

accessed and utilised by the human resource offices of large organisations, but never reaches small businesses. Further, information alone about costs and benefits does not necessarily equip organisations with the skills to identify the costs of exclusion in their workplaces nor devise better alternatives. And for prejudiced or incompetent business managers who appear to be irrational actors, cost-benefit information may elicit no response.

Importantly, however, there is good evidence to suggest that the business case is not the only rationale for firms introducing family-friendly policies, such as paid maternity leave.[57] Doing (and being seen to be doing) the 'right thing' is also a strong motivation for some organisations. This is consistent with the research discussed below about organisational actors being motivationally complex, acting upon not only the motivation of profit maximisation but also, for instance, the desire to be responsible citizens.

The business case is not entirely separate from this 'moral' case. So, for instance, education and awareness-raising alters the values and expectations of employees, potential recruits and customers about family-friendliness of corporations, it can simultaneously alter the bottom line. Employees may request or negotiate for different conditions or, more realistically, have their morale, loyalty, absenteeism and productivity influenced. Potential recruits may factor family-friendliness into their consideration of job offers. The presence or absence of family-friendliness can also impact on brand reputation and company valuation,[58] something which is difficult to assess and measure.

While the seeds of family-friendliness are being planted, there is evidence to suggest that their distribution is patchy,[59] their uptake limited, and their effectiveness uncertain. Paid maternity leave provides a good study focus, as a key benefit in enabling women to participate fully as worker-carers. Numerous studies of the availability of paid maternity leave have revealed that while its provision is growing,[60] the period of paid leave is still usually very short, and access is often restricted to workers who are highly skilled and valuable (ie those who have some bargaining power).[61] This means that where innovation has occurred, it has not been generalised effectively across the field.

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57 Charlesworth et al, *Drivers and Contexts*, above n23.

58 Michelle Arthur & Alison Cook, 'Taking Stock of Work-Family Initiatives: How Announcements of '"Family-Friendly" Human Resource Decisions Affect Shareholder Value' (2004) 57 *Indus & Lab Rel Rev* 599.

59 Matthew Gray & Jacqueline Tudball, 'Access to Family-Friendly Work Practices: Differences Within and Between Australian Workplaces' (2002) 61 *Family Matters* 39; Sex Discrimination Unit of HREOC, *Valuing Parenthood: Options for Paid Maternity Leave* (2002). The unit reports that 'the most recent data on paid leave arrangements found that 38 per cent of female employees reported that they were entitled to some form of paid maternity leave' and concludes 'existing paid maternity leave arrangements are limited, haphazard and fall significantly below what could be considered a national system': at 29 and 25.

60 Charlesworth et al, *Drivers and Contexts*, above n23.

61 Marian Baird, 'Parental Leave in Australia: The Role of the Industrial Relations System' in Jill Murray (ed), *Work, Family and the Law* (2005).

Other research has found that many corporate family-friendly benefits do not satisfy the take-up test, appearing to be on the books to gain the public relations or morale benefits, but being discouraged in the uptake.[62] Many firms that know they need to attract and retain women as employees and clients make some effort to de-bias their practices, but fail to do so effectively due to a lack of commitment or competence in developing new practices and programs. Other commentators have identified a lack of integration of these benefits with the corporation's business goals, making them unsustainable.[63]

Further, many developments that are promoted as being family-friendly are actually developed purely for the business need for a flexible workforce.[64] The 'flexible' tag has been used in such disparate ways that it has all but lost meaning. While workers with family responsibilities may need flexibility, it is the autonomy or control over that flexibility that is critical,[65] and that is often obscured in the marketing of workplace benefits. While such initiatives might be in the interests of shareholders, they are not designed to meet the values and needs of other stakeholders, such as workers. Such self-regulation is not permeable to the views and values of stakeholders.[66]

What this evidence suggests is that while a number of organisations are taking responsibility for work-family balance and experimenting with possible solutions, there is insufficient copying or diffusion of such practices across the board, as well as insufficient accountability for the practices that have developed. Further, the use of terms such as 'family-friendly' and 'flexible' to describe a wide range of initiatives and practices creates uncertainty and scepticism about these terms and corporate efforts. This makes it increasingly difficult for leading firms who have committed resources to creating innovative, genuine and integrated family-friendly work practices to distinguish themselves from other players in the market.

C. Legal Interventions

Law plays a significant role in reflecting, constituting and reinforcing assumptions about ideal worker characteristics and the separation of work and family,[67] but it also has the power to challenge and change such assumptions.

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62 Men have certainly not taken them up: see Michael Bittman, Sonia Hoffmann & Denise Thompson, *Men's Uptake of Family-Friendly Employment Provisions: Policy Research Paper No 22* (2004), a comprehensive analysis of the limited use Australian men make of family-friendly work provisions.

63 Rapoport et al, above n1; see also Graeme Russell & Don Edgar, 'Organisational Change and Gender Equity: an Australian Case Study' in Linda L Haas, Philip Hwang & Graeme Russell (eds), *Organisational Change and Gender Equity: International Perspectives on Fathers and Mothers at the Workplace* (2000) at 197 on how 'addressing work-family issues has limited value unless there is a strategic business focus.' They note '[it] is argued that strategic solutions involve building the "consideration of family issues into job design, work processes and organisational structures — just as one would consider marketing concerns, say, or engineering input"'.

64 Conaghan, 'Family-Friendly Workplace', above n25 at 168.

65 Strachan & Burgess, above n7 at 258 (warning that many supposedly family-friendly provisions, such as flexible hours, are not necessarily so when the worker has little control).

66 See Part 3 ' "Regulatory Scholarship" for more discussion of permeable self-regulation.'

67 This is a theme running throughout Conaghan & Rittich, above n41, particularly Part II.

Around the world there are many examples of states using law as a tool to address gender inequality and work-family conflict. The range of approaches reflects differences in how law — legislation and other regulation — is used,[68] and possibly also the extent to which gender equality is seen as an individual or social and structural issue linked to women's disproportionate responsibility for family caregiving. In very general terms, it is arguable that the US has focused largely on individual rights and formal equality, while the European Union (EU) has focussed less on facilitating workforce participation, and more on supporting care work. Australia's approach is not easy to characterise.

According to Hegewisch, the US, as a neo-liberal state,

> arguably has the highest levels of formal equality for women who are able to work full-time 'like a man' but provides the least public support for women's continued greater and unequal role in performing domestic and caring work. [69]

In contrast, there has been much greater focus in the EU on the ways in which workplace practices — such as long work hours and limited leave — impact differentially on women and limit their participation in paid work. All EU countries, for instance, provide national schemes for paid maternity leave, a benefit that the US (and Australia) has yet to establish.[70] Various EU directives also relate specifically to promoting working time arrangements that are compatible with caring responsibilities, such as the Part-Time Work Directive[71] which provides part-time workers in the EU with the right to claim equal treatment with comparable full-time workers, unless 'different treatment is justified on objective grounds.'[72] A number of EU states, such as Germany, the Netherlands and the UK, have also introduced through legislation a right to, or 'right to request', part-time hours.[73] US working hours have stalled or grown over the same period in which average working hours in Europe have fallen through 'longer vacations, shorter weekly working time and statutory limits on overtime.'[74]

Providing family leave benefits and alternative working time options does not guarantee that men will take up more of the unpaid family caring work and thereby change the sexual division of labour. However, such initiatives do contribute to substantive gender equality by reducing the costs and risks borne by those who undertake the traditionally female role of caregiving, thereby supporting and validating this work.

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68 See for example Joan C Williams on how the US does not use legislation in the same way as the EU: Joan C Williams, 'The Interaction of Courts and Legislatures in Creating Family-Responsive Workplaces' in Ariane Hegewisch et al (eds), *Working Time for Working Families: Europe and the United States* (2005).

69 Ariane Hegewisch, 'Introduction' in Ariane Hegewisch et al, above n68.

70 Sex Discrimination Unit of HREOC, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002).

71 Part Time Work Directive 97/81 [1998] OJ L14/9.

72 Alexandra Heron, 'Promoting and Protecting Reduced-Hours Work: European Union Law and Part-Time Work' in Ariane Hegewisch et al, above n68 at 37 quoting the Part Time Work Directive 97/81 [1998] OJ L14/9.

73 Jill Murray, 'Work and Care: New Legal Mechanisms for Adaptation' (2005) 15 *Lab Ind* 67.

74 Hegewisch, 'Introduction' above n69 at 1.

The United Kingdom, often of particular interest to Australians, appears to have moved significantly along the European course of using law and other State interventions to facilitate better work and family balance. Joanne Conaghan argues that New Labour's legal initiatives could be described as a radical program, putting the UK 'in the midst of a huge social and legal experiment, the object of which is to promote a better balance between work and family life.'[75] She notes that 'Britain starts from a very low baseline — a working environment that is historically far from family-friendly'[76] but, compelled in part by European directives, it has recently seen the emergence of family-friendly working policies under New Labour. Conaghan documents a number of legislative initiatives to achieve this goal, including the expansion of paid parental leave and the introduction of a right to request part-time hours. The new Gender Equality Duty for public authorities, due to come into effect in 2007, is yet another legal intervention designed to actively promote substantive gender equality.[77]

Australia's approach to gender equality and work-family balance is difficult to categorise due to its historically unique system of determining employment terms and conditions through conciliation and arbitration, combined with its general revenue based social security system. The latter provides some social and economic citizenship to carers, providing income support for those who provide otherwise unpaid care for dependants, and an array of benefits to support family and alternative care of children.[78] Terms and conditions of work, however, largely reflect the primary mechanism of their development — arbitration of claims made by unions representing their constituents, traditionally men.[79] Industrial awards, being focused on the full-time worker, traditionally reflected the worker as breadwinner and not worker-carer. It is important to acknowledge, however, that the industrial relations system was largely successful in establishing a safety net of 'decent work' conditions — a living wage, hours-regulation, employment security, and a voice for workers — and that such a safety net is fundamentally family-friendly.

More recently the industrial laws have played some part in establishing benefits that specifically promote family-friendliness in organisations. Many of the significant developments in family-friendly policies that have established themselves as universal standards in Australia, such as unpaid parental leave and family or carers' leave, were the result of hard-fought arbitration battles in the Australian Industrial Relations Commission (AIRC) as award test cases.[80] The

75 Joanne Conaghan, 'Women, Work, and Family: A British Revolution' in Joanne Conaghan, Michael Fischl & Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) at 53.

76 Conaghan, above n75 at 59.

77 See Equal Opportunity Commission (UK) website, *The Gender Equality Duty*: <http://www.eoc.org.uk/Default.aspx?page=15016> (23 June 2006).

78 Bettina Cass, 'Redistribution to Children and to Mothers: A History of Child Endowment and Family Allowances' in Bettina Cass & Cora V Baldock (eds), *Women, Social Welfare and the State in Australia* (2nd ed, 1988).

79 Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and the Family' (2004) 46 *J Ind R* 400.

most recent example is the 2005 *Family Provisions Case*, in which workers won a limited 'right to request' part-time work following maternity leave.[81] Such test case standards apply immediately to the particular awards being arbitrated, but traditionally have then become universal by the variation of other federal awards, which have underpinned enterprise bargaining, and the adoption of test case principles by the federal commission's state counterparts.

With the passage of the Work Choices legislation late in 2005,[82] however, the AIRC has been effectively stripped of its capacity to arbitrate test cases, and existing standards in awards will no longer form the safety net against which bargained outcomes are to be tested.[83] In one fell swoop, we have lost a very important and long-standing, public and legitimate mechanism by which working conditions could be challenged, analysed, debated and updated.[84] And based on the strength of antipathy toward employee rights and trade unions expressed by the current Federal Government, the industrial laws are not likely to be modified while it retains power.

So, while many countries are granting workers positive rights specifically designed to promote work-family integration, the approach of the Australian government is to pull back on all worker rights, leaving working conditions to be determined largely by the market. This approach, reflecting the US, may promote formal equality for those who can compete as the ideal worker, but does little to promote substantive equality, which requires support and validation for the unpaid caregiving that women traditionally and disproportionately undertake. State intervention in the market is needed to transform the ideal worker from one who is unencumbered to one who participates in both paid work and caregiving. While such cultural change cannot be simply mandated, the law can play a significant role in challenging entrenched practices that reflect and constitute the norm, as well as encouraging the development of alternatives. Industrial or labour laws are the traditional focus for regulating workplace practices, but I consider here how equality laws can also form part of the armoury in this endeavour.

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80 See for example *Maternity Leave Test Case* (1979) 118 CAR 218; *Parental Leave Test Case* (1990) 36 IR 1; *Family Leave Test Case* (1994) 57 IR 121; *Working Hours Case,* Decision PR072002 (23 July 2002). These standards are not unproblematic: see Rosemary Owens, 'Taking Leave: Work and Family in Australian Law and Policy' (offering a critique of leave being the only solution offered to women's worker-carer status) and Anna Chapman 'The right to flexibility' (providing a critique of the limited and normative understanding of 'family' in the test cases and workplace legislation) in Conaghan & Rittich (eds), *Labour Law*, above n67.

81 *Family Provisions Test Case*, Decision PR082005 (8 August 2005). Other benefits won in the case include a right to request simultaneous parental leave of up to eight weeks and an extension of unpaid parental leave from 12 to 24 months.

82 *State of New South Wales & Ors v Commonwealth of Australia*, High Court of Australia, heard: May 4-5, 8-11 2006, *Judgment reserved*.

83 For a regulatory analysis of this legislation, see Cooney et al, above n13.

84 Jill Murray, 'The AIRC's Work and Family Test Case: The End of Dynamic Regulatory Change at the Federal Level?' (2005) 18 *AJLL* 325.

3. Regulatory Scholarship

In this section I turn to consider insights from the burgeoning field of regulatory or 'new governance'[85] scholarship that might prove useful in analysing and redesigning Australia's equality laws to address gender inequality and work-family conflict. These ideas are drawn from scholars who share a 'pragmatic' approach to regulation, one in which solutions are built upon understandings of what has worked and what is possible with limited state resources. After noting the significant and path-breaking contribution of Ian Ayres and John Braithwaite,[86] I briefly set out key features of more recent regulatory work and new governance scholarship in the United States.

A. Responsive Regulation

In their 1992 book, *Responsive Regulation: Transcending the Deregulation Debate,* Ian Ayres and John Braithwaite describe the surprising increases in state regulation despite the prevalence of rhetoric about deregulation. They characterise this as a new regulatory state that does less rowing, but more steering. They then argue convincingly that this increase in regulation can and should be more diverse and tailored in order to resolve public problems more effectively. In particular, they seek 'to transcend the intellectual stalemate between those who favour strong state regulation of business and those who advocate deregulation', arguing that '[g]ood policy analysis is not about choosing between the free market and government regulation. Nor is it simply deciding what law should proscribe.'[87] They argue:

> If we accept that sound policy analysis is about understanding private regulation — by industry associations, by firms, by peers, and by individual consciences — and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation.[88]

Building on a critique of command and control regulation — as blunt, after-the-fact application of rules that is either over or under inclusive — they develop their now well-known ideas about responsive regulation. The state continues to play a central role in regulating, but to be effective, regulatory agencies need to be responsive to the different conduct and motivations of regulated actors as private regulators, as well as to industry structure. Formal regulation itself can affect all of these things. The regulatory response, rather than being command and control oriented, may 'promote private market governance through enlightened [but not absolute] delegations of regulatory functions', including the monitoring of other delegations.[89]

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85 I adopt this term from Karkkainen, who coined it in response to Lobel in Bradley C Karkkainen, 'Reply: "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 *Minn L Rev* 471.

86 Ayres & Braithwaite, above n9.

87 Ayres & Braithwaite, above n9 at 3, building on John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985).

88 Ayres & Braithwaite, above n9 at 3.

Advancing on Braithwaite's earlier findings that people are more likely to be persuaded by someone with a 'big stick',[90] they develop the idea of an enforcement pyramid which reflects a number of different aspects of a regulator's role and power, and the responsiveness of regulated actors. Under the pyramid, the base represents low level or minimally intrusive forms of intervention, with severity increasing right up to the apex. The least intrusive forms of intervention could be used effectively as the primary and usual regulatory tools, *so long as* the regulator had access to more serious sanctions (ie a big stick) to be held mostly in reserve for extreme cases of irrational actors. In essence, the 'notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation.'[91]

The central idea is that regulation is both effective and efficient if the regulatory agency is able to prompt the desired behaviour, by deploying most often the 'soft' tools at the bottom of the pyramid for the bulk of organisations. This is based on an assumption that most actors are rational and will therefore be influenced to do the right thing by education, assistance, and the pressures of persuasion and deterrence. These tools are most effective when the regulator has access to a big stick, punitive or injunctive, but wields it infrequently and only after the softer approaches have proven ineffective. In this way, the regulatory model encourages self regulation, but can push or punish those who fail to take responsibility for particular problems. It also recognises that 'actors are motivationally complex',[92] with profit maximisation being one likely motivation of management, but not to the exclusion of other motivations such as the maintenance of 'individual and corporate repute, dignity, self-image and the desire to be responsible citizens'.[93]

For the purposes of understanding the form of regulation that anti-discrimination laws represent, it is important to note particular implications of this thesis. First, for responsive regulation there must be a regulatory agency that has 'enforcement powers', that is, power to investigate and prosecute for non-compliance. Without such power, the agency has no opportunity to enter into regulatory dialogue with non-compliant organisations in which the practices of the latter could be evaluated and better performance promoted. There is no opportunity for state responsiveness. Second, for the enforcement agency to regulate responsively there must be a range of possible sanctions that can be used or recommended. These might include penalties or, for breaches of norms that are unclear or uncertain, systemic corrective orders by which an organisation can be compelled, for example, to review its own practices and develop and report upon a compliance program to prevent further breaches.

89 Ayres & Braithwaite, above n9 at 3.
90 Braithwaite, *To Punish or Persuade*, above n87.
91 Ayres & Braithwaite, above n9 at 3.
92 Fisse & Braithwaite, *Corporations*, above n10 at 136.
93 Fisse & Braithwaite, *Corporations*, above n10 at 136.

Braithwaite's more recent thinking on the regulatory pyramid is of particular relevance to the regulation of equality beyond the eradication of blatant and intentional discrimination. While the regulatory pyramid may effectively promote compliance with a rule or floor of standards, Braithwaite suggests the corresponding notion of a 'strengths-based pyramid' for building capacity is required to move organisations above the floor.[94] He argues that effective regulation will have multiple interventions. In addition to enforcing a baseline of compliance, strengths or successes need to be identified and mechanisms developed — such as informal praise, prizes, grants, and other resources and assistance — to expand upon these.[95] Valerie Braithwaite's empirical research on the implementation of federal affirmative action legislation clearly suggests that equal employment opportunity (EEO) officers saw education or capacity-building as more effective than punitive approaches in improving EEO programs.[96]

B. Corporate 'Self-regulation'

Adopting and building upon these ideas, regulatory scholars have gone on to explore the state's role not only in *prompting* corporate responsibility, but also in building organisational capacity and accountability mechanisms for 'self-regulation'. For example, in *The Open Corporation*, Christine Parker draws together a wealth of empirical and theoretical regulatory scholarship to argue that corporate self-regulation can be prompted, fostered and made accountable for the efficient and effective achievement of policy goals, through a combination of law (formal government regulation or meta-regulation), internal corporate self-management and input from external stakeholders.[97] In Parker's model the corporation is accepted as a regulated and regulatory actor. This means that the state may set normative goals — in respect of employee health, product safety, environmental protection, discrimination or otherwise — but relies to some extent on the internalisation of these goals and private ordering to bring them into effect.[98] This private ordering or self-regulation is not voluntary or optional, but a necessary part of the web of regulation in respect of any particular policy goal.

In this picture, regulation seeks to foster corporate openness or permeability to stakeholder views.[99] Parker argues:

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94 John Braithwaite 'Webs of Explanation, Webs of Regulation, Webs of Capacity', presentation given at Regulation Institutions Network (RegNet), Research School of Social Sciences, Australian National University, Canberra, February 2006: <http://regnet.anu.edu.au/program/past/> (27 Oct 2006).

95 Ibid.

96 Valerie Braithwaite, 'First Steps: Business Reactions to Implementing the Affirmative Action Act', A Report to the Affirmative Action Agency, September 1992 at 66–73 (on file with author).

97 Parker, *Open Corporation*, above n9 at 292; the Hepple Report similarly identifies three interlocking mechanisms: internal scrutiny by the institution, interest group participation and agency assistance and enforcement. See Bob Hepple, Mary Coussey & Tufyal Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000) at 58.

98 Jill Murray summarises this view: 'law does not work by automatic fiat, but requires some kind of internalisation to ensure its effectiveness', above n19.

> In the open corporation, management self-critically reflects on past and future actions in the light of legal responsibilities and impacts on stakeholders. They go on to institutionalise operating procedures, habits and cultures that constantly seek to do better at ensuring that the whole company complies with legal responsibilities, accomplishes the underlying goals and values of regulation, and does justice in its impacts on stakeholders (even where no law has yet defined what that involves). The open corporation … is internally responsible for its own actions through self-management, yet externally accountable through the requirements of disclosure, dialogue, exposure and enforcement. [100]

In Parker's view the establishment of permeable self-regulation can be depicted in three phases:

1. the commitment to respond;
2. the acquisition of specialized skills and knowledge; and
3. the institutionalization of purpose.[101]

She suggests that, in respect of any particular issue, organisations can be positioned either at one of the three phases, or not yet on the pathway at all and that effective regulation operates to support and move organisations through the three phases.

While the trajectory analogy has some flaws and is critiqued below,[102] it is still worth considering the three aspects of regulation that Parker calls phases — prompting, enabling, and holding accountable. The first aspect of prompting management commitment is achieved primarily but not entirely through restorative justice (or responsive regulation), whereby wrongdoers are identified and held accountable through effective enforcement. Efforts to self-regulate are taken into account in determining liability or the need for a court-ordered compliance program. In respect of the second aspect of enabling or capacity-building, the role of law and regulators is to help organisations to build self-regulation capacity and acquire knowledge and skills. It also fosters and harnesses innovation by leaders, and the generalisation of these innovations across industries.

The third aspect of the state's role is evaluating self-regulation of corporations and holding them accountable. This means, firstly, not being content with the implementation of a compliance program, but requiring companies to engage in double-loop learning — evaluating the compliance program and learning from the results. Law and regulators can require or promote the evaluation of performance against benchmarks. Requiring disclosure of such evaluations to regulators and stakeholders allows the information to be used to assess regulatory impact and to revise regulatory strategies. For regulators, this means a 'triple loop of regulatory

99 Parker, *Open Corporation*, above n9 at 292.

100 Parker, *Open Corporation*, above n9 at 292–93.

101 Parker, *Open Corporation*, above n9 at 31.

102 See below Part 3C 'New Governance'. I thank Susan Sturm and Elizabeth Emmens of Columbia Law School for prompting this critique.

learning' — regulators using meta-evaluation results to 'revise their regulatory objectives (including their strategies for fostering and holding accountable self-regulation).'[103] It is this final aspect that Parker and others identify as the weakest in practice, as discussed below.

This model of regulation rests on two main principles that law and regulatory institutions must heed in order to regulate effectively. Firstly,

> law and regulators must help to connect the internal capacity for corporate self-regulation with internal commitment to self-regulate, by motivating and facilitating moral or socially responsible reasoning within organisations …[104]

This is achieved by 'carrot and stick' measures — corporations should be provided with incentives to adopt standards, and should be prodded through 'regulatory enforcement action, legal liability and public access to information about corporate social and legal responsibility.'[105] Under the second principle,

> [L]aw and regulators should hold corporate self-regulation accountable, and facilitate the potential for other institutions of civil society to hold it accountable, by connecting the private justice of internal management systems to the public justice of legal accountability, regulatory coordination and action, public debate and dialogue.[106]

C. New Governance

In parallel and sometimes intersecting scholarship, numerous legal scholars in the United States have stepped outside of a litigation and rule-enforcement focus, to explore alternative conceptions of law as a form of regulation that operates with other forms of regulation. Orly Lobel has attempted to draw together such scholarship under an umbrella that she labelled the 'Renew Deal'[107] but which others have called 'new governance' practice and scholarship.[108] Under this umbrella, Lobel includes many scholars who are active in a wide variety of fields, such as Susan Sturm (employment discrimination);[109] Charles Sabel, Michael Dorf[110] and Bradley Karkkainen (environmental management and protection);[111] and Jody Freeman (administrative law).[112] '[P]ointing to the false dilemma between centralised regulation and deregulatory devolution', Lobel argues that 'there is a growing consensus in legal scholarship that innovative approaches to law, lawmaking, and lawyering are possible and necessary.'[113] Further, she argues

103 Parker, *Open Corporation*, above n9 at 277.
104 Ibid at 246.
105 Ibid.
106 Ibid.
107 Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minn L Rev* 342.
108 Karkkainen, 'New Governance', above n86 at 472.
109 Sturm, 'Second Generation', above n10.
110 See for example Dorf & Sabel, 'Democratic Experimentalism', above n10.
111 See, for example Bradley C Karkkainen, 'Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism' (2003) 87 *Minn L Rev* 943.
112 Jody Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA L Rev* 1.

that 'a myriad of policy initiatives in different fields are employing new regulatory approaches in legal practice that reflect this theoretical vision.'[114]

One of these scholars, Susan Sturm, has put forward a 'structural approach' to addressing complex, 'second generation' discrimination in employment.[115] Sturm herself summarises the common elements of this new governance scholarship:

> [T]his approach places a focus on regulation through centrally coordinated local problem solving. Public agencies encourage local institutions to solve problems by examining their own practices in relation to common metrics and by comparing themselves to their most successful peers. Problem solving operates through direct involvement of affected and responsible individuals. Information about performance drives this process. Its production and disclosure enable problems to be identified, performance to be compared, pressure for change to mount, and the rules themselves to be revised. Public bodies coordinate, encourage, and hold accountable these participatory, data-driven problem solving processes.[116]

Even in this short summary, we can identify a number of key features shared by these scholars and regulatory scholars writing in Australia:

- an acceptance that the state has a role to play in regulating;
- a rejection of command and control as an ideal form of regulation;
- the promotion of self-regulation or problem solving by local institutions;
- the importance of standards or common metrics by which to evaluate self-regulation initiatives;
- the production and disclosure of information about performance as a mechanism for identifying, allowing and facilitating pressure for improvement in self-regulation and meta-regulation; and
- involvement of stakeholders, not merely shareholders, in identifying and solving problems, and advocating for improvement.

One thing that is certainly *not* a feature of the new governance scholarship is the notion that self-regulation can be viewed as a linear pathway made up of phases. While organisations might possibly move forward in respect of any one particular, discrete issue, problems such as gender equality are not discrete or defined in any fixed way. Commitment, capacity and accountability will always be contested, and thus all aspects will need to be regulated simultaneously in multiple, reinforcing ways. For instance, commitment to and benchmarking on paid maternity leave might lead simultaneously to stakeholder (employee, client and agency) pressure for commitment to the wider goal of gender equality (redefining the problem or goal), for improvements in policies and practices for enabling leave to be taken (capacity) and the development of information-recording systems to facilitate evaluation and feedback learning.

113 Lobel, 'Renew Deal', above n107 at 343.
114 Ibid.
115 Sturm, 'Second Generation', above n10.
116 Sturm, 'Architecture of Inclusion', above n10 at 268.

Two particular concerns about these regulatory and new governance proposals are worth highlighting. Firstly, the proposals often rely for effectiveness on stakeholders participating to lobby for greater commitment and better performance. But who are the stakeholders, and do they have the capacity (knowledge, skills, power) to participate? While workers, to some extent, have used unions as their voice in consultations and bargaining, the decline in unionisation and the restriction of union roles in workplace activities seriously undermines their role in any regulatory scheme. Additional and alternative mechanisms for enabling workers and other stakeholders to participate in consultations and lobbying need to be built into the regulatory scheme if it is to rely upon such participation.[117]

A further and related concern is that proposals to develop worker terms and conditions through the regulation of corporations treat workers as 'stakeholders' at best.[118] This characterises workers as having no greater interest and treats them as indistinguishable from other stakeholders (such as shareholders and customers). Alternatively, labour law is cast merely as a subset of corporate law with employees seen as assets or appendages of the corporation.[119] A person's employment is about livelihood and identity and citizenship, and is not truly akin to the holding of shares, or the patronage of a client.[120] Corporations are regulatory actors in the setting of terms and conditions of employment and workplace cultures and, as such, their role in the web of regulation of working conditions is rightly acknowledged and utilised by state regulators. But to regulate working conditions, the role and interests of workers as the parties most directly affected by the corporate conduct must be given a central position in the regulatory scheme, which needs to include enabling mechanisms to facilitate the participation of workers (and possibly their dependants) both in defining the problems and designing the response.

Drawing on this regulatory scholarship, I turn now to explore how our equality laws and regulators prompt, enable and hold accountable corporate self-regulation of worker-carer integration. In the last section I use this framework to put forward ideas for reform. A summary of the analysis and the proposal in these terms is set out in Appendix A.

4. Current Equality Regulation

In this section I seek to identify the sprouting seeds of permeable self-regulation in respect of gender equality in work and, specifically, work-carer integration, as well as the limited role played by current equality laws in fostering their germination.

117 Alternatives to unions have been proposed — see Cynthia Estlund, 'Rebuilding the Law of the Workplace in an Era of Self Regulation' (2005) 105 *Colum L Rev* 319 at 397 — but have also been critiqued for *assuming* capacity rather than offering 'strategies for enabling these groups': see Sturm, 'Architecture of Inclusion', above n10 at 269.

118 Jill Murray, 'Searching for a New Map for Labour Law' (2003) 16 *AJLL* 123.

119 Ron McCallum, 'The Australian Constitution and the Shaping of our Federal and State Labour Laws' (2005) 10 *Deakin Law Review* 460.

120 Murray, 'New Map', above n118.

A. Outline of Current Equality Laws

Without a charter or bill of rights, Australian equality laws have no constitutional force and few constitutional limitations. Federal and state anti-discrimination laws are complemented by affirmative action or equal opportunity provisions in employment laws that cover most private corporations and the various public services. While both the federal anti-discrimination legislation, the *SDA,* and the affirmative action legislation, the *EOWW Act*, contain the objective of gender equality, they utilise very different regulatory models.

A relatively uniform regulatory model has been adopted across all anti-discrimination legislation in Australia, including the *SDA*.[121] Under this model, discrimination on particular grounds — such as sex, pregnancy and family responsibilities — is prohibited in particular fields of endeavour, such as work, at particular stages, such as hiring or firing. Discrimination is cast either as direct or indirect, and there is no positive duty to accommodate. Only victims of prohibited discrimination are given the right to take action against perpetrators to seek remedies for the harm caused. This is in contrast to the US model, in which the agency has some powers to undertake investigations on behalf of complainants in order to enforce compliance. HREOC is charged with the power to investigate and confidentially conciliate complaints, and to otherwise promote the legislative goals through education and guidelines. Complaints that are not resolved through conciliation may be determined by a court, or, at state level, an administrative tribunal, which can only make orders of compensatory remedies.

The federal equal opportunity Act (*EOWW Act*) imposes a positive process and reporting duty on organisations that employ 100 or more workers, as well as tertiary institutions. These employers are required to analyse their workplaces and workforces and develop plans for the elimination of barriers to equality for women. They must also report on these plans annually to the regulatory agency, the Equal Opportunity for Women Agency (EOWA). No hard or soft quotas are imposed. A corporation that fails to report may be named in parliament as non-compliant,[122] and, although this has never been used, may be excluded from federal government contracting.[123] There is no formal link between the *EOWW Act* and the *SDA*, or between their respective agencies.

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121 For a fuller outline and critique of this model, see Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell & Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) at 105–124; see also Chris Ronalds & Rachel Pepper, *Discrimination: Law and Practice* (2nd ed, 2004) for a summary of Australian federal equality laws.

122 *EOWW Act* s19.

123 See Equal Opportunity for Women in the Workplace Agency (EOWA) website, *Contract Compliance Policy* <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/Sanctions_for_not_Complying/Contract_Compliance_Policy.asp> (23 June 2006).

B. Analysis of Current Equality Laws

(i) Prompting Management Commitment

One role for the state is to get corporations to accept responsibility for the problem of inequality — if corporations do not care about the issue, then they will make no effort to try to solve it.

(a) Prompting by Legal Duties

The most obvious way in which our equality laws have made corporations pay attention to gender equality is by imposing legal duties — a negative duty not to discriminate on the ground of sex (*SDA*) and a process duty to identify and remove barriers to women's advancement (*EOWW Act*). The *SDA* also has a more limited prohibition in respect of family responsibilities: employers must not directly discriminate on this ground in dismissing an employee.[124] Rules of law also have symbolic power or normative effect, meaning that to some extent they can command compliance regardless of the size, nature or even likelihood of a sanction for non-compliance.[125]

Strachan et al conclude that Australian equal employment opportunity laws in contrast to the purely voluntary British program, 'has a definite effect on the number of organisations prepared to undertake an examination of their position on equal employment opportunity' and that over time 'in Australia more organisations appear to be considering issues such as work and family, return to work of women after maternity leave and progression of women into management roles in a planned way.'[126]

In numerous ways, however, the regulatory model of anti-discrimination laws inhibits the normative effect of the rule, or its capacity to prompt commitment. Firstly, the rule against discrimination retains an increasingly unsustainable distinction between direct and indirect discrimination, requiring applicants to articulate whether they have experienced differential treatment or differential impact. Second, the rule is purely proscriptive, providing no positive duty to accommodate. Third, while the rule is a general one, the regulatory model provides few mechanisms for its meaning to be given content or elaborated upon. Indirect discrimination, for instance, prohibits requirements that have a differential impact on the protected group, but only if the requirement is not 'reasonable', and the factors to be considered are only outlined very generally.[127] The development of standards or guidelines, a rule-elaboration mechanism used in other regulatory regimes such as occupational health and safety, was not formally established under

124 All states, except South Australia, prohibit direct and indirect discrimination on the basis of carer's or family responsibilities.

125 Glenda Strachan, John Burgess & Anne Sullivan, 'EEO Policy in Australia and Britain', paper presented at the 'Reflections and New Directions' AIRAANZ Conference, Melbourne, 4–7 February 2003; Valerie Braithwaite and John Braithwaite, 'Early Steps: Regulatory Strategy and Affirmative Action', Report to the Department of Workplace Relations and Small Business in Relation to the Review of the Affirmative Action Act, May 1998 (on file with author).

126 Strachan et al, 'EEO Policy', above n125 at 10.

127 *SDA* s7B(2)

anti-discrimination legislation. There is little judicial elaboration, because there are so few cases litigated through to adjudication. HREOC can develop standards — a function it has performed in a limited way — but there are no requirements for this agency or other parties to develop standards to provide concrete meaning to the simple statement that 'an employer must not discriminate.'

Finally, there is little capacity for those who breach the rule to be identified and held accountable through effective enforcement. Two limitations on effective enforcement are the absence of an enforcement agency and the lack of a full pyramid of sanctions for non-compliance. While HREOC plays a regulatory role, it lacks any enforcement powers and thus it certainly lacks any capacity to regulate responsively. Only victims are permitted to bring actions for a breach of the rule against discrimination. And, importantly, the sanction for breach is limited to compensatory remedies, usually (very low) damages.[128] No systemic corrective orders or penalties are available.[129] This means that there are few carrots in the system, and what stick there is, is not in the hands of the regulatory agency. The groups most disadvantaged in our society have been granted a right against discrimination, but then left to enforce it alone and not for systemic change, but for individual compensation.

It is worth teasing this out to appreciate the bluntness of these two related features of the model that deny the regulator the ability to regulate responsively. To prompt management commitment to self-regulate in respect of any issue, the regulator must be able to provide incentives to corporations to adopt performance standards, and internal compliance programs to achieve them, and must be able to prod or compel those who are resistant to adopt such programs. HREOC is denied the capacity to do either. Without enforcement powers, it has little capacity to engage in any regulatory conversations with corporations. It can provide information on what corporations could or even should do — and it does this — but its capacity to motivate or prompt commitment is limited to the production of persuasive information.

Without a pyramid of sanctions, the regulations provides little incentive for organisations to develop compliance programs. Parker notes:

> 'Regulatory crime' laws, such as trading standards and consumer protection statutes, frequently encourage self-regulation by providing businesses with a defence to offences if they can show they exercised 'due diligence' by having in place management and quality assurance systems aimed at ensuring compliance with the standards.[130]

This suggests that one way for law to encourage the development of management systems is to threaten 'offences' or penalties for breach, and allow for good behaviour efforts to be taken into account in determining such penalties. A corporation that does develop an anti-discrimination program may gain the benefit

128 The amount awarded for non-economic loss rarely exceeds $10000: HREOC, *Federal Discrimination Law 2005* (2005) at 78.

129 *Hughes (formerly De Jager) v Car Buyers Pty Ltd and Ors* [2004] FMCA 526 at 69–71. Contrast the decision of Raphael FM in *Font v Paspaley Pearls* [2002] FMCA 142 at 158–167.

130 Parker, *Open Corporation*, above n9 at 16.

of reducing incidents and thus claims of discrimination against it (and also may gain benefits of morale and productivity that can flow from seeking to identify and eliminate discrimination). Efforts to develop and implement such policies might also enable an organisation to prove that it took 'all reasonable steps' to prevent discrimination and thereby avoid vicarious liability for discriminatory employee behaviour that was, in effect, beyond its control. However, if liability is found, the corporation will be liable only for compensatory remedies. There is no capacity for the court to take account of the efforts the corporation has taken to prevent discrimination, because the remedy is purely compensatory — with no penalty element. Any reduction in damages, for instance, would be a reduction in the victim's payment of compensation.

The absence of penalties as a possible sanction means that there is no 'penalty discount'[131] for good behaviour. The focus of litigation is upon determining liability and the focus in determining sanction is purely upon the victim, asking 'what is the nature and value of the harm?' The reckless, blatant and repeat perpetrators are treated the same as the well-intentioned but feckless perpetrators who develop policies but fail to properly implement them. The regulation fails adequately to distinguish between such actors. Similarly, the courts lack power to order systemic corrective orders, such as a change in policy, the introduction of a compliance program that might prevent further discrimination, an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant, or setting reform standards.

This is not to deny there has been some success in using litigation of rights under anti-discrimination laws to challenge the unencumbered worker norm.[132] Claims against full-time hours requirements, inflexible hours and the absence of work options during pregnancy and times of particular caring needs have been argued as discrimination. Such claims are framed using various grounds — sex, pregnancy or even family responsibilities discrimination — and direct and indirect discrimination actions are often argued in the alternative.[133] The few cases that have been adjudicated have received some publicity and have certainly been promulgated widely throughout the networks of human resource and equal opportunity officers. Their reportage indicates that despite being so few in number, the cases have prompted some inchoate understanding of work-family conflict as structural and potentially discriminatory.

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131 A term used in John Braithwaite, 'Restorative and Responsive Regulation of OHS' in Elizabeth Bluff, Richard Johnstone & Neil Gunningham (eds), *OHS Regulation for a Changing World of Work* (2004) at 194–208.

132 See Smith & Riley, above n25; John Von Doussa & Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act' (2004) 10 *UNSWLJ* 43-50.

133 Australian cases in which applicants have been successful are *Mayer v ANSTO* [2003] FMCA 209; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939*; Evans v National Crime Authority* [2003] FMCA 375; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31*; Howe v QANTAS Airways Ltd* (2004) 188 FLR 1; *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294. Australian cases in which applicants have failed are *State of Victoria v Schou* [2004] VSCA 71; *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 1; *Howe v QANTAS Airways Ltd* [2004] FMCA 242, *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184.

The impact, however, has been limited because there are few cases, each turning on its own facts which are often poorly argued and reasoned, and inconsistent with each other.[134] This leaves practitioners with little guidance about what to do to comply. It also does little to shift the thinking by employees or employers about work-family conflict as an equality issue. Charlesworth has found that such conflict is still often characterised by both employees and employers as being about individual choice clashing with business imperatives, rather than a matter of structural discrimination.[135]

The regulatory model of our anti-discrimination laws allows for, but also limits the emergence, the success and the impact of such claims.

Our 'affirmative action' law, the *EOWW Act*, is also very limited in the following ways:

- It only applies to large organisations (100 or more employees);
- Only process, and not outcomes, requirements are imposed, requiring organisations to audit, plan and report, but not necessarily monitor, reach targets or improve;
- The law applies only in respect of women, not in respect of worker-carers; and
- There is virtually no sanction for non-compliance (with naming in Parliament being only a questionable deterrence, and the exclusion of government contracting never used).[136]

(b) Prompting by Persuasion

Despite or because of their lack of enforcement powers, HREOC and EOWA have worked to promote corporate responsibility by using a combination of arguments about the business case, moral case and litigation risk of inequality. In some ways, every attempt to raise public awareness and educate citizens about the case for equality and the goals of equality laws is intended to, and will, operate indirectly to prompt corporate responsibility.

Sara Charlesworth has found evidence of such indirect impact in how HREOC's public inquiries have prompted corporate responsibility in respect of paid maternity leave.[137] She argues that we should not underestimate the importance of these inquiries, such as the two most recent inquiries into pregnancy discrimination and paid maternity leave (PML). They not only place equality on the public agenda but, importantly, 'also influence what is seen as discrimination and as EEO measures within workplaces', as evidenced by the rise in pregnancy and 'motherhood' claims made after these inquiries.[138] Charlesworth also notes that such inquiries can impel corporate action:

134 Smith & Riley, above n25; Adams, 'Indirect Discrimination', above n16.

135 Charlesworth, above n53 at 88–126.

136 Strachan et al, 'EEO Policy', above n125.

137 Sara Charlesworth and Belinda Probert, 'Why Some Organisations Take On Family-Friendly Policies: The Case Of Paid Maternity Leave', paper presented at the AIRAANZ Conference, Sydney, 2005: <http://airaanz.econ.usyd.edu.au/papers/Charlesworth_Probert.pdf> (20 September 2006) at 2–3.

138 Ibid.

> [I]n some recent case study work I have undertaken across a number of best practice organisations, it was the public debate around PML that provided the impetus for the introduction or increase in the quantum PML in three of these companies. While such individual enterprise-based initiatives are a poor substitute for a national scheme, and often have eligibility criteria that restrict their practical effect, their introduction suggest that employers and management are susceptible to what are seen as community expectations of 'the right thing to do', particularly where promoted by government agencies such as HREOC.[139]

In this way, regulation and regulators work to prompt rather than mandate corporate initiatives of paid maternity leave (or other forms of integration). Such an approach may run the risk of organisations not adopting such initiatives because they are not amenable to the particular regulatory pressures exerted, but mandates run alternative risks of non-compliance because of resistance.

This soft regulatory approach could also minimise the risks noted by law and economics scholars, such as Jolls in her work on 'accommodation mandates.'[140] Jolls argues that when legal rules impose mandates on employers to provide benefits to identifiable target groups such as women, there is, in most cases, an adverse impact on the employment rate or wages of the target group. Jolls explains how equality rules can operate as mandates in this way, hurting rather than advancing the interests of the group. However, an approach that operates to reveal the benefits, and *alter* the net cost, of introducing integration programs should undermine or even erase this effect. Further, while family caring work is currently gendered, 'workers with caring responsibilities' are not as discernible a category as 'women' and it therefore might not be as easy for employers to transfer the (assumed or actual) costs of such programs onto worker-carers or limit their employment.

One of the limitations of a persuasion approach, however, is that relevant information is always competing for attention with other business imperatives. Further, arguments for corporate responsibility for equality and family-friendliness are often filtered through a long-standing and pervasive discourse that maintains a separation of work and family into different spheres.[141] Key elements of this discourse include: the valorisation of individualism; a view of care work that is usually limited to the care of small children rather than ill and disabled dependants in our society; and a rhetoric of choice or voluntarism[142] which posits that individuals can *choose* whether or not to take on care responsibilities. From this flows a strong argument that if individuals have care responsibilities, they must have chosen them and they should bear the full cost, given that they gain the benefits exclusively. The question of costs and benefits of care work is a valid inquiry, and should prompt public debate, as HREOC's current inquiry into work

139 Ibid.

140 Christine Jolls, 'Accommodation Mandates' (2000) 53 *Stan L Rev* 223; Christine Jolls, 'Antidiscrimination and Accommodation' (2001) 115 *Harv L Rev* 643.

141 Joanne Conaghan, 'Equity or Efficiency: International Institutions and the Work-Family Nexus' in Conaghan & Rittich, above n41.

142 Adams, 'Problem of Voluntariness', above n53.

and family is seeking to do.[143] One of the greatest challenges for gender equality advocates is to explain the links between paid and unpaid work, so as to challenge the notion that work and family are separate. They must also do so in a way that reveals the gender unfairness, the invalidity of assumptions of choice rhetoric and the short-sightedness of not supporting adequately reproductive work.

In summary, our current equality laws have some capacity to prompt corporate responsibility for gender equality, or specifically the development of genuine, effective and integrated family-friendly initiatives. While they do appear to have prompted the development of anti-discrimination and harassment policies, there is little to inspire or coerce a corporate response that goes beyond a change in language to avoid the most blatant of direct discrimination, and the development of a diversity policy that enables box-check compliance for *EOWW Act* reporting. While many initiatives may have gone beyond this, it is difficult to see how the current regulation could be more than very indirectly responsible for this.

(ii) Enabling – Acquisition of Skills and Knowledge

The focus of our current equality laws, especially the *EOWW Act*, is on the provision of information to facilitate compliance with the rules and goals of the laws. As noted, there is little to prompt corporate responsibility, but there is a relatively large body of information produced by HREOC and EOWA specifically designed to provide knowledge to corporate actors to enable self-regulation. Thus, for organisations that have identified market or moral reasons for addressing equality, I would say that HREOC and EOWA have done quite well to support their efforts, especially given the limited and often threatened resources for such agencies.

(a) HREOC Education

I explore here four specific forms of education undertaken by HREOC that assist corporate actors to identify equality problems and develop self-regulatory responses. These are explicit compliance publications, the process and outcome of public inquiries, litigation reports and conciliation of disputes.

HREOC produces a vast array of publications that are specifically targeted at assisting employers to understand what the legal rule of non-discrimination proscribes, and what employers could do to avoid legal liability and go beyond risk management.[144] As anti-discrimination laws impose no prescriptive duty to develop preventative policies or procedures, this information about what to do and what not to do can only rather loosely be described as compliance information, but it is certainly intended to facilitate corporate compliance with the goals of the legislation to promote equality and eliminate discrimination.

HREOC also has the power to conduct public inquiries, and has utilised this power on numerous occasions, strategically targeting issues of high public interest

143 Sex Discrimination Unit of HREOC, *Striking the Balance*, above n32.

144 See the HREOC website, *Information for Employers: Good Practice, Good Business — Eliminating Discrimination and Harassment in the Workplace*: <http://www.hreoc.gov.au/info_for_employers/index.html#> (23 June 2006).

or confusion. In respect of gender equality these include inquiries into pregnancy discrimination,[145] sexual harassment,[146] paid maternity leave,[147] and work and family.[148] Inquiries are generally conducted through the Sex Discrimination Unit issuing a discussion paper to prompt debate,[149] followed by an extensive national round of public consultations including open forums, round-tables targeted at specific groups such as small businesses, unions, and academics and, ultimately, invitations for written submissions.[150] Through this process, the unit raises public awareness and fosters debate, as noted above in respect of paid maternity leave. It also facilitates networks around the issues to some extent through the smaller round-table forums.

The resultant reports document the array of practices and views on the topic, and present recommendations to address outstanding problems. In respect of paid maternity leave, HREOC made public that Australia was lagging amongst OECD countries[151] and proposed the introduction of a national government-funded scheme.[152] In respect of sexual harassment and pregnancy discrimination, it produced associated guidelines for compliance.[153] These guidelines were based on corporate best practice and, in an inchoate way, represent a benchmark for compliance. *Sexual Harassment: A Code of Practice* has now been updated twice, arguably reflecting the positive development of best practice over time.

Discrimination claims create opportunities for HREOC to educate respondents throughout the investigation and conciliation process. Being private and confidential, little is known about the way in which these investigations and conciliations are conducted. However, some research suggests that HREOC does use this process to educate respondents and to press not only for remediation, but also for systemic reforms, such as the implementation or improvement of a compliance program.[154] This represents a glimmer of responsive regulation, but

145 Sex Discrimination Unit of HREOC, *Pregnant and Productive: It's a Right not a Privilege to Work While Pregnant* (1999).

146 HREOC, *A Bad Business: Review of Sexual Harassment in Employment Complaints 2002* (2003); HREOC, *20 Years On: The Challenges Continue — Sexual Harassment in the Australian Workplace* (2004).

147 Sex Discrimination Unit of HREOC, *Valuing Parenthood,* above n59; Sex Discrimination Unit of HREOC, *A Time to Value*, above n70.

148 Sex Discrimination Unit of HREOC, *Striking the Balance*, above n32.

149 For example Sex Discrimination Unit of HREOC, *Valuing Parenthood*, above n59; Sex Discrimination Unit of HREOC, *Striking the Balance*, above n32.

150 For a description of this consultation process see 'Methodology' part A1.2 in Sex Discrimination Unit of HREOC, *A Time to Value*, above n70.

151 Australia was one of only two OECD countries that did not have a national paid maternity leave scheme (the other being the US): Sex Discrimination Unit of HREOC, *A Time to Value*, above n70.

152 Sex Discrimination Unit of HREOC, *Valuing Parenthood*, above n59. For a summary see Belinda Smith, 'A Time to Value: Proposal for a National Paid Maternity Leave Scheme' (2003) 16 *AJLL* 226–233.

153 HREOC, *Sexual Harassment: A Code of Practice* (2004) HREOC <http://www.hreoc.gov.au/sex_discrimination/code_practice/SH_codeofpractice.pdf> (23 June 2006); Sex Discrimination Unit of HREOC, *Pregnant and Productive*, above n145; HREOC, *Pregnancy Guidelines 2001*: <http://www.hreoc.gov.au/sex_discrimination/pregnancy/guidelines.html> (20 September 2006).

154 Devereux, above n24.

without any enforcement powers, HREOC's capacity to engage the respondent in a dialogue about preventative self-regulation measures is limited.

Finally, in respect of matters that proceed all the way to adjudication, HREOC works to publicise the outcomes, and any jurisprudence they reflect. This is done through publications of case summaries,[155] recent cases seminars, and press releases. Naturally HREOC also draws on case law in publications for employers and inquiry reports summarising what legislation requires. HREOC has also tried to publicise cases that are resolved at conciliation. These provide concrete examples of situations that prompt complaints and warrant employer responses. However, this information is too brief and general to be of much use, constrained as HREOC is by a duty of confidentiality respecting such cases.

In these various ways, HREOC develops and distributes knowledge of compliance requirements and equality practices that can facilitate self-regulation. Such endeavours are unlikely to do much to prompt innovation, but there are some limited ways in which innovative initiatives may be disseminated through HREOC education. The public inquiries and focus-group discussions may elicit disclosure and publicity for exemplary efforts, as can the development and publication of guidelines based on best practice.

(b) EOWA Education

EOWA's publications are more explicitly designed to assist corporations in developing self-regulation policies and procedures. EOWA collates organisational reports, and distributes the information about what leading firms are doing in statistical and case study format.[156] Drawing on this, it also provides electronic audit and assessment tools and training seminars, marketed as a means of helping corporations to fulfil their *EOWW Act* reporting requirements, and move beyond this to get the full benefit of the process.[157] In these ways, EOWA provides a mechanism for diffusing information about innovative programs.

A further way in which EOWA gains information about corporate initiatives, and possibly also prompts such initiatives, is through a certification exercise. EOWA has established an EOWA Employer of Choice for Women (EOCFW) citation, which it allows employers to use if they are able to prove to the agency that they are 'women-friendly organisations with Equal Opportunity (EO) programs that recognise and advance their female workforce.'[158] Employers must lodge an application, providing details of their initiatives to support the participation and advancement of women that go beyond the Act's reporting

155 Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (2005) which sets out the legislation but is largely a summary of the case law in respect of all the federal discrimination Acts.

156 EOWA, 'Research and Resources': <http://www.eowa.gov.au/Information_Centres/Resource_Centre.asp> (20 September 2006).

157 EOWA, 'Consultancy and Workshops': <http://www.eeo.gov.au/Consultancy_And_Workshops.asp> (20 September 2006).

158 EOWA website, *EOWA Employer of Choice for Women* <http://www.eeo.gov.au/EOWA_Employer_Of_Choice_For_Women.asp> (20 September 2006).

requirements. Similarly, the Federal Government, together with private sponsors, has established the ACCI/BCA National Work & Family Awards.[159] These awards are run as an annual competition with many different categories, to acknowledge different environments for small and large businesses, and between industries and regions. Organisations are encouraged to enter the competition in order to gain recognition, and to differentiate themselves from their competitors in terms of their efforts to establish family-friendly workplaces. These initiatives rely on branding as regulation, similar to those used by anti-sweatshop and 'fair trade' advocates.

Both the EOCFW citation and the Work & Family awards constitute efforts to encourage leadership in compliance with social and legal obligations of gender equality and family-friendliness. However, there are a number of limitations. Neither EOWA or the federal Work and Family unit have the means to audit or check what organisations say they are doing. Nor have they actively promoted the criteria for certification or award as a means for self-assessment and improvement. Finally, they have not collated and promulgated best practice standards arising out of these processes.[160]

(iii) Evaluation and accountability

The final question is whether our current equality laws and regulators operate to establish monitoring and self-evaluation to facilitate double-loop learning from the results, feeding back into improvements in compliance programs. Do they require disclosure of evaluations and compliance failures, to both stakeholders and regulators, in order to alter meta-regulation strategies, creating a triple-loop of learning? Do they foster the capacity of stakeholders to perform this role?

This regulatory aspect is the one least supported by current equality laws. The *SDA* provides no requirements of self-evaluation or disclosure, and there are no formal mechanisms allowing HREOC to evaluate performance. There is also no scope for judicial evaluation of internal policies and procedures designed to prevent discrimination and promote equality, as the focus of adjudication is on determining liability and harm, not on establishing blameworthiness or due diligence in seeking to *prevent* harm. The absence of regulation to encourage and support evaluation of programs, and disclosure of assessments, would certainly reinforce a corporate approach to anti-discrimination that focuses on risk management and keeping complaints out of the public eye. Evidence of this approach has been documented in the banking industry.[161]

159 See the 'Workplace: Employment and Workplace Relations Services for Australians' website, *Work and Family Awards* <http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/WorkFamily/WorkandFamilyAwards.htm> (23 June 2006). States also offer similar awards.

160 In contrast, 'Working Mother', makes public the five assessment categories: flexibility, childcare, leave for new parents, advancement of women, and a miscellaneous category of work/life benefits, below n175.

161 Sara Charlesworth, 'Paying the Price: The Cost of EEO in the Australian Banking Industry', Paper presented at the 'Gender — From Costs to Benefits: 6th Interdisciplinary and International Symposium on Gender Research', Kiel University, Germany 15–17 November 2002 at 7–8.

While the *EOWW Act* appears to institute a process of auditing in order to develop compliance, there are significant weaknesses in its capacity to foster self-evaluation and permit meta-evaluation. Firstly, the Act requires each organisation to audit its workplace, and develop and report on a plan for addressing identified disadvantages for women, but it does not require organisations to conduct any evaluation of their current measures. Nor does it require improvement in performance since the last report or disclosure of any lack of improvement. Secondly, the content of reports is not independently assessed by EOWA or a third party. Rather, each organisation is taken at its word. Further, organisations are free to report in whatever form they wish, with no standardisation.

The only official evaluation EOWA conducts is to determine whether an organisation has complied with the reporting requirements. The previous Act enabled the agency to evaluate the EEO programs of organisations against a common standard, ranking them according to the merit of their initiatives. This is no longer done or even possible, since the removal of standardised reporting, which has made the data less comparable. In these ways, the current Act relies substantially on the *process* of self-auditing to produce results, with the regulation having little capacity to force evaluation or produce meaningful information that enables meta-evaluation.

In summary, while the enactment of gender equality laws was a very significant step in promoting awareness of inequality and commitment to equality, the regulatory mechanisms developed are not sufficiently sophisticated and responsive to the task of securing behavioural and cultural change. The regulatory mechanisms are tailored to resolving discrimination complaints as *individual* disputes, which may be useful in reducing blatant and intentional discrimination but does little to reveal or address the more structural forms of discrimination that characterise today's workplaces. Little information is produced about what corporations are and are not doing to address work-family conflict and gender inequality, and thus there is little capacity for HREOC or stakeholders to evaluate particular practices against best practice, or develop standards to constitute and improve upon a norm. And while HREOC and to some extent EOWA have fostered networks of EEO professionals, the regulatory model fails to provide any formal mechanisms for *enabling* stakeholders to perform roles of monitoring, evaluating or lobbying for improvements.

5. Reform Proposal

Before we throw the baby out with the bathwater, I wish to explore in this section how current regulatory models might be developed and made more effective. I first outline a number of specific proposals, and then analyse how this revised regulatory framework might better prompt, enable and render accountable corporate self-regulation of worker-carer integration.

A. Outline of Proposal

At the centre of my proposal is a new role for HREOC as a regulatory agency, and an emphasis on the production of useable information about corporate performance in respect of equality. As outlined above, HREOC currently acts to investigate and conciliate complaints, primarily as a neutral party, and to educate the public about the merits of equality practices and the harm of discrimination. Under the proposal, HREOC would also take on an active enforcement role, entering into regulatory dialogue with organisations to encourage self-regulation, and act to promote and coordinate local experimentation and improvement in more inclusive work practices. The disclosure of corporate practices would enable standards of best practice to be developed for use in all three aspects of regulation: prompting commitment, enabling self-regulation, and evaluating performance.

The key elements of the proposal are:

- *Rule change*, expanding the prohibition on family responsibilities discrimination in the *SDA* to encompass indirect discrimination at all forms and stages of work, not merely employment and not merely dismissal;
- *Responsive regulation*, extending enforcement powers to HREOC and expanding non-compliance orders to encompass a pyramid of sanctions, to enable HREOC to regulate responsively; and
- *Standards*, expanding the *EOWW Act* duty to require reporting on worker-carer integration, and charging HREOC to use this and other information to develop best practice standards of gender equality and worker-care integration.

B. Proposal Analysis

(i) Prompting Management Commitment

(a) Rule Change

The first proposal is to broaden the prohibition on discrimination in the SDA, expanding the prohibition on family responsibilities discrimination[162] to encompass indirect discrimination and all stages of work, not merely dismissal. This would bring family responsibilities in line with all other grounds under the *SDA* (and state legislation).

While the inclusion of family responsibilities was an important development, the federal restrictions on this type of discrimination, and areas of coverage, severely limit the prohibition's usefulness and its normative impact. Direct discrimination has been interpreted very narrowly by the High Court of Australia,[163] restricting it to the very narrow concept of formal equality. The direct discrimination restriction combined with this narrow interpretation means that the federal family responsibilities provisions do not prohibit an employer from imposing even unreasonable requirements that differentially impact upon workers with family responsibilities.[164] Indirect discrimination provisions at least allow for

162 See *SDA* ss7A and 14(3A).

163 *Purvis v New South Wales* (2003) 217 CLR 92.

164 Although the facts might allow such a claim to be argued as indirect sex discrimination.

the consideration of whether workplace requirements whose impacts are biased are reasonable or justifiable.

One important reason for expanding this rule is to provide a means of promoting not only equality of women with men, using sex discrimination provisions, but of worker-carers with other workers. It has been shown that women under some circumstances can utilise sex discrimination provisions because having caring responsibilities is a characteristic that appertains generally to women, and which thus disproportionately prevents them from complying with family-unfriendly requirements.[165] The proposed change would better enable men, too, to challenge family-unfriendly practices. It could also operate to prompt greater corporate responsibility for work-family conflict, because of the normative impact of legal rules, as discussed above.[166] This change alone would not be significant, however, because it would add little to the web of state laws that already prohibit carers' responsibility discrimination. This impact could, however, be enhanced by the enforcement reforms outlined below, which enable responsive regulation by HREOC.

Another proposal that would be worth exploring in another article is a positive duty to develop a program to address family-responsibilities discrimination in the workplace, and to provide reasonable adjustments in accommodating the special needs of worker-carers. Such duties have recently been developed in a limited way for disability in education,[167] but have not been tried in respect of other grounds under federal anti-discrimination laws.

(b) Responsive Regulation

Possibly the most significant change proposed for the current model of anti-discrimination laws is to extend enforcement powers beyond the victim and expand the range of non-compliance orders beyond compensatory remedies. This would, in effect, transform the regulatory model from a private or purely civil, torts-style model with a remedial focus to a public law model more akin to occupational health and safety laws that would align the regulatory tools with the explicit normative objective of the legislation to eliminate discrimination and promote equality.

These changes would enable HREOC to regulate responsively, connecting liability for inequality with the commitment to self-regulate by adjusting orders based on past preventative efforts. If HREOC had powers to initiate or support complaints, with the option of pursuing a range of sanctions including compensatory remedies, systemic corrective orders, and possibly even penalties, it could engage in regulatory conversations with laggards, assessing existing compliance programs and negotiating improvements to be binding as enforceable undertakings.

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165 This way of framing family-responsibilities claims, and limitations on these claims as a strategy for change, are explored in more detail in Smith & Riley, 'Family-friendly Work Practices', above n25.

166 However, given that all states except South Australia already have a rule of this kind, changing the federal rule would not be enough on its own to have a significant impact on the problem.

167 See *Disability Standards for Education 2005* and the *Disability Discrimination Act* 1992 (Cth).

In identifying tools for effective deterrence and encouragement, it is obviously critical to consider the type of behaviour that needs to be modified. It is probably fair to say that much family responsibilities discrimination is not intentional or malicious, but stems from stereotyping and biased practices that simply go unquestioned. These reflect and reinforce cultural norms, and thus have the *effect* of excluding and disadvantaging, but they are not practices that necessarily warrant — or would respond to — punishment. Such sanctions could be worth including as the tip of the regulatory pyramid, but could be restricted in their availability to cases of intentional or reckless direct discrimination, or particularly blatant and offensive cases of sexual harassment.

In respect of family responsibilities discrimination, equality laws could force corporations to question the criteria used for recruiting employees, uncover and challenge stereotyping and ask whether the way a business, project or process being run is the least discriminatory and most efficient way of running it. Claims by victims and compensatory remedies do not sufficiently motivate organisations to question their practices and processes in this respect. Even if a discrimination claim is lodged, the regulatory regime focuses the parties' attention on the claim as an individual dispute to be resolved rather than a 'miners' canary' or a prompt for wider questioning. Granting a regulatory agency the power to examine practices beyond the limits of individual claims and engage in regulatory conversations with organisations about developing or evaluating equity programs, could move the debate beyond individual disputes and formal equality.

(ii) Enabling – Acquisition of Skills and Knowledge

Even when an organisation accepts equality as a business goal, whether prompted by legal obligations or social expectations, this commitment may continue to be challenged. In any event, the organisation will be faced with on-going questions of content and practice. What does equality really mean or look like? How can practices be institutionalised to achieve it? These questions highlight the need for two different but related sets of knowledge or standards: those that elaborate on the general goal of equality or, specifically, worker-carer integration and those that provide guidance on effective systems and practices that corporations can use to achieve this goal. This is an important distinction between ends and means, outcome and strategy. On the agency side, if HREOC is to regulate responsively and constructively, evaluating the compliance efforts of organisations and pursuing improvements in their practices, it needs to be equipped with standards in respect of both the goal, and effective practices for achieving it.

(a) Compliance Standards

One important source of standards in Australia across a range of business and community issues is Standards Australia, the 'peak non-government standards development body in Australia.'[168] This body has produced and recently updated a standard in respect of compliance programs which:

168 Standards Australia Limited website, <http://www.standards.org.au/cat.asp?catid=21> (23 June 2006).

> [p]rovides guidance on the principles of effective management of an organization's compliance with its legal obligations, as well as any other relevant obligations such as industry and organizational standards, principles of good governance and accepted community and ethical norms. The principles cover commitment to achieving compliance, implementation of a compliance program, monitoring and measuring of compliance, as well as continual improvement.[169]

The foreword to the standard goes on to emphasise that '[c]ompliance should not be seen as a stand-alone activity, but should be aligned with the organisation's overall strategic objectives. An effective compliance program will support these objectives.'[170] This is the general point that is made by leading work-family integration advocates, such as Rapoport[171] and Bailyn,[172] that family-friendly initiatives will only be successful (and sustainable) in achieving equity and efficiency outcomes if the goal of work-family integration is itself aligned with the organisation's other business objectives.

While the *EOWW Act* outlines steps for achieving the elimination of sex discrimination, the model of compliance program that it adopts is simplistic and not sufficiently integrated with other business goals to be sustainable and effective. Currently, compliance responsibilities under the *EOWW Act* could be allocated to human resource personnel as a 'box-checking' exercise, with the CEO merely signing off and with little engagement with other personnel or business goals. HREOC also provides guidance on the development of anti-discrimination and anti-harassment policies and procedures but, again, these do little to link equality goals with other business goals, and do not explicitly include monitoring, evaluation or feedback elements.

HREOC's promotion of more generic compliance standards, such as AS 3806-2006 in respect of the goals of equality and/or worker-carer integration could improve equality programs. Importantly, it could also reinforce the notion that equality and worker-carer obligations are legal and social responsibilities that warrant the same kind of corporate attention and compliance practices as such other business goals as occupational health and safety, product safety, competition and taxation.

(b) Work-Carer Equity Standards

In respect of the substantive goal of worker-carer integration, there is a role for HREOC to develop a standard or guide which provides details of best corporate practice and objectives. HREOC could be charged with responsibility for developing such a standard, utilising information compiled from the *EOWW Act* reports and building on its networks and experience of developing codes of practice for sexual harassment and pregnancy discrimination.

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169 Abstract for Standards Australia Limited, *Australian Standard Compliance Programs: AS 3806–2006* (2006): <http://www.saiglobal.com/shop/script/Details.asp?docn=AS073377296XAT> (23 June 2006).

170 Foreword, Standards Australia Limited, ibid.

171 Rapoport et al, above n1.

172 Bailyn, above n8.

Criteria for such a standard could be drawn locally from the ACCI/BCA National Work & Family Awards and the EOWA Employer of Choice for Women certification. These could be supplemented by adapting metrics used overseas, such as the Standards of Excellence in Work-Care Integration Project's 'Excellence Index' developed by the Boston College Center for Work and Family in the United States.[173] Other possible sources include the Employer of the Year Awards offered through the Working Families organisation in the UK,[174] and the categories used by *Working Mother* magazine to compile its list of the '100 best companies for working mothers,'[175] which include flexibility, childcare, leave for new parents, advancement of women and a miscellaneous category of work/life benefits. However, care must be taken to ensure that the standard is not simply a list of family-friendly benefits that must be provided, as this would undermine initiatives by organisations to develop programs specific to the needs of their own workers and would substitute 'benefits' for the real goal of integration or equality.

Parker describes a range of tools that might be used by regulatory agencies to foster innovation or experimentation leading to improvements in performance, and to promulgate emerging knowledge and skills in order to ratchet up the norm of best practice.[176] These include the building of compliance leadership and the establishment and fostering of networks of compliance professionals.

The development and maintenance of a standard of business excellence or best practice in worker-carer integration could provide opportunities for HREOC to undertake both these functions of building compliance leadership and fostering practitioner networks. By offering expertise, praise and good publicity, HREOC could encourage corporations to be innovative and, importantly, to share their innovations for the establishment of a standard. This reflects Braithwaite's concept of strength or capacity building, complementing the regulatory pyramid of enforcement.[177] The involvement of business leaders could improve the workability of the standards by improving their quality and minimising any anticipated resistance.

Parker and others emphasise the importance of the presence of compliance professionals within organisations in promoting commitment to particular goals and developing and maintaining internal workplace practices and compliance programs to support those goals.[178] One role for a regulatory agency is supporting such compliance personnel, and fostering connections between them to promote the development of new ideas and enhance the diffusion of knowledge and skills.

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173 Boston College Center for Work & Family, *Standards of Excellence in Work-Care Integration Project Excellence Index* (2002) <http://www.bc.edu/centers/cwf/standards/overview/index/meta-elements/pdf/ExcellenceIndex10_03_03.pdf> (23 June 2006).

174 Working Families website, *Employer of the Year Awards 2005* <http://www.workingfamilies.org.uk/asp/awards/a_EYA_awards.asp> (23 June 2006).

175 'How We Choose', *Working Mother* magazine <http://www.workingmother.com/choosebest.html> (23 June 2006).

176 Parker, *Open Corporation*, above n9.

177 Braithwaite, above n94.

178 Parker, *Open Corporation*, above n9. See also Sturm, 'Second Generation', above n10; Sturm, 'Architecture of Inclusion', above n116.

Parker provides the example of the Australian Competition and Consumer Commission establishing and supporting the development of consumer protection networks.[179] In respect of workplace equality, there are a number of existing networks which HREOC could support, such as the Equal Employment Opportunity Network of Australasia (EEONA)[180] and, in New South Wales, the New South Wales EEO Practitioner's Association (NEEOPA)[181] and the Employment Equity Specialists Association (EESA), a network for professionals working on employment equity programs in the NSW Public Sector.[182]

(c) Utilising the Standards

Unlike the Disability Standards that are developed under the *Disability Discrimination Act* 1992 (Cth) and have legislative force,[183] what I am proposing are more flexible standards that could be given evidentiary rather than mandatory status in litigation. Such standards are currently being developed in the UK to support and supplement the new Equality Duty.[184]

Such standards could be used in a number of ways. The first is in the promotion of best practice in work-carer integration. The second is in assessing liability under indirect discrimination claims concerning workplace requirements that differentially impact upon women (under sex discrimination) or workers with family responsibilities (assuming the *SDA* prohibition is extended to indirect discrimination). A requirement that is biased against the protected group only constitutes unlawful indirect discrimination if the respondent is unable to prove that the requirement is 'reasonable' in all the circumstances. With so few cases being adjudicated, judges and practitioners have little practice or precedent to guide them on what is 'reasonable'. A worker-carer integration standard could guide organisations by providing evidence of what other organisations are doing.

Another way in which a Worker-Carer Equity Standard could be used is in determining litigation orders. Such a standard would provide HREOC, as an enforcement agency, with a guide to assess a transgressor's existing compliance program and recommend orders or negotiate enforceable undertakings for alterations and monitoring.

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179 Parker, *Open Corporation*, above n9 at 250–251.

180 The EEONA website describes EEONA as a 'national peak body representing over 300 member organisations across Australia and New Zealand. The aim of EEONA is to provide members and the community with research and advice on diversity and equality issues. EEONA was established in 2003 and biannually conducts the Australasian Diversity Equality Survey (ADES) which provides cutting edge research on diversity best practice': <http://www.eeon.com.au/> (23 June 2006).

181 See the NEEOPA website: <http://www.neeopa.org/> (23 June 2006).

182 See the EESA website: <http://www.eeo.nsw.gov.au/eeocs/eesa.htm> (23 June 2006).

183 Disability Standards, such as the 'Disability Standards for Accessible Public Transport 2002', are legislative instruments, and non-compliance with such standards is enforced in the same way as non-compliance with the *Disability Discrimination Act*'s general prohibition on discrimination.

184 See the Code of Practice being developed by the EOC to supplement the new UK equality duty, available at Equal Opportunity Commission (UK) website, *The Gender Equality Duty*, above n77.

(iii) Evaluation and Accountability

A number of opportunities for evaluation and meta-evaluation emerge from this proposal, which could be developed once their effectiveness was assessed over time. Granting HREOC enforcement powers and expanding the range of non-compliance sanctions under the *SDA* would enable evaluation of corporate compliance programs by HREOC at first instance and by the courts in complaints pursued through to adjudication. A claim of breach filed by a complainant or initiated by HREOC could engage the respondent organisation in dialogue with HREOC about both the specific allegations and any preventative compliance efforts, assessed against the compliance and worker-carer integration standards. If liability were made out or conceded, the focus would turn to assessing the preventative efforts and negotiating or compelling improvements that might identify other cases of discrimination, rectify gaps or breakdowns in existing programs, promote more effective prevention mechanisms, institute on-going monitoring (internal or external) and establish improvement targets. Such changes could be agreed upon and made binding as enforceable undertakings, or recommended to the court for judicial orders.

The courts' new role in assessing compliance initiatives would arise out of the expansion of non-compliance orders: courts would have the power to require respondents to take steps to develop or enhance preventative programs. The legislation could be amended to give the HREOC standards evidentiary status in these deliberations, in order to enhance the quality and consistency of judicial reasoning, outcomes and precedent.

Extending the process and reporting duty under the *EOWW Act* to include consideration of worker-carer integration could help to develop information about what corporations are and are not doing to remove barriers for workers with family responsibilities. The disclosure of such information not only to the regulatory agency, but also to stakeholders such as employees, customers and shareholders permits it to be used in evaluating corporate performance. One outstanding question is what further regulatory measures could be taken to *enable* stakeholders to utilise this information for effective monitoring and lobbying.

There are at least two obvious opportunities for improving evaluation in respect of duties under the *EOWW Act*. The first is to revert to the original requirement that reports be provided in a standardised form, in order to produce more usable compliance data. The second is to require third party certification of reports,[185] which in turn could help to establish an industry of professionals equipped with equal opportunity compliance skills.

185 Note the warnings offered by Susan Sturm about the risk of external auditors being ineffective if audits are conducted rarely or by auditors unfamiliar with the particular industry and its culture: Sturm, 'Architecture of Inclusion', above n116, infra n80–82.

6. Conclusion

Women have traditionally undertaken family caring work and continue to bear a disproportionate responsibility for this. We need this work to be done in order to reproduce our citizens and our society, and it should therefore be supported and not penalised. As long as workplace practices and cultures marginalise or exclude those workers who also have caring responsibilities, and idealise the unencumbered worker, the traditional male model will remain the norm, women will be denied equality with men and both the quality and quantity of unpaid caring work will be threatened.

In her powerful book *The Invisible Heart*, Nancy Folbre urges:

> We must stop assuming that norms and preferences of caring for others come from 'outside' our economic system and can therefore be taken as a given. We must start thinking about care as a propensity that can be defended and developed — or weakened and wasted — by economic risks and rewards.[186]

Our gender equality laws provide one means of altering the risks and rewards of care, by asserting gender equality as a normative goal, and by providing a limited right for enforcing anti-discrimination. However, these laws need to be reformed so that they depend less upon enforcement by individual victims of disadvantage, and more upon an enforcement agency equipped with the 'carrots and sticks' and the resources that could promote commitment, enable innovation in local problem solving, foster the generalisation of best practice and render corporate efforts to achieve family-friendliness accountable.

What I have put forward is a pragmatic proposal, drawing on regulatory scholarship about what the law and regulatory agencies can do to foster and entrench behavioural change. I have focused on corporations as sites of power, particularly for employers over workers, and suggested how the capacity of the present regulatory model to harness corporate power to achieve gender equality in the public sphere of work might be enhanced.

Understandably, many worker advocates in Australia are currently directing their energy and attention to holding the line in the face of the unprecedented increases in employer power, and diminution of employee rights, brought about by the WorkChoices legislation. However, it is important to appreciate that these changes to industrial laws have left intact other avenues, such as anti-discrimination laws, for asserting rights and effecting workplace change. These changes also encouraged us to design for the future, developing ideas of how to achieve a better and fairer society in readiness for a political shift. It is with this aim that I have developed this proposal for reforming equality laws, to be challenged, debated and refined as a way forward.

186 Folbre, *Invisible Heart*, above n48 at 210.

Appendix A: Summary of Analysis — Current and Proposed Equality Laws

ASPECT	CURRENT LAW AND REGULATORY TOOLS	PROPOSED LAW AND REGULATORY TOOLS
Prompting Corporate Commitment	***Anti-discrimination laws*** – *SDA/HREOCA*: ° Prohibition on discrimination ° Symbolic/normative effect of legal rule, but ° General rule with no formal mechanism of elaboration (contrast OHS) ° Family responsibilities discrimination limited ° Enforcement/sanction: ° Remedial – victim only, compensatory remedies, confidential conciliation of claim as dispute ° No enforcement agency, no pyramid of sanctions → No capacity for responsive regulation to prompt commitment and compliance programs ***Equal Opportunity for Women in the Workplace Act*** (*EOWW Act*): ° Process duty — Audit, identify risk, consult, develop and implement plan, report to agency barriers to gender equality ° Normative effect – high reporting compliance (no evaluation)	***Anti-discrimination laws*** – *SDA/HREOCA*: ° Rule change — expand family responsibilities prohibition – ID, all stages of work ° Enforcement/orders: ° Grant HREOC prosecution powers ° Expand sanctions to full pyramid – including systemic corrective orders (and penalties) → HREOC to prompt commitment by identifying and holding accountable wrong-doers — able to use responsive regulation to connect liability to commitment to self-regulation: ° Pursuing corrective/probationary agreements or orders ° Adjusting liability based on efforts [note — best practice standards are used to assess and recommend compliance programs]

ASPECT	CURRENT LAW AND REGULATORY TOOLS	PROPOSED LAW AND REGULATORY TOOLES

Enabling — Acquisition of skills and knowledge (fostering innovation and diffusion)	***HREOC***
	° Publications – compliance info for employers
	° Conducts inquiries:
	  ° Consultation/discussion as awareness raising
	  ° Reports eg pregnancy, PML, SH, W&F
	  ° Guidelines best practice – only SH, pregnancy
	° Case summaries publication, press releases, seminars
	° Conciliation of disputes – some education/leverage
	EOWA:
	° Info/education:
	  ° Business case for diversity publications
	  ° Equality/diversity statistics
	° Training, seminars, networking
	° Badging
	  ° Employer of Choice for Women certification EOCFW
	  ° Work & Family Awards — government & private
		HREOC
		° *Standards*:
		  ° Adopt/develop compliance standard (Standards Australia)
		  ° Develop standards/metric of best practice re Worker-Carer integration (EOCFW, WFA, Excellence Index?)
		° *Innovation* — build compliance leadership:
		  ° utilise EOWA's EOCFW certification &/or Work and Family awards to encourage experimentation/ innovation
		  ° incentive: provide expert support, praise and publicity
		° *Diffusion* — education and training unit:
		  ° Using standards in regulating responsively
		  ° Support and foster development of networks and associations of EEO and WF compliance professionals
		  ° Develop/expand consulting and auditing services

Evaluation and Accountability	***SDA*** ° No evaluation or disclosure requirements ° No judicial evaluation of policies (except SH) ° No mechanism for HREOC evaluation ***EOWW Act*** ° No evaluation of reports – taken at their word ° No standard reporting form – data not comparable ° No requirement to report on improvement/change	***SDA*** ° HREOC 'evaluation' in regulating responsively – the regulatory dialogue ° Third party audits for certification? ° Judicial evaluation – prompted by pyramid of sanctions, and HREOC prosecution ***EOWW Act*** ° Standardised reporting ° Third party or EOWA inspections/audits?